BURNS & LEVINSON LLP

PRIVATE CLIENT UPDATE

Recent Changes to MA Laws Affecting Guardianships, Conservatorships, and Durable Powers of Attorney

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After a long and tortuous road, the Massachusetts legislature recently passed an extensive overhaul of the laws regarding, probate, guardianships and related matters, known as the Massachusetts Uniform Probate Code ("MUPC"). Much of the law is subject to a two-year "waiting period," and will not become effective until 2011, but some critical parts of it became effective on July 1, 2009, namely the state laws affecting guardianships, conservatorships, and durable powers of attorney. Out of concern for the rights of incapacitated persons, almost every aspect of the guardianship/conservatorship process has been made more legally complex. At the same time, durable powers of attorney and health care proxies have become increasingly effective substitutes for court proceedings in many cases. Every client should review the summary of changes below to make sure that he or she has the documents in place to best deal with a potential disability, illness or other incapacitating event.

CHANGES TO THE GUARDIANSHIP/ CONSERVATORSHIP PROCESS

The MUPC has literally changed the language of law with respect to incapacitated persons. From now on "guardians" may only deal with the physical and mental aspects of a person's care and may manage small incidental amounts of cash related to such purpose. Full-scale management of an incapacitated person's financial assets and real property requires a "conservatorship". The two are entirely distinct and the law with respect to a person in need of both now requires the filing of two separate petitions.

Furthermore, state policy, and hence the statute, now emphasizes limiting the powers of a guardianship or conservatorship to the minimum authority necessitated by actual limitations of the individual's abilities. An individual's rights may only be restricted to the least extent actually needed to protect the individual from harm and to ensure that all necessary decision making can be made. The incapacitated individual is encouraged to participate in decisions with the guardian, to the extent possible.

WHEN IS GUARDIANSHIP NEEDED OR APPROPRIATE?

A guardian may be appointed for the purpose of protecting an incapacitated person. Advanced age or Minority are not, in themselves, grounds for the appointment. The person must have a clinically diagnosed condition that results in an inability to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.

WHEN IS CONSERVATORSHIP NEEDED OR APPROPRIATE?

A conservator may be appointed to protect an individual under any of three circumstances. (1) The person is unable to manage property and business affairs effectively because of a clinically diagnosed impairment in the ability to receive and evaluate information or make or communicate decisions, even with the use of appropriate technological assistance. (2) The individual is detained or otherwise unable to return to the United States and the person has property that will be wasted or dissipated unless management is provided. (3) Money is needed for the support, care, and welfare of the person (or those entitled to the person's support) and the conservator's protection is necessary or desirable to obtain or provide money.

EVIDENCE REQUIRED FOR GUARDIANSHIP AND CONSERVATORSHIP

In order to establish a guardianship or conservatorship under the new statute, a Medical Certificate form must be filled out that requires factually specific information regarding the specific limitations and particular incapacities of the individual, which usually results in the creation of a limited guardianship, as opposed to a plenary (comprehensive) guardianship. The form is extensive and can make the guardianship process cumbersome and expensive as a result of the time required to complete it. This critical document must be filled out within 30

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days of filing the petition for guardianship in court. Even if that deadline is met, if 30 additional days then pass between the date of the examination and the date of the scheduled hearing before a judge, a new competency examination must take place and a new Medical Certificate must be completed within the 30 day window before the hearing. As a result, multiple Medical Certificates may be required before the process is finished. Medical Certificates can be prepared by a lawyer with the assistance of the incapacitated person's clinicians, but it can only be signed by a licensed psychologist, physician, or certified psychiatric nurse clinical specialist who has examined and evaluated the incapacitated person within the prior 30 days.

THE GUARDIAN/CONSERVATOR IS OBLIGATED TO REPORT TO THE COURT AT REGULAR INTERVALS

In addition to making it more difficult to secure appointment of a guardian and/or conservator, the new law increases the reporting obligation of guardians. A guardian must submit to the Court a written report, known as a Guardian's Care Plan, within 60 days of being appointed, that includes information

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about the incapacitated person, his or her physical, emotional, social, medical, vocational, and educational needs, the services and resources required for the incapacitated person's future care, the individual's living arrangements, treatment received, social and spiritual needs and activities, and information about the frequency of the guardian's visits. After the first 60 day report, an annual report and review is thereafter required. The Court may accept or reject the Guardian's Care Plan, and may send the guardian to a training to learn how to better address the incapacitated person's needs.

