

Temporary, Limited, and Full Guardianships – April 2011

State law provides various methods for people with disabilities to get help making important decisions in their lives. The most desirable of these are arrangements that people with disabilities design themselves, including powers of attorney and advance directives, which are addressed in a related fact sheet. However, in some cases these may not be sufficient. In these cases, temporary, limited, or full guardianship may be the appropriate option.

A guardianship is a legal relationship that provides that a person appointed as a guardian is empowered to make a variety of decisions for another adult who is “incapacitated.” A person is incapacitated when:

by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, except minority, to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning the person or which cause has so impaired the person's judgment that the person is incapable of realizing and making a rational decision with respect to the person's need for treatment. Mont. Code Ann. § 72-5-101(1) (2009).

Full guardianship often limits nearly every right of the incapacitated person and should only be used when the person lacks the capacity to make any of these decisions. Where the person has the ability to make some decisions, that person's right to make those decisions needs to be preserved. In these cases, other methods should be used such as a limited or temporary guardianship or a conservatorship if powers of attorney or advance directives are not sufficient. These arrangements maintain more freedoms for the “incapacitated” adult while providing aid in complex decision making, such as in financial transactions.

Montana state law requires that when a guardianship or conservatorship is sought, a judge must make a specific finding to limit each right of the incapacitated person. All rights that are not specifically assigned to the guardian to assert are maintained by the incapacitated person and the person is not presumed to be incompetent. Mont. Code Ann. § 72-5-306 (2009).

A guardianship “may be used only as is necessary to promote and protect the well-being of the person.” Further, it “must be designed to encourage the development of maximum self-reliance and independence in the person and may be ordered only to the extent that the person's actual mental and physical limitations require it.” *Id.*

A guardian, limited or temporary guardian, or conservator can be appointed in a will or as the result of a court proceeding. When a petition to appoint a guardian is filed in a district court, the allegedly incapacitated person has a right to have an attorney represent them, and where it is in the interest of justice, the court can appoint an attorney from the public defender system. The person is entitled to be present at the hearing, to see or hear all evidence, present evidence, cross-examine witnesses, and have a trial by jury.

Commonly Asked Questions

1. How does a conservatorship differ from a guardianship?

Conservatorships are for the purpose of managing assets and making financial decisions. Conservators do not typically have any authority to make health care decisions, unless this has been specifically given to them by the appointing court, or by a power of attorney executed by the “protected person.”

Full guardianships usually include the authority to make health care decisions, decisions about living arrangements, and financial decisions.

2. What are the duties of a full guardian?

A guardian must:

- a. Make provision for the care, comfort, and maintenance of the incapacitated person or “ward,” if the guardian is entitled to the custody of the ward;
- b. Arrange for training and education, wherever appropriate;
- c. Take reasonable care of the ward’s clothing, furniture, vehicles, and other personal effects and commence protective proceedings if other property of the ward is in need of protection; and
- d. Report the condition of the ward and the ward’s estate annually for the preceding year. A copy of this report must be served on the ward’s parent, child, or sibling if that person has requested that information.

In addition, if a conservator has not also been appointed, a guardian:

- a. May institute proceedings to compel persons with the duty to support the ward or pay for the welfare of the ward, to fulfill that duty;
- b. May receive money and property owed to the ward and apply that money and property for care, support, and education. The guardian may not use funds from the ward's estate for room and board that the guardian has provided the ward, unless a charge for this service is approved by the court, with notice of this charge to at least one of the next of kin of the ward, to the extent this is possible;
- c. Must exercise care to conserve any excess funds for the ward's needs.

3. Are there any limitations to the authority of the guardian to make decisions for the ward?

A court may limit even a full guardian's authority in the order appointing the guardian. A court may not give powers and duties to a guardian beyond those sought in the petition. It also may determine to appoint a conservator instead of a guardian if it finds that the ward could provide for his or her health and safety if his or her finances were managed.

However, even if broad authority is given to make decisions, there are still some limitations to this authority. A guardian of an incapacitated adult has the same powers as a parent has with regard to an unemancipated child. Consequently, the Montana Supreme Court has found that a guardian does not have the ability to dissolve a marriage of a ward, as a parent would not be able to do so for their unemancipated child, given that a child who marries is deemed legally emancipated. *In re Marriage of Denowh ex rel. Deck*, 2003 MT 244, 317 Mont. 314, 78 P.3d 63.

There are also statutory limitations to a guardian's authority. For example, if a court has given a full guardian the authority to make medical decisions, a guardian cannot use this authority to commit a ward to mental health or treatment of a developmental disability against the will of the ward. Mont. Code Ann. § 72-5-321(5) (2009). An involuntary commitment proceeding must occur to require this treatment.