

THE COLORADO GUARDIANSHIP PROCESS

By W. Eric Kuhn, Esq.

Why do I need a Guardianship?

There are a number of reasons that a person may want to seek a guardianship over another person. Two common situations arise when a parent has a child with a disability or a child has a parent who is no longer able to take care of his or her affairs.

If you are a parent of a child with a disability you may eventually reach the point where a guardianship is necessary. When your child reaches eighteen, he or she is automatically legally emancipated. Even though you have always been there, and even though his or her mental age probably hasn't changed, you no longer have the authority to make decisions for that child. These decisions include where your child lives and what relationships he or she enters into.

On the other end of the spectrum, children with aging family members may be faced with a parent or grandparent who can no longer manage his or her affairs. If the parent has not executed valid durable medical and financial powers of attorney, the child will have no legal authority to deal with issues that arise on the parent's behalf.

In either of these situations, or at any other time when a loved one becomes incapable of caring for him or herself, a guardianship or conservatorship may be necessary. A guardian is responsible for the care of the individual and his or her healthcare and bodily decisions while the conservator is responsible for the financial decisions. These roles and processes are similar but there are important differences.

This article will only provide an overview of the guardianship process.

How do I get a Guardianship?

You can only become a guardian for a person who needs help managing his or her affairs through a court order. The process first involves filing a petition, which asks
(Continued on page next page)



PERSONAL NOTE FROM BRADLEY FRIGON

I hope you will join me in welcoming our newest staff member, Vanessa Salinas. Vanessa has been a paralegal since 2003 and brings a considerable amount of enthusiasm and experience to our office. Vanessa is a great addition to our staff and I know you will enjoy working with her.

I'm very fortunate to be invited to speak at national conferences around the country. However, I'm always happy to talk to smaller groups. If you would like me to speak to your organization please contact Vanessa.

I will be speaking at the following conferences in October and November:

Building Your Private Pay Referral Base through Elder Law Attorneys, National Association for Home Care & Hospice, National Convention, Denver, Colorado, October 9, 2007.

Special Needs Trust Overview and Case Law Update, National Structured Settlements Trade Association, Tampa, Florida, October 11, 2007.

Which Special Needs Trust, When and Why?, The Basics of Special Needs Trusts, Stetson University College of Law, Clearwater Beach, Florida, October 18, 2007.

Taxes, Special Needs Trusts and Retirement Plans, Special Needs Trust IX, Stetson University College of Law, Clearwater Beach, Florida, October 19, 2007.

Why Can't We All Just Get Along: The Battle Between Special Needs Trusts, Retirement Accounts, and Tax Rules, National Academy of Elder Law Attorneys, Advanced Elder Law Institute, Memphis, Tennessee, November 2, 2007.

Brad Frigon

THOUGHT FOR THE DAY

Estate Planning 101

When Dan found out he was going to inherit a fortune when his sickly father died, he decided to meet a woman to enjoy it with. So, one evening he went to a singles bar where he spotted the most beautiful woman he had ever seen. Her natural beauty took his breath away.

"I may look like just an ordinary man," he said as he walked up to her, "but in just a week or two, my father will die, and I'll inherit 20 million dollars." Impressed, the woman went home with him. Three days later, she became his stepmother.

Women are so much smarter than men.

Does your organization need a

speaker? If you would like Mr. Frigon to speak to your organization on such topics as financial planning for seniors, tax, estate planning, elder law, end of life decisions, Medicaid and Medicare, please contact the Law Offices of Bradley J. Frigon.



THE COLORADO GUARDIANSHIP PROCESS (cont.)

the court to appoint a guardian. The petition is filed by an "interested person," which is a person who cares about the affairs of the person who needs help. The person who needs help is referred to as a ward and is a proposed ward until the guardian is actually appointed. Colorado law lays out the order in which people have priority for appointment as guardian. The order of priority begins with the person nominated in a power of attorney. Next in line is the acting agent under a medical then a financial power of attorney. Third in line is the spouse or person nominated by the spouse. Fourth is the person's adult child. The list ends with the person's parent or a person nominated by the parent, or a person he or she has lived with for the past six months. Deviating from this list will require explanation to the court.

