

Guardianship and Conservatorship

GENERAL OVERVIEW

A. **CONSERVATORSHIP AND GUARDIANSHIP:** A conservatorship or guardianship is established through a legal action, or proceeding. The person who files a petition with the court requesting that a conservatorship or guardianship be established is the petitioner. In this proceeding, the court orders the appointment of a person (a conservator or guardian) to act as a decision maker for another person (the protected person or ward). The court bases this decision on clear and convincing evidence that the protected person or ward has been found to be unable to make necessary decisions on his or her own behalf. The court calls this *making a finding of incapacity*. Guardianship or conservatorship should only be sought if the individual's judgment or decision making is a threat to the individual's welfare.

1. What is the difference between Conservatorship and Guardianship? A guardian is appointed to make the personal decisions for the ward. The guardian has decision making authority for matters such as choice of place to live, medical decisions, training and education, etc. A conservator is appointed to make financial decisions for the protected person. The conservator typically has the power to contract, to pay bills, invest assets, and perform other financial functions for the protected person.

A conservatorship does not assume, or *presume*, that the proposed protected person is incapacitated in all areas of his or her life. There is no evidence of, or finding of, general incompetence. The individual can still marry, make a will or vote (unless specified by the court that the individual is incapable of doing so).

2. What types of Guardianships or Conservatorships are there? An adult who may need a guardian for personal decisions, such as where to live, would have a guardian of the *person*. An adult who may need a conservator for financial matters only would have a conservator of the *estate*. A guardian of the person and a conservator the estate may also be necessary.

- a. Guardianship of the Person: "A guardian of the person" is appointed for personal matters.

A guardian of the person makes decisions regarding:

- general care and needs, and where to live,
- care, comfort and maintenance (food, clothing, shelter, health care, social and recreational, training, education, habilitation or rehabilitation),
- taking reasonable care of personal effects,
- giving necessary consent for medical or other professional care, counsel, treatment, or service,
- approving or withholding approval of contracts, except for necessities, (this power is only given if there is no conservator of the estate) and
- exercising supervisory authority which limits civil rights and restricts personal

freedom only to the extent necessary to provide needed care and services.

- b. Conservatorship of the estate: A conservator of the estate is appointed for financial matters.

A conservator of the estate must:

- pay reasonable charges for the support, maintenance, and education of the protected person from the protected person's estate, and in a manner suitable to the person's station in life and the value of the estate (the conservator must seek federal, state or local services that the protected person is entitled.),
- pay any just and lawful debts of the ward or protected person from the protected person's estate, possess and manage the estate, collect all debts and claims in favor of the person and invest all funds not currently needed as directed by statute,
- approving or withholding approval of contracts, except for necessities, and
- by approval of the court, sell, exchange, or purchase undivided interest in real estate.

- B. PROCEDURES TO ESTABLISH A GUARDIANSHIP/CONSERVATORSHIP:** In this section the basic steps necessary for a petitioner to begin the process of establishing guardianship or conservatorship are discussed. A petitioner may proceed with these actions with an attorney, or pro se, meaning without an attorney. The following information is meant to familiarize either type of petitioner with the overall process.

There must be cause, or reason, to believe that the person is incapacitated. It is not sufficient to proceed just because a person has a diagnosis which may indicate incapacity. There must be evidence which supports this belief, such as behavior which demonstrates incapacity, and there must be no other less restrictive alternatives available to meet the needs of the person. It must be kept in mind that the individual has the potential and the right to contest any guardianship or conservatorship proceedings.

1. What is required in the filing process? To file for guardianship or conservatorship the petitioner must obtain and complete the correct forms, and file them at the right place.
 - a. Obtain forms: The forms necessary to begin can be located on the state court website (www.mncourts.gov/forms).
 - b. Complete forms: The petitioner must answer and fill out all the questions on the forms according to the specifics of the proposed ward's or protected person's circumstances.
 - c. File forms: Once completed all forms should be filed with the court administrator. There is a filing fee which varies from county to county. Once the petition is filed a court date will usually be scheduled for 4-6 weeks later.

All forms required for guardianship or conservatorship must be filed in the Probate Division at the district court in the county where the proposed ward or protected person resides.

