

PLANNING AHEAD, DIFFICULT DECISIONS

Guardianships and Conservatorships



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One of a parent's greatest fears involves what will happen to his or her minor children in the event of the parent's premature death or incapacity. Competent adults may also wonder who will ensure their own welfare if they become incompetent. Similar problems can arise when family members and friends lose the ability to take care of themselves due to age or physical or mental infirmity.

These diverse situations can provoke intense anxiety based on the realization that there may come a time when we lose control over our ability to take care of our loved ones and ourselves. While this possibility can be difficult to contemplate, it does not typically arise as a matter of choice or convenience. These traumatic situations must often be addressed on short notice by establishing legal guardianships or conservatorships. It may, therefore, be a good idea to think about what you would like to happen in a true "worst-case scenario" and undertake legal steps to plan for that situation before it happens.

Take the example of a young married couple with one daughter. In addition to traditional forms of financial estate planning, the couple may benefit from guardianship and conservatorship planning, both to protect the welfare of their child and to maintain their own sense of dignity and fulfillment during the late years of their lives. Now imagine what happens if the couple experiences a freak automobile accident, which leaves the mother dead, leaves the father in a coma, and injures the daughter. This bulletin seeks to explain some of the guardianship and conservatorship possibilities available in such a situation. This information can also apply to Wyoming residents in other stages of life and who face other situations.

What is a Guardian?

A "guardian" is a person who has been approved by a court to care for a minor or an adult who needs assistance due to incompetence (the term for a subject in this condition is referred to as a "ward"). This care involves a) providing the least-restrictive and most-appropriate residence for the ward (often the guardian's home, but an institutional facility may be appropriate for certain wards, such as those with special needs), b) facilitating the ward's education, socialization, and other activities, c) providing for medical care, and so on.¹

Who Needs a Guardian?

Guardianships and conservatorships fall into two categories: those for minor children and those for incompetent adults.

Guardianships for Children

If a parent can no longer care for his or her minor child, someone else must fulfill that role. This situation typically results from the death, unfitness, or termination of the parental rights of the child's parents. A "minor" is an unemancipated individual who is under 18 (an emancipated minor is person who is at least 17 and has successfully petitioned a court to be recognized as an adult). If one parent dies and the minor child still has a living, fit parent, the surviving parent will typically take custody of the child (a fit natural parent is considered a child's natural guardian). But the court must appoint a new guardian if neither parent is available.

In our example, a guardian must be appointed to ensure the safety and well-being of the couple's daughter because neither parent can fulfill that role. Without a properly appointed guardian, an individual who seeks to take care of the daughter (i.e., a grandmother) may be unable to access medical care, educational opportunities, public assistance, and other important needs and opportunities for the daughter's benefit.

The couple may have benefitted from clarifying their preferred guardians for their daughter or other minor children while they were still alive and competent. An attorney could have assisted in making such a designation in their will. While a court will not appoint a guardian that it does not believe will provide for a child's best interests, a nomination in a will carries great weight in determining who will act as a minor child's guardian. Often, this will be the most important decision someone makes in planning an estate. The decision should be made in light of the parents' physical, educational, financial, social, and spiritual goals for their children. It should also be made in light of the proposed guardian's physical and mental ability and willingness to take care of the parents' children to achieve these ends.

Guardianships for Incompetent Adults

Wyoming law also permits a court to appoint a guardian for adults who have been found incompetent. This has become an issue of heightened urgency as advances in medical technology and methods can substantially extend the average American's natural lifespan.²

Under Wyoming law, a person is incompetent if he or she is unable, while unassisted, to properly manage and take care of him/herself or his/her property as a result of the medical conditions of advanced age, physical disability, disease, the use of alcohol or controlled substances, mental illness, mental deficiency, or intellectual disability.³ Additionally, people can be found "mentally incompetent" if they can't properly manage or take care of themselves or affairs without assistance because of mental illness, mental deficiency, or intellectual disability.⁴ Incompetency can result from a wide variety of factors, including mental illness, genetic conditions, Alzheimer's disease, the effects of old age, etc. In some cases, these conditions can make it difficult or impossible for people to take care of themselves or manage their affairs, making it necessary for a court to appoint a guardian or conservator, whether with or without the person's consent.

Appointing a guardian for an adult can be a challenging process, particularly for individuals who have been accustomed to independently managing their own affairs. If a guardianship is contested, the court may find itself in the difficult position of balancing a person's liberty interests against the threat the person poses to himself or herself and the general community.

In our example, the couple may have benefited from planning for the possibility of their own incompetence. The father will obviously be unable to make decisions for himself while comatose. If he had signed an effective Advance Health Care Directive or Durable Power of Attorney before the accident, those documents would allow his agent(s) to make a number of medical and financial decisions on his behalf. Otherwise, it may be necessary for a guardian or conservator to be appointed to manage the father's affairs.

What is a Conservator?

A "conservator" is appointed by a court to manage a

ward's property. In contrast, guardians are appointed to manage their wards' person. Like guardians, conservators are fiduciaries in carrying out their responsibilities. The court will appoint a conservator when a child or incompetent person is in need of someone to manage his or her property and the appointment is in the ward's best interest. While the conservator takes possession of the ward's property, the ward retains legal title of the property. A petition for a guardianship and conservatorship may be combined into a single petition.

In our example, a conservator may be necessary if the father or daughter has significant assets in need of management. A conservatorship may not be necessary for a minor child who lacks significant assets (a person may transfer \$5,000 or less to a minor's guardian if no conservator has been appointed),⁵ but it can be difficult to predict whether this will be the case. It may have benefitted the couple to nominate a conservator in the terms of their will.

What is a Guardian Ad Litem?

A guardian ad litem (GAL) is a person appointed by the court to represent a ward's best interests during court proceedings. Among other situations, the court may appoint a GAL to represent a child's interests during a guardianship or conservatorship proceeding. The GAL does not