

Guardianship: Transcript 1

Good afternoon everyone. My name is Alexandra Shroufe. I am here to talk to you today about the Incapacitated Adult. We're going to cover the guardianships and conservatorship basics and my initial thoughts on how to avoid them. I am an attorney in private practice. I have been practicing law for 25 years most of which has been here in Flagstaff and my practice is focused on estate planning in elder law.

Elder law encompasses things like guardianships and conservatorships as well as long term care planning and planning for special needs cases with families who have special needs children. So, what causes incapacity in adults? Well normally it's about getting old and most typically that includes things such as dementia, the side effects or after effects of a stroke, Parkinson's disease but we can also deal with incapacity in adults who have developmental disabilities, that were related to birth or accidents thereafter, mental illness and addiction and catastrophic events.

Unfortunately, I've been involved in a variety of emergency guardianship cases where someone's been in a catastrophic traffic accident and no one can make healthcare decisions for that individual, so we're forced to move into the court system to gain that type of authority to deal with that emergency.

This is just a brief overview of the sources of Arizona law on the topic of guardianships and conservatorships. I want to point out to you that there have been changes to the rules of probate procedure effective January 1st of 2020. Now, that's probably more pertinent to folks who are practicing law in this area and I won't bore you too much with the details, but I just wanted everyone to note that. But from a high-level perspective the places where lay individuals would want to look for more information is on the self-help center page not only for Coconino County, but I believe that most counties also have self-help center pages that have forms and information about various legal proceedings that are undertaken here in the state of Arizona.

What is a guardianship? Well, it's a court proceeding where a judge is making a determination that an adult it's impaired by any one of a variety of circumstances you'll see the list here-it includes mental illness, mental deficiency, physical illness, chronic intoxication, such that the individual lacks understanding or capacity to communicate responsible decisions concerning his or her person. So, sort of a lot of words for a finding that a person is just unable to make informed decisions on their own behalf. The important thing you must note here is that that finding by the court is by clear and convincing evidence.

Clear convincing evidence is a higher standard than most cases that are decided in our court system. So, we have a range of anything from "by a preponderance of the evidence"-which is the normal standard in a civil proceeding. I think a lot of attorneys would describe that as being 51%- to something like "beyond a reasonable doubt"

which is the standard for deciding a criminal case, which means not 100% for pretty darn close to 100%. The clear and convincing evidence standard in my mind is somewhere between the two and if you had to assign a percentage to it let's say at 75%.

The judge must be very, very positive that the individual who is the subject of the guardianship is not able to make decisions for him or herself. There are several different types of guardianship. There is what we call a general guardianship-this is where the guardian is given general and full authority to make decisions on behalf of the incapacitated adult, it's very similar to the role between a parent and a minor child. We can also have a limited guardianship and a limited guardianship is where the powers granted to the Guardian are specified. For example, an individual may have difficulty making healthcare decisions for him or herself but is able to make decisions concerning where he or she lives or what type of job they have.

So, the idea is to customize or tailor the guardianship in such a way as to give the incapacitated adult as much freedom and independence in the least restrictive environment possible. A guardianship can be temporary or permanent and as I mentioned when I first started the presentation, an emergency appointment can be sought and obtained if an emergency exists and it can be done with or without notice to the alleged incapacitated adult.

Additionally, we have something called a Title 14 plus guardianship this is a guardianship that pertains particularly to individuals who are suffering from a mental disorder typically a mental illness and who are currently or likely to need inpatient mental healthcare treatment.

Now, inpatient mental healthcare treatment means a level 1 psychiatric unit. It does not mean a memory unit in an assisted living facility. It does not mean a level 2 unit in a psychological or psychiatric facility it means a level 1 facility where the person cannot leave unless someone lets them leave. So, it's a very high level of authority. In order to attain obtain this type of guardianship, you as the petitioning party have to provide a report from a psychiatrist or a licensed psychologist that supports the need for the inpatient authority and because the authority is so special- it does expire after one year unless the authority is extended by the court based upon a motion after the expiration or very close to the expiration of that one year period, that is supported by the report of a psychiatrist or psychologist.

Who can be a Guardian? Well, this probably seems self-evident that it must be an adult but certainly someone over the age of 18. It is possible for parents to do something called execute a testamentary appointment of a guardian. So, this most commonly arises when we have parents with special needs children who are going to become adults or already are adults and if the parent has been appointed by the court as a

guardian then in their wills, they can appoint a successor Guardian to take over for them if the parent dies and the child continues to need the guardianship.

We have a list of statutory priorities about who gets to be the Guardian and so a guardian or conservator has been appointed as such, for the incapacitated adult in another jurisdiction, another state has first priority. It's then followed by someone nominated by the adult, if the adult has enough capacity to do so. Certainly, in durable financial and healthcare powers of attorney, individuals can also nominate guardians and conservators prospectively should they need one down the road. But, if none of those things happen- the statute does give us a list of who then has priority and it's who you would expect, right? Spouse first, adult children, parents, individuals who lived with the adult, individuals who are receiving benefits on behalf of the adult-like, who's a representative payee for Social Security benefits. Then, if there's none of those folks we have the Veterans Administration, a licensed fiduciary and a public fiduciary.

So, let me stop right there and describe to you what I mean by a licensed fiduciary and or a public fiduciary because some of you may not know what that means. A fiduciary is a term of art that in this instance applies to an individual who has been licensed, as such by the Arizona Supreme Court. So, in order to become licensed, fiduciaries have to complete a training program, an internship, for a certain period of time and they have to take an examination-which of course, they have to pass in order to become licensed and as such they are subject to the supervision of the Arizona Supreme Court (the fiduciary board which operates under the Supreme Court) for the balance of their career very much the way lawyers are subject to supervision and monitoring.

A public fiduciary is also a licensed fiduciary, but they work in the public sector, so what that means is that every county in the state of Arizona has a public fiduciaries' office and the public fiduciary is an it's a public entity that provides fiduciary services for individuals who can't afford to hire or pay for a private fiduciary or who don't have family members to act on that behalf. So, they are considered a fiduciary of last resort and that's why they are at the end of the list.

OK-what's a conservatorship? Well, conservatorship is the financial side of a guardianship-it's equivalent to a guardianship and let me distinguish it this way. A guardianship is the authority granted to make personal decisions on behalf of an incapacitated adult.