

**FOCUS:  
ELDER LAW**

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In recent months, television viewers have been captivated by docuseries and fictional portrayals of conservatorship, known in New York as Guardianship. As with most on-screen productions, there may be more dramatic fiction at work than factual portrayal. A reasonable viewer would be worried about the prospect of guardianship, and maybe with good reason. A guardianship proceeding is an involved and often expensive process whereby a court declares a party to be incapacitated. This often means that the party no longer makes decisions about finances or medical treatment or even where they reside. It is essential to understand the New York State statutory framework and what our clients can do to avoid a guardianship altogether.

**Fiction vs. Fact**

**Fiction:** Guardianship proceedings happen without the participation of the person alleged to be incapacitated.

**Fact:** Guardianship proceedings in New York are initiated through the New York State Supreme Court and constitutional protections exist in each proceeding which afford the person alleged to be incapacitated with a right to be heard at any hearing which relates to their case and to be represented by counsel. In fact, if the alleged incapacitated person (“AIP”) is not present at the hearing, and no adequate reason is provided for their absence, any decision subsequently made by a judge can be overturned by a higher court. In New York, guardianships are initiated pursuant to the Mental Hygiene Law which is a statute with a multitude of protections for the AIP. Moreover, if the presiding judge does not appoint an attorney for the AIP, the AIP always maintains the right to request an attorney be appointed at any time during the guardianship proceeding.

**Fiction:** Family members are not notified of a pending guardianship proceeding and therefore a stranger

**Guardianship: Fact vs. Fiction**

can be appointed as guardian of the alleged incapacitated person without the input of close family or friends.

**Fact:** Article 81 gives very specific written direction as to who must be noticed of a pending guardianship hearing. Failure to notify all appropriate parties could invalidate any later guardianship findings. Among a variety of parties, the statute requires that the spouse, adult children, siblings, and parties who are active participants in the life of the AIP receive notice of any pending proceeding. Upon the initiation of the case, the Court will direct service of relevant documents upon all named relatives and will make further inquiry throughout the process to assure that all relevant parties are apprised of the status of the guardianship proceeding. Moreover, interested family members can themselves petition for guardianship if they oppose the application being brought before the Court. Once a finding is made, the “Alleged Incapacitated Person” is now denominated as an “Incapacitated Person.”

**Fiction:** Bank accounts or financial resources of the now incapacitated person can be accessed at whim by a court appointed guardian.

**Fact:** Guardianship matters are given great attention by the court and continuous oversight even after the initial proceeding has concluded. Pursuant to the Metal Hygiene Law, any guardian appointed over financial assets of an incapacitated person (“IP”) must provide several different reports to the court for review. First, 90 days after appointment, a court appointed guardian must submit an Initial Report for review. This report will detail what assets the IP owns and where such assets are held. Thereafter, at the end of each calendar year the guardian must provide the court with a comprehensive document known as an annual accounting. This accounting is a very detailed report of each expenditure made on behalf of the IP (with accompanying receipts for each transaction) as well as a detailed report of all investment gains and losses. These reports must be provided each year until the death of the IP. These reports are reviewed in detail by a court appointed examiner who has the authority to report back to the court



if their investigation reveals any financial irregularities or concerns.

Furthermore, guardians in New York must seek permission of the court to sell real property belonging to the IP, which assures an additional layer of protection for the IP. The guardian must present a compelling reason to sell real estate, especially if the IP is residing in the home at the time the sale is proposed.

**Fiction:** A guardian can send an Incapacitated Person to live in a nursing home against their will or without just reason.

**Fact:** A further proceeding under MHL Article 81 will be held to determine whether an incapacitated party should be moved into a nursing facility or other congregate care setting. If a court determines that a person is incapacitated within the meaning of the Metal Hygiene Law, the court may appoint a personal needs guardian. This type of guardian, often the same person as the property guardian, is commonly tasked with managing the care needs of the IP to assure that they are accessing and receiving the best quality of care available. Care can be delivered in a variety of settings, including at the home of the IP, in an assisted living or at a nursing home. Decisions regarding the day-to-day care of the IP are within the authority held by the guardian. If a guardian seeks to transfer the IP to a new care setting, he or she must first make an application to the court for permission to do so. This application must contain information pertaining to the proposed move, including the identify of the proposed care setting, the services available therein and the just cause for changing the residence of the IP. The IP would be noticed of such proceeding

and permitted to participate and be present during any discussion around a change in care. If the IP objects to the proposal, he or she can request counsel for the purposes of filing written objections to the proposed plan. In any case, decisions pertaining to change in home environment are not taken lightly and will be subjected to great scrutiny by the guardianship judge.

**Fiction:** Clients are at risk of having this proceeding initiated at any time and there is nothing they can do to protect themselves from a guardianship proceeding.

**Fact:** Clients who are proactive in their estate planning can avoid lengthy guardianship proceedings and can protect themselves from unwanted intervention. Anticipating their future needs, providing for assistance for personal and financial care, and maintaining a relationship with an attorney beyond what is commonly believed to be “estate planning” is critically important.

**Conclusion**

Clearly, it is critically important that each person, especially the elderly, to consult with an attorney to consider his or her future needs and to put what is needed in place. Even so, there may come a time when a formal guardianship is needed. However, the court pays close attention to the wishes of those in need. ⚖️



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