

JOHNSON, GASINK & BAXTER, LLP

# TWO THINGS CERTAIN®

---

February 2014

## **DOES MY ADULT CHILD NEED A POWER OF ATTORNEY?**

**By: Spencer M. Baxter, Esq.**

Many of us take for granted the ease in which we can care for our children. On any given day if my daughter should fall and scrape her knee, I can pick her up and give her comfort. If the injury is more serious, I can immediately take her to the doctor's office and decide the best course of treatment. Yes, my daughter may have an opinion on what Disney character Band-Aid she gets (she is 2 ½ years old), but as her parent I am legally authorized to make decisions on her behalf. This is all true up until the day she turns eighteen, the age of majority in Virginia. Once my daughter is eighteen she is considered an adult, and I am not authorized to make financial or health care decisions on her behalf. Unfortunately this transition from child to legal adult occurs at eighteen regardless of the capacity or maturity of the child. This is of particular concern where parents of special needs children need to continue making decisions for their children well beyond the age of eighteen. Regardless of whether a child has been incapacitated from birth, or a tragic event has put them in a state of incapacity, the same problem persists with parents making decisions for their adult children.

Less than ten years ago the shooting at Virginia Tech was an all-too-tragic reminder of a parent's helplessness. In the hours following the campus shooting, scores of terrified parents flooded the hospital phone lines inquiring as to the status of their adult children. In most cases HIPAA (a medical privacy law) prevented the hospital from even confirming whether a child was at the hospital, let alone their medical condition. In cases where adult children needed medical attention, but had not named a health care agent in a legal document, physicians had to rely on the protocols set up in Virginia Code § 54.1-2986 to establish an agent. If an adult child had a health care power of attorney naming a parent as their agent, access to their medical condition and decisions on their behalf would have been immediate.

Financial decisions don't usually take the same precedence as health care decisions, but they do eventually need to be addressed. A financial power of attorney can authorize a parent (the agent) to make financial decisions at the onset of the adult child's incapacity. Unlike in a regulated court conservatorship, a financial agent acting under a power of attorney does not have to deal with court scrutiny, expense and recurrent reporting requirements. Unfortunately, if an adult child does not have the capacity to create a power of attorney, a court guardianship/conservatorship is the only remaining option.

The Virginia guardianship/conservatorship process is rather arduous and can last anywhere from a few weeks to a few months. To clarify, a guardian is someone appointed by the court to make decisions on behalf of the incapacitated person regarding support, health care, safety, treatments, education, etc. A conservator is the person appointed by the court who manages the financial affairs of the incapacitated person. The same person typically petitions and qualifies as both guardian and conservator. Initially the person qualifying as the guardian/conservator submits a petition to the circuit court outlining the overall facts of the incapacity. The court then appoints a Guardian Ad Litem (GAL) to represent/protect the interests of the incapacitated adult. The GAL will submit a report to the court outlining their findings regarding the petition and the incapacitated adult. An evaluation report is then prepared by a psychologist or physician and submitted to the court and the GAL. The hearing finally occurs in the circuit court where the overall facts, evaluations and disposition of the incapacitated adult are decided upon to appoint the guardian/conservator. The court must find clear and convincing evidence the incapacitated adult is incapacitated and needs a guardian/conservator. Once the guardian/conservator is named by the court, they are still required to submit reports in a manner similar to the Virginia probate process. A conservator will typically have to file an initial inventory and then file annual accounting reports of all expenditures, income, and assets.

Every parent dreads the moment when their children need them and they are powerless to help. Although the right disability documents can't prevent harm to your children, they can place you as their advocate in the toughest of times. A court conservatorship/guardianship should only be viewed as the option of last resort and can easily be avoided with the right documents in place BEFORE disability occurs. Should you or your family have concerns over the ability to make decisions on behalf of a loved one, please feel free to contact the attorneys of Johnson, Gasink & Baxter, LLP for a further discussion of your options.

"You know your children are growing up when they stop asking you where they came from and refuse to tell you where they're going." –P.J. O'Rourke



**Johnson, Gasink, Baxter, LLP.**

1138 Professional Drive  
Williamsburg, VA 23185  
(757) 220-9800  
(804) 824-9690

**GENERAL DISCLAIMER:**

*This newsletter is intended to be used for informational purposes only and should not be construed as personal legal advice. Transmission of this information is not intended to create, and receipt does not constitute, an attorney-client relationship.*



**About the Author:**

Spencer Baxter is an experienced problem solver who helps individuals and businesses achieve and protect their goals of prosperity, stability and growth through appropriate planning. Spencer takes great pride in making sure that his work for clients is always reliable, correct, and on time.

---

**CIRCULAR 230 DISCLOSURE:**

*U.S. Treasury Department Regulations require that we advise you that unless otherwise expressly indicated, any federal tax advice contained herein is not intended or written to be used, and may not be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any tax-related matters addressed herein.*

---