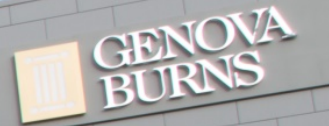


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Guardianship of Incapacitated Adults

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Presented By:

Judson M. Stein, Esq.

Matthew Kertz, Esq.

Materials Prepared By:

Lauren M. Ahern, Esq.



Gearing Up For Guardianship

- What does the term “Guardianship” mean?
 - The appointment by a Court of a legal representative for the person and/or to administer the property of an adult incapacitated person
- When might Guardianship be appropriate?
 - An individual is unable to care for themselves or to make their own medical or financial decisions
 - The individual has no Advance Directive for Healthcare or Durable Power of Attorney in place

Gearing Up For Guardianship, Cont'd

- Absent an emergency situation, informed consent must be obtained from a patient prior to medical treatment
 - See, N.J.S.A. 26:2H-12.8; Liguori v. Elmann, 191 N.J. 527, 924 A.2d 556 (2007)
- If the patient is unable to give informed consent, who can the healthcare provider rely upon for consent?
 - Emergency vs. Non-Emergency situations
 - Agent under Advance Directive for Healthcare
 - Legal Guardian of a minor or an incapacitated adult

Advance Directives and Durable Powers of Attorney

- Advance Directives for Healthcare
 - Governed by N.J.S.A. 26:2H-53, et. seq.
 - Proxy Directives and Instruction Directives
 - 26:2H-53, et. seq. does not apply in the absence of an Advance Directive by the patient
- Durable Powers of Attorney
 - Governed by N.J.S.A. 46:2B-8.1, et. seq.
 - Principal grants authority for Agent to perform financial and/or personal transactions
 - May be “springing” or “non-springing”

What An Agent Can And Cannot Do

- Agent under Advance Directives for Healthcare:
 - Makes healthcare decisions for the Principal not inconsistent with the Principal's stated wishes or, in the absence thereof, best interests
 - Including decisions regarding end of life care and cessation of medical treatment
- Agent under Durable Power of Attorney:
 - Perform financial transactions within the scope of the authority granted by the Principal
 - Agent has a fiduciary duty to the Principal and cannot act in any manner contrary to the Principal's best interests

Life Support Decision Making

- N.J.S.A. 26:2H-67
 - Circumstances under which life sustaining measures may be withheld or withdrawn
 - Experimental or unproven treatments, permanent unconsciousness, terminal condition, serious irreversible illness where the benefits of medical intervention do not outweigh the burdens
 - Only applicable when the patient has executed an Advance Directive for Healthcare

What To Do When There is No Advance Directive

- Absence of Advance Directive for Healthcare
 - Legal Guardianship of the person for the purpose of making healthcare decisions for an incapacitated individual
- Absence of Durable Power of Attorney
 - Legal Guardianship of the property of an incapacitated person for the purpose of administering or receiving same
- Legal Guardianship of an incapacitated individual may be granted of the person or the property, or both, and may be plenary (general) or limited in scope

Requirements for Declaring an Adult Incapacitated

- Statutory Definition of Incapacitated Individual – N.J.S.A. 3B:1-2
 - “...an individual who is impaired by reason of mental illness or mental deficiency to the extent that he lacks sufficient capacity to govern himself and manage his affairs.”
 - “...also used to designate an individual who is impaired by reason of physical illness or disability, chronic use of drugs, chronic alcoholism or other cause (except minority) to the extent that he lacks sufficient capacity to govern himself and manage his affairs.”
 - “[t]he terms incapacity and incapacitated individual refer to the state or condition of an incapacitated individual as hereinbefore defined.”

Appointment and Termination Of A Guardian

- An alleged incapacitated person (“AIP”) is afforded the right to a jury trial on the issue of capacity if demanded. See, N.J.S.A. 3B:12-24; R. 4:86-6.
- Who is entitled to appointment as Guardian of an incapacitated person?
 - (1) spouse; (2) next of kin; (3) office of the public guardian; (4) any suitable person. R. 4:86-6(c).
- When does Guardianship terminate?
 - Death of the ward; death of the Guardian; resignation of the Guardian; removal by the Court; judgment of restored capacity

Guardianship Proceeding Procedures

- Governed by New Jersey Court Rule 4:86
- Required to file a Complaint:
 - Name, age, and domicile of Plaintiff, AIP, and AIP's spouse (if any);
 - Plaintiff's relationship to the AIP and interest in the action;
 - Names, ages, and addresses of AIP's children, if any, parents, and next of kin (at a minimum, those persons who are in the same degree of relationship to the AIP as the Plaintiff)

What Must Be Filed With The Court?

- Verified Complaint containing all information listed in R. 4:86-2;
- Affidavit of Assets of the AIP;
- Certifications of two physicians who have examined the AIP containing, generally: (1) their opinions of the AIP's ability to manage his own affairs, and the particular conduct of the AIP upon which the opinion is based; (2) their opinions as to whether the AIP is capable of attending and participating in a hearing; (3) the extent to which the AIP retains sufficient capacity in some areas; and
- Case Information Statement

Who Must Be Notified?

- Spouse and adult children of the AIP, if any;
- Parents of the AIP, if any;
- Any person named as Agent for the AIP under a Durable Power of Attorney or Advance Directive for Healthcare;
- The Trustee of any trust for the AIP's benefit;
- The person having custody of the AIP;
- The AIP's appointed attorney; and
- Any other person(s) the Court directs.

