

**New Jersey  
N2K Hour:  
Conservatorships  
and  
Guardianships**

Webex Presentation,  
July 21, 2020  
11:00am EST

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## What is a Legal Guardianship?

- In NJ, a legal guardian is defined as any person or agency appointed by a court to act on behalf of a person who is mentally incapacitated.
- The legal guardian may be appointed to act on behalf of a minor or an incapacitated adult to assure that the disabled party's rights are protected.
- A guardianship is always a solution of last resort, since it strips an individual's fundamental right of self-determination.
- A person under disability is not precisely defined in NJ, but it is understood that this term refers to minors, incapacitated adults, and conservatees.

## What is a Legal Guardianship? (cont.)

- A guardianship is not a voluntary procedure.
- The interested person or entity must file a formal application in New Jersey asserting that an individual cannot manage his/her own affairs and that a guardian is needed.
- A guardian has a fiduciary duty based on trust to act solely and selflessly in the best interest of the individual who needs care.
- Once incompetency is established, the court will then review the qualifications of the interested party, and appoint them as the guardian of the disabled person.

## General v. Limited Guardianship

- In NJ, guardianships can be in either two forms: a general guardianship or a limited guardianship.
- A general guardianship is appropriate for disabled persons who have been found incapable of making or expressing any decisions, and is often referred as a “plenary” guardianship.
- In contrast, a limited guardianship is appropriate for disabled persons who have been found capable of making and expressing some, but not all decisions.
- A limited guardianship will usually cover decision-making around residential, educational, medical, legal, vocational, and financial issues.

# Adult Guardianship

- Most frequently, guardianships are established on behalf of older adults who have lost mental capacity due to senile dementia, major strokes, or severe mental illness.
- The person for whom a guardian is appointed is called a “ward.”
- N.J.S.A. 3B:12-49A establishes that a court may authorize a sale of property if satisfied that it is in the ward’s best interest.
- A ward’s real property may not be sold or mortgaged without court authorization.

## Adult Guardianship (cont.)

- Regarding a sale of real property, the guardian will need to provide the Court with proof of value and in some cases the actual proposed contract for approval.
- In order to obtain a guardianship over a person or property, a complaint is first filed in the Superior Court located in the county where the mentally incapacitated individual is domiciled.
- The complaint must include all of the applicable information for the mentally incapacitated person, a list of the names and addresses of immediate family members, and a statement regarding the need for the guardianship.

## Adult Guardianship (cont.)

- Certifications from two separate qualified physicians who examined the ward must also accompany the complaint.
- During a guardianship proceeding, a court will require detailed information regarding the personal, medical, and financial history of the ward.
- Once the court issues an Order to Show Cause, a hearing date will be established, and an independent attorney will be appointed to represent the interests of the mentally incapacitated individual.

## Adult Guardianship (cont.)

- This attorney must then personally interview the ward and file a report with the court indicating whether the guardianship is appropriate.
- If the court orders in favor of the guardianship, the court appointed guardian is then granted the fiduciary duty to make financial and personal decisions for the ward.



## Fiduciary Powers Act

- In NJ, a guardian is a fiduciary as defined by law under the Fiduciary Powers Act.
- N.J.S.A. 3B:12-25 sets forth the procedure in which a guardian is appointed, and N.J.S.A. 3B:12-57 establishes the powers, rights and duties of a guardian of a ward.
- Self-dealing occurs when a fiduciary acts according to his or her own interests rather than to the interests of the parties to whom he or she owes a legal duty.
- Any self-dealing or other actions that are not done in the best interests of the ward or incapacitated individual will violate the guardian's fiduciary duty to the ward.

## Case Law Regarding Guardianships in NJ

- Several cases in New Jersey have confirmed the court's authority to allow guardians to transfer assets.
- *In re Trott*, 118 N.J. Super. 436, 440 (Ch. Div. 1972), the court permitted a guardian to transfer \$100,000 and make yearly gifts of the ward's estate to her four living descendants as a means of reducing the ward's estate tax burden.
- *In the Matter of Mildred Keri*, 181 N.J. 50 (2004)., an adult child sought guardianship of his mother and her estate and proposed to gift some of her assets to himself and his brother so that the mother could qualify for Medicaid while in a nursing home.

## Case Law Regarding Guardianships in NJ (cont.)

- The New Jersey Supreme Court unanimously ruled that guardians may engage in Medicaid planning on behalf of their incapacitated wards, since the guardian's proposed Medicaid spend-down plan met the criteria set forth in *In re Trott*, 118 N.J. Super. 436, 440 (Ch. Div. 1972).

