

Guardianships and Conservatorships In Colorado

These materials are provided by Marco Chayet, Esq., Commissioner for the Office of Public Guardianship and a partner in the law firm Chayet & Danzo, LLC, and the Public Administrator for the 18th Judicial District. These materials are intended to be used as educational materials only and should not be construed as legal advice, comprehensive authority or official guidelines of the Office of Public Guardianship.

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I. DEFINITIONS IN PROTECTIVE PROCEEDINGS

- A. **Guardian:** A person appointed by the court to make decisions concerning the person of an incapacitated person.
- B. **Incapacitated Person:** A person, other than a minor, who is unable to effectively receive or evaluate information or both or make or communicate decisions to such an extent that the individual lacks the ability to satisfy essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance.
- C. **Ward:** A person for whom a guardian has been appointed.
- D. **Conservator:** A person appointed by the court to make decisions concerning the estate of a protected person.
- E. **Protected Person:** A person for whom a conservator has been appointed.
- F. **Petitioner:** The person who petitions, or asks, the court for the appointment of a guardian or conservator.
- G. **Respondent:** The person for whom the appointment of a guardian or conservator is sought.
- H. **Guardianship:** The court procedure for the appointment of a guardian.
- I. **Conservatorship:** The court procedure for the appointment of a conservator.

II. THE DISTINCTION BETWEEN A GUARDIANSHIP OF AN INCAPACITATED PERSON AND A CONSERVATORSHIP

- A. A guardianship involves making personal decisions about the incapacitated person, such as where the individual will live, what kind of medical treatment, care and assistance the individual will receive, how the individual will be protected, what kind of supervision the individual will receive, etc. In order to appoint a guardian for an adult, the court must find that the person is incapacitated.

- B. A conservatorship involves making financial decisions for, and managing the estate and financial affairs of, a person who is unable to manage property and business affairs effectively because he or she is unable to effectively receive or evaluate information, or both, or to make or communicate decisions, even with the use of appropriate and reasonably available technological assistance, or because the individual is missing, detained, or unable to return to the United States; and the individual has property that will be wasted or dissipated unless management is provided or money is needed for the support, care, education, health, and welfare of the individual or of individuals who are entitled to the individual's support and that protection is necessary or desirable to obtain or provide money.

III. THE DUTIES, POWERS, RIGHTS, IMMUNITIES AND LIMITATIONS OF A GUARDIAN AND CONSERVATOR

A. A **guardian** has the following **duties** with respect to his or her ward:

1. To make decisions regarding the ward's support, care, education, health, and welfare;
2. To exercise authority only as necessitated by the ward's limitations and, to the extent possible, to encourage the ward to participate in decisions;
3. To act on the ward's own behalf;
4. To help the ward to develop, or to regain, the capacity to manage his or her personal affairs;
5. To become, or to remain, personally acquainted with the ward, and to maintain sufficient contact with the ward to know of the ward's capacities, limitations, needs, opportunities, and physical and mental health;
6. To take reasonable care of the ward's personal effects, and to bring protective proceedings, if necessary, to protect the ward's property;
7. To expend the s money received by the guardian on behalf of the ward for the ward's current needs for support, care, education, health, and welfare;
8. To conserve any excess money of the ward for the ward's future needs, but, if a conservator has been appointed, to pay the money to the conservator;
9. To immediately notify the court should the ward's condition change;
10. To inform the court of any change in the ward's custodial dwelling or address;

