

SUMMARY OF GUARDIANSHIP AND CONSERVATORSHIP IN THE STATE OF MINNESOTA

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The purpose of guardianship and conservatorship is to protect the person and property of individuals over the age of 18 who, due to incapacity, are incapable of managing their own affairs. "Incapacitated person" means an individual who, for reasons other than being a minor, is impaired to the extent of lacking sufficient understanding or capacity to make or communicate responsible personal decisions, and who has demonstrated deficits in behavior which evidence an inability to meet personal needs for medical care, nutrition, clothing, shelter, or safety, even with appropriate technological assistance. In guardianship, this person is referred to as the "person subject to guardianship". If the person with the disability acknowledges they need such assistance, and/or the family, together with their attorney and other advisors, believe such assistance is necessary to protect the individual, then the guardianship is appropriate.

It is important to bring notice to a common misconception with Minnesota law: a guardian does not have any financial decision-making authority. If the incapacitated person has personal assets of their own and does not have the ability to manage those assets, it may be necessary to have a Conservator of the Estate appointed. In many cases the person with a disability does not have significant assets so it is not necessary to have a Conservator of the Estate in addition to the Guardian of the Person. This is helped by the fact that the Guardian of the Person can have the power to approve or disapprove of any contracts that include the person subject to guardianship as a party. If there are personal assets and the individual lacks the capacity to execute a Power of Attorney for assistance in managing those assets, there should be a separate discussion about the conservatorship process in addition to the guardianship.

GUARDIANSHIP OF THE PERSON: The court shall grant to a guardian only those powers necessitated by the person subject to guardianship's limitations and demonstrated needs and, whenever feasible, make orders that will encourage the development of the person subject to guardianship's maximum self-reliance and independence.

The duties and powers of a guardian or those which the court may grant to a guardian include, but are not limited to:

- (1) the power to establish a place of abode;
- (2) the duty to provide for the person subject to guardianship's care, comfort, and maintenance needs, including food, clothing, shelter, health care, social and recreational requirements, and, whenever appropriate, training, education, and habilitation or rehabilitation. The guardian has no duty to pay for these requirements out of personal funds. Whenever possible and appropriate, the guardian should meet these requirements through governmental benefits or services to which the person subject to guardianship is entitled, rather than from the person subject to guardianship's estate;
- (3) the duty to take reasonable care of the person subject to guardianship's clothing, furniture, vehicles, and other personal effects, and, if other property requires protection, the power to seek appointment of a conservator of the estate;
- (4) The power to give any necessary consent to enable the person subject to guardianship to receive necessary medical or other professional care, counsel, treatment, or service; except that no guardian may give consent for psychosurgery, electroshock, sterilization, or experimental treatment of any kind unless the procedure is first approved by order of the court;
- (5) In the event there is no duly appointed conservator of the person subject to guardianship's estate, the guardian shall have the power to approve or withhold approval of any contract, except for necessities, which the person subject to guardianship may make or wish to make;

(6) The duty and power to exercise supervisory authority over the person subject to guardianship in a manner which limits civil rights and restricts personal freedom only to the extent necessary to provide needed care and services;

(7) If there is no acting conservator of the estate for the person subject to guardianship, the guardian has the power to apply on behalf of the person subject to guardianship for any assistance, services, or benefits available to the person subject to guardianship through any unit of government;

(8) Unless otherwise ordered by the court, the person subject to guardianship retains the right to vote;

(9) The power to establish an ABLE account (although NOT the power to administer the ABLE account);

(10) If there is no acting conservator of the estate, the guardian has the duty and power to represent the person subject to guardianship in expungement proceedings, harassment proceedings, and all civil court proceedings, including (but not limited to) restraining orders, orders for protection, name changes, conciliation court, housing court, family court, probate court, and juvenile court, although the guardian may not settle any claim or debt without approval.

