Guardianship Concerns in New York State

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Summary: The article focuses on the need for a well-drafted and executed power of attorney to delegate authority on behalf of an elderly or disabled person, and where none exists, the need to then commence a guardianship proceeding to obtain that same authority. Guardianships are expensive, time consuming, and, in many cases, difficult to win. Two case studies present unique issues of law within the scope of the Mental Hygiene laws, the statutes that govern most aspects of the guardianship proceeding.

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Introduction

According to the U.S. Census Bureau, approximately 330 Americans turn sixty years of age each and every hour. Thusly, goes the aging of the baby boomer generation, those Americans born between 1946 and 1964. U.S. Census Bureau, American Fact Finder at http://factfinder.census.gov/servlet/ACSSAFFfacts (2009); U.S. Census Bureau, Facts for Features at http://www.census.gov/Press-Release/www/releases/archives/facts (2006). Of course, the consequence of our aging is the aging of our parents, and aunts and uncles. Today, most families have at least one member in his or her late eighties, or early nineties, unheard of a mere thirty years ago.

Such staggering numbers will place a demand on many resources, perhaps a few never contemplated. One thing is for certain, and that is that estate planning will become a priority for most everyone, no longer for a select few. It is simple enough to have an attorney prepare a health care proxy, living will or power of attorney. Such documents are customarily prepared by attorneys as a complement to the preparation of a will, many offices consider the aforementioned as a package, and strongly suggest the client execute all documents.

When prepared comprehensively and executed properly, the result of that planning is as follows: a principal delegates authority to an agent to make health care decisions or property management decisions for that person in the event that the principal is incapable of making those decisions. Recently, in response to the needs to protect the elderly (in ever-increasing numbers) and for clarity, the rules for the preparation and execution of powers of attorney have been substantially modified in New York. See General Obligations Law, Section 5-1501B (McKinney's, 2009).

All practitioners should review this new statute carefully before drafting a power of attorney. In the prior statute, only the principal was required to sign and have his signature acknowledged; now, both the principal and the agent must sign and have their respective signatures acknowledged. Major gift-giving authority may only be delegated by rider, and that rider must be signed by the principal, his signature must be acknowledged and witnessed by two witnesses, neither of which may be a donee. There are additional changes, and I urge all to thoroughly familiarize themselves with those changes before drafting a power of attorney.

Ordinarily, a principal designates an agent to make decisions for her in the event that she cannot make them herself, and the document that memorializes those directions is accepted by the health care provider or financial institution, as the case may be. At times, there may be a dispute about the authenticity of the document, but, normally, when such a document is prepared by an attorney who supervises the execution it will withstand scrutiny.

More commonly, problems arise from the failure of the individual to have any document at all. Therein lies a very expensive, labor intensive and emotionally frustrating problem. Frequently, the only solution is to commence a guardianship proceeding to have a person appointed to make health care or financial decisions – or both – on behalf of a person who is deemed incapacitated by family or friends or an independent business relation.

The Peters Family

Earlier this year, I was retained by the Peters family to assist Margaret Peters in her application to the court to be appointed guardian of the person and property of her brother, Matthew Simpson, a ninety-two year old man who had had a devastating stroke in February. Margaret assured me that she and her brother were close and that they had a long-term, loving relationship. Upon speaking with both my client and her brother, it became clear that Matthew was not about to consent to anything. He stated, unequivocally, that his goal was to return to his apartment and continue as he had been prior to the stroke, despite his extremely compromised condition.

Since the stroke, both his physical and mental health had been profoundly affected: he is no longer able to climb steps, is inappropriately paranoid and argumentative, has short-term memory loss in the extreme, is undernourished and not capable of remembering to take his

many medications for conditions related to his advanced age and physical and mental illnesses. It is obvious that he simply can no longer perform the activities of daily living that most individuals take for granted.

