

The Law and You

Legislative Survey: HB 167

I need your help this month. I have been trying to move an important bill through our State Legislature. HB 167 has the support of many, including the Utah State Bar.

But there are those, I believe, who have a lack of understanding about guardianships and the need to protect vulnerable adults.

So, I would like to conduct a small poll. It will not be scientific, but it may influence those who are blocking HB 167.

Before launching into the survey, I must first provide sufficient background and information so that you can reach an informed opinion. This is not a subject of common knowledge or a subject that has received any media coverage.

I am involved in many guardianship proceedings. There are also conservatorship proceedings, but to simplify this discussion, I will generally confine my terminology to guardianships.

Unfortunately, we all face the possibility of old age. Unless taken from this mortal existence sooner, we will face the prospect of becoming incapacitated. By this I mean that we will no longer be capable of making reasoned decisions about our care. We may also not be able to manage our financial affairs prudently or safely.

Some of you may have already witnessed this kind of incapacity in your parents or a friend or a spouse. None of us wants it. Many of us fear it. Nonetheless, it happens far more often than we would like.

When it does happen, who will protect us? That is, who has the legal power to make medical decisions for us. Or, who will keep us safe and protect us? Who will manage our financial affairs and keep others from exploiting us?

For those of us who have adequately prepared estate documents, a child or spouse

or a friend or relative may have been named to protect us and our assets. For those who have not made such preparations, however, a guardianship may be required.

The central issue of debate among some of our senior advocates is whether your spouse or child who petitions the court for a guardianship should be permitted to pay for the costs of the guardianship from your estate.

By “senior advocates” I mean organizations like the local AARP or Salt Lake County Aging Services. They believe that your child or your spouse or your relative should pay for the guardianship proceeding out of their funds, not yours.

This is contrary to what actually happens in practice. I know because I have handled hundreds of these of cases. However, there is no statutory basis. The theory is that the guardianship or conservatorship proceeding is for the sole purpose of protecting you or your assets.

These are not adversarial proceedings as between you and the petitioner. It may be adversarial between the petitioner and a sibling or other person. But courts will not impose a guardianship unless the facts show that you are incapacitated and that you or your assets need to be protected.

Since it is you or your assets receiving protection in a guardianship proceeding, does it not make sense for your estate to pay for such protection? We are not talking about a lot of money here, perhaps \$1,000-\$2,000. It could be more if someone other than you contests it. Often the person contesting it is the one who has engaged in abuse or financial exploitation.

HB 167 provides that such costs would be paid from your estate ONLY if the court finds that you are incapacitated and only if the court appoints a guardian or conservator to

protect you.

Let us now get to the survey. I would like you to send me an e-mail message or write me a letter or card at the addresses set forth below under the heading of "Your Questions."

Simply state one of the following responses:

1. I agree that if I am determined to be incapacitated by a court, the costs of the guardianship proceeding should be paid from my estate. Or, in the alternative,

2. I believe that the petitioner who seeks guardianship to protect me should pay for the guardianship proceeding himself or herself, even if I am truly incapacitated and can no longer protect myself or my assets.

That is all I am asking from you. If you wish to say more, that is fine. And, if you wish to have further information or clarification, you can visit my web site where guardianship and conservatorship matters are discussed more fully.

I should add one final note about HB 167. It also contains another important provision to protect vulnerable adults from abuse and financial exploitation. It permits you to recover your attorney fees if you prevail in a lawsuit against a person who has abused or exploited you. Without HB 167, you cannot recover your attorney fees.

And finally, in addition to responding to my little survey or instead of doing so, please contact your State Representative and Senator and urge them to support HB 167 and bring it to the floor for a vote. It should pass if a vote is allowed.