ST. LUCIE COUNTY YOURNEWS

Determining incapacity for guardianship explained

By Michael Fowler
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PORT ST. LUCIE — The procedure to have someone determined to be incapacitated and incapable of handling their own affairs is complex, expensive and potentially counterproductive and should, therefore, not be undertaken without considerable advice of counsel to determine whether or not there is a less traumatic alternative.

For example, many times we can handle almost anything in an elder law/long-term care planning environment if we have an agent appointed and capable of serving under a robust power of attorney, healthcare surrogate designation and other advanced directives. If those alternatives are not available or workable, the procedure for determining someone incapacitated starts with a Petition to Determine Capacity.

This is a fairly sophisticated petition to the court setting forth the reasons why you think the person should be determined to be incapable of handling their own affairs. Simultaneously, the petitioner will file a petition for appointment of guardian. In other words, if the judge does end up determining the alleged

incapacitated person (AIP) as incapable, then a guardian would need to be appointed and empowered to exercise the rights taken away from the AIP.

These pleadings are multi-page pleadings involving a lot of information regarding background, qualifications, assets, etc. of the proposed guardian as well as what assets and issues are involved in the proposed guardianship.

While I cannot speak for other attorneys, it is my general understanding that most attorneys do not undertake a guardianship proceeding with less than a $5,000 deposit. Of course, if the petition is contested, for example either by the AIP or another family member, the litigation expenses could be considerable.

One of the things that happens as soon as the petitions are filed is that the court will appoint an Elizor — this is an attorney whose job it is to read the pleadings to the AIP and represent the interests of the AIP in the incapacity/guardianship proceeding. The AIP is, of course, free to select their own attorney instead. Just having the attorney read the petition to the AIP can lead to considerable backlash depending upon the condition of the AIP.

The next thing that happens in the procedure is that the court appoints a three-member panel to interview the AIP and file their report as to capacity with the court. Two members of the panel are medical personnel and one is usually a lay person.

Finally after all the reports have been filed, there is a hearing before the court to determine the capacity and, if determined incapacitated, to appoint the guardian. Many times the guardian will also be required to post bond.

In short, as I said, it's extensive, expensive, cumbersome and can

potentially backfire. Generally, if an individual has the capacity to appoint an individual, commonly a spouse or child, to act and serve as their Power of Attorney that usually avoids the future need for a guardianship. This alternative, of course, is only preferable if the selected agent has the senior's best interest at heart. Individuals should never appoint a person they do not trust unconditionally as their Power of Attorney.

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