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Managing Incapacity: A Brief Overview of Guardianship in Virginia and Available Alternatives

by Shannon A. Laymon-Pecoraro, Esq.

Upon reaching the age of majority, an individual is presumed to have the capacity to make his or her own decisions. Many people plan for an incapacity by executing a Power of Attorney and Advanced Medical Directive, documents that appoint someone to serve as an agent under terms and conditions set forth in the document. However, a problem arises when advanced planning has not been done and an individual no longer has the requisite legal capacity to execute a Power of Attorney and Advanced Medical Directive.

In most cases, when an adult becomes incapable of making their own decisions and appropriate estate planning documents do not exist, a local court will need to appoint a substitute decision maker. These substitute decision makers, known as Guardians and Conservators, will then have the authority to make decisions on behalf of the incapacitated individual. In Virginia, a Guardian is a person appointed to make health care decisions for an incapacitated individual, while a Conservator is a person appointed to make financial decisions.

To initiate a guardianship proceeding, a formal request for appointment must be made in the appropriate court. A Guardian ad Litem will be appointed by the court to protect the interests of the person with the alleged incapacity, medical evidence of the incapacity must be produced, and notice of the proceedings must be provided to individuals identified by the Commonwealth of Virginia as having an interest in the matter. The person against whom the suit is brought has rights, such as the right to be represented by an attorney of their choosing and a right to a trial by jury.

At the hearing, the court will attempt to determine if an individual is incapacitated and, if so, to what extent the individual requires assistance. If the court determines that the individual is incapacitated, the court will then determine the appropriate individual(s) to serve as a guardian and conservator. The appropriate individual may be an adult individual such as a relative or friend, or may be an entity such as a non-profit agency or a corporation. Upon appointment as a Guardian or Conservator, the appointed individual will be required to qualify in the clerk's office and post a bond, which may be with or without surety.

With the determination of incapacity and appointment of a Guardian or Conservator, the person with the incapacity may lose fundamental rights and

Managing Incapacity: A Brief Overview of Guardianship in Virginia and Available Alternatives (cont'd)

privileges such the right to vote, marry or divorce, or carry a driver's license. Because the guardianship process may affect such rights, state law require that guardianship be imposed only when less restrictive alternatives are not available. In addition to the execution of a Power of Attorney and Advanced Medical Directive, less restrictive alternatives include the appointment of a Representative Payee by a state or federal benefits or entitlement program, establishment of trusts, and utilizing default provisions under the Virginia Code.

Many factors must be considered when managing incapacity. To assess how you should prepare for incapacity, or to receive assistance in managing a loved one's incapacity, contact Hook Law Center to schedule an initial consultation with one of our attorneys.



Seal Pups

Hook Law Center: Kit Kat, what can you tell us about seal pups in San Diego?

Kit Kat: Well, there is some great news! As you may know, California is the perfect place for harbor seals! They love the relatively mild weather that is year-round in that part of the country. However, in San Diego, there had been a problem with a public beach in which there was not enough room for the seal pups and the general public. The beach was in the La Jolla section and was not quite large enough to accommodate both groups. So, in August, the California Coastal Commission decided that the beach would be off-limits to the public during pupping season, Dec. 15-May 15. People can still see the pups, but they have to do so at a distance from a sea wall. It's an experimental rule for 5 years, so they'll see how this works.

Something had to be done. It's hard to believe, but some strange things were happening to the seals. People were hugging them for pictures, throwing frisbees very close to them, even hitting them and pulling on their flippers! People probably did not realize how disturbing this was to the seals, but it was very unsettling for them. Now, during this critical period when the pups are small, they will be forced to observe at a safe distance. The city had tried other less intrusive measures, like roping off part of the beach and establishing curfews. However, they proved ineffective. Stay tuned as we see how the seals adapt. At least for the next five years, they're going to love the return to a quieter way of live.

(Emily Smith, "Protecting the Pups, All Animals, January/February 2015, p. 9)

Upcoming Events

- **January 22, 2015** – Andrew Hook will be speaking to the Portsmouth Community Criminal Justice Board regarding how the aging population may affect the court system.
- **January 29 – 31, 2015** - Andrew Hook will attend the NAELA Summit in Newport Beach, California.
- **February 7, 2015** – Shannon Laymon-Pecoraro will be speaking to the Down Syndrome Association of Hampton Roads' Baby Play Group.
- **February 10, 2015** – Andrew Hook will be teaching a continuing legal education seminar to personal injury attorneys on "Protecting Your Client's Settlement Using Trusts."
- **February 20-21, 2015** – Andrew Hook will be speaking on Managing a Small Law Firm at the 2015 VAELA UnProgram in Charlottesville, VA.
- **August 12, 2015** - Andrew Hook will be speaking to a group at Maryview Hospital in Portsmouth, Virginia.
- **August 21, 2015** - Andrew Hook will be speaking to a group at DePaul Hospital in Norfolk, Virginia.
- **August 27, 2015** - Andrew Hook will be speaking to a group at Mary Immaculate Hospital in Newport News, Virginia.



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