

# **25 Things You Should Know About Your State's Guardianship Laws**

**Mary F. Radford**

**Professor Emerita**

**Georgia State University College of Law**

**Atlanta, GA**

# **A. STANDARD FOR THE APPOINTMENT OF A GUARDIAN OR CONSERVATOR**

- 1) State statutes take a number of different approaches to defining incapacity and the need for a guardianship or conservatorship. What standard is used in your state?**
- 2) Does your state statute allow the adult to make the decision that she is in need of a guardian or conservator and thus petition to impose a guardianship or conservatorship on herself?**

## **B. CHOICE OF GUARDIAN OR CONSERVATOR**

**3) Does your state have a procedure whereby an adult can name in advance the adult's choice as to who will serve as guardian or conservator should one be needed?**

**4) Can a parent or spouse make a testamentary appointment of a guardian or conservator for his or her incapacitated adult child or spouse?**

## **C. ATTORNEY FOR THE PROPOSED WARD**

**5) Does your state statute require that an attorney be appointed for the proposed ward in a guardianship or conservatorship proceeding?**

**6) If an attorney is required, what is that attorney's role — to advocate the proposed ward's wishes or to advocate for a result that would be in the ward's best interest?**

## **D. GUARDIAN'S AUTHORITY TO MAKE HEALTH-CARE DECISIONS (1)**

**7) Does your state law list procedures to which a guardian cannot consent?**

**8) Can a guardian exercise the power to make medical decisions if there is health care power of attorney or advance directive in place? In other words, what effect does the appointment of a guardian have on an already existing health care power of attorney?**

## **D. GUARDIAN'S AUTHORITY TO MAKE HEALTH-CARE DECISIONS (2)**

**9) Does your state's medical consent law coordinate with the guardianship law?**

**10) Does your state law address whether a guardian has the right to terminate life-sustaining treatments, including artificial nutrition and hydration?**

**11) Does your state law allow a guardian or conservator to make anatomical gifts on behalf of the ward?**

## **E. DECISION-MAKING STANDARD FOR GUARDIANS**

**12) When making decisions in the course of a guardianship, should the guardian use “substituted judgment” (emphasizing the expressed wishes and personal values of the ward) or a “best interest” standard (acting in a parental role towards the ward) or both?**

## **F. GUARDIANSHIPS & DURABLE FINANCIAL POWERS OF ATTORNEY**

**13) What is the effect of the appointment of a guardian or conservator on the continuing validity of a durable power of attorney?**



## **G. GUARDIANSHIPS AND DIVORCE**

**14) Does your state statute allow the guardian or conservator to petition for divorce on behalf of the ward?**

## H. GUARDIANSHIPS AND THE RIGHT TO VOTE

**15) Does the appointment of a guardian or conservator automatically deprive the ward of the right to vote?**

# I. GUARDIANSHIPS AND TESTAMENTARY CAPACITY

**16) Does the appointment of a guardian automatically cause the ward to lose testamentary capacity?**

**17) Does an adjudication of incapacity and the appointment of a guardian or conservator raise the presumption that the ward lacks testamentary capacity?**

## **J. GUARDIANSHIP AND THE POWER TO CREATE OR REVOKE A TRUST**

**18) Does the appointment of a guardian or conservator affect the ward's capacity to establish or revoke a trust?**

**19) May a guardian or conservator create a trust and transfer property of the ward into the trust?**

**20) May the guardian or conservator revoke a revocable trust that was set up by the ward prior to the imposition of the guardianship or conservatorship?**

## K. GUARDIANSHIPS AND GIFT-GIVING

**21) May the guardian or conservator make gifts on behalf of the ward?**

## L. GUARDIANSHIPS AND ESTATE PLANNING IN GENERAL

**22) What factors will a court consider before authorizing a guardian or conservator to engage in estate planning for the ward?**

## **M. GUARDIANSHIPS AND DISCLAIMERS**

**23) Will the IRS respect a disclaimer made by a guardian or conservator?**

**24) Will the Medicaid authorities recognize a disclaimer made by a guardian or conservator?**

## N. ATTORNEYS REPRESENTING GUARDIANS AND CONSERVATORS

**25) To whom does the  
attorney for a guardian or  
conservator owe duties?**