If released to the community, there is no question that he could not safely cook, shop, bathe, pay bills, run errands and schedule and keep his numerous doctor's appointments. Further complicating the case are the facts that Margaret Peters is eighty years old, has some difficulty ambulating, herself, (at the hearing, she could not take the stand without the assistance of a cane) and lives in Maryland. Notwithstanding the foregoing, and because no other family member wanted the responsibility, we commenced the case with my client as petitioner seven months ago.

At the writing of this article, many issues still remain unresolved. Fortunately, guardianship matters are calendared fairly quickly after they are instituted, and hearings are normally set within a few weeks of the date that the motion is filed. A hearing was set, and all interested parties were notified, including Matthew and his attorney.

After my client testified, the judge urged a settlement. He granted my application only to the extent of appointing a temporary guardian (not my client) to review this matter and to make a determination as to whether Matthew could, in fact, be returned to the community, safely. My client's age, health and domicile were significant factors in the judge's decision. I am unsure as to whether the judge suspected that my client's motives were not entirely altruistic; she did not do well under cross-examination.

Matthew is currently residing in a New York City facility. He has refused to pay for his medical costs, which as of October 1, 2009 total over $60,000.00. Since the order has not yet been signed, that bill remains unpaid, as do all of Matthew's bills. Matthew's failure to execute a health care proxy and power of attorney has affected most everyone with whom he deals. This is a perfect example of what we can expect to occur more and more, as the baby boomers age. Matthew is extremely frustrated, his sister is extremely frustrated and the facility – as well as all of Matthew's creditors – are beyond frustrated.

The entire process is expensive, and after endless delays, everyone emerges dissatisfied in the extreme. In the absence of a comprehensive, properly drafted and executed health care proxy and durable power of attorney, the Peters' family had little option but to commence a guardianship proceeding. In the State of New York, the rules for doing so are set forth in the Mental Hygiene laws.

The Mental Hygiene Laws

In 1992, the Mental Hygiene Laws were enacted by the New York State Legislature in response to dissatisfaction with the prior rules under the conservator and committee systems, which

were viewed as draconian. The goal was to customize the rules so as to appropriately assist the incapacitated person while respecting his individual independence and self-determination. Mental Hygiene Law, Section 81.01 et seq. (McKinney's, 2009). The legislature intended to create the least restrictive, most customized and respectful intervention possible, based on all the facts and circumstances of a particular case.

In the Peters' matter, two contentious areas were hotly debated during the hearing itself and the settlement negotiations. Firstly, the determination of the extent of the incapacity of the alleged incapacitated person, and secondly, the determination of the eligibility of the petitioner to serve as guardian. Such key issues, all in all, are quite commonplace.

Some guidance is offered by Mental Hygiene Law Sections 81.02 and 81.19. Section 81.02 states, in relevant part, that the petitioner must establish that the appointment of a guardian is necessary to provide for the personal needs and/or property management of the alleged incapacitated person and that the alleged incapacitated person either consents (that has happened to me only once, and certainly not in the Peters' matter) or that the alleged incapacitated person is, in fact, likely to suffer harm because he is unable to provide for his personal needs and/or property management and that he cannot adequately understand and appreciate the nature and consequences of his inability.

This test must be satisfied on proof of clear and convincing evidence, a relatively high burden for the petitioner to sustain. In the Matter of Storar, 52 N.Y. 2d 363 at 379 (1981), the Court of Appeals stated that clear and convincing proof is the "highest level of proof in a civil case" which "forbids relief whenever the evidence is loose, equivocal or contradictory." The bar is set high so as to "impress the fact finder with the importance of the decision."

