



ASA DIX LEGAL BRIEF

A PREVENTIVE LAW SERVICE OF THE JOINT READINESS CENTER LEGAL SECTION
UNITED STATES ARMY SUPPORT ACTIVITY DIX
KEEPING YOU INFORMED ON YOUR PERSONAL LEGAL NEEDS

GUARDIANSHIP CONSERVATORSHIP

Q: WHAT IS THE PURPOSE OF APPOINTING A GUARDIAN OR CONSERVATOR?

A: Traditionally, there has been a distinction between “guardianship” and “conservatorship.” A guardian is a person, institution, or agency appointed by a court to manage the personal affairs of minor children or adults who lack the capacity to make or communicate responsible and/or sound decisions concerning their own personal matters. Various states have identified adults with mental illness, developmental disability, physical incapacity, chronic intoxication, and advanced age as lacking decisional capacity. While guardians are appointed to manage personal affairs, such as food, health care, housing, etc., conservators are usually appointed to specifically manage financial affairs. The minor or incapacitated person is called a “ward.”

Q. CAN A GUARDIAN AND A CONSERVATOR BE THE SAME PERSON?

A: Yes. A ward may have either a guardian or conservator, although he or she will usually have both. A minor or incapacitated person who is incapable of handling his or her own personal affairs will usually be incapable of managing financial matters. Thus, petitions for both a guardianship and conservatorship are often filed together with the probate court (or other court with appropriate authority) and the proceedings for both are combined. When both a guardian and a conservator must be appointed, the same person might serve in both capacities.

Q. HOW IS A GUARDIAN OR CONSERVATOR APPOINTED?

A. Typically, the person seeking to be appointed the guardian or conservator of an alleged incapacitated person will file a petition, accompanied by medical affidavits or sworn statements supporting that person’s incapacity, with the probate court (or other court having appropriate authority) in the jurisdiction where the alleged incapacitated person lives. The court will usually then appoint a “guardian ad litem” to evaluate the person’s condition and prognosis, whereby a report will be submitted to the court. If the alleged incapacitated person contests the appointment of a guardian or conservator, a trial will be scheduled and testimony will be presented. However, if consent is given to the appointment of the guardian/conservator or the person is incapable of responding, the court will schedule a hearing and witnesses will present testimony in support of the incapacitation. If a guardian and/or conservator is appointed, the court will prepare and issue written documents (often referred to as “letters of authority”) evidencing the guardian’s or conservator’s authority to act on behalf of the incapacitated person. Certified copies normally are obtained and provided to interested parties such as schools, hospitals, and government agencies upon request.

Q. DO GUARDIANS HAVE ANY FINANCIAL AUTHORITY OVER THEIR WARD?

A. Normally, yes. Guardians normally have limited powers under state probate codes. Guardians usually can receive and use current income for the ward’s support and maintenance, and to pay off the ward’s bills. Guardians normally may receive their ward’s Social Security benefits, disability income and similar benefits. If the guardian and conservator are not the same person, then the guardian may be asked to assist the conservator

in devising a monthly budget and financial plan. Excess money should be turned over to the conservator, trustee, or other person responsible for the ward's overall finances.

Q. WHAT RESPONSIBILITIES DO GUARDIANS AND CONSERVATORS HAVE TOWARD THE COURT?

A. The court will supervise the guardian's care of the ward and/or the conservator's financial management of the ward. The guardian and conservator are required to submit reports to the court, typically on an annual basis. However, if there is a significant change in the ward's condition or situation, or if the guardian or conservator moves, he or she should promptly notify the court prior to the next scheduled report due to the court. Unlike conservators, guardians are not normally required to post bond (most jurisdictions routinely waive the posting of bonds) or file a periodic financial accounting.

Q. ARE GUARDIANS AND CONSERVATORS COMPENSATED?

A. Normally, guardians and conservators are entitled to reasonable compensation for their services, payable from the funds of the ward. However, no compensation is permitted without a court order. This compensation is taxable income to the guardian and conservator.

Q. WHEN MAY A GUARDIANSHIP AND CONSERVATORSHIP BE TERMINATED?

A. A guardianship or conservatorship may be terminated for various reasons, such as death of the ward, resignation of the guardian or conservator, when the ward reaches the age of majority, when the ward recovers from the incapacity that resulted in the establishment of the guardianship or conservatorship, or when the court deems it necessary to terminate the guardianship or conservatorship. However, a guardianship or conservatorship is never automatically terminated; court proceedings or the filing of mandated documents are still necessary to relieve the guardian or conservator.

Q. CAN A GUARDIANSHIP OR CONSERVATORSHIP BE AVOIDED?

A. Generally, yes. Guardianships and conservatorships can be avoided so long as a health care power of attorney and a general durable power of attorney are in effect. It is also advisable to have a living will to ensure that your end-of-life decisions are appropriately enacted. Health care powers of attorney, general durable powers of attorney, and living wills are the topic of other ASA Dix Legal Briefs "Advanced Medical Directives" and "Powers of Attorney." When these legal documents are properly executed under your state's law, a guardian or conservator will usually not need to be appointed if you become incapacitated.