

Powers of Attorney and Guardianships



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TALK TO A LAWYER TODAY TRAINING

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Powers of Attorney and Guardianships



- Power of Attorney – a legal document naming an agent to act on behalf of the Principal
- Guardianship – a judicial proceeding in which an agent is named to act on behalf of a Protected Person

These processes represent our society's attempt to contend with a major life issue: "What if you are unable to make decisions or act for yourself?"

Tension



Loss of Control & Vulnerability to Mismanagement

VS

The Need for Continuity and Protection & The Need
for Active Decision-Making

There is a great need for advocacy in this area. It is a public and family responsibility to address the needs of elderly and vulnerable populations.

Something Good Can Always Be Done



- **Indiana law provides a wide set of options**
 - Powers of Attorney
 - Guardianships
 - Additional named on accounts
 - Use of technology
- **More need than ever before**
 - Greater life expectancy
 - Greater probability of a need for long-term care/ an event of disability
 - More property
 - An increasingly complex world

Life Is a Team Sport



- Everyone exists in a mutually-interdependent web of relationships. This is how it should be. This is how humans have always lived.
- Who is the modern team?
 - Family
 - Doctors
 - Attorneys
 - Attorneys-in-Fact
 - Guardians
 - Physical Therapists
 - Nurses
 - Accountants
 - Retirement Planners
 - Personal Bankers
 - Insurance Brokers

The Parent-Child Relationship



The parent-child relationship is a central source of mutual support in our society.

- In the case of a disabled child, this support can continue well into adulthood with adult siblings eventually taking over the caregiver role previously held by a parent.
- In the case of a disabled or aging adult, the parent-child relationship can reverse.

The Goal



Provide for as much autonomy and safety as possible while fulfilling the principal's goals to the full extent possible.

To get where we need to go, several things are needed:

- Communicate Goals
- Evaluate the Situation
- Transparency with the Team
- Involvement of Trusted Professionals

Triggering Events



- Aging
- Accident – Driving, Wandering, Falls
- Disabled Individual Reaching the Age of Majority
- Onset of Disease or Disorder
- Violence/Arrest
- Breakdown of the Ad Hoc Structure in Place
 - Divorce
 - Death of a Parent
 - Inheritance
 - Abuse

Family



- Family is the first line and often a stand-in for comprehensive planning
- Family members will vary on skill level, abilities and resources
- Family members can differ on beliefs, understanding and approach
- Need for consult with an experienced attorney
- Value of a good relationship with your local Area Agency on Aging

Early Steps: Inventory and Sharing Information



- **Discuss Goals:** have an honest, forthright discussion about the issues that matter to your client about their care, the care of their loved ones and management of property
- **Inventory Assets & Income:** collect useful information in advance of a crisis
- **Make a Plan:** Build the team and consult with them

Early Steps: Advice for an Agent



- **Get Organized**
 - Pull together the paperwork
 - Store it in a safe place
 - Periodic updates
 - Consider digital assets and access to information
- **Communicate**
 - Not everyone needs to know everything
 - Respect the principal's desires and privacy
- **Periodic Updates**
 - Transparency fosters trust

Ongoing Attention: Check-Ups



- Build a strong relationship with the family doctor and maintain a habit of regular check-ups
- Maintain social involvement and family contacts as permitted by abilities and needs for safety
- Maintain financial monitoring through professional relationships, information sharing and assistance with bills and account management as needed
- Watch for changes in health status, behavior, habits and hygiene

This Is Not a Sprint: The Difficult Conversations



- Loss of Control
- Desire for Privacy
- Fear That Someone Has Done Something Wrong
- Elder Abuse
- Planning as an Ethical and Moral Statement

Who Is the Client?



- As attorneys, we must be precise as to the identity of our client in a given representation. *See* Ind. R. Prof. Cond. 1.7.
- The values of loyalty and independent judgment are paramount to the attorney-client relationship. *See* Ind. R. Prof. Cond. 1.7 Comment [1].
- In these situations, the client will conventionally be the principal or protected person.

