

Guardianship & Conservatorship

Questions

And

Q&A



Answers

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This pamphlet is designed to help you understand what legal guardianship and conservatorship is, how it is obtained, and what the responsibilities of a guardian and/or conservator are. Because of the general nature of this information, it is not a substitute for legal advice. The statutes on guardianship and conservatorship are found at Title 15 of the Idaho Code. Consult a lawyer familiar with this area of law to answer any specific questions.

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What is guardianship?

A procedure whereby a competent suitable person or entity is appointed by the Court to make legal decisions for another person, called the "ward".

Who may need a legal guardian?

A child under the age of 18 whose biological parents are unable to provide necessary care or a developmentally disabled or otherwise incapacitated person, who lacks the ability to make informed decisions about care or finances.

What is incapacity and how can you recognize it?

An incapacitated person is often an older person in your family who can no longer handle finances, gets lost easily, is forgetful and confused, may have been diagnosed with Alzheimer's disease or dementia, or who has become unreasonably paranoid. It does not include a person who makes occasional bad choices.

Who can become a guardian?

Any "interested person" can become the guardian. Most often this will be the spouse, adult child, or sibling of a proposed ward. In some instances, a professional guardian may be appointed as guardian.

Can more than one person be appointed as guardian?

Yes. Generally it does not take two people to do the job of one, but under certain circumstances more than one family member can be appointed as a co-guardian. An example would be when both parents are appointed guardians of a developmentally disabled adult.

How is a guardian appointed?

A family member or other interested person must file a petition with the Court to have a guardian appointed.

What is the procedure to appoint a guardian?

You should consult an attorney familiar with guardianships to file a petition with the Court to appoint a guardian. The Court will appoint a guardian ad litem attorney to represent the ward and will appoint a person called a court visitor (in adult cases, but not in developmental disability or minor child cases) to investigate the circumstances and file a written report with the Court on whether a guardian should be appointed. A hearing is required before a guardian will be appointed. At that hearing the person petitioning to be the guardian will testify about why a guardian is needed and the plans for the ward's future care. If the Court appoints a guardian, Letters of Guardianship will be issued.

What are the duties and responsibilities of a guardian?

A guardian takes care of the ward, makes sure the ward has clean clothes, proper food, transportation, medical care and a place to live. A guardian's rights and responsibilities are much like those of a parent for a child. A guardian generally does not handle the ward's finances.

Is the guardian liable for the ward's debts?

No. The law specifically provides that a guardian shall not be liable for the ward's debts. The guardian is not personally responsible for payment of the ward's medical and nursing home care, clothing, food, or necessities.

Who pays for the guardianship proceeding?

The ward's assets pay the fees and costs associated with the petition and appointment of a guardian. However, if the ward's assets are insufficient, the petitioner should be prepared to pay some or all of the fees and costs, or the Court may allocate the fees and costs.

Practically, what does a guardianship mean for the ward?

Guardianship does not mean that the ward's freedom is taken away. Guardianship provides an umbrella of protection for the ward. Guardianship means a competent person is appointed to make sure that the ward has a place to live, meets at least minimum standards for health and safety and is not victimized.

Does the guardian handle the finances for the ward?

The guardian may have authority to handle the ward's finances, if they are minimal, usually as a representative payee. Otherwise, a conservator must be appointed to handle the ward's finances, sell assets such as the ward's home, make contracts for living arrangements for the ward, and borrow money.

What is the guardian's relationship to the rest of the family?

The guardian is responsible for keeping all interested parties informed of the ward's status. All family members should have a fair opportunity to visit with the ward and stay involved in their own way. The guardian coordinates the family's effort to care for the loved one.

What is a guardian ad litem attorney?

An attorney appointed by the Court to represent the best interests of the proposed ward in a guardianship proceeding. The guardian ad litem attorney appears in Court on behalf of the ward. The ward's estate pays for the guardian ad litem attorney, but if the ward's assets are insufficient, the petitioner should be prepared to pay for the guardian ad litem, or the Court may allocate the fees and costs. The guardian ad litem remains in the case as long as it is open.

What is a court visitor?

