Guardianship and Conservatorship

Contested Proceedings

By Joseph P. Buttiglieri

Most attorneys realize we have a rapidly aging population in the United States. The baby boomers, born between 1946 and 1964, have not only started to reach the age of retirement, but are reaching ages when they are more likely to suffer from dementia, Alzheimer's disease, and other debilitating conditions that can lead to the necessity for guardianships and conservatorships.

Many people have executed appropriate estate planning documents and can avoid guardianship or conservatorship because they have durable powers of attorney and medical powers of attorney. However, a large portion of the population, either by default or because the planning documents they prepared are outdated or challenged, must rely on the probate court to appoint guardians, conservators, or both.

Many people realize their need for a guardian and conservator and some are so incapacitated they are unable to render an opinion, and these guardianships and conservatorships are established with a minimum of court involvement and no need for the trappings of contested proceedings such as depositions, interrogatories, pre-trial conferences, alternative dispute resolution, or trial. Despite this, there appears to be an increase in the number of litigated conservatorships and guardianships being handled by the probate court.

To properly represent clients seeking to obtain guardianship or conservatorship or properly defend against a guardianship or conservatorship, attorneys must be familiar with the statutes, procedures, and strategy for handling such cases, especially when contested. This can be a rewarding area of practice, and attorneys can render a real service to their clients by advocating zealously in a manner that serves the clients' best interests and addresses the concerns of the interested parties.

This article covers some of the important issues that need to be dealt with in handling these cases.

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Knowing the law and the facts

First, you must be familiar with the requirements that authorize the court to appoint a guardian or conservator. As to the appointment of a guardian, MCL 700.5306(1) provides that:

> The court may appoint a guardian if the court finds by clear and convincing evidence both that the individual for whom a guardian is sought is an incapacitated individual and that the appointment is necessary as a means of providing continuing care and supervision of the incapacitated individual, with each finding supported separately on the record. Alternately, the court may dismiss the proceeding or enter another appropriate order.

An incapacitated individual is defined by MCL 700.1105(a):

> "Incapacitated individual" means an individual who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, not including minority, to the extent of lacking sufficient understanding or capacity to make or communicate informed decisions.

The probate court's authority to appoint a conservator is described at MCL 700.5401(3), which provides:

> The court may appoint a conservator or make another protective order in relation to an individual's estate and affairs if the court determines both of the following:
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> (a) The individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance.
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> (b) The individual has property that will be wasted or dissipated unless proper management is provided, or money

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> is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money.

If an emergency exists, such as the need for an immediate medical decision or placement of an alleged ward, the court has authority, pursuant to MCL 700.5312(1), to appoint a temporary guardian upon greatly reduced notice with the requirement that a "full" hearing be held pursuant to MCL 700.5311 within 28 days. This allows the filing of a petition to resolve medical or other emergencies at a later time.

It is important to carefully examine a petition for guardianship to determine if the concern relates to the physical condition or the need for placement of the prospective ward, the need for medical care, or other related issues such as the protection of others affected by the behavior of the subject of the petition. It is equally important to carefully examine a petition for conservatorship to determine if the issues raised relate to an inability to pay bills and make appropriate decisions about investments or the protection of assets from third parties, such as telephone solicitors or alleged friends and family who may not have the best interests of the prospective ward at heart.

Interviewing witnesses in guardianship and conservatorship disputes is as vital, if not more so, than in any other case. Many times, witnesses will help develop the case for or against conservatorship and guardianship. You should also be aware of the ward's rights to request the appointment of a particular person or persons as guardian and conservator. There are situations in which it becomes obvious that a guardian or conservator will be appointed, but the most significant issue will be who will act as guardian or conservator. MCL 700.5409 sets forth the priorities for appointment of a conservator while priorities for appointment of a guardian are covered by MCL 700.5313. This is often a key issue in that the prospective ward may realize he or she needs assistance, but is adamant that it not be rendered by the very person who has filed the petition because of a belief that the person is trying to exert control over the prospective ward's life or financial affairs. When competing family members try to gain control over property or an individual, one of the most effective ways to defuse that competition is to appoint a disinterested third party as conservator and perhaps guardian.

Sometimes, a petition for conservatorship is filed because family members or a third party such as a protective services worker know or believe that an elderly adult is being financially disadvantaged or physically abused. If you work in this area, it is important to be aware of the vulnerable adult statute—MCL 750.145n regarding physical abuse and harm and MCL 750.145p concerning financial abuse.

Guardians ad litem

The importance of the guardian ad litem should not be underestimated or overestimated. Pursuant to MCL 700.5303(3), the court will appoint a guardian ad litem unless the individual is represented by legal counsel of his or her own choice. If you have been retained by the subject of a petition for guardianship or conservatorship, no guardian ad litem should be appointed; if an appointment has been made, you may be able to have it vacated.

The guardian ad litem is often an attorney familiar with probate law and procedure. He or she will interview the prospective ward and render a report to the court that can recommend the appointment of a guardian or conservator, opine that no guardian or conservator is needed, or inform the court that the individual has requested the appointment of an attorney or is represented by counsel and that the matter will be contested. The duties of the guardian ad litem are covered by MCL 700.5305, 700.5306a, and 700.5406.