Clients with Diminished Capacity



- **Ind. R. Prof. Cond. 1.14 applies in the event of representation of clients with diminished capacity.**
 - The attorney must work to maintain as normal a client-lawyer relationship as possible. Ind. R. Prof. Cond. 1.14(a).
 - If appropriate, the attorney can engage in reasonably necessary protective action (including seeking the appointment of a guardian). Ind. R. Prof. Cond. 1.14(b).
 - The client must keep the client's interests foremost and can involve persons necessary to assist in the representation. Ind. R. Prof. Cond. 1.14 comment [3].
 - Protecting the client with diminished capacity can involve a series of potential protective actions. *See* Ind. R. Prof. Cond. 1.14 comment [5].
 - Under appropriate circumstances, the attorney can seek guidance from a diagnostician. Ind. R. Prof. Cond. 1.14 comment [6].

Powers of Attorney: Getting Started



- Do not assume that the family knows the client's wishes
- Do not assume that everyone can or will follow instructions
- Testamentary Capacity: “We presume that every person is of sound mind to execute a will until the contrary is shown. To rebut this presumption, a party must show that the testator lacks mental capacity at the time of executing his will to know: (1) the extent and value of his property; (2) those who are the natural objects of his bounty; and (3) their deserts, with respect to their treatment of and conduct toward him.” *Gast v. Hall*, 858 N.E.2d 154, 165 (Ind. App. 2006).

What If There Is No Power of Attorney?



- **Health Care Decision-Making**
 - See Indiana Code § 16-36 generally
 - Ind. Code § 16-36-1-5: if no health care representative appointment, then decision-making authority goes in order to:
 - ✦ Guardian of the Person;
 - ✦ A Spouse;
 - ✦ An Adult Child;
 - ✦ A Parent;
 - ✦ An Adult Sibling;
 - ✦ A Grandparent;
 - ✦ An Adult Grandchild;
 - ✦ Nearest Other Adult Relative;
 - ✦ A Qualifying Friend; and then
 - ✦ The Individual's Religious Superior (if a member of a religious order).
 - 2018 changes created this new line of authority and replaced a larger class of simultaneous decision-makers
 - Individuals at the same level must attempt to find consensus, but majority rules in the event of a disagreement

What If There Is No Power of Attorney? (2)



- **Asset Management**
 - Access to Accounts
 - ✦ Third party agreements
 - ✦ Co-signer or co-owner status on bank accounts
 - Use of a Trust to Manage Assets
 - ✦ In many ways, this functions as a substitute for a Power of Attorney
 - ✦ Only works if the trust is funded
 - Guardianship Under Ind. Code § 29-3
 - ✦ Generally the option of last resort
 - ✦ Judicial proceeding

Power of Attorney



Durable General Power of Attorney

- Durable – survives an event of incapacity
- Can Be Immediate or Springing – Watch the Effective Date
- Multiple Agents and Successor Agents
- Healthcare Powers and the Health Care Representative Appointment/HIPAA Authorization
- Necessity of Capacity
 - Fact-based inquiry
 - *See In the Matter of the Guardianship of Brewer*, 922 N.E.2d 82 (Ind. App. 2010).

Power of Attorney (2)



- A strong-customized document resulting from a detailed discussion with the principal is the best way to serve the principal's goals and see their objectives fulfilled.
- In situations where capacity is at issue, a physician's report or letter is entirely appropriate.
- There is no "one size fits all" answer.
 - Variations & Going Without
 - Online Forms Dealers
 - Old Forms

Power of Attorney (3)



- Ind. Code § 29-3-5-4 refers to the ability to name a preferred guardian in a Power of Attorney.
- Attorneys-in-Fact are required to maintain records and provide accountings under Ind. Code § 30-5-6-4.
- A Power of Attorney can be revoked by the principal. *See* Ind. Code § 30-5-10-1.
- Generally and with limited exceptions, a Power of Attorney terminates at the death of the principal. Ind. Code § 30-5-10-4.

