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GUARDIANSHIPS-BASICS AND HOW TO AVOID ABUSE AND PITFALLS

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Presented By:

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*No representation is made that the quality of the legal services to be performed
is greater than the quality of legal services performed by other lawyers.*

Guardianship and Conservatorship Law

- Alabama's Uniform Guardianship and Protective Proceedings Act.
Code of Alabama §26-2A-1
- **The Basics**
 - **Guardian**-Over the person-health, support, education, and maintenance
 - **Conservator**-Over the property; Bond Required; Triennial Accountings; and Final Settlement.
- **Guardian-Basics**
 - *Alabama Code §26-2A-70.* Appointment for a minor (under age 19). *A person may become a guardian of a minor by parental appointment or upon appointment by the court. The guardianship status continues until terminated, without regard to the location from time to time of the guardian or minor ward.*
 - *Alabama Code §26-2A-20(8). INCAPACITATED PERSON.* *Any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, physical or mental infirmities accompanying advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions.*
- **Conservator-Basics**
 - *For the Minor: Alabama Code §26-2A-130(b).* *Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a minor if the court determines that a minor owns funds or property requiring management or protection that cannot otherwise be provided or has or may have business affairs that may be jeopardized or prevented by minority, or that funds are needed for health, support, education, or maintenance and that protection is necessary or desirable to obtain or provide funds.*

- **For the Adult: Alabama Code §26-2A-130(c).** *Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines that (i) the person is unable to manage property and business affairs effectively for such reasons as mental illness, mental deficiency, physical illness or disability, physical or mental infirmities accompanying advanced age, chronic use of drugs, chronic intoxications, confinement, detention by a foreign power, or disappearance; and that (ii) (aa) the person has property that will be wasted or dissipated unless property management is provided, or that (bb) funds are needed for the health, support, education, or maintenance of the person or those entitled to the person's support and that protection is necessary or desirable to obtain or provide the funds.*
- **Guardian- Venue**
 - **Court Where the Ward Has Property-Alabama Code §26-2A-101-** *The venue for guardianship proceedings for an incapacitated person is in the place where the incapacitated person resides or is present at the time the proceedings are commenced. If the incapacitated person is admitted to an institution pursuant to order of a court of competent jurisdiction, venue is also in the county in which that court is located.*
 - **Court Where the Person Resides or if Person Does Not Reside in Alabama: Alabama Code §26-2A-132-** *Venue for proceedings under this division is: (1) In the court at the place in this state where the person to be protected resides whether or not a guardian has been appointed in another place; or (2) If the person to be protected does not reside in this state, in the court at any place where property of the person is located.*
- **Jurisdiction- Alabama Code §26-2A-31**
 - (a) *To the full extent permitted by the constitution, the court has jurisdiction over all subject matter relating to estates of protected persons and protection of minors and incapacitated persons. (b) The court has full power to make order, judgements, and decrees and take*

all other action necessary and proper to administer justice in the matters that come before it. (c) The court has jurisdiction over protective proceedings and guardianship proceedings. (d) If both guardianship and protective proceedings as to the same person are commenced or pending in the same court, the proceedings may be consolidated. (e) No provision of this chapter shall be construed to void, abate, or diminish, the powers or equity jurisdiction, when invoked, heretofore or hereafter granted by the statute to certain probate courts.

- Probate Court has jurisdiction over protective proceedings and guardianship proceedings.
- Probate Court may consolidate guardianship and conservatorship
- Since only Probate Courts of Jefferson and Mobile have equity powers some subject matters may be moved to Circuit Court for proper consideration. (Example: Sale of Real Estate).
- ***The Adult Protective Service Act of 1976 (Alabama Code, §38-9-1 through §38-9-11)*** allows the Department of Human Resources to petition the Circuit Court for protective services or placement to prevent abuse, neglect or exploitation.

