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Understanding the Importance and Implications of Guardianships and Conservatorships

Often in estate planning, attorneys present the idea of guardianship and/or conservatorship as a bad thing - something to be avoided. In a perfect world, we could move through our lives from cradle to grave without such things as guardianships and conservatorships. But in order to achieve this perfect world, we have to do advance planning to provide for our own care if we become impaired or incapacitated, and we need trustworthy, responsible and financially astute family members who are willing and able to assist us. For some people, these "perfect world" conditions do exist. However, for many others, they do not.

Increasingly, attorneys run into the following situations:

1. Seniors come to us, often brought by their children or children-in-law, when mental incapacity has set in, and although they appear to have willing and able family members who can take care of them, assist with making personal care and living decisions, or manage their finances, the seniors do not have the necessary delegation documents in place to empower these helpers as their agents.
2. Seniors have documents in place, but the people named are dead or no longer available, willing or appropriate to serve.
3. The people who the senior trusted and anticipated would be appropriate have become exploitive and abusive to them.
4. Seniors have been conned into paying for, or agreeing to pay for, fraudulent products and/or services.

Elder abuse in its many forms - including fraud by unscrupulous "vendors," financial exploitation, and physical or emotional abuse by "friends" and relatives - is a huge problem in the United States. The topic is being exposed in the 21st century much like child abuse and spousal abuse came into public view and began to receive legislative solutions during the late 20th century.

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Crisis Situations

Another increasingly common situation is where seniors do not have agent-delegation planning in place and end up in a medical or living condition crisis where they are putting themselves or others at risk. Loyal family members and friends are very concerned, but nobody has the power to assist once they learn what needs to be done.

Alternatively, seniors may have excellent voluntary delegation planning in place, but the seniors are noncompliant about what they now need to do for their own safety and care. For example, they may need to live in an assisted living community or nursing home, but they voluntarily check themselves out and depart. They are free to make their own decisions, even though imprudent or unsafe, so they can walk right out and put themselves in danger. If they have access to an automobile, they put the general public at risk as well.

Adult Protective Services

In emergencies, where the seniors are unwilling to cooperate and their intransigence is putting themselves or others at risk, often the first call should be to Adult Protective Services (APS). APS is a state agency, typically within the department of "human services" or "social services" of the particular state. APS generally will appoint a social worker or other staff person to investigate, perhaps with local police in order to gain access to the senior and entry into the home.

Seeking Court Protection

Whether or not Adult Protective Services gets involved, and whether or not the case is an emergency or just a situation where the senior needs help and is not willing or able to sign voluntary agent-delegation documents, the solution is often a guardianship and/or conservatorship over the senior, if he or she meets the applicable standards of incapacity. (Less commonly, where mental illness other than dementia is the apparent cause, "involuntary commitment" may be necessary to place the senior in a hospital psychiatric ward for analysis.)

Guardianship

Terminology varies from state to state, but in general, guardianship (sometimes called "guardianship of the person") applies to probate court appointment of a fiduciary ("guardian") to make decisions in regard to the protected person's personal care. The protected person may be called a "ward" under some state laws, but that term is being phased out as unfavorable. A guardian generally does not have control of the protected person's finances, although state law or the specific terms of the guardianship may authorize the guardian to hold small amounts of the protected person's funds if no conservator has been appointed and the protected person does not have a durable power of attorney.

Conservatorship

Conservatorship refers to probate court appointment of a fiduciary ("conservator") to administer the finances and assets of the protected person. In some states, conservatorship may be called "guardianship of the estate." Conservatorship is much like trusteeship, although the powers of and restrictions on the conservator are defined by statute and regulation, rather than a voluntary trust agreement or trust declaration, and are typically are much less flexible than the powers authorized for trustees.

Conservatorships are also analogous to durable powers of attorney. However, one of the key differences between conservatorships, trusts and durable powers of attorney is that conservatorships are court-supervised and directly accountable to the court. It is common for conservators to be required by state

law and regulations to account annually to the probate court. Such accounting needs to be accurate to the penny.

Conservatorship is also similar to a decedent's probate estate administration. Like a probate Personal Representative or Executor (except where a decedent's will waives bond), a Conservator may be required by law to obtain a probate bond through an insurance company to insure his or her fidelity to proper administration of the protected person's assets and income. The costs of the probate bond and of the administration come out of the assets of the protected person. The amount of coverage of the bond is set by the court to cover the assets under the conservator's administration, and may cost anywhere from just under \$1,000 per year to considerably more. The probate judge may have the authority to waive the probate bond requirement under certain circumstances, such as where the spouse is the conservator and is the primary devisee under the protected person's will.

A conservator does not have plenary power to do whatever financial transactions he or she feels are warranted. For example, a conservator needs specific court authorization to sell real estate in most states.

Compensation of Fiduciaries

In most circumstances, the fiduciary is entitled to "reasonable compensation." Reasonable compensation often is based on a list of criteria such as the time spent, lost opportunity to do other work that the fiduciary normally does, difficulty of the work, etc. Unlike provisions under some state probate codes for Personal Representatives of decedents' estates, reasonable fees for a conservator or guardian are not related to a percentage of the value of the protected person's assets that the fiduciary manages.

Imposing Minimum Restrictions

For a guardian and/or conservator of an adult, the probate code generally imposes a standard that the protected person's rights are to be removed to the minimum degree necessary to protect him or her. This is because the removal of personal rights and liberty by the court is analogous to a civil form of imprisonment. Where a protected person is capable of making some kinds of decisions safely and prudently in regard to his or her living conditions, care, or finances, the theory is that his or her rights to make such decisions should be preserved as long as possible. On a practical level, keeping seniors involved in their care and financial decisions also helps to keep them engaged with life, reality, and higher mental functions, so this legal construct is very consistent with practical experience in caregiving for seniors who are in a process of deteriorating mental capacity. There is a growing movement nationwide to maximize decision-making by adults who are under guardianship and/or conservatorship.

Maximizing the decision-making by protected persons can make it more difficult for the fiduciary, since he or she is not able to make unilateral decisions where the protected person retains decision-making power. How this works out in practice depends very much on the personalities of the protected person and fiduciary. When circumstances are such that retained decision-making by the protected person unduly hampers the process of making or implementing needed decisions, the fiduciary can file to obtain guidance or an order of the court.

Conclusion

Although attorneys correctly advise clients to plan to avoid unnecessary guardianship and conservatorship, there are many situations where guardianship and/or conservatorship are appropriate

and very beneficial. Court supervision in difficult cases can be beneficial to impose financial accountability and to bring about sound decisions for the care of a protected person. Examples are where the protected person is unwilling to comply with doctor's orders or other considerations that are important for the safety of the protected person and others. Under modern guardianship and conservatorship theory, courts impose the minimum restrictions on protected persons that are needed to accomplish the personal safety and prudent financial management that are the goals of these court-supervised protective measures.

If you have any questions or would like to discuss issues raised in this newsletter in more detail, please feel free to contact our office. You may call us at (239) 513-2324 or via email at info@jjlawyers.com.

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Jeffrey M. Janeiro is the Managing Member of the Law Office of Jeffrey M. Janeiro, P.L., where his practice focuses primarily on the areas of estate planning, probate, elder law (Medicaid and VA Benefits planning), business succession planning, estate and trust administration, taxation, and real estate. Mr. Janeiro received his Master of Laws in Taxation from New York University, and is pleased to assist clients through the process of developing their estate plan using new and innovative estate, business, and tax planning strategies.