

GUARDIANSHIP AND CONSERVATORSHIP A New Look

A Fact Sheet from the Minnesota Disability Law Center

The Minnesota Disability Law Center does not represent persons who seek to become guardians or conservators or persons for whom a guardian or conservator is sought. This Fact Sheet provides general information about guardianship and conservatorship. It is based upon Minnesota law and may not be accurate for other states. Nor is it a substitute for legal advice for your particular situation.

Changes in the State Guardianship Law

1. What changes were made by the state legislature in 2003?

In 2003, the legislature made major changes in the state guardianship law. One important change is that there no longer will be guardianship *or* conservatorship *of the person* and guardianship *or* conservatorship *of the estate*. From now on, all guardianships will be *guardianships of the person* and all conservatorships will be *conservatorships of the estate*.

A guardian of the person has the power to make certain personal decisions for a person who is incapacitated. A conservator of the estate makes financial decisions for that person.

Under the new law, a person under guardianship is still called a *ward*. A person for whom there is a conservatorship of the estate is now called a *protected person*.

2. If I was a guardian of the estate or a conservator of the person before the changes were made in the guardianship law in 2003, what do I have to do to comply with the new statute?

Nothing. The Court will issue the appropriate new guardianship or conservatorship letters. Generally, your responsibilities and your duties will remain the same.

3. What effect does the new law have on public guardianship or on guardianship of minors?

The new law says that nothing in it applies to public guardianship of persons with mental retardation, where the State of Minnesota (actually the Minnesota Commissioner of Human

Services) is appointed guardian, rather than a private person. The new law also does not apply to guardianships established in juvenile court proceedings.¹

Guardianship of the Person

4. When does an adult person need a guardian?

Just as under the old law, parents do not have legal authority to make decisions for their children after they turn 18. If someone will actually need to make decisions for your child after he or she turns 18, your child needs a guardian or some other, less restrictive, protection.

The law says that a person must be an “incapacitated person” before a guardian may be appointed. An “incapacitated person” is someone who:

- a. Is so impaired that the person lacks the understanding *or* capacity to make *or* communicate reasonable personal decisions, *and*
- b. Whose behavior shows that he or she is unable to meet personal needs for medical care, nutrition, clothing, shelter, *or* safety *even with appropriate technological assistance*.²

Guardianship has to be the least restrictive way to meet these needs.³

5. What power does a guardian have?

A guardian has the power to do what the court says the guardian can do. Under Minnesota law, the powers of the guardian may include one or more (or all) of the following:⁴

- a. To have custody of the person;
- b. To decide where the person will live;
- c. To make decisions about the person’s personal property such as clothing, furniture and personal effects;
- d. To give consent for medical care or treatment;
- e. If there is no conservator of the estate, to make or to withhold approval of contracts for the ward;

¹Minn. Stat. § 524.5-106.

²Minn. Stat. § 524.5-102, subd. 6.

³Minn. Stat. § 524.5-310(a)(2).

⁴These powers are included in Minn. Stat. § 524.5-313(c).

- f. If there is no conservator of the estate, to apply for government benefits or assistance for the ward;
- g. To exercise general supervision over the ward.

6. What general limits are there on a guardian's power?

The basic rule is that a guardian's powers are limited to what the court authorizes the guardian to do. Under the old law, a guardian of the person had all powers that the law could authorize and a conservator of the person had only those powers the court specifically authorized. Under the new law, a guardian's power can be limited.

The law says that the court should only give a guardian "those powers needed to provide for the needs of the incapacitated person."⁵ In another place, the law is even more specific about the court's responsibility to limit the power a guardian can use:

The court shall grant to a guardian only those powers necessitated by the ward's limitations and demonstrated needs and, whenever feasible, make appointive and other orders that will encourage the development of the ward's maximum self-reliance and independence.⁶

7. Are there specific areas in which a guardian has limited powers?

Yes. For instance:

- a. A guardian may not consent to medical care for a ward "which violates the known conscientious, religious, or moral belief of the ward."⁷
- b. Court approval, after notice to "interested persons"⁸ is required for psychosurgery, electroshock, sterilization, or experimental treatment.⁹
- c. A guardian may not admit a ward to a regional treatment center except for outpatient services, for temporary care for not more than 90 days in any calendar year, or by going through the commitment process in court.¹⁰

⁵Minn. Stat. § 524.5-313(b).

