

**June/July 2006**

## **Making tough decisions on incapacity and guardianship**

There are many tangible signs of the effects of aging, such as a slower step or worsening eyesight and hearing. But the intangible signs, such as mental health, can be more difficult to discern.

An incompetent adult can't communicate rationally about his or her well-being because of an illness, an accident or advanced age. If a family member, such as your mother or father, seems not to have the intellectual wherewithal to manage daily affairs, you may have to step in and make the difficult decision to have a judge declare him or her incompetent and assign a guardian (a conservator in some states).

### **Defining capacity**

The legal definition of capacity varies from state to state, but generally it's the mental ability to adequately function. More specifically, it's the ability to continue to live in the manner to which one is accustomed.

A person is presumed competent unless an adjudication process determines otherwise. That is, a judge must declare a person incompetent. Factors leading to such a decision will depend on the circumstances. Often, the barometer of whether someone is able to adequately function is the person's ability to understand basic financial matters. Similarly, a person unable to adequately attend to his or her own health needs might be considered to lack capacity.

Sometimes the line between having and lacking capacity is less than clear. In fact, a person may be competent for many things, but not for everything. And going from having the capacity to understand and manage things to not having such capacity doesn't typically happen overnight.

In an ideal world, a parent who's slipping will realize it and ask for your assistance. (See the sidebar "Alternatives to guardianship.") But if your mother or father doesn't realize what's happening — or can't bring him- or herself to ask for help — you should step in for everyone's sake.

### **Guardianship responsibilities**

If you've made the gut-wrenching decision to have an incapacity determination and the judge agrees your parent is no longer competent, the court will appoint a guardian. The guardian will be responsible for managing your parent's affairs on his or her behalf.

There's no reason that you shouldn't be appointed guardian, and, in fact, it's logical that a child would be so appointed. More often than not, it will be a child or adult grandchild. But there is similarly no reason that the named guardian has to be a family member. In some states a person can designate whom he or she wants to act as his or her guardian. The guardianship will specify whether the guardian has been appointed for the management of all aspects of your parent's life or if there's a narrower applicability,

such as for only financial matters. Whatever the decision, the guardian will owe a duty of care to your parent, and will be held accountable by the court for showing that the actions he or she takes are appropriate.

If the guardianship extends to financial management, the guardian will be responsible for regularly reporting to the court — at least in most jurisdictions — a summary of money received on your parent's behalf and expenditures made for his or her benefit.

### **Making the right choices**

There are many issues with which to deal when it comes to an aging parent. Having to face the possibility of a loved one becoming legally incompetent can be particularly difficult. But a guardianship is a decision that ultimately might be best for the entire family. •

#### **Alternatives to guardianship**

If your mother or father realizes he or she needs some assistance and requests it, the entire family may be better off. Why? Because the expense and emotional toll of a guardianship proceeding can be avoided, and, most important, your parent still receives the needed help. Here are four ways you or someone else can assist your parent:

1. **Bill paying.** If your parent needs someone to write checks and pay his or her bills, you or another sibling may be able to fill the role. Alternatively, there are many banks and professional firms that provide those services. The expense of paying someone to help your mother or father may be worth the increased feeling of control he or she feels by delegating the work and freeing up time and energy for other things.
2. **Powers of attorney.** If your parent consents to giving you or another trusted individual power of attorney over his or her financial and health care matters, the result is similar to what you would achieve through the guardianship process. The difference is that your parent still is treated as legally competent to make decisions, though he or she is providing someone with the legal right to act on his or her behalf.
3. **Living trust.** If your parent creates — or already has created — a living trust that names a successor trustee, such as you, a professional advisor or the trust department of a bank, all he or she needs to do is step down as trustee and the successor takes over the trust's management. With respect to property, this is the same function as the agent acting pursuant to a power of attorney, though the trusteeship by definition applies only to those assets titled in the name of the living trust.
4. **Joint ownership.** Your parent could add someone as joint owner of his or her accounts to provide that person rights similar to those of his agent under the power of attorney for property and the trustee under the living trust. The major difference is that, while the agent and trustee are merely managing assets on your parent's behalf, the joint tenant is treated as a joint owner of the

property. In the case of joint tenancy there are potential gift tax consequences of such transfers, so before creating joint ownership be sure you know the tax implications.