

TBA General Practice Probate Practice and Procedure Conservatorships/Guardianships

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Crimes Against the Elderly Report

2009-2011



Department of Health Elderly or Vulnerable Registry

- The Tennessee Department of Health is required by state law and federal regulations to maintain a **registry of persons** who have abused, neglected, or misappropriated personal property. Allegations of abuse, neglect, or misappropriation of personal property against individuals are investigated thoroughly. Substantiated complaints are referred to the Office of General Counsel for review and processing.

CONSERVATORSHIP/GUARDIANSHIP

- Conservatorship
- Distinction between Conservatorship and Guardianship (title 34)
 - Persons with lack of mental or physical capacity to make decisions in one or more important areas of their lives (person with a disability) may need a conservator, due to mental or physical impairment. (The state statute also recognizes an action for a conservator over an entity, but my talk is geared toward individuals).

Guardianship

- A guardianship is created by the court to provide partial or full supervision, protection and assistance of the person or property, or both, of a minor. A minor who has an estate \$20,000 or over, must have a guardianship, unless there is good cause shown otherwise.

When is a Conservatorship or Guardianship needed?

– Consider who is coming to you and asking for the legal fiduciary status to be established:

- A family member, concerned friend, (learn of their background to determine suitability of the person to serve.
- **NOTE:** the proposed conservator or guardian must be able to qualify for a bond and fulfill all requirements, such as
- accountings and proposing and adhering to a property plan.

Is it a situation more appropriate under the Power of Attorney (POA) for Care of Minor Child Act?

- Illness of parent
- Incarceration of parent
- Physical or mental impairment of parent
- Natural disaster that destroyed the child's home

Initiating a Conservatorship or Guardianship.

- A petition is needed, (T.C.A. §34-3-104) stating the nature of the disability (or whether it is a minor, needing a guardianship) and make sure you are in the court which has jurisdiction over the individual.

Include a Report from an Examiner

- **Include a report from an examiner, who has examined the respondent within 90 days of the petition, stating the diagnosis with the nature and extent of disability. The report should include the reasons the examiner deems a respondent in need of a conservator.**

Guardian *ad Litem*

- Prepare, and have signed by judge, an Order Appointing Guardian *ad litem*.

GAL

- The GAL has a duty to the court to impartially investigate.
- The GAL has a duty to the court to provide a report to the court
- §34-1-107 (d)(1).
- §34-1-107 (d)(2) (D) requires the report to include:
 - Whether a fiduciary should be appointed,
 - Whether the proposed fiduciary is the appropriate person to be appointed, and
- Set forth any other matters that are appropriate

§34-1-107 (d)(3) , requires the GAL to:

- **conduct an “in person interview” with the proposed ward,**
 - **review the sworn examiner’s report required by §34-3-105,**
- **Note: As GAL, I recommend that you review the entire medical records, including other doctors than the one who makes the sworn report of the examiner.**
 - **review the description of the respondent’s physical and mental condition,**
 - **review “how the condition may “impair the respondent’s ability to function normally”,**
 - **§34-1-107 (d)(4) requires investigation of the property of the respondent and the financial circumstance of respondent.**

Hearing

- If good cause (life threatening condition to the minor or person with a disability) is shown that there needs to be a hearing in less than seven (7) days, then the court can do it sooner. Shelby County does a swift job of scheduling conservatorship hearings soon as feasible and within the statutory rules. Emergency Conservatorships are discussed later.

Respondent's Due Process

- The respondent has a right to a hearing §34-1-106 and:
 - right to ask for an attorney *ad litem* and right to have one appointed,
 - right to attend all hearings,
 - right to call witnesses and present evidence,
 - right to cross examine witnesses, and

Protective Orders

- As of July 2013 revisions, T.C.A. § 34-3-106: to request a protective order placing health and financial records under seal, including reports provided pursuant to §34-3-105 (c)

At the Hearing

- The judge rules on the respondent's competence and whether conservatorship is necessary, and if so, in which areas (read this as the court deciding which rights will be taken away from the ward and given to the conservator).
- 2013 The clerk will mark the fiduciary letters prominently with the word "LIMITED", if the Court did not grant the fiduciary unlimited authority over the person and property.

Be Careful What You Ask For

- The court appoints the conservator, so it may or may not be the petitioner. The court issues an order defining the areas over which the conservator will have authority.

If the situation is an emergency:

- If the situation is an emergency, you can use an expedited procedure.
 - File the petition.
- Practice tip: Determine if you have facts that indicate that:
- -the traditional process/ time frame for obtaining a hearing on a conservatorship, would cause delay that would be of “substantial harm” to the respondents health, safety, or welfare, and
- -No other person has authority or is willing to act on behalf of the respondent,
- If you can present the facts to satisfy these two prongs, then the Court may appoint an emergency guardian or conservator.

Emergency Petitions (cont'd)

- An attorney *ad litem* is appointed.
- A GAL can be appointed.
- Ask for a quick setting for the hearing
- Give reasonable notice as required, as quickly and well documented as possible, so that you are ready to proceed, when you get before the Court. You do not want a delay because “the ball was dropped”, so to speak, relative to informing the respondent, relatives and if necessary residential care facility of the time and date for the expedited hearing.

The emergency order is for up to 60 days.

- An order will be issued by the Court on an emergency conservatorship, as appropriate and can provide for an appointment of a conservator, for up to 60 days.

Tennessee Commission on Aging and Disability

Jim Shulman, Executive Director

Elder Abuse

Currently in Tennessee, only 1 in 23 cases of elder abuse is reported. Many times it's because the victim lives with someone who controls the elder's access to the outside world, finances, meals, medication, and everything else. Bruises go unnoticed, and the behavioral signs aren't witnessed, so the abuse continues.

More than two-thirds of elder abuse perpetrators are family members.

Noteworthy 2013 and 2014 Changes

- **The 2013/14 legislative changes are attached:**
 - **2013 revisions make clear that the petitioner or other person can be assessed the costs, so it may not come out of the respondent's estate, just because you ask for that in the petition.**
 - **The amendments of 2013 are not to be construed to indicate that Chapter 34 does not supersede the Tennessee Adult Protection Act (TAPA). Copies of the most recent amendments to TAPA are attached.**
 - **Although I do use the words disabled person for short-form convenience, the act has replaced these word to read Person with a disability.**

2013/14 Amendments (cont'd)

- The amendments really emphasize the GAL's powers and duties to the Court in a guardianship or conservatorship action.
- The fiduciary shall select a time period that s/he commits to provide regular accounting to the clerk, and must abide by that schedule, at least once every twelve months.
- A mental or physical condition report may not be waived or excused in these fiduciary proceedings.
- The clerk will mark the fiduciary letters prominently with the word "LIMITED", if the Court did not grant the fiduciary unlimited authority over the person and property.

Protecting Against Abuse

- I have also included the Adult Protective Services summaries for 2013 in your attachments because I want to emphasize that all that we do in dealing with minors, disabled persons and seniors carries with it, an abundance of ethical and moral considerations. Completing the paperwork and filing documents, without investigation and analyzing the entire situation, may lead to wasted money, or worse exploitation and abuse.

Protecting the ward

- Some of your cases may necessitate a referral to the authorities. It is good to look at Chapter 39 and familiarize your self with the definitions of exploitation, abandonment, neglect and so forth. **Tennessee is a duty to report state.** Perhaps this would be a good future topic in examining confidentiality issues and this area of the law.