⁶Minn. Stat. § 524.5-310(c).

⁷Minn. Stat. § 524.5-313(c)(4)(i).

⁸The statute defines "interested persons" in Minn. Stat. § 5-102, subd. 7. The list includes the ward, a spouse, parent, adult children, siblings, an attorney for the ward, the county social service agency, and a health care agent or proxy appointed according to a health care directive.

⁹Minn. Stat. § 524.5-313(c)(4)(i) and (ii). The statute includes specific requirements for a petition for sterilization in section 524.5-313(c)(4)(iii).

¹⁰Minn. Stat. § 524.5-313(c)(1).

- d. The guardian’s general power to supervise the ward has to be used in a way that “limits civil rights and restricts personal freedom only to the extent necessary to provide needed care and services.”¹¹
- e. A guardian has to give notice to “interested persons” before disposing of a ward’s personal property or personal effects.¹²

8. What duties does a guardian have?

A guardian has the duty “to provide for the ward’s care, comfort, and maintenance needs, including food, clothing, shelter, health care, social and recreational requirements, and, whenever appropriate, training, education, and habilitation or rehabilitation.” The guardian has no duty to pay for these requirements out of personal funds. But the guardian does have the responsibility to meet these needs out of government benefits or services whenever possible, rather than the ward’s estate.¹³

A guardian has the responsibility to take reasonable care of the ward’s personal property and to seek appointment of a conservator of the estate if other property requires protection.¹⁴

Each year the guardian must make a report to the court which states:

- a. The current mental, physical, and social condition of the person;
- b. The living arrangements of each place the person lived during that year;
- c. The medical, educational, vocational and other services provided the person;
- d. The guardian’s opinion of the adequacy of those services;
- e. Recommendations about the need for continued guardianship.¹⁵

9. May a person under guardianship vote?

Yes, unless the court order says that the ward does not retain the right to vote. The law used to say that a person under a guardianship of the person was not eligible to vote. The legislature changed that law by adding the requirement that the court order has to specifically say that the ward cannot vote.¹⁶

¹¹Minn. Stat. § 524.5-313(c)(6).

¹²Minn. Stat. § 524.5-313(c)(3).

¹³Minn. Stat. § 524.5-313(c)(2).

¹⁴Minn. Stat. § 524.5-313(c)(3).

¹⁵Minn. Stat. § 524.5-316(a).

¹⁶Minn. Stat. § 201.014.

10. Can the guardian's actions be challenged?

Yes, the guardian is under the control of the court "at all times and in all things."¹⁷

The statute specifically allows the ward or an "interested party" to petition the court to prevent or to seek a change of residence.¹⁸

Any "person interested in the ward's welfare" may petition the court to terminate or modify a guardianship.¹⁹

11. Who can be appointed a guardian?

The law lists these persons in priority order, but allows the court to determine who would best serve the interests of the proposed ward.²⁰

- a. A guardian currently acting for the person in this state or elsewhere;
- b. An agent appointed by the person under a health care directive;
- c. The spouse of the person or other individual nominated by a deceased spouse in a will or in a signed writing executed the same way as a health care directive;
- d. An adult child of the person;
- e. A parent of the person or other individual nominated by a deceased parent in a will or a signed writing executed the same way as a health care directive;
- f. An adult with whom the person has resided for more than six months.

The court cannot appoint a person as a guardian (or conservator) until a background study has been completed of criminal history records and records of substantiated maltreatment of vulnerable adults and minors unless the proposed guardian is:

- a. The parent of a proposed ward who has mental retardation or a related condition, if that parent has raised the proposed ward in the family home until the petition is filed and if the proposed ward's attorney has not recommended a background study;
- b. A state agency or county; or,
- c. A bank or trust company.²¹

¹⁷Minn. Stat. § 524.5-313(a).

