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GUARDIANSHIP ACTIONS AGAINST INDIVIDUALS WHO HAVE SELECTED AN AGENT AS POWER OF ATTORNEY: WHEN SHOULD THE COURTS SAY "NO?"

Linda S. Ershow-Levenberg.*

INTRODUCTION

State guardianship statutes and court rules make reference to existing agents under power of attorney documents, and the power of attorney statutes recognize that a person *may* have both an agent and a guardian.¹ An individual may designate, in a power of attorney (POA) document, who shall be guardian if it becomes necessary.² However, in general, state laws do not address the question of what happens when a person, who has already signed a POA for healthcare and for all financial, business, and legal decisions, is served with a complaint seeking to have him or her declared incapacitated and seeking to have a third party appointed as a guardian, also referred to as a fiduciary. This article suggests that the choice of fiduciary is a constitutionally-protected privacy and liberty interest, on which the courts may not intrude, absent a compelling governmental interest. The article explores the question of whether and when the courts should dismiss guardianship actions when there is a duly designated agent who has comprehensive authority and is ready to serve.

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1. ARIZ. REV. STAT. ANN. § 14-5503 (Supp. 2004); CAL. PROB. CODE § 4126 (West Supp. 2005); N.J. STAT. ANN. § 46:2B-8.4 (West 2004). (Statutes also refer to an agent as an attorney-in-fact).

2. ARIZ. REV. STAT. ANN. § 14-5503(B) (Supp. 2004); ALA. CODE § 26-1-2(c)(2) (Michie Supp. 2004); CAL. PROB. CODE § 4126 (West Supp. 2005); N.J. STAT. ANN. § 46:2B-8.4 (West 2004); N.C. GEN. STAT. ANN. § 32A-10b (West 2003); TENN. CODE ANN. § 34-6-104(b) (2001).

POWER OF ATTORNEY RELATIONSHIPS

Individuals have long had the right to sign a document authorizing another person as agent to take actions on their behalf. Known as a "power of attorney," the appointment was valid only so long as the principal remained competent to revoke it. Modern statutes created the "durable power of attorney," which survives the incapacity of the principal, commonly for the purpose of allowing the agent to make healthcare decisions for the principal.³ The power granted to the agent in a durable power to attorney may be limited to certain transactions, or it may be plenary and comprehensive, covering everything from insurance, to banking, to litigation. Gift transfers of the principal's income or assets may not be made absent express authority in the document.⁴

An individual is free to select the agent of his or her choice as a POA and healthcare representative. The agent designated by a principal is a fiduciary who owes a duty of loyalty and good faith to his or her principal.⁵ It is this fiduciary status which gives the principal comfort and confidence that the named agent will act in his or her best interests.⁶ As the court stated in *Louis Schlesinger Co. v. Wilson*, "[t]he confidence arising from a principal-agent relationship is not charted on a one-way street. Good faith works in both directions."⁷ Indeed, the principal has legal recourse against the agent for the breach of fiduciary duty.

One risk inherent in the POA lies in the fact that third parties may rely upon the authority granted in a durable POA until the third party has received actual notice of the revocation,

3. The durable power of attorney includes specific language such as "this power of attorney shall not be affected by subsequent disability of the principal or lapse of time," *see, e.g.*, CAL. PROB. CODE § 4124 (West Supp. 2005); 755 ILL. COMP. STAT. ANN. 45/2-1 to 2-7 (West 1993); MICH. COMP. LAWS ANN. § 700.5502 (West 2002); N.J. STAT. ANN. § 46:2B-8.2 *et seq.* (West 2004).

4. *See, e.g.*, N.J. STAT. ANN. § 46:2B-8.13(a) (West 2004).

5. *Manna v. Pirozzi*, 130 A.2d 55, 57 (N.J. Super. Ct. App. Div. 1957); *Hirsch v. Schwartz*, 209 A.2d 635, 639 (N. J. Super. Ct. App. Div. 1965); *Tieman v. Carasaljo Pines*, 143 A.2d 892, 900 (N.J. Super. Ct. App. Div. 1958); *Campagna v. U.S.*, 474 F. Supp. 573, 585 (D.N.J. 1979); CAL. PROB. CODE § 2101 (West Supp. 2005).

