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Guardianships: What, Why, How, and Comparison to Power of Attorney

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WHAT

A Guardianship is a legal arrangement that involves one person (the guardian) being appointed by a court to have legal authority to make decisions and provide care for another person (the ward) who is deemed unable to make those decisions on their own, including those related to their living situation, healthcare, and daily activities.

The appointed guardian is responsible for acting in the best interest of the ward, which can include making responsible choices about medical treatment, where the ward will live, and other aspects of their personal life. Guardians must act in accordance with the court's orders and are held accountable for their decisions.

WHY

A guardianship is typically put in place when someone is unable to manage their personal affairs and financial matters due to mental incapacity, cognitive impairment, or physical disabilities. This may apply to elderly individuals with advanced dementia, individuals with severe developmental disabilities, or adults who have sustained serious injuries or illnesses. Guardianships can also be put into place for minors who don’t have parents available to make decisions on their behalf.

HOW

Guardianships are established through court proceedings. The court assesses the individual's [ward’s] capacity and determines whether guardianship is necessary. Once appointed, the guardian must regularly report to the court on the ward's well-being.

It's important to note that guardianships are legal measures of last resort. Courts typically strive to protect the rights of individuals and may explore less restrictive alternatives, such as power of attorney or advanced

healthcare directives, before appointing a guardian. Additionally, these arrangements can vary by jurisdiction, so it's essential to consult with an attorney experienced in elder law or guardianship matters when dealing with these legal processes.

Guardianship vs. Power of Attorney

Guardianships and powers of attorney are both legal arrangements that involve one person making decisions on behalf of another person, but they differ significantly in terms of their nature, initiation, scope, and control.

Nature:

- **A Guardianship** is a legal arrangement established by a court when an individual is deemed legally incapacitated and unable to make decisions about their personal or medical affairs. It is often considered a more restrictive and intrusive option because it involves the court's oversight and decision-making authority. Also, a guardian has an obligation to act in the ward’s best interest and can be legally liable for a failure to do so.
- **A Power of Attorney** is a voluntary legal document that a competent person (the principal) creates to appoint another person (the agent) to make decisions on their behalf. It is typically used when the principal is still competent but wants to delegate decision-making authority. As compared to a guardianship, an agent’s power is discretionary; an agent is not obligated to act on the principal’s behalf.

Initiation:

- **A Guardianship** is initiated by someone (often a concerned family member, friend, or medical facility) filing a petition in court to have a guardian appointed for an incapacitated individual. The court process involves an assessment of the individual's capacity.
- **A Power of Attorney** is initiated by the principal voluntarily signing a power of attorney document while they are still competent. It does not involve court proceedings unless there is a dispute or challenge.

Scope:

- **A Guardianship** typically covers personal and medical decisions, including decisions about healthcare, living arrangements, and daily activities. It is often used when the individual is incapable of managing these aspects of their life.
- **The scope of a Power of Attorney** can vary widely based on the language of the document. It can be limited to specific tasks (e.g., managing finances, real estate transactions) or broad and encompass all financial and legal decisions. It allows the agent to act on behalf of the principal within the specified scope.

Control and Oversight:

- **A Guardianship** involves court oversight, meaning that the court monitors the guardian's decisions and actions to ensure they are acting in the best interests of the incapacitated person. The guardian must report regularly to the court.
- **A Power of Attorney** grants the agent authority to act on the principal's behalf, but it does not involve court oversight unless there is a dispute. The principal can revoke or amend the power of attorney as long as they are mentally competent.

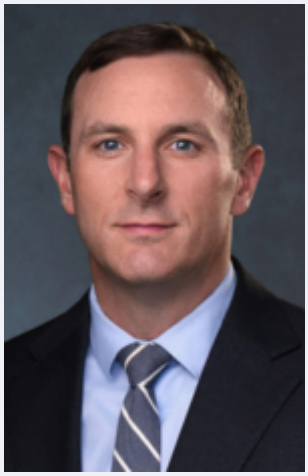
Duration:

- **A Guardianship** is typically ongoing until the court determines that the individual is no longer incapacitated or until the individual passes away. It may be difficult to terminate without a court order.
- **A Power of Attorney** can have a specified duration or can be revoked by the principal at any time, as long as they are competent. It automatically terminates upon the principal's incapacity or death unless it is a durable power of attorney, which continues in effect even after the principal becomes incapacitated.

In summary, a **guardianship** is a court-imposed arrangement for incapacitated individuals, whereas **power of attorney** is a voluntary document that allows a competent person to appoint an agent of their choice to make decisions on their behalf. Power of attorney is generally less restrictive and offers more control to the principal, while guardianship is often seen as a last resort when the individual cannot make decisions for themselves and requires court intervention.

In either case, it is wise to consult an attorney experienced in guardianship matters or elder law when dealing with these legal processes.

Please reach out to Mike Musone for more information or to implement a guardianship.



Michael J. Musone

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