

GUARDIANSHIP / CONSERVATORSHIP: What Do I Need to Know?

What is a Guardian?

A guardian is a person who is responsible for your personal affairs. A guardian is appointed by a judge after he or she determines that you are incapacitated.

What is a Conservator?

A conservator is a person who is responsible for managing your estate and financial affairs. A conservator is appointed by a judge after he or she determines that you are incapacitated.

What is the difference between a Guardian and a Conservator?

A guardian makes decisions about your person. For example, your guardian could decide where you live, what you eat or which doctor you see. A conservator makes decisions about your money. For example, your conservator could pay your bills or invest your money for your benefit.

***Note: Unless it is necessary to use the terms “guardian” or “conservator” to denote clearly different roles, the phrase “guardian / conservator” will be used in this leaflet.

Can the same person be both a Guardian and a Conservator?

Yes. Frequently the same person is appointed as guardian and conservator. However, the court can appoint different people to fill these jobs if it determines that would be in your best interests.

Who decides that I need to have a Guardian / Conservator?

A judge makes the final determination as to whether you need to have a guardian / conservator appointed.

How does the judge decide that I need to have a Guardian / Conservator appointed?

The judge must find that you are a “protected person.” In order to categorize you as a “protected person”, the court must find that because of mental impairment, you are unable to receive and evaluate information effectively or to respond to people, events, and environments to such an extent that you do not have the capacity to:

1. To meet the essential requirements for your health, care, safety, habilitation, or therapeutic needs without the help of a guardian; (You cannot take care of yourself physically) or

2. To manage your property or financial affairs or to provide for your support of your legal dependents without the help of a conservator. (You cannot manage your money)

What if the court simply disagrees with the way I take care of myself and my property? Is this enough to support the appointment of a guardian / conservator?

No. If the judge ONLY finds that you exercised poor judgment, that is not enough to qualify you as a “protected person.”

How does the process get started?

Someone makes an official request to the court to appoint a guardian / conservator for you. The act of making this official request is called “filing a petition.”

Who can file a petition to have a guardian / conservator appointed for me?

Any of the following people can file a petition to have the court appoint a guardian / conservator for you:

1. You;
2. A person who is either responsible for your care or who has assumed responsibility for your care;
3. A facility providing your care, like a hospital or nursing home;
4. The person you have nominated as guardian or conservator, (more about this later);
5. ANY other interested party, including, but not limited to, the Department of Health and Human Resources.

The person or facility filing the petition is called the “petitioner” and will have to pay a fee of ninety dollars when the petition is filed.

Which court should the petition be filed in?

The petition should either be filed with the clerk of the circuit court in the county where you reside or with the clerk of circuit court in the county where the healthcare facility that you have been admitted to is located.

What information does the petition contain?

The petition must contain:

1. the petitioner’s name and address and their relationship to you;

2. your name and address;
3. the names and addresses of your nearest known living relatives;
4. the name and address of any person or facility who is responsible for your care or custody and a detailed list of all the things they do for you or your benefit;
5. the name and address of your living will or medical power attorney representative, or appointed healthcare surrogate, and a detailed list of all the things they do for you or your benefit, (Copies of these documents should be attached to the petition if they are available);
6. the name, address and phone number of the petitioner's attorney;
7. whether you will be able to attend the hearing and the reasons why you cannot;
8. the extent of the guardianship / conservatorship requested, the reasons why and the specific areas of protection or assistance requested;
9. the name and address of the guardian / conservator the petitioner proposes;
10. if the proposed guardian / conservator is an individual, the petition should also include his or her age, occupation, criminal history, and relationship to you;
11. the name and address of the guardian / conservator you nominated, if different from that proposed by the petitioner;
12. if the guardian / conservator you nominated is an individual, the petition should also include his or her age, occupation, criminal history, and relationship to you;
13. the name and address of any current guardian / conservator already acting on your behalf.

The petition should also include an evaluation by a licensed physician or psychologist documenting:

1. The nature, type and extent of your incapacity, including specific cognitive and functional limitations;
2. Your mental and physical condition and, if appropriate, your educational condition, adaptive behavior and social skill;
3. If the petition is requesting appointment of a guardian, a description of the services currently being provided for your health, care, safety or therapeutic needs;
4. A recommendation of the most suitable living arrangement and, if appropriate, treatment and habilitation plans;
5. An opinion as to whether the appointment of a guardian / conservator is necessary, the reasons why and the scope of the guardianship / conservatorship needed;
6. An opinion as to whether your attendance at the hearing would be detrimental to your health, care or safety;
7. A statement as to whether you are on any medications that may affect your actions, demeanor or participation at the hearing;
8. The evaluating physician or psychologist's signature;
9. The signatures of any other individual who performed, supervised or reviewed the examinations on which the report was based or who made substantial

- contributions towards the report's preparation; and
10. The date(s) of examinations on which the report is based.

How will I know if someone else petitions the court to have a guardian / conservator appointed for me?

If someone petitions the court to have a guardian / conservator appointed for you, you will receive a notice of the date, time and place of the hearing, a copy of the petition and a copy of the doctor's evaluation not less than fourteen days before the hearing.

Can I go to the hearing?

Definitely. The law specifically says that you are entitled to attend the hearing. If you are not present at the hearing the judge will require a verified statement, known as an affidavit, from your doctor stating that you could not be there due to a physical inability or that if you attended it would hurt you or your health or evidence that you refused to be there.

