



## A Look at Guardianship and Older Adults

Suppose an elderly family member becomes incapacitated and has made no arrangements for such a situation. **Advance directives** are legal instructions that express a person's wishes regarding financial and health care decisions in the event that he or she becomes unable to make them. If incapacity occurs and there are no advance directives, is **guardianship** a viable option?

Guardianship for an adult differs from guardianship of a minor child. For minors, it involves parenting because children require adult supervision until they reach a certain age. Further, minors have not yet earned societal rights, such as the right to vote or drive, so they do not give up any rights with guardianship.

By contrast, an adult who is accustomed to making his or her own decisions, typically loses the right to vote, hold a driver's license, marry, and draft a will (laws may vary by state) when placed under guardianship. The guardian, appointed by the court, becomes the *decision-maker* with the power to make some, if not all, financial and health care decisions for an incapacitated person.

Guardianship for an adult is considered to be a serious intervention and is not enforced until *after* a clear need becomes evident. At a minimum, most states require a court hearing and examination by a physician and/or psychologist to determine

incompetence. The person for whom guardianship has been petitioned (i.e., the **ward**) must be informed of his or her rights and notified that a court hearing has been scheduled. Proposed wards generally have the right to retain an attorney and to object to the petition for guardianship, even if incapacity prevents them from attending the hearing.

It is important to understand that bouts of confusion or eccentricity do not necessarily indicate mental incompetency. For example, an older individual may appear to be spending money frivolously, but that alone may not indicate an *inability* to manage his or her personal finances. Or, consider what would happen if the court appointed a guardian for someone in a coma who later recovers consciousness. Therefore, guardianship for an adult is used only as a last resort in the absence of advance directives.

### Advance Directives

Advance directives can help a person plan for a variety of possible situations. A **durable power of attorney** grants authority to another person to make legal and financial decisions on a person's behalf in the event of mental incapacity. The powers granted can be broad or limited in scope. A durable power of attorney can provide assistance with personal finances, insurance policies, government benefits, estate plans, retirement plans, and business interests.

A **living will** allows an individual to state his or her preferences prior to incompetency regarding the giving or withholding of life-sustaining medical treatment. In most states, a person must have a “terminal condition,” be in a “persistent vegetative state,” or be “permanently unconscious” before life-support can be withdrawn. The definition of these terms and the medical conditions covered may vary from state to state.

A **health care proxy** allows a person to appoint an agent to make health care decisions on his or her behalf in the event of incapacity. These medical

decisions are not limited to those involving artificial life-support.

### **Time Is of the Essence**

Advance directives by durable power of attorney, living will, or health care proxy are generally inexpensive and easy to implement. They are essential estate planning tools available to everyone, regardless of age. In the absence of such documents, court intervention to appoint a guardian may be necessary. This could involve a great deal of time, expense, and stress at precisely the moment when ease of action is of the greatest importance.