After the petition is filed, the court will appoint a court visitor whose role is to meet the proposed ward and explain what the legal proceedings mean and what will happen if a guardian is appointed. The visitor will also find out the proposed ward's feelings about the guardianship and will offer the opportunity to have a lawyer appointed to represent him or her. The visitor will then visit the place where the proposed ward will be living, meet with the prospective guardian, and will ensure that the prospective guardian understands his or her role.

At the end of this process, the court visitor will file a visitor's report with the court and make recommendations as whether they agree or disagree about appointing a guardian. The court visitor can also recommend that the court appoint a lawyer to represent the proposed ward's legal interests.

A hearing will now be scheduled with the court. The hearing, and the opportunity to be represented by a lawyer, are important constitutional safeguard of the ward's rights, because the ward will lose the legal ability to make decisions if a guardian is appointed. At that time the court will review the evidence before it. Before it can appoint a guardian the court must clearly find that the proposed ward is an "incapacitated person" and that his or her needs cannot be met in less restrictive ways. An incapacitated person is defined by the law as one "who is unable to receive or evaluate information or both or make or communicate decisions to such an extent that the individual lacks the ability to satisfy essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance."

Once the court finds that the interested person has met the above standard the court may appoint a guardian. The court has broad latitude to determine the arrangements and can enter any other protective order in place of a guardianship. In many cases, however, the court will approve the proposed guardian.

What does it mean when I'm a Guardian?

Once you are appointed as a guardian your work is just beginning. You now owe a series of duties to different people. Your first duty is to the court. You must file a guardian's report within 60 days of your appointment and every year you remain guardian. This report gives information about your ward's health including any

physical or mental conditions, diagnoses and prognoses. It includes your personal care plan for the ward, plans for any treatments or therapies, and plans for future care. It will also ask you for any other information that should be brought to the court's attention.

You also owe duties to your ward, which will depend on the circumstances of your case. You may need to decide where your ward lives and goes to school and when he or she goes to the doctor or receives medical care. You will need to meet the basic daily needs of your ward, including food, clothing and shelter. Under Colorado law you are normally not personally liable for the financial needs of your ward but you can become liable if you do not state that you are acting as a guardian or make a personal guarantee in your individual capacity.

Your duties to the ward may have been limited by the court and there are other limitations in the law. You cannot provide authorization to involuntarily receive treatment for mental illness, developmental disability, or alcoholism. The general philosophy of guardianship law is that you should exercise only so much of your powers as guardian as are necessary. The idea is to allow and foster the ward to develop the highest degree of independence and self-esteem possible under the circumstances.

You may also be compensated for serving as a guardian out of the funds of the ward. The law does not set out a particular fee schedule but requires that the fee is fair and reasonable considering the time spent and the outcome obtained. Some guardians only seek reimbursement for expenses while others seek hourly compensation. If you wish to seek compensation you must keep a record of your time spent acting as guardian, including descriptions of services performed.

It is extremely important that you follow the rules for guardians set out in the law. You could face contempt of court and sanctions if you do something forbidden by the court order appointing you. If you don't disclose that you are representing your ward you may be personally responsible for his or her debts. If you enter into transactions with your ward you may face liability from others for improper transactions. These, along with numerous others, are potential pitfalls facing a guardian who does not understand all of the rules imposed by Colorado law.

How do I stop being a Guardian?

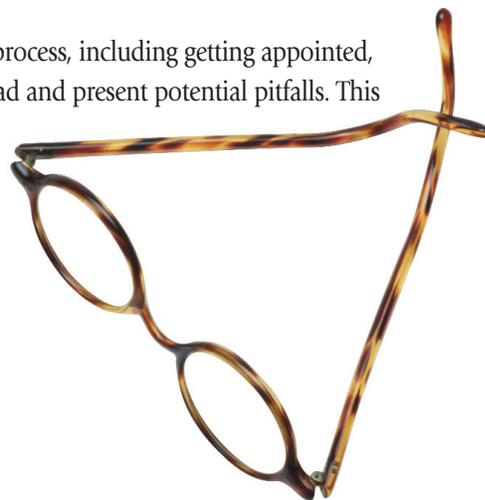
The guardianship process is often terminated by the death of the ward as many wards require care for their entire lives. However, you or the ward can also seek to terminate the guardianship or ask the court to appoint another guardian and relieve you of that responsibility.

