

GUARDIANSHIP/CONSERVATORSHIP

CHAPTER 8

Guardianship is a legal process whereby one individual is appointed by a Probate Court to have the authority and responsibility for the personal affairs of another person who has been adjudged **incapacitated**. In particular, the guardian has the power to decide care and custody matters for his **ward**. The guardian makes personal decisions for the incapacitated person to the extent decreed by the Probate Court judge and based on that person's own best interest (such as where he lives or the care he requires).

Conservatorship is a legal process similar to guardianship; however, it deals only with the financial affairs of an individual who has been adjudged **disabled**. The conservator has the authority to take charge of and manage the **protectee's** property and money. A conservator has no authority to make decisions regarding another individual's personal affairs. Only a guardian has the power to make such decisions. A person may be both guardian and conservator for an individual who is adjudged incapacitated or disabled.

DEFINITIONS

Guardianship in Missouri is governed by Chapter 475 of the Missouri Revised Statutes. It is important that certain terms dealing with guardianship and conservatorship be understood. The following definitions, as they apply to guardianship and conservatorship, should be helpful:

Guardian: A person appointed by the Probate Court to have the custody of a minor or of an incapacitated person. A **limited guardian** is a person whose powers as guardian are limited by the court to certain specified functions.

Incapacitated Person: A person who is unable due to any physical or mental condition to receive and evaluate information or to communicate decisions to such an extent that he is unable to provide himself with food, clothing, shelter, safety, or other care to such an extent that physical injury, illness or disease is likely to occur.

Partially Incapacitated Person: A person who lacks some, but not all, of the abilities necessary to provide himself with food, clothing, shelter and other essential care.

Ward: A minor or an incapacitated person for whom a guardian or limited guardian has been appointed.

Conservator: A person or corporation appointed by the Probate Court to care for, have custody of the property, and oversee the financial affairs of a minor or a person with a disability.

Limited Conservator: A person whose duties and powers are limited by the court. A conservator is **not** automatically a protectee's representative payee for federal SSI or Social Security benefits.

Person with a disability (requiring a guardian or conservator): A person who is unable due to any physical or mental condition to receive and evaluate information or who lacks the ability to communicate decisions needed to manage his financial resources.

Person with a partial disability (requiring a guardian or conservator): A person who lacks some, but not all, of the abilities necessary to manage his financial affairs.

Protectee: A person for whom a conservator or limited conservator has been appointed.

Habilitation: Instruction, training, guidance or treatment to enable and encourage a person with a disability to gain the life skills necessary to cope with the demands of his care and environment.

Guardian ad litem: A person appointed by the court to represent a minor, incapacitated person, a person with disabilities, or an unborn person in a particular situation or lawsuit. The guardian ad litem is appointed for a limited period or conservatorship and during the court proceedings.

Respondent: A person who is alleged in a legal petition to be incapacitated or disabled. The term is used in written notices of hearings for guardianship or conservatorship and during the court proceedings.

Adult: A person who has reached the age of 18.

Minor: A person under the age of 18.

Least Restrictive Environment: The legal requirement that an incapacitated person's liberties should be limited to the minimum necessary to prevent him from injuring himself or others and which provides him with such care, habilitation, and treatment as is appropriate considering his physical and mental condition and his financial means.

Manage Financial Resources: The ability to obtain, administer, or dispose of real, personal and business property, benefits, income or assets or take necessary actions to prevent waste or loss of property, or to provide the care and support of one's self or anyone under one's care by ordinary skills and intelligence based on training and experience.

For Whom May a Guardian Be Appointed?

1. A person adjudged to be incapacitated.
2. A minor with no living parents.
3. A minor whose parents have had parental rights terminated by Juvenile Court action.
4. A minor whose parents are judged unwilling, unable, or unfit by Probate Court action.

Who May File for Guardianship?

Any interested person may file a petition with the Circuit Court, Probate Division, for the appointment of himself or some other qualified person as guardian of a minor or an incapacitated person. The person filing the petition is not guaranteed to be appointed guardian, even if the petition is successful. The Probate Court will make the final decision as to who will be appointed guardian.

Who May Serve as Guardian or Conservator?

Any interested person may petition to become the guardian of an individual who is alleged to be incapacitated, and, if so appointed by the judge, may serve in that capacity.

Relatives usually make the best guardians or conservators. The law states that the court shall consider the appointment of a spouse, parent, adult child, adult sibling, or other close adult relative of an incapacitated person before considering the appointment of a non-relative. This “family priority” is a preference, but is not obligatory because appointment is based on a “best interest” standard.

The law provides that a person who is not a Missouri resident may become guardian for a person who is a Missouri resident. Some judges frown on that practice, especially if the proposed guardian lives in a state far removed from the ward. However, the law recognizes that in some cases, such as when the proposed guardian lives in a neighboring state, the appointment of an out-of-state guardian may be just as effective as appointing one who lives in Missouri.

