

# Loudoun Parent Series Workshop

## Guardianship

*Presented by Matthew J. Yao, Esq.*

Disclaimer: LCPS is not intending to provide legal advice.  
Please consult with community agencies or private attorneys  
for individual decision-making.

# What is Guardianship?

- Proceedings to appoint a guardian for an incapacitated person
- Guardian = person appointed by the court who is responsible for the personal affairs of an incapacitated person
  - Support, care, health, safety, habilitation, education, therapeutic treatment, residence
  - Personal and medical decisions - NOT financial

# Who qualifies for guardianship?

- Incapacitated person = cannot meet essential requirements for health, care, safety, or therapeutic needs
  - Mental incapacity – cannot receive and evaluate information effectively
  - Physical incapacity – cannot respond to people, events, or environments
- Not the same as testamentary capacity or capacity to execute a power of attorney
  - In some cases, executing a power of attorney is preferable to full guardianship
- Medical evaluation to determine capacity
  - Doctor, psychologist, or other licensed professional skilled in assessment and treatment of the person's condition

# Who qualifies for guardianship?

- Incapacitated person must be over 18 years old
- EXCEPTION: petition by parent or guardian and person is 17.5 years old
  - Tip: Start process with attorney early to ensure guardianship entered before child turns 18. The process typically takes several months.

# Why is guardianship needed?

- Individual loses ability to care for himself/herself
  - No one to make personal/medical decisions
- Special needs child turns 18 years old
  - Legally an adult and presumed to have decision-making ability
  - Needed to continue acting as parent past 18
- Protection from abuse/exploitation
  - Placement in a safe setting

# Outline of a Guardianship Proceeding

- File Petition with Medical Evaluation
  - Guardian ad litem will be assigned by the court
  - Guardian ad litem (“GAL”) = attorney representing best interests of allegedly incapacitated person
- Select court date
  - Loudoun = first Fridays at 10 AM or a specifically selected date/time
- GAL investigation and report
  - GAL will visit the incapacitated person at his/her home and interview the petitioners and other relatives
  - GAL will submit a report to the court with recommendations
- Court hearing
  - Very short (<5 minutes) unless contested
- Meeting with probate clerk
  - Oath and Certificates of Qualification



# What persons are involved?

- Petitioner – can be anyone
- Petitioner's attorney
- (Allegedly) incapacitated adult
  - Also referred to as the Respondent
- Proposed Guardian
- Guardian *ad litem*
- Respondent's attorney
  - Contested cases only
- Respondent's relatives
  - Spouse, adult children, parents, and adult siblings
  - Additional relatives to bring total to 3

# What fees are involved?

- Petitioner's attorney's fees
  - Typically a flat rate (unless contested)
  - Petitioner is responsible for the fees
  - Can be reimbursed by the estate of the incapacitated adult – good faith requirement
- Filing fee - \$20 in most jurisdictions
- Guardian *ad litem* fees
  - Paid by incapacitated adult's estate
  - If incapacitated adult is indigent – paid by the State
- Respondent's attorney's fees
  - Contested cases only



# What happens if the guardianship is contested?

- Contested = someone does not agree with an aspect of the case
  - Respondent does not agree that he/she is incapacitated
  - Respondent does not agree with selection of guardian
  - Interested relative does not agree with selection of guardian
- Full hearing with evidence will be needed
- Respondent has the right to counsel
  - If requested – counsel will be appointed
  - Counsel is paid by Respondent's estate, or by the State if the Respondent is indigent
- Respondent has the right to a jury trial
- Takeaway: make sure everyone agrees before filing
  - Be prepared for the costs in a contested case

# What rights are affected by guardianship?

- Guardianship is the most restrictive form of relief
- Guardian makes decisions for the incapacitated person (e.g. medical treatment, where to live)
- In addition, incapacitated persons generally lose their rights to:
  - Drive
  - Vote
  - Own a gun
  - Marry

# Can rights be preserved?

- Rights can be preserved specifically or by limiting the scope of the guardianship
- Preserving specific rights
  - Right to vote: often preserved if requested
  - Drive: may need doctor opinion and/or specific conditions
    - NOTE: very hard to restore once taken, so should be preserved up front
- Limited guardianship
  - e.g. guardian only for medical decision making or residency decisions

# What are the qualifications of a guardian?

- Must be a “suitable person” – what does this mean?
  - Not clearly defined – Court will consider a number of factors
- Relationship with the incapacitated adult
  - Family members are highly favored
- Familiarity with incapacitated adult’s needs
- Proximity to the incapacitated adult
  - Typically must be in proximity to be an effective guardian
- Felony conviction – disfavored but not an absolute bar