An attorney or social worker appointed by the Court in adult cases, but not in a minor or developmental disability case, to investigate the circumstances of the alleged incapacitated person and submit a written report to the Court as to the appropriateness of appointing a guardian. The court visitor does not appear in Court, unless requested to do so.

Does the Court receive a report from the ward's physician?

The Court will ask the ward's physician to write a letter to the Court to verify the ward's incapacity. The Court can also appoint other health professionals to submit reports or testify.

Does the Court appoint a guardian ad litem attorney and court visitor in each case?

No. The guardianship actions are serious actions and therefore the Court will appoint a guardian ad litem attorney in each case unless there is a good reason not to. Court visitors are not appointed in minor child cases or developmental disability cases. The guardian ad litem attorney and court visitor are there for the protection of the ward. They work collectively together to see that the most appropriate person is appointed as guardian under the circumstances.

Does the guardian have to file reports with the Court?

Yes. The guardian is required to submit a short statement to the Court each year which tells the Court where the ward is living, and updates the Court on the health, hobbies, needs and any significant changes in the ward's status in the previous year. The report is generally due on the anniversary date of the guardian's appointment. There are Court approved forms for this. A copy should be sent to the guardian ad litem and to any person that the Court orders.

What is a ward?

A person for whom a guardian has been appointed.

What are Letters of Guardianship?

Your proof of appointment as guardian and your authority to act and be in charge of the ward. The letters specify the powers of a guardian and any limitations on those powers.

How long does guardianship last?

Generally, guardianship last until the ward dies, or until the minor reaches the age of majority. If the ward's health significantly improves and the ward no longer needs a guardian, the guardianship may be terminated. The ward or any interested person may request the termination.

Does the Court stay involved in the guardianship?

Yes. After a guardian is appointed, the Court stays involved to handle issues such as termination of the guardianship, resignation of the guardian, or the appointment of a successor guardian if the guardian can no longer act. There is also monitoring of the reports of the guardian.

If an emergency exists, can a guardian be appointed on a temporary basis?

Yes. The Court will examine the facts and determine if an emergency exists. An emergency may exist if the State has started mental commitment proceedings, if there are important medical decisions to be made immediately, or if the person is likely to suffer substantial harm without the appointment of a temporary guardian. A temporary guardianship may not exceed 90 days for an adult, or six months for a minor.

Can the guardianship be limited?

Yes. The Court may impose limitations on the guardian, such as obtaining approval of the Court to move the ward.

How much does guardianship cost?

The overall cost of the professionals involved can vary greatly depending upon the circumstances of the particular case. If there is disagreement among the interested persons this may prevent an expedient resolution of the issues, which results in increased professional fees. If there is "family harmony" and there are no problems, the professional fees will be substantially less. It is important to clarify at the beginning of the proceedings who will pay fees and costs, and to seek Court approval or allocation if necessary.

Is a guardianship necessary when there is a Durable Power of Attorney for Health Care?

Letters of Guardianship are your proof of authority. They cannot be revoked by anyone other than the Court. The ward cannot be influenced to make changes. The Letters of Guardianship are readily acceptable by all medical and long term care institutions. Although a Durable Power of Attorney for Health Care may suffice for a short term medical emergency, a guardian may be appropriate in a long term care situation. Taking a shortcut may result in the ward not receiving the attention he or she needs.

If the ward has a living trust, is a guardianship necessary?

The main purpose of a trust is to provide administration of financial assets. A Living Trust may provide assistance in the management of the ward's affairs, but does not relate to decisions made involving health care, living arrangements, and activities of daily living. The trustee of a Living Trust does not have this authority and a Living Trust is not a substitute for guardianship.

What is conservatorship?

Conservatorship is a procedure whereby a competent, suitable person is appointed by the Court to manage the financial affairs of the ward.

Who may need a conservator?

A child under the age of 18, or a developmentally disabled or otherwise incapacitated person.

Who can become a conservator?

The spouse, adult child, or sibling of a ward may be appointed conservator. Where the ward has substantial assets, or if no one else is available to serve, a professional fiduciary, such as a bank, trust company or private professional fiduciary, may be appointed as the conservator.

How is a conservator appointed?