Conservatorship for the property of a person adjudged to be incapacitated might be vested in either a person or a corporation.

Joint Guardianship/Conservatorship

Joint Guardianship/Conservatorship is possible, but some judges do not like the idea that more than one individual must be involved to make a decision on behalf of a ward.

Types of Guardianship and Conservatorship

The Missouri guardianship statutes are designed to tailor guardianship and/or conservatorship to meet the specific individual needs of a proposed ward or protectee. They recognize that persons who are incapacitated or disabled have different abilities in different areas. For example, a person who has mild retardation may forget about taking medication and need a limited guardian to help with the task, or an elderly person may have trouble balancing his checkbook and need a

conservator to help manage his money. The law provides for limited guardianship and limited conservatorship, as well as full guardianship and conservatorship. With a limited guardianship or a limited conservatorship, the ward or protectee retains certain legal rights and freedoms.

The Process of Awarding Guardianship/Conservatorship

The process by which a guardian or conservator may be appointed begins when an interested person files an application/petition with the Probate Division of the Circuit Court (1) in the county where the respondent has his official residence, (2) if the respondent has no official residence, the county in which the respondent actually lives or has property, or (3) in the county or on any federal reservation within the county where the respondent or his property is found. Forms for filing for guardianship are available from the Probate Court. The Probate Court judge, if satisfied that there is good reason to do so, will then set a time and place for a hearing on the application and must appoint an attorney to represent the respondent. This attorney is the Guardian ad litem. Notice of the pending proceeding is to go to the respondent and all relatives listed on the petition.

The Guardian ad litem is required to visit the respondent prior to the hearing. The law provides for paying reasonable fees to Guardian ad litem. These fees are charged to the estate of the respondent, or if the respondent has no estate, to the county. It should be kept in mind that if an individual files an application for guardianship/conservatorship and is not successful, he would be responsible for all costs in connection with the case unless he is acting within the scope of responsibility of a public office to which he has been elected or appointed.

Based on evidence presented at the hearing, the judge will decide whether the respondent needs a guardian or conservator (or both) or a limited guardian or limited conservator (or both). In order to make that decision, the judge will consider, among other things:

1. If the respondent is capable of living independently;
2. The degree to which the respondent can live independently;
3. If the respondent can take care of himself; and
4. If the respondent can properly take care of his own money and property.

These questions and many more may be asked by the judge, and for that purpose he may seek testimony from a number of sources, such as family members, friends, neighbors, caseworkers, counselors, doctors and others who may have specific information concerning the respondent and his needs.

The burden of proof is on the petitioner, the person who is seeking to have a guardian/conservator appointed for the respondent, to prove that the respondent is totally or partially incapacitated or totally or partially disabled.

Duties of a Guardian

Guardians are required by Missouri statutory law to act in the best interest of the ward. The guardian is also required to insure the ward receives the necessary care, treatment, habilitation,

education, support, and maintenance. According to Missouri statutory law, a Guardian's duties include, but are not limited to the following:

- Assure the ward lives in the best and least restrictive environment;
- Assure that the ward receives needed medical care and other services;
- Promote and protect the care, comfort, safety, health and welfare of the ward; and
- Provide required consents on behalf of the ward.

Guardians do not have the authority to seek admission of a ward to a mental health or mental retardation facility for more than 30 days without a court order, except in certain cases provided under the law. § 475.120, RSMo (2000).

Effects of Guardianship/Conservatorship

The seriousness of a legal proceeding designed to have a guardian or conservator appointed for a respondent becomes obvious when one considers that such an action, if successful, will remove some or all of the rights of citizenship from the individual. Thus, the intent of the guardianship law is to protect the rights of the respondent, not cater to the convenience of the proposed guardian or conservator.

Particular legal and personal limitations that happen if a full conservator and/or guardian is may imposed include:

1. The stigma that a ward feels regarding how he is now treated under the law. The person, for example, may have little or no say about where he lives, who his doctor is, or how this property and money is handled. In sum, the person's status in society is confirmed through legal reinforcement.
2. Loss of power to consent, or object, to medical care.
3. Loss of the right to vote.
4. Loss of the power to obtain Department of Mental Health community placement if the guardian objects.
5. Loss of the right to marry without guardian/court permission.
6. Loss of the right to make enforceable contracts.
7. Being subjected to placement in a mental health or mental retardation facility without court hearing.
8. Loss of the right to hold public office.
9. Loss of the right to obtain a driver's license or drive a motor vehicle.
10. Disqualification from being a witness in court.

An important distinction should be made between a minor and an adult who is found to be incapacitated or disabled. In the case of a minor, the presumption is that when he reaches age 18, he is no longer subject to the authority of his parents. It is at this age that parents of a child who has a disability are faced with the question of whether a guardian and/or conservator are

necessary. As with any decision to seek a guardian and/or conservator, the effort should be made only after careful consideration of the minor's abilities, desires, and needs. Without an order by a court giving a parent the authority as a guardian/conservator, the parent can no longer legally make decisions on behalf of the child.

