

Office of the State Public Defender
**GUARDIANSHIP/CONSERVATORSHIP
CHECKLIST**

January 1, 2011

INITIAL CLIENT CONTACT

- Meet with the client as soon as possible – in private and in advance of litigation
- Identify yourself by name and affiliation
- Be sure to clarify that you are not part of the healthcare or residential facility staff
- Explain what is happening and the basis on which guardianship/conservatorship is being sought
- Explain court appointed physician's examination, visitor's interview, and the judicial hearing process
- Get the client's version of the facts of the case, including
 - Circumstances surrounding the filing of the petition
 - Names and contact information for all persons having knowledge of the circumstances
 - Information regarding past hospitalizations, treatment, guardianships, conservatorships, payeeships, valid or void POA's or other forms of substituted judgment to which client has been subjected
 - Information to aid in exploring alternatives to guardianship and conservatorship
 - Client's preferences for guardian or conservator, including past conflicts
 - Information regarding income and assets and concerns client has about managing those assets, including gifts, trust transfers or other distributions within past 10 years
 - Information regarding any obligations the client has to support others
 - Any wishes the client has for priority in use of assets
- If the client has a deteriorating condition you should consider recording or otherwise preserving the conversation
- Discuss and explain the client's rights including right to remain silent and right to have counsel present during any examination
- Discuss the desirability of a court hearing
- If you believe the client may have difficulty understanding or retaining information, you must present that information in such alternative format as facilitates understanding
 - And you must do the same for any ward authorized to receive the information
- Explain the confidential nature of attorney-client communications
- Explain the client's right to obtain private counsel at client's own expense
- Obtain signed releases from client
- Advise the client regarding all available options
 - Assist the client in obtaining his/her objectives by advising him/her regarding the probabilities of success associated with each option
 - **But remember:** If the client wishes to seek services that would obviate the need for guardianship or conservatorship or would support a limited guardianship or conservatorship, you must give the client such advice and assistance as allows the client to pursue those wishes
- You must advocate for the client's express wishes and not substitute your own judgment
 - To the extent that the client is unable to express personal wishes, you must advocate the position that best safeguards and advances the client's interests in liberty
- Be alert for issues involving language, literacy, chemicals, mental health, medication

HANDLING THE CASE

- Thoroughly review guardianship and conservatorship statutes and the pleadings associated with the case
- Attempt to interview all persons with knowledge of the circumstances of the guardianship/conservatorship
- Where a client consents, or wishes to consent, to voluntary services or alternatives to guardianship or conservatorship, ensure the consent was not a result of threats, coercion or undue influence
 - If it was, take immediate steps to ameliorate the consent
- Seek the most expedient and timely resolution that does not offend the client's express wishes
- Do not agree to a continuance unless it is necessary for effective advocacy
- Ensure that the client may exercise the client's right to a jury trial
 - Explain the benefits and detriments of a jury vs. judge trial
 - Inform the court immediately if the client elects a jury trial
 - If the clients elects to waive a jury, ensure that the waiver is knowing and voluntary
- Ensure that the client actively participates in every stage of the proceeding
 - Encourage the client to be present at all hearings
 - ❖ Avoid using your authority to waive the client's presence except where attendance would seriously jeopardize the client's condition
 - Advise the client regarding the law at every stage of the proceedings
 - Make a record of advice regarding the client's elections and waivers
- When a client is under the influence of medications, introduce evidence regarding the medication and its effect on the client's demeanor
- Advocate zealously and effectively for the client's express interests at all stages of trial
- Be familiar with court rules and local customs regarding the guardianship/conservatorship process
- Seek to bifurcate the incapacity proceedings and the proceedings to identify the guardian or conservator
- Conduct rigorous examination and cross-examination of all witnesses and challenge non-testimonial evidence regarding
 - the client's judgment pertaining to personal care and safe living arrangements or the ability to make rational day to day decisions;
 - the client's susceptibility to exploitation;
 - client's current functional abilities;
 - alternate explanations for impairment;
 - alternatives to guardianship or conservatorship;
 - the viability of health examinations that were performed;
 - allegations that the client was exhibiting unusual behavior;
 - the factual basis for conclusory opinions;
 - the qualifications of the proposed guardian or conservator, and possible conflicts of interest; and
 - the client's ability to make rational important life decisions
- Consider whether the client's condition permits participation in the hearing process
- Argue for strict application of the burden of proof and the law and preserve the record
- If the court orders guardianship or conservatorship, ensure it narrowly defines the restricted rights
- Identify and introduce all evidence favorable to the least restrictive guardianship available
 - E.g., limited guardianship, temporary guardianship, protective order
- Ensure the order protects client's maximum self-reliance and independence
- Request 90 day inventory, annual accounting, and annual guardian reports
- Request court prohibit guardian from receiving compensation from the estate without a court order
- Solicit support of social workers to explore possible community service options