Section 81.19 provides that anyone over the age of eighteen who is considered by the court to be "suitable" may serve as guardian. The statute goes on to state that the determination of who is "suitable" shall be based upon appointments or delegations made by the alleged incapacitated person, the social relationships, unique requirements of and the personal and property requirements of the alleged incapacitated person, the care and services being provided to and the relevant experience necessary to properly serve as guardian to the alleged incapacitated person. Any conflicts between the proposed guardian and alleged incapacitated person shall also be considered. In the Peters' case, conflicts abounded as Matthew became more and more hostile to Margaret. He could not or would not control himself at the hearing. It made for an extremely long and unpleasant day in court.

While it would appear that a petitioner-family member of the alleged incapacitated person should receive preferential consideration, family members are still subjected to scrutiny by the court. There is no guarantee that a petitioner-child or sibling will be appointed just by virtue of the family relationship. On occasion, I have observed that a family member can be subjected to even greater scrutiny than a stranger. The standard is supposed to be "suitability," which is, of

course, extremely subjective, with the best interests of the alleged incapacitated person being determinative.

In the Matter of Addo, New York Law Journal Vol. 218 Page 26, September 30, 1997 (Sup. Ct. Bronx County) the issue before the judge was whether loving parents were, in fact, skilled enough financial managers to serve as property management guardians for their disabled child. The court concluded that, in light of the fact that the medical malpractice settlement exceeded $5 million, and that, although the parents were loving, they had spent their personal $200,000.00 lump sum settlement almost as soon as they received it, the appointment of a third party would be a more suitable guardian.

Further complicating the case was the fact that the alleged incapacitated person's parents gave away most of their settlement monies to family members who resided outside the United States. Insofar as the disabled child's personal needs, the court did appoint the petitioner-parents as co-guardians. Split decisions are not unusual in these types of cases.

Courts evaluate factors such as ongoing interaction between the petitioner and alleged incapacitated person and quality of care being given by the petitioner at the time of the application, if any. The age and health of the petitioner and the petitioner's geographic location are also considered important factors. See In re Robinson 272 A.D. 2d 176, 709 NYS 2d 795 (1st Dep't, 2000).

In the Robinson case, the Appellate Division reversed a Bronx trial judge who denied the petitioner-son's application to be appointed property guardian for his father because the court found that petitioner lacked sufficient experience in money management. While the trial judge granted petitioner's application to appoint a guardian, it named the evaluator as guardian. The Appellate Division held that, absent a showing of neglect or conflict of interest, the lower court abused its discretion in substituting the evaluator, and substituted the petitioner's name for the evaluator in its decision.

Distinguishable from Robinson, (and similar to the court's decision in Addo) in the matter of In re Lopez, 292 A.D. 2d 231 (1st Dep't, 2002) the court held the opposite result. In Lopez, the court affirmed the lower court's decision to appoint a stranger where the petitioner-mother of an incapacitated daughter made an application to be appointed guardian of her daughter's person and property. The court pointed out that the petitioner had not properly accounted for disbursements from her daughter's assets and disregarded the court's recommendations to purchase a home for the daughter, among other directions which were also ignored. Clearly, Robinson and Lopez are distinguishable, but, more often, there are so many facts in these cases that muddy the waters, so that predicting the outcome can be extremely difficult.

It is also important to look to the prior relationship between a petitioner seeking to be appointed guardian and the alleged incapacitated person. Was the petitioner the alleged incapacitated person's caregiver and did that person act reasonably under the

circumstances? In In re Chase, 264 A.D. 2d 330 (1st Dep't, 1999), the court stated that "strangers will not be appointed guardian of the person and property of an incompetent unless it is impossible to find within the family circle or their nominees one who is qualified to serve." The court went on to say that this preference would have to yield if it was established that the proposed guardian failed to properly care for the incapacitated person or if there were a conflict of interest between the petitioner-family member and the alleged incapacitated person.

When in doubt, I believe the court favors an independent person to serve as guardian, when family conflict develops as a result of the institution of the proceeding, which is what happened in the Peters' case. During the hearing, Matthew created countless disturbances; his bitter outbursts made it clear to all that he was very angry at the petitioner for commencing the case. If Matthew had appointed my client as his agent in a durable power of attorney, that document would have saved the family enormous expense, time and aggravation. (In his will, Matthew nominated my client as executrix and residuary legatee of his entire estate.

