

Planning for Incapacity in New Hampshire

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1. GUARDIANSHIP

A person with disabilities should have the opportunity to make decisions he or she is able to make with such nonbinding advice as is appropriate on an informal basis. However, when a person is legally not competent to make decisions, then other options need to be explored.

When a person is not legally competent, guardianship is generally the best approach when there had been no opportunity for the client to give powers of attorney for health care and financial matters prior to becoming legally incapacitated. "Incapacitated" for guardianship purposes means the person is likely to suffer substantial harm because of an inability to provide for his or her personal needs for one or more of the following: food, clothing, shelter, health care safety or management of property or financial affairs.

In the situations of medication or other medical attention, for example, the question may arise whether a physician will decide that the disabled person is not able to give informed consent. If not, the physician may not be in a position to prescribe medication or even operate until a guardianship is established (unless a power of attorney for health care had already been given by the patient during a period of capacity) even though the medication or surgery is needed. Also, in deciding about living arrangements and services, sometimes a guardianship is necessary if the person with disabilities is not able to give informed consent, for example, to a rental agreement or to planned individual services (and had not given appropriate financial and health care powers of attorney ahead of time during a period of capacity). It may also be difficult to access records or be admitted to attend meetings about health or social services without a guardianship.

A guardianship is established by a family member or other person familiar to the disabled person, explaining to the Probate Judge what the disabled person is not able to do, and why he or she cannot live independently and make informed decisions. The Court appoints an attorney to conduct an investigation and to be present in Court to cross examine and test the petition.

When considering petitioning for guardianship, ask: What was the precipitating factor? What is the proposed ward's daily routine? What are the specific functional limitations which have caused the client to consider guardianship for the proposed ward? Ask whether the disabled

person, any family members, service providers or others are opposed to the guardianship and, if so, why.

Consider alternatives to guardianship including no fiduciary arrangement at all, powers of attorney, trusts, or conservatorship (RSA 464-A:13-20). Depending upon the nature of the disability, other possible alternatives to guardianship, if available and sufficient for the ward's needs, include under RSA 464-A:2: visiting nurses, homemakers, home health aides, adult day care and multipurpose senior citizen centers, representative and protective payees and residential care facilities.

The Court petition requires a detailed statement of “specific factual allegations” concerning the proposed ward's transactions, actions and actual occurrences which support the granting of the petition for guardianship in accordance with RSA 464-4 III and *In re Delucca* 121 N.H. 71 (1981). If the petition does not set forth sufficient factual details of actions and occurrences, the Court-appointed attorney may feel that the petition is insufficient. An example of specific actions or occurrences would be: “The proposed ward when asked was unable to identify the current year, or the day, month and year of his birth.” Another example would be: “The proposed ward asked no questions at all after he was advised by his physician that he needed an operation.” It is permitted to allege specific conditions which are ongoing and occur every day, but they should be specific. An example of this “ongoing” type of action or occurrence would be: “the proposed ward has not in the last six months been observed reading, writing or speaking.”

The petition needs to show a pattern of specific factual allegations which prove the need for a guardianship, beyond a reasonable doubt. Under RSA 464-A:2 XI: “Isolated instances of simple negligence or improvidence, lack of resources or any act, occurrence or statement if that act, occurrence or statement is the product of an informed judgment shall not constitute evidence of inability to provide for personal needs or to manage property.”

Discuss and decide who should be the proposed guardian. It is possible to request a sole guardian, a co-guardianship arrangement or a divided duty guardianship arrangement. An example of a divided duty guardianship arrangement would be to have one person as guardian over the person and another person as guardian over the estate. A co-guardianship would involve two people serving together as co-guardians over the person, or over the estate, or both person and estate. A co-guardianship might involve the two parents, or a parent and sibling, or a spouse and adult child, or a family member together with a public guardian under RSA 547-B. It is not a good idea to have more people serve as co-guardians than can easily join together to make a decision. Also, check to determine whether a proposed guardian or co-guardian has a conflict of interest under RSA 464-A:10 .

