# *Legally Speaking*

**Skip Morgan – 473-1986 – chmorgan2d@yahoo.com, www.skipmorganlaw.com**

## "I Must Have Lost My Mind !"

One of our worst nightmares is to lose our personal autonomy. The thought of becoming completely dependent on somebody else to manage our personal affairs is chilling. A story in the *Rocky Mountain News* told of Helen Arnold, a retired high school French teacher who found herself, against her wishes, a ward of the Denver Probate Court. She had fallen at home and fractured her neck. While she was recovering in the hospital a psychologist who examined her at the request of her son found she was suffering from "significant overall brain dysfunction." The Denver Probate court agreed, and without her presence or reference to her wishes, appointed first her son, then later a stranger, to be her guardians and conservators. A guardian is somebody who looks after the person, and a conservator is somebody who looks after the property. Both are called fiduciaries, people in whom are reposed the highest degree of trust, or, as Justice Cardozo put it, 'that punctilio of an honor the most sensitive."

For the ensuing three years, Helen's estate dissolved into nothing. Her home was sold, in part to pay attorney's fees. Ironically those fees were incurred for both her own attorney *and* the attorney who argued for a finding of incapacity in Probate Court. She wrote the Court that her only wish was to die soon. It was ironically providential that her life and her money ran out just about the same time.

We understand ultimately the necessity for a will. Death is inevitable. Not as obvious is that we are more likely to suffer temporary or permanent incapacity than we are "premature" death. Helen Arnold had made no provisions against the possibility that she might at some point become incapacitated. She had neither a durable power of attorney nor a health care power of attorney. Thus, when an issue as to her capacity arose it had to be adjudicated in court and an involuntary guardianship and conservatorship established. On the one hand, court supervision provides some protection against fraud and self-dealing. Yet the cost of hiring attorneys, court proceedings, guardians ad-litem, neuropsychological evaluations, court-appointed visitors, guardians and conservators, along with the continuing necessity to bring even simple issues to the court for its approval, can add up in a big hurry.

We cannot guarantee against our ever losing capacity, temporarily or otherwise. What we can do is to make provisions against that possibility while we are still in a position to do so. This is vital. Unlike catastrophic brain injuries or stroke, most forms of dementia come on gradually, and the victim is usually aware of it well before reaching the critical "incapacity" tipping point. Ronald Reagan famously remarked that the great thing about Alzheimer's Disease was that he got to meet new people every morning. The condition has to be pretty far advanced before the individual has reached the point where there is a loss of even testamentary capacity (knowing who your family is, who you trust, etc.) in which a power of attorney might be questioned.

In this respect, selecting the right person is simply the most important thing you can do. It is often assumed that if we do lose capacity our spouse automatically can speak for us in legal, personal, and medical affairs. Not so. We have to appoint our husband or wife and specify the powers that go with it in legal instruments called durable, or durable springing powers of attorney. The "durable" means that the power of attorney survives our incapacity. The "springing" means that the power of attorney comes into effect only in case of our incapacity. These two documents, carefully thought out, can save not just tens of thousands of dollars, but potentially the very fabric of our family. Nothing is quite so wrenching as deciding how to care for a loved one who has lost the ability to care for himself. Don't leave it to chance, and don't let strangers in black robes decide for you. You decide for yourself who you want to be your guardian and conservator.

As I said, if you don't have current POAs even your spouse must go to court just like anybody else to get legal authority to act in your behalf. It makes sense, therefore, for most of us to appoint our spouse as our attorney-in-fact in these documents. But what if there is no spouse, or if the spouse is just not up to handling things? Who should we appoint then? Our natural inclination is to appoint one of our adult children. Even so, the grave responsibilities that attend a child who becomes legally responsible for the parent, in conjunction with a built-in conflict of interest that attends child-as-fiduciary and child-as-heir, can make for a witches brew of internal and inter-familial conflict. If Donny and Susie didn't get along as children, chances are they're not going to agree on how to care for mom or dad. Worse still is where there are blended family issues. And when disagreements arise among family members, too often resolution can only be had by going to court, the very thing you wish to avoid.

The very best thing you can do is to talk about it fully and frankly beforehand with your family. *All* of your family. I'll admit, it's hard to think of a topic less appetizing for the dinner table than discussions such as this, but they can be the most important thing that you can do to prevent what happened to Helen Arnold from happening to you.