11. To immediately notify the court in writing of the ward's death; and
 12. **In making decisions, a guardian shall consider the expressed desires and personal values of the ward to the extent known to the guardian. At all times, a guardian shall act in the ward's best interest and exercise reasonable care, diligence, and prudence.**
- B. Unless limited by the court, a **guardian** has the following **powers** with respect to his or her ward:
1. To apply for and receive money payable to the ward;
 2. To take custody of the ward, or to establish the ward's place of custodial dwelling within Colorado (the guardian must obtain court approval prior to relocating the ward out of state);
 3. If a conservator has not been appointed, and under appropriate circumstances, to commence a proceeding to compel a person to support the ward or to pay money for the benefit of the ward;
 4. To consent to medical and/or other care, treatment or service for the ward;
 5. If reasonable under all of the circumstances, to delegate to the ward certain responsibilities for the ward's well-being;
 6. To consent to the adoption or marriage of the ward, subject to court approval; and
 7. The guardian may petition the court for authority to pursue a dissolution of marriage or legal separation on behalf of the ward.
- C. A **guardian** has the following **rights** and **immunities** with respect to his ward:
1. To receive reasonable compensation for services as guardian, but only as approved by order of the court unless a conservator, who is not also the guardian, has been appointed;
 2. To reimbursement for room and board provided to the ward by the guardian or by one who is affiliated with the guardian, but only as approved by order of the court unless a conservator, who is not also the guardian, has been appointed;
 3. A guardian need not use the guardian's personal funds for the ward's expenses;
 4. A guardian is not liable to a third person for acts of the ward solely by reason of the relationship;

5. A guardian who exercises reasonable care in choosing a medical provider for the ward is not liable for injury to the ward resulting from the negligent or wrongful conduct of the medical provider.

D. A **guardian** is subject to the following **limitations** with respect to his ward:

1. Without authorization of the court, a guardian may not revoke the ward's medical durable power of attorney. Moreover, if a medical durable power of attorney is in effect, and absent a court order to the contrary, a health-care decision of the agent takes precedence over that of a guardian.
2. A guardian may not initiate commitment of a ward to a mental health-care institution for involuntary civil commitment, may not seek hospital or institutional care and treatment for mental illness, may not obtain care and treatment from an approved service agency for a ward with developmental disabilities, and may not obtain care and treatment for alcoholism or substance abuse using the guardianship. In each of these circumstances, the guardian must comply with the Colorado law which governs these medical conditions.

E. A **conservator** has the following **powers and duties** with respect to the estate of the protected person:

1. With respect to the protected person and members of his or her household, all of the powers over his or her estate and affairs which he or she could exercise if present and not under disability;
2. To expend or distribute income or principal of the estate without court authorization or confirmation for the support, education, care or benefit of the protected person and his dependents;
3. To consider recommendations relating to the appropriate standard of support, education and benefit for the protected person or a dependent made by a parent or guardian, if any;
4. To expend or distribute sums reasonably necessary for the support, education, care or benefit of the protected person with due regard to the size of the estate, the probable duration of the conservatorship, and the likelihood that the protected person, at some future time, may be fully able to manage his or her affairs and the estate which has been conserved for him or her; and with regard to the accustomed standard of living of the protected person and members of his or her household, and other funds or sources used for the support of the protected person;
5. To expend funds of the estate for the support of persons legally dependent on the protected person, and others who are members of the protected person's household who are unable to support themselves, and who are in need of support;

6. If the estate is ample to provide for the purposes implicit in the other distributions authorized by the statute, the conservator has the power to make gifts to charity and other objects as the protected person might have been expected to make, in amounts which do not exceed in total for any year twenty percent of the net income from the estate, as determined under normally acceptable principles;
 7. In investing the estate, and in selecting assets of the estate for distribution, the conservator should take into account any known estate plan of the protected person;
 8. To be paid reasonable compensation for services rendered as conservator; and
 9. Under a protective arrangement or authorization of a single transaction, without appointing a conservator, the court may authorize, direct or ratify any transaction necessary or desirable to achieve any security, service or care arrangement meeting the foreseeable needs of the protected person. Protective arrangements include, but are not limited to, payment, delivery, deposit or retention of funds or property, sale, mortgage, lease or other transfer of property, entry into an annuity contract, a contract for life care, a deposit contract, a contract for training and education or addition to or establishment of a suitable trust.
- F. A **conservator** must have **prior court approval** before he or she takes the following actions with the protected person's estate:
1. Makes gifts, if appropriate, which cumulatively exceed twenty percent of the protected person's annual income;
 2. Conveys, releases or disclaims contingent or expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy;
 3. Exercise or release a power of appointment;
 4. Exercise rights to elect options and to change beneficiaries under retirement plans, insurance policies and annuities or surrender the plans, policies and annuities for their cash value;
 5. Create a revocable or irrevocable trust of property of the estate, or revoke or amend a trust revocable by the protected person;
 6. Exercise a right to elective share in the estate of the protected person's deceased spouse and to renounce or disclaim any interest by testate or intestate succession or by transfer *inter vivos*; and
 7. To make, amend or revoke a protected person's will.