2. What are the costs of filing? When and how to file *In Forma Pauperis*: Since the total fee, filing fee plus law library fee, may vary in each County, you should check with the County in which you wish to file for the correct fee. If a petitioner is unable to file for

guardianship or conservatorship because he or she cannot afford court costs or attorney fees, they may file for *in forma pauperis* status. This allows people who have very low income and assets and are in need of a guardian or conservator to have the court costs and other associated costs waived. However, if a petitioner wants to apply for *in forma pauperis* status, he or she must file the additional forms at the same time the petition for guardianship or conservatorship is filed. These forms can be obtained from the Court Administration office or found on the state court website at www.mncourts.gov/forms.

C. BEFORE THE HEARING: Before the hearing the petitioner must prepare and file the following forms with the court:

1. **Complete and file - Petition for appointment of general conservator or guardian**

A petition for the appointment of a guardian or conservator is completed and filed with the court. The petition may be filed by the person to be protected, any person interested in the estate, affairs or welfare of the protected person such as a parent or any person adversely affected by improper management of the property and affairs of the protected person.

Each petition for guardianship or conservatorship must be written specifically for each proposed ward or protected person. The powers over that individual must be backed up by evidence that demonstrates that there is a need for the guardianship or conservatorship. Upon hearing the petition, the court then makes an order to either appoint the guardian or conservator and will grant very specific, limited powers based on the petition and the evidence, or may dismiss the petition due to lack of evidence proving the need for a guardian or conservator.

In all cases of guardianship and conservatorship the probate courts must only grant powers based on that individual's specific needs. Petitioners should, therefore, be very specific in requesting powers, and should petition for all powers only when they are convinced that other less restrictive options is not appropriate.

2. **Complete and file - Notice of Hearing and Notice of Rights and Setting Date for Hearing**

When the Petition for Appointment of General Guardianship/Conservatorship is filed, the Notice of Hearing and Notice of Rights must also be filed. Once these forms are filed, the court will set the time and place for the hearing and must order that notice be given of the hearing. They do this by filling in the bottom half of The Notice of Hearing and Notice of Rights form and sending it back to the petitioner. This will show the time and location of the hearing and notifies the proposed ward or protected person that they have the right to request an attorney to represent them.

3. **Complete and Mail. Notice of hearing and notice of rights**

After the court has set the date and time for the hearing the petitioner must mail a copy of the Notice of Hearing and Notice of Rights, and a copy of the Petition for Appointment of General Guardian/Conservator to all interested parties, including: any spouse (or person who lived with the person for six months or more), parents, adult children, and brothers or sisters of the proposed ward or protected person, and other interested persons (see petition and Minnesota Statutes § 524.5-102 subd. 7). Notice of the time and place of the hearing is given to the proposed ward or protected person and other persons specified by statute. *These must be postmarked at least 14 days prior to the hearing date.*

If the proposed ward or protected person lives in a residential facility, which includes group homes, nursing homes, and state institutions, the petitioner must also mail the notice to the administrator of the facility. It is also necessary to send notice to the program administrator

if the proposed ward or protected person lives in a waived services residence or in foster care. If the proposed ward or protected person is currently under public guardianship or conservatorship or guardianship, it is necessary to send notice to the Commissioner of Human Services.

4. Who is the court visitor and what does he or she do? The Notice of Hearing and Notice of Rights, along with the Petition for Appointment is given to the proposed ward or protected person at least 14 days before the hearing indicating that someone is petitioning for guardianship or conservatorship. That means that a “court visitor” or “process server” must personally give a copy of the petition and of the Notice of Hearing and Notice of Rights to the proposed ward or protected person and read it to him or her. If the proposed ward or protected person does not receive personal service of the notice at least 14 days before the hearing, the proceedings are invalid.

The court may appoint a visitor who will visit the proposed ward or protected person, give notice of hearing rights, and submit a report to the court before the hearing, or the court may ask the petitioner if they know someone who could serve notice to the proposed ward or protected person. Some probate courts have staff members who will perform the personal service on the proposed ward or protected person. If the court assigns someone to do this they may assess the petitioner a fee.

The court visitor must explain to the proposed ward or protected person his or her right to contest the petition. After the visit the visitor will file a report with the court as to his or her own independent appraisal of the situation. This report will include a recommendation as to whether guardianship or conservatorship seems necessary. If guardianship or conservatorship is recommended then the report will also recommend which specific powers that should be granted. The petitioner must obtain a copy of the Visitor’s Report from his or her attorney or from the court and review it.

