

Stradley Ronon Stevens & Young, LLP
2005 Market Street
Suite 2600
Philadelphia, PA 19103-7018
215.564.8000 Telephone
215.564.8120 Facsimile
www.stradley.com

With other offices in:
Washington, D.C.
New York
New Jersey
Illinois
Delaware



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New Guardianship Rules: Time to Execute a Power of Attorney

by Amanda M. Kita

Under Pennsylvania law, when an individual's mental or physical disabilities prevent him or her from effectively evaluating information and making decisions regarding his or her health and safety, the court may appoint a guardian. Any interested person may petition the court to be appointed as a guardian for an alleged incapacitated person to make decisions on that individual's behalf. The nature of these decisions can include financial, medical and personal matters.

The process to appoint a guardian is expensive and time-consuming, and the Supreme Court of Pennsylvania recently enacted new rules that present additional challenges for guardians. However, guardianship proceedings may be avoided if individuals effectively appoint trustworthy agents under powers of attorney and advance health care directives while they still have the capacity to evaluate and make decisions.

New Rules for Guardianships

Under the new rules, petitions to appoint a guardian must include a Pennsylvania State Police criminal background check and, if the proposed guardian has resided outside Pennsylvania in the previous five years, a criminal record check of the statewide database. Additionally, pursuant to the new rules, the court must appoint individuals to act as guardian in the following order of priority (except for good cause shown or disqualification):

1. Person nominated under Power of Attorney, Health Care Power of Attorney, Advance Health Care Directive, Mental Health Care Directive or Mental Health Care Power of Attorney.
2. Spouse (unless estranged or divorce is pending).
3. Adult child.
4. Parent.
5. Nominee of a deceased or living parent of the alleged incapacitated person.
6. Adult sibling.
7. Adult grandchild.
8. Other adult family member.
9. Adult who knows of the alleged incapacitated person's preferences and values.
10. Another qualified proposed guardian.

This new required order of appointment may be problematic if the individual who is best suited to act as guardian is not the alleged incapacitated person's closest familial relative.

Once a guardian is appointed for an incapacitated person, the guardian has certain duties and obligations to the incapacitated person, including the duty to always act in the person's best interests. Guardianship forms, such as the annual report of the guardian of the person and the annual report of the guardian of the estate, have been revised to require more details and more information regarding the incapacitated person. Under the new rules, these annual reports must be filed online on the Guardianship Tracking System (GTS). The goal of the GTS is to allow the courts to follow up on reports that have not been submitted and better track the status of the incapacitated person.

Summary

By implementing new procedures, rules and forms pertaining to guardianships, Pennsylvania is making an effort to address the growing problem of elder abuse and exploitation, but the new rules present additional challenges and costs. However, guardianship proceedings may be avoided through the execution of a well-thought-out estate plan, including the following:

General Durable Powers of Attorney. General Durable Powers of Attorney allow an individual to name an Agent and thereby give that person the power to (i) handle their assets and financial affairs; (ii) file tax returns; and (iii) take care of certain personal needs (other than health care needs). Powers of attorney are effective only during a person's life and are especially useful if the person becomes incapacitated, disabled or unconscious and unable to take care of his or her self and affairs.

Health Care Durable Powers of Attorney. These documents are similar to General Durable Powers of Attorney in their purpose; however, Health Care Durable Powers of Attorney are limited to the designation of an Agent to exercise only health care powers. A Health Care Durable Power of Attorney authorizes an Agent to make any and all health care decisions on the principal's behalf.



*For more information, contact
Amanda M. Kita at 484.323.6434 or
akita@stradley.com.*

Advance Health Care Directives. Commonly referred to as “Living Wills,” Advance Health Care Directives may be used by individuals to set forth their wishes for their care and treatment when they are in an “end stage medical condition” or “permanently unconscious,” and to appoint a surrogate to make decisions on their behalf during that time.

If you are considering updating your estate plan, please contact any of the attorneys in our Trusts and Estates practice group (<https://www.stradley.com/services/practices/trusts-estates--personal-planning>) to discuss your particular circumstances and how we may best serve you.