6. *Louis Schlesinger Co. v. Wilson*, 127 A.2d 13, 18 (N.J. 1956).

7. *Id.*

termination, or suspension of the authority granted (or actual notice of the death of the principal).⁸ By statute, such third parties are typically indemnified for harm that may occur to the principal from an otherwise authorized act by the agent.⁹ If the agent, who has a fiduciary duty to the principal,¹⁰ abuses the principal and breaches his or her fiduciary obligations, the principal's sole recourse is against the agent. If the principal no longer has the mental capacity to revoke the authorization and sue the agent, some interested party must step in on behalf of the violated principal.¹¹ It is at this time that some guardianship actions are appropriately initiated. Ultimately, the agent or attorney-in-fact will be accountable to the guardian.¹²

GUARDIANSHIP ACTIONS

Guardianship is the legal mechanism under purview of the courts in which a court appoints a person to take control of decision-making and management for a person deemed no longer competent to manage his or her affairs.¹³ There may be slight differences in procedure from state to state. Generally, before appointing a guardian, the court must first adjudicate the individual to be mentally incapacitated.¹⁴ Once the court has done so, the court must appoint a guardian for person or property, or both. The appointment of a guardian strips the individual of his or her rights and liberties, except to the extent that those rights may be reserved for the person by the court, and the guardian becomes the authorized decision-maker for the incapacitated person. From then on, the guardian must file with the court annual reports of health and welfare as well as annual accountings.¹⁵ These documents can be obtained by interested parties such as family members.¹⁶

8. N.J. STAT. ANN. § 46:2B-8.5 (West 2004); WIS. STAT. § 243.07(4) (2003-2004).

9. *E.g.*, WIS. STAT. § 155.50 (2003-2004) (specifically regarding healthcare POA).

10. N.J. STAT. ANN. § 46:2B-8.13 (West 2004).

11. *E.g.*, WIS. STAT. §§ 243.07(6r), 243.10(8) (2003-2004).

12. ARIZ. REV. STAT. ANN. § 14-5503(A) (Supp. 2004); 755 ILL. COMP. STAT. ANN. 45/2-10 (West 1993); MICH. COMP. LAW ANN. § 700.5503(1) (West 2002); N.J. STAT. ANN. § 46:2B-8.13 (West 2004).

13. *E.g.* CAL. PROB. CODE §§ 2100-2112 (West Supp. 2005); 755 ILL. COMP. STAT. ANN. 5/13-5 (West 1993); N.J. STAT. ANN. §§ 3B:12-24 to 12-29 (West 2004); N.J. Ct. R. 4:86-1 *et seq.* (2005).

14. *E.g.*, WIS. STAT. §§ 880.03, 880.12 (2003-2004).

15. *E.g.*, WIS. STAT. § 880.25 (2003-2004) (regarding annual financial accountings).

16. *E.g.*, WIS. STAT. § 243.07(6r) (2003-2004) (on review of the agent's performance).

A guardianship action is initiated by filing a verified complaint.¹⁷ Generally, the complaint must be accompanied at the time of filing by affidavits of incapacity signed by at least one licensed physician who has examined the individual within thirty days of the filing date.¹⁸ The affidavits must be based on findings that the person lacks the capacity to make decisions in specific areas of life activity. The standards for determining "incapacity" or "incompetency" are by no means black and white and are beyond the scope of this article.

The plaintiff's verified complaint must state his or her relationship to the alleged incapacitated person.¹⁹ Among other things, the plaintiff must disclose the name and address of any person appointed as POA or healthcare representative.²⁰ After a complaint for guardianship is accepted and filed, the court appoints an attorney for the alleged incapacitated person.²¹ Counsel's role can be very challenging to fulfill. The attorney is responsible for representing the client's wishes, if ascertainable or if the client is competent (in the view of counsel) and for representing the best interests of the client if he is not competent.²²

Among other things, the court-appointed counsel must report on whether "less restrictive alternatives" exist such that guardianship would not be necessary.²³ The plaintiff must serve the next of kin and other interested parties.²⁴ Opposition to the action may be filed either because a party denies that the individual in question requires a guardian or because a party objects to a certain person being appointed as guardian.²⁵ In either case, litigation ensues and the private affairs of the alleged incapacitated person become a part of the court record.

