

# SPECIAL REPORT

## Guardianships

### **A FACT SITUATION THAT MAY RESULT IN A GUARDIANSHIP:**

John and his sister, Sally, are very concerned about their mother, June. June has been slowly declining. Lately, she has begun forgetting things, important things, like whether she left the burner on the stove on, or that she put her leftovers in the oven to warm and forgot about them until they were burned to a crisp. June's physical condition has also begun to deteriorate and her children are concerned for her safety and welfare. The last time John visited June, he noticed that she had not retrieved the mail from her mailbox in quite some time. After looking through her mail, it became clear that she was not paying her bills or depositing her dividend or Social Security checks to the bank. It also appeared that she may have recently been talking with a broker of some kind regarding her financial affairs and that she may have done something questionable with her assets.

John's mother executed some estate planning documents a few years back. He has a power of attorney to handle financial matters and one to make medical decisions. He is concerned that if he tries to take over his mother's affairs, she will not take it well. June insists that she is "just fine" and "does not need any help." His sister, Sally,

recently asked June to come live with her and her family. June's response was to physically kick Sally out of the house, insisting that she neither needs nor wants help. June has not spoken to Sally since.

John is beside himself and does not know what to do. He is wondering whether he needs to get a guardianship over his mother to force her to take better care of herself and so that he can move her to a safer location.

### **JOHN'S DILEMMA IS BY NO MEANS UNIQUE, BUT THE QUESTION IS WHAT SHOULD BE DONE?**

In an ideal world, we would all retain decision-making capacity and the ability to care for ourselves right up until death. Realistically, this almost never occurs. Some people think ahead and make preparations to ease their future through the use of estate planning documents and other arrangements. However, as is the case with John, Sally, and June, those estate planning documents may not always provide all of the answers.

A person creating a power of attorney may revoke that document, provided he/she retains capacity. Also, some financial institutions or medical providers may refuse to acknowledge the authenticity of the document. In John's situation, if

he tries to help his mother, she may react by revoking her estate planning documents or, worse, attempt to retaliate against him personally in some way. Even if she does not do any of these things, unless her rights are removed, she remains a potential threat to herself and/or others and can be easily victimized by unscrupulous persons. Many people do not realize that the power-of-attorney document itself does not empower John to force any type of assistance upon his mother.

With regard to guardianships, people often want to know what they are, when they are appropriate, and how a guardianship can be obtained over a loved one who can no longer manage his/her affairs. And more importantly, how and when can guardianship be avoided.

#### **WHO IS AN APPROPRIATE CANDIDATE FOR GUARDIANSHIP/CONSERVATORSHIP?**

Each state has its own requirements for guardianship proceedings. In most states, however, guardianship is appropriate when a person has become incapacitated and can no longer make sound decisions relative to his/her personal welfare or financial affairs, and when no alternative exists. June, for instance, is certainly a candidate for guardianship. She clearly needs immediate assistance before she harms herself or falls victim to some type of scam. She cannot continue as before without serious consequences.

#### **WHAT EXACTLY IS A GUARDIANSHIP/CONSERVATORSHIP?**

Guardianships, also called conservatorships, involve a legal process requiring court action. The subject of the guardianship is called the "ward." The court reviews the proposed ward's situation, decides whether the individual has capacity (either full or partial) or is

incapacitated. This determination is based on the individual's age, degree of infirmity, and other factors. If the individual is found to be incapacitated, a guardian is appointed to assist him/her where necessary. The rights of the ward are removed by the court. Courts do attempt to make the guardianship as non-intrusive as possible. In this context, the court defines the parameters of the guardian's authority, and the guardian may not act outside of these parameters.

Generally, guardianship is a grant to another person or entity of a measure of authority over an incapacitated person, to the extent that the latter requires assistance because of mental and/or physical impairments. The authority granted by the court should be limited to that which is necessary to protect the incapacitated person and to promote his/her well being.

In John's case, he will most likely need to be appointed as his mother's guardian to ensure that she receives appropriate healthcare, supervision, and residential placement. Also, he will likely need to take control of her financial affairs, pay bills, manage her assets, and assert her rights if she has been victimized by unscrupulous persons.

#### **WHEN SHOULD A GUARDIAN BE APPOINTED?**

Since guardianship results in loss of civil liberties, is intrusive and sometimes embarrassing for the ward, it is usually considered a measure of last resort. Therefore, less intrusive alternatives should first be explored. But when no alternative is feasible, a guardian should be appointed as soon as possible. In June's case, she requires immediate assistance.