¹⁸Minn. Stat. § 524.5-313(c)(1).

¹⁹Minn. Stat. § 524.5-317(b).

²⁰Minn. Stat. § 524.5-309.

12. Who cannot be appointed a guardian?

Paid caregivers, unless related to the person by blood, marriage, or adoption. Paid caregivers include any individual or entity providing residence, custodial care, medical care, employment training, or other care or services for the person for which they receive a fee.²²

13. Can more than one guardian be appointed?

Yes. There is no limit in the law on the number of guardians who may be appointed for a person, but as a practical matter, it is not wise to have more than two co-guardians. When co-guardians are appointed, both signatures are required for written consent. If a co-guardian is not going to be available for a period of time, that co-guardian may use an appropriate power of attorney to delegate to someone else (which could be the other guardian) any powers regarding care, custody, or property of the ward except the power to consent to marriage or adoption of a minor ward.²³

14. How is a guardian appointed?

Generally by the court after a petition by a person interested in the person's welfare. That petition has to include, among other things, the names and addresses of all family members, and an explanation of why the guardianship is necessary.²⁴

The petition has to say whether an unlimited guardianship is requested and, if so, why a limited guardianship would not be appropriate. If a limited guardianship is requested, the petition has to spell out what powers should be granted to the limited guardian.²⁵

Notice has to be given to the proposed ward, to all family members, to the head of any institution where the person is living or home care agency providing service to that person, to the proposed guardian, to a health care agent, and to anyone nominated as a guardian²⁶

The court appoints a "visitor" to bring the petition and the notice of the hearing to the proposed ward, to explain the substance of the petition and the proposed ward's rights (including the right to counsel) to that person, to determine the proposed ward's views

²¹Minn. Stat. § 524.5-118.

²²Minn. Stat. § 524.5-309(c).

²³Minn. Stat. § 524.5-211.

²⁴Minn. Stat. § 524.5-303(b).

²⁵Minn. Stat. § 524.5-303(b)(9).

²⁶Minn. Stat. § 524.5-308.

about the proposed guardianship, and to make recommendations to the court regarding the proposal.²⁷

The court must hold a hearing on the petition. The proposed ward has the right to be represented by an attorney at that hearing and at any other hearing or proceeding involving his guardianship. The court must appoint an attorney to represent the proposed ward at the hearing on the petition if neither the ward nor anyone else provides one, unless the proposed ward specifically waives the right to this representation in the meeting with the “visitor.”²⁸

The person petitioning for guardianship and the proposed guardian must be present at the hearing unless excused. The proposed ward must also be present unless there is good reason for that person not to attend, an issue which should be dealt with in the report and recommendations from the “visitor.”²⁹

15. How much does it cost to get guardianship?

If the proposed ward has funds, the court costs for getting guardianship may be paid from those funds. If the proposed ward is indigent, the court may order the county to pay the costs of the proceeding.³⁰ To get costs paid for this way, you have to ask for an in forma pauperis order from the court. Forms for that purpose are available on line at <http://www.guardianforms.com>.

Conservator of the Estate

16. Is a conservator of the estate always needed?

Only if the proposed protected person has money or real property, cannot appropriately manage that money, and there is no other less restrictive way to assist that person.

A person who is getting Social Security or SSI benefits does not have to have a conservator of the estate, because the Social Security Administration can appoint a representative payee for someone who cannot manage those funds. For some people, a Power of Attorney³¹ will allow another person to manage a checkbook or savings account. In both of these cases, there is no court supervision of the actions the person takes.

²⁷Minn. Stat. § 524.5-306(c).

²⁸Minn. Stat. § 524.5-304(b).

²⁹Minn. Stat. § 524.5-307(a).

³⁰Minn. Stat. § 524.5-502.

