Guardianship in New Hampshire

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1. Introduction. A person with disabilities should have the opportunity to make decisions he or she is able to make with such nonbinding advice as is appropriate on an informal basis. However, when a person is legally not competent to make decisions, then other options need to be explored.

When a person is not legally competent, guardianship is generally the best approach when there had been no opportunity for the client to give powers of attorney for health care and financial matters prior to becoming legally incapacitated. "Incapacitated" for guardianship purposes means the person is likely to suffer substantial harm because of an inability to provide for his or her personal needs for one or more of the following: food, clothing, shelter, health care, safety or management of property or financial affairs.

In the situations of medication or other medical attention, for example, the question may arise whether a physician will decide that the disabled person is not able to give informed consent. If not, the physician may not be in a position to prescribe medication or even operate until a guardianship is established (unless a power of attorney for health care had already been given by the patient during a period of capacity) even though the medication or surgery is needed. Also, in deciding about living arrangements and services, sometimes a guardianship is necessary if the person with disabilities is not able to give informed consent, for example, to a rental agreement or to planned individual services (and had not given appropriate financial and health care powers of attorney ahead of time during a period of capacity). It may also be difficult to access records or be admitted to attend meetings about health or social services without a guardianship.

2. Establishing a guardianship. A guardianship is established by a family member or other person familiar to the disabled person, explaining to the Probate Judge what the disabled person is not able to do, and why he or she cannot live independently and make informed decisions. The Court appoints an attorney to conduct an investigation and to be present in Court to cross examine and test the petition.

When considering petitioning for guardianship, ask: What was the precipitating factor? What is the proposed ward's daily routine? What are the specific functional limitations which have caused the client to consider guardianship? Ask whether the person with disabilities, any family members, service providers or others are opposed to the guardianship and, if so, why.

Consider alternatives to guardianship including no fiduciary arrangement at all, powers of attorney, trusts, or conservatorship (RSA 464-A:13-20). Depending upon the nature of the disability, other possible alternatives to guardianship, if available and sufficient, including under RSA 464-A:2: visiting nurses, homemakers, home health aides, adult day care and multipurpose senior citizen centers, representative and protective payees and residential care facilities.

The Court petition requires a detailed statement of "specific factual allegations" concerning the person's transactions, actions and actual occurrences which support the granting of the petition for guardianship in accordance with RSA 464-A:III and In re Delucca 121 N.H. 71 (1981). If the petition does not set forth sufficient factual details of actions and occurrences, the Court-appointed attorney may feel that the petition is insufficient. An example of specific actions or occurrences would be: "The proposed ward when asked was unable to identify the current year,

or the day, month and year of his birth." Another example would be: "The proposed ward asked no questions at all after he was advised by his physician that he needed an operation." It is permitted to allege specific conditions which are ongoing and occur every day, but they should be specific. An example of this "ongoing" type of action or occurrence would be: "the proposed ward has not in the last six months been observed reading, writing or speaking."

The petition needs to show a pattern of specific factual allegations which prove the need for a guardianship, beyond a reasonable doubt. Under RSA 464-A:2 XI: "Isolated instances of simple negligence or improvidence, lack of resources or any act, occurrence or statement if that act, occurrence or statement is the product of an informed judgment shall not constitute evidence of inability to provide for personal needs or to manage property."

3. <u>Choosing a guardian</u>. Discuss and decide who should be the proposed guardian. It is possible to request a sole guardian, a co-guardianship arrangement or a divided duty guardianship arrangement. An example of a divided duty guardianship arrangement would be to have one person as guardian over the person and another person as guardian over the estate. A co-guardianship would involve two people serving together as co-guardians over the person, or over the estate, or both person and estate. A co-guardianship might involve the two parents, or a parent and sibling, or a spouse and adult child. It is not a good idea to have more people serve as co-guardians than can easily join together to make a decision. Also, check to determine whether a proposed guardian or co-guardian has a conflict of interest under RSA 464-A:10 .