IV. THE LIMITS TO THE ROLES OF THE GUARDIAN AND CONSERVATOR

A. A guardian is subject to the following limitations and restrictions:

1. The court **shall** consider less restrictive alternative means of providing the necessary protective services for the ward.
2. The court **shall** consider the wishes of the alleged incapacitated person concerning his care, counsel, treatment, service and supervision. The court **shall** also consider such person's views concerning the selection of the guardian, the duties of the guardian, the scope and duration of the guardianship and any limitations or restrictions which should be imposed on the powers of the guardian.
3. The court may set forth limitations or restrictions of the guardian's powers or duties, thereby creating a **limited guardianship**, including the scope and duration of the guardianship and including the extent to which a guardian shall be permitted to give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, etc.
4. The guardian is not required to provide from his own funds for the incapacitated person and is not liable to third persons for acts of the ward solely by reason of the parental relationship except as provided by law.
5. The guardian cannot use the guardianship case to obtain hospital or institutional care and treatment for mental illness of a ward, to obtain care and treatment from an approved service agency for a ward with developmental disabilities, or to obtain care and treatment for alcoholism. Rather, these services must be secured under different sections of Colorado law. Additionally, the guardian shall not have the authority to consent to any such care or treatment against the will of the ward.
6. The guardian or the ward or any person concerned with the care, counsel, treatment or service of the ward may petition the court at any time for instructions with regard to any such care, counsel, treatment or service.

B. A conservator is subject to the following limitations and restrictions:

1. Any order entered in a conservatorship case or protective proceeding has no effect on the capacity of the protected person.

2. A conservator must act as a fiduciary, and shall observe the standards in dealing with the conservatorship estate that would be observed by a prudent man dealing with the property of another, and if the conservator has special skills or expertise, he is under a duty to use those skills.
3. The Prudent Man Rule provides: In acquiring, investing, reinvesting, exchanging, retaining, selling and managing property for the benefit of others, fiduciaries (including conservators) shall be required to have in mind the responsibilities which are attached to such offices, the size, nature, and needs of the estates entrusted to their care, and shall exercise the judgment and care under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of the property of another, not in regard to speculation but in regard to permanent disposition of their funds, considering the probable income as well as the probable safety of their capital.
4. A conservator cannot engage in self-dealing or use the protected person's estate for the conservator's benefit.
5. The court may limit the powers of a conservator, thereby creating a **limited conservatorship**.

V. THE STATE'S STANDARD FOR IMPOSING A GUARDIANSHIP

- A. The burden of proof refers to how much evidence must be presented in order to prevail in a case. In a guardianship, the petitioner must prove by **clear and convincing evidence** that a person needs a guardian. *Sabrosky v. Denver Department of Social Services*, 781 P.2d 106 (Colo. App. 1990). Compare this to a criminal case, in which the burden of proof is beyond a reasonable doubt, and a civil case, in which the burden of proof is by a preponderance of the evidence.
- B. When the court finds that a person is incapacitated, it must set forth its findings of fact concerning the nature and degree of incapacity and shall determine the nature and extent of the care, assistance, protection or supervision which is necessary or desirable under all of the circumstances, including consideration of less restrictive alternatives.