17. *E.g.*, TENN. CODE ANN. § 34-2-104 (2001).

18. *E.g.*, WIS. STAT. § 880.33 (2003-2004).

19. N.J. Ct. R. 4:86-1 (2005); TENN. CODE ANN. § 34-2-104 (2001).

20. N.J. Ct. R. 4:86-1 (2005); WIS. STAT. § 880.07 (2003-2004).

21. *E.g.*, N.J. Ct. R. 4:86-4(b) (2005); WIS. STAT. § 880.33(2)(a) (2003-2004) (proposed ward has right to counsel).

22. *E.g.*, WIS. STAT. §§ 880.38 (regarding guardianship of an incompetent), 880.331 (2003-2004) (guardian *ad litem* represents best interests).

23. N.J. Ct. R. 4:86-4 (2005). *See also* TENN. CODE ANN. § 34-1-127 (2001) (court should impose least restrictive alternatives *sua sponte*).

24. *E.g.*, TENN. CODE ANN. § 34-1-106 (2001); WIS. STAT. § 880.08(1) (2003).

25. N.J. Ct. R. 4:86-7 (2005).

PRIVACY AND LIBERTY

The selection of a fiduciary and healthcare representative is an intrinsically personal matter that should be included among protected liberty and privacy interests. As such, the courts should not infringe on that right absent a compelling governmental interest. There is a zone of privacy and liberty protected by the Constitution with "the dignity of a fundamental right."²⁶ As one court noted:

It is the fundamental freedom from intrusion by government derived by federal decisions from the 'penumbra' of several constitutional provisions, including the right to receive information under the free speech guarantee of the First Amendment, freedom from unreasonable search and seizure under the Fourth Amendment, the right against self-incrimination under the Fifth Amendment, the retained rights of the people under the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment.²⁷

As with all constitutional rights, the right is not absolute, and it may be regulated by a compelling governmental interest.²⁸ When privacy interests run up against the state's exercise of its police power to protect the general public and safeguard high ethical standards for a functioning, democratic government, the privacy interest in question has often had to give way to the larger public interest, such as drunk driving, fingerprinting of applicants for real estate broker's licenses, state investigation of alleged wrongdoing on part of government officials; and disclosure of confidential financial information to casinos on employment applications. These were the holdings of a series of cases in New Jersey. However, where the police power is not involved, and the interest is intrinsically personal, the government's incursions have been curtailed by the courts.²⁹

26. *Lehrhaupt v. Flynn*, 323 A.2d 537, 540 (N.J. Super. Ct. Ch. Div. 1974), *aff'd*, 356 A.2d 35 (N.J. Super. Ct. App. Div. 1976), *aff'd*, 383 A.2d 428 (N.J. 1978).

27. *Lehrhaupt*, 356 A.2d at 41, *aff'd*, 383 A.2d 428, (citing *inter alia*, *Griswold v. Conn.*, 381 U.S. 479 (1965)).

28. *G.P. v. Florida*, 842 So. 2d 1059, 1062-1063 (Fla. Dist. Ct. App. 2003).

29. *See, e.g.*, *Doe v. Borough of Barrington*, 729 F. Supp. 376 (D.N.J. 1990) (according higher level of protection to the confidentiality of an individual's HIV positive status), and *Yeager v. Hackensack Water Co.*, 615 F. Supp. 1087 (D.N.J. 1985) (invalidating state law

The courts need to be sensitive to the severe incursion into the fundamental right of privacy which occurs when an unnecessary guardianship action is prosecuted. The freedom to choose one's companions and fiduciaries is intrinsic to this right of privacy. For care, assistance, and management of daily life, an individual should have the right to appoint an agent of his or her choice, and a court should not overturn this choice by means of a guardianship adjudication absent a compelling governmental interest.³⁰ This is particularly so in light of the deprivation of liberty which can occur upon adjudication of incapacity: loss of the right to marry, to vote, to sign documents with legal effect, and to make a will, among other things.³¹

"[I]ntrusions into constitutionally protected areas must be founded on a compelling state interest which overrides private rights."³² Some state constitutions impose upon state government an affirmative obligation to protect fundamental individual rights.³³ The state courts are just as bound by these principles as any other branch of government, and they may not aid and abet the infringement of protected rights that would result from a litigant's use of the courts.