A public guardian may be requested as sole guardian under RSA 547-B:3, because “there is no relative, friend, or other interested person available, willing and able to serve.” A public guardian may also be requested to serve as co-guardian with a relative or friend under RSA 547-B:5. If a public guardian is serving as co-guardian with a family member or friend, then RSA 547-B:5 provides that the public guardian's decision shall prevail if there is a disagreement until reviewed by the Court. The family member or friend should be advised of this ahead of time, so

it does not come as a shock when mentioned at the hearing or after the hearing. Also, if you are requesting a public guardian, remember to seek N.H. Department of Health & Human Services approval prior to filing the petition.

If a guardianship of the estate is sought, select an independent appraiser to list and appraise the ward's assets to determine specific values. It is not necessary to have an appraiser in the event you are seeking guardianship over the person only.

The duties of a guardian over the person include arranging services, deciding where the ward lives, making medical decisions, protecting the civil rights of the ward and visiting the ward regularly. The guardian must act independently of the service providers, and make independent informed decisions on behalf of the disabled person. A bond is required in all cases. If the ward's assets are small or it is a guardianship over the person only, a small bond without sureties is all that is generally ordered. (A bond with sureties is an insurance policy in case the guardian acts unlawfully). The Court expects that the proposed guardian will be present at the hearing. If the proposed guardian is a family member and does not come to the hearing, the Judge may wonder whether that family member understands the duties of guardianship and whether he or she is willing to accept the responsibility. The proposed ward is also generally present at the hearing (RSA 464-A:8), unless excused by a physician.

Guardianship over the person of a disabled citizen also requires filing a short statement every year with the Probate Court stating essentially how the disabled person's life is going. It is also possible, but often not desirable, to obtain guardianship over the ward's money. This might be thought desirable in the event the disabled person has substantial assets, but it does require annual financial reports to the Probate Court every year. Often financial reporting to the Court would only duplicate, with an additional form to fill out, financial reports already made to the IRS, the social security representative payee system, the ward and others. At times, as an alternative to guardianship over the estate, a trust is established, with its own accounting procedures, by the person who is the source of the disabled person's assets. The guardianship law requires that other options be explored before guardianship is sought RSA 464-A:2II, 9 III(c). A special needs trust may be a better choice than a guardianship of the estate in terms of remaining eligible for public benefits. Special needs trusts are discussed in the next section of these materials.

The five biggest pitfalls in the guardianship statute to watch out for, in preparing a guardianship petition, are: (1) RSA 464-A:2 XI which requires technical compliance with specific 20 day and 6 month time frames for your evidence of need for guardianship; (2) RSA 464-A:4 III which requires that you have in your petition a detailed statement of specific factual allegations rather than just summary statements or general language; (3) RSA 464-A:8 IV which states that you have the burden of proof beyond a reasonable doubt; (4) RSA 464-A:2II and 9 III(c) which require you to show that available alternative resources do not exist to suitably substitute for guardianship; and (5) RSA 464-A:8 II which requires that a physician's affidavit and petitioner's statement be filed twenty-four hours before the hearing to excuse the proposed ward's attendance unless the ward is out of state or has changed his or her mind within that twenty-four hour period.

Other guardianship statutes may be involved under special circumstances: Determine whether the proposed ward is under the age of eighteen, and if so, see RSA 463 and 11 N.H. Practice ch. 70. In addition, determine whether the proposed ward is a veteran and, if so, see RSA 465 and 11 N.H. Practice ch. 71. Consider whether a civil commitment is involved, and, if so, see RSA 135-C. Also, determine whether the proposed ward became disabled due to a cause for which a statute of limitation to bring a claim must be considered. Determine whether a special education or other claim is warranted under RSA 186-C; 42 U.S.C. sec. 1983; 20 U.S.C. sec. 1401 et seq.; sec. 504 of the Rehabilitation Act of 1973; 29 U.S.C. sec. 794.2.

