

Guardian or Conservator Fact Sheet For Children & Caregivers of the Aging Population (Seniors)

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Guardians - A guardianship is a legal right given to a person to be responsible for the food, health care, housing, and other necessities of a person deemed fully or partially incapable of providing these necessities for himself or herself.

Legal Guardianships typically become necessary when a person no longer becomes able to manage his or her own estate and/or able to care for themselves. A Guardianship can be obtained over a person, his or her estate, or both. In its simplest terms, a Guardianship is a Court supervised proceeding where a person (the Guardian) is appointed by the Court to act on behalf of another (the Ward) and/or to manage the Ward's assets if the Ward is a minor or incapacitated.

Guardianships are similar to Probate in the sense that they can be costly, require Court supervision, and take several weeks to establish in the ordinary course of business. However, with proper state planning you can avoid the use of a Guardianship altogether. Nonetheless, if it becomes necessary to establish a Guardianship, we are here to help guide you through the process.

When Is A Guardian Required for an Adult?

It may be necessary to petition a court to appoint a legal guardian for persons:

- Who have a physical or mental problem that prevents them from taking care of their own basic needs;
- Who as a result are in danger of substantial harm; and
- Who have no person already legally authorized to assume responsibility for them.

Under some circumstances, it may be necessary for a court to appoint an emergency guardian, who can act on your behalf during a crisis (such as immediately following a car accident) until you regain your ability to make your own decisions.

How is a Guardian Appointed?

The precise procedure will vary to some degree from jurisdiction to jurisdiction. The typical steps are as follows:

1. The person seeking the appointment of a guardian files a petition with the probate court for the jurisdiction where the allegedly legally incapacitated person resides. This petitioner is often a relative, an administrator for a nursing home or health care facility, or other interested person. A petition is ordinarily accompanied by medical affidavits or other sworn statements which evidence the person's incapacity, and either identifies the person or persons who desire to be named guardian or requests the appointment of a public guardian.

2. The court arranges for any necessary evaluation of the allegedly legally incapacitated person. Often, this will involve the appointment of a "guardian ad litem", a person who is appointed to provide an independent report to the court on behalf of the allegedly legally incapacitated person. If appointed, the guardian ad litem will meet with the allegedly incapacitated person, inform that person of his or her legal rights, and report back to the court on the person's wishes. The guardian ad litem may also speak to the petitioner, to health care providers, and to other interested individuals in order to provide the court with full information about the allegedly incapacitated person's condition and prognosis. Depending upon state law, the court may appoint a doctor or professional to examine the allegedly incapacitated person.
3. If the allegedly incapacitated person contests the appointment of a guardian, a trial is scheduled during which sworn testimony will be given, and at the conclusion of which the judge will decide if the petitioner met the requisite burden of proof for the appointment of a guardian. The allegedly incapacitated person is ordinarily entitled to appointed counsel, if unable to afford a private attorney.
4. If the allegedly incapacitated person consents to the petition, or is unable to respond to inquiries due to disability, the court will hold a hearing at which witnesses will provide sworn testimony to support the allegations in the petition. If the evidentiary basis is deemed sufficient, the guardian will be appointed.
5. If a guardian is appointed, the judge will issue the guardian legal documents (often called "letters of authority") permitting the guardian to act on behalf of the legally incapacitated person.

What Are a Guardian's Duties?

The guardian makes decisions about how the person lives, including their residence, health care, food, and social activity. The guardian is supposed to consider the wishes of the incapacitated person, as well as their previously established values, when making these living decisions. The guardian is intended to monitor the legally incapacitated person, to make sure that the person lives in the most appropriate, least restrictive environment possible, with appropriate food, clothing, social opportunities, and medical care.

A guardian may be required to post a bond, unless the requirement is waived by the court. In most jurisdictions where bond is required, waivers are routine.

The Purpose of Court Supervision

The court supervises the guardian's choices on behalf of the ward. After the initial appointment of a guardian, an initial review is usually scheduled, followed by annual reports by the guardian to the court. The purpose of this supervision is to ensure that the legally incapacitated person is in fact benefiting from the most appropriate, least restrictive living environment possible, with appropriate food, clothing, social opportunities, and medical care.

How Can a Guardianship Be Ended?

A guardianship can be terminated by the court which created it. This ordinarily happens if the legally incapacitated person recovers from the incapacity that necessitated the guardianship. A particular guardian's role may be terminated by the court or by resignation, in which case the court will ordinarily appoint a successor guardian to take over management of the legally incapacitated person's affairs. A guardianship also ends upon the death of the legally incapacitated person.