Whether you represent the proponent or the proposed ward, it is always a good idea to contact the guardian ad litem as soon as you are aware of his or her appointment. By discussing the situation with the guardian ad litem, you often can craft a solution that will avoid a trial and solve the issues that have been raised. For example, the prospective ward may have sufficient competence and lucidity to execute powers of attorney that will eliminate the need for a guardianship and conservatorship. Working with the guardian ad litem can be advantageous; for example, it increases the likelihood that the court will support a negotiated settlement since it will be approved by the person it appointed to act as guardian ad litem.

Another area for negotiation is placement. Many times, the issues of guardianship have to do with whether the individual will continue to live in his or her home or be placed in either an assisted living facility or a more restrictive environment. Understanding the issues that caused the filing of the petition is instrumental in negotiating a solution while advocating for your client's best living situation.

Pre-trial or status conference

Most courts will conduct status or pretrial conferences, and it is important to be familiar with MCR 2.401, which is made applicable by MCR 5.141. The pre-trial or status conference is an opportunity to accomplish what is in your client's best interest. This includes simplification of issues, time necessary for discovery, necessity for amendments to pleadings, admissions of fact and documents, limiting the number of experts, settlement, alternative dispute resolution, identity of witnesses, length of the hearing, and other issues that may lead to the disposition of the matter. This is also the time to point out whether a jury trial has been demanded and otherwise set the tone and tenor of the forthcoming contested hearing.

Medical testimony

The court has authority under MCL 700.5304(1) to order that an individual alleged to be incapacitated be examined by a physician or mental health professional. The statute further provides that the individual alleged to be incapacitated has the right to secure an independent evaluation. Regarding a conservatorship petition, the court has the same authority to direct examination by a physician and the same right by the individual to an independent exam, all pursuant to MCL 700.5406(2).

Most counties request that a doctor's letter or other information from a medical care provider be included when filing a petition for guardianship or conservatorship. If you are opposing such a petition, it is important to gather medical records or a medical opinion against the guardianship or conservatorship. It is not unusual for the court to order an independent medical evaluation. Many times, the competing parties are able to agree on a facility or doctor to render an opinion. If you represent the ward, you may agree to a medical examination, but do not agree to be bound by one.

Alternative dispute resolution

MCR 5.143 provides that the court may submit any contested proceeding to mediation, case evaluation, or other alternative dispute resolution process. This is an opportunity to be of real service to clients who may not be able to withstand the vagaries of depositions and trials. Mediation, in particular, is well-suited to fashion solutions such as agreed-upon fiduciaries, how care will be provided, execution of powers of attorney, and creating a living situation that benefits the client and addresses the legitimate concerns of interested persons.

It is important to know there is a right to trial by jury for both guardianships and conservatorships. While such jury trials may be unusual, filing a demand for a jury can be an important and advantageous component of your strategy in defending against guardianships and conservatorships. A jury demand can help you negotiate the best resolution for your respective client. The right to jury trial is preserved in MCL 700.5304(5) for guardianships and MCL 700.5406(5) for conservatorships. It is also a good idea to be familiar with the rights of a person for whom a guardian is sought pursuant to MCL 700.5306a.

Strategy

When involved in contested guardianship or conservatorship proceedings, it is crucial to have a strategy. In developing a strategy, you must determine which goals you hope to accomplish for your client. If the goal is complete dismissal of the petitions, you will aggressively use the statutes and court rules to defend your client through the use of discovery tools such as interrogatories, depositions, a demand for a jury trial, and asserting all the rights to which your client is entitled as delineated by MCL 700.5306a concerning guardianships and MCL 700.5406 regarding conservatorships.

On the other hand, if it is acknowledged that some court involvement is necessary or inevitable, you can still plan a strategy to preserve as much of your client's independence as possible by using alternatives like powers of attorney, nominating your client's choice as fiduciary, and otherwise controlling the situation as much as possible. This is an area of the law in which you render your client a great service by counseling him or her and negotiating in the client's best interests a solution to an acknowledged problem such as an inability to manage assets or provide for self-care. There are many times when a person can continue to live in his or her home as opposed to being placed in a nursing home by obtaining needed services and assistance. With this in mind, be ready to assert the applicability of MCL 700.5316, which encourages self-reliance regarding incapacitated individuals, and MCL 700.5407, which mandates that the court encourage the development of maximum self-reliance and independence of a protected individual.

Conclusion

This article has briefly touched on some of the important issues one must consider when representing clients involved in guardianship and conservatorship proceedings. This is an area of the law that will continue to grow and can be interesting, important, and rewarding for attorneys involved in assisting individual clients and families with issues of incapacity and asset protection. ■

Joseph P. Buttiglieri is a shareholder at Kemp Klein Law Firm concentrating in the areas of probate litigation and administration, conservatorships, guardianships, wrongful death distributions, family law, and mediation. He is a popular speaker and writer on topics in his focus areas. In 2012, he became a certified mediator. Mr. Buttiglieri maintains an "AV" peer review rating with Martindale-Hubbell Law Directory*, the highest peer-review rating for attorneys.*