

Contested guardianships

Appointments, examinations, requirements and jurisdiction in the context of contested guardianship cases.

By Shirley B. Whitenack

Contested guardianship cases typically involve disputes among family members concerning the safety, living arrangements, autonomy and financial management of a family member who is elderly or has a cognitive disability.

While many family members initiate guardianships to protect an alleged mentally incapacitated person, some are motivated by a desire to control a relative and his or her assets. An elderly person may not see the need to be protected. Other relatives may object to having the initiating party control the affairs of the person in need of guardianship services.

Appointment

The appointment of a guardian is governed by New Jersey statute and court rules; N.J.S.A. 3B:12-1 *et seq.*; R.4:86-1 *et seq.* A guardianship action is commenced by filing a verified complaint by the person seeking to have guardian appointed in the Chancery Division, Probate Part in the county where the alleged incapacitated person is domiciled. If the alleged incapacitated person is not domiciled in New Jersey, the action is commenced in any county in which he or she has property.

N.J.S.A. 3B:12-25 and R.4:86-6(c)

provide priority ranking of individuals who can serve as guardian. A spouse, registered domestic partner and civil union partner living with the alleged incapacitated person have first priority, followed by the incapacitated person's "heirs," friends, and Office of the Public Guardian. If none will accept, then a professional guardian can be appointed. Consideration may be given



to an agent under a durable power of attorney, health care proxy or advance directive. N.J.S.A. 3B:12-35.

The complaint must be accompanied by the affidavits or certifications of two qualified physicians or one physician and one licensed practicing psychologist who have examined the alleged incapacitated person within thirty days of the filing of the complaint. The physician cannot be related to the alleged incapacitated person or to a proprietor, director or chief executive officer of any private institution in which the alleged incapacitated person is living or in which it is proposed to place the alleged incapacitated, or be professionally employed by such a facility as a resident physician or have a financial interest therein.

Examinations

The alleged incapacitated person may refuse to be examined or the person having control of that individual may deny the physician access to perform the examination. If the alleged incapacitated person cannot be examined, one physician's affidavit must be filed indicating that he or she has tried to make such an examination but that the alleged incapacitated person or those in charge of him or her refused or were unwilling to permit such an examination. On motion and with notice to all persons entitled to notice of the guardianship hearing, the court may order the alleged incapacitated person to submit to an examination.

A physician or psychologist may believe that disclosure of medical information pertaining to a competency examination may violate the Health

Insurance Portability And Accountability Act of 1996 (HIPAA). Physicians and psychologists, however, are authorized by N.J.S.A. 3B:12-24.1d to disclose in guardianship proceedings medical information, including but not limited to medical, mental health and substance abuse information as permitted by federal and state law.

The complaint must be accompanied by an Order which must provide that at least 20 days' notice of hearing be given to the alleged incapacitated person, his or her spouse, children over 18, parents, persons having care and custody of the alleged incapacitated person and any other persons as the court directs.

The alleged incapacitated person must be served personally with the signed order, complaint and the supporting affidavits. A notice containing specific language set forth in R.4:86-4(a) or its equivalent must be read aloud to the alleged incapacitated person, advising him or her that a guardianship proceeding has been instituted as well as the place, date and time of the hearing, the right of the alleged incapacitated person to oppose the action, the right to a trial by jury, the right to appear at the hearing in person or by an attorney, and appointment of the court-appointed counsel.

Requirements

The Order typically requires the alleged incapacitated person or interested parties to file written responses to the complaint within a certain time period if they intend to object to the appointment of the proposed guardian. If the alleged incapacitated person or other interested party files an objection the court typically will permit the parties to engage in a short period of discovery and ultimately will set the matter down for trial.

The court-appointed attorney must represent the client's wishes as an attorney would represent a client in any other matter. See *In Re Mason*, 305 N.J. Super.120 (Ch.Div. 1997). R.P.C. 1.14 addresses an attorney's obligation to a client who is under a disability. R.P.C. 1.14(a) states that when representing a client with diminished capacity the lawyer shall try to maintain a normal client-lawyer relationship with the client. The court-appointed attorney must advocate for the decisions made by the alleged incapacitated person unless such decisions are "blatantly absurd or pose an undue risk of harm." *Mason, supra.* see also, *Matter of M.R.*, 135 N.J.155 (1994) which addressed assessing the role of court-appointed attorneys for allegedly incapacitated developmentally disabled adults. At any time prior to entry of judgment, the court may appoint a guardian ad litem in addition to counsel to evaluate the best interests of the alleged incapacitated person and to present that evaluation to the court. R.4:86-4(d).

The mediation alternative

Contested guardianship matters can be time-consuming and expensive. They

can tear families apart. Mediation encourages consensus building within the family setting and fosters the preservation of relationships with family and friends. This form of alternative dispute resolution can also assure the retention of maximum possible independence and autonomous control over basic life decisions for the incapacitated person. A legal declaration of incapacity may be necessary, however, to protect the assets and person. In such cases, a court hearing will be required because a person cannot enter into a consent order to declare himself or herself incapacitated or consent to the appointment of a guardian. See *In re Guardianship of Macak*, 377 N.J. Super. 167 (App. Div. 2005).

Interstate guardianship proceedings

Family conflicts over relatives with diminished capacity are nothing new. But in our increasingly mobile society it has become more common for family members engaged in such disputes to move relatives with diminished capacity across state lines. The laws governing guardianships in two or more states may lead courts in those states to conclude they have jurisdiction over the same alleged incapacitated person, leading to conflicts among states in addition to family members. This is because while some states, like New Jersey, base guardianship jurisdiction on domicile, others base jurisdiction on residence or physical presence in the state.

New Jersey jurisdictional requirements

In New Jersey, jurisdiction over an incapacitated person requires a determination of domicile. See *In re Seyse*, 353 N.J. Super. 580 (App. Div. 2002); certif. denied, 175 N.J. 80 (2002); *In re Jacobs*, 315 N.J. Super. 189 (Ch. Div. 1998). The New Jersey legislature recently confirmed that a ward's domicile is a necessary criterion for the assertion of jurisdiction. See N.J.S.A. 3B:12-66.2 (2006). There are three ways to obtain domicile:

1. birth or place of origin;
2. choice by a person capable of choosing a domicile; and
3. operation of law in the case of a person who lacks capacity to acquire a new domicile by choice.



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It is well-settled in New Jersey that an incapacitated person may have the capacity to change his or her domicile. *In re Seyse, supra; In Jacobs, supra.* Assertions that an alleged incapacitated person changed domicile should be accompanied by physicians' affidavits stating that the person had the requisite mental capacity to do so.

New development: Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

On Aug. 2, 2007 the Uniform Law Commission (ULC) — also known as the National Conference of Commissioners on Uniform State Laws or NCCUSL — approved the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA or the Act). The UAGPPJA, if adopted by the states, will provide the states with a solution for resolving multi-state jurisdictional disputes. The goal of the Act is to ensure only one state exercises jurisdiction at any time. Accordingly, the Act specifies which court has jurisdiction to appoint a guardian or conservator by determining the state that has primary jurisdiction. ☉