

The
COLORADO GUIDE
to
Guardianships
and
Conservatorships



Including a Discussion about
Alternatives and Court Procedures



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Introduction

Caring for a loved one who lacks capacity can be very difficult. It is further complicated when your loved one does not have the capacity to nominate someone to act on his or her behalf. So, how do you protect your loved one, yourself, and family assets when faced with this situation?

The only legal option you have is to petition the court for a guardianship and conservatorship. It is very important to note that guardianships and conservatorships can be very restrictive. As such, it is imperative that you consider all the possible alternatives before bringing such an action. In many instances, a guardianship and conservatorship may be the only way to protect your loved one from harm.

This guide will walk you through a guardianship and conservatorship, highlight some issues worth considering before bringing such an action, and discuss your responsibilities over your loved one's healthcare, living arrangements, and finances.

GUARDIANSHIP, CONSERVATORSHIP, AND THE ALTERNATIVES

Capacity

Colorado law states that an incapacitated person is “an individual, other than a minor, who is unable to effectively receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to satisfy essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance.” To determine if your loved one is incapacitated, you will need to seek a physician’s opinion of incapacity. Without such an evaluation, every adult, regardless of mental ability, is considered to have capacity to make decisions.

What is power of attorney?

A power of attorney (POA) is a document that allows adults (principals) to nominate an agent to make decisions on their behalf. In Colorado, there are two kinds of POAs. First, there is the medical durable power of attorney. This document gives the agent the authority to make medical and personal decisions on behalf of the principal. Second, there is the financial durable power of attorney that gives the agent the authority to make financial and property decisions on behalf of the principal. For these documents to be executed properly, the principal must have capacity and sign in the presence of a notary public.

Who needs a guardian and conservator?

One who lacks capacity, and has not previously appointed an agent under a power of attorney, has nobody to act when decisions are necessary. This includes the developmentally disabled, elderly folks showing signs of dementia, individuals who are mentally ill, or people suffering from alcohol or substance abuse. A guardianship and conservatorship may be necessary to make life and death decisions.

What is a guardianship?

A guardianship is a court proceeding where the court appoints an individual or entity to make medical, residential and other personal-care decisions for a disabled person who is not capable of making these decisions for himself. This process is usually not necessary if the disabled person has a durable medical power.

What is a conservatorship?

A conservatorship is a court proceeding where the court appoints an individual or entity to make financial decisions for a disabled person who is not capable of making these decisions for herself. This process is usually not necessary if the disabled person has a durable financial power of attorney.

Who can be a guardian or conservator?

Any person age 21 and older may be appointed as a guardian and/or conservator for an incapacitated person. The court does place priority on an individual who was specifically nominated by the individual prior to loss of

capacity. Rather, the court may give priority to the individual's spouse or civil union partner, adult children, parents, or an adult with whom the individual has resided for more than six months immediately prior to filing the petition. An owner, operator, or employee of a long-term-care provider may not be appointed as guardian or conservator unless they are related by blood, marriage, or adoption. A professional guardian and conservator (a third party entity who earns a fee for services) can be appointed by the court, as well. The person who is nominated as the guardian and conservator must pass a criminal background and credit check.

What are the duties of a guardian?

A guardian has the authority to determine where the incapacitated person should live, consent to medical care and treatment, and ensure the person's well-being. The court must give prior authority before the individual is moved out of state. The court may also give specific authorization or direction to the adoption or marriage of the individual.

What are the duties of a conservator?

A conservator has the authority to control the estate and financial affairs of the individual. A conservator may make gifts, convey, release, or disclaim interests in property, exercise, or release powers of appointments, create a revocable or irrevocable trusts, and elect options or change beneficiary under retirement plans and insurance policies.

How do I become a guardian and conservator?

A guardianship and conservatorship is usually initiated by a member of the incapacitated person's family. The court must be persuaded that the incapacitated person is unable to make proper decisions for his own care and safety. This is usually substantiated by a letter from the individual's physician. The court must also determine that the person asking to be appointed as guardian and conservator is proper, competent, and willing to take on the task. A guardianship and conservator can continue for years, but terminates at the death of the incapacitated person.