2. SPECIAL NEEDS TRUSTS

Special needs trusts are designed to benefit people with disabilities, to provide for special needs which public benefits do not. There are traditional common law special needs trusts and federal statutory special needs trusts.

In the United States it has been traditional to establish a common law special needs trust to benefit an heir who has a disability based on constitutional concepts of the right to will or gift property to succeeding beneficiaries. The underlying theory of common law special needs trusts is that the trust assets have never belonged to the disabled beneficiary and so are not considered to be the disabled beneficiary's property. See also *Heckler v. Turner* 470 U.S. 184, 200, 105 S. Ct. 1138, 84 L.Ed. 2d 138 (1985), which prohibited “imputing financial support from persons who have no obligation to furnish it or by overvaluing assets in a manner that attributes nonexistent resources to recipients.” With a special needs trust the disabled beneficiary does not control the assets. A relative or independent trustee makes disbursements to benefit the disabled beneficiary.

A federal law was passed on August 10, 1993 (called OBRA-93) concerning special needs trusts designed to benefit people who are totally and permanently disabled. Under this federal law (OBRA-93) it is the articulated policy of Congress to allow persons who have disabilities, to be the beneficiaries of a trust without becoming disqualified from receiving public benefits. The Social Security Act was amended in 1999 (42 USC 1382b(e)(5)) to make it clear that this uniform federal protection for special needs trusts included SSI eligibility in addition to medicaid eligibility. This “safe harbor” law allows three types of trusts to be established for persons who have disabilities, described respectively in subsections (A), (B) and (C) of the law. The subsection (B) trust does not apply in New Hampshire. Subsection (A) permits the following type of trust:

“(A) A trust containing the assets of an individual under age 65 [emphasis supplied] who is disabled (as defined in sec. 1614(a)(3)) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual [note the absence of the phrase “by such individuals” which appears at this point in the description of the subsection (C) trust set forth below], or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this title [note the absence of the phrase “To the extent that amounts remaining in the beneficiary's

account upon the death of the beneficiary are not retained by the Trust” which appears at this point in the description of the subsection (C) trust set forth below.]”

Subsection (C) is substantially different. It permits the following type of trust:

“(C) A trust containing the assets of an individual [note the absence of phrase “under age 65” which appears at this point in the description of the subsection (A) trust set forth above] who is disabled (as defined in sec. 1614(a)(3)) that meet the following conditions:

- (i) The trust is established and managed by a non-profit association [emphasis supplied]
- (ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.
- (iii) Accounts in the trust are established [emphasis supplied] solely for the benefit of individuals who are disabled (as defined in sec. 1614(a)(3)) by the parent, grandparent, or legal guardian of such individuals, by such individuals [emphasis supplied] or by a court.
- (iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust [emphasis supplied], the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this title.”

What are the differences between a subsection (A) trust and a subsection (C) trust? In contrast to a trust under subsection (A) a subsection (C) trust: (1) can be established by the disabled individual, (2) there is no age limitation and (3) funds can be retained by the trust after the death of the original disabled beneficiary. On the other hand, a subsection (C) trust requires that a non-profit association manage the trust, rather than having as trustee a family member or other person as permitted in the case of a subsection (A) trust.

Whoever the trustee is, that trustee may be able to provide individual advocacy and promote empowerment for individual beneficiary to participate to the fullest extent possible in the decision making process. The trustee should first seek to arrange funding from other sources and the provision of services from existing organizations, where possible.

What are the characteristics of a good trustee? In choosing a trustee whether a family member or independent trustee, the Court in the case of *In re Quirin Estate* 116 NH 845 (1976) set forth suitability characteristics. Characteristics to consider include: integrity; sound judgment; good health; solvency; intelligence; not hostile to others involved; no conflict of interest; familiarity with required procedures; prior experience as a trustee and substantial experience in managing finances particularly if large sums are involved; and acceptance by the beneficiary.