## What is a Conservatorship?

- A conservatorship is a voluntary procedure instituted by a competent person (the Conservatee) to grant authority to a third-party (the Conservator) to manage his or her property.
- NJ Court Rule 4:86 et seq. establishes the procedural requirements for a guardianship or a conservatorship.
- If a conservator is appointed through a court proceeding, the conservator then has the fiduciary duty of managing the financial affairs of the individual, such as collecting assets and income, managing the assets, and preserving their value.

## What is a Conservatorship? (cont.)

- The court will oversee the arrangement of the conservatorship, which can be revoked at any time by the conservatee, provided that the conservatee is legally competent to decide on the revocation.
- The same person can be appointed guardian of the person and the conservator of the person's estate, which is known as a plenary guardianship.
- Typically, individuals suffering from mental illness, or who have cognitive impairments that interfere with their ability to make informed decisions are appropriate candidates for a conservatorship.

## The Age of Majority in NJ

- In NJ, any person under the age of eighteen (18) is considered a minor.
- When a person reaches the age of 18, parents can no longer make decisions legally on behalf of their child, regardless of the nature of their disability and regardless of whether the child still lives with their family.
- Also, even if the parent is the minor's natural guardian, the parent has no control over the minor's real property.
- A minor can have ownership of real property, but the minor is under a "disability" until he/she reaches the age of majority, since the minor lacks the capacity to enter into a binding contract.

## Conveyances that are Void or Voidable

- If a real estate conveyance is declared void, then it has no legal effect.
- However, if a conveyance is voidable, then it is valid until the conveyance is cancelled or deemed invalid.
- When a minor conveys or takes title to real property, the conveyance is voidable by the minor at the minor's option until he/she reaches the age of majority.
- For example, when the child conveys the real property by deed when he/she is 17, the child can then disavow it once they reach the age of majority and for some time thereafter.

## Custodianships

- A custodianship is a convenient way for a minor to hold title, but there can be estate planning and taxation ramifications when children own real estate.
- The New Jersey Uniform Gifts to Minors Act or N.J.S.A. § 46:38-13 et seq. establishes that the custodian's responsibilities over such gifts to minors include collecting, holding, managing, investing and reinvesting the custodial property for the minor's benefit.
- If the gift is vested in the child, it cannot be used by the custodian, who has a fiduciary duty over the gift, to fulfill the minor's support obligation.



## Custodianships (cont.)

- If title to real property is currently vested in a minor, once the minor reaches the age of majority, the custodian must convey the property to the minor.
- With a custodianship proceeding, the court action needs to be closed, and the property distributed to the minor.
- Also, the custodian has a fiduciary responsibility to the minor, and can't dispose of or use the assets for personal gain.
- All proceeds from a sale of the real property still belongs to the minor, and must be distributed by the custodian once the minor reaches the age of majority.

## Selling or Mortgaging a Property as a Minor

- If the minor wishes to sell or take out a mortgage on a property, then a guardian must be appointed through a guardianship proceeding.
- A court order specifically authorizing the transaction must also be obtained, so the guardian can execute the deed or mortgage.
- Also, if a guardian has been appointed in another state, an ancillary court proceeding will be needed because the foreign court does not have jurisdiction in New Jersey.
- This procedure may be time consuming and expensive, so if a minor is in title, the guardianship proceeding must be raised as a requirement on title.

## Foreign Guardianship or Conservatorship

- A foreign guardian or conservator is one appointed by a judicial authority outside the state where the property is located or the ward or conservatee is domiciled.
- A foreign guardian or conservator cannot make a valid conveyance, mortgage, or lease of property located beyond the limits of the state where the guardian or conservator qualified, unless authorized by statute.
- N.J.S.A. 3B:12-66.2 permits a guardian or like fiduciary of a minor appointed in another state to file a summary action in the Superior Court for the transfer of the guardianship and the appointment as a guardian in this State if domicile in this State is or will be established.

# Termination of Guardianship or Conservatorship

- Conservatorships and guardianships may be terminated by the court upon petition by the ward or a third party if a finding can be reached that it is no longer necessary.
- The death of the legally incompetent person also proves self-terminating.
- In the case of a minor, the guardianship will terminate by operation of law when the age of majority is reached.

## Powers of Attorney

- NJ Rev Stat §46:2B-8.1 et seq., or the NJ Revised Durable Power of Attorney Act defines a power of attorney and durable power of attorney.
- N.J.S.A. 46:2B-8.2A defines a power of attorney (POA) as a written instrument by which an individual known as the principal authorizes another individual or individuals known as the attorney-in-fact to perform specified acts on behalf of the principal as the principal's agent.