Accordingly, we are baffled at Matthew's level of animus, and believe it is related to his dementia. The petitioner claims that her brother never acted in this manner prior to his stroke.)

Of course, there are no guarantees that the authority of a health care or property management agent, designated by written proxy or power of attorney, will not be revoked and an entirely different guardian appointed, if the court decides that such a choice is in the alleged incapacitated person's best interests.

In light of the major changes in the power of attorney laws in New York State, which became effective September 1, 2009, it behooves every practitioner to thoroughly familiarize herself with the new requirements so that improper preparation and/or execution are not the basis for court revocation of a power properly intended by the principal. Where the court determines that a health care agent and attorney in fact have been properly appointed, it shall refrain from appointing guardians. In the Matter of Balich, No. WL 21649907, Slip Op. (Supr. Ct. Suffolk Cty., July 10, 2003).

In Balich, the petitioner-health care agent was appointed by a valid health care proxy. The alleged incapacitated person had also designated an attorney in fact, pursuant to a valid, durable power of attorney, properly executed. Subsequently, the petitioner commenced a proceeding to be appointed guardian of the person and property of the principal. The court denied his application, citing the Public Health Law, Section 2982 (4) (McKinney's, 2009) which provides, in part, that health care decisions by health care agents have priority over decisions made by anyone else, save for a competent patient.

The Bernini Family

Now, let us presume for a moment, that the baby-boomer, himself, has questionable capacity. And further presume that the boomer's mother has been placed in a facility by a hospital. Then, the facility institutes a proceeding to have a guardian for the personal needs and property management appointed for the incapacitated mother who resides in their facility. The son stands by stoically, in a vain attempt to comprehend what has happened. This particular scenario can easily have an unjust result, and, in my office, almost did.
The Bernini family made quite a lot of money in the real estate market in the 1970's and 1980's. When Mr. Bernini died, both his widow and adult son struggled. They were extremely secretive, so that no one in the extended family realized that Mrs. Bernini had Alzheimer's and that her son was developmentally disabled. Family members are very skilled at hiding what embarrasses them, until something major happens. When Mrs. Bernini broke her hip at 91 years of age, it became apparent that she could not return home, so she was placed in a facility, and the facility instituted a guardianship proceeding.

The son was incapable of objecting or cross-moving for relief, so an agency was appointed, and shortly thereafter, in marshalling Mrs. Bernini's assets, the guardian re-titled Mrs. Bernini's only resource, an annuity, from Mrs. Bernini's name, to the agency's name AS BENEFICIARY. Then Mrs. Bernini died. It is elementary that the re-titling of guardianship assets should show the guardian's name as "guardian," and not as "beneficiary."

Once we realized what had happened, it required letters, telephone calls and threats of filing a complaint with the local District Attorney-over the course of many months-before the appropriate corrections were made, and the money released to the son, the rightful beneficiary. Unfortunately, there is abuse and fraud, and we practitioners must be vigilant in watching for such abuse.

The Bottom Line – More an Issue than Ever

Presuming that the petitioner has retained the attorney, the next logical questions is, who pays the attorney? In my practice, I caution the petitioner several times, both at the initial consultation and in writing, in my retainer, as to how the attorney fees are to be paid to this office. Ordinarily, I am willing to accept a flat fee, and when I do, I maintain scrupulous time records. Despite the foregoing, I have experienced the alleged incapacitated person's attorney objecting to the amount of time I have expended drafting the myriad documents required. Customarily, courts do not award reimbursement of expended legal fees to petitioners who lose, so that fact must be made clear to the client.