Power of Attorney (4)



- See Ind. Code § 30-5-5-1 for the Statutory Powers of an Attorney-in-Fact
- Some Provisions of Particular Note:
 - Ind. Code § 30-5-5-9: gift transactions
 - Ind. Code § 30-5-5-14.5: digital assets
 - Ind. Code § 30-5-5-16: health care
 - Ind. Code § 30-5-5-17: consent to or refusal of health care

Power of Attorney (5)



- **Additional Powers Can Be Included to Further Customize the Document – Some Examples:**
 - Authority to access safe deposit boxes, remove the contents and surrender the boxes
 - Power to fund trusts for the principal's benefit and direct trust payments to the attorney-in-fact
 - Public benefits and Medicaid power including the authority to apply for benefits, to represent the principal in related proceedings and to take action as necessary to secure said benefits (such as the creation and use of a Qualified Income Trust and assignment of rights of support)

Power of Attorney (6)



The process of preparing a Power of Attorney and related documents is not complete until the proposed agent has been looped in and account managers and care providers have copies of the relevant documents.

DO NOT SIT ON THE DOCUMENTS.

Guardianships



- Usually the Option of Last Resort – The Stripping Away of Personal Autonomy and Control Cuts Against Basic Values of Self-Determination.
- Procedure:
 - Petition
 - Notices
 - Potential Appointment of a Guardian Ad Litem
 - Hearing
 - Letters, Oath and Instructions
 - Inventories
 - Future Proceedings
 - Termination
- Court Oversight, the Need for Permission and the Tailoring of Powers

Guardianships (2)



- Guardianship Standard – Ind. Code § 29-3-5-3(a):
 - “[I]f it is alleged and the court finds that:
 - (1) the individual for whom the guardian is sought is an incapacitated person or a minor; and
 - (2) the appointment of a guardian is necessary as a means of providing care and supervision of the physical person or property of the incapacitated person or minor;the court shall appoint a guardian under this chapter.”

Guardianships (3)



- **Guardianships Can Be Temporary or Permanent**
 - Ind. Code § 29-3-3-4 allows for temporary guardianships of ninety (90) days or less in emergency situations.
 - Ind. Code § 29-3-3-4(d): “A temporary guardian appointed under this section has only the responsibilities and powers that are ordered by the court. The court shall order only the powers that are necessary to prevent immediate and substantial injury or loss to the person or property of the alleged incapacitated person or minor in an appointment under this section.”
- **Temporary Guardianships Are Often Followed with Requests for a Permanent Guardianship**

Guardianships (4)



- Guardianships Can Be Total Guardianships or Involve Tailored Powers – Ind. Code § 29-3-5-3(b):

“If it is alleged and the court finds that the welfare of an incapacitated person would be best served by limiting the scope of the guardianship, the court shall make the appointive or other orders under this chapter to:

- (1) encourage development of the incapacitated person’s self-improvement, self-reliance, and independence; and
- (2) contribute to the incapacitated person’s living as normal a life as that person’s condition and circumstances permit without psychological or physical harm to the incapacitated person.”

Guardianships (5)



- Major Financial Transactions under a Guardianship Will Require Court Oversight. Permission Is Better than Forgiveness – Do It Right the First Time.
- Be Mindful of Conflicts of Interest.
- Additional Provisions to Keep in Mind:
 - A Guardian May Appoint a Standby Guardian under Ind. Code § 29-3-3-7 with Authority To Act for Ninety (90) Days.
 - Ind. Code § 29-3-9-4.5 Authorizes Petitions for Authority for Estate Planning Transactions.
 - See Ind. Code § 29-3-8-10 Concerning Digital Assets.
 - Ind. Code § 29-3-9-12.2 Authorizes Petitions for Authority To Petition for Dissolution.

Guardianships (6)



- The Guardian Must Prepare and Submit Inventories. Ind. Code § 29-3-9-5:
 - Temporary Guardianship:
 - ✦ Within thirty (30) days of appointment.
 - Permanent Guardianship:
 - ✦ Within ninety (90) days of appointment;
 - ✦ Thereafter, at least biennially within thirty (30) days of the anniversary of the guardianship; and
 - ✦ Within thirty (30) days after termination of the guardianship.

Thank You!



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