A family member, trustee, or adult protection service or any "interested person" may file a petition with the Court to have a conservator appointed.

Can the conservatorship petition be filed in conjunction with the guardianship petition?

Yes. Often it is most efficient and cost effective to bring the actions as one.

What are the duties and responsibilities of a conservator?

A conservator manages and protects the ward's assets and makes sure that the ward's bills are paid.

What is the difference between a trustee and a conservator?

Trustees and conservators both act as fiduciaries and must comply with high standards of conduct. A trustee is appointed by the individual in the trust document and the conservator is appointed by the Court. An individual can remove his or her own trustee, while a conservator can only be removed by the Court. A trustee's duties are outlined by the trust document and a conservator's duties and responsibilities are governed by statute and Court orders. A trustee manages only those assets transferred to the trust. A conservator has the authority to marshal and protect all assets for the benefit of the ward.

Is the conservator liable for the ward's debts?

No. The law specifically provides that a conservator is not personally liable for the ward's debts.

Does the conservator file reports with the Court?

Yes. The conservator is required to file both an inventory of the ward's assets, and an accounting of the first 90 (ninety) days of the conservatorship, within one hundred twenty (120) days after the appointment by the Court. Thereafter, the conservator must file annual reports which update the Court on the ward's income and expenses. These reports are monitored.

What are Letters of Conservatorship?

Your proof of appointment as conservator and your authority to transact business on behalf of the ward. The letters specify the powers and duties of the conservator and any limitations on those powers and duties.

What is the role of the Court?

The Court makes the appointment of the conservator and oversees the administration of the ward's estate. The Court provides a forum where problems, issues and concerns regarding the management of the estate may be addressed and/or approved. This is important because families need a place where their differences can be settled.

If the ward has given someone a Durable Power of Attorney or created a Revocable Living Trust, is a conservator necessary?

In some instances, Durable Powers of Attorney and Living Trusts properly obtained may negate the need for a conservatorship. However, Durable Powers of Attorney obtained in the middle of a night from the incapacitated person or Revocable Living Trusts created at the request of family members may create substantial problems. A Durable Power of Attorney given by an incapacitated person might be given to more than one person and may be given to someone who is less than honest. An agent acting under a Durable Power of Attorney may not be subject to any accounting or reporting requirements and therefore has power with little obligation to report or be responsible. In addition, Durable Powers of Attorney are subject to revocation and financial institutions may hesitate to recognize them.

What happens to the Durable Power of Attorney when a conservator is appointed?

The appointment of a conservator terminates any financial Power of Attorney unless the Court orders otherwise.

Is the issue of incapacity the same for both the conservatorship and guardianship actions?

No. The incapacity for guardianship relates more to the activities of daily living, while incapacity for conservatorship actions relates to the ward's ability to handle financial affairs.

Is there a certain size of estate that must exist before a conservatorship action can be initiated?

No. An independent determination is made in each case as to whether the cost of the action is justifiable and whether protection is needed.

Is it more difficult to bring a conservatorship action? Is it more involved than a guardianship action?

No. Similar information is necessary for each action. Many times a petition for guardianship and conservatorship are filed together.

Is a guardian ad litem and court visitor appointed in a conservatorship action?

No court visitor is appointed in a minor child or developmental disability case. In adult cases, a guardian ad litem attorney and/or court visitor may be appointed at the Court's discretion.

Can the conservator make a will or change a will for a ward?

No. A conservator is duty bound to follow the known testamentary scheme of the ward.

Does a conservator have to post a bond? If so, in what amount?

The statute provides for a bond to be posted by the conservator, but in many cases the Court does not require a bond.

Can a ward fire the conservator?

The conservator is appointed by the Court after a formal hearing and can only be removed by the Court.

If the conservator turns out to be a tyrant and no one likes him, can something be done about it?

Yes. The Court is always available to handle issues and problems, including the removal of a conservator who is unable to perform adequately, but also other problems regarding the conservator. The Court can impose limitations on the conservators powers.

Does the conservator have a duty to account to the family or does the family have the right to be kept informed on the financial matters?

Yes. The conservator must file an accounting at least annually and more often if ordered to do so by the Court. A copy of the accounting can be furnished to the guardian ad litem and to all interested parties. A copy of the accounting may also be obtained from the Court.