What About Co-Guardians?

Sometimes, relatives of a legally incapacitated person will request that they be made co-guardians for that person. If this is done, depending upon the laws of the jurisdiction and the

terms of the appointment, it may be necessary for both co-guardians to approve any decision made on behalf of the legally incapacitated person. This can create needless delay in the administration of emergency care, and can create difficulty in establishing authority for even minor decisions. Thus, it is usually advisable not to have co-guardians, but instead to name a single guardian, perhaps with the other relative named as a successor guardian.

Avoiding Guardianship

It is possible to avoid the necessity of a guardianship through estate planning. A good estate plan will include a medical power of attorney which will enable a trusted individual to make health care decisions for you in the event of incapacity, and a general durable power of attorney to permit a trusted individual to manage your personal affairs. To a considerable extent, those documents can specify how you wish to live, and how you wish to be treated, in the event of disability - whereas a court or guardian may make decisions with which you would disagree. In most cases, when these documents have been executed in accord with the laws of your state, it will not be necessary for your loved ones to seek the appointment of a guardian or conservator should something happen to you - something that can be cumbersome and emotionally taxing at an already difficult time.

A probate conservatorship is a court proceeding where a judge appoints a responsible person (called a conservator) to care for another adult who cannot care for him/herself or his/her finances (called a conservatee).

Conservators - A conservatorship is a legal right given to a person to be responsible for the assets and finances of a person deemed fully or partially incapable of providing these necessities for himself or herself.

In some jurisdictions, a conservatorship may be referred to as a "guardianship of the estate", or by some similar alternative name. For information on addressing matters concerning the person as opposed to property see legal our section on legal guardianship.

A conservator of the person - cares for and protects a person when the judge decides that the person (called the "conservatee") can't do it.

A conservator of the state - handles the conservatee's financial matters like paying bills and collecting a person's income - if the judge decides the conservatee can't do it.

There are many circumstances where a person is still able to live an independent life, but may require assistance with his or her assets due to failing health or disability. Thus it is not unusual for a petition to be made for the appointment of a conservator, even where the allegedly incapacitated person does not require a guardian.

1. When Is A Conservatorship Required

It may be necessary to petition a court to appoint a legal guardian for persons:

- Who have physical or mental problems that prevent them from managing their own financial affairs;
- Who have no person already legally authorized to assume responsibility for them; and
- Where other kinds of assistance with financial management will not adequately protect them.

2. When can I Establish a Probate Conservatorship?

You must be sure that establishing a conservatorship is the only way to meet the person's needs. If there is another way, the Court will not grant your petition.

You may not need a conservatorship if the person who needs help:

- Can cooperate with a plan to meet his/her basic needs.
- Has the capacity and willingness to sign a power of attorney naming someone to help you with his/her finances or healthcare decisions.
- Has only social security or welfare income every month and the Social Security Administration can appoint you Representative Payee. The Representative Payee is the person the beneficiary allows to receive Social Security checks in their name on behalf of the beneficiary.
- Is married and the spouse can handle financial transactions. The property must be community property or in joint accounts.

3. How is a Conservator Appointed?

The precise procedure will vary to some degree from jurisdiction to jurisdiction. The typical steps are as follows:

1. The person seeking the appointment of a conservator files a petition with the probate court for the jurisdiction where the allegedly legally incapacitated person resides. This petitioner is often a relative, an administrator for a nursing home or health care facility, or other interested person. A petition is ordinarily accompanied by medical affidavits or other sworn statements which evidence the person's incapacity, and either identifies the person or persons who desire to be named conservator or requests the appointment of a conservator.
2. The court arranges for any necessary evaluation of the allegedly legally incapacitated person. Often, this will involve the appointment of a "guardian ad litem", a person who is appointed to provide an independent report to the court on behalf of the allegedly legally incapacitated person. If appointed, the guardian ad litem will meet with the allegedly incapacitated person, inform that person of his or her legal rights, and report back to the court on the person's wishes. The guardian ad litem may also speak to the petitioner, to health care providers, and to other interested individuals in order to provide the court with full information about the allegedly incapacitated person's condition and prognosis. Depending upon state law, the court may appoint a doctor or professional to examine the allegedly incapacitated person.
3. If the allegedly incapacitated person contests the appointment of a conservator, a trial is scheduled during which sworn testimony will be given, and at the conclusion of which the judge will decide if the petitioner met the requisite burden of proof for the appointment of a conservator. The allegedly incapacitated person is ordinarily entitled to appointed counsel, if unable to afford a private attorney.
4. If the allegedly incapacitated person consents to the petition, or is unable to respond to inquiries due to disability, the court will hold a hearing at which witnesses will provide sworn testimony to support the allegations in the petition. If the evidentiary basis is deemed sufficient, the conservator will be appointed.
5. If a conservator is appointed, the judge will issue the conservator legal documents (often called "letters of authority") permitting the conservator to act on behalf of the legally incapacitated person.

