

The Law and You

Avoid Litigation If a Guardian is Needed

In earlier columns, I have discussed the increasing need for guardians and conservators. Our aging society is generally in better health and enjoying life more than ever. The result, however, is that we are living longer—giving rise to a need for care beyond our capacity to provide it for ourselves.

When we can no longer make reasonable decisions about our financial and personal affairs, we have to rely on someone else to make those decisions for us. Sometimes a spouse or a child takes over for us through a durable power of attorney.

For some, there is no spouse or child to assume those duties. For others, there are children or siblings who demand control of our estates or our person. In the later case, family battles often result. Our children or siblings may mean well. But their inability to agree on who ought to make decisions for us frequently spawns costly litigation.

A dispute resolved by a judge or jury can easily cost each side of the dispute more than \$10,000. Perhaps more important than money is the damage to familial relationships and the long-term destruction these disputes often cause.

There are some easy measures that you can take to avoid these family fights, or at least to minimize them. First, you can nominate in advance your own guardian and conservator. Making such nominations are easily accomplished and are often combined with the preparation and signing of a Will or Trust.

By nominating someone to be your guardian or conservator, the Courts are obligated to give such person priority over all others who may demand to serve in those capacities. More importantly, however, these nominations act as a deterrent against children

or siblings who may otherwise petition the Court to be your guardian or conservator.

Although you can nominate your own guardian and conservator, most of us are not likely to do so. It is like making out a Will. We may have good intentions, but we most often fail to act in a timely manner. So, most of us will not have nominated a guardian or a conservator.

Under these circumstances then, how can litigation be avoided? Sometimes, family members harden their positions so that litigation is the only way to resolve their dispute. In others, mediation may help.

Unlike most civil litigation, neither side makes a claim for damages in guardianship and conservatorship proceedings. Rather, the central issue in dispute is who should make decisions for “Mom” or “Dad.” In effect, it is usually about control.

A subsidiary issue is “trust;” one child is usually distrustful of a sibling who has been exercising control over Mom or Dad. While physical care of Mom or Dad may be of some concern, the distrust normally arises from how Mom’s or Dad’s money is being spent. And rarely is there any accountability.

Given these circumstances and combined with a history of strained relations between siblings, a family battle begins. If there are other siblings, they may take sides: several children on one side and several on the other. The objective at that point is to quickly diffuse the emotions and try to keep the matter out of the Court.

The second way to avoid litigation is to retain a good Elder Law Attorney who can guide the family through a process of resolution. A family meeting may be helpful if the family members are willing to try and resolve their differences.

Mediation, a more formal process, may

also produce positive results. If a resolution in mediation is reached, it is by mutual agreement of the two sides. Since an agreement is reached voluntarily and not imposed by a judge, it is usually more acceptable by both sides. It is more like a successful negotiation; more like a win-win solution.

Although not binding on your children, you should put in writing that you want any disputes over your care or finances to be mediated and not litigated. At the same time, if you have made the effort to let your children know your feelings, you should also formalize your choice of which child or children should be your guardian or conservator.

Does this sound confusing? To assist in preparing a nomination of guardian and conservator, it is best to consult with an Elder Law Attorney. To locate an Elder Law Attorney, check your local Yellow Pages or the National Academy of Elder Law Attorneys at (520) 881-4005, or on their web site at www.naela.com.