Legal Aspects of Guardianship

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The law presumes that every adult is fully competent, capable of making every type of decision that might be necessary. Unless a court has taken some action to change this presumption, every adult is deemed competent. This means that a parent, spouse, or child is not empowered to make decisions for an adult child, spouse, or parent, even if that individual is actually incapable of making such a decision. The exceptions to this general rule are when the individual has authorized some other person to make decisions through a power of attorney or if a court has empowered someone to make decisions through a guardianship.

1. Concept of Substitute Decision Making

No adult has the legal authority to make decisions for another adult until and unless proper legal steps have been taken to authorize such substitute decision making. There are several situations in which substitute decision making is allowed. Most commonly, parents are allowed to make decisions for their minor children. A trustee holding money for someone has the legal authority to make decisions regarding how that money is spent, so long as the decision is consistent with the trust document. An executor acting on behalf of the estate of a deceased person has the legal right to make decisions on behalf of the estate.

There are two other types of substitutive decision making, power of attorney (POA) and guardianship. POA is the authority granted to an agent under a POA. The POA is a written legal document that is signed while an individual is mentally competent appointing someone to make decisions for that individual. A POA may be general, meaning it is good only for a specified purpose and time and stops being effective when the person who signed it is no longer mentally competent. The second type of POA is a durable POA (DPOA). The word durable means that the document remains remains valid and the agent named continues to have legal authority even after the signer is no longer competent.

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The only way you can tell whether a power of attorney is a general or DPOA is to read the document. Usually the words general or durable to not appear on the document; the document must be read to determine its scope and authority.

The coverage of powers of attorney is governed by state law and is different from one state to another. In Illinois there are two specific types of DPOA; one for health care and another for property. Under a health DPOA in Illinois an individual can appoint an agent to make virtually any type of decision regarding health care. This includes admission to hospitals, consent to medical treatment, admission to nursing homes, group homes, consent for surgery, and decisions regarding whether life support should be started withheld, or withdrawn. Under Illinois law, an agent operating under a DPOA for health care can also consent to an autopsy and anatomical gifts, although in most states the agency under a POA ends when the principal dies.

A DPOA for property empowers the agent to make decisions not only about real estate, but also about other types of property that an individual will own including bank accounts, certificates of deposit and stocks and bonds. This means an agent under a DPOA can write checks on the account of the principal, deposit and withdraw money from a bank, and cash in securities. Under Illinois law an individual can limit or expand the DPOA to give very limited authority.

The important thing to emphasize regarding a DPOA is that the *person who signs the document must be mentally competent at the time.* If it is subsequently proven that the individual was not mentally competent at the time it was signed, all action taken by the agent may be invalid causing legal liability.

Once a person is no longer mentally competent there are only two ways someone else can make decisions: as guardian and through the Health Care Surrogate Act (HCSA) Each state has laws regarding both. In all states, the only way a guardian can be appointed is by order of a judge. If a person does not have a court order appointing him or her guardian, he or she is not guardian. The appointment is by judicial order after a hearing in court. Under Illinois law the person who is no longer competent is referred to as a *disabled person.* After a guardian is appointed, the person who is subject to the guardianship is called a *ward* and/or disabled adult.

Under Illinois law there are two types of guardianship. Guardianship of the person involves the same kind of decision making as in a health POA. That is, the guardian has the authority to make decisions including placement and medical. There is a broad range of personal decisions to make but the authority ends at the moment the ward dies. Guardianship of the estate relates to the property of an individual. This power includes decisions regarding real estate and all property owned by the ward, controlling money, writing checks, and safeguarding the physical property of the disabled person. *Unlike the agent under a POA, the guardian is subject to the supervision and control of the probate court and must file periodic reports regarding the property*.

Guardianships can be plenary or limited. Plenary means the disabled person lacks the ability to make any type of decision and limited is just that, the ward retains the ability to make some decisions which are outlined in the court order. Under Illinois law the guardianship is to be limited as much as possible so that the ward retains as many rights as he or she has the capacity to exercise. In addition, under Illinois law a person who requires only a limited guardianship is not considered incompetent and has legal competence to make certain decisions as directed by the court.

For an additional resource that expands on the types of guardianships available, please consult "A Guide to Adult Guardianship in Illinois" found on our IGA website at www.illinoisguardianship.org. In addition to the types mentioned above there are Temporary, Successor, Stand-by, and Testamentary. For our purposes here, the guardianships mentioned are adequate. For greater detail of guardianship you can go to the Illinois law at 755 ILCS/Probate act Article XIa.

There are a number of other legal instruments that fall into the substituted decision making categories. They are Last Will and Testament, Living Will, Representative Payee for Social Security, Veterans, Black Lung, and Mental Health Treatment Preference Declaration Act. The various public agencies will provide you with the proper forms for using these decision making instruments.

The last category of substituted decision making resides in *Family decision making.* Some people assume that family members have the legal right to make decisions regarding health and property for a family member who is seriously ill or impaired. *This is not correct.* No person has the legal right to make a