➤ **Priority of Candidates-Guardians**

- (a) ***Alabama Code, §26-2A-104(a)-Any qualified person may be appointed guardian of an incapacitated person.***
- (b) ***Alabama Code, §26-2A-104(b)-Unless lack of qualification or other good cause dictates the contrary, the court shall appoint a guardian in accordance with the incapacitated persons' most recent nomination in a durable power of attorney.***
- (c) ***Alabama Code, §26-2A-104(c)-Priority of candidates.***
(c) except as provided in subsection (b, the following are entitled to consideration for appointment in the order listed: (1) spouse of the incapacitated person or a person

nominated by will of a deceased spouse or by other writing signed by the spouse and attested by at least two witnesses or acknowledged; (2) An adult child of the incapacitated person; (3) A parent of the incapacitated person, or a person nominated by will of deceased parent or by other writing signed by a parent and attested by at least two witnesses or acknowledged; (4) Any relative of the incapacitated person with whom the person has resided for more than six months prior to the filing of the petition and (5) A person nominated by the person who is caring for or paying for the care of the incapacitated person.

➤ **Priority of Candidates-Conservators**

➤ **Alabama Code, §26-2A-138-Priority of candidates for trustee or conservator:** *(a) The court may appoint an individual or a corporation with general power to serve as trustee or conservator of the estate of a protected person. The following are entitled to consideration for appointment in the order listed: (1) A conservator, guardian of property, or other like fiduciary appointed or recognized by an appropriate court of any other jurisdiction in which the protected person resides; (2) An individual or corporation nominated by the protected person who is 14 or more years of age and of sufficient mental capacity to make an intelligent choice; (3) An attorney-in-fact under a valid durable power of attorney previously executed by the protected person and giving the attorney-in-fact reasonably broad powers over the property of the protected person; (4) The spouse of the protected person, or a person nominated by the will of a deceased spouse to whom the protected person was married at the decedent's death and the protected person has not remarried; (5) An adult child of the protected person; (6) A parent of the protected person, or a person nominated by the will of a deceased parent; (7) Any relative of the protected person who has resided with the protected person for more than six months before the filing of the petition; (8) A person nominated by one who is caring for or paying benefits to the protected person; and (9) A general guardian or sheriff for the county who must be appointed and*

act as conservator when no other fit person applies for appointment and qualifies. (b) A person in priorities (1), (4), (5), (6), or (7) may designate in writing a substitute to serve instead and thereby transfer the priority to the substitute. With respect to persons having equal priority, the court shall select the one it deems best suited to serve. The court, acting in the best interest of the protected person, may pass over a person having priority and appoint a person having a lower priority or no priority.

- **Petition for Appointment-Alabama Code, §26-2A-102- Court appointment of guardian for incapacitated person.**
 - (a) *Except as provided by subsection (e), an incapacitated person or any person interested in the welfare of the incapacitated person may petition for appointment of a limited or general guardian.*
 - (b) *After the filing of a petition, the court shall set a date for hearing on the issue of incapacity so that notices may be given as required by Section 26-2A-103, and, unless the allegedly incapacitated person is represented by counsel, appoint an attorney to represent the person in the proceeding. The person so appointed may be granted the powers and duties of a guardian ad litem. The person alleged to be incapacitated shall be examined by a physician or other qualified person appointed by the court who shall submit a report in writing to the court. The person alleged to be incapacitated also shall be interviewed by a court representative sent by the court. The court representative also shall interview the person who appears to have caused the petition to be filed and any person who is nominated to serve as guardian and visit the present place of abode of the person alleged to be incapacitated and the place it is proposed that the person will be detained or reside if the appointment is made and submit a report in writing to the court. The court may utilize the service of any public or charitable agency as an additional court representative to evaluate the condition of the allegedly incapacitated person and to make appropriate recommendations to the court.*

- (c) *A person alleged to be incapacitated is entitled to be present at the hearing in person. The person is entitled to be represented by counsel, to present evidence, to cross-examine witnesses, including the court-appointed physician or other qualified person and any court representative, and upon demand to trial by jury as provided in Section 26-2A-35. The issue may be determined at a closed hearing if the person alleged to be incapacitated or counsel for the person so requests.*
- (d) *Any person may apply for permission to participate in the proceeding, and the court may grant the request, with or without hearing, upon determining that the best interest of the alleged incapacitated person will be served thereby. The court may attach appropriate conditions to the permission.*
- (e) *The custodial parent or parents or an adult custodial sibling of an adult child who is incapacitated by reason of an intellectual disability, may file, in lieu of a petition, a written request to be appointed guardian of his or her adult child or his or her adult sibling in order to continue performing custodial and other parental responsibilities or family responsibilities, or both responsibilities, for the child after the child has passed his or her minority. The court may waive any or all procedural requirements of the Uniform Guardianship Act, including notice and service, and appointments, and interviews. The adult child alleged to be incapacitated shall have had an examination by a physician or other qualified person and furnish a written report of the findings to the court.*

In lieu of a hearing, the probate court shall hold an informal hearing with the custodial parent or custodial parents or custodial adult sibling requesting the guardianship, the adult child for whom the guardianship is sought, and a guardian ad litem for the adult child chosen by the judge of probate.