VI. DETERMINING WHERE TO FILE FOR GUARDIANSHIP--THE INTERSTATE GUARDIANSHIP ACT

- A. Colorado has adopted the Interstate Guardianship Act. It is located in the Colorado Statutes §15-14.5-101 to 15-14.5-503. This act is the source for all the statutes relating to determining which state and county a person can file for guardianship in. The rules on where you can file for a guardianship changer depending on whether you are filing for an emergency guardianship or a permanent guardianship.

- B. The Interstate Guardianship Act explains how to transfer a guardianship from one state to another and how to register the guardianship in the new state. If a guardianship is established, a ward cannot be moved from one state to another without court approval.

VII. THE GUARDIANSHIP AND CONSERVATORSHIP PROCESS

- A. A guardianship case is started by the filing of a Petition for the Appointment of a Guardian for an Incapacitated Person by the petitioner.
- B. A conservatorship case is started by the filing of a Petition for the Appointment of Conservator (Adult) by the petitioner.
- C. Venue for a guardianship case is in the place where the incapacitated person resides or is present, or, if the incapacitated person is admitted to an institution pursuant to order of a court of competent jurisdiction, venue is also in the county in which that court sits.
- D. Venue for a conservatorship case is the place where the person to be protected resides whether or not a guardian has been appointed in another place, or, if the person to be protected does not reside in Colorado, any place where he has property.
- E. Typically, the two petitions are filed at the same time, the actions are given the same case number and the petitions proceed through the process simultaneously. However, it is not unusual to file only for a guardianship or conservatorship, or to file the actions at different times. The facts of the case will determine how to proceed.
- F. Once a petition is filed, the court will set a date for a hearing on the appointment of a guardian and conservator.
- G. If an incapacitated person has no guardian, and an emergency exists, the court itself may exercise the power of a guardian, or may appoint an emergency (temporary) guardian without notice or a hearing. In such cases, the petitioner must set forth the allegation of an emergency and the need for a temporary guardian in the petition. The emergency guardian's authority cannot exceed 60 days.
- H. While a petition for appointment of a conservator or other protective order is pending, the court has the power to preserve and apply the property of the person as may be required for his or her benefit or the benefit of his or her dependents, including the power to appoint a special (temporary) conservator.
- I. Once a guardianship petition is filed, unless the alleged incapacitated person has an attorney of his own choice, the court **shall** appoint a court visitor, by entering an Order Appointing Visitor for Incapacitated Person, who, among other duties, must interview the allegedly incapacitated person; interview the person seeking to become

guardian; visit or obtain information about where the allegedly incapacitated person lives; interview any physician or other person who has provided care, counsel, treatment or service to the allegedly incapacitated person in the recent past; and provide the court with a written report on the form provided, called Visitor's Report -- Guardianship Proceedings. The court visitor is "the eyes and ears of the court."

- J. The court may also appoint a court visitor in a conservatorship case.
- K. In both a guardianship and conservatorship case, the court may appoint a guardian *ad litem* or an attorney to represent the alleged incapacitated/protected person.
- L. A physician's letter, setting forth the alleged incapacitated/protected person's medical circumstances and the need for a guardianship and/or conservatorship, is required before the court will appoint a guardian or conservator. If the petitioner cannot procure a physician's letter, the court has the authority to order an evaluation of the respondent.
- M. In a guardianship case, a Notice of Hearing and a copy of the petition must be provided as follows:
 - 1. To the alleged incapacitated person, a separate form, in large type, by personal service. The alleged incapacitated person cannot waive notice unless he attends the hearing, or his waiver of notice is confirmed in an interview with the court visitor;
 - 2. To the alleged incapacitated person's spouse, parents and adult children;
 - 3. To any person who is serving as his guardian or conservator, or who has his or her care and custody;
 - 4. In the event that no other person is available to receive notification as set forth above, to at least one of his or her closest adult relatives, if any can be found; and
 - 5. To other persons as the court may direct.
- N. In a conservatorship case, a Notice of Hearing and a copy of the petition must be provided as follows:
 - 1. To the alleged protected person, if he is thirteen years of age or older, a separate form, in large type, by personal service. The alleged incapacitated person cannot waive notice unless he attends the hearing;
 - 2. To the alleged protected person's spouse or, if none, his parents; and
 - 3. To any person who has filed a request for notice under C.R.S. § 15-14-406;

