

How to Avoid a Guardianship

Thomas E. Simmons

Planning to Avoid a Guardianship

Because of the expense and judicial nature of a guardianship proceeding, most individuals would prefer alternatives to appointing an individual who can act on their behalf in the event of an incapacity. Any individual who is competent and at least eighteen years old may take concrete steps to avoid having to be placed under a court supervised guardianship in the event he or she later suffers an incapacity. The most common step to avoid the need for a future guardianship is the execution of durable powers of attorney. A durable power of attorney is, in some respects, a “paper guardianship” that may eliminate the need for a court-appointed guardian.

A revocable living trust is a planning technique which further reduces the need for a guardianship. (In this article, powers of attorney and living trusts are referred to as “guardianship avoidance planning” and the term “guardianship” includes “conservatorships”.)

In some limited scenarios, it may be possible to defer or eliminate the need for a guardianship over an incapacitated individual even in the absence of powers of attorney or a living trust. If all of an incapacitated individual’s assets are titled jointly with a spouse and there arises no need for any separate legal or other matters to be addressed on the incapacitated individual’s behalf, there may be no present need for obtaining a guardianship.

There are disabled adults without a court-appointed guardian. More often than not, however, a guardianship is needed eventually if the individual remains incapacitated and guardianship avoidance planning was not undertaken before the incapacity occurred.

(a) Powers of Attorney Documents

Most South Dakota attorneys provide three different types of power of attorney documents, although they may be combined into a single document or pair of documents: (1) a durable power of attorney; (2) a healthcare proxy; and (3) a living will. Each is discussed briefly below.

An individual must have decisional capacity to execute any of these documents. Once an individual has lost capacity, he or she has lost the ability to execute a power of attorney and a guardianship may be required. Accordingly, it is important for guardianship avoidance planning to take place before the need is so great that it is too late to do so.

(1) General Durable Power of Attorney¹

A general durable power of attorney typically grants broad powers over assets, property and finances by naming an agent and one or more successor agents. A “durable” power of attorney means one which is effective without regards to the individual who granted the power later losing capacity; it is “durable” in the sense that it is undisturbed by the individual’s later incapacity.² Powers of attorney do cease to be effective upon notice of the principal’s death.

The “agent” in a durable power of attorney is the person who has been granted the power from the “principal.”

A durable power of attorney may be effective immediately, or its effective date may only be later triggered by the individual actually experiencing an incapacity (e.g., typical language states that the power is effective only upon the principal’s later incapacity). When the power is triggered by an incapacity, it is referred to as a “springing” power. A doctor’s statement is usually required to trigger the effectiveness of a springing durable power of attorney.

Key provisions in any general durable power of attorney include revocation procedures, gifting provisions, compensation for the agent, and how co-agents are to act.

A general power of attorney should be contrasted with a special or limited power of attorney for a specific function such as registering a car title or signing closing documents for a real estate closing.

(2) Healthcare Proxy³

A healthcare proxy is simply a power of attorney for healthcare decisions. In South Dakota, a healthcare power of attorney must be drafted as a “springing” power which only becomes activated upon the individual’s later inability to make or communicate a healthcare decision.

A healthcare power of attorney may contain a HIPAA Release.⁴ Powers of attorney documents also frequently include the nomination of a guardian in case the power of attorney ever needs to be supplemented with a guardianship proceeding.⁵

¹ SDCL 59-7-2.1.

² “Durable” powers of attorney are a relatively recent innovation of the law. Throughout most of the legal history of agency law, powers of attorney became void upon the principal’s incapacity.

³ Id.

(3) Living Will/Advance Directive⁶

A living will (also called an “advance directive) is a statement which typically directs the withholding or withdrawal of artificial means of life support in the event of an incapacitated individual suffering from a persistent vegetative state (e.g., coma) or a terminal condition. Artificially supplied nutrition and hydration (e.g., a J-tube) can also be rejected in such circumstances.

