CHAPTER 1
CONSERVATORSHIPS AND GUARDIANSHIPS

ORIGINAL CHAPTER BY BRENDA S. MCELNEA AND
MARY E. WANDERPOLO
REVISIONS BEGINNING 2008 BY: BRENDA MCELNEA, ESQ.
WITH THE ASSISTANCE OF JOYCE BROWN, ESQ.

I. Introduction

Surrogate management of the person and property of the elderly and/or disabled is a subject matter that affects individuals, families, health care givers, members of the legal system and policy makers at state and national levels. As the number of elderly in our population has increased, the issue of surrogate management has moved to the forefront of the concerns of the legal community working with the elderly and their families.

In New Jersey, guardianships and conservatorships are the legal mechanisms designed to provide surrogate management for an individual who is no longer able to govern himself or herself frilly and who has not effectively put into place alternative surrogate management mechanisms, such as a general durable power of attorney, together with a health care instruction directive and health care proxy directive, or who, having executed those documents, fails to recognize the present need for those documents to be implemented. (See other chapters in this publication regarding powers of attorney and medical directives.) Guardianships and conservatorships are similar in that each involves court supervised decision-making by another. In the case of a guardianship, decisions are made by the guardian for his ward; in the case of a conservatorship, by the conservator for the conservatee. The significant difference between the two is that a conservatorship is voluntary, requiring the initial and continuing consent of the conservatee, while a guardianship is an involuntary proceeding (i.e., does not involve the consent of the ward for whose benefit the proceeding is undertaken). Further, a conservatorship permits management only of the conservatee's property, while a guardianship provides for the management of the ward's property and person.

The process of court appointed management begins when some individual believes that the elder or disabled individual is mentally incapacitated and no longer able to care for himself and/or his property. It is often a family member who retains an attorney to begin the court proceeding and is the plaintiff in the action. The attorney prepares the guardianship or conservatorship complaint in which the family member is usually the moving party. During the interview with the plaintiff, the attorney should ascertain the following:

1. What behavior the elder or disabled person has exhibited to cause the client to seek the appointment of a guardian or conservator;

2. What medical care the elder or disabled person is presently receiving and who is the treating physician;

3. Whether the elder or disabled person is participating in the decision about surrogate decision-making, is resistant to it or is altogether unaware of the plan;

4. If participating, an exploration of the competency of the elder or disabled person to determine if he or she may still utilize less restrictive alternatives and/or whether a limited, rather than a plenary guardianship is appropriate;

5. If other alternatives are not appropriate, who are the potential guardians/conservators;

6. Whose interest would be served by the proposed guardianship or conservatorship;

7. The care plan that is in place or is being developed for the elder or disabled person;

8. Whether the elder or disabled person has any minor or adult dependents that will require continued support;

9. The income and assets of the elder or disabled person;

10. The extent to which the assets of the elder or disabled person are sufficient to cover the cost of the care plan, and if anticipated to be insufficient, how the cost of the care plan will otherwise be met, including planning for eligibility for government benefits; and

11. In the case of an elder or disabled person owning substantial assets, the estimated estate and inheritance taxes to be imposed and the exploration of the possibility of court supervised gift giving to minimize those taxes.

A sample Intake Form is appended to this chapter as Exhibit 1.

II. Conservatorships

Although the law provides for the use of conservators to manage assets, few actions are brought for such an appointment. The statutory scheme is found at *N.J.S.* 3B:13A-1 *et seq.* The

statute defines a conservatee as a person who has not been judicially declared an incapacitated person, but who by reason of advanced age, illness or physical infirmity is unable to care for or manage his property or has become unable to provide for himself or for others who are dependent upon him for support.

Elder and disability law practitioners debate the utility of conservatorship. It is limited to situations where an individual suffers from physical infirmity or from some degree of diminished mental capacity that does not rise to the level of incompetence. Absent unusual circumstances, an elder and disability law practitioner would generally prefer to utilize surrogate decision-making that is not court supervised, *i.e.*, well drafted general durable powers of attorney and durable medical powers of attorney. For additional asset protection, the general durable power of attorney may even require that the attomey-in-fact post a surety bond.

Unusual circumstances, however, do occasionally occur and a conservatorship may be sought when court supervision is deemed desirable under the totality of the circumstances. As discussed below, conservatorship requires that the conservator submit to the conservatee and to the court an annual informal report or accounting. *N.J.S.* 3B:13A-27. Under certain circumstances, such a submission may be considered advantageous. The practitioner will recall that planning for disability with conservatorship must actively involve the individual for whose benefit the proceeding is undertaken. The elder or disabled person may express concern that there is no family member available to serve as agent under a general durable power of attorney, or none whom he or she can trust, and desire the court's involvement. A family member available to serve as conservator may be concerned about threats of asset mismanagement from others in the family, including the elder or disabled person, and may prefer court supervision. At times, a private geriatric care manager who has already been assisting an individual with family members who are geographically distant may determine that the individual's capacity has diminished, and such a care manager also will prefer the supervision of the court in the management of the conservatee's funds. Where there are no family members or friends who can be relied upon and a bank or other institution has been asked to manage the financial affairs for the elder or disabled person, the court's involvement in the conservatorship may offer the assistance necessary for the potential conservator to serve. In the planning process, the practitioner should not lose sight of the fact that, as discussed below, the conservatee is not deprived of access to his or her own funds during the conservator's administration, unless expressly adjudicated by the court. If the conservatee continues to withdraw assets from his or her accounts, and fails to keep records, the preparation of the annual accounting by the conservator may be exceedingly difficult.