In Mrs. Peter's case, the judge interrupted the hearing to urge a settlement because, while it was clear to the judge that Matthew needed a guardian, he was not persuaded that my client was the appropriate choice. Witnesses not accustomed to court procedure, who are elderly and have physical complaints, can perform poorly on the stand, despite lengthy preparation over

the course of weeks. One never knows what a witness will say when testifying, even when that witness is one's client.

Under those circumstances, I would not even consider agreeing to settle and to the appointment of an independent third party without the court acknowledging that my client must be reimbursed for her advance of legal fees to me. Since Matthew was the person designed to benefit from the institution of the proceeding, it follows that his estate should bear the cost. As in estate matters, the court applies the classic test set forth in In re Potts Estate, 213 A.D. 59 (4th Dep't 1925) and considers the amount of time spent, the difficulties involved in the matters in which the services were rendered, the nature of the services provided, the amount involved, the attorney's professional standing and the results obtained. Mental Hygiene Law Section 81.16 (f). To date, on the Peters' matter, we are still waiting for the judge's decision on the reimbursement issue. Fortunately, money is not a problem for Mrs. Peters, but many elderly people are not that fortunate.

As stated hereinabove, when determining whether to appoint a guardian, the courts consider many factors, including the petitioner's motivations. From an attorney's perspective, determining one's client's motives can be extremely daunting. Certainly, we must zealously represent our clients within the confines of the law. Frequently, the court appoints an attorney to represent the alleged incapacitated person, especially where the petitioner seeks provisional relief prior to the hearing.

Ordinarily, I find such court appointees very helpful. In addition, or in lieu of the appointment of counsel to the alleged incapacitated person, the court appoints a court evaluator, usually an attorney, to investigate the circumstances of the application. In the Peters' case, I was very lucky that the court evaluator recommended that a guardian be appointed because the attorney appointed by the court for Matthew opposed my application, in its entirety. This surprised me because the evaluator, psychiatrist and doctors, social worker and all of Matthew's family supported Mrs. Peters' application.

During our day in court, I was perplexed by my adversary's position because Matthew was so infirm, pathetic, confused and obstinate. I could not imagine how anyone could argue that this poor man should be released into the community to fend for himself. He would not stand a chance. When this matter is concluded I intend to ask the attorney about the basis for her argument. The question is: When does zealous representation become irresponsible representation? The old adage is true; you can never predict exactly what is going to happen at a hearing or at trial.

It has been my experience that compliance with the court order for the guardianship appointment is fairly well supervised. Once a guardian has been appointed, the court evaluator's job is done, and the court examiner steps in to oversee the acts of the guardian. Essentially, the court examiner reviews all of the accountings. The examiner is

responsible to monitor the incapacitated person's assets and protect that person's independence, to the extent that the incapacitated person is capable of independence. The examiner notifies the court of any significant changes in the case, and reviews all applications to the court by the guardian.

Occasionally, an errant guardian appears in newspaper headlines, buy that is rare when one considers how many applications are granted each year. In addition, guardians must post a bond to insure the incapacitated person's assets, so that in the event of malfeasance, the incapacitated person's assets are protected.

Of course, all of the foregoing is expensive; all of the foregoing people must be compensated from the incapacitated person's assets, if that is possible. While the court does order that compensation, and controls, to a great extent, the disbursements from the guardian's estate, it is a shame that the failure to execute a health care proxy and durable power of attorney results in such needless costs and inconvenience. Moreover, the result achieved at the hearing may not remedy the issues adequately.

And after the Smoke Clears?

How well does the guardianship system work? I believe that unless one has absolutely no option, the commencement of a guardianship proceeding should be avoided, if possible, due to the difficulty, unpredictability and expense. Clients are frequently unhappy, but there is little option for the individual who fails to adequately plan, especially where the incapacitated person has assets. Strongly recommending that clients include comprehensive durable powers of attorney and health care proxies, while emphasizing the ramifications if they do not, is an absolute must whenever estate, tax or Medicaid planning is the client's goal.

References

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