3. GENERAL POWERS OF ATTORNEY

A durable general power of attorney is most often chosen to provide for financial decisionmaking in the event of the client's future disability. The financial decisions are then made by a person who has been selected by the client when the client was able to sign legal papers before the client became disabled. No Court hearings are then required for financial decisions to be made. Other people are not involved in choosing the decision maker, although the Court can be asked to review the actions of the fiduciary under RSA 506:7.

Financial powers of attorney are governed by RSA 506:5,6,7, as well as RSA 384:39, RSA 385:7 and RSA 477:9. RSA 506:6 I provides:

“The subsequent disability or incompetence of a principal shall not revoke or terminate the authority of an agent who acts under a power of attorney in a writing executed by such principal which contains the words 'This power of attorney shall not be affected by the subsequent disability or incompetence of the Principal' [emphasis supplied] or words of similar import showing the intent of such principal that the authority conferred shall be exercisable notwithstanding his subsequent disability or incompetence.”

Unless other arrangements are made, a financial power of attorney goes into effect as soon as it is signed. Often it is not intended to be used until disability of the principal. If a power of attorney is desired that does not go into effect until disability (a so-called springing powers of attorney), the question arises as to how to determine whether the principal is in fact disabled. A person dealing with the agent of a springing power of attorney might require guardianship or updated medical reports on a periodic basis in order to honor the power of attorney. That is why most general financial powers of attorney are written to go into effect immediately even though they may not be used until much later. As an alternative for the client who is concerned about the power of attorney going into effect immediately, it may be advisable to have the financial power of attorney held by a third party for release upon disability under specified circumstances such as the opinion of the client's physician or a chosen family member or friend.

General financial powers of attorney are an important part of estate planning for disability, but it is important to remember that abuses can occur. The client should select the agent with great care and inform the agent of his or her fiduciary duties. It may be appropriate to appoint co-agents, and/or give an outside party power to approve disbursements in advance and/or power to revoke the power of attorney. The Court in the case of In re Estate of Ward, 129 N.H. 4 (1986), held that the agent is a fiduciary to the principal, and that the agent may be held liable for interest on any misappropriated funds. Under RSA 506:7 the principal, the spouse, child or parent of the principal, an heir or devisee of the principal, a treating health care provider and the office of the ombudsman under RSA 161-F:10, may, without a Court proceeding, require the agent to submit an accounting. RSA 506:6 II provides that if a guardian or conservator has been appointed by the Court, then the guardian or conservator has the same power that the principal would have had to revoke, suspend or terminate any part of the power of attorney. To protect the principal's interests, RSA 506:7 contains significant limitations on the agent and provides that a petition may be filed in the Superior or Probate Court to determine whether the

power of attorney is in effect, to determine the legality of acts of the agent, to require the agent to file an accounting or to terminate the power of attorney. RSA 506:7 provides that the Court may order the agent to pay reasonable attorney fees to the petitioner if the Court determines that the agent has violated his fiduciary duties under the power of attorney or has failed without a reasonable cause or justification to submit accounts after written request.

RSA 477:9 requires that powers of attorney concerning real estate must be signed and acknowledged and may be recorded as required for a deed, and RSA 506:6, IV requires that every durable power of attorney be executed in accordance with RSA 477:9. The legislature has also enacted into law specific disclosure forms which must be attached to financial powers of attorney. These disclosure forms are designed to make the principal aware that he or she is giving someone else significant authority to act, and to make the agent aware that the agent must act properly.

A power of attorney for financial matters may be written to be specific to one matter. Typically, however, financial powers of attorney are written to cover a broad range of issues which might arise in the event of disability of the principal. These issues include depositing funds in a bank and withdrawing funds to pay for the principal's needs, making investment decisions, having access to safe deposit boxes, arranging for social security and other public benefits and private retirement benefits for the principal, filing tax returns and handling tax audits and representing the principal's interests in litigation.