Following the interview, the court may do any of the following:

(1) Issue an order appointing the custodial parent or custodial parents or custodial sibling as guardian of the adult child as in any other proceeding pursuant to this section.

(2) Deny the request for appointment as guardian pursuant to the special proceedings allowed only for a custodial parent or custodial parents or custodial sibling.

(3) Delay a determination on the request to gather additional information in compliance with one or more of the usual requirements for appointments, interviews, or examinations by physicians or other qualified persons.

- Petition for Appointment filed in Probate Court by any person interested in the welfare of the incapacitated person.
- Notice of date set for hearing (per **Alabama Code §26-2A-103**).
- Person must be represented by counsel or court appoints Guardian *ad Litem*.
- Examination by physician or other qualified person appointed by the court. Examiner must present written report to court.
- Court representative shall also interview person nominated to serve as guardian, as well as the incapacitated person, as well as the proposed residence. A written report shall be submitted to the court.
- Person alleged to be incapacitated is entitled to the following:
 - To be present at the hearing;
 - To be represented by counsel;
 - To present evidence;

- To cross examine witnesses including the court-approved physician or other qualified person and any court representation; and
- Demand to trial by jury.

➤ ***Alabama Code, §26-2A-103- Notice of Hearing on Guardianship-Adult***

(a) In a proceeding for the appointment of a guardian of an incapacitated person, and, if notice is required in a proceeding for appointment of a temporary guardian, notice of hearing must be given to each of the following:

(1) The person alleged to be incapacitated, her or his spouse (if any), and adult children, or if none, parents;

(2) Any person who is serving as guardian, conservator, or who has the care and custody of the person alleged to be incapacitated;

(3) In case no other person is notified under paragraph (1), at least one of the nearest adult relatives residing in this state, if any can be found; and

(4) Any other person as directed by the court.

(b) Notice of hearing on a petition for an order subsequent to appointment of a guardian must be given to the ward, the guardian, and any other person as ordered by the court.

(c) Notice must be served personally on the alleged incapacitated person. Notices to other persons as required by subsection (a)(1) must be served personally if the person to be notified can be found within the state. In all other cases, required notices must be given as provided in Section 26-2A-50.

(d) The person alleged to be incapacitated may not waive notice.

- Guardianship or temporary guardianship notice must be given fourteen (14) days in advance of the hearing to the following:
- ***Alabama Code , §26-2A-107-Temporary Guardian***
 - (a) If an incapacitated person has no guardian, an emergency exists, and no other person appears to have authority to act in the circumstances, on appropriate petition the court, without notice, may appoint a temporary guardian whose authority may not extend beyond 30 days and who may exercise those powers granted in the order.*
 - (b) If the appointed guardian is not effectively performing duties and the court further finds that the welfare of the incapacitated person requires immediate action, it may appoint, with or without notice, a temporary guardian for the incapacitated person having the powers of a general guardian for a specified period not to exceed six months. The authority of any permanent guardian previously appointed by the court is suspended as long as a temporary guardian has authority.*
 - (c) The court may remove a temporary guardian at any time. A temporary guardian shall make any report and comply with any conditions the court imposes or requires. In other respects the provisions of this chapter concerning guardians apply to temporary guardians.*
- If there is no Guardian and an emergency exists, the Court on appropriate petition and without notice, may appoint a temporary guardian whose authority shall not extend beyond thirty (30) days.
- The petition must explain the emergency of the circumstances.
- Because the position is temporary, a petition for permanent guardianship should accompany petition for temporary guardianship.