ADDITIONAL CONSIDERATIONS

I don't live in Colorado. Can I become a guardian or conservator of my family member who lives in Colorado?

You do not need to live in the same state as your loved one to become a guardian and conservator. The court does require that you meet with your loved one at least three times a year to ensure you are well informed of his or her personal needs and circumstances. The court also requires you to sign an "Irrevocable Power of Attorney Designating Clerk of the Court as Agent" for service of process.

How do I transfer my loved one out of state?

Once you have been appointed guardian and conservator, any plan to permanently move your loved one out of the state needs court approval. A court proceeding will determine whether or not the transfer is in your loved one's best interest. An application for transfer must also be brought in the receiving state. The courts in Colorado require proof that the guardianship and conservatorship will be accepted by the courts of the receiving state prior to granting the transfer of power.

I want to be someone's guardian, but how do I plan for succession?

To permanently transfer the power of a guardian and conservator to another individual cannot be done via will or other advance planning document. The court must approve any permanent substitution. As such, when a designated event occurs in which the guardian and conservator's ability to act is impaired, the court must be notified within 30 days. At that time, a successor guardian and conservator can be nominated.

If there is a likelihood that the proposed guardian and conservator will predecease the incapacitated person, it is beneficial to have two people apply to act as co-guardians and co-conservators of the incapacitated person. This is the easiest way to plan for succession, and creates a seamless transfer of power when one guardian and conservator is no longer able to act.

I need emergency authority, what do I do?

Courts do have special proceedings to address emergency situations. The court will appoint an emergency guardian or special conservator if they determine there are circumstances that present substantial harm to the person's health, safety, or welfare. This proceeding does not determine whether or not the individual has capacity, and only lasts for 60 days.

SPECIAL CONSIDERATIONS

My adult child is mentally ill. What authority would I have as his guardian and conservator?

While a guardianship and conservatorship gives you immense authority, it does not give you the authority to consent to any care or treatment against your child's will. As such, the law is very clear that the guardian cannot initiate the commitment of a loved one to a mental health care facility. As guardian, however, you can bring a petition for a court-ordered evaluation if your child is a danger to others, or himself/herself, or is gravely disabled due to mental illness.

My adult child is developmentally disabled. What else do I need to do in order to protect him and his assets?

As a parent of a disabled child, it is very important to place any money that your child inherits, or is otherwise gifted, in a supplemental (special) needs trust. If your child has more than \$2,000, he or she will not be eligible for public benefits. The three most common supplemental (special) needs trusts are third-party funded trusts, self-settled disability trusts, and pooled trusts. A trust is the safest, and best way, to ensure that your child's funds are not wasted on government spend downs, and will ensure your child has additional funds for their adulthood.

FOLLOWING THE APPOINTMENT OF A GUARDIAN/CONSERVATOR

I have been appointed as someone's guardian and conservator. Now what?

Once you have the order and decree stating that you have been appointed guardian and conservator, you must complete an educational course. The court system offers the course online; it is very easy to complete. You are also required, as the guardian, to file a report which includes a personal care plan within 60 days of appointment. As conservator, you must file a financial report and asset inventory within 90 days of appointment. These reports are then filed on an annual basis with the court.

Am I legally and financially liable for my loved one?

No. As a guardian and conservator, you should use your loved one's funds to pay for his or her needs. You are not required to physically live with or care for your loved one. You are also not liable for your loved one's actions. As such, if your loved one is charged with a crime or sued, you have the ability to hire an attorney for help.

Where can I go for help?

Our team at The Hughes Law Firm has helped hundreds of Colorado families navigate the choppy waters of challenging guardianships and conservatorships. Consider calling us at (303) 758-0680 for a free consultation to see if we can help. We would be honored to offer you clarity and peace of mind.



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