CONSERVATORSHIP OF THE ESTATE: The court shall grant to a conservator only those powers necessary to provide for the demonstrated needs of the protected person. The duties and powers of a conservator include, but are not limited to:

(1) the duty to pay the reasonable charges for the support, maintenance, and education of the protected person in a manner suitable to the protected person's station in life and the value of the estate. The conservator has no duty to pay for these requirements out of personal funds. Wherever possible and appropriate, the conservator should meet these requirements through governmental benefits or services to which the protected person is entitled, rather than from the protected person's estate;

(2) the duty to pay out of the protected person's estate all lawful debts of the protected person and the reasonable charges incurred for the support, maintenance, and education of the protected person's spouse and dependent children;

(3) the duty to possess and manage the estate, collect all debts and claims in favor of the protected person, or, with the approval of the court, compromise them, institute suit on behalf of the protected person and represent the protected person in any court proceedings, and invest all funds not currently needed for the debts and charges;

(4) where a protected person has inherited an undivided interest in real estate, the court, exchange or sale of the protected person's interest or a purchase by the protected person of any interest other heirs may have in the real estate;

(5) the power to approve or withhold approval of any contract, except for necessities, which the protected person may make or wish to make;

(6) the power to apply on behalf of the protected person for any assistance, services, or benefits available to the protected person through any unit of government.

THE TEAM CONCEPT: In order to determine whether a guardianship and/or conservatorship (with the resulting restrictions on independence) is warranted and in fact in the best interest of the individual, and in order to satisfy the requirements of the above cited statutes and meet the burden of proof (by clear and convincing evidence) required by the court in order to establish the guardianship and/or conservatorship, expertise regarding the nature of the individual's disability is necessary.

In almost all cases, such expertise is available. For persons who are developmentally disabled, there is a support group (consisting of the individual, their family members, residential program director, day training program director and social worker) known as an interdisciplinary team. For persons with other disabilities, there is likely a treatment team or rehabilitation team consisting of the individual, their family members, physical therapist, occupational therapist, speech therapist, nurse, doctor, neuropsychologist and the rehabilitation facilities social worker. This team not only has the expertise required but also gets to know the client very well and will likely have established an excellent rapport. First and foremost the team can advise the attorney as to whether a guardianship and/or conservatorship is appropriate and warranted. Second, the team can provide the attorney with the required

"Physician's Statement in Support of Guardianship and/or Conservatorship" for filing with the court, and provide the evidence necessary to satisfy the petitioner's burden of proof. This is vital as in some cases the proposed person subject to guardianship and/or conservatorship may not "appear" to the court visitor or the judge to be disabled (they may be able to talk a better game than they can play). The team is an invaluable asset to the attorney which should be used from inception of the process. Also good communication and cooperation with the team will greatly mitigate the potential for an adversarial proceeding.

PETITION FOR GUARDIANSHIP AND/OR CONSERVATORSHIP: The establishment of a guardianship and/or conservatorship can only be done through a formal court proceeding with the petition for guardianship and/or conservatorship.

GUARDIANSHIP/CONSERVATORSHIP EDUCATIONAL VIDEO: In 2012 Hennepin County created an educational video for the purpose of educating prospective guardians and conservators. Two counties, Hennepin and Ramsey County, require that the video be viewed by the petitioning guardians prior to their being appointed guardians. Regardless of whether it is a requirement or not, many of our clients find the video helpful to understanding the role of the guardian or conservator, especially if you are the parents and suddenly have legal requirements thrust into your parent/child relationship. The video can be found at "<https://www.mncourts.gov/Help-Topics/Guardianship.aspx>" or by searching Google with "Minnesota Guardianship Video".

ATTORNEY FEES AND PROCEEDING IN FORMA PAUPERIS: Our firm charges a fixed rate fee for representing the petitioners in a guardianship matter. Our fee includes preparation and review of all court documents required for the procedure such as the medical records, IEP for Respondent, Petition for Guardianship, Oath and Acceptance of Appointment, Notice of Hearing and service of the Notice of Hearing to all interested parties, obtaining a Physician statement and any correspondence necessary, the Order for Guardianship and Letters of Guardianship and service of the same, any communication with the court-appointed attorney for the person subject to guardianship and representation of the Petitioner(s) at the court hearing. Our fee also includes any communication with the petitioners and any physicians or social workers treating the person subject to guardianship as may be necessary. Finally, our fee includes the preparation of the Application for In Forma Pauperis (see below) to assist with the expenses of the guardianship.

