

A Whole New World

Navigating the Uniform Probate Code

BY GINA BARRY

Imagine that your spouse or parent is in an accident or develops an illness that renders them incapacitated. Certainly, you would be dealing with worry and fear due to their situation, and you would most likely want to do all that you could to assist them. Unfortunately, when adults lose capacity to make their own decisions, if they do not have the proper documents in place, it is necessary to petition the court to have a guardian and/or conservator appointed. In order to have a guardian and/or conservator appointed, the court must first declare the incapacitated person to be incompetent.

While guardianship and conservatorship laws have existed in the Commonwealth for many years, the laws changed dramatically with the enactment of the Uniform Probate Code (UPC) on July 1, 2009.

Recently, the Probate Court has endured harsh criticism. Many felt that guardianships and conservatorships were obtained too easily, and that there were not enough due-process protections in place for the incapacitated person. With the enactment of the Uniform Probate Code, additional safeguards have been put in place to protect the incapacitated person and to ensure that their rights are protected throughout the process. While this is beneficial to the incapacitated person, it means additional time, expense, and consternation for the petitioning party.

Prior to the UPC, a guardian could be appointed to handle personal and financial decisions for an incompetent person, or a

conservator could be appointed to handle financial decisions. Under the new law, a guardian is only empowered to make personal decisions, such as decisions involving support, care, educa-



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tion, health, and welfare, and a conservator is only empowered to make financial decisions. As such, if a person is seeking to be appointed to handle both personal and financial matters, this person will have to request that the Probate Court appoint them as both guardian and conservator. Under the new law, this requires two separate petitions to the court.

Some of the terminology that has been used for many years has also changed. While in the past, all incompetent people were called 'wards,' the term 'ward' is now reserved solely for guardianships of minors. Under the new law, a person under guardianship is called an 'incapacitated person' and a person under conservatorship is called a 'protected person.' Court personnel, attorneys, and the public will need some time to master the terminology now used in these matters.

The UPC has also established priority as to whom should be

appointed as guardian or conservator. The highest priority is given to the person named in the incapacitated person's health-care proxy or durable power of attorney, unless good cause can be

shown as to why they should not be appointed. The order of priority differs depending on whether a guardianship or a conservatorship is sought, but in either case, the court may pass over a person having priority and appoint a person having lower priority or no priority.

A new provision also ensures that a person who is being investigated, or who has charges pending, for committing an assault and battery that resulted in a serious bodily injury to a minor or otherwise incapacitated person cannot be appointed as a guardian or conservator. The court will run a criminal-record check to determine a petitioner's status and to ensure that they are not prohibited from serving.

Prior to the UPC, completing the petition to appoint a guardian or conservator was fairly simple. The entire petition consisted of one double-sided page. Under the UPC, the petition has increased to seven pages and the information requested

therein is much more comprehensive. The court is seeking information that would allow the court to restrict the guardian or conservator to making only those decisions that are absolutely necessary, while allowing the incapacitated person to maintain as much independence as possible.

At the time that a guardian or conservator is appointed, it is necessary to provide the court with a medical certificate completed based upon an examination of the alleged incapacitated person that occurred within 30 days of the hearing. In the past, the medical certificate consisted of one double-sided page, and the physician could complete it with information that the physician believed to be pertinent. Now, a medical certificate spans six pages, and the physician must answer specific questions detailing the incapacity.

Under the new law, a medical certificate meeting the same requirements must also be filed when the petition is initially filed. It is generally impossible to have a guardianship or conservatorship allowed within 30 days of filing. As such, this new rule essentially guarantees that two examinations and two certificates will be needed, which translates into added expense and increased time pressures.

Once a petition is filed, notice must be given to all interested parties, including the alleged incompetent person. This notice provides a date by which the person could object to the petition. Under the new law, the alleged incompetent person has a right to counsel, which would likely be exercised if they desire to object. Under the new law, it appears

that the appointment of counsel can be requested by anyone, even if they are not involved in the case. If the alleged incompetent person is indigent, then their counsel will be paid for by the Commonwealth.

The UPC has also restricted some decisions typically made by a guardian that were not restricted in the past. For example, the guardian must receive court approval prior to revoking a previously executed health-care proxy. In addition, the guardian must receive court approval prior to admitting the incapacitated person to a nursing home.

This provision is extremely problematic as it prevents incompetent individuals who have been hospitalized and who are in need of rehabilitation from being admitted to the rehabilitation facility without a prior court order. This requirement could easily delay the needed admission to the rehabilitation facility for as much as 30 days or longer.

With respect to substituted judgment determinations, in

which the court places itself in the incapacitated person's shoes in order to make the decision that the incapacitated person would make if competent, the new law requires the incapacitated person to attend the hearing thereon. The most common substituted judgment determination is related to whether the incapacitated person should be treated with anti-psychotic medications. In the past, it was possible and fairly easy to waive the appearance of the incapacitated person. Now, the court must find that extraordinary circumstances exist requiring the incapacitated person's absence from the hearing.

In the past, it was the duty of a conservator or guardian of an estate to file an account with the Probate Court on a yearly basis. If the account was not filed, it would not be uncommon for this failure to go unnoticed. The new law mandates that, within 60 days following their appointment, a conservator must report all assets that may be coming under their control in addition to filing an

account on an annual basis.

With the use of new software, it is understood that the court will be proactive and will require conservators to file accounts timely. If an account is not filed, the court may order the account to be filed. In the event that the conservator does not file his account timely, or in the event that the judge is not satisfied with the account, the conservator could be removed and a successor conservator appointed by the court.

Given the increasing difficulty involved in appointing and maintaining a guardianship or conservatorship, it is increasingly important for competent adults to execute health-care proxies and durable powers of attorney. A health-care proxy is a document in which someone is designated to make health-care decisions in the event of incapacity. A durable power of attorney is a document in which someone is designated to make financial decisions in the event of incapacity. Executing these two documents allows a person to avoid the need for

guardianship or conservatorship as the documents cover the two areas in which the court would appoint a decision maker — personal and financial.

Ultimately, the enactment of the UPC has vastly changed the legal landscape with respect to incapacity. The easiest way to avoid having to navigate this landscape is to plan ahead for incapacity. By executing a health-care proxy and durable power of attorney now, you can put a plan in place that can be carried out without court intervention. ❖

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