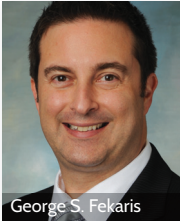


Experts' Advice

Guardianships and Conservatorships— Managing the Affairs of Incapacitated Adults

—GEORGE S. FEKARIS AND ROBERT E. EMMITT

As our population ages, more and more seniors are reaching the age when they can no longer manage their financial affairs on their own. Many of our clients enter nursing homes, assisted living facilities, or are unable to run errands as they were accustomed to in the past. In more serious circumstances, seniors may be afflicted with Alzheimer's or Parkinson's disease and lose their ability to understand their own financial affairs, medical care and/or are unable to manage activities of daily living. Some clients require assistance due to an illness, accidental disability or developmental disability, without regard to age. When this happens, the family members of the senior or other disabled person must seek a court supervised guardianship and/or conservatorship for the disabled person, unless a proper, comprehensive estate plan that deals with incapacity is in place.



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dividual" as a person "who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, not including minority, to the extent of lacking sufficient understanding or capacity to make or communicate informed decisions." The impairment of decision-making ability can result from a number of conditions, including dementia, traumatic brain injury, stroke, mental illness, or substance abuse. If a person is found to be an incapacitated individual, he or she no longer has the ability to enter into legally binding contracts, therefore he or she cannot engage in ordinary financial transactions. Incapacitated individuals will not be able to direct their own medical care. Guardianships and Conservatorships are oftentimes the tools used for the management of an incapacitated person's legal, financial and medical affairs. However, the establishment of a guardianship or a conservatorship for an individual involves a drastic restriction of the individual's right to make decisions and thus, a loss of control over their own affairs. Further, since the individual's affairs are now subject to court proceedings, there is a significant loss of privacy for the individual.

INCAPACITY IN MICHIGAN

Michigan's probate law, the Estates and Protected Individuals Code (EPIC), governs guardianships and conservatorships for incapacitated Michigan residents. EPIC defines an "incapacitated in-

dividual" as a person "who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, not including minority, to the extent of lacking sufficient understanding or capacity to make or communicate informed decisions." The impairment of decision-making ability can result from a number of conditions, including dementia, traumatic brain injury, stroke, mental illness, or substance abuse. If a person is found to be an incapacitated individual, he or she no longer has the ability to enter into legally binding contracts, therefore he or she cannot engage in ordinary financial transactions. Incapacitated individuals will not be able to direct their own medical care. Guardianships and Conservatorships are oftentimes the tools used for the management of an incapacitated person's legal, financial and medical affairs. However, the establishment of a guardianship or a conservatorship for an individual involves a drastic restriction of the individual's right to make decisions and thus, a loss of control over their own affairs. Further, since the individual's affairs are now subject to court proceedings, there is a significant loss of privacy for the individual.

GUARDIANSHIPS

A guardianship is established when a Guardian is appointed

by a probate court to make personal decisions, such as decisions about medical treatment and place of residence, for another individual who lacks the capacity or understanding to make such decisions. The typical situation involves a close relative to the alleged incapacitated individual (known as the potential "Ward") petitioning for the creation of a guardianship in the probate court in the county in which the Ward resides. A guardian ad litem (a public administrator, attorney, or social worker) will be appointed by the court, and this person will meet with and interview the potential Ward. The guardian ad litem will write a report and recommendation and submit it to the judge. Finally, a public hearing at the courthouse will be held, where the potential Ward and other interested parties can express their consent for the guardianship or object to the proceedings. If a guardianship is established by the probate court, the court will appoint a Guardian. The Guardian will be required to account to the probate court every year. Therefore, there will be an ongoing, open case file with the court until either the Ward passes away or the Ward makes a complete recovery and is no longer considered incapacitated.

CONSERVATORSHIPS

A conservatorship is established when a Conservator is appointed by the probate court to manage the legal and financial affairs or property of another individual who is unable to manage his or her finances. The typical conservatorship is set up in the same manner as a guardianship, including the appointment of a guardian ad litem and a public hearing. Furthermore, the Conservator will be required to take control over all of the Ward's assets, file an inventory with the probate court reporting all of the Ward's assets, and file an annual account. There will be annual court hearings to review the Conservator's accounts. The conservatorship will remain open so long as the Ward is alive, incapacitated and owns assets.

NEGATIVE ASPECTS OF GUARDIANSHIPS AND CONSERVATORSHIPS

Guardianships and conservatorships are time-consuming. The initial appointment process can take six (6) weeks or more. This process generally includes meetings with lawyers and the guardian ad litem, and hearings before a court. Thereafter, the Guardian or Conservator must annually prepare and file public reports with the court. Most non-professional Guardians and Conservators find the process to be burdensome.

Guardianships and conservatorships are also expensive. The cost of attorney's fees, filing fees, premiums on surety bonds, annual reports, annual accounts and court hearings is significant and continues for the life of the Ward.

The use of a guardianship and/or a conservatorship can cause a loss of dignity on the part of the Ward. In particular, the process involves the Ward's potential loss of personal autonomy and privacy. There is no guarantee that the Guardian or Conservator appointed by the court would be the individual the Ward would have trusted or chosen if the Ward were able to make the decision. Finally, this process can be an expensive solution to a temporary situation where incapacity is only temporary.

PROPER PLANNING TO GUARDIANSHIPS AND CONSERVATORSHIPS

If the appropriate estate planning documents are in place, prior to

the incapacity of the individual, establishment of guardianship and/or conservatorship is unnecessary.

A Durable Power of Attorney document allows a person to appoint an Agent to assist him or her with his or her financial and legal affairs in the event of incapacity. The word "durable" means that the authority granted in the document is still in effect even after the incapacity of the grantor. If you do not have a current Durable Power of Attorney document, a court supervised conservatorship will most likely be required in the event you become incapacitated.

A Patient Advocate Designation allows you to appoint a Patient Advocate to assist you with your medical affairs if you are unable to make medical decisions on your own. A Patient Advocate Designation is similar to a Durable Power of Attorney, however, the Patient Advocate Designation deals with medical affairs, while a Durable Power of Attorney deals with financial and

legal matters. If you do not have a current Patient Advocate Designation, a court supervised guardianship likely will be necessary in the event you become incapacitated.

A comprehensive estate plan will include both a Durable Power of Attorney and a Patient Advocate Designation. Often a Revocable Living Trust is recommended. With these estate planning documents in place, you control who is in charge of your affairs in the event that you become incapacitated, and they can control your affairs without the probate court's involvement and its associated uncertainty, loss of privacy and cost.

MAKE INFORMED DECISIONS

If you, or someone you know, are at or are close to the point in your life when you need somebody to manage your affairs, we encourage you to speak with a licensed Michigan attorney who understands Michigan probate law, specifically guardianship and conservatorship

matters and practices in the estate planning field. Remember that there are many issues to address, so make sure you are fully informed of what options are available, and what planning may still be available, for you and those close to you. Advance planning can maximize the control you have over your affairs, ensure the person you select cares for you when you need a trusted person most, protects privacy and helps to lower expenses. ■

For further information or to schedule an appointment regarding any issues raised in this article, please contact Morello Law Group, P.C., George S. Fekaris, Esq., and/or Rob E. Emmitt, Esq. at (734) 281-6464 or on the web at morello@morellolawgroup.com.

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