

Guardianship

- CP: Good morning and welcome to Your Legal Right. My name is Chris Placitella. I'm a partner here at Wilentz, Goldman & Spitzer and we're here this morning with Linda Lashbrook to discuss the topic of guardianship. Linda is one of New Jersey's foremost authorities on the issue and she'll have some important information to impart to you today. As always, the information that you're provided in this broadcast is not by way of legal advice. It is information for you to take in, understand, so that when you go visit with an attorney or discuss your legal options you'll be better informed as to what the proper course of conduct might be. Moreover, we are currently here in New Jersey and most of the information that you will receive relate to New Jersey law, although some of the principles announced during this broadcast will, in fact, have some broader application. But, again, there is no substitute for a visit or consultation with an attorney to understand your individual legal rights. With that being said during the course of this broadcast, if you should have any general questions, you can type them in on the interface that you see underneath this picture and we will attempt to address them here. If, for any reason you would like to review this broadcast or would like to forward it to someone else, or, or just watch it at a different point in time it will be on demand on our website at wilentztv.com probably within 24 hours. With that being said I'd like to welcome this morning my friend and colleague Linda Lashbrook.
- LL: Good morning Chris. Very well thank you.
- CP: Thanks for joining us.
- LL: Thanks for asking me.
- CP: Your topic is guardianship.
- LL: Right.
- CP: And the typical thing you usually hear when you're listening to TV or movies is he or she is my legal guardian or you're not the legal guardian, I'm the legal guardian. What does that mean? What is a legal guardian?
- LL: Well, the kinds of things you're talking about, that guardian may never have been appointed, it may just be a parent who is a guardian by reason of being a parent up until the age of 18. What I specialize in is guardianships that are created by the court. A regular guardianship is a protective arrangement under which the Judge of the Superior Court appoints one person to take over all of the financial and personal affairs of another person after it's been shown to the court that the person cannot by reason of mental incapacity handle its own affairs and the guardian puts up a bond for any money or assets that are gonna come into his or her hand and continues round from there making all the decisions for the other person.

CP: Under what circumstances is the, does the issue of guardianship arise? Maybe it can be, I know you did it briefly, but you can be more specific as to --

LL: Sure.

CP: -- why is a guardian needed. Under what circumstances is the need created?

LL: Well, sometimes the wards, once you have a guardian you're known as a ward and sometimes their children, sometimes their developmentally disabled or brain damaged people of any age who can't make their own decision. Most of the time they're aged people who because of Alzheimer's or strokes or other illnesses have lost the ability to handle their own affairs. Sometimes they're people who have mental illnesses that are not under control and they can't make their own decisions. Sometimes they're people who, by reason of alcoholism or drug addiction are permanently or temporarily unable to handle their own affairs, and in all these situations once the court is convinced that you cannot handle your own affairs, the way is open to appoint a guardian.

CP: Okay, so we, we really have a two different issues. One, every parent is a guardian of their child.

LL: Right.

CP: Up until what age?

LL: Up until the age of 18. Usually, let's say you have a developmentally disabled child who receives services from the State of New Jersey. Once that child reaches the age of 18 the parent is not really able to make decisions for the child so the Division of Developmental Disabilities will usually ask the parents to be appointed as guardians just so they can keep on making decisions, you know, about group homes and things like that.

CP: Okay, so I think that's an important issue. As a parent who's caring for a, a disabled child there is a magic bright line that one crosses when that child becomes 18.

LL: Exactly.

CP: And the parent needs to plan for that.

LL: Absolutely in advance.

CP: What is the line of differentiation for some child who needs a lot of extra care and who turns 18 and is out on his or her own and a child who turns 18 and is then required or needs a guardian. What, how's that determination made?

LL: Well, usually by the time the child is approaching 18 you know what his or her capabilities are going to be, you'll know whether he's going to be able to have a

more or less normal life and make more or less normal decisions, but you know that you're not going to live forever and so you might have yourself appointed guardian, but you may also make plans for after you're gone. Parents who have the assets to do it often set up special kinds of trusts for disabled children so that even when the parents are gone there will be funds and there will be people responsible to make sure that the child still has a pleasant, comfortable, rewarding life you know.

