

## **Guardianship or Power of Attorney: Which One Do You Need?**

*What can you do when your close relative can no longer manage his or her own affairs? Your relative might have had a stroke or have developed Alzheimer's disease, for example. These are just a couple of the reasons why a person might be unable to pay bills, cash checks, and make important decisions.*

*If the sick person can still make some decisions and communicate, it **might** be possible for him to appoint a person to handle his affairs. This is usually done by signing a **power of attorney**. However, if the sick person can no longer understand and make decisions, a **guardianship** may be necessary.*

*Sometimes it is not easy to figure out if your relative is still well enough to understand and sign a power of attorney. You or your relative can speak with a lawyer to decide which approach -- guardianship or power of attorney -- would be best. Your relative's doctor may be able to determine if he is well enough to sign legal papers.*

### **Guardianship**

Guardianship is a legal procedure in which one person is appointed by a court to make decisions for someone who no longer can make decisions for himself.

There are **2 types of guardians**: (1) A "guardian of the person" is appointed when people cannot take care of their own personal needs, such as medical care. (2) A "guardian of the estate" is appointed if people cannot handle their own business or financial affairs. A "**general guardian**" is someone who acts in both roles.

A person will be declared **incompetent**, and in need of a guardian, **if** he lacks sufficient capacity to manage his own affairs **or** to make or communicate important decisions about his health, property or family.

Usually, you do not need a lawyer to ask to be appointed someone's guardian. The forms to file a guardianship case are easy to fill out and can be obtained from your local courthouse. Most courts will require that you get a letter from a doctor explaining why the doctor feels that the person is incompetent.

**If the incompetent person does not have a lawyer**, the court will appoint a lawyer to represent the incompetent person at the hearing. This temporary representative is called a "guardian ad litem." The incompetent person also has a right to have a personal lawyer present at the hearing. A jury trial or a broad evaluation of competency may be requested.

**If you are appointed** to be a general guardian or a guardian of the estate, you will need court permission for many financial transactions on the incompetent person's behalf. A guardian of an estate must manage the business and financial affairs of the incompetent person in a careful manner. The guardian must give a report each year of the receipts, payments, and other transactions made that year.

If a person is still able to understand legal documents, signing a power of attorney may be preferable to guardianship. With a power of attorney, the person chooses who will handle his or her affairs, instead of having the court make this choice. It is handled out of court, and there is no court supervision.

## Power of Attorney

For those who need someone to handle their financial affairs, a power of attorney is very helpful. It must be signed by a person who is mentally competent. The person must understand what he is signing. This can be done either before a person loses mental capacity or, if this has already happened, during a period that the person has regained capacity, if only temporarily. A doctor could help determine capacity if there is doubt.

If the power of attorney is signed by a person whose competency "comes and goes," it is important to have a written medical determination of competency at the time the documents are signed.

A medical opinion is also helpful where the person has a progressive disease -- one that gets worse, like Alzheimer's -- in case someone later questions whether the power of attorney is valid.

Probably the most useful type of power of attorney is the **durable power of attorney**. Unless a power of attorney is made durable, the agent loses any power to act if the maker becomes incompetent. For most, that is precisely when the agent's assistance is necessary. A power of attorney can be made durable with clear language in it stating that it remains effective after the maker becomes incompetent.

The person who receives the power of attorney is known as the agent. **Trust in the agent is a crucial issue.** The agent has the power to write the maker's checks, sell the maker's property, and incur debt in the maker's name.

Sometimes, all that an incapacitated person needs is someone to take care of a Social Security check. Contact the Social Security Administration to see if you can become the **representative payee**. This is a person approved by the Social Security Administration to receive the check and spend it for the incapacitated person. If your loved one needs someone to make medical and health care decisions, a health care power of attorney is useful. Your loved one can sign this document if he is mentally competent or during a period that he is mentally alert.

## Health Care Power of Attorney

The health care power of attorney goes into effect when a person lacks the ability to make and understand medical decisions. At that time, the person named in the health care power of attorney, the "agent", can make all medical decisions (or only those listed in the health care power of attorney). The health care agent cannot make any decisions related to property or bills.

**Note:** You should consult an attorney for specific legal advice.  
This brochure is only general information.



Published by  
**THE ELDER LAW CLINIC**  
Wake Forest University School of Law  
P.O. Box 7206  
Winston-Salem, NC 27109-6226  
(336) 758-5061  
<http://elder-clinic.law.wfu.edu/>