

GUARDIANSHIP AND CONSERVATORSHIP OF ADULTS

Although adults are assumed to be capable of making their own decisions, there are times when circumstances render an individual incapable of making responsible decisions. If a person becomes incapacitated, and no other instrument is in place to appoint a decision maker, it may be necessary for a court to appoint a guardian and/or a conservator for the individual.

What is a Guardian?

A guardian is an individual or entity appointed by the Probate Court to make decisions regarding the care and welfare of an incapacitated individual. The court must determine, through a hearing, that an individual is incapacitated and that appointment of a guardian is necessary and desirable to provide continuing care and supervision of the incapacitated person. Unless the court imposes limitations on the guardian's authority, a guardian has general authority to make decisions about the incapacitated individual's life and well-being, including where the person lives, whom the person sees and with whom the person speaks, and what medical treatment the person receives. If the court does not appoint a conservator for the individual, the guardian may also have limited authority over the individual's money and property. If the person has a significant amount of money or property, the court will usually appoint a conservator as well as a guardian, although the same person may serve both roles.

What is a Conservator?

A conservator is an individual or entity appointed by the Probate Court to manage the money and property of an individual who is determined to be incapacitated. A person under a conservatorship is referred to as a "protected person." Before a conservator is appointed, the court must be persuaded that the person who is incapacitated has property that will be wasted or dissipated unless properly managed. A conservator has the duty to protect, invest, and use the assets for the protected person's benefit, and must account to the court for the administration of the assets.

What is Incapacity?

The Probate Code, at title 18-A, section 5-101(1) of the Maine Revised Statutes, defines an incapacitated person as "any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause except minority to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions regarding his person." Incapacity must be proved by the written report of a physician or licensed psychologist. A court cannot determine that a person is incapacitated or order a guardianship merely because the person has made poor decisions or decisions with which the person's family members disagree. Individuals of limited capacity may not need a full guardianship to ensure continuing care

and oversight of their needs. In those situations, the court can grant a limited guardianship, giving the guardian authority over only the specific issues needed for the protection of the incapacitated person.

Who May Serve as a Guardian or Conservator?

Any competent adult can serve as a guardian or conservator. The law gives preference to an incapacitated person's spouse, an adult child, or a parent, in that order, but the court may appoint another relative or close friend if there is no spouse, child, or parent who is willing and available to serve. A private agency or corporation could also serve as a guardian in appropriate circumstances. If a suitable, private guardian cannot be found, the court may appoint a public guardian—an agency of the state government—for the incapacitated person.

What is the Process for Appointing a Guardian or Conservator?

Any person who is concerned about another person's welfare and ability to manage personal affairs and assets may file a petition in the Probate Court (in the county where the person in need of a guardian or conservator lives) asking the court to appoint a guardian, a conservator, or both. The person filing the petition may request that he or she be appointed guardian or conservator, or may nominate someone else to serve. Notice of the petition must be given to all "interested parties," including the person who is allegedly incapacitated, his or her spouse and adult children, and in some instances, the state. The petitioner must also file a guardianship plan and conservatorship plan stating how the person's needs will be met. A physician or psychologist must also evaluate the individual and file a report documenting the person's capacity (or lack of capacity) to make personal or financial decisions.

After the petition is filed, the Court appoints a neutral person, called a "visitor," who will meet with the person in need of a guardian or conservator. The visitor will also meet with the person who is nominated to be the guardian or conservator. After these meetings, the visitor will file with the court a report of his or her observations. If the allegedly incapacitated person expresses an interest in contesting the appointment of a guardian or conservator, the court must appoint an attorney to represent the individual if he or she has not already retained one. After the court receives all of the required reports, it will hold a hearing to decide whether the person is in fact incapacitated and whether a guardian or conservator is needed. If it is necessary, the court will issue an order appointing a guardian and/or conservator. The court's order will also describe the limitations, if any, on the authority of the guardian or conservator.

Is the Appointment of a Guardian or Conservator Permanent?

When an individual files a petition for guardianship or conservatorship with the court, he or she may indicate that an emergency exists and request the appointment of a temporary guardian or conservator to protect an individual from physical danger or threatened loss of property. If the Court finds that an emergency exists, the Court may appoint a temporary guardian or conservator without following the formal process described above. A temporary

conservator may serve no longer than six months, however, and the Court's order will limit the authority of the temporary guardian or conservator to that which is needed to address the emergency. The court will later hold a full hearing to determine whether the incapacitated individual needs a guardian or conservator on a long-term basis. Regardless of whether the court imposes a guardianship or conservatorship on a general or temporary basis, the court can remove the guardian or conservator at any time if the protected person is no longer incapacitated or the court feels removal would be in the person's best interest.

What Are the Alternatives to Guardianship and Conservatorship?

Though a guardianship or conservatorship provides the protection of court oversight, it is not always desirable because it involves public disclosure of family matters, results in the deprivation of a person's rights and independence, and can be more expensive than available alternatives. Planning for incapacity while you are still competent, for example, by creating a financial power of attorney or advance health care directive (instruments that allow you to appoint individuals to make financial and health care decisions in the event of your incapacity) may avoid the need for a guardian or conservator in the future.

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