CP: So do you, we'll deal with the children first, if that's all right.

LL: Sure.

CP: And then we'll talk about the elderly which I think is the other major issue discussed. When it involves a child and it's your child, is it actually necessary for you to go to court to, to be declared that child's guardian after the age of 18?

LL: Yes, it is, it is. Although it's a somewhat shortened procedure because usually your child is receiving state aid of some kind, maybe in a sheltered home, or maybe getting special education and they have a shortened procedure just for those children in that category, so.

CP: And what, what is the process, what happens? Do you have to, you have to see a lawyer, can you do it on your own?

LL: Well, with --

CP: Do you have to file papers? What is it?

LL: In all guardianships you start out by filing a set of papers with the court and the first papers are a Verified Complaint. Verified means it's sworn to by the person who's asking to be guardian and not just made up by the lawyers. An Order to Show Cause which is a paper that's served on every possible interested party telling them that you're about to start a guardianship and if they have any objection to it this is the time for them to make their objections known. And you have to also have before you even submit paper number one, you have to have the Affidavits or Certifications of two medical people. It used to be until September 1st, two physicians and now in New Jersey it's one physician and one psychologist, and their Affidavits have to say that they examined and evaluated the person or the child and their diagnosis, whatever it may be and they need to say that in their carefully considered medical opinion this person is not by reason of mental incapacity able to handle his or her own affairs and a prognosis as to whether they might ever be able to and it also has to state whether in their medical opinion the person can come to court for the proceeding or not. And so you have this whole package and you file it with the court and that gets the ball rolling. You actually file it with the Surrogate in New Jersey of the county that the person lives in and that's transmitted to the court and then it goes on from there.

CP: Now, is it -- is the child, for lack of better, better description, if the child, for instance, at age 19 could work, but is not able to handle his or her finances or get in, or drive a car, I mean, what are the factors that go into making these kinds of decisions.

LL: Well it used to be that you just have guardianship or not guardianship and the guardian had all of the power and made all of the decisions. The courts in New Jersey have come to realize, we have very good courts in New Jersey that one size may not necessarily fit all. A person who has a guardian because he can't handle his financial affairs or be trusted with money may be perfectly able to vote or decide where to live or to pick a roommate or to work in a relatively sheltered environment, and a lot of other things. So today when we start a guardianship and when we draw up the judgment that we want the court to sign in the end, we try to build in as many wrinkles and details as this particular person might need. You might have a very, very old person who really can't do much of anything, but desperately wants to vote in this election -- as we make this recording we're expecting an election. You could certainly put it into the guardianship judgment that this person will be allowed to and facilitated in going to vote whenever she wants to, so if the Judge can understand what it is this person needs, that's what you accomplish, and I should mention that the first thing the court does when it gets the papers is appoint an attorney for the person who's going to have a guardian to be his spokesperson in the courtroom.

CP: Okay, so let, I want to just break this down one piece at a time. You start a guardianship proceeding with filing papers.

LL: Yes.

CP: The person who is the subject of the proceeding may or may not agree with your -

LL: Oh right.

CP: -- with how you're going forward.

LL: Right. You have to serve a set of the papers on his, let's say it's a man and the papers make it clear that he can object to it, he can hire a private attorney, he can even have a jury trial, although I've never actually seen that done, but he can object both to the idea of being adjudicated as mentally incapacitated or to the choice of the person who has volunteered to be the guardian. He might not want number one son to be the guardian. He might want his daughter or his niece.

CP: Okay. So the first thing is you file a paper. The second thing is notice is given.

LL: Right.

CP: The person at that point has a choice to make whether they want to contest the guardianship or not.

LL: Right.

CP: Even if they don't contest the guardianship the court will appoint a lawyer to represent that person for that limited purpose.

LL: Yes.

CP: Okay. Then what happens. Do you actually go to court?