➤ ***Alabama Code, §26-2A-133-Petition for Appointment of Conservator***

(a) The person to be protected or any person who is interested in the estate, affairs, or welfare of the person, including a parent, child, guardian, custodian, or any person who would be adversely affected by lack of effective management of the person's property and business affairs may petition for the appointment of a conservator or for other appropriate protective order.

(b) The petition must set forth to the extent known the interest of the petitioner; the name, age, residence, and address of the person to be protected; the names and addresses of all persons, known to the petitioner, who must be given notice, a general statement of the person's property with an estimate of the value thereof, including any compensation, insurance, pension, or allowance to which the person is entitled; the reason why appointment of a conservator or other protective order is necessary, and whether bond has been relieved. If the appointment of a conservator is requested, the petition must also set forth the name and address of the person whose appointment is sought and the basis of the claim to priority for appointment.

➤ The person protected, or any person who is interested in the estate or welfare of the person or any person who would be adversely affected by lack of management may petition for appointment of a conservator.

➤ Petition must include:

- Interest of the Petitioner;
- Protected person's identification (name, addresses, age), names of all person entitled to notice;

- Statement of person's property and value including income;
- Name and address of person whose appointment as conservator is sought;
- Whether bond is relieved (Bond required to insure performance of the Conservator.) Bond amount must include all property (excluding real estate) and one year's annual income (*Alabama Code, §26-2A-139*)

➤ ***Alabama Code, §26-2A-134-Notice of Hearing on Petition***

(a) On a petition for appointment of a conservator or other protective order, the requirements for notice described in Section 26-2A-103 apply, but (i) if the person to be protected has disappeared or is otherwise situated so as to make personal service of notice impracticable, notice to the person must be given by publication as provided in Section 26-2A-50, and (ii) if the person to be protected is a minor, the provisions of Section 26-2A-75 also apply.

(b) Notice, as described in Section 26-2A-103, of any hearing on a petition for an order subsequent to appointment of a conservator or other protective order must be given to the protected person, any conservator of the protected person's estate, and any other person as ordered by the court.

- Similar to *Alabama Code, §26-2A-103*, unless person is missing. Must then publish notice.

➤ ***Alabama Code, §26-2A-108-Powers of Guardian***

(a) Except as limited pursuant to Section 26-2A-105(c), a guardian of an incapacitated person is responsible for health, support, education, or maintenance of the ward, but is not liable to third persons by reason of that responsibility for acts of the ward. In particular and without qualifying the foregoing,

a guardian has the same duties, powers, and responsibilities as a guardian for a minor as described in Section 26-2A-78(b), (c), and (d).

(b) Except as provided in Division 2A, in addition to the duties, powers, and responsibilities of a guardian described in subsection (a), a guardian of an incapacitated person has the power to limit or enforce the ward's right to visitation or communication with anyone, including the right to receive visitors, telephone calls, and personal mail.

- Unless limited by ***Alabama Code, §26-2A-105(c)*** guardian is responsible for health, support, education, or maintenance of the ward.
- Guardian not responsible for acts of the ward. Guardian is not responsible to third parties by reason of the responsibilities (cost of care).
- Court encourage maximum self reliance and independence of protected persons. Therefore, court may limit guardian's duties.
- ***Alabama Code, §26-2A-152-Powers of Conservator-No Court Approval Needed (Examples)***
 - Invest and reinvest funds.
 - Collect, hold and retain lands.
 - Dispose of assets (other than real property).
 - Enter into leases for term not exceeding five (5) years.
 - Pay claims.
- Pay reasonable annual compensation to conservator. Subject to approval of accounting.
- **Court Approval Required (Examples)**
 - Sell Real Estate, operation of any business, leases for terms of five (5) years or more.

