

APPENDIX A: GUARDIANSHIP AND CONSERVATORSHIP

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Appendix A: Guardianship and Conservatorship

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GUARDIANSHIP**What is Guardianship?**

The guardian is an agent over a PERSON with incapacities. This does not suggest incompetence as the previous law and definition did. Limited guardianship is also available for individuals who are capable of having some control over their decisions.

New laws allow parents to appoint a guardian for their own child (minor or adult) with incapacities. The Court grants only those powers necessary to provide for the demonstrated needs of the child.

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

1. The power to have custody of the ward and the power to establish a place of abode within or outside of the state. The ward or any interested party may petition the Court to provide or initiate a change in abode.
2. The duty to provide for the ward'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 the requirements with personal funds. Whenever possible and appropriate, the guardian should meet these requirements through governmental benefits or other services to which the ward is entitled.
3. The duty to take reasonable care of the ward'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 ward to receive necessary medical or other professional care, counsel, treatment, or service.
5. In the event there is no duly appointed conservator of the ward's estate, the guardian shall have the power to approve or withhold approval of any contract, which the ward may make or wish to make.
6. The duty and power to exercise supervisory authority over the ward in a manner which limits civil rights and restricts personal freedom only to the extent necessary to provide care and services.
7. If there is not acting conservator of the estate, the guardian has the power to apply on behalf of the ward for any assistance, services, or benefits available through any unit of government.
8. Unless otherwise ordered by the court, the ward retains the right to vote.

Who can petition for guardianship?

Any individual interested in the individual's welfare (also voluntary petitions).

When is a Guardianship needed?

When an individual is incapacitated such that:

- he/she lacks sufficient understanding or capacity to make or communicate responsible personal decisions; and
- he/she demonstrates deficits in behavior that evidence an inability to meet personal needs for medical care, nutrition, clothing, shelter, or safety, even with appropriate technological assistance.

What power is needed?

Refer to the powers listed above. Guardianship is needed only for those powers necessary to provide for the demonstrated needs of the person.

Who has Priority for Appointment?

The priority for appointment is as follows:

- A guardian currently acting for the person in this state or other state, other than a temporary or emergency guardian.
- A nominated health care agent in a MN Health Care Directive.
- The spouse of the person, or a person nominated by a spouses' will or other written document executed in the same manner as a Health Care Directive.
- An adult child of the person
- A parent of the person or an individual nominated by a deceased parent's will or other written document executed in the same manner as Health Care Directive.
- Adult with whom respondent or proposed ward lived with for more than 6 months prior to the petition being filed (i.e., family members, friends).

How to Petition for Guardianship

- Complete forms and explain reasons for need for guardianship.
- Obtain Physicians Statement supporting guardianship.
- Complete and file a consent to criminal background study (if required).
- Complete and file an affidavit to proceed in Forma Pauperis, if necessary (petitioner's attorney fees and guardian fees may or may not be covered).

Venue – In which Court should petition be filed?

The petition should be filed in the county where the person currently resides or the county where the person is admitted to an institution by Court order.

Hearing is scheduled

Personal service of the Notice of a Hearing and a copy of the petition on the respondent and mailed notice to interested parties occurs 14 days prior to hearing.

Court Visitor is Appointed

A Court Visitor serves notice and petitions to the respondent, interviews the respondent and explains the substance of the petition, the nature and purpose of the proceedings, the respondent's rights and the general powers and duties of the guardian. The Court Visitor also determines the respondents views regarding the guardianship and informs the respondent of his/her right to employ/consult with an attorney, as well as informs the respondent that all costs and expenses of the proceedings will be paid from the respondent's estate. A final written report is made by the Court Visitor with recommendations regarding the appropriateness of the guardianship, the powers to be granted and a statement regarding whether the respondent approves of the proposed guardian and the scope of the guardianship.

Attorney is Appointed, Unless Waived

The respondent's attorney has full right to subpoena and represents the respondent throughout the proceedings.

Court hearing and Standard of Proof

The petitioner has the burden to demonstrate the need for the appointment for guardianship, the standard of proof requires clear and convincing evidence that:

- the respondent is an incapacitated person; and
- the respondent's identified needs cannot be met by less restrictive means, including technological assistance.

Required Attendance of Hearing

The petitioner, respondent and proposed guardian are required to be in attendance at the hearing.

Guardian Files Acceptance of Appointment

The Court issues an order appointing the guardian and letters of guardianship.

AN APPOINTMENT OF A GUARDIAN CAN BE CONDUCTED BY A PARENT OR SPOUSE THROUGH THEIR LAST WILL AND TESTAMENT OR OTHER WRITTEN INSTRUMENT THAT IS WRITTEN IN THE SAME MANNER AS ANY HEALTH CARE DIRECTIVE.

Rights Can Be Limited

Parents and spouses may specify desired limitations to the powers to be provided to the guardian and may revoke or amend the appointment – prior to Court confirmation.

Effective Date of Appointment

The appointment of the parent or spouse of a guardian becomes effective upon the first of the following:

1. death of the appointing parent or spouse; or
2. a court finding of incapacity for the appointing parent or spouse; or
3. a physician's written determination that an appointing parent or spouse is no longer able to care for the person with incapacities.