IS A GUARDIANSHIP NECESSARY?

The burden of proof should rest with the plaintiff petitioning for guardianship, and the threshold question should be whether he or she has presented a *prima facie* case showing that guardianship is necessary. The inquiry should not simply focus on whether the person is currently incapacitated. I suggest that to adequately safeguard protected privacy and liberty interests, the facial sufficiency of the allegations is not enough. A court should also satisfy itself of the *necessity* of the proceeding before

that authorized the water company to collect names of individuals residing in customers' homes); *Woodland v. City of Houston*, 918 F. Supp. 1047 (S.D. Tex. 1996); *Schwenk v. Kavanaugh*, 4 F. Supp. 2d 110 (N.D.N.Y. 1998).

30. See *Forst v. Fogel*, 385 N.Y.S.2d 558 (N.Y. App. Div. 1976) (holding that severe mental impairment and inability to care for oneself or one's property does not in and of itself determine that a guardian must be appointed).

31. E.g., *Estate of Bechtold*, 376 A.2d 211, 213 (N.J. Super. Ct. Ch. Div. 1977). See also *Lommason v. Washington Trust Co.*, 53 A.2d 175 (N.J. 1947).

32. *Toms River Publ'g Co. v. Borough of Manasquan, Monmouth County*, 316 A.2d 719, 723 (N.J. Super. Ct. Ch. Div. 1974).

33. E.g., CAL. CONST. art. I, § 1 (specifically protecting privacy). See also MONT. CONST. art. II, § 3.

authorizing the case to go forward.³⁴ If the complaint states that there is a named agent, or if the answer to the complaint indicates that there is a formally designated agent who can assist the alleged incapacitated person if and when it becomes necessary, the burden of proof should remain with the plaintiff to come forward with the prima facie evidence showing that there is still a need for a guardianship. The court could conduct a hearing in limine and in camera to hear such evidence. This would protect the due process and privacy rights of the alleged incapacitated person.

If the documents signed by the principal are comprehensive and authorize the agent to take all of the actions that may be required on behalf of the principal, if and when such actions become necessary, the principal will be fully protected. A guardianship should be unnecessary. The court should not even reach the issue of whether the principal is incapacitated.

There must be some reason other than mere incapacity to warrant the filing and pursuit of a guardianship action. Further, regardless of whether an individual is legally incapacitated, the plaintiff in a guardianship action must have standing to initiate the action.³⁵ This principle is based on the common law rule that a judicial determination of a person's mental incompetency may not be made upon the application of a "mere stranger" to the issue.³⁶ "A person with no actual legal or equitable interest may not initiate proceedings to determine another's mental incompetency."³⁷ When there is a comprehensive, available power of attorney and an agent, the plaintiff, regardless of familial relationship, is a "mere stranger" to the issue of the principal's capacity.

A guardianship might be necessary in spite of there being an authorized agent in certain situations. These situations divide themselves into two categories: (1) the need to fill a void

34. See, e.g., *In re Gottsmann*, 48 A.2d 800 (N.J. Ch. 1946) (allegations of various unhealthy behaviors found insufficient to warrant complaint to be accepted). See also *In re Clifford*, 41 A. 356 (N.J. Ch. 1898) (where the alleged incapacitated person had no estate and was in prison, the court refused to entertain an action to have that person declared incapacitated or to permit the appointment of a guardian).

35. *In re Oswald*, 28 A.2d 299, 300 (N.J. Ch. 1942). See also *In re Joseph P.*, 586 N.W.2d 52 (Wis. Ct. App. 1998).

36. *In re Oswald*, 28 A.2d at 300; *Allison v. Walvoord*, 819 S.W.2d 624, 626-627 (Tex. Ct. App. 1991).

37. *In re Tierney*, 421 A.2d 610, 613-614 (N.J. Super. Ct. Law Div. 1980), *aff'd*, 426 A.2d 81 (N.J. Super. Ct. App. Div. 1981).

unintentionally created and (2) the need to deal with imminent risk of harm to the principal.

As to the first category, four situations present themselves:

(1) An individual may have signed a POA, but neglected to appoint a healthcare representative. It could become necessary to appoint a guardian of the *person* to carry out medical treatment decisions.