# What are the duties and powers of a guardian?

- Make personal and medical decisions
- File or defend lawsuits involving incapacitated adult
- Fiduciary relationship – must act in person's best interests
  - NOT liable for acts of incapacitated person unless personally negligent
- Maintain contact and visit
- Encourage participation and consider desires/values
- Move out of state or change in marital status require court approval
- Guardian report – filed with Department of Social Services within 6 months and then annually thereafter



# What is a standby guardian?

- Standby guardian = person authorized to assume duties of guardian immediately upon death or incapacity of the guardian(s)
- Pros:
  - Can be appointed in same proceeding as guardian
  - Eliminates gap between guardians
- Cons:
  - Only valid for 60 days before needing a new guardianship order
  - Means that the standby guardian will still need to file an entirely new case for guardianship



# What if there is no one to serve as guardian?

- Lack of suitable person or no one willing to serve
- Public guardianship program
  - In very high demand and low supply = long wait list
  - Private program – fixed fee each year until unable to pay
- Attorney as guardian
  - Low supply of attorneys that do this work
  - Hourly fees typically apply

# What is an alternative to guardianship?

## ■ Medical Power of Attorney

- Person selects an Agent to assist with personal and medical decisions
- Person is still able to make his/her own decisions
- Pros:
  - Avoids loss of rights, stigma of incapacitated label
  - Easy, immediate, and less costly
- Cons:
  - Person must have enough capacity to execute the document
  - Can be revoked

# Transfer of Educational Rights

- Student who reaches age of 18 is presumed competent and all educational rights transfer to him/her unless:
  - Declared incapacitated by the court (e.g. under guardianship)
  - Executed power of attorney
  - Certified as unable to provide informed consent

# What is Conservatorship?

- Conservator = person appointed by the court who is responsible for the estate and financial affairs of an incapacitated person
- Incapacitated person = cannot manage property or financial affairs
- Court process – same as guardianship
  - Can request both in same proceeding

# Why is conservatorship needed?

- Individual loses ability to manage his/her finances
  - No one to pay bills and make financial decisions
- Protection from financial abuse/exploitation
  - Person loses access to income/assets
  - Ability to reverse harmful financial decisions made while incapacitated

# When is conservatorship not needed?

- No income or assets
- Income mainly from Social Security or other governmental program and has a representative payee
- Already have access/ability to manage finances (e.g. spouse with all joint accounts)
- Tip: avoid conservatorship if at all possible
  - Burdensome requirements



# What are the qualifications of a conservator?

- Same as guardianship – “suitable person”
  - Same factors are considered
- Bondable – secured bond is required for conservators
  - Bond set at an amount greater than the incapacitated person’s total income and assets
  - Exception: can be waived by the Court, typically if assets are under \$25,000

# What are the duties of a conservator?

- Fiduciary relationship – must act in person's best interests
- Preserve and manage the estate – make all financial decisions
- Encourage participation and consider desires/values
- Accounting to Commissioner of Accounts
  - Inventory – due 4 months after qualification
  - First Account – covers 4 months and is due 6 months after qualification
  - Subsequent Accounts – cover 12 months and due 16 months after prior accounting
- Tip: Accountings must be done a specific way that only certain attorneys understand.

# What if there is no one to serve as conservator?

- Lack of suitable person or no one willing to serve
  - Bonding issues
- Public guardianship program
  - Note: many programs will not serve as conservator
- Attorney as conservator
  - Percentage of income/assets
  - Hourly rates in some situations
- Financial institution
  - Percentage of income/assets
  - Note: many financial institutions will not serve as conservator unless it is a large estate

# What are alternatives to conservatorship?

- Temporary or limited conservatorship
  - Just to get certain aspects of the finances in order
    - Direct income to a payee
    - Gain control of and dispose a specific asset (e.g. car)
    - Spend down estate for Medicaid qualification
- Financial Power of Attorney
  - Same Pros and Cons as Medical Power of Attorney
- Trust
  - Property in trust managed by Trustee for benefit of individual

# Estate Planning Considerations

- Important to preserve eligibility for public benefits (e.g. SSI, Medicaid)
  - Generally must keep assets under \$2,000
- Do NOT leave assets directly to an incapacitated person
  - Incapacitated person will need a Special Needs Trust
  - Parent will need estate planning documents (revocable trust or will)

Questions?



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