A public guardian may be requested as sole guardian under RSA 547-B:3, because "there is no relative, friend, or other interested person available, willing and able to serve." A public guardian may also be requested to serve as co-guardian with a relative or friend under RSA 547-B:5. If a public guardian is serving as co-guardian with a family member or friend, then RSA 547-B:5 provides that the public guardian's decision shall prevail if there is a disagreement until reviewed by the Court. The family member or friend should be advised of this ahead of time, so it does not come as a shock when mentioned at the hearing or after the hearing. Also, if you are requesting a public guardian, remember to seek N.H. Department of Health & Human Services approval prior to filing the petition.

If a guardianship of the estate is sought, select an independent appraiser to list and appraise the ward's assets to determine specific values. It is not necessary to have an appraiser in the event you are seeking guardianship over the person only.

The duties of a guardian over the person include arranging services, deciding where the ward lives, making medical decisions, protecting the civil rights of the ward and visiting the ward regularly. The guardian must act independently of the service providers, and make independent informed decisions on behalf of the disabled person. A bond is required in all cases. If the ward's assets are small or it is a guardianship over the person only, a small bond without sureties is all that is generally ordered. (A bond with sureties is an insurance policy in case the guardian acts unlawfully). The Court expects that the proposed guardian will be present at the hearing. If the proposed guardian is a family member and does not come to the hearing, the Judge may wonder whether that family member understands the duties of guardianship and whether he or she is willing to accept the responsibility. The proposed ward is also generally present at the hearing

(RSA 464-A:8), unless excused by a physician and there is a Court form for such a physician's opinion.

Guardianship over the person of a disabled citizen also requires filing a short statement every year with the Probate Court stating essentially how the person's life is going. It is also possible, but often not desirable, to obtain guardianship over the ward's money. This might be thought desirable in the event the person with disabilities has substantial assets, but it does require annual financial reports to the Probate Court every year. Often financial reporting to the Court would only duplicate, with an additional form to fill out, financial reports already made to the IRS, the social security representative payee system, the person with disabilities and others. At times, as an alternative to guardianship over the estate, a trust is established, with its own accounting procedures, by the person who is the source of the disabled person's assets. The guardianship law requires that other options be explored before guardianship is sought. RSA 464-A:2, 9 III(c). A special needs trust is a less restrictive alternative than a guardianship of the estate and also allows for remaining eligible for safety net services.

4. The five biggest pitfalls. The five biggest pitfalls in the guardianship statute to watch out for, in preparing a guardianship petition, are: (1) RSA 464-A:2 XI which requires technical compliance with specific 20 day and 6 month time frames for your evidence of need for guardianship; (2) RSA 464-A:4 III which requires that you have in your petition a detailed statement of specific factual allegations rather than just summary statements or general language; (3) RSA 464-A:8 IV which states that you have the burden of proof beyond a reasonable doubt; (4) RSA 464-A:2 and 9 III(c) which require you to show that available alternative resources do not exist to suitably substitute for guardianship; and (5) RSA 464-A:8 II which requires that a physician's affidavit and petitioner's statement be filed twenty-four hours before the hearing to excuse the proposed ward's attendance unless the ward is out of state or has changed his or her mind within that twenty-four hour period.

5. Other guardianship statutes. Other guardianship statutes may be involved under special circumstances: Determine whether the proposed ward is under the age of eighteen, and if so, see RSA 463 and 11 N.H. Practice ch. 70. In addition, determine whether the proposed ward is a veteran and, if so, see RSA 465 and 11 N.H. Practice ch. 71. Consider whether a civil commitment is involved, and, if so, see RSA 135-C. Also, determine whether the disability was due to a cause for which a statute of limitation to bring a claim must be considered. Determine whether a special education or other claim is warranted under RSA 186-C; 42 U.S.C. sec. 1983; 20 U.S.C. sec. 1401 et seq.; sec. 504 of the Rehabilitation Act of 1973; 29 U.S.C. sec. 794.2.

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