³¹Minn. Stat. § 523.

17. When will the court appoint a conservator of the estate of a person?

The process is similar to the guardianship process. There must be a petition, notice, appointment of a visitor, and a hearing.³² Before the court may appoint a conservator of the estate for someone, the court has to determine that the person:

- a. is unable to manage property and business affairs because of an impairment in the ability to make judgments or decisions, even with appropriate technological assistance, and
- b. the person has property that will be wasted if management is not provided, or
- c. assistance is required to get money for the care and support of that person.³³

The court may also, without appointing a conservator, enter a “protective order” to deal with a particular situation or transaction for which the person needs to make financial judgments.³⁴

18. What powers does a conservator of the estate have?

The conservator of the estate has only those powers that the court orders, which should be limited to what is necessary to provide for the demonstrated needs of the protected person.³⁵ There are some actions a conservator cannot take without express court approval.³⁶ But the powers and duties of the conservator of the estate may be very broad and enable the conservator to manage all that person’s financial affairs.³⁷

19. What duties does a conservator of the estate have?

The duties of a conservator include paying reasonable charges for the support, maintenance, and education of the protected person. These payments must be made from the protected person’s estate. The conservator has no duty to make those payments out of his or her own money. The conservator does have the duty to seek government benefits or services for the protected person to meet those needs. If there is both a guardian of the person and a conservator of the estate, the conservator of the estate is the one who applies for public benefits.³⁸

³²Minn. Stat. §§ 524.5-401 -524.5-410.

³³Minn. Stat. § 524.5-401.

³⁴Minn. Stat. § 524.5-412.

³⁵Minn. Stat. § 524.5-417(a) and (b).

³⁶Minn. Stat. § 524.5-411.

³⁷Minn. Stat. §§ 524.5-411, 524.5-417, 524.5-418.

³⁸Minn. Stat. §§ 524.5-417(c)(1), 524.5-314(c)(7).

20. How does the conservator have to account for the protected person’s funds?

Each year, more often if the court orders it, the conservator must give the court a report including a list of the assets of the estate under the conservator’s control and all receipts, disbursements, and distributions made during the reporting period. The court may appoint a person to review the report, to interview the protected person or the conservator, and to make any other investigation that the court directs.³⁹

Guardianship of Minors

21. Do parents have a way to indicate who should be guardian for their child if they were to die or become incapacitated?

Yes, by will or by other written documents that meet requirements specified in the statute. That person’s status as a guardian becomes effective when the parent dies or becomes incapacitated. There is a process for that status to be confirmed by the court.⁴⁰ This Fact Sheet does not include a detailed discussion of this issue.

More Information

22. Where can I find out more information about guardianships and conservatorships?

The guardianship law is on the web at www.leg.state.mn.us/leg/statutes.asp. Click on “retrieve a section” and enter the section desired, such as 524.5-102.

A manual on Conservatorship and Guardianship in Minnesota, published by the Minnesota Conference of Chief Judges and revised in September 2003, can be found by going to the home page for the Minnesota Court System - www.courts.state.mn.us. On that cite, put the curser on the “Court Forms” icon on the menu which opens. In the Minnesota Court Forms page which opens, scroll down in the “Form Selection” box and click on “Guardianship and Conservatorship.” A list of forms will open and, if you scroll down, the Guardianship Manual can be found.

A wide range of guardianship forms, including forms developed for persons who petition the court without an attorney, can be found at: <http://www.guardianforms.com>.

Both Arc Minnesota (651/523-0823 or toll-free 1-800-582-5256) and the Minnesota Disability Law Center have lists of attorneys who represent persons in guardianship cases.

³⁹Minn. Stat. § 524.5-420.

⁴⁰Minn. Stat. § 524.5-202.

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**Minnesota Disability Law Center
430 First Avenue N., Suite 300
Minneapolis, MN 55401-1780
Toll Free Number: 1-800-292-4150
TDD: 612-332-4668
New Client Intake: 612-334-5970
www.mndlc.org**

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