The Uniform Probate Code

Enhanced Protection Available for Those Needing Guardianship

By HYMAN G. DARLING

A new law will take effect in Massachusetts on July 1 relative to guardianships. This issue has been debated and discussed for more than 20 years, and this law is intended to create uniformity among all states across the country; 13 states enacted the law in 2008.

Until now, in Massachusetts, most issues regarding the administration and legal requirements of guardianships were decided on a case-by-case basis. The new law is more than 100 pages long, and one article applies primarily to the protection of disabled people and their property.

Most provisions of the Uniform Probate Code relating to the settlement of deceased people's estates do not become effective until July 1, 2011. In Massachusetts, however, over the past year, changes have been made to both the 'petition for guardianship of a person' and the medical certificate required to be filed with the court for a finding of incapacitation. These forms were implemented in order to reflect society's changing view of incapacitated individuals and preserve those people's rights.

The court has redefined the requirements to determine that a person is incapacitated when they are unable to attend to their own affairs and are in need of a guardian. In addition, some of the terminology that was utilized for many years is now going to be changed. As an example, in the past, a person who was determined by the court to be incapacitated was referred to as a 'ward.' This term is now reserved solely for the guardianship of a minor. Any other person who needs a guardian is determined as an 'incapacitated person,' a 'person in need of services,' or a 'protective person.' Court personnel, attorneys, and the public will have to learn the new terminology as well as, potentially, new forms, procedures, and standards.

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Here are some of the highlights of the measure:

• Any petition over a protective person must be served on that person, and that individual has a right to appear at a hearing. In addition, if that person so requests, they may, but do not have to be given, a right to a closed hearing. It is uncertain how this will be conducted, but presumably, the courtroom will be closed to all parties not having an interest in that particular proceeding.

• A person has a right to counsel. This was not always the rule in the courts regarding a civil proceeding. This right to counsel has been expanded to apply to the person in need of protection. In addition, the statute also provides that consideration should be given to that person if he or she is 14 or more years of age as to the selection of a guardian.

• To the extent that the person has assets, then their counsel should be compensated from those until the court determines otherwise. If the person to be protected is indigent, then their counsel may be paid by the Commonwealth, but it is uncertain as to where that money will come from and at what rate or by what standard their counsel should be compensated.

• At the current time, a person may always select their counsel, but in some cases, a person who is not competent, but thought they were, may or may not have the right to select counsel of their own choosing. As a further safeguard for the person, in the event that the court finds it necessary or beneficial, the court may appoint a guardian ad-litem who may be a lawyer, public social worker, or charitable agency to investigate the condition of the person, their affairs, living arrangements, etc., and report to the court to allow the court to make a better decision. Note that a guardian ad-litem does not advocate for the incapacitated person, but reports to the court as the 'eyes and ears' of an independent investigator that provides additional information.

• A new provision provides that there is a prohibition against a person being appointed as a guardian when that person is being investigated or has charges pending for committing an assault and battery that resulted in a serious bodily injury to a minor or incapacitated person. There will presumably be a CORI investigation done to determine each petitioner's status and ensure that they are not a prohibited party.

• The terminology of 'guardians' and 'conservators' has been relatively interchanged for years in the probate courts. Under the new law, a guardian is charged with making decisions regarding the incapacitated person's support, care, education, health, and welfare. A person's financial matters are to be managed by a person who is now going to be called a conservator. Therefore, if a person is seeking to be designated as responsible for a protected person's personal care and financial matters, this person will have to request that the court appoint them as both a guardian and conservator. Of course, these matters may be consolidated into one, but separate documentation may be required by the court.

• While each competent person has always been encouraged to establish a health care proxy and durable power of attorney during their lifetime, it is increasingly more important to do so. The health care proxy will attend to one's medical decisions in the event of incapacitation, while the durable power of attorney will attend to financial decisions, and thus allow either the same or different people to make decisions relative to the principal's affairs.

With proper execution while competent, these two very important documents allow a person to make decisions for himself or herself and avoid the need for guardianship. Naturally, if there is disagreement within the family over decisions made by the agent under the health proxy or power of attorney, the family would be able to bring a petition with the probate court and seek to either have the agent removed or have a guardian or conservator appointed.

However, information in prior documents must be disclosed on the petition for guardianship filed with the court so the judge will have information as to whom the protected person nominated while he was still competent.

Under the new act, the guardian may have to request specific authority to have a protected person institutionalized in a long-term care facility. Hopefully, this special request can be made within the original petition for guardianship. If not, then after a guardianship is allowed, the guardian may need to file a separate or supplemental petition for additional authority to require the permanent institutionalization of the protected person. Naturally, this will cause additional emotion, time, publicity, and cost.

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Within the framework of the new law, there is additional language that encourages the courts to review guardianships and possibly allow one on a limited basis, rather than making a full determination that the person is incapacitated and has no rights to make any decisions regarding his or her own care and finances.

In the past, it was the duty of a guardian to file an account with the probate court. As a condition of their bond, the new law mandates that the guardian/conservator report all assets that may be coming under their control within 60 days following their appointment and file an account on an annual basis. With the advent of new, sophisticated software, it is likely that the court will be proactive in requiring fiduciaries to file accounts.

In the event that the guardian/conservator does not provide an account in a timely fashion, or in the event that the judge is not satisfied with the decisions that the guardian/conservator is making, then the fiduciary could be removed and a successor fiduciary be appointed by the court.

All in all, these changes are intended to further protect the rights of anyone needing guardianship. Hopefully, the provisions of the new law will be carried out as intended and enacted.❖

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