Rights of the AIP and Role of Counsel

- Counsel for the AIP must:
 - Personally interview the AIP;
 - Inquire of other persons having knowledge of the AIP's circumstances;
 - Make reasonable inquiry to discover if the AIP has a Will, Durable Power of Attorney, Advance Directive for Healthcare, or any beneficial interest in an estate or trust;
 - Report his findings and recommendations to the Court
- Rights of the AIP:
 - Right to be treated with dignity and respect, right to privacy, right to equal treatment under the law, right to have personal information kept confidential, right to communicate privately with counsel or other advocate, and right to petition the Court to modify or terminate the Guardianship

Rights of the AIP and Role of Counsel, Cont'd

- In the context of an incompetency proceeding, Court appointed counsel acts as an advocate for the interests of the AIP and the Temporary Guardian acts as the “eyes of the court” to further the best interests of the AIP.
- Further, the appointment of a Guardian for the AIP does not require the discharge of the court-appointed attorney for the ward. The Court’s discretion and authority in matters involving the ward’s estate and affairs is far reaching and does not terminate upon the appointment of a Guardian.
- *See, Matter of Mason, 305 N.J.Super. 120, 701 A.2d 979 (1997)*

Potential Issues and Outcomes

- Objections by the AIP or interested parties
 - Determination of incapacity is usually made without a jury trial unless one is demanded by the AIP
 - Family members may disagree on the necessity of a Guardian or the person to be appointed
- Trial
 - Incapacity is inherently a question of fact requiring the presentation of evidence
 - Litigation may result on the question of incapacity or fitness of a certain person to serve as Guardian

Potential Issues and Outcomes, Cont'd

- Possible Outcomes of Guardianship Actions:
 - The AIP is adjudged incapacitated and a Guardian is appointed, either for the person, the property, or both
 - The AIP is adjudged to have capacity and the Complaint is dismissed

Emergent Issues Requiring Guardianship

- N.J.S.A. 3B:12-24.1(c) – Temporary Guardian; Pendente Lite
- Pending a Guardianship hearing the court may appoint a Temporary Guardian, after any notice it requires, for good cause shown and upon a finding that there is a critical need or risk of substantial harm, including:
 - The physical or mental health, safety and well-being of the person may be harmed or jeopardized;
 - The property or business affairs of the person may be repossessed, wasted, misappropriated, dissipated, lost, damaged or diminished or not appropriately managed;
 - It is in the best interest of the alleged incapacitated person to have a temporary guardian appointed and such may be dealt with before the hearing to determine incapacity can be held.

Emergent Issues Requiring Guardianship, Cont'd

- The Temporary Guardian may:
 - Arrange interim financial, social, medical or mental health services or temporary accommodations for the AIP determined to be necessary to deal with those critical needs of, or risk of substantial harm to, the AIP or his property
 - Be authorized to make arrangements for payment for such services from the estate of the AIP
- The Temporary Guardian shall communicate all actions taken on behalf of the AIP to his/her attorney, who shall have the right to object to such actions

Emergent Issues Requiring Guardianship, Cont'd

- A pendente lite temporary guardian appointment shall not have the effect of an adjudication of incapacity or effect of limitation on the legal rights of the individual other than those specified in the Court order
- If the Court enters an order appointing a pendente lite Temporary Guardian without notice, the AIP may appear and move for its dissolution or modification on two days' notice to the plaintiff and to the Temporary Guardian or on such shorter notice as the Court prescribes
- Every order appointing a pendente lite Temporary Guardian granted without notice expires as prescribed by the Court, but within a period of not more than 45 days, unless within that time the Court extends it for good cause shown for the same period

Emergent Issues Requiring Guardianship, Cont'd

- N.J.S.A. 3B:12-24.1(d) – Disclosure of information
“Physicians and psychologists licensed by the State are authorized to disclose medical information, including but not limited to medical, mental health and substance abuse information as permitted by State and federal law, regarding the alleged incapacitated person in affidavits filed pursuant to the Rules Governing the Courts of the State of New Jersey.”
- RPC 1.14 – a lawyer is required to maintain a normal lawyer-client relationship with a client who is impaired, to the extent possible
 - when a lawyer reasonably believes that a client of diminished capacity is at risk of physical or financial harm, the lawyer may take protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, may seek the appointment of a guardian ad litem, conservator, or guardian
 - although the lawyer otherwise has the confidentiality obligations of RPC 1.6, RPC 1.14 allows the lawyer to reveal information about the client to the extent reasonably necessary to protect the client’s interests when taking protective action for the client with diminished capacity

Duties Of A Guardian

- Guardian's duties governed by R. 4:86-6(e). A Guardian has a fiduciary relationship to his ward and is required to act in the ward's best interests
- R. 4:86-5(b) – a Guardian is required to complete a training course as promulgated by the Administrative Director of the Courts
- R. 4:86-6(e) – Guardian must file an inventory of the ward's assets with the Surrogate within 90 days of appointment and shall account annually to the Surrogate. Upon termination of the Guardianship, a final accounting must be filed

Duties Of A Guardian, Continued

- Guardian of the person shall keep the Surrogate informed of the whereabouts and phone number of the Guardian and ward
- Guardian shall advise the Surrogate within 30 days of the ward's death or any major change in status or health
- Guardian shall fully cooperate with the Courts and Surrogate
- Guardian shall monitor the ward's capacity and take steps in their best interest, including commencing an action for return to capacity, if appropriate

Best Practices

- For Healthcare Facilities:
 - Create and maintain written policies for recognizing and dealing with issues of patient capacity in the context of obtaining informed consent for medical treatment
 - New Jersey follows the “doctrine of informed consent;” but, there is no statutory list of procedures which require informed consent
- For Guardians:
 - Maintain complete and accurate records on behalf of the ward
 - Maintain compliance with all legally required duties and procedures

Questions?

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Address

494 Broad Street, Newark, NJ 07102

Phone

973-533-0777

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