#### **WHY ARE GUARDIANSHIPS NECESSARY?**

Guardianships are used when a person can no longer make sound decisions (and communicate those decisions) regarding his/her person and/or property, thus rendering the person vulnerable to

undue influence or fraud, and when there is no reasonable alternative to such a restrictive solution.

Undoubtedly, the most important reason to have a guardianship in place is to expedite medical treatment needed by the disabled person. Doctors and hospitals may refuse to perform necessary but non-emergency procedures on disabled persons without legally authorized consent. In the absence of advance directives, a guardian can provide such consent in the most efficient manner.

A guardian may also perform the useful (and sometimes necessary) function of providing consent and acknowledgment on behalf of the ward. Such consent and acknowledgment may be required in a myriad of situations pertaining to the ward's care and well being, such as for behavior modification plans, treatment plans, the administration of medications, as well as the acknowledgment of receipt of rules, regulations, and rights. Moreover, the guardian may need to sign forms in order for the ward to obtain or retain certain benefits (e.g, Medicaid). In many states, a guardianship which covers the ward's health and personal care is known as a guardianship of the person.

If the disabled person has significant assets, a guardian will be needed to manage those assets, unless they are held in trust. A guardianship which covers the ward's finances is known as a guardianship of the estate.

An individual may require one or both of these types of guardianship. In June's case, she requires assistance in both areas of her life, her person and her estate.

### **HOW IS THE GUARDIANSHIP OBTAINED?**

John should immediately visit an attorney who regularly deals with guardianship proceedings in the county or jurisdiction where his mother resides. The attorney will guide John through the necessary steps

to obtain a guardianship over June in her county of residence.

Most often a doctor familiar with the proposed ward or a court-appointed physician is asked to prepare a written and recent sworn diagnosis, which is filed with the court as evidence of the proposed ward's incapacity. The attorney will file the applications that are required by the state in which June resides. The court will then appoint an advocate to represent June in the proceedings. This advocate (or counsel) is referred to as the "guardian ad litem." June must be personally served with court papers to ensure that she is properly notified of the guardianship proceedings.

Once a ruling is made by the court regarding the necessity of guardianship, an order is then signed by the court removing June's legal rights. The order of the court should specify the type of guardianship (i.e., guardianship of the person and/or estate) and whether it is full or partial. For partial guardianships, the order must specifically list those legal rights of the ward that have been removed, thus limiting the duties of the guardian to only the things the court decides are absolutely necessary. The court with jurisdiction over the proceedings makes the final decision as to the powers that will be retained by the ward and the powers that will be given to the guardian. The decision is made based on medical evidence submitted by the doctor who examined the ward.

Throughout the duration of the guardianship, the guardian cannot act without court approval when spending the ward's funds or paying the ward's bills. The guardian also must file an inventory and appraisal of the guardianship estate, as well as accounting and other records regarding the ward's financial status and well being. These requirements continue until the guardianship is no longer necessary.

Many guardianship proceedings are public. For instance, a hearing is held to determine the following:

- (1) Whether the proposed ward is capable of managing his/her affairs; and
- (2) Which person should be appointed guardian.

Documents filed by the guardian relative to the ward's property are public record. One common goal of estate planning is to avoid the need for guardianship. Most people prefer to avoid guardianships because of the expense, publicity, and resulting forfeiture of civil liberties.

In John and Sally's case, an immediate meeting with June is in order. It is usually preferable to avoid guardianship, if possible. Perhaps family intervention in June's situation, involving her doctor and psychiatrist (if any), would allow her to realize that she does need help and that options are available. If June can be persuaded to accept help from her family, John could use the financial power-of-attorney and medical directives to good advantage, thus avoiding guardianship.

As so often happens, however, it is possible that the above-mentioned meeting with June will not eliminate the problems that John and Sally have with her. If June is so deluded that she cannot see the dangers inherent in her situation, guardianship may be the only solution.

### **REFERRALS**

Potential guardianship cases should be referred to an attorney who works routinely with guardianships in the locality where the potential ward resides.

The law firm of Oast & Hook deals in these matters on a regular basis and welcomes the opportunity to assist a family in this sensitive matter. Please call if the need arises.

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