

private client services update

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INCAPACITATED WITHOUT A POWER OF ATTORNEY . . . WHERE DO WE GO FROM HERE?

Vonda W. Chappell

Many people, for a variety of reasons, become unexpectedly incapacitated without having executed a well-drafted Power of Attorney authorizing his or her designated agent(s) to act in the event that he or she is unable to manage and conduct his or her affairs. Whether it is because of denial, procrastination or simply due to the fast-paced lives we live today, it is not uncommon for individuals to have overlooked this critical issue in connection with their financial and personal planning. Many elderly clients will become interested in creating a Power of Attorney after having experienced a medical emergency or other circumstance which rendered them unable to conduct their personal business, but what about everyone else? It is essential for people of all ages and stations in life to have a Power of Attorney which (1) designates one or more agents to act for them in the event of their incapacity; and (2) sets forth the specific powers which are being granted to their agents. Such a document is relatively inexpensive to prepare and execute and could save an enormous amount of expense and time if circumstances call for a Power of Attorney which is not in existence.

The Problem

In the event that an individual is faced with either a temporary or permanent incapacity and is determined by a qualified medical professional to lack the ability to manage, conduct and/or otherwise administer his or her affairs, an extensive search will likely ensue to locate a Power of Attorney for him or her. If such a document does not exist, since the affairs of the incapacitated individual will likely demand immediate attention, the only viable option remaining is to seek the appointment of a Conservator and/or Guardian through the circuit court in which the incapacitated individual has established his or her residency. The appointment of a Conservator and/or Guardian is a creature of statute and is accomplished through a bifurcated structure set forth in Code of Virginia §37.1-134.6 *et seq.*

The Proposed Solution

Both a Guardianship and a Conservatorship are court established relationships in which an individual or entity is appointed as a decision maker for an incapacitated individual as reflected in an Order of the court. A Guardian is typically authorized by the court to administer the personal affairs of an incapacitated individual, including health, support, care, education, treatment and safety. On the other hand, a Conservator is authorized by the court to administer and manage the assets (also known as the incapacitated individual's estate), to include real and personal property, and the financial business and affairs of the incapacitated individual. The court may limit the authority granted to any Guardian and/or Conservator through either the scope of his or her responsibilities or the length of time that he or she will serve in such capacity. The court's Order should be carefully drafted by an attorney to ensure that the Guardian and/or Conservator is granted all of the necessary authority to provide for the best interest of the incapacitated individual, without stripping him or her of those rights and privileges which he or she may still retain the capacity to exercise. Depending upon the specific circumstances with which it is faced, the court may appoint either a Guardian or Conservator or both, and may appoint separate individuals or entities in those respective capacities.

continued on page 2

The Process

The first step in obtaining the appointment of a Guardian and/or Conservator is the filing of a Petition in the circuit court in accordance with the applicable statutes. The applicable Code provisions are very specific regarding the mandatory contents of a Petition and should be read and applied strictly. Notice of such proceedings are required to be provided to the alleged incapacitated individual, as well as to his or her family members or other interested parties as defined by law. The court will thereafter appoint a *Guardian Ad Litem* (an attorney who has been certified by the Virginia Supreme Court) to represent and safeguard the interests of the alleged incapacitated individual, to advise him or her of the rights which he or she has in connection with the pending proceeding, to protect the alleged incapacitated individual from unnecessary diminution of authority and to investigate and report to the court regarding the specific circumstances and parties involved in the proceeding. A hearing will thereafter be conducted before the court, and upon it being determined by the court that there is clear and convincing evidence that an individual is incapacitated as defined by statute, the court will appoint a suitable individual or entity to serve as a Guardian and/or Conservator. Upon entry of such an order of appointment, the designated individual or entity is required to appear in the Clerk's Office of the appointing court to qualify, subscribe to the required oath and post the bond mandated by the court in its Order. Once this has been accomplished, the Clerk of the Court will provide the individual or entity with a sealed, original Certificate of Qualification as evidence of the formal qualification.

The Presentation

When dealing with an individual or entity who represents that they are the Conservator of an incapacitated individual, it is vital that they present both a certified copy of the court's Order and an original Certificate of Qualification evidencing their authority to act. Additionally, the authority of the individual should be verified by a thorough review of the court's Order and care should be taken to confirm the identification of the individual or entity. Both a Conservator and a Guardian remain under the jurisdiction of the circuit court that ordered their appointment until their responsibilities are terminated by the court, and thus, they are required to file reports with the Department of Social Services and/or Inventories and Accountings with a Commissioner of Accounts assigned by the court to ensure that they are acting in accordance with their fiduciary duties due to the incapacitated individual.

The Point

Although Virginia law has made provision for the appointment and qualification of a Conservator and/or Guardian for those individuals who are adjudged to be incapacitated and who lack the benefit of a Power of Attorney communicating his or her desires, the process is neither expedient nor inexpensive. The lesson — everyone needs to take the time and make the investment to have their wishes properly and accurately set forth in a well-drafted Power of Attorney. It is a small price to pay for peace of mind.



Vonda W. Chappell is the managing partner of the Chesapeake office of Kaufman & Canoles. Her practice includes corporate law, estate and trust planning and administration, guardianship and conservatorship matters, and commercial and residential real estate. Vonda can be reached at (757) 546.4150 or vwchappell@kaufcan.com.

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IN THIS ISSUE

- INCAPACITATED WITHOUT A POWER OF ATTORNEY . . .
WHERE DO WE GO FROM HERE?

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