(2) An individual may have signed nothing but a bank account POA. It could become necessary to institute a guardianship to sell real estate or carry out other major, necessary transactions.

(3) The individual may have signed a POA which lacked authority to make gift or trust transactions, yet the current state of affairs suggests that had the principal known of the necessity to include such authority in the POA, he or she would have done so.

(4) The POA document may fail to designate a successor. If the primary agent cannot function, a guardianship might be needed.

If there is a designated healthcare representative as well as an attorney-in-fact, there should be no need for a guardian because all areas of decision-making authority are taken care of in the documents that were signed.

The second category involves situations like the following: the agent is known to be stealing money from the principal or has abandoned the principal in his or her apartment where he or she is starving to death. The conflicting tensions appear to be the state's *parens patriae* power over incapacitated persons who are at imminent risk of harm and the individual's ability to order his or her own affairs to ward off state interference if he or she does become incapacitated. I suggest that the government and the courts should only become involved in replacing the chosen agent with someone else, or placing the agent under control of the court, if the plaintiff presents *prima facie* evidence showing that the chosen agent is breaching his fiduciary duty to the alleged incapacitated person. However, this does not mean that a guardianship action can be instituted and then followed by a fishing expedition to see whether there is substantive evidence to substantiate it *ab initio*.

Once the court knows that there is a *bona fide* POA and a

healthcare representative in place, entertaining a guardianship action can virtually force the invalidation of a POA, which was signed as a precaution against such intrusions. Ostensibly, if there is a designated POA and a healthcare representative, and the plaintiff has presented no *prima facie* evidence of harm, less restrictive alternatives *do* exist, and there is no need to proceed with the action.³⁸ Individuals sign powers of attorney and appointments of healthcare representative as insurance in case they do become incapacitated. They choose someone whom they trust and who will be there to take care of them and make decisions for them if the time comes. They should be allowed to order their personal affairs however they see fit, without undue interference by a third party or by the state, provided that their agents are reasonably fulfilling their fiduciary obligations. Absent evidence that the agent is breaching fiduciary obligations or is causing physical, mental, or financial harm, a third party should have no say in the choice that the principal made as to her agent. Yet, the mere filing of a bare-bones guardianship complaint allows a plaintiff to inject the court's oversight into a personal arrangement between the principal and his chosen agent, at considerable cost to the principal who must defend his or her choice.

By allowing the pursuit of a guardianship case where none of the above problems exist, the courts risk undue interference with privacy and liberty without a compelling governmental interest. The courts should therefore exercise caution and restraint in allowing such cases to be litigated. Judges should consider dismissing certain guardianship complaints to prevent such unwarranted intrusions. The guardianship statutes and court rules are intended to be used as a shield against frivolous actions, not as a sword to be wielded by anyone who is upset by a citizen's choice of agent. In deciding not to eliminate the standing requirements discussed above, one New Jersey court expressed the issue well when it stated:

The public policy which gave birth to the standing requirements as to incompetency actions is clearly to

38. *In re Waxman*, 466 N.Y.S.2d 85 (N.Y. App. Div. 1983) (where incapacitated person had irrevocable trust to provide for his medical and living expenses, there was no need for appointment of guardian); *cf. In re Roche*, 687 A.2d 349 (N.J. Super. Ct. Ch. Div. 1996) (invalidated the incapacitated person's POA for healthcare and appointed a guardian for her because she had been adjudicated incompetent two years before she executed the purported advance directive).

protect individuals from unwanted interference in their affairs; to shield an individual from the necessity of defending himself or herself from frivolous or insidious incompetency charges. It is the opinion of this court that the general need for such protection has not diminished; . . .³⁹

CONCLUSION

The intrusion on personal privacy resulting from guardianship litigation, and the deprivation of liberty which can result from the adjudication of incapacity, should raise the courts' scrutiny to ensure that these actions not be lightly pursued. In the absence of patent verified allegations of harm or risk by the designated agent, the courts should be cautious in allowing such litigation to proceed.⁴⁰

39. *In re Tierney*, 421 A.2d at 615.

40. In matter of H.P., an alleged incapacitated person, the New Jersey Equity Court ultimately dismissed the guardianship action as the plaintiff presented no evidence to invalidate the power of attorney.