

Guardians And Conservators: Who are They? What Do They Do? Can You Avoid Them?

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Planning has become a way of life. Most of us have daily, weekly and monthly planners. We plan strategically in our careers and our investments, we plan our vacations and we plan for retirement.

Yet too many of us fail to plan for our own welfare (and by implication the welfare of our spouses, children and other family members) in the event that an illness or injury causes us to be unable to communicate our decisions or desires.

Planning for your future is a powerful way to gain peace of mind, but if your planning does not include provisions for the use of a healthcare proxy, durable power of attorney, or, if appropriate, Standby Guardianship, you may find yourself being appointed a guardian or conservator through the probate court in your county.

Remember, this is a person who will be legally empowered to make decisions about your medical affairs, business and day-to-day affairs and the affairs of your children under age 18. Also keep in mind that the court proceeding necessary to appoint a guardian or conservator is an emotional, public, time consuming, expensive and often difficult-to-understand process.

Guardians and conservators are persons appointed by the probate court to act on behalf of an individual (called a ward). In order for the probate court to appoint a guardian or conservator, the ward must be a minor or must appear incapacitated

to such a degree that she or he is unable to make informed decisions regarding personal and financial affairs.

Specific legal standards dictate that a guardian be appointed for a ward when the probate court determines at least one of the following situations exists:

- the ward is a minor (less than 18 years old)
- the ward is mentally or physically incompetent, as evidenced by the opinion of a qualified physician
- the ward is mentally retarded, as evidenced by the opinion of a qualified physician
- the ward, because of excessive drinking, gambling and the like, wastes or lessens his or her estate.

Likewise, a conservator is appointed for a ward when the probate court determines the ward suffers from:

- mental weakness
- mental retardation
- physical incapacity
- inability to make or communicate informed decisions due to physical incapacity or illness.

Once appointed, guardians and conservators have many duties, and the manner in which those duties are carried out is subject to supervision of the probate court. As the general law gives no preference to any particular class of persons or relatives who can act as a ward's guardian or conservator, any person who is "proper and fit" is eligible to be appointed.

This can have huge implications when you understand that the guardian or conservator has, among other duties, the legal ability to:

- pay the ward's debts
- represent the ward in all lawsuits
- control and manage the ward's property
- invest the ward's funds
- collect funds due the ward
- support the ward and his or her family using the ward's funds
- sell, lease or mortgage the ward's property (with approval from the probate court).

Also, the guardian may have custody of the person of the ward, and therefore the ability to consent to such matters as the ward's medical treatment and place of residence. Commonly, the person who first petitions the court to be appointed as guardian/conservator will be appointed—absent any objections. Yet all too often, the person appointed would not have been the choice of the ward.

Because the process of appointing a guardian/conservator is a court proceeding, the matter is part of the public record. That means anyone could appear in the probate court where the matter has been filed and review nearly every document in the case. This includes all documents from medical providers, mental health evaluations, inventories of the ward's assets, the ward's income and expenses, and all manner of information related to the ward, the guardian/conservator, as well as heirs, creditors and anyone involved in the affairs of the ward.

Additionally, guardians and conservators are able to charge fees for their services that are paid out of the assets of the ward. The "reasonableness" of these fees is ultimately determined by the court, which takes into account the size

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of the ward's estate, the responsibilities placed upon the guardian or conservator and the amount of work involved.

Individual guardians and conservators generally collect a lesser fee than corporate guardians and conservators who base their fees upon a percentage of the assets they are handling for the ward. In either case, the expense to the ward is great when subject to a guardianship/conservatorship.

All in all, by failing to prepare your own plan, you forfeit the abil-

ity to choose who is going to handle your medical decisions and personal day-to-day business decisions if you are unable to act on your own behalf. You will also cause additional cost and expense to be incurred against your assets by way of court costs, filing fees, attorney's fees to assist the guardian or conservator and the fee to the guardian or conservator themselves for carrying out their duties.

By executing a health care proxy, durable power of attorney and a Standby Guardianship (if applicable), you

can select the person who will make your medical decisions and personal day-to-day decisions, as well as who will care for your child(ren) in the future if you are unable to do so yourself.

The cost to prepare the appropriate documents to plan for unforeseen events in our lives is a fraction of the costs that may otherwise be incurred. By properly planning your affairs, you will keep your private affairs just that—private. You'll also have an absolute say in selecting the person most appropriate to make decisions on your behalf, not to mention unburdening your family, friends and loved ones from the emotional toil of a court process.

Surely by now you're on the edge of your seat, and just dying for more information on the documents referenced in

this article. If so, great...that's exactly the way it should be. So keep your eyes open for next month's issue of *The Healthcare Ledger* and plan on reading an in-depth discussion of health care proxy, durable power of attorney and standby guardianship. You and your family cannot afford otherwise.

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