Living wills received a great deal of attention several years ago in the media.⁷

(b) Revocable Living Trusts⁸

A revocable living trust can serve at least two primary functions: (1) as a “Will substitute” which fulfills the purposes of a Will and provides for the orderly distribution of an individual’s estate after death without the need for probate proceedings; and (2) as a guardianship avoidance planning technique.

A revocable living trust generally is a more effective guardianship avoidance planning technique that powers of attorney alone. There are at least three reasons for the advantages of living trusts over powers of attorney alone: (1) the authority of a trustee is more readily accepted by third parties than the authority of an agent under a power of attorney; (2) many corporate fiduciaries will agree to be named as a successor trustee, but not as an agent under power of attorney; and (3) it is easier to provide for more detailed and specific planning objectives. That said, however, powers of attorney are an economical guardianship avoidance technique which provide many benefits for a low cost.

All of the guardianship avoidance techniques outlined above are revocable and amendable. The individual can always update agent and trustee appointments, or add and

⁴ The Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. 1320d, 45 CFR 160.

⁵ SDCL 59-7-2.4.

⁶ SDCL 34-12D-2.

⁷ Bush v. Schiavo, 885 So.2d 321 (Fla. 2004).

⁸ See generally SDCL ch. 55-4 (the South Dakota Uniform Trusts Act).

subtract powers and provisions within the documents as circumstances or the law changes.

When *Not* to Avoid a Guardianship

Guardianships are subject to the supervision of the circuit judge assigned to the case. There are mandatory accounting and reporting requirements and there can be requirements to post a bond to secure the performance of the guardian. These safeguards come at a cost, but do provide a higher level of oversight. An agent acting under a power of attorney is not subject to court supervision and generally has few clear accounting or reporting requirements to other family members. If an individual has doubts about the trustworthiness of family members to serve in the role of an agent, a guardianship can very well be a better option.

Certain powers can be exercised by a guardian that cannot be exercised by an agent under a power of attorney. The most important of these “guardian-only” powers is the power to make or amend an individual’s Will or estate plan with court approval.⁹ If it becomes necessary to exercise certain “guardian-only” powers, a guardianship proceeding cannot be avoided.

A guardianship proceeding also allows the guardian to receive ongoing court approval of their actions and accountings. This has the effect of “closing the books” on the guardian’s performance from time to time and gives the guardian the peace of mind in knowing that their actions will not later be questioned or re-examined by dissatisfied family members.

WHERE TO FIND THE LAW

The law is generally comprised of statutes, regulations and caselaw (reported opinions by a court to specific facts). The law cited within the above discussion can be found at the links provided in the “Law” section of the ThomasESimmons.com website. South Dakota statutes are abbreviated as “SDCL” for South Dakota Codified Laws. South Dakota administrative rules are abbreviated as “SDAR.” Federal statutes are abbreviated as “USC” for United States Code.

DISCLAIMERS

Pursuant to IRS Circular 230, these materials are not intended or written to be used -- and cannot be used -- by taxpayers for the purpose of avoiding tax penalties; taxpayers should seek advice from independent tax advisors based upon their particular circumstances; these materials do not promote any particular plan or arrangement; general information is provided here.

⁹ SDCL 29A-5-420(3), (8).

These materials are provided as educational and informational resources only. Consult with a lawyer before making a legal decision since many rules contain exceptions and refinements which are not summarized here. This information should not be interpreted as legal advice. No one legal rule can be applied to all individuals or situations. State law varies tremendously from state to state and unless otherwise indicated, the law discussed here is applicable only in South Dakota. Since the law often changes when new statutes are enacted and cases are decided, no representations are made to the accuracy, completeness or timeliness of the discussions of law provided above.

© 2009 Thomas E. Simmons Inc.

Thomas E. Simmons
Attorney-at-Law
P.O. Box 8045
Rapid City, SD 57709-8045
Tel. (605) 342-1078
Email: Tom@gpnlaw.com