5. Complete and File - Affidavit of Mailing Notice of Hearing and Notice of Rights and Petition: Prepare an Affidavit of Mailing of the documents above, attach a copy of each of the documents to the Affidavit, and file it with the Court. The court will require an “Affidavit of Mailing” to verify that copies of the petition and the hearing notice were sent to all of the proper people.

D. PREPARING FOR THE HEARING: The hearing itself is the same for both conservatorship and guardianship and may be very simple unless it is contested by someone. The petition may be contested by any interested person who thinks there is no need for the appointment of a guardian or conservator, or that the proposed guardian or conservator will not be able to act in the best interest of the proposed ward or protected person, or by the proposed ward or protected person himself or herself.

1. Should the proposed ward or protected person attend the hearing? The proposed ward or protected person must be present at the hearing if he or she is within the state, unless excused by the court. It is strongly encouraged that the proposed ward or protected person attend the hearing even if there will be little or no comprehension of the proceedings on his or her part, or even if he or she waived their right to attend. This will allow the court to observe his or her responses to questions asked of him or her.

For some individuals, significant behavior problems may be disruptive in the courtroom. In these cases, the proposed ward or protected person should still attend the hearing. Allowing the Judge to observe the person may help support the petitioner’s case. The courts are understanding of disruptive behavior, but families may want to consider waiting outside of the courtroom with the proposed ward or protected person until their case is called if such behavior is likely.

There may be situations where medical conditions prohibit attendance at the hearing. In these cases, the petitioner will need to have a physician fill out the bottom portion of the Physician's Statement in Support of Guardianship/Conservatorship (and re: Ward's/Protected Person's Inability to Attend Hearing).

2. Does the proposed ward or protected person have an attorney? A proposed ward or protected person has the right to be represented by legal counsel in every new proceeding. The petitioner should contact the attorney for the proposed ward or protected person and attempt to resolve any differences. Appointment of an attorney does not necessarily mean that the proceedings will be contested, but ensures that the proposed ward's or protected person's interests are being protected.

E. THE HEARING: The court visitor may be asked to testify about his or her personal observations or write a report to the court regarding his or her personal observations.

The petitioner will be asked to state why he or she thinks the individual needs a guardian or conservator. At this time they should talk about the evidence they have submitted. The court presumes that the proposed ward or protected person is competent, so it is up to the petitioner to prove that the individual is incapacitated.

Once all of the evidence has been heard, there are several potential outcomes:

- The court may grant conservatorship or guardianship, as requested, and the court then enters an Order stating that fact.
- The court may decide that the person needs less assistance than was requested and may modify the petition to a less restrictive form. For example, the court may grant less powers than were requested.
- The court may determine that the individual does not need a conservator or guardian and dismiss the petition.

F. ANNUALLY AFTER THE HEARING: After a person is appointed as guardian or conservator he or she will be required to file with the court additional forms every year: a Personal Well-being Report (only filed by guardian of the person); an Annual Account (only filed by conservator of the estate); and the Annual Notice of Right to Petition. These forms must be filed within thirty days of the anniversary of the date that guardianship or conservatorship was appointed. If an annual report is not filed within 60 days of the required date, the court shall issue an order to show cause.

1. What is the Personal Well-being Report? The Personal Well-being Report is filed so that the court can remain informed about changes in the ward's residence, medical condition, and mental or emotional condition, and any changes in the guardian's status and capacity to serve as a guardian, and reports any reimbursements for services rendered in the past year that were not reimbursed by county contract. This form must be served on the ward and interested persons of record with the court.
2. What is the annual and final account? It is required that the courts review and accept the accounts on a regular basis in a court hearing. The frequency of these reviews is determined by court rules as well as the court in each county. This form is an accounting of the protected person's estate. The Annual Account form is only required when a conservator of the estate has been appointed. This form shows the court how the protected person's assets have been handled, and provides information on any changes in the conservator's status and capacity to serve as a conservator, and reports any reimbursements for services rendered in the past year that were not reimbursed by county

contract. The form must be filed with the court within 30 days from the anniversary date of the appointment of the conservator.

3. What is the annual notice of right to petition and affidavit of service? The Annual Notice of Right to Petition must be filled out by the guardian or conservator and sent to the ward or protected person and interested persons of record with the court. This notice informs the ward or protected person and interested persons of record with the court of the right to petition the court to request a hearing to modify or terminate the guardianship or conservatorship.