## Powers of Attorney (cont.)

- A durable power of attorney is a power of attorney which contains the words "this power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time," or "this power of attorney shall become effective upon the disability or incapacity of the principal," or similar words showing the intent that the authority conferred shall be exercisable notwithstanding the principal's subsequent disability or incapacity, and unless it states a time of termination, notwithstanding the lapse of time since the execution of the instrument.
- When reviewing a durable power of attorney, please confirm that the disability provision is included in the POA form.

## Powers of Attorney (cont.)

- The statute also defines disability as a principal who is unable to manage his property and affairs effectively.
- Also, an attorney-in-fact shall be under a disability if the attorney-in-fact is unable to exercise the authority conferred by the power of attorney effectively.
- If a power of attorney (POA) is executed, please note that the appointment of a guardian or conservator on behalf of the principal does not automatically cause the revocation of the attorney-in-fact's power.
- With the POA, the attorney-in-fact will now be accountable to both the fiduciary as well as to the principal, once a guardian or conservator is appointed by a court.

## Springing Durable Power of Attorney

- A springing durable power of attorney only takes effect upon the principal's disability.
- In NJ, all power of attorney documents require that both the principal and the attorney-in-fact are competent and be of sound mind at the point at which they are executed.
- This POA form is not typically used in most circumstances since the burden of proof for legally establishing that the "springing event" has occurred is on the principal and can sometimes be difficult to establish for the state.
- If you receive an executed Power of Attorney for a real estate transaction, please consult your underwriter to confirm that it is acceptable for a Deed or Mortgage.



## Fiduciary Duty of Attorney-in-Fact

- An attorney-in-fact in New Jersey has a fiduciary obligation to the principal and must act “within the powers delegated by the power of attorney and solely for the benefit of the principal.” N.J.S.A. 46:2B-8.13.a.
- An attorney-in-fact is also prohibited from any self-dealing which would be in violation of their fiduciary duties.
- Also, the fiduciary duty of the attorney-in-fact cannot be delegated to another agent, except to the extent that the power of attorney expressly and specifically so authorizes.

## Power of Attorney Affidavit

- From an underwriting standpoint, when recording a Power of Attorney for a particular transaction, we do require an Affidavit from the attorney-in-fact confirming that the POA is still in full force and effect.
- The attorney-in-fact must confirm that the POA has not been altered, revoked, or terminated, and the Principal is neither incompetent, disabled, nor dead.
- If the POA has been altered, revoked, or terminated by a subsequent POA, then the original POA is no longer effective and cannot be relied upon for the specific transaction.

# Underwriting Procedures for Guardianships and Conservatorships

- In general, a guardian or conservator has no authority without an order from a court of competent jurisdiction to sell, mortgage, lease, or otherwise encumber any property owned by the ward or conservatee unless the guardian or conservator is acting under statutory authority.
- An act of a guardian or conservator, if not executed with proper authority, is voidable and may be totally void.
- In the absence of specific authority, given either by statute or by an order of the court, the guardian or conservator has no power to purchase real property with the ward's or conservatee's funds.

## Underwriting Procedures for Guardianships and Conservatorships (cont.)

- If a guardian has been appointed on behalf of the seller or borrower on a transaction, a court order is required authorizing the sale, mortgage, lease, or encumbrance of the property.
- This order must be responsive to the petition presented and describe the property with sufficient certainty in order to identify it.
- When reviewing a Deed or Mortgage, please be sure the document is in compliance with the court order, and consult your underwriter regarding approval of the court order for the transaction.

## Underwriting Requirements

- When underwriting a transaction which involves a guardianship or conservatorship, please confirm that the guardian or conservator has been duly appointed and qualified.
- Also, please confirm that letters of guardianship or conservatorship have been issued, and that the guardianship or conservatorship has not been terminated by the death of the ward, or the minor reaching the age of majority.
- Lastly, when reviewing court documents for a guardianship proceeding, please confirm that the petition conforms with the provisions of the pertinent NJ statute.

## Wrap Up and Review

- A guardianship is not a voluntary procedure and is always a solution of last resort, since it strips an individual's fundamental right of self-determination.
- A conservatorship is a voluntary procedure which grants authority to a third-party to manage the ward's property, and can be revoked at any time by the ward, provided that the he/she is legally competent to decide on the revocation.
- In NJ, courts do have authority to allow guardians to transfer assets on behalf of a ward.
- Guardians, Conservators, and Custodians all have a fiduciary duty to the legally incompetent individual once they are appointed by a court.

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Please mark your calendars for our:

## August N2K HOUR

Tuesday  
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