A conservator must provide an inventory of assets in the protected person's estate within 90 days after appointment and then must also account annually for every cent over which the conservator has control and custody. The Account must list all assets owned by the Incapacitated Person as of the date of appointment, every payment or transfer made by the conservator, every receipt of additional funds or assets, and the existing balance on account at the conclusion of each year.

A GUARDIAN CAN NO LONGER FREELY ADMIT THE INCAPACITATED PERSON TO A NURSING HOME

In order for the guardian to admit the incapacitated individual to a nursing facility, the guardian or another interested person must file a petition at court seeking permission to consent to such a nursing home transfer. At hearing on the request, the court must find that it is in the incapacitated person's best interest to move to a nursing facility. Prior court approval is required even if the incapacitated person does not object to the transfer and even if the incapacitated person agrees with it. This added burden in the new law can vastly increase legal fees, especially if the nursing home placement request is made after the court has already granted the basic guardianship.

USE CHANGES TO THE LAW AFFECTING DURABLE POWERS OF ATTORNEY AND HEALTH CARE PROXIES AS A MEANS TO AVOID GUARDIANSHIP

While it is not new advice for individuals to have an effective Durable Power of Attorney ("DPOA") and Health Care Proxy ("HCP") prepared, the reasons for doing so have been emphasized by the changes to the guardianship/ conservatorship laws detailed above. A well-drawn DPOA, in combination with a Health Care Proxy, may be an effective substitute in many cases to a guardianship, saving families from legal fees and court involvement.

Massachusetts has allowed individuals to create "durable" powers of attorneys since 1981. A power of attorney is simply a document allowing one person (the "agent" or "attorney-in-fact") to perform legal acts on behalf of another (the "principal"). It is called "durable" when it is drafted to read that the agent's power continues, even after the principal becomes incapacitated. Durable powers of attorney are only valid if authorized by statute - as is now the case in all fifty states.

DPOAs, however, have had their problems. In many situations, when an agent presented a third party (for instance, a bank) with a DPOA that was dated more than a few years beforehand, the third party may have resisted relying upon it for fear that the power had become "stale" - essentially refusing to accept any liability that might arise if the principal had revoked, revised or supplanted the DPOA. Our previous statute did not address this problem.

A recent change in law has helped address this by providing that DPOAs may now specify that they are not impaired by "lapse of time". For individuals who do not regularly update their estate plan, this change will be a beneficial one and will increase the efficiency of a DPOA.

Another important change directly dovetails with the changes to the guardianship law. A far higher percentage of guardians and conservators will now be subject to the requirement that they obtain a commercial surety bond (an insured promise not to default on their duties to the incapacitated person) as a condition of their appointment. However, the new durable power law provides that the principal may, in his or her DPOA, specify that any individual appointed as guardian or conservator pursuant to the designation in the DPOA be excused from obtaining a surety on the bond, which can potentially save quite a bit of money in annual premium costs.

Fortunately, the MUPC did not change a provision in the law that permits the principal to designate and nominate whom she or he wishes to have appointed as guardian and/or conservator in the event that such proceedings are later required. Any person so nominated is deemed and presumed to be suitable to serve as guardian or conservator unless a contrary showing is made in court.

Massachusetts law continues to provide for Health Care Proxies. A Health Care Proxy is a document that permits the principal to nominate an agent to make health related decisions on behalf of the principal. If a person who has a Health Care Proxy later becomes incapacitated, and health care decisions present themselves, there will be no need for the appointment of a guardian because most such decisions can be made by the health care agent. Even if there are decisions to be made that are not contemplated by the Health Care Proxy, thus necessitating the appointment of a guardian, the health care proxy has priority in healthcare decisions over a guardian. That means that the health care agent's decision controls as to treatment issues. Furthermore, a guardian cannot revoke a health care proxy, but is able to ask the court to do so. The court, however, will want to have good cause demonstrated for doing so. In sum, having a Health Care Proxy is the best way to avoid guardianship in the first place, and under the new MUPC law, even if a guardian is appointed, the health care agent controls.

CONCLUSION

If you are caring for or looking after the interests of an individual who is, or who may become, incapacitated or otherwise incapable of making decisions about financial, legal, or medical issues, or decisions regarding everyday maintenance and support, be aware that the legal mechanism for obtaining the appointment of a guardian and conservator has become far more costly, complicated and burdensome. On the other hand, the best strategy of prevention is to execute a new MUPC-tailored durable power of attorney and health care proxy. Every adult should execute such documents regardless of age, and the documents should be reviewed and updated on a regular basis.

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