A conservator will ordinarily receive compensation, subject to court oversight, for performing duties for the estate. This is often charged on an hourly basis, and is ordinarily paid from the estate of the legally incapacitated person.

4. Who can be Appointed as Conservator?

The law has a system for choosing the conservator. It gives preference to the person at the top of the list, then moves down:

- Spouse
- Adult Child
- Parent
- Sibling
- Any other person that law says is okay.
- Public Guardian

5. What Are a Conservator's Duties?

The first duty a conservator has is to take an inventory of the legally incapacitated person's assets, and to report those assets to the court.

If the conservator will be paying money on behalf of the legally incapacitated person, it will be necessary to open a special checking account reflecting the conservatorship (e.g., in the name of "John Doe, as Conservator for the Estate of Jane Smith"). Courts often require that the checking account return the actual physical checks after they are processed, and that those cancelled checks be maintained as part of the conservator's records.

The conservator will be responsible to account for all expenditures, and for the assets of the estate, typically on an annual basis or more frequently if ordered by the court.

If the legally incapacitated person has assets that must be maintained, or which are not in use, the conservator may seek court permission to rent or sell those assets. For example, if the legally incapacitated person has a home but will never be able to return home due to illness or disability, it may be wise to sell the home. If the legally incapacitated person is expected to return home, but not for an extended period of time, it will be necessary to maintain the home, and in some circumstances may be appropriate to rent the home during the period when the legally incapacitated person is absent. Similarly, rather than leaving a motor vehicle parked in a garage for years, it may be in the best interest of the legally incapacitated person to sell the vehicle before further depreciation or deterioration from non-use.

If the legally incapacitated person is capable of participating in financial decisions, the conservator is ordinarily required to permit the legally incapacitated person to participate to the extent he or she is able. In some circumstances, a court may appoint a conservator to perform a certain set of tasks which are beyond the ability of the legally incapacitated person, while permitting that person to manage his or her own affairs for other financial tasks which remain within his or her ability.

A conservator is typically required to post a bond, unless the requirement is waived by the court. In most jurisdictions where bond is required, waivers are common.

6. When should the Public Guardian be Conservator?

The Court can sometimes appoint the Public Guardian as conservator. This usually happens when someone makes a referral. Referrals can be made by:

- Adult Protective Services (APS)
- A relative,
- A neighbor,

- A doctor,
- A police officer,
- The Court, or
- Another interested person.

7. The Purpose of Court Supervision

The court supervises the conservator's actions by requiring that permission be obtained in advance of certain major transactions (such as the sale of a legally incapacitated person's home), and through annual accountings, in order to ensure that the legally incapacitated person's assets are being properly managed, bills are being paid, nobody is misappropriating funds, and the estate is not being wasted.

8. How Can a Conservatorship Be Ended?

A conservatorship can be terminated by the court which created it. This ordinarily happens if the legally incapacitated person recovers from the incapacity that necessitated the conservatorship. A particular conservator's role may be terminated by the court or by resignation, in which case the court will ordinarily appoint a successor conservator to take over management of the legally incapacitated person's assets. A conservatorship also ends upon the death of the legally incapacitated person.

9. Avoiding Conservatorship

It is possible to avoid the necessity of a conservatorship through the state planning. A good estate plan will include a general durable power of attorney to permit a trusted individual to manage your personal affairs in the event of your incapacity. You may also create a more limited power of attorney, which protects your assets in the manner you desire rather than leaving their management to the discretion of a conservator or court. In most cases, when this document has been executed in accord with the laws of your state, it will not be necessary for your loved ones to seek the appointment of a conservator should something happen to you.

You may also choose to place your assets into a living trust, such that they are automatically under the management of a designated trustee in the event that you become disabled.