- *Alabama Code, §26-5-2-Routine account and vouchers-If not otherwise directed, the conservator must, at least once in three years, file in the court of probate an account of his or her guardianship, accompanied with the vouchers showing his or her receipts and disbursements, which must be verified by affidavit. Upon the filing of such account and vouchers the court must appoint a guardian ad litem to represent the ward.*
 - Triennial Accounting- must be filed in Probate Court.
 - Final Settlement (*Alabama Code, §26-5-8*)-*The conservator, or his personal representative, must file in the court of probate a full account of the conservatorship, accompanied by the vouchers and verified by affidavit. Upon the filing of such account and vouchers, the court must appoint a guardian ad litem to represent the ward if he be a minor or otherwise incapacitated.*
 - The conservator must file final settlement in order to have his audit approved. More importantly, final settlement is necessary to relieve conservator of his/her duties and discharge of bond.
- **Alternatives to Guardianship**
 - **Persuasion**
 - Social Worker
 - Care Managers
 - Conversation
 - Medical Team
 - **Health Care Power of Attorney**
- **Alternatives to Conservatorship**
 - Single Transaction- (*Alabama Code, §26-2A-137*)
 - Example: Sale of real estate or establishment of trust where power of attorney is insufficient.

➤ **Advance Planning**

- Powers of Attorney.
- Joint Accounts.
- VA Fiduciary.
- Representative Payee over Social Security payment.
- Living Trust can hold assets where Trustee has powers to manage.
- Limited Guardianship with acknowledgement of Irrevocable Durable Power of Attorney. Very successful when Mom no longer meddles in finances.

➤ **Lessons of *Ex parte Joann Bashinsky In the Matter of the Estate of Joann Bahsinky, a protected person No. 1190193 Supreme Court of Alabama***

- Joann Bashinsky petitioned the Supreme Court of Alabama for a writ of mandamus directing the Jefferson Probate Court to vacate its orders disqualifying her attorneys from representing her in the underlying proceedings and appointing a temporary guardian and conservator over her person and property. Bashinsky also seeks dismissal of the “emergency Petition for a Temporary Guardian and Conservator” (“the emergency petition”) that initiated the underlying proceedings and the petition for a permanent guardian and conservator (“the permanent petition”) filed simultaneously with the emergency petition in probate court, both of which were filed by John McKleroy and Patty Townsend.
- The two (2) primary arguments:
 - 1) Defect in personal jurisdiction based on a lack of proper service of process of emergency

petition for Temporary Guardianship and Conservatorship; and

2) Fundamental lack of due process as result of disqualification of her counsel at the outset of the October 17, 2019 hearing on the emergency petition.

- The Supreme Court opined that an emergency did not exist.
- Mrs. Bashinsky was due notice which she did not receive.
- The petition did not support any circumstances that would likely result in substantial harm to a respondent's health safety or welfare (*Alabama Code, §26-2B-201(a)(1)*). This is part of Alabama's Uniform Adult Guardianship and Protective Proceeding Jurisdiction Act. *Mrs. Bashinsky therefore contends that the definition of the term "emergency" in §26-2B-201(a)(1) should be considered in pari materia with discussion in §26-2A-107(a) of an "emergency" petition for guardianship. She further asserts that nowhere in their petition did McKelroy and Townsend allege, much less demonstrate, that "substantial harm to [Mrs. Bashinsky's] health, safety, or welfare" existed at the time they filed the emergency petition.*
- At the October 17, 2019, Mrs. Bashinsky was present, her attorneys were disqualified and she was not able to present evidence or question witnesses. Because there was no emergency established, the representation and case presentation rights of §26-2A-102 and §26-2A-135 were applicable.
- **Conclusion:** *Mrs. Bashinsky's constitutional and statutory rights of due process were also violated through a deprivation of counsel and a lack of opportunity to present evidence and argument before the probate court. "A judgment is void...if the court rendering it...acted in a manner inconsistent with due process." Insurance Mgmt. & Admin., Inc. v. Palomar Ins. Corp., 590 So. 2d 209, 212 (Ala.1991).*

Accordingly, we conclude that the probate court's October 17, 2019, order appointing a temporary guardian and conservator

must be set aside. Given that the hearing appointing a temporary guardian and conservator was a nullity, it follows that the determination to disqualify Mrs. Bashinky's attorneys that occurred during that hearing, and which precipitated the aforementioned due-process violations, must also be set aside.

➤ When All Else Fails

- Mom may still be a pill.
- Guardianship may not solve all the issues. You still have to juggle issues of care and safety over a difficult resident.
- Guardian and Conservator involve a significant taking away of liberties and due process is essential to foundation.
- Guardianship and Conservatorship may not solve all the issues...consider alternative.
- Understand duty and responsibility of Guardian and Conservator before petition is filed.