



## William & Mary Elder Law Clinic

W&M Elder Law Clinic

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In today's world, the legal issues that face us or our loved ones as a result of age are many and complex. This issue of the William & Mary Elder Law Clinic Newsletter addresses and clarifies some of these issues. Abby Norris explains how to plan ahead with documents like Powers of Attorney and Advance Medical Directives. She also explains how and why guardianships and conservatorships can be the solutions to problems that can't be solved with powers of attorney.

Then, Eric Fischer and Scott Foster explain what filial responsibility laws are and how you could be held responsible for certain health care expenses incurred by your parents.

### **Planning Ahead: Powers of Attorney, Advance Medical Directives, and Guardianships and Conservatorships.**

*By Abby Norris*

It is not uncommon these days for elderly parents to need the help of their adult children as they age. From heavy lifting, to yard work, to deciphering technology, the list of things that become more difficult as the years fly by only gets longer. The assistance needed by parents as they grow old can be as limited as a mere safety net for worst-case-scenarios, or as extensive as complete responsibility for every day decisions. As an adult child, or loved one, needing expansive permissions and authorizations, it can be extremely difficult to navigate how to go about acquiring them, especially when the one needing the help does not want to ask for, or admit they need, the help. There are a number of options available to parents, children, and loved ones looking to prepare for and react to the failing mental and physical help of the aged.

### **Powers of Attorney and Advance Medical Directives.**

One way to prepare in advance for a parent or loved one's possible future mental and physical decline is to execute a durable power of attorney. A power of attorney is a document that authorizes a designated person to act on behalf of another. The person giving the power of attorney is the "principal," and the person who is authorized to act on behalf of the principal is the "agent." The power of attorney does not take away the rights of the principal; it simply grants the agent the power to act on behalf of the principal while keeping the principal's rights intact. It is essential that at the time of execution of a power of attorney, the principal is able to understand the nature and consequences of the power of attorney in order for the power of attorney to be legally valid. A durable power of attorney will remain in effect if the principal later becomes mentally incapacitated. Virginia law requires language indicating that the principal intends for the power of attorney to remain in effect upon disability; otherwise, the power of attorney would automatically terminate.

A power of attorney is normally effective as soon as it is signed, unless it is "springing." "Springing" powers of attorney contain language stating that they will not go into effect until a specified time in the future (for example, upon incapacitation).

Alongside a power of attorney, an agent can be designated under an advance medical directive, which gives a loved one the authority to make tough health care decisions if the loved one cannot make the decisions for themselves. Again, this document does not remove the principal's right to make decisions. These documents set up a back-up plan in the event the principal loses the ability to make decisions and act on their own behalf.

### **When Powers of Attorney and Advance Medical Directives Are No Longer an Option.**

However, it is not always possible or realistic that people prepare ahead of time for the kinds of unfortunate situations that require these documents. When executing a power of attorney isn't an option, because the elderly person cannot or will not legally agree to it, a loved one can petition the court to obtain guardianship and conservatorship. Guardians and conservators are appointed by a Circuit Court judge to protect an incapacitated person, someone who legally cannot make decisions without assistance. Incapacitation is a legal status that can only be determined by a Circuit Court judge; it should not be confused with poor judgment or foolishness.

A guardian's authority can be very broad or can be limited to making specific decisions. A guardian can be granted the authority to make any number of decisions, from personal and health care decisions to whether the person may have visitors or will attend a social gathering. A court may limit the breadth and scope of a guardians' authority based on the facts presented to the court in the petition that speak to the ability of the incapacitated adult to care for his own personal, health and safety needs.

A conservator is appointed to manage a person's financial and property affairs. Similarly to the authority of a guardian, the authority of a conservator may be limited depending on the situation of the incapacitated person.

Unlike the power of attorney, the appointment of a guardian or a conservator removes the person's freedoms and rights to make decisions for himself, including things such as driving and voting, and therefore is a last resort. This option is meant to be used only when there are no less restrictive alternatives that will protect the interest of the incapacitated person.

### **Conclusion.**

Whenever possible, it is always prudent to plan ahead for these kinds of situations. A power of attorney and advance medical directive are great planning tools, but loved ones may need to obtain guardianship and conservatorship in certain crisis situations.

### **Filial Responsibility Laws Highlight Need for Long-Term Care Planning**

*By Eric Fischer and Scott Foster*

In 2008, Maryann Pittas was involved in a car accident. After sustaining serious injuries, she spent six months in a nursing home to recover. Upon her discharge, Mrs. Pittas, who was supporting her

retirement solely with Social Security benefits, was unable to pay the \$93,000 nursing home bill. Several weeks later, the nursing home filed a lawsuit against Mrs. Pittas's son, alleging liability under Pennsylvania's "filial responsibility" law. A court agreed, holding that the law made Mrs. Pittas's son liable for supporting his indigent parent.

At present 30 states, including Virginia, have similar laws on the books. While such laws are rarely invoked, the potential to pass on liability to your children is very real. As nursing homes become increasingly strained by an aging population and a national concern about healthcare costs, an increasing number of long-term care providers may turn to these laws to collect delinquent accounts.

Friendly and knowledgeable students at the William & Mary Law School Elder Law clinic can help you with long-term care planning, including Medicaid and government benefits eligibility. Effective future planning can help ensure your long-term care and your family's long-term financial stability.

### **About the Elder Law Clinic:**

The William and Mary Elder Law Clinic was founded in 2012 to service the growing need for legal assistance for the elderly and impoverished in the Hampton Roads area. The clinic is managed by Adjunct Professor Helena S. Mock, Esq. and staffed with second- and third-year law students.

The Elder Law Clinic teaches second- and third-year law students the substantive law regarding issues affecting our senior population. Work in the clinic benefits the students as much as the clients by helping students to improve their interviewing, counseling, research, writing, and advocacy skills as they advance their clients' interests.

Students provide assistance and advocacy in matters involving competency, nursing home issues, Medicare, Medicaid, Social Security and other public benefit programs, including non-service connected pension and related benefits from the Department of Veterans Affairs, as well as basic estate planning (wills, powers of attorney, medical directives) and simple probate matters