Does the conservator have to live in the same town as the ward?

No. So long as the conservator can perform adequately, he or she can live anywhere.

Can a ward change the will after a conservator has been appointed?

Perhaps. The test for incompetency for a will is different than the test for incapacity for a guardianship and/or conservatorship.

Does having a conservator mean that the ward can no longer have a checking account, money in her purse, or charge cards?

No. The conservator and/or the Court can determine whether the ward can manage some funds, a small checking account, and/or charge cards. The conservator may set up a small commissary account for the ward's use.

Does having a guardian or conservator automatically make a ward ineligible to drive and automobile?

No. However, if the ward is incapacitated and would be dangerous driving an automobile, the guardian should take reasonable steps to protect the public.

Is the conservator compensated? If so, how much?

A conservator may be reasonably compensated. The amount varies depending upon the size of the estate and the work involved. The Court will set the compensation amount.

How long does it take to get a conservator appointed?

A conservator can be appointed in an uncontested matter, absent an emergency, in four to six weeks. If the matter is contested, the appointment of a conservator takes considerably more time.

Can a temporary conservator be appointed?

Yes. The Court may appoint a temporary conservator in an emergency situation or during the pendency of a contested matter. A temporary appointment is only for 90 days, unless renewed for good cause.

If funds have been inappropriately taken prior to appointment, can a conservator get them back?

If the funds are still intact, the conservator can take action to recover the assets.

Does it cost more to obtain a conservatorship than a guardianship?

Usually no. The cost is about the same, and the actions may be brought jointly.

What happens to the estate when the ward dies? Who gets the leftovers?

The conservatorship estate normally is paid to the personal representative of the deceased ward's estate.

Is a conservator necessary even if the ward has no money?

Maybe. A conservator may be appointed for the specific purpose of applying for benefits or handling litigation.

Can the conservator borrow money for the benefit of the ward?

Yes. Many times a conservator will have to arrange short-term financing for a project or to provide liquidity for the ward's expenses while other assets are sold. However, the conservator can never create a debtor-creditor relationship with the ward by borrowing money from the ward or loaning money to the ward, unless the Court expressly approves the loan.

Can the conservator sell real property owned by the ward?

Yes. However, the conservator should have sales of real property approved by the Court, after notice to all interested parties.

Is it necessary to have assistance from a lawyer to file for conservatorship?

There is no legal requirements to have a lawyer assist in filing for conservatorship. However, it is a special proceeding best handled by professionals.

How difficult are the accountings and inventory to prepare?

If the conservator has maintained accurate records, the reports to the Court are not difficult to prepare. Problems arise when the conservator has not properly handled the money or maintained accurate records. There are Court approved forms for the inventory and accountings.

Does the Court really review the accountings?

Yes. And, the guardian ad litem may also review the accountings.

What happens if the conservator fails to file the annual accounting?

The Court may order the conservator to come to the Court and give testimony regarding why the accounting was not filed. The Court may impose penalties for contempt of Court if the conservator does not comply with the Court's orders.

What happens if the conservator misuses the ward's funds?

The Court has the power to surcharge the conservator personally for losses suffered by the ward as a result of a conservator's inappropriate conduct and in serious cases criminal charges may be filed.

What is the most frustrating thing for the Court in guardianship and conservatorship actions?

The Court is often frustrated with families who have not started the proceedings when they should have and then claim that there is an emergency. For instance, the family will initiate the petition for the appointment of a guardian and conservator after their parent has lost many thousands of dollars and then expect the Court and the conservator to recover the lost funds. When families wait too long to file an action, serious injury and/or death to the parent or family member who is incapacitated can result. Another frustrating area for the Court is when an ex parte (no hearing or notice) temporary guardianship is sought for a minor child alleged to be in danger instead of a child protection action being started.

More Info...

For referral to a lawyer or more copies of this brochure, visit the Idaho State Bar website at isb.idaho.gov or contact:

PO BOX 895
Boise, Idaho 83701
Phone: (208) 334-4500



Prepared by the Idaho State Bar
Taxation, Probate & Trust Law Section
(REV2013)