

ADULT GUARDIANSHIPS IN NEW YORK STATE

By Frank G. D'Angelo, Esq.

It is imperative that individuals that have experienced a decrease in their cognitive function develop an estate plan to deal with the memory loss. A good basic plan should include a Durable Power of Attorney, a Health Care Proxy, as well as explore the options of establishing joint bank accounts with people who can help with financial management. More comprehensive estate planning might involve Living Trusts and more sophisticated legal plans.

People who fail to develop a contingency estate plan subsequently become incapacitated and are often in need of an Article 81 Guardianship, also known as an Adult Guardian. A Guardian is a judicially appointed person who has the power to make decisions regarding a person's financial affairs or, if necessary, personal affairs.

The person authorized to make financial decisions is a Guardian of the Property. The person authorized to make decisions about personal affairs, including health, is a Guardian of the Person.

An Article 81 Guardianship Proceeding is a legal proceeding that is held before a Supreme Court Judge. During the proceeding the court determines if a person is suffering from an incapacity that warrants the need for the appointment of a Guardian. The Court is charged with establishing a Guardian to meet the specific needs of the individual based on their physical and/or limitations. The goal is always to implement "the least restrictive alternate".

Because the Guardianship Proceeding is a judicial proceeding that can ultimately limit a person's individual rights, a person who is the subject of a Guardianship Proceeding has a right to counsel. In addition, the Court will appoint a Court Evaluator to investigate the facts and circumstances that are being alleged and to report back to the Court and recommend if a Guardian is appropriate. The Court Evaluator will also recommend who might be an appropriate Guardian. Preference is always to appoint a family member, if possible. However, if the Court finds that there is no family member who is an appropriate guardian, they will appoint an independent guardian.

A Guardianship Proceeding can be a very costly process because attorneys must be paid and the Court Evaluator must be paid. In addition, the Guardian is required to post a Surety Bond and report to the Court annually regarding his or her activities as the Fiduciary for the incapacitated person.

Individuals are urged to implement an Estate Plan before they become incapacitated in order to avoid the Guardianship process. However, it is important for people to understand that when a person has not implemented such a plan, Guardianship Proceeding is the option of last resort and the Court can implement a plan that involves a Guardian to supervise a person's financial affairs, as well as his or her health care needs.

As always, it is important to consult with a knowledgeable attorney if you believe that a Guardianship may be necessary for a family member.