LL: Oh, in the end you do. In between the, the court fills out the papers with a date of about 30 days or 6 weeks hence for a hearing and in between the court appointed attorney investigates the situation, interviews all the parties, interviews the subject especially, may talk to the doctors, we usually check to see if the finances of the person are as they are described in the complaint and then submits a report to the court. In one sense the court appointed attorney is the eyes and ears of the court because the court is not going to go out and meet everybody. But, in another sense, he's only the advocate for the person who's supposedly incapacitated. He's not there to say what's in the best interest of that person. And if he begins to feel that what the person wants and what he's going to argue for is not in the best interest of the person, he is required to tell the court, the attorney is, so that the court can appoint another person, a guardian ad litem, usually, to argue for the best interest, and that's a lot like a custody case in a child situation. You may have a person who is to most everybody's opinion quite incapable of handling his own affairs but he may argue very _____, I want to do this, I want to move to Florida, I want my money in my hands right now. I want to give a gift, you know, I want to give \$10,000 to so and so and it's all not in his best interest, so in that kind of a situation it would be good to have another attorney who could look at the situation dispassionately and say to the court, I know that's what he wants Your Honor, but in my opinion his best interest would be better served by a guardianship or whatever it is.

CP: So when this whole thing comes to a head and I'm assuming a lot of times it's peaceful and --

LL: Most of the time it's uneventful unless there's a dispute.

CP: Right, but if there is an event, or there is a dispute, where is it resolved. Is it resolved inside a court room?

LL: Well, if there's no dispute it's usually resolved at that first hearing that was specified in the initial papers. If someone, let's say a son has applied to be the guardian of his father, sends the papers to his siblings and his brother said no, you would be a terrible guardian for our father, you know, you're bankrupt or whatever, I should be the guardian or our sister should be the guardian. That person, usually through an attorney, sends in papers also. So once the court realizes that this is a disputed issue, a contested issue, it may set down another date for more of a full dress hearing where people will actually testify as to what they think. Sometimes there's a question about what the doctors have said. In

that case the court can order its own evaluation, you know, a doctor of its own. The court can certainly require the incapacitated person to come to court so as to get a look at them and decide for the court all in satisfaction whether there appears to be incapacity. I've been involved in a case where a lady came to court in her wheelchair and answered the judge's questions and convinced the judge that she was not ready for a guardianship at this time and she went home on her own so it can, it can go any way.

CP: Now who can, I want to get in a few minutes to the issue of, in particular, the Alzheimers which I'm assuming is a big issue for a lot of families and where the lines are drawn, but who is it that can qualify to be a guardian?

LL: Well, theoretically --

CP: That's one of the questions we received.

LL: Well, theoretically, it could be anybody who's concerned about the subject. Let's call the person the subject. If they're married there's a presumption in the statute and in the rules that the spouse will be the appropriate guardian so if it's an elderly man and he's got a spouse who is not herself disabled and has, you know, is able to take on the responsibility, the spouse will normally be the applicant and she will normally be favored. Other than a spouse --

CP: The wife ultimately wins in the end?

LL: Huh, well. You've been looking to too many of those divorce lawyers -- you're getting biased. If the spouse, there's no spouse, or the spouse himself is, you know, a little out of it or, or incapable, then it may, it will be the next of kin who gets a presumption. So, one of the children, or perhaps a younger sibling or sometimes a grandchild. You know, sometimes the intervening generation has died off and is a very aged person and it's a grandchild. These are only presumptions, however, the job, if there's a dispute of any kind, the court has to figure out what would be in the person's best interest. The next of kin may not be in the person's best interest.

CP: Well, I want to get to that, but let me just talk about the presumptions for a second.

LL: Yeah, presumption is spouse or next of kin. However, if there's nobody, no relative, it could be a friend, it could be a relative by marriage and not a blood relative, it could be a neighbor that really likes the person and realizes that they're handing out their money to the people that come to the door or something like that. If there's absolutely no one and the person is, for example, in a hospital or institution, the institution can start the guardianship because they're going to need someone to make decisions for this person who can't make decisions for him or herself.

CP: So let's take an example. There are two siblings, both of whom want to be guardian for their brother or sister. And, what criteria are used by the court to make the determination as to who is best fit to be a guardian for that person?