4. To interested persons; and
 5. To other persons as the court may direct.
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- O. A Return of Service, indicating that the alleged incapacitated/protected person has been personally served with notice and the petition, and a Certificate of Mailing, indicating that the other appropriate individuals have received notice, must be filed with the court prior to the hearing.
 - P. Once the hearing has been held and the court has determined that the appointment of a guardian and conservator is appropriate, an Order Appointing Guardian for Incapacitated Person and an Order Appointing Conservator (Adult) are signed by the judge and the probate registrar issues Letters of Guardianship and Letters of Conservatorship (Adult). If there are any limitations or restrictions on the guardian or conservator, they are noted on the Order and the Letters. The Letters are the documents used by the guardian and conservator to evidence his or her authority to act on behalf of the ward and protected person.
 - Q. The guardian and conservator must sign a document called an Acceptance of Office, indicating that he or she is willing to assume the duties and obligations of a guardian and conservator and submitting, personally, to the jurisdiction of the court in any proceeding relating to the guardianship and conservatorship that may be instituted by any interested person. The submission of a credit report and a criminal background check likely will be required.
 - R. If the guardian or conservator lives outside of the State of Colorado, he must sign an Irrevocable Power of Attorney Designating Clerk of Court as Agent for Service of Process, in which he designates the clerk of the court to accept service of all notices and process issued by a court or tribunal in the State of Colorado in relation to any suit, matter, cause, hearing, or thing, affecting or pertaining to the guardianship or conservatorship case.
 - S. The guardian must file an Initial Report of Guardian within 60 days of appointment and must also file a Report of the Guardian at least once a year, or more frequently if required by the court.
 - T. The conservator must file an Inventory of the Protected Person's income and assets within 90 days of appointment. A Financial Plan, which is similar to a budget, must also be filed within 90 days of appointment. Additionally, the conservator must file, on an annual basis, a Conservator's Report which reflects all income received, all funds paid, including the date, to whom paid and for what purpose, and the value of the remaining assets.
 - U. The court may require a conservator to be bonded.

VIII. WHO MAY SERVE AS GUARDIAN AND CONSERVATOR

- A. If there are competing requests for appointment as a guardian or a conservator, the court must consider persons qualified in order of **priority**.
- B. In a guardianship proceeding, the following persons have priority for appointment:
1. A guardian, other than a temporary or emergency guardian, currently acting for the respondent in this state or elsewhere;
 2. A person nominated as guardian by the respondent at a time when the respondent had sufficient capacity, including the respondent's specific nomination of a guardian made in a durable power of attorney;
 3. An agent appointed by respondent under a medical durable power of attorney;
 4. The spouse of the respondent or a person nominated by will or other signed writing of a deceased spouse;
 5. An adult child of the respondent;
 6. A parent of the respondent or a person nominated by will or other signed writing of a deceased parent; and
 7. An adult with whom the respondent has resided for more than six months immediately before the filing of the petition.
- C. In a conservatorship proceeding, the following persons have priority for appointment:
1. A conservator, guardian of the estate, or other like fiduciary appointed or recognized by an appropriate court of any other jurisdiction in which the protected person resides;
 2. A person nominated as conservator by the respondent at a time when the respondent had sufficient capacity, including the respondent's specific nomination of a guardian made in a durable power of attorney;
 3. An agent appointed by respondent to manage the respondent's property under a general durable power of attorney;
 4. The spouse of the respondent;
 5. An adult child of the respondent;
 6. A parent of the respondent; and

7. An adult with whom the respondent has resided for more than six months immediately before the filing of the petition.

D. Restrictions on professionals

1. Unless the court makes specific findings for good cause shown, the same professional may not act as an incapacitated person's or protected person's:
 - a. Guardian and conservator;
 - b. Guardian and direct service provider; or
 - c. Conservator and direct service provider.