Limited Guardianship/Conservator

If there is a finding of partial incapacity or partial disability, a limited guardian or limited conservator may be appointed. The judge must specify the extent of the powers and duties of the limited guardian in order to allow the ward to care for himself to the maximum of his ability. The intent is to design the guardianship arrangement to encourage the development of maximum self-reliance and independence of the ward.

Limited conservatorship is much like limited guardianship, except that conservatorship deals strictly with the estate (property and financial resources) of the protectee. If a limited conservator is appointed, the judge must specify his powers and duties in such a way as to permit the person with a disability to manage his resources to the fullest extent of his ability. Furthermore, appointing a limited guardian and/or limited conservator does **not** impose any legal limitation on the person except for what is specified in the court order.

Costs

There are costs involved in obtaining guardianship, however those costs are usually charged to the estate of the person for whom guardianship or conservatorship is established. The guardian of an adult is **not** responsible for the financial care of that person. However, the guardian of a minor is responsible for the financial care of the minor. One thing to remember: if an individual files a petition for guardianship over another person and the petition is denied by the court, the person filing the petition may be held liable for costs associated with the action, unless that person is acting within the scope of a public office to which he has been elected or appointed. There is no requirement that the individual filing the petition retain an attorney, but most find it wise to do so.

Rights of the Respondent

In order to ensure that the rights of the respondent are protected, he shall have the right to:

1. Be represented by an attorney (whose fees will be paid by the county if the respondent cannot afford an attorney);
2. Have a jury trial;
3. Present evidence on his own behalf;
4. Cross examine witnesses;
5. Remain silent;
6. Have the hearing open or closed to the public as he chooses;
7. A hearing conducted in accordance with the rules of evidence in civil proceedings, except as otherwise modified by law;
8. Be present at the hearing; and

9. Request an independent medical or psychological examination, with the fees paid by the county if the respondent cannot pay for the examination.

Possible Court Actions

At the close of the hearing, the judge has several options, among them a judge can determine that the respondent is:

1. Not incapacitated and, therefore, no guardian should be appointed.
2. Not disabled and, therefore, no conservator should be appointed.
3. Totally incapacitated and, therefore, a full guardian must be appointed.
4. Partially incapacitated and, therefore, a limited guardian must be appointed.
5. Completely disabled and, therefore, a full conservator must be appointed.
6. Partially disabled and, therefore, a limited conservator must be appointed.

Changes in Guardianship or Conservatorship Status

The law requires that each guardian or conservator must file a written report with the Probate Court at least annually concerning the status of the guardianship or conservatorship arrangement. The Probate Judge can also order a review at any time the judge sees a need for it.

This requirement gives the judge an opportunity to determine if the process is working satisfactorily in each individual case and if any changes need to be made, *e.g.*, whether a full guardianship appointment should be changed to a limited guardianship. However, no actual court hearing is required for this review process.

Least Restrictive Doctrine

In determining the degree of supervision necessary, the court must apply the **least restrictive alternative principle** as defined in the guardianship law. The supervision ordered by the court shall not restrict the respondent's personal liberty or his freedom to manage his financial resources to any greater extent than is necessary to protect the respondent and his financial resources. The court must consider whether the respondent may be fully protected by the use of temporary protective services provided by a private or public agency or agencies, the appointment of a guardian or conservator ad litem, appointment of a limited guardian or conservator, or the appointment of a full guardian or conservator.

In a full guardianship/conservatorship, any limitations imposed upon the authority of the guardian or conservator must be stated in the letters of guardianship or conservatorship. However, in a limited guardianship/conservatorship, the guardian/conservator has only the power specified in the judge's order.

Removal of a Guardian

The court may remove a guardian, if the guardian:

1. Becomes mentally incapacitated.
2. Is convicted of a felony.
3. Becomes unable to fulfill their duties.

The court may remove the guardian upon its own motion. The court may also remove a guardian upon the complaint of an interested party supported by an affidavit. Under the second process, notice must be given to the guardian and his or her attorney of record before the court hearing. §§ 473.140 and 475.110, RSMo (2000).

CONCLUSION

This brief discussion of Missouri's guardianship/conservatorship laws is designed as a preliminary guide for individuals who are disabled, their parents, and advocates. Questions about specific circumstances are best addressed to the Probate Division of the appropriate Circuit Court.

Another possibly useful publication is entitled, **A Basic Guide for Understanding Guardianship and Conservatorship in Missouri**. It is available from Missouri Protection & Advocacy Services, 925 South Country Club Drive, Jefferson City, MO 65109, 1-800-392-8667, and TDD 1-800-735-2966. This manual addresses many aspects of the law in layman's language and is complete with statutory references.