



# Guardianship & Conservatorship

*Although adults are assumed to be capable of making their own decisions, there are times when circumstances render an individual incapable of making responsible decisions. If a person becomes unable to make her own decisions, and no other instrument is in place to appoint a decision maker, it may be necessary for a court to appoint a guardian and/or a conservator for the individual.*

## What is a Guardian?

A guardian is an individual or entity appointed by the Probate Court to make decisions regarding the care and welfare of an individual who is unable to meet the essential requirements for physical health, safety, or self-care. The court must determine, through a hearing, that an individual cannot receive and evaluate information or make or communicate decisions using supportive services, technological assistance, or supported decision making. The court will also consider whether the individual's needs could be met by a less restrictive protective arrangement.

Unless the court imposes limitations on the guardian's authority, a guardian has general authority to make decisions about the individual's life and well-being, including where the person lives, whom the person sees and with whom the person speaks, and what medical treatment the person receives. If the court does not appoint a conservator for the individual, the guardian may also have limited authority over the individual's money and property. If the person has a significant amount of money or property, the court will usually appoint a conservator as well as a guardian, although the same person may serve both roles.

## What is a Conservator?

A conservator is an individual or entity appointed by the Probate Court to manage the money and property of an individual who is unable to manage property or financial affairs. Before a conservator is appointed, the court must be persuaded that appointment is necessary to avoid harm or significant dissipation of property, or, that appointment is necessary to obtain or provide money needed for support, care, education, health, or welfare. A conservator has the duty to protect, invest, and use the assets for the protected person's benefit, and must account to the court for the administration of the assets.

**Determining the Need for Guardianship/Conservatorship**  
The individual must be examined by a licensed physician or psychologist who then files a report with the court. A court cannot order a guardianship or conservatorship merely because an individual has made poor decisions or decisions with which the person's family members disagree. Also, full guardianship or conservatorship may not be needed. The court is required to consider whether limited guardianship or conservatorship, or another less restrictive alternative, is available to meet the persons' needs.



## Who may serve as a Guardian or Conservator?

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**Any competent adult can serve as a guardian or conservator.** The law gives preference to a spouse or domestic partner, or another adult who has exhibited special care and concern for the individual. A private agency or corporation could also serve as a guardian in appropriate circumstances. If a suitable, private guardian or conservator cannot be found, the court may appoint a public guardian or conservator—an agency of the state government.

## What is the process for appointing a Guardian or Conservator?

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Any person who is concerned about another person's welfare and ability to manage personal affairs and assets may file a petition in the Probate Court (*in the county where the person in need of a guardian or conservator lives*) asking the court to appoint a guardian, conservator, or both.

The person filing the petition may request that he or she be appointed guardian or conservator, or nominate someone else to serve. Notice of the petition must be given to all interested parties, including the respondent, a spouse or domestic partner, adult children, and in some instances, the state or certain state agencies. The petitioner must file a guardianship plan and conservatorship plan stating how the person's needs will be met. A physician or psychologist must evaluate the individual and file a report documenting the person's cognitive and functional abilities.

After the petition is filed, the Court appoints a neutral person, called a "visitor," who will meet with the person in need of a guardian or conservator. The visitor will also meet with the person who is nominated to be the guardian or conservator. After these meetings, the visitor will file with the court a report of his or her observations. If person in need of a guardian or conservator disagrees with the petition, the court must appoint an attorney to represent the individual if he or she has not already retained one. After the court receives all of the required reports, it will hold a hearing to decide whether a guardian or conservator is needed.

If it is necessary, the court will issue an order appointing a guardian and/or conservator. The court's order will also describe the limitations, if any, on the authority of the guardian or conservator.

## Is the appointment of a Guardian or Conservator permanent?

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When an individual files a petition for guardianship or conservatorship with the court, he or she may indicate that an emergency exists and request the appointment of a temporary guardian or conservator to protect an individual from physical danger. If the Court finds that an emergency exists, the Court may appoint a temporary guardian or conservator without following the formal process described above.

A temporary guardian or conservator may serve no longer than six months, however, and the Court's order will limit the authority of the temporary guardian or conservator to that which is needed to address the emergency. The court will later hold a full hearing to determine whether the individual needs a guardian or conservator on a long-term basis.

Regardless of whether the court imposes a guardianship or conservatorship on a general or temporary basis, the court can remove the guardian or conservator at any time if the person no longer needs guardianship or conservatorship, or if the court feels removal would be in the person's best interest.

## What are the alternatives to Guardianship and Conservatorship?

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Though a guardianship or conservatorship provides the protection of court oversight, it is not always desirable because it involves public disclosure of family matters, results in the deprivation of a person's rights and independence, and can be more expensive than available alternatives. Planning for incapacity while you are still competent, for example, by creating a financial power of attorney or advance health care directive (instruments that allow you to appoint individuals to make financial and health care decisions in the event of your incapacity) may avoid the need for a guardian or conservator in the future.

*This article is intended to provide information of a general nature only. It does not provide or replace professional legal advice, and it does not establish an attorney-client relationship with Rudman Winchell. Please consult an attorney for advice regarding your specific circumstances.*