Right to Object

The following people have a "right to object" to a parent or spousal appointment of a guardian:

1. the person with the incapacity;
2. a person having custody of the person with incapacities, if other than the appointing parent or spouse;

3. the adult that is nearest in kinship to the person with incapacities.

If one of the above persons objects, the guardian's appointment is terminated, unless it was previously confirmed by the Court. The Court will then appoint a guardian.

Right to Prior Approval by Court and Termination of Right to Object (Confirmation of Appointment of Guardian)

A Court, upon the petition of the appointing parent or spouse and a "finding" by the Court that the appointing parent or spouse will "likely be unable to care for the person with incapacities" within two years or less and after notice to all interested parties, may confirm the appointing parent's or spouse's selection of guardian and terminate the right to object by others.

Authority of Appointed Guardian to Act

An individual appointed as a guardian for an appointing parent or spouse must use the following steps before actually being authorized to act as the guardian for a person with incapacities.

1. File within 30 days a Notice of Acceptance of Appointment with the Court and a copy of the written instrument of appointment with the Court of the county where the will was or could be probated or the county in which the person resides or is present.
2. Give written notice of acceptance of appointment to:
 - a. the appointing parent or spouse, if living;
 - b. the person with incapacities;
 - c. the person having custody or care of the person with incapacities, if it is someone other than a parent or spouse.
 - d. The adult nearest in kinship to the person with incapacities.

This notice must contain a statement of their right to terminate the appointment by filing a written objection (unless previously confirmed by the Court).

3. If an objection to the appointment is filed and the appointment terminates, the Court, in its discretion, may:
 - a. proceed to appoint the parent or spouse appointee as guardian;
 - b. treat the objection as a petition for the appointment of an "emergency guardian" and proceed accordingly; or
 - c. treat the objection as a petition for appointment of a limited or unlimited guardianship and proceed accordingly.

Termination of Guardian's Authority

The authority of a parental or spousal appointed guardian may be terminated if an appointment is made by the Court or an objection is filed.

Procedures for Appointment of an Emergency Guardian

- **With Notice to Respondent/Proposed Ward**

A petition for the appointment of an emergency guardian may be filed by either a person interested in the proposed ward's welfare or a Court acting on behalf of a vulnerable adult. An emergency guardian can be appointed only if the Court finds that compliance with the normal guardianship procedures is likely to result in substantial harm to the proposed ward's health, safety or welfare, and that no other person appears to have the authority or willingness to act under the circumstances. An emergency guardian has authority to act for 60 days if the guardian is a private person and 90 days if a county employee. The Court must appoint an attorney to

represent the proposed ward immediately upon receipt of a petition to appoint an emergency guardian.

- **Without Notice to Respondent/Proposed Ward**

An emergency guardian may also be appointed without notice to the proposed ward, if the Court finds from an affidavit or sworn testimony that the proposed ward will be substantially harmed before a hearing on the appointment can be held. The proposed ward must be given notice of the appointment within 48 hours after the appointment. The court must hold a hearing on the appropriateness of the appointment within 5 days after the appointment. This appointment is not a determination of the proposed ward's incapacity.

Appointment of a Temporary Substitute Guardian

The Court may appoint a temporary substitute guardian if it finds a guardian is *not effectively performing the guardian's duties* and the *welfare of the ward requires immediate attention*.

The appointment of a temporary substitute guardian is subject to the following:

- Appointment can be made without notice, but the Court must then inform the guardian and ward of the appointment within five days after the appointment.
- A temporary substitute guardian must be for a specified period of time and cannot exceed 6 months.
- A temporary substitute guardian will have all powers given to the guardian in the previous order for appointment.
- The authority of the previous appointed guardian is suspended during any periods that a temporary substitute guardian has the authority to act.
- A temporary substitute guardian must make any report the court requires.
- The Court may remove a temporary guardian substitute at any time.

Rights and Immunities of Guardians

A guardian is entitled to certain rights and immunities, including:

- Reasonable compensation and reimbursement for expenditures made on behalf of the ward.
- A guardian is not liable to third parties for the ward's acts.
- A guardian is not liable for injuries sustained by the ward that are caused by third persons, provided the guardian exercised reasonable care in the selection of a third party to provide services or medical treatment for the ward.
- A guardian may revoke a health care directive "agent designation" in a Health Care Directive without authorization from the Court. The health care decisions of the guardian take precedence over that of a health care agent.
- The guardian may NOT revoke the Health Care Directive itself without a Court Order.

- A guardian may NOT initiate commitment of a ward to an institution except as authorized § 524.5-313.

For forms, see the following web sites: www.guardianforms.com and www.courts.state.mn.us/ctforms/guardian_index.asp

CONSERVATORSHIP

What is Conservatorship?

A conservator can no longer be appointed to manage both the person and/or estate of a person with incapability's. A conservator refers ONLY to the appointment of an agent to manage the estate/money/assets of a person with incapacities – protected person.

A Court appoints a conservator of an estate if the Court determines that some or all of the powers and duties listed below are needed to provide for the needs of the protected person.