Who will represent my interests before the court?

If someone petitions the court to have a guardian / conservator appointed for you, the court must appoint legal counsel for you. In making this appointment, the court will consider your preferences if they are known. For example, if you have had a longstanding relationship with an attorney and the court knows about this, the court should appoint this attorney as your legal counsel if possible.

What is a "guardian ad litem"?

A "guardian ad litem" is the old terminology for your appointed legal counsel.

What are the duties of my appointed legal counsel?

Your appointed legal counsel has the following major duties:

1. Determination of whether a guardian is needed;
2. Tailoring the guardian's role to your specific needs, for example, personal supervisor, business affairs, medical consent only;
3. Ensuring that the person with the greatest interest in you is appointed guardian;
4. Ensuring that the bond is adequate; and
5. Ensuring that proper living arrangements and placement are considered.

At the minimum, your appointed legal counsel should meet with you and conduct an interview to determine your needs and wishes, conduct an investigation to determine if a guardian is needed, make a recommendation as to who would be the best guardian for you, and make sure that your living arrangements suit your needs.

How can my appointed legal counsel carry out these duties?

The law provides that your appointed legal counsel can perform any or all of the following in carrying out his or her duties:

1. Promptly notify you, and any caretaker, of his or her appointment;
2. Contact any caretaker, review your file and all other relevant information;
3. Maintain contact with you throughout the case and assure that you are receiving services appropriate to your needs;
4. Contact persons who may have knowledge about you;
5. Interview all possible witnesses;
6. Pursue discovery of formal and informal evidence;
7. File appropriate motions;
8. Obtain independent psychological and medical examinations as needed;
9. Advise you about the consequences of the proceeding and find out what your specific interests and desires are;
10. Subpoena witnesses to the hearing;
11. Cross-examine witnesses;
12. Review all medical reports;
13. Tell the judge what you want;
14. Produce evidence on all relevant issues;
15. Zealously represent your interests and desires, including objecting to inadmissible testimony;
16. Raise appropriate questions to all nominations for guardian and the adequacy of the bond;
17. Take all steps to limit the scope of the guardianship to your actual needs and make all arguments to limit the scope of intervention;
18. Ensure that the court considers all issues concerning your current or intended placement

Simply put, your appointed legal counsel is empowered to use any of the standard legal tools and methods to assure that your interests are protected.

Do I have any say over who will be my guardian / conservator?

Yes. There are several ways in which your preference will be considered.

1. If you already have written down your preference in a durable power of attorney, medical power of attorney or living will, this person shall be the first preferred nominee for guardian or conservator;
2. So long as you have capacity to do so, you may at any time nominate an

individual to serve as your conservator / guardian;

3. If you have already named a surrogate decisionmaker in a medical power of attorney or living will that person will be treated as your nomination for your guardian.
If you have already named a power of attorney representative under a durable power of attorney, that person will be treated as your nomination for your conservator.
4. Additionally, anyone who has the capacity to form a preference may nominate his or her own guardian or conservator. The nomination may be made in writing, by an oral request to the court, or may be proved by other evidence.

You've been talking about nominees or nominations, doesn't the court have to follow my instructions if I've already expressed who I want to serve as my guardian / conservator?

Not necessarily. The final decision as to who will serve as your conservator / guardian rests with the court. The court will appoint your nominee if it determines that he or she is eligible to act and would serve in your best interests.

Who is eligible to serve as a guardian / conservator?

1. Any adult individual can serve as a guardian / conservator so long as they can show that
 - a. they have the necessary education
 - b. they have the ability and background to perform the duties of guardian / conservator
 - c. the court determines that they are capable of providing an active and suitable program of guardianship / conservatorship
2. The following persons ARE NOT ELIGIBLE to serve as guardian / conservator
 - a. Persons employed by or affiliated with any public agency, entity or facility which is providing substantial services or financial assistance to you are not eligible to serve as guardian / conservator. (This category includes nursing home employees.)

My son had some trouble with the law when he was a teenager, does this mean he cannot serve as my guardian?

Not necessarily. Any person being considered for appointment as a guardian / conservator must provide information regarding any crime, other than traffic offenses, of which he or she was convicted. The court must then consider this information as one factor in the individual's fitness as guardian / conservator.

Are there times when the state will become my guardian / conservator?

The state itself is not appointed guardian / conservator. However, if there is no one else that is eligible to serve, a representative of the Adult Services Department of the West Virginia Department of Health and Human Resources may be appointed to serve as guardian. Similarly, when there is no one else equally or better qualified to serve as conservator, the sheriff of the county where the petition was filed may be appointed to serve as conservator.

Are there any particular educational requirements to be a guardian / conservator?

There are no specific educational requirements in order to be considered for appointment as a guardian / conservator. It is only necessary that the person being considered show that he or she is capable of performing the duties of guardianship / conservatorship. However, after the individual is appointed to serve as guardian / conservator he or she must complete educational training. This educational program is developed by the secretary of health and human resources and may consist of written materials and / or audio- or videotapes. The only reason that a newly appointed guardian / conservator would not have to complete this training would be if the court agreed that the individual did not require training because he or she completed it in the last three years.

This Leaflet Provided By:

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