LL: Well, usually when there's a dispute, the person who's disputing the applicant's right to become guardian has reasons. They will say, my brother spent time in jail because he stole money from grandpa or my brother's emotionally ill and he's not capable of taking care of himself, let alone of our parent. You know, it could be any number of things and it's up to the judge to try to sift through the fact. As you know, in your field, you do a lot of discovery to find out all the facts and documents and, and testimony and evidence before the hearing. We may even need discovery in a guardianship matter to find out the truth of the allegations that the different parties make. Often, unfortunately, when there's a dispute it's children who have always disagreed and now they're middle aged people and they still disagree and the court has to figure out what to do. I once had a situation where three daughters all wanted to be mother's guardian. Mother had a lot of assets I might note. The one thing I said to the court was, I was representing one of the daughters, whatever you do, just don't appoint them jointly because they've never gotten along in 50 years and there's no reason to hope they'll get along now. But, the judge did appoint them jointly and they continued to fight so, you know, you can't guess them all right.

CP: All right. Let's just jump ahead for a second because I think we have a foundation. It's becoming increasingly clear that a parent or an older sibling, well, let's just say a parent, at this point, is going to be in need of some special care and that their mental faculties are deteriorating. What is the point where the line is drawn where the Court will say, okay, now is the time? What is it that they are looking at first? And then I'll ask – the second question I have is how can caring family members best plan for this, you know, in a compassionate way that deals with these issues as they go forward?

LL: Well, the best way to avoid a full-blown guardianship, of course, is to think ahead, not let it go too far. When the person is completely incapable of making decisions you've really waited too long, there's not going to be any choice. If decisions have to be made a guardianship will have to be put in place. But if a person, on her own, let's say, or with the assistance of the family, saying, Mom, you can't balance your checkbook any more, recognizes that she may become incapacitated some time in the not too distant future, she can make arrangements for that ahead of time without going to guardianship. There's two things that can be done, one of them, I'm sure familiar to your viewers is, the power of attorney. A power of attorney is a lot cheaper than a guardianship, a lot easier, and it doesn't require the supervision of the Court. And a power of attorney, which you should have written by a lawyer, can be as expansive as you like or as narrow and focused as you like. It can give all the powers of a guardianship to the son, make every decision for me as soon as I become disabled or whatever, or it can be very small. You can say, you can write checks on my account at the Sovereign Bank but you can't touch my IRS, my IRA or whatever. It can include or not include

medical decisions. You know, you've heard of the living will and the advance health care directive for people to be nominated to make your health decisions. You can even have a power of attorney that's only about medical decisions. And you can make the power of attorney either take effect immediately, you can go right down and write my checks for the gas company, or not take effect until I become incapacitated, and you can include in there how we'll decide when I'm incapacitated, because a parent doesn't want the child to just say, okay, Mom, I've decided you're incapacitated, I'm in charge from now on. You want to have it in black and white in some way so that other family members, as well as the nominee, will agree that now is the time for the power of attorney.

The other solution that's less than a guardianship is called a conservatorship. This also needs to be done while the person, let's say the elderly person, is still pretty much understanding what's going on. Then the Court will appoint a conservator, usually of the person's choice, but the Court's choice, if that's what the person wants, to take care of all the finances and other arrangements and the person consents to that person. And the conservator is under the supervision of the Court, posts a bond, just the way a guardian would. The main difference is that the conservatorship could be revoked at any time if the person who is the conservatee, as we call them, decides that they don't want it to be in place any more. So, if people think ahead, and we all know we're going to get old, if we're lucky we're going to get old, so there's no reason not to think ahead, and talk to your attorney about a power of attorney. What will I do when I can't figure out my checkbook any more? Or I can't understand these Medicare reimbursement forms that I have to figure out?

CP: I can't figure that stuff out now.

LL: Right. And the hardest part for them may be choosing the most trustworthy person, because, you know, we don't always guess right on who's trustworthy.

CP: But if you want some control over your own affairs or you want to minimize the bickering within your own family --

LL: -- exactly.

CP: It's within your power --

LL: Yep.

CP: -- and control to do that.

LL: That's right, that's exactly what you should do. Parents should talk to their children about it and children should talk to their aging parents about it before there is any real need to get involved. Powers of attorney usually work, I mean permanently, unless you have some very argumentative family, you know, in which case all bets are off. People will try to get you to revoke your power of

