



Adult Guardianship

By Douglas G. Chaljian

The New Divorce

Family conflicts have historically been the province of family law or divorce court. Now those same issues have become the meat and potatoes of the elder law practitioner and are being played out in probate courts. The difference is that rather than battling over child custody, child support, and alimony obligations, adult children are battling over decisions about their parents' care and often management of their parents' resources.

Consider the following realities:

- People are living longer, and as a result, more are reaching advanced years with significant cognitive impairments. These impairments can make them vulnerable to overreaching, exploitation, or simply bad decisions regarding their care and finances.
- Many of today's adult children moved away from home (often out of state) decades ago and are distanced from each other and their parents, both emotionally and physically.
- An aging parent may be married to or living with someone who is not the parent of his or her children. Tension between second spouses or live-in partners and children is sometimes unavoidable.
- Parents of the elder generation were characterized as "savers." Their children's generation could be considered "spenders." In the current economic environment, many adult children are relying on their parents' resources to maintain their own lifestyles, and in some instances take an unwholesome interest in how their parents' care decisions might impact their expected inheritance.

A Primer on Michigan Guardianship Law

In Michigan, there are guardians and conservators for minors (persons under 18); partial and plenary guardians for adults with developmental disabilities (persons who were impaired before reaching the age of 22); and guardians and conservators for adults who had the ability to manage their own affairs but are no longer able to do so as a result of cognitive impairment or physical limitations.

This article deals with the growth in litigation involving these adult guardianships and conservatorships. For the remainder of this article, the use of these terms will be limited to that meaning. Michigan law regarding adult guardianships is found in the Estates and Protected Individuals Code, specifically Article 5.

FAST FACTS

Adult guardianships are bringing family law concepts into probate courts—involving aging parents instead of children.

Standing to initiate a guardianship or conservatorship proceeding is very broad and should not be confused with notice requirements.

Probate court litigation involving vulnerable adults can relate to money, care needs, or simply control.

Standing to initiate either a guardianship or conservatorship proceeding is very broad. Pursuant to MCL 700.5303, “any person interested in the individual’s welfare” has standing to initiate a guardianship proceeding.¹ Similarly, “a person who is interested in the individual’s estate, affairs, or welfare” has standing to initiate a conservatorship proceeding.² Standing should not be confused with the concept of “interested persons” or those entitled to receive notice as set forth in MCR 5.125.

Venue for a guardianship is in the county where the individual “resides or is present.”³ Venue for a conservatorship is in the county where the individual resides, or if not residing in Michigan, in the county where the property of the individual is located.⁴

Generally speaking, to invoke a court’s authority in guardianship or conservatorship matters, it is necessary to show that individuals subject to petitions are impaired to the extent that they are unable to make decisions for themselves or protect themselves from exploitation. For a guardianship, this standard is set forth in MCL 700.1105(a) and MCL 700.5306(1). For a conservatorship, the standard is addressed in MCL 700.5401(3)(a) and (b).

In addition to establishing the impairment, it is also necessary to show that court involvement is needed. In other words, even if an individual is cognitively impaired, the court will not get involved if the individual created estate planning documents that provide for the management of his or her affairs during periods of incapacity, provided those documents are valid and the person appointed to manage the affairs is acting in the impaired adult’s best interests. In guardianship proceedings, this barrier is particularly strident.⁵ For a conservatorship, see MCL 700.5401(3)(b).

Finally, assuming these threshold issues are addressed, a court will then decide who should be appointed as guardian, conservator, or both. The law imposes priorities for appointment, starting with a person nominated by the impaired individual followed by a spouse and then adult children. To pass over someone with priority or defeat the appointment of someone with equal priority, the court looks for evidence of a how “suitable” a party is to serve.⁶

The Reasons People Litigate

While there are various scenarios that give rise to litigation in these types of cases, the most typical situations in which conflicts arise are described below.

Lack of Authority

The most obvious reason for establishing a guardianship or conservatorship is that the impaired person never created documents allowing someone else to make decisions on his or her behalf and circumstances have arisen requiring someone to have this authority. In such cases, the conflict, if there is one, may be simply about who is most suitable to serve as guardian or conservator.

Care Decisions

Litigation can arise from disagreements regarding how and where impaired elders should receive proper care. Should they

remain at home or be institutionalized? If remaining at home, should a family member be paid to provide care? If institutional care is needed, issues may arise concerning whether the elder should be placed in an institution where the costs of care can be provided through government programs such as Medicaid or veterans benefits and, if so, whether it is appropriate to take steps to preserve assets for the benefit of a spouse or other potential beneficiaries of the estate.

Removing a Fiduciary

If an elder has created estate planning documents providing for management of his or her affairs during periods of incapacity, disputes may arise about the manner in which the individual appointed to manage the affairs is acting. Proceedings may involve efforts to remove a trustee of a trust created by the impaired adult or to terminate the authority of an agent appointed under a durable power of attorney. Before court involvement, these cases might begin with, or include, a request that the trustee or agent account for the activities in which he or she engaged.

Reversing Decisions

Court involvement may occur as a result of an elder’s actions that family members believe he or she may not have understood or intended. Court proceedings may involve challenges to wills, trusts, trust amendments, deeds, and even the validity of a marriage; most often the proceedings involve allegations of lack of capacity and undue influence.

Conclusion

While many of the issues that generate these cases can be anticipated and addressed in good estate planning documents, even the best documents cannot eliminate the possibility of family feuding when a person becomes cognitively impaired. Families that want to battle will almost always find a way. ■

© 2012 Douglas G. Chalgian



Douglas G. Chalgian is a founding partner of the Chalgian & Tripp Law Offices, PLLC. He is past chair of the SBM Elder Law and Disability Rights Section and the Probate and Estate Planning Section. He is certified in elder law by the National Elder Law Foundation and is a Fellow of the American College of Trust and Estates Counsel. He is an adjunct professor at the Thomas M. Cooley Law School and a regular speaker and author for ICLE.

FOOTNOTES

1. MCL 700.5303(1).
2. MCL 700.5404(1).
3. MCL 700.5302.
4. MCL 700.5403.
5. See MCL 700.5306(5).
6. MCL 700.5313 (guardianship) and MCL 700.5409.