Duties and Powers of a Conservator

- 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. This does not release parents from the obligations imposed by law for the support, maintenance, and education of their children. The conservator has not responsibility to pay for these requirements out of personal funds. Whenever possible and appropriate, the conservator should meet these requirements through governmental benefits or services to which the protected person is entitled, rather than the protected person's estate.
- Pay out the protected person's estate all lawful debts of the protected person and reasonable charges incurred for the support, maintenance and education of the protected person's spouse and dependent children and, upon order of the Court, pay such sum as the Court may fix as reasonable for the support of any person unable to earn a livelihood who is legally entitled to support from the protected person.
- 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.
- When a protected person has inherited an individual interest in real estate, the Court may authorize an exchange or sale of the protected person's interest or a purchase by the protected person's interest other heirs may have in the real estate.
- The power to approve or withhold approval of any contract, except for necessities, which the protected person may make or wish to make.
- 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 power to revoke, suspend, or terminate all or any part of a durable power of attorney of which the protected person is the principal with the same power the principal would have if the principal were not incapacitated. The decision of the conservator takes precedence over that of an attorney-in-fact.
- If the protected person has made a financial transaction or gift or entered into a contract during the two year period before establishment of conservatorship, the conservator may petition for Court review of the transaction, gift, or contract. If the Court finds that the protected person

was incapacitated or subject to duress, coercion or undue influence when the transaction, gift or contract was made, the Court may declare it void.

Procedures to Establish Conservatorship of an Estate

Who Can Petition for Conservatorship?

Any person interested in the estate, affairs or welfare of the protected person, or any person who would be adversely affected by lack of effective management of the property and/or business affairs of the protected person can petition for conservatorship.

When is a Conservatorship Needed?

Conservatorship is needed if the individual is unable to manage property and business affairs because of an impairment in the ability to receive and evaluate information or make decisions; the individual has property that will be wasted or dissipated without proper management or funds needed for support, care, education, health and welfare of the protected person or another dependent of the protected person; or the individual's needs cannot be met by less restrictive means, including the use of technological assistance.

The appointment of a conservator or protective arrangement is not a determination of incapacity of the protected person.

What Powers are Needed?

Refer to the powers listed above.

Who has Priority Appointment?

- A conservator, guardian of the estate, or other fiduciary appointed or recognized by an appropriate Court of any other jurisdiction where the protected person resides;
- A person nominated as conservative by the protected person;
- An agent appointed by the protected person to manage the protected person's property under a durable power of attorney;
- Spouse of a protected person;
- Adult child of a protected person; or
- Adult with whom the protected person has resided for more than six months before filing the petition has priority appointment.

Note: The Court, when in the best interest of the protected person, may decline to appoint a person having priority and appoint a person having lower or no priority.

An individual/agency providing residence, custodial care, medical care, employment training, or other care/services for which a fee is received, may not be appointed as a conservator unless related by blood, marriage or adoption.

How to Petition for Conservatorship

- Complete forms and explain reasons for need for conservatorship
- Obtain Physicians Statement supporting conservatorship
- Complete and file Consent for the Criminal Background Study (if required)
- Complete and file an affidavit to proceed in forma pauperis, if necessary (petitioners attorneys fees and conservator fees may or may not be covered)

Venue – In which Court should the petition be filed?

The Petition should be filed in the county where the respondent currently resides or the county where the respondent owns property.

Hearing is scheduled

Personal service of the Notice of a Hearing and a copy of the petition on the respondent and mailed notice to interested parties occurs 14 days prior to hearing.

Court Visitor is Appointed

A Court Visitor serves notice and petitions to the respondent, interviews the respondent and explains the substance of the petition, the nature and purpose of the proceedings, the respondent's rights and the general powers and duties of the conservator. The Court Visitor also determines the respondents views regarding the conservatorship and informs the respondent of his/her right to employ/consult with an attorney, as well as informs the respondent that all costs and expenses of the proceedings will be paid from the respondent's estate. A final written report is made by the Court Visitor with recommendations regarding the appropriateness of the conservatorship, the powers to be granted and a statement regarding whether the respondent approves of the proposed conservator and the scope of the conservatorship.

Attorney is Appointed, Unless Waived

The respondent's attorney has full right to subpoena and represents the respondent throughout the proceedings.

Court Hearing and Standard of Proof

The petitioner has the burden to demonstrate the need for the appointment for conservatorship, the standard of proof requires clear and convincing evidence that:

- The respondent is unable to manage property and business affairs because of impairment in the ability to receive and evaluate information and make decisions; and
- The respondent's identified needs cannot be met by less restrictive means, including the use of appropriate technological assistance.

And by the preponderance of the evidence that:

- The respondent has property that will be dissipated or wasted unless proper management is provided or funds are needed for the support, care, education, health and welfare of the respondent or of the individuals who are entitled to the respondent's support and that protection is necessary or desirable to obtain or provide funds.

Required Attendance of Hearing

The petitioner, respondent and proposed conservator is required to be in attendance at the hearing.

- Conservator files Acceptance of Appointment.
- The Court issues an order appointing the conservator and letters of conservatorship.