

Assigning Responsibility



Power of Attorney or Guardianship?

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JUST AS A PERSON CHARGED WITH A CRIME is presumed innocent until proven guilty, a person over the age of 18 is presumed competent unless proven otherwise. This can present a challenge to parents of children with special needs or to adult children with aging parents.

Once a child turns 18, they gain the right to buy property, vote, or get married in most states. The parents, on the other hand, lose the right to freely access the child's education records, such as report cards, disciplinary records, and class schedules. Parents also lose rights to health information and making critical medical decisions. As well, competent children may become concerned with their elderly parents' ability to make financial decisions or speak for themselves in a medical situation. But they will not have the right to step in as an advocate without proper documentation.

In both situations, parties concerned for their loved ones may want to consider power of attorney or even guardianship. How do you choose which legal method to pursue?

POWER OF ATTORNEY

A power of attorney (POA) is a document whereby an individual appoints another person to manage their property, or medical or financial affairs. A POA is a legal contract, which means the persons engaging in the contract must be considered competent. It is an important part of estate planning an individual can use to pre-determine who might handle financial or medical decisions if they were to become incapacitated. A lesser-known use of a POA, but equally important, is a contract between parents and a child who has recently reached adult age allowing the parents to act on the child's behalf if needed, such as while they are away at college, in the military, or traveling.

A parental POA is an important document for parents with special needs children. Even though the child may remain in the parents' care, communication with educators and medical providers would be restricted without the use of a POA. Note, however, that the

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If a person is not eligible to sign a contract (for various reasons), guardianship is an alternative to a POA.



Social Security Administration does not recognize power of attorney as authorization to release, change, or manage information on a person's behalf. SSA utilizes a Representative Payee program. To be a payee a person or organization must apply for and be appointed by SSA.

GUARDIANSHIP

If a person is not eligible to sign a contract due to an intellectual disability or other medical impairment, guardianship is an alternative to a POA.

Guardianship of an adult is obtained through a court proceeding governed by state laws. The person seeking guardianship (the petitioner) must be able to show that the subject is incapacitated. In Pennsylvania, for example, an "incapacitated person means an adult whose ability to receive and evaluate information effectively and communicate decision in any way is impaired to such a significant extent that he is partially or totally unable to manage his financial resources or meet essential requirements for his physical health and safety." (<https://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.>)

A guardian would have legal authority to act on behalf of an incapacitated person, or "ward." They may be able to make decisions regarding the personal care of the ward as "guardian of the person," or the financial care of the ward as "guardian of the estate," or both as "plenary guardian." It is possible, and often preferred, that the guardian have authority limited to very specific decisions, as a "limited guardian." Limited guardianship restricts the guardian's decision-making to only those decisions the individual could not make alone. This allows more personal freedoms for a person with disabilities or other limitations, but also serves as protection in areas of need.

In the case of an injury to a person without pre-determined powers of attorney or trustee, an "emergency guardian" can be appointed. This appointment can last no more than 20 days when a permanent guardian must be found.

If a person needs a guardian but has no one to assume responsibility, the court may appoint a state-administered guardianship service. These public guardians are guardians of last resort.

PLANNING AHEAD

Due to the complexity and expense of obtaining guardianship, and the risk of losing control of emergency matters for your adult child, it is wise to plan ahead. Taking time while you or your loved one are healthy to appoint guardians for minor or disabled children or assign financial and medical powers to people you trust can assure you are in good hands in the event of emergency.

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