Financial powers of attorney may also allow the agent to disclaim any interest in property which the principal may be entitled to. Such a disclaimer would allow property to be disclaimed which had passed to the principal while disabled prior to death. Disclaimer powers and gifting powers can be very helpful, for example in tax matters, but do place considerable power in the agent. Disclaimers are regulated by RSA 563-B. Gifting through powers of attorney are also regulated by statute, and gifts, including gifts to the power of attorney agent must be specifically permitted in the document. It is a good idea to consult the principal's will when using gifting powers in a financial power of attorney.

When estate planning in the principal's best interests goes beyond carrying out a plan already established prior to the disability, there is the option of requesting or petitioning the Probate Court to make an estate plan.

A power of attorney may also contain a provision stating that the agent may "take such other actions on my behalf as I have the authority to do under RSA 464-A."

Clients sometimes wonder why they need a financial power of attorney if they are establishing a trust. Financial powers of attorney typically include certain powers which a trustee does not have. Financial decisionmaking by a trustee only extends to the assets which have been retitled into the trust. The agent under the financial power of attorney can be authorized to make decisions concerning assets which are not in the trust. Arranging for public benefits and handling various tax matters are two examples of areas of decisionmaking outside the trust. Also the agent under the financial power of attorney can be authorized to transfer assets into trust.

4. HEALTH CARE POWERS OF ATTORNEY

A power of attorney for health care matters should be considered so as to allow all health care decisions to be made, in the event of the client's disability, by a person who has been selected by the client before the client becomes disabled. RSA 137-J provides specific legislative authorization for this type of document and also a specific form, created by the legislature, to use. No Court petition for guardianship is then required before health care decisions can be made for a disabled person who made a health care power of attorney prior to disability.

A living will, in addition to the health care power of attorney, is appropriate if the client wishes to declare that he or she does not want artificial means used to prolong his or her life in the event of terminal illness or permanent unconsciousness. RSA 137-J provides specific legislative authorization for this type of document and also a specific form, created by the legislature, to use.

If the client wishes a living will, it is usually best to have both documents (a living will and a health care power of attorney) because the living will more clearly determines what will happen concerning terminal illness and permanent unconsciousness, and the health care power of attorney allows decisions to be made flexibly not only concerning terminal illness and permanent unconsciousness, but also for all other health decisions by a person named in the document. If there is a conflict between the instructions of a living will and a health care power of attorney, the health care power of attorney controls under RSA 137-J:21 II.

Because both the health care power of attorney and living will declaration are legislative forms, they are an inexpensive component of an estate plan for disability, but they are in many ways the most important. The language can be altered to some degree, but it is not advisable to create a document which would risk not being honored when needed.

Clients may ask what happens if they are out-of-state at the time a decision needs to be made if the client could not return to New Hampshire. Each state in the United States is bound by the full faith and credit clause of the U.S. Constitution, taking into account public policy, but public policy differs among states. Some states authorize health care powers of attorney only. Other states authorize living wills in various forms. For example, until 1991, New Hampshire arguably did not authorize a client to make a decision concerning artificial nutrition and hydration. No guarantee can be made that the documents will be honored in another state or country. New Hampshire's advance directive reciprocity law (RSA 137-J:17) states: Nothing in this chapter limits the enforceability of an advance directive or similar instrument executed in another state or jurisdiction in compliance with the law of that state of jurisdiction. However, any exercise of power under such a foreign advance directive or similar instrument shall be restricted by and in compliance with the requirements of this chapter and the laws of that state of New Hampshire. If a client maintains a vacation home in another state or country or travels regularly to another jurisdiction, the client should inquire about the matter there. Having both a living will and a health care power of attorney provides some additional security that one or the other at least would be honored on the issue of terminal illness or permanent unconsciousness. The question of terminal illness and permanent unconsciousness is a very personal matter, but one which should be discussed with the client in connection with an estate plan.