The fixed rate fee that we charge DOES NOT include the court filing fee, background study costs and attorney fees for the separate attorney appointed by the court to represent the person subject to guardianship. If the person with the disability (regardless of the parents' assets) is not able to pay the fees and costs for establishing the guardianship, the case may proceed under a designation of "In Forma Pauperis" (IFP), which is a ruling that the county of residence pay those fees when the person subject to guardianship does not have sufficient personal assets to afford such expenses. The court does not take the financial assets of the parents into consideration. Only the personal assets of the Respondent are considered when evaluating their eligibility for IFP relief.

When a petition for IFP is granted, the court will waive the filing fee and court visitor fees, and will order the county to pay the court-appointed attorney (who is required by law to represent the person with the disability who is the subject of guardianship). If not waived or ordered, those costs usually exceed \$1,800 on their own. An additional petition, affidavit and court order is used to proceed in this fashion. Laws regarding In Forma Pauperis and its procedures vary by county and in some cases only small amounts will be paid by the county towards legal fees incurred by the petitioners. Because the county rates do not reimburse at a level to cover even our costs and paralegal fees, we are not able to include our legal fees in the IFP request unless our flat fee represents a significant hardship to families.

THE HEARING: The petitioner(s), the proposed guardian(s) and the proposed person subject to guardianship (the person with a disability) must appear at the hearing. Even in uncontested cases, the petitioner must testify in order to prove the allegations in the petition. State law provides that the proposed person subject to guardianship will be assigned a court-appointed attorney who will represent the person subject to guardianship and advise the court as to the person subject to guardianship's consent to the appointment of the guardian and the power and duties to be granted; although some counties allow representation to be waived if the court visitor determines it to be unnecessary. The physician's statement in support of the petition, as well as any statements of other support staff/team members, are submitted to the court as further evidence.

ANNUAL REQUIREMENTS: The Guardian of the Person must annually file, on the anniversary date of appointment, the Personal Well Being Report with the court. The conservator of the estate must file an Annual Account with receipts for all transactions. These act to advise the court and interested parties on changes to the status of the person and estate of the protected person. Also, a Notice must be personally served upon the person subject to guardianship annually stating that they have the right to request that the guardianship and/or conservatorship be modified or terminated. As of August 1, 2020, for guardianship of the person only, if the client is under the age of 30 at the date the Order Appointing Guardian is issued by the court, the guardianship must be of a limited duration not to exceed 72 months (6 years). This means that all guardianships for a person turning 18 will be required by state law to be evaluated 6 years later to determine whether they remain necessary or whether less restrictive alternatives (see below) might be more appropriate at that time.

ALTERNATIVE TO GUARDIANSHIP AND/OR CONSERVATORSHIP: In cases where the individual's disability does not make a guardianship and/or conservatorship appropriate and they are competent to execute a Power of Attorney, then a guardianship and/or conservatorship can be avoided and the use of a Power of Attorney is recommended. A separate Power of Attorney for financial decisions and a Health Care Directive should be signed as a statement of the individual's consent to their appointed agent making decisions for them. This enables the nominated person (usually a family member) to act on the individual's behalf if they become unable to do so.

The difference between these alternatives and guardianship/conservatorship is that the adult individual retains legal authority to act for themselves as their own advocate if they are capable, whereas in a court-ordered guardianship and/or conservatorship the individual's rights to legally act alone without their guardian/conservator have been removed in order to protect them from exploitation where they might be vulnerable without required supervision. The logic is the same as protecting a minor child from being responsible for critical life decisions without their parents having ultimate authority over any such decision. As of August 1, 2020, a new state law requires the petitioners to present evidence at the court hearing that these alternatives were explored and/or attempted before a final determination that guardianship and/or conservatorship is necessary. The court must make a specific finding of fact that these alternatives will not be sufficient to assist the individual.

CONSERVATORSHIP VS. SUPPLEMENTAL NEEDS TRUST: Often the goal is to make sure that the person with the disability will be eligible for and participate in government assistance programs, such as Medical Assistance (which is the State of Minnesota Medicaid program) and the Supplemental Security Income (SSI) program. Assets held for the benefit of the person with a disability under a conservatorship will be "counted" and will likely make them ineligible for such assistance. However, assets held in a supplemental or a special needs trust for the benefit of the person with a disability will not be "counted" and will ensure that the person can receive such benefits, while the trust assets are used to provide for items not provided by government assistance. Please let us know if you would like additional information about a supplemental needs trust or a special needs trust.

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