

Legal Implications of Mental Incapacity: Guardianship & Conservatorship

by

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1. Introduction

As individuals age, many suffer a serious decline in mental functioning. The most common cause is dementia, including Alzheimer's and Parkinson's disease, although for many strokes are the root cause of mental decline.

The law operates on the assumption that adult individuals have mental capacity, meaning that they are capable of making rational decisions and so are best situated to make decisions on their own behalf. Of course, merely because individuals have the ability to make rational decisions does not mean, and the law does not necessarily expect, that they will make rational decisions. Individuals, whether old or young, have the right to make foolish, eccentric or idiosyncratic decisions so long as they have the mental capability to make rational choices.

If, however, an individual lacks the mental capacity necessary to make rational choices, the law provides two methods creating a substitute decision maker, that is delegating to someone the right to make decisions for an incapacitated individual. The first is the appointment of the substitute decision maker by the incapacitated individual prior to the onset of the mental incapacity. By signing a durable power of attorney, the individual can appoint an attorney-in-fact, also known as an agent, to act on his or her behalf.

If an individual does not sign a durable power of attorney naming an attorney-in-fact, the state, acting through the courts, may appoint a substitute decision maker, most commonly known

as a guardian (also known as a “conservator”), for the incapacitated individual.

State guardianship laws detail the procedures required to initiate a guardianship proceedings, define who is incapacitated, give the courts the right to appoint a guardian, detail the powers granted to the guardian, and describe the manner and extent of judicial supervision of the guardian.

By statute, all states have delegated to the courts—typically the probate court—the authority to determine who lacks mental capacity, the right to appoint a guardian, and the responsibility to oversee the acts of the guardian

The 1980’s saw almost every state revisit its guardianship statute; including amending the definition of incapacity, instituting procedural safeguards for the alleged incapacitated person, and imposing greater judicial scrutiny of the acts of guardians. The result has been the creation of new forms of guardianship, more involvement of lawyers, and a greater judicial sensitivity to the need to balance the protection of individuals with diminished capacity against their right to autonomy and self-determination.

2. Terminology

Every state and the District of Columbia has a statute that authorizes courts to conduct guardianship hearings, defines when a person is legally considered mentally incapacitated, and grants the court the power to appoint a guardian. Guardianship is under the jurisdiction of the individual states; there being no federal law of guardianship

While the terms “guardian and guardianship” are the most commonly employed terms, a few states use the terms “conservator and conservatorship.” In some states the terms “guardian and guardianship” refer to appointing a decision maker empowered to make decisions about the incapacitated individual’s person, such as decisions about health care, while the terms “conservator and conservatorship” refer to appointing a decision maker with the authority to make decisions about that individual’s property, such as how to invest their savings. In many states the terms “guardians and guardianship” are used to describe the substitute decision maker for both person and property. (In Louisiana, guardianship is referred to as interdiction.)

The incapacitated individual for whom a guardian or conservator has been appointed is

often referred to as the “ward” although some states have adopted the nomenclature of “incapacitated person” with a few states retaining the older term “incompetent.” In these materials, unless otherwise indicated, the terms “guardian and guardianship” are used to include the duties of a conservator and the concept of conservatorship. The incapacitated individual for whom a guardian has been appointed will be referred to as the ward.

3. For Whom May a Guardian Be Appointed?

Although the laws of the various states differ as to the definition of an incapacitated person, the common formulation is someone who lacks the capacity to make or communicate reasonable decisions.

The Uniform Probate Code defines an incapacitated person as one for any reason other than minority is “lacking sufficient understanding or capacity to make or communicate responsible decisions.”¹ Some state statutes define incapacity somewhat differently. Florida, for example, defines an incapacitated person as one who lacks “the capacity to manage at least some of the property or to meet at least some of the essential health and safety requirements of such person.”² Pennsylvania combines the two approaches to define an incapacitated person as someone “whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he is partially or totally unable to manage his financial resources or to meet essential requirements for his physical health and safety.”³

It is how the individual acts, not how he or she is diagnosed that is important. The proper test is whether the individual can make rational decisions and is able to care for him or herself; not whether he or she is given a label, such as “demented.”

The distinction between a guardian and conservator permits a different definition of who

¹U.P.C. § 5-103(7).

²FLA. STAT. ANN. title 21A, § 744.102(10).

³20 PA. CONS. STAT. ANN. § 5501.

is in need of one or the other.⁴ In contrast, states that use only the term “guardianship” usually have only a single definition of who is an incapacitated person.⁵

4. The Requirement of a Demonstrated Need for a Guardian

Establishing that an individual lacks mental capacity is only the first step toward a court appointed guardian. Under common law⁶ or by statute⁷ courts often will not approve a guardianship unless the incapacitated individual both needs and would benefit from the appointment of a guardian. For example, under Illinois law a guardianship is to used only if it is “necessary to promote the well-being of the disabled person, to protect him from neglect, exploitation, or abuse.”⁸ Consequently, in many states no guardian will be appointed for an incapacitated person whose needs are being met by other arrangements, such as a durable power of attorney, advance health care directive or by having a trust that manages the incapacitated person’s assets.

Although states vary in their willingness to appoint a guardian, the underlying reality remains that those who file a petition seeking guardianship must be prepared to demonstrate to the court’s satisfaction that a guardianship is needed; that is, that the appointment of a guardian

⁴E.g., MISS. CODE ANN. § 93-13-121; OHIO REV. CODE ANN. § 2111.01-2111.021 (Baldwin 1994).

⁵E.g., TEXAS PROB. CODE ANN. § 601-890 (Vernon 2003 & Supp. 2004); N.Y. MENTAL HYG. LAW §§ 81.01-81-44 (McKinney 1996 & Supp. 2005); GA. CODE ANN. § 29-5-1 (1997 & Supp. 2003).

⁶*In re Lowe*, 180 Misc. 2d 404, 405 (N.Y. Misc., 1999) (“Even if all of the elements of incapacity are present, a guardian should be appointed only as a last resort, and should not be imposed if available resources or alternatives will adequately protect the person.”).

⁷E.g., N.Y. MENTAL HYG. LAW § 81.02 (McKinney 1996 & Supp. 2005).

⁸755 ILCS 5/11a-3.