A health care power of attorney covers all health care matters, not just terminal illness and permanent unconsciousness. It is possible to add to the statutory health care power of attorney additional specific provisions similar to what are often found in guardianships orders. Although it should not be necessary to do so, it may be advisable to add additional powers to the statutory health care power of attorney to help ensure that the mental, emotional and physical health concerns of the disabled person are properly addressed and treated, for example (1) attend meetings on my behalf, (2) make decisions concerning educational and service plans for me and (3) determine who shall be permitted to visit me in a hospital or other medical institution or any other placement including my home.

It may also be advisable to add a specific reference to the health care records federal law such as the following: In accordance with the Health Care Insurance Portability and Accountability Act of 1996 (Pub. L 104-191), 45 CFR Sections 160 and 164 (“HIPAA”), my Agent may act as my Personal Representative for the purpose of obtaining and receiving any and all protected health information related to my health care and related to payments in regard to such health care.

On the specific question of disclosure to family members, friends and services providers of confidential records, it is also useful to know that RSA 135-C:19-a provides:

I. Notwithstanding RSA 329:26 and RSA 330-A:32, a community mental health center or state facility providing services to seriously or chronically mentally ill clients may disclose information regarding diagnosis, admission to or discharge from a treatment facility, functional assessment, the name of the medicine prescribed, the side effects of any medication prescribed, behavioral or physical manifestations which would result from failure of the client to take such prescribed medication, treatment plans and goals and behavioral management strategies to a family member or other person, if such family member or person lives with the client or provides direct care to the client. The mental health center or facility shall provide a written notice to the client which shall include the name of the person requesting the information, the specific information requested and the reason for the request. Prior to the disclosure, the mental health center or facility shall request in writing the consent of the client. If consent cannot be obtained, the client shall be informed of the reason for the intended disclosure, the specific information to be released and the person or persons to whom the disclosure is to be made.

II. Notwithstanding RSA 329:26 and RSA 330-A:32, when the medical director of designee determines that obtaining information is essential to the care or treatment of a person admitted pursuant to RSA 135-C:27-54, a designated receiving facility may request, and any health care provider which previously provided services to any person involuntarily admitted to the facility may provide, information about such person limited to medications prescribed, known medication allergies or other information essential to the medical or psychiatric care of the person admitted. Prior to requesting such information the facility shall in writing request the person's consent for such request for information. If the consent cannot be obtained, the facility shall inform the person in writing of the care providers how have been requested to provide information to the facility pursuant to this section. The facility may disclose such information as is

necessary to identify the person and the facility which is requesting the information. No care provider who discloses otherwise confidential information to a designated receiving facility following a request made pursuant to this section shall be held civilly or criminally liable for disclosing such information.

Finally, it is possible to add to a health care power of attorney a provision saying that if a person is incapacitated but objects to medical treatment such as medications, the power of attorney Agent may still authorize the treatment under RSA 137-J:5, IV.

5. MENTAL CAPACITY TO SIGN POWERS OF ATTORNEY

Sometimes guardianship is the only alternative available when there has been no chance during a period of capacity to grant powers of attorney. The Probate Court does provide supervision of guardians which can be very helpful, and the New Hampshire Probate Courts are efficient and understanding. But guardianship court proceedings can, by their very nature, be time consuming, expensive, adversarial and emotionally stressful for family members, although they may be much less stressful than Involuntary Emergency Admission (IEA) proceedings if done in advance of a mental illness crisis. It is always difficult, however, for family members to testify in Court about a disabled loved one's specific functional limitations, and then to be cross-examined about such sensitive family matters. It is more expensive and emotionally trying to the family to petition for guardianship, than it is to utilize powers of attorney given, without the necessity of Court proceedings, prior to the disability arising, if that is possible. Financial and Health Care Powers of Attorney are less restrictive alternatives to guardianship and IEA proceedings.

