MARGOLIS & BLOOM
Planning for Life

GUARDIANSHIP AND CONSERVATORSHIP

What is guardianship? What is conservatorship?

Guardianship or conservatorship is a legal relationship whereby the Probate Court gives one person (the guardian or conservator) the power to make personal and financial decisions for another (the incapacitated person). A guardian is appointed solely for personal and medical decisions, and a conservator is appointed solely for financial decisions. In some cases, both appointments will be needed. The guardian and conservator have a "fiduciary" obligation to the incapacitated person. This is the highest duty of care that the law can require.

When is a guardianship or conservatorship appropriate?

A fiduciary appointment is appropriate when impaired judgment or capacity poses a major threat to a person's welfare. A medical evaluation by a licensed physician, licensed psychologist or certified psychiatric nurse clinical specialist is necessary to establish the proposed incapacitated person's condition. However, only a Probate Court can determine the need for a guardian or conservator.

A guardian may be appointed for an "incapacitated person" (IP), defined as a person who, "for reasons other than advanced age or minority, has a clinically diagnosed condition that results in an inability to receive and evaluate information or make or communicate decisions to such an extent that the individual *lacks the ability to meet essential requirements for physical health, safety, or self-care*, even with appropriate technological assistance" (emphasis added).

A conservator may be appointed for a "protected person" (PP), if that person is "unable to manage property and business affairs effectively because ofa clinically diagnosed impairment in the ability to receive and evaluate information or make or communicate decisions, even with the use of appropriate technological assistance . . . *and the person has property that will be wasted or dissipated unless management is provided or money is needed for the support, care, and welfare of the person* or those entitled to the person's support and that protection is necessary or desirable to obtain or provide money" (emphasis added).

What are limited guardianships and conservatorships?

The law favors limited appointments whenever appropriate. This reflects a commitment to each individual's rights of independence, self-direction and self-advocacy whenever possible. The petitioners now have the burden of showing that the appointment **should not** be limited. The decree can provide that the IP retains the right to choose his or her place of residence, make certain health care decisions, or handle limited amounts of cash, for example.

Incapacitated persons have a right to counsel under the new statute. They are informed of this right to counsel and may invoke it at any time in the process. Their counsel may also seek to limit the extent of the guardianship.

How can I become a guardian or conservator?

The petitioner must file a petition with the probate court requesting the appointment of a guardian or conservator. A registered physician, licensed psychologist, certified psychiatric nurse clinical specialist, or nurse practitioner must complete a detailed Medical Certificate documenting the incapacity. The proposed fiduciary must file a bond with the court. Then, the court directs that the alleged IP and his or her heirs receive notice of the petition, and sets a deadline for objections to be filed. Anyone who wishes to object, including the proposed IP, must do so within that time. Then a hearing is held where a judge decides whether a guardian or conservator should be appointed.

How long does this appointment last?

A temporary appointment can last 90 days. Temporary appointments are granted by the court only in extreme circumstances, i.e., when the petitioners demonstrate an immediate risk of harm to the IP. A permanent appointment may last until the death of the IP or the fiduciary, until the IP is able to establish that he or she has regained capacity, or until the fiduciary resigns or is removed by the Probate Court.

Who should attend the court hearing?

The IP must be at the hearing unless legally excused by the court. In some cases, it may be harmful to the person to appear, because it would adversely affect his or her health or well-being. The court is not inclined to excuse a person due to inconvenience. The petitioner should also be at the hearing, although the court may allow petitioners to appear telephonically if they live out of state or have other good reason for not appearing.

What responsibilities does the guardian have?

Unless limited by the court, the guardian has total control over the IP's personal decisions. This includes deciding where the incapacitated person will live and making routine medical decisions for the incapacitated person. For decisions involving extraordinary medical care, the administration of anti-psychotic drugs (so-called "Rogers" cases), or placement in a nursing home, the guardian must obtain the approval of the court in a separate proceeding. The probate court may not authorize the guardian to admit or commit an incapacitated person to a mental health facility; only the district court has that authority.

Does the guardian have to report to the court?

Within 60 days of appointment and annually thereafter, the guardian must file a report on the PP's current mental, physical and social condition, living arrangements, services provided, summary of guardian visits, comments on treatment, plans for future care and a recommendation on the continuation and scope of the guardianship.

What responsibilities does the conservator have?

Except as specifically limited by the Court, the conservator has control over all financial decisions of the PP. This means that the conservator must take control of and manage the PP's assets and income and decide how the funds will be invested or spent. Decisions about the PP's estate plan or the sale of real estate are subject to probate court approval.

Does the conservator have to report to the Court?

The conservator must file an Inventory listing the PP's assets as of the date of appointment, as well as annual accounts detailing all of the PP's income and expenses. The conservator must also report all services provided to the PP, make a recommendation as to the continued need for a conservator, and indicate any recommended changes in the scope of the conservatorship. A final account must be filed when the conservatorship is terminated. The conservator is liable for his or her acts until the court allows (approves) the account.

What are the alternatives to guardianship and conservatorship?

There are several less restrictive alternatives, including:

- durable powers of attorney
- representative payees
- trusts
- health care proxies

Each of these options may enable people to avoid or delay the need for a guardian or conservator. Except for a representative payee appointment, these documents need to be executed while the individual still has the cognitive capacity to do so.

The Massachusetts probate courts stress the importance of these documents by giving them great weight in any court proceedings. Petitions for guardianship and conservatorship ask whether any of these documents or agents exist and those agents will be given preference in any proceeding. In addition, the court encourages people to come before the court for instructions when questions or disputes arise, rather than initiating a full guardianship or conservatorship proceeding.

Where can I find more information?

More information is available at:

- www.massprobatecode.com – Contains the full text of the UPC
- http://www.mass.gov/courts/forms/ (search for guardianship forms under Topic) – provides updates on new forms and procedures under the UPC.