

Alternatives to Guardianship/Conservatorship

Powers of Attorney

Many problems can be avoided with valid powers of attorney. These generally come in two varieties, one is a financial power of attorney, another is healthcare power of attorney. The financial power of attorney allows a designated person to conduct business and manage the financial affairs of a person. The healthcare power of attorney allows a designated person to make medical decisions on behalf of a person.

You cannot grant powers of attorney over someone else. Mother cannot grant to her adult son powers of attorney to make decisions for her incapacitated adult daughter. Son would have to seek appointment as guardian of his incapacitated adult sister to be able to make decisions for his sister.

Two problems arise with powers of attorney: 1) they can be revoked at any time, 2) in Georgia, there is no present requirement that financial institutions accept a financial power of attorney. From this arise several issues as to how useful powers of attorney actually are in a real and practical sense. In practice however, powers of attorney are generally accepted and are very useful.

For the most part, if the person signed the durable powers of attorney prior to losing capacity, then the powers will be effective. An incapacitated child may never have had the capacity to enter into the contractual agreement which creates the power of attorney. Also, you must be at least 18 years old to sign a power of attorney.

I have heard of people who had their incapacitated children sign powers of attorney. They tell me that their children will sign anything they are told to sign. If that is true, then the child probably lacks the capacity to grant the powers of attorney.

If the incapacitated adult at one time had normal capacity, and signed a power of attorney when they had normal capacity, but then subsequently lost capacity (via illness, stroke, car accident, etc) you may not need to establish guardianship or conservatorship. Just because someone tells you to go and establish a guardianship does not necessarily mean you have to, if you have a viable alternative, then you can avoid a guardianship.

You must have capacity to grant powers of attorney, if you do not have capacity, you cannot grant powers of attorney.

A word of caution, because people have abused financial powers of attorney, there is a risk that financial institutions will lose confidence in the integrity of financial powers and no longer be willing to accept them. With increasing identity theft problems, this is only going to get more difficult. If this occurs, more people will be forced to seek conservatorships, which are costly and time consuming.