Even if the disability arose before powers of attorney could be granted, there are situations where a disabled person has periods of capacity during which documents can be understood and signed. Many disabilities have up and down periods.

If there is a question whether an already disabled person has the capacity to make a power of attorney, an evaluation may be done by a psychiatrist, psychologist, or other professional depending upon the nature of the disability. This evaluation can be done at or near the time of signing. Many people who are disabled still have the ability to make a power of attorney. A person is presumed to be competent unless a guardian has been appointed under RSA 464-A. RSA 464-A:2 XI requires a functional assessment of the client's ability to provide for his personal needs or to manage his finances or property. Before a guardianship can be granted the Probate Court must find that the proposed ward is incapacitated under RSA 464-A:2 XI, which provides in part: "Isolated instances of simple negligence or improvidence, lack of resources or any act, occurrence or statement if that act, occurrence or statement is the product of an informed judgment shall not constitute evidence of inability to provide for personal needs or to manage property." RSA 464-A:2 XII then defines informed judgment as follows: "Informed judgment' means a choice made by a person who has the ability to make such a choice, and who makes it voluntarily after all relevant information necessary to making the decision has been provided, and who understands that he is free to choose or refuse any alternative available and who clearly indicates or expresses the outcome of his choice."

The testamentary capacity necessary to make a will requires under RSA 551:1 a “sane mind”, but this statutory phrase is not defined in the statute. The leading New Hampshire case of Boardman v. Woodman 47 N.H. 120 (1866), held that “in order to have sufficient mental capacity to make the will [the decedent], at the time of making it, must have been able to understand its general nature, to bear in mind those who were then her nearest relatives as such, and to make an election upon whom and how she should bestow the property by her will; that she must have had the ability, the mental power or capacity to do this....” This standard is generally understood to mean that a person making a will must be able to (1) understand the nature of the act of execution, (2) recollect what property he wishes to dispose of and understand its general nature, (3) bear in mind his relatives, and (4) elect and choose the disposition to be made of his property. N.H. Practice Wills, Trusts and Gifts, Vol. 7, sec. 6.03.

Although the contractual capacity required under agency principles to make a power of attorney or can technically differ somewhat from the capacity to make a will (see Restatement Contracts 2nd, sec. 12 and Restatement Agency 2nd, sec. 20), the above Boardman standard is a New Hampshire Supreme Court defined standard to look to when determining capacity to make decisions about one's finances. See also, by way of analogy, the statutory standard for capacity to name another to make financial decisions set forth in RSA 464-A relative to conservatorship. The standard there is basically that the Court must find that the disabled person is capable of making the decision to have another person make financial decisions, even though the disabled person is not able to make the actual financial decisions themselves.

The newly enacted Uniform Trust Code provides at RSA 564-B:6-601: “Capacity of Settlor Of Revocable Trust. The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.”

RSA 137-J:14, concerning health care powers of attorney, requires that the witnesses to the durable power of attorney for health care affirm that the principal “appeared to be of sound mind and free from duress at the time....and that the principal affirmed that he was aware of the nature of the document and signed it freely and voluntarily.” This is not as high a mental capacity as that required to make the health care decision itself under RSA 137-J:2 V, which generally states: “Capacity to make health care decisions” means the ability to understand and appreciate generally the nature and consequences of a health care decision, including the significant benefits and harms of and reasonable alternatives to any proposed health care.”

In a close question, consider providing legal standards to a psychiatrist, psychologist, or other professional depending on the nature of the disability and requesting an evaluation and opinion letter. If the opinion favors capacity, then retain it with the powers of attorney. If the opinion favors incapacity, consider guardianship. If the court then overturns the evaluation and denies the guardianship because the client's functioning level is too high for a guardianship, then revert to powers of attorney. Take these steps, if possible, before a crisis situation. If there is a crisis and no powers of attorney have been signed in advance, then consider guardianship as a less restrictive alternative to an emergency involuntary admission (IEA) procedure, unless an IEA is the only alternative.