(1) In addition, a guardian and conservator may not employ the same person to act as both care manager and direct service provider for the incapacitated person or protected person.

IX. THE RIGHTS OF THE ALLEGED INCAPACITATED/PROTECTED PERSON

- A. The alleged incapacitated/protected person is entitled to be present at any court proceeding and to see or hear all evidence presented. He is entitled to be represented by counsel, to present evidence, to cross-examine witnesses, including the court visitor.
- B. The court **may** appoint a physician to examine the person alleged to be incapacitated or in need of protection, who shall submit a written report to the court.
- C. In a guardianship case, the court **shall** appoint an attorney for the alleged incapacitated person if he does not have one and if he requests an attorney or expresses a desire to object to the appointment of a guardian. The court **shall** appoint an attorney for the alleged incapacitated person if an emergency guardianship is established. Additionally, if the court believes that the rights and interests of the allegedly incapacitated person cannot otherwise be adequately protected or represented, the court **shall** appoint an attorney to represent the person.
- D. In a guardianship case, the court **may** appoint a guardian *ad litem* for the alleged incapacitated person. A guardian *ad litem* is a special fiduciary with the responsibility to represent and protect the best interests the person in the guardianship proceeding.
- E. In a conservatorship case, the court **may** appoint an attorney for the alleged protected person if he does not have one. The court **may** also appoint a guardian *ad litem*
- F. In a guardianship case, the alleged incapacitated person is entitled to have the court

consider less restrictive alternatives of providing the necessary protective services for him. In a conservatorship case, although the statute does not directly address the issue of less restrictive alternatives, as a practical matter, the court will do so.

- G. In a guardianship case, the alleged incapacitated person is entitled to have the court consider his wishes concerning his care, counsel, treatment, service and supervision. In a conservatorship case, although the statute does not directly address this issue, as a practical matter, the court will do so.
- H. In a guardianship case, the alleged incapacitated person is entitled to have the court consider his views concerning the selection of the guardian, the duties of the guardian, the scope and duration of the guardianship and any limitations or restrictions which should be imposed on the powers of the guardian, thereby creating a **limited guardianship**. In a conservatorship case, the court can limit the powers of the conservator, thereby creating a **limited conservatorship**.
- I. In a conservatorship case, the conservator is required to take into account any known estate plan of the protected person when making investments or distributions.
 - a. Once a guardianship/conservatorship has been established, the incapacitated/protected person has the right to petition the court to terminate the guardianship/conservatorship on the grounds that the person is no longer incapacitated. He or she may also ask for the removal of a guardian/conservator and the appointment of a successor guardian/conservator.
 - b. If the guardianship/conservatorship is no longer necessary, the guardian and/or conservator must petition the court to be released from his or her appointment. Typically, a conservator is required to file a final accounting, and to provide proof of the disposition of any funds remaining in the protected person's estate.

X. HOW THE COURT MONITORS A GUARDIANSHIP AND CONSERVATORSHIP AND ITS ENFORCEMENT POWERS

- A. As indicated above, the court requires the guardian to file an Annual Report of Guardian, and requires a conservator to file an Inventory and Conservator's Report.
- J. If the required documents are not filed, the court may issue a Delay Prevention Order requiring the guardian/conservator to file the report by a certain date. Should the guardian/conservator fail to comply with the Delay Prevention Order, he or she will be ordered to come before the probate court to show cause why the guardian/conservator should not be held in contempt of court for failure to comply with the statutes, or to be removed as the guardian/conservator.
- K. Every judicial district in Colorado has access or employs a Protective Proceedings Monitor who monitors and oversees required reporting of a guardian and conservator.