

GENERAL INFORMATION REGARDING GUARDIANSHIPS AND CONSERVATORSHIPS

GUARDIANSHIP AND CONSERVATORSHIP

Guardians may be appointed for protection of the person only. A conservator must be appointed to protect property and business affairs of a person in need of protection.

A guardian may be appointed for an incapacitated person “who for reasons other than advanced age or minority, has a clinically diagnosed condition that results in an inability to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.”

A conservator may be appointed for a person to be protected if “the person is unable to manage property and business affairs effectively because of a clinically diagnosed impairment in the ability to receive and evaluate information or make or communicate decisions, even with the use of appropriate technological assistance, or because the individual is detained or otherwise unable to return to the United States; and the person has property that will be wasted or dissipated unless management is provided or money is needed for the support, care, and welfare of the person or those entitled to the person’s support and that protection is necessary or desirable to obtain or provide money.”

Note the difference in terminology. Guardians are appointed for incapacitated persons, and conservators are appointed for persons to be protected.

LIMITED GUARDIANSHIP

All too often plenary or full guardianship appointments are made when a person’s incapacities are limited in scope and the individual displays only some areas of diminished functionality. The new Medical Certificate form requires information which will highlight functional capacities and incapacities and promote the creation of limited guardianships. The concept of limited guardianship allows the Court to address specific areas of incapacity and tailor guardianship decrees (letters) to meet an individual’s unique circumstances. Individuals may be competent for one purpose and not competent for another. For example, if appropriate, a guardianship may be limited or apply only to medical treatment decisions. Orders curtailing or removing an individual’s liberty should be made only to the extent absolutely necessary to protect the individual from harm.

LIMITED CONSERVATORSHIP AND PROTECTIVE ORDERS

Similarly, the concept of conservatorship includes both limited and unlimited conservatorships. A conservator should be appointed only when necessary, and then with only those powers that are necessitated by the individual’s actual limitations. For example, if appropriate, a conservatorship may be limited or apply only to investments or real estate and leave to the protected person the ability to receive pension income and pay for daily or monthly expenses.

In addition, it may be the case that a conservatorship is not necessary at all but that a narrowly tailored ‘protective order’ will suffice to protect an individual’s assets/property. For example, the Court, without appointing a conservator, may authorize, direct or ratify any contract, trust, or other transaction relating to the protected person’s property and business affairs if the Court determines that the transaction is in the best interests of the protected person.

TEMPORARY GUARDIANSHIP

While a petition for the appointment of a guardian is pending, if an incapacitated person has no guardian, and the Court finds that an emergency exists that will likely result in immediate and substantial harm to the health, safety or welfare of the person alleged to be incapacitated, and no other person appears to have authority to act in the circumstances, on appropriate motion, the Court may appoint a temporary guardian who may exercise only those specific powers granted in the order. The appointment may be for a period of up to 90 days except that upon a finding of extraordinary circumstances set forth in its order, the Court may order an appointment for a longer period to a date certain. The Court may for good cause shown extend the appointment for additional 90 day periods.

TEMPORARY CONSERVATORSHIP

While a petition for the appointment of a conservator is pending, if a person to be protected has no conservator, and the Court finds that an immediate and/or urgent situation exists that will likely result in substantial harm to the property, income or entitlements of the person to be protected or those entitled to the person’s support, and no other person appears to have authority to act in the circumstances, on appropriate motion, the Court may appoint a temporary conservator who may exercise only those specific powers granted in the order. The appointment may be for a period of up to 90 days except that upon a finding of extraordinary circumstances set forth in its order, the Court may order an appointment for a longer period to a date certain. The Court may for good cause shown extend the appointment for additional 90 day periods.

FULL/PLENARY GUARDIANSHIP

A full/plenary guardianship generally removes from an incapacitated person all personal decision-making responsibility and authority. Under the current law, clinicians and the Court must now consider whether an incapacitated person’s legal rights can be preserved in specific areas and whether the guardianship can be limited or tailored accordingly. See discussion of Limited Guardianship above.

FULL/PLENARY CONSERVATORSHIP

A full/plenary conservatorship generally removes from a person to be protected all control over his or her assets. Under current law, the Court must now consider if a conservatorship can be limited which means that the Court can preserve legal rights in specific areas. See discussion of Limited Conservatorship and Protective Orders above.

MEDICAL CERTIFICATE

In guardianship cases involving incapacitated persons and in conservatorship cases involving persons to be protected, a Medical Certificate must be filed. For cases involving mentally retarded persons, see below. A Medical Certificate must be dated within 30 days of the filing of the petition. In addition, a Medical Certificate must be dated and the capacity/competency examination must take place within 30 days prior to the hearing. Thus, it is possible that a new medical Certificate might have to be procured prior to the permanent hearing. A Medical Certificate may be completed by a physician or licensed psychologist or a certified psychiatric nurse clinical specialist.

CLINICAL TEAM REPORT

For mentally retarded persons, a Clinical Team Report (CTR) must be filed. A Clinical Team Report must be dated within 180 days of the filing of the petition. A Clinical Team Report must be completed by a physician, a licensed psychologist, and a social worker, each of whom is experienced in the evaluation of mentally retarded persons.