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## **GUARDIANSHIP AND CONSERVATORSHIP**

Difference Between Guardianship and Conservatorship. Guardianship does not typically include control of the assets of a protected person, hence the role of conservator. The guardian is appointed to take charge of an incapacitated person's ("IP") health and welfare while the conservator is appointed to manage the IP's financial affairs. The same person can be appointed to both roles, or just one. In either case, sufficient allegations of incapacity must be made to justify the appointment, which in effect, supplants vital decision-making authority from an individual to a surrogate. In both guardianship and conservatorship, the appointee takes on essentially the role of a parent in managing the affairs of the IP.

Due Process and Other Notice Requirements. The court appointed visitor typically serves the dual requirement of serving the incapacitated with notice of the protective proceedings. The protected person must be given at least 14 days notice prior to the hearing on the petition for guardianship or conservatorship.

Notice must also be given to the IP's spouse and adult children, any person serving as guardian or conservator or who has care and custody of the IP, and if the protected person has no spouse or adult children, then the closest living relative, or if there are none, then an adult friend. In a conservatorship petition, the spouse and all adult children must be notified, and if there are none, then the IP's parents or closest adult relative, and if none, then an adult friend. Also, notice must be given to any payers of public benefits. This typically includes Social Security, and sometimes Railroad Retirement and Veteran's Benefits.

Anyone requiring notice under the probate code may waive his or her right to notice by signing a waiver. This can be general, waiving the right to notice of any future proceedings on the action, or limiting the waiver to certain hearings.

Filing Requirements. The Probate Court generally requires the use of its forms, which may be purchased from the Register of Probate in each county. In a guardianship proceeding, a Petition for Appointment of Guardian for Incapacitated Person must be filed, PP-201, in a conservatorship proceeding, a Petition for Appointment of Conservator, PP-401 and if proceeding with both, a Joined Petition for Appointment of Guardian/Conservator, PP-205.

In a guardianship proceeding, a Guardianship Plan must be filed, PP-502, in a conservatorship proceeding, a Conservatorship Plan, PP-503 and if proceeding with both, a Joined Guardianship/Conservatorship Plan, PP-504. An Acceptance of Appointment must also be signed by the nominee for appointment and submitted to the court before the court will proceed to hearing.

In guardianship proceedings, the IP must be examined by a physician or psychologist. In a conservatorship proceeding, this is not required, but practically speaking, in either type proceeding, a Physician's Report/Psychologist's Report (PP-505), is generally required by all of the probate courts in Maine.

The Probate Code requires appointment of a visitor, a guardian ad litem or attorney to represent the IP in a guardianship proceeding. This requirement is typically met with appointment of a visitor. A visitor with respect to guardianship proceedings is a person trained in law, nursing, social work, or able to perform the function, and is an officer, employee or special appointee of the court with no personal interest in the proceedings. The court may and typically does order that the petition and hearing notice be served on the IP by the visitor. Thus, the visitor generally serves the dual purpose of meeting with the IP and reporting back to the court with his or her opinion as to whether a guardian or conservator is needed and also meeting the due process notice requirements.

The Probate Court must require bond of the conservator in estates of \$25,000 or more. For estates of less than \$25,000, the court may in its discretion require bond. The spouse of the IP, certain financial institutions and persons already bonded in their course of business sufficient to cover the estate of the conservator are exempt from the bonding requirement

Proceeding to Hearing on the Petition. Once all notices or waivers have been procured and the physician's report and visitor's reports have been filed, bonds have been obtained (some courts require this prior to scheduling the matter for hearing) and notice periods have elapsed, the case can be scheduled for hearing. In the lion's share of cases, the hearing is an informal, non-testimonial hearing which the IP does not attend, because he or she is too incapacitated to understand the nature of the proceedings or even realize that it is taking place. If the IP contests the action, a full blown hearing will be required. Likewise, if any persons with standing (those entitled to statutory notice of the proceeding) contest the petition or nomination of guardian or conservator, a testimonial hearing will be required.

Limited versus Full Guardianship or Conservatorship. In either type of proceeding, one must indicate whether full powers are sought or just limited powers. If limited powers are sought, one must specify the powers. For example, a guardianship might be limited to making an initial placement decision, or a guardianship might have a restriction such that the placement of the IP could not be changed without court approval.

Deciding Whether a Conservatorship is Necessary. In cases in which the IP has limited funds, a guardianship may be all that is necessary. The Probate Code sets out that if there is no conservator, the guardian may receive money and tangible property deliverable to the ward and apply the money and property for support, care and education of the ward. Such funds, however, may not be paid to the guardian for room and board supplied by the guardian without prior court approval.

Priorities for Appointment. The Probate Code establishes priorities as to whom should be considered for appointment - probably in attempt to avert feuds over this to the extent possible. In guardianship proceedings, the order of priority for appointment is 1) the person or institution nominated in writing by the IP (typically in an advance health care directive), 2) the spouse or domestic partner, 3) adult child, 4) parent, 5) any relative with whom the IP resided for more than 6 months prior to the filing of the petition, 6) person nominated by the person who is caring for or paying benefits to the IP. The order of priorities for conservator is similar, except that the first priority is given to "a conservator, guardian of property or other like fiduciary appointed or recognized by the appropriate court of any other jurisdiction in which protected person resides." These priorities, however, are not binding on the court and may be disregarded by the probate judge if there is compelling evidence warranting a different appointment.

Duties after Appointment. Although a guardian has the same powers, rights, and duties that a parent has respecting his unemancipated child, and the conservator has extensive powers over the property of the ward, it is important that the appointee remember that he is under the continued jurisdiction of the Probate Court and there are certain ongoing duties that must be observed. The guardian is required to report the condition of his ward and of the estate which has been subject to his possession or control as specified by the court at the time of the initial order and generally at yearly intervals. The court will usually specify that it is to be notified if the ward's place of abode changes.

Within 90 days following a conservator's appointment, the conservator is required to prepare and file a complete inventory of the estate with the court. Although there are not absolute requirements for filing accounts to the court, a conservator is obligated to keep suitable records of the administration of the estate and exhibit them at the request of any interested person. The conservator must account to the court for administration of the estate as specified by the court and upon resignation or removal. As a matter of practice, it is very wise to file annual accounts with the court. Doing so will make the job of preparing the final account upon termination of the conservatorship much easier. It also protects the conservator, as once the court approves the account, it cannot later be challenged.