

# ELDERLAW

## NEWS

Legal News for the Aging and Disabled

New Jersey

®

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### QUESTIONS? CALL CERTIFIED ELDER LAW ATTORNEYS FOR ANSWERS.

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Call or write: Donald D. Vanarelli, Esq., Certified Elder Law Attorney and former Social Security Claims Representative.

Mr. Vanarelli is available to speak with your social, religious or educational group, or with your employees.

#### A PUBLICATION OF

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## GUARDIANSHIP LAW IN NEW JERSEY

### INTRODUCTION.

Guardianships are the legal mechanisms designed to provide surrogate decision-making and financial management for an individual who is no longer able to govern himself or herself fully due to physical or mental impairments and who has not effectively made alternate arrangements, such as voluntarily appointing an agent under a power of attorney or advance medical directive.

### HISTORY.

The concept of guardianship is of very early origin. Literature from Rome indicates that procedures were then in use to protect a person's property. Under Anglo-Norman legal traditions, the King, acting under the doctrine of *parents patriae*, was the protector of his subjects. Guardianships in England applied both to the person and the estate. The primary purpose of the guardianship power was to prevent persons from becoming public charges or squandering their resources to the detriment of their heirs.

### APPOINTMENT OF GUARDIANS IN NEW JERSEY.

All guardians in New Jersey are appointed by the Superior Court of New Jersey. The process of appointing a guardian begins when an individual, usually a family member, believes that the person is incapacitated and no longer able to care for him/herself and/or property. A Complaint must be filed in Court, and written statements from two (2) doctors must support the claim that the person lacks the mental capacity to make personal decisions and manage his or her financial affairs. The consent or cooperation of the incapacitated person, called the ward, is not required.

A Superior Court judge reviews the Complaint and supporting papers and, if sufficient, the judge sets a hearing date. At that time, the Court also appoints an attorney to represent the proposed ward, who must be notified of the guardianship application and may oppose the appointment of a guardian. The ward's attorney must submit a report to the Court, and appear at the hearing. If appropriate, the Court will judge the ward to be incompetent, and appoint a guardian of the ward's person and/or property.

### THE LAW.

A guardian has the power to: a. exercise custody over the ward and the ability to determine where the ward lives "within or without this state" b. provide for the ward's care, comfort, maintenance, training and education c. consent to medical treatment d. institute legal actions on behalf of the ward, and e. receive funds for the ward and apply such funds to the needs of the ward. (N.J.S.A. 3B:12-57)

"If a guardian has been appointed..., the court shall have full authority over the ward's person and... estate..., and all matters relating thereto;..." (N.J.S.A. 3B:12-36).

"The court has, for the benefit of the ward,...all the powers over his estate and affairs which he could exercise, if present and not under disability, except the power to make a will,

and may confer those powers upon a guardian...” (N.J.S.A. 3B:12-49)

“The court may exercise, or direct the exercise of, or release the powers of appointment of which the ward is donee, to renounce interests, to make gifts in trust or otherwise, or to change beneficiaries under insurance and annuity policies, only if satisfied, after notice and hearing, that it is still in the best interests of the ward.” (N.J.S.A. 3B:12-50)

“The court may...limit the powers conferred upon a guardian...” (N.J.S.A. 3B:12-37)

“[In exercising certain powers]...the guardian or the court should take into account any known estate plan of the ward, including his will...” (N.J.S.A. 3B:12-62)

“A guardian...has the same powers, rights and duties respecting his ward that a parent has respecting his unemancipated minor child, except that he is not legally obligated to provide for the ward out of his own funds.” (N.J.S.A. 3B:12-56)

“The authority...of a guardian...terminates upon the death, resignation or removal of the guardian or upon the death...” or return to competency of the ward. (N.J.S.A. 3B:12-64)

### **GUIDES TO DECISIONMAKING.**

Historically there have been two (2) substantive standards to guide how decisions for wards are to be made. Under the “substituted judgment” standard, the surrogate decisionmaker, the guardian, effectuates, to the extent possible, the formerly competent person’s wishes. In In re Conroy, 98 NJ 321, 365 (1985) the NJ Supreme Court stated that “the goal of decisionmaking for incompetent patients should be to determine and effectuate, insofar as possible, the decision that the patient would have made if competent”. When a guardian is unable to ascertain the ward’s wishes, the “best interest” standard is applied. Under the “best interest” standard, the guardian simply does what he or she believes is in the best interest of the ward. In the absence of clear direction, the guardian is expected to act as a reasonable person would under the circumstances.

### **COMMON MISPERCEPTIONS.**

1. Voting: A person does not lose his or her right to vote because he or she needs a guardian.
2. Constitutional rights: Persons found to be in need of a guardian retain fundamental constitutional rights which are not inconsistent with their status as incompetent persons.
3. Procreation: A guardian cannot consent to the sterilization of his or her ward without court approval
4. Marriage: New Jersey law prohibits the issuance of a marriage license to a person needing a guardian.
5. Guardian liability: A guardian is not liable for the acts or debts of his or her ward. However, a guardian is liable to use the ward’s assets to pay the ward’s debts, and for any of the guardian’s acts which may have contributed to the opportunity for acts of the ward to result in injury to a third party.

### **CONCLUSION.**

Mentally incapacitated persons may rely on surrogates to make personal and financial decisions. The surrogates may be voluntarily or involuntarily appointed. In New Jersey, guardians are surrogates appointed by the Superior Court who are empowered to protect the interests of their wards.



## **In This Issue... GUARDIANSHIP LAW IN NEW JERSEY**

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