Legal Considerations for Family Members: Guardianship, Conservatorship, and Estate Planning

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Legal Considerations for Family Members

- What is a Guardianship/Conservatorship and when should I use one?
- What is a Power of Attorney and when should I draft one?
- What is a Special Needs Trust and when is it appropriate to execute one?
- Chick does not like PowerPoints
Mental Health Law: Balancing of Rights
What is Guardianship?

- A guardian is a court appointed medical decision maker for an incapacitated person (“the ward”).
- A guardian is responsible for life decisions that must be made for the ward, like living arrangements, consent to medical treatment and medication, and authorization or withholding of medical care, and the like. See A.R.S. § 14-5312.
- The statutes compare the relationship of guardian-ward to that of a parent and a minor child.
- By appointing a guardian, certain rights are usually taken away (right to vote, suspension of driver’s license).
- Guardian must always act in the best interest of the ward.
- Limitations: general guardianship cannot admit to locked psychiatric unit; does not have the enforcement power of COT.
- Note: No such thing as “he/she is his/her own guardian.”
Guardianship: Legal Standard
A.R.S. § 14-5304(B)

In order to meet the legal standard for guardianship, the following elements must be present:

- Incapacity
- Necessary to Provide for Demonstrated Need
- Least Restrictive
Incapacity: A Moving Target

**Guardianship:**
- "Incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.

**Testamentary:**
- Must know the natural objects of his or her bounty, to understand the nature and extent of his or her property, and must be able to tie these two together in order to create a rational plan.

**Donative:**
- Requires understanding of the nature and purpose of the gift, an understanding of the nature and extent of property to be given, a knowledge of the natural objects of the donor’s bounty, and an understanding of the nature and effect of the gift.

**Contractual:**
- Must have ability to understand the nature and effect of the act and the business being transacted.

**To Convey Real Property:**
- Must understand the nature and effect of the act at the time the conveyance is made.

**Execute a Durable Power of Attorney**
- Similar to the capacity to contract.
Guardianship with Mental Health Authority ("14+")

- A general guardianship gives the guardian the authority to make life decisions for the ward, including psychological care and treatment, include the administration of psychotropic medications. See A.R.S. § 14-5312.01(A).

- However, a general guardianship does not give the guardian the authority to place the ward in a level-one (locked) behavioral health unit, or consent to any care or medication while the ward is inpatient there.

- In order to place the ward in a level-one behavioral health facility, there must be a mental health overlay ("14+") to the general guardianship. See A.R.S. § 14-5312.01(B).
Conservatorship

- Conservator is appointed to protect and make decisions regarding the finances of the ward.

- Legal Standard:
  - The person is unable to manage the person's estate and affairs effectively for reasons such as mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power or disappearance.
  - The person has property that will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care and welfare of the person or those entitled to be supported by the person and that protection is necessary or desirable to obtain or provide funds.

See A.R.S. § 14-5401.
Alternatives to Guardianship/Conservatorship

- Durable Powers of Attorney
- Advance Directives
  - Medical POA
  - Mental Health POA
  - Living Will
- DNR
- Pre-Hospital Medical Directive (POLST)
Health Care Power of Attorney

- Appoint someone to make medical and end-of-life decisions when you are not able to make or communicate them yourself
- Every adult should select the person whom they want to make these decisions for them
- Choose a trustworthy adult who shares your views and review regularly
- Make sure to include Mental Health and HIPAA Authorization
- Eliminates the need for a Guardianship
Durable Power of Attorney

- Appoint someone to handle financial activities when you are not able to
- Every adult should select the person whom they want to make these decisions for them
- Choose a trustworthy adult who will have your best interest in mind
- Magic Words: Continues in effect even if the Principal becomes disabled
- Consider: “springing POA that doesn’t become effective until you are disabled
- Remember: expires upon your death
- Eliminates the need for a Conservatorship
Advance Directives

- Express your wishes about medical care and appoint someone to advocate for your wishes when you can’t do it for yourself.

- Includes: Living Will, Medical POA, Mental Health POA, Pre-hospital Medicare Care Directive.

- Every adult should select the person whom they want to make these decisions for them, and document their wishes so others don’t have to guess.

- Have changing circumstances caused you to re-think the agent you selected?
Advance Directives

Pre-hospital Medical Directive
- “Orange form” - used to communicate with First Responders

DNR (“Do Not Resuscitate”)
- Physician’s order NOT an Advance Directive
- May apply only to a current period of hospitalization
Advance Directives

Living Will
- Your opportunity to document your wishes regarding end-of-life treatment if you are not able to express yourself
- Serves as a “road map” to the person with your Health Care Power of Attorney
- Review frequently – our views change over time

Other Expressions of your Intentions
- Pre-arranged funeral, cremation or burial and description of your wishes
- Ethical Will: the legacy of your values
Last Will and Testament

- Have you made other arrangements to dispose of your property? Should you?

- Do you still have the property that was listed, or have you acquired additional property?

- Are the beneficiaries you named still living? Have their circumstances changed?

- Is your Personal Representative still a good choice?
Special Needs Trust

The purpose of a SNT is to improve the quality of an individual’s life without disqualifying him or her from eligibility from public benefits.

A special needs trust is created for a person with special needs to supplement, rather than replace, any benefits the person with special needs may receive from government programs.

A properly drafted special needs trust will allow the beneficiary to continue receiving government benefits while still receiving funds from the trust.
Special Needs Trust

- Self-Settled vs. Third Party
- Entitlement vs. Means Tested
- Non-Countable vs. Countable Assets