

UNDERSTANDING GUARDIANSHIPS AND CONSERVATORSHIPS

In a perfect world, we could move through our lives without such things as guardianships and conservatorships. But in order to achieve this, 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.

Increasingly, attorneys run into the following situations:

1. Seniors come to us, often brought by their children, 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.

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. 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.

Adult Protective Services

In emergencies, where the seniors are unwilling to cooperate and their stubbornness is putting themselves or others at risk or in cases with elder abuse, neglect or exploitation, often the first call should be to Adult Protective Services (APS). APS is a state agency and 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 APS 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.

Guardianship

In general, guardianship applies to the probate court appointment of a fiduciary ("guardian") to make decisions in regard to the protected person's personal care. A guardian generally does not have control of the protected person's finances.

Conservatorship

Conservatorship refers to probate court appointment of a fiduciary ("conservator") to administer the finances and assets of the protected person. Conservatorships are court-supervised and directly accountable to the court. Conservators are required to account annually to the probate court.

Conservators may be required 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 is required for estates over \$25,000.00. For estates under \$25,000.00, the probate judge may, in his/her discretion, waive the probate bond requirement.

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.

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.