

LEGAL ISSUES AFFECTING ELDERLY CLIENTS¹

Incompetent Elderly Clients: Powers of Attorney and Guardianship

Elderly clients may suffer from dementia, impairing their decision making capacity on personal, healthcare and financial decisions. The elderly are often targeted by financial exploiters and fraudulent schemes. There are legal mechanisms such as powers of attorney and/or guardianship that may be used to assist elderly clients who are no longer competent to make healthcare, personal and/or financial decisions for themselves.

A. Powers of Attorney.

Many adults plan in advance for the eventuality that there may come a time when they are no longer competent to make important medical, personal and financial decisions for themselves by executing powers of attorney designating another person to act and make decisions on their behalf. There are three primary types of powers of attorney:

- A power of attorney for healthcare decisions;
- A power of attorney for property decisions (this may include, but is not limited to real estate, bank accounts, investments, businesses, bill paying); and,
- Powers under the Mental Health Treatment Preference Declaration Act.

Each type of power of attorney must be executed by the principal when that person is competent to make that decision or else it may be void. Thus, if you have a client who has demonstrated a lack of competence in decision making for three months and a power of attorney is presented dated two days ago, the question may arise as to whether the principal was competent at the time the power of attorney was executed and the power of

¹ This is the second in a three part series addressing legal issues affecting elderly clients. This article address issues regarding incompetent elderly clients, guardianship and powers of attorney. The final article in this series will provide guidance as to Medicare and Medicaid planning for the elderly.

attorney is valid. This scenario often arises in instances of financial exploitation, where the exploiter is named as the agent under the power of attorney.

In addition, when presented with a power of attorney, it is important to check the document to determine the date, or precipitating event that activates the power of attorney. For example, some powers of attorney contain language that the named agent has the authority to act pursuant to the powers of attorney when two physicians certify that the principal is no longer competent to act. In such instances, it is prudent to request proof of such certification.

If a person purports to act pursuant to a power of attorney, and there is reason to believe that the power of attorney is being used to exploit the elderly principal, or otherwise act in a manner that is not in the best interest of the elderly principal (*i.e.* failing to make healthcare decisions), there is a legal recourse. Action may be taken in court to suspend, invalidate or revoke the powers of attorney and appoint a guardian for the elderly person.

B. Guardianship of the Elderly Incompetent.

Every adult is presumed to be legally competent unless a court determines otherwise in a guardianship proceeding. A disabled person may be found incompetent and have a guardian appointed for him/her if found to be a person not fully able to manage his or her person or estate. (755 ILCS 5/11-a-2) The disability may be due to: physical or mental illness; developmental disabilities; gambling; idleness; debauchery; or, excessive use of intoxicants or drugs. (*Id.*)

Guardianship may be initiated by the filing of a petition for guardianship in court. (755 ILCS 5/11a-3) The petition must state: that the alleged disabled person lacks the

understanding or capacity to make or communicate responsible decisions; whether the person is able to manage his estate or financial affairs; the reasons for those conclusions (*i.e.* dementia, coma, financial exploitation). Reasonable steps must be taken to notify all close relatives and any agents under powers of attorney for the alleged disabled person of the filing of the Petition and the hearing date on the Petition. The petition for guardianship should be accompanied by a report of physician, providing information as to: the nature and type of disability; how the disability impacts decision making and independent functioning; whether guardianship is needed and if so, what type; and, the most appropriate living arrangement and care plan for the alleged disabled adult. (755 ILCS 5/11a-9)

There are different types of guardianships:

- Temporary Guardian (755 ILCS 5/11a-4) may be appointed in an emergency situation upon a showing of necessity and actual harm. The Temporary Guardian has limited authority as granted by the court and expires after 60 days.
- Guardian of the Person (755 ILCS 5/11a-12(b))—makes personal decisions for healthcare and placement amongst other things.
- Guardian of the Estate (755 ILCS 5/11a-12(b))—makes financial decisions.
- Guardian of the Person and Estate (755 ILCS 5/11a-13(b)).
- Limited Guardian of the Person, Estate or both (755 ILCS 5/11a-12(c)) is tailored to the individual abilities of the disabled person (*i.e.* a disabled person may be able to handle a small monthly budget for some living expenses on his or her own, but not manage all of their funds or pay bills).

The Petition for Guardianship should designate the type of guardianship sought and nominate an individual, public agency, not for profit agency or Bank and Trust Company (Estate only) to serve as guardian. (755 ILCS 5/11a-5(b).) The individual nominated must be over 18 years of age, a resident of the United States and not disabled. Two

public agencies in Illinois accept guardianships when no willing individual can be found: Office of State Guardian for those with assets under \$25,000.00; and the Office of Public Guardian for those with assets over \$25,000.00.

In summary, decision making authority for an elderly client who is no longer competent to make healthcare, personal and/or financial decisions may be obtained from the agent named under existing powers of attorney or through a guardian appointed by the court. Every effort should be made to determine whether powers of attorney exist prior to commencing guardianship to conserve time and expense, and try to ensure that the choice of decision-maker is whom the elderly person chose when competent to do so.