Anderson Kill & Olick, P.C.
ESTATE PLANNING & TAX ADVISOR
Volume 10 Number 3 www.andersonkill.com Autumn 2011

Guardianship Planning

By Jerry S. Goldman

When a person becomes seriously incapacitated, there is often a need for someone to assist them in their personal and/or economic affairs. In such circumstances, the judicial appointment of a guardian may be required. This article will discuss the process under New York law, but similar statutes and safeguards exist under other states' laws as well.

The legislative intent is that the legal remedy of a guardianship should be the last resort for addressing a person's needs, as it deprives the individual of power and control over his or her life. Accordingly, the scope of the powers of a guardian are to be tailored to meet a person's specific needs with the use of the least restrictive level of guardianship that is appropriate.

A court may appoint a guardian if it determines, based upon "clear and convincing evidence" that the appointment is necessary to provide for the personal needs, including food, clothing, shelter, health care or safety, and/or to manage the property and financial affairs of the alleged incapacitated person (AIP). The AIP can either agree to the relief sought, or require a trial and a judicial determination. As part of the process, after the filing of a petition, the court appoints a court evaluator who is charged with conducting a thorough investigation in order to make recommendations. The recommendations have great weight in determining the outcome of the case.

Guardianship is a Drastic Remedy

A guardianship may only be imposed if there is a finding that the AIP "is likely to suffer harm" because he or she is unable to provide for personal needs and/or property management; and the person cannot adequately understand and appreciate the nature and consequences of such inability. Rather than relying on mere medical diagnoses, the court must give "primary consideration to the functional level and functional limitations of the person." This includes an assessment of the AIP's "management of the activities of daily living," the "understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living," "her or his preferences" and "the nature and extent of the person's property and financial affairs and his or her ability to manage them." The statute is quite broad in enumerating the categories of interested parties who have standing to commence the proceeding, but usually it is brought either by family members or by health care institutions or other care givers.

> "The legal remedy of **a guardianship** should be the last resort for addressing a person's needs, as it **deprives the individual** of power and control over his or her life."

While as a practical matter the rules of evidence are somewhat relaxed for guardianship hearings, the AIP has a full panoply of due process rights at the proceeding, including the rights to counsel (which will be appointed by the court for the AIP), to confront witnesses and to present evidence.

Two contentious issues pertaining to the hearing are the questions of medical privilege and whether the AIP can be forced to testify. In my experience, the courts generally permit the court evaluator to summarize medical information, and, at times, permit the testimony of an independent medical expert who has conducted an examination of the AIP as well as reviewed the pertinent medical records, but do not permit the

who's who

Jerry S. Goldman is a shareholder in the New York and Philadelphia offices of Anderson Kill & Olick, P.C. Mr. Goldman practices in the areas of estate planning along with estate and trust administration, general business law, complex litigation, white collar criminal defense, employment law, and federal and international taxation.
jgoldman@andersonkill.com
(212) 278-1000 | (267) 216-2795

The information appearing in this newsletter does not constitute legal advice or opinion. Such advice and opinion are provided by the firm only upon engagement with respect to specific factual situations. We invite you to contact the editor **Abbe Herbst** with your questions and/or concerns.
aherbst@andersonkill.com
(212) 278-1781

The firm has offices in New York, NY, Newark, NJ, Philadelphia, PA, Stamford, CT, Ventura, CA, and Washington, DC.

Be carbon conscious ... Please consider switching your subscription to email.

By switching to email, you will receive our timely **Client Alerts** that are sent by email only. It's easy, send your mailing and email address to andersonkill@andersonkill.com.

To subscribe to Anderson Kill Newsletters and Alerts, please visit www.andersonkill.com/publications_subscribe.asp. To unsubscribe, please email unsubscribe@andersonkill.com.

testimony of treating physicians and the introduction of the medical records themselves. As to compelling the testimony of the AIP, there is some authority indicating that the AIP cannot be forced to testify.

At the conclusion of the hearing, the court can: a) dismiss the petition, b) approve protective arrangements that have been put in place or c) appoint a guardian. If the court decides to appoint a guardian, it must determine who is to be the guardian and the scope of the guardian's powers. The guardian may be appointed for personal needs, for property management or for both, and, in either case, the powers of the guardian are set forth in great detail in the commission appointing the guardian. The preference of the incapacitated person as to the choice of the guardian is given great weight. The statute and the case law further favor family members rather than court appointees.

Planning to Avoid Guardianship

New York law mandates that the petitioner attempt other less drastic alternatives to a guardianship. These attempts must be described in the petition. In the area of property management, the most common alternatives are the establishment of stand-by or fully funded revocable trusts and the creation of powers of attorney. With regard to trusts, several issues often arise. First, assets may not have been transferred to the trust when the grantor was healthy, and he or she may later lack the capacity to do so when the need arises. Second, frequently these trusts are self-settled: with the grantor serving as the initial trustee, the question of transition to a third-party trustee can be problematic. Lastly, there are often assets which as a result of either inadvertence or other consequences (e.g., high transfer taxes or other legal restrictions) are not in the trust's *corpus* but still need to be managed and protected.

Powers of attorney can often prevent the need to appoint a guardian of the property. An advance designation by an individual as to who he or she would want to serve as guardian is given great weight. Health care proxies and living wills are very important instruments. New York law takes careful notice of these advance-planning devices and attempts to incorporate them into any guardianship decree if required.

While guardianships are never desirable, sometimes they are necessary. Advance planning can reduce, but not eliminate, the need for a guardianship, and, if one is ultimately required, can make the process both easier and compatible with the incapacitated person's desires.