

ABOUT GUARDIANSHIPS & CONSERVATORSHIPS

BY BEN KINIRY, ESQ.

What can you do if you have a loved one who is having difficulty in some or many aspects of his or her daily life? A reality today is that many of our family members have been, or may be, diagnosed with Alzheimer's or Dementia. Do you have specific legal authority to help them (you would, of course, if the person had created an estate plan prior to becoming incapacitated, said the Elder Law Attorney)? What if they don't recognize the problems they are having and refuse your help?

This set of circumstances comes up all too often. Your loved one can't keep track of his or her bills, is being exploited financially, is not eating well, forgets to take medications, is a danger to themselves and society when they get behind the wheel of their automobile. The list goes on and on. What can you do to help?

In many cases the only option is to petition the appropriate probate court to be appointed as guardian or conservator. What is a guardian (referred to as a conservator in some states)? Funny you should ask. Following this paragraph is an excellent explanation of guardianships and conservatorships written by the National Academy of Elder Law Attorneys, Inc. (NAELA). NAELA is an excellent resource for all who desire to help our elders and those with special needs. I encourage you to peruse NAELA's website to learn more about this valuable resource (www.naela.org).

What you Need to Know

A guardian or conservator can be appointed for any person who needs assistance making decisions, such as: an older person, a person with disabilities, a minor, a person temporarily incapacitated, and, in some states, a person who desires a voluntary guardianship for his or her property. A guardian is sometimes necessary to prevent the exploitation or abuse of a vulnerable person, or to recover assets wrongly taken from the vulnerable person. A guardian or conservator can only be appointed if a court hears evidence that convinces it that the person lacks mental capacity in some or all areas of their life and needs assistance. The person alleged to be incapacitated has a right to an attorney and to object to the appointment of a guardian or conservator for him or her.

A person who has a guardian or conservator appointed for him or her is called a "ward". Guardians and conservators have great power, but are required to report to the court. Guardians frequently make decisions about where their ward will live, with whom the ward associates, how the ward's property is invested, what type of financial benefits the ward needs, and the type and scope of health care needs required by the ward. Whenever possible, the guardian or conservator must seek the input of the ward and must only act in areas authorized by the court.

Guardians and conservators are frequently required to post a bond, or place



the ward's funds into protected financial accounts that can only be used with prior court approval. Guardians and conservators will often need to seek the court's permission before selling or disposing of property, before entering into contracts, and before making major decisions about the ward's life. At the time the guardian or conservator requests court permission for these actions, the ward is often entitled to notice of the request being made, and the ward's spouse, children and other next of kin may also need to be notified. Guardians and conservators are also required to report to the court regarding their ward's property, finances and expenditures, usually on an annual basis, or more frequently as the court may require. They are also typically required to report at least annually about the ward's person and his or her health care needs.

Guardianship or conservatorship, when properly used, are beneficial methods of protecting an incapacitated person for whom no other means are available to assist with making informed decisions. The continuing involvement of the court provides added protection for the ward and those interested in the ward's welfare.

Where to Go For Help

If you know a family member or friend who needs the assistance of a guardian or conservator, you should contact an attorney who is familiar with this area of the law so that the correct documents can be



prepared and filed with the appropriate court, and so the correct procedures will be followed. The attorney knowledgeable about guardianship or conservatorship should be able to advise you of potential suitable alternatives for assisting the person needing assistance, such as durable powers of attorney, appointment of a health care surrogate, and living trusts.

Some planning options may be available for your family member or friend, even if you believe they need assistance with making some decisions, and an attorney well-versed in this area should be sought. If someone has filed a court document known as a "petition" which seeks a guardian or conservator for you, you should contact an attorney experienced in this area of the law (if one has not been appointed for you, or if you do not want the appointed attorney).

Either a court-appointed attorney or one that you hire can advise you regarding your rights, the procedures that are required, and choices you have. Some issues you may want to discuss with your attorney are whether to oppose the petition for a guardian or conservator; whether to request other options for yourself; whether you can choose your guardian or conservator; and other methods for protecting your legal rights.

Role of the Elder Law Attorney

Many Elder Law Attorneys have expertise in establishing, defending, and

administering guardianships and conservatorships. When hiring an attorney, you should always inquire about the amount of experience and training he or she has in your area of concern. Guardianship, conservatorship and the available alternatives are a major part of many Elder Law practices."

National Academy of Elder Law Attorneys, Inc.: Guardianship & Conservatorship (2016) (NAELA).

The information provided in this article does not constitute legal advice (is legal advice ever given in the newspaper?).

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