Terminating a guardianship, other than by death of the ward, can only be accomplished by court order. A court proceeding will be required to wind up the guardianship and you can seek court approval of your actions and a discharge of liability. A court order is also required if you plan to move the ward out of the state. Once you receive this court order you will no longer be liable for your actions as guardian and you will be released from your duties. The court will then appoint another guardian who will have these duties or the court will terminate the guardianship and the former ward will regain the legal ability to make decisions.

Conclusion

Guardianship proceedings can be full of complicated issues and they span the entire process, including getting appointed, serving, and terminating a guardianship. The powers and duties of a guardian are broad and present potential pitfalls. This overview can only scratch the surface with regard to the information you will need to know if you are appointed as a guardian.

If you wish to try to get a guardianship over a family member or loved one it is important to get advice and in depth information from a trusted source. This is equally true if you need assistance in making decisions as guardian or in terminating a guardianship. We are always happy to answer questions or assist you with your legal needs related to the guardianship process.



Nursing Home Admission Contracts

Moving a family member to a nursing home is never a simple process. Finding the right facility, coordinating the move, managing a very sick family member and dealing with all of your emotions will easily overwhelm most of us. To make matters more difficult, the nursing home is asking you to sign a very complicated admissions agreement. Here is what you need to know before you sign.

Most importantly, take the time to review the agreement with your attorney because it may contain provisions that make you personally responsible for the bill. You need to pay very close attention to a couple of provisions.

You should become familiar with the term "responsible party." A "responsible party" is the person who is ultimately required to pay the bill. Becoming a "responsible party" is like co-signing a car loan with a child with one big difference. Nursing homes are prohibited from requiring a third party to guarantee payment of a nursing home bill. Always keep in mind that it is not illegal for the nursing home to request that you voluntarily agree to be the "responsible party". It is only illegal for the nursing home to require that you sign as the "responsible party" as a condition to admitting your family member.

It is better if the family member moving in to the nursing home signs the agreement. If that is not possible, you should make certain that you are signing the admission agreement in your capacity as the agent under a financial durable power of attorney. You should not sign the agreement in your individual capacity. If you do not have a financial durable power of attorney, it may be necessary to start guardianship proceedings for your family member.

Many admission agreements include a provision that requires all disputes regarding the resident's care to be decided by arbitration. An arbitration provision is not illegal, but by agreeing to such a provision you give up your right to go to court to resolve a dispute with the facility. The nursing home cannot require you to sign an arbitration provision as a condition to admit your family member, but they almost always include an arbitration provision. We recommend that you cross out the arbitration language in the agreement before signing.

You should also be aware of other provisions that nursing home cannot require as a mandatory part of the admission agreement. Remember, just because the law makes it illegal to require such a provision does not mean the nursing home cannot request that you voluntarily agree to it.

1. A nursing home cannot require a Medicare or Medicaid recipient to pay the private rate for a period of time. The nursing home also cannot require a resident to affirm that he or she is not eligible for Medicare or Medicaid.
2. The nursing home cannot evict a resident for any reason other than the following: the nursing home cannot meet the resident's needs, the resident's health has improved, the resident's presence is endangering other residents, the resident has not paid, or the nursing home is ceasing operations.
3. Additionally, any provision that waives the nursing home's liability for lost or stolen personal items is illegal. It is also illegal for the nursing home to waive liability for the resident's health.

Know your rights before you sign a nursing home admission contract.

Help us update our records

If you have changed your name or address, or if you are receiving more than one copy of LEGALVIEW, please contact us by phone, fax or email so we may correct our records.

The Law Offices of Bradley J. Frigon is a member of the Special Needs Alliance, a national network of attorneys that practice disability law. As a member of the Special Needs Alliance, we help preserve Medicaid, Medicare and SSI eligibility for people receiving personal injury damage awards, workers' compensation settlements, inheritances, or their own personal assets. This assistance includes the creation of special needs trusts, Medicare set aside arrangements, qualified settlement trusts, and tax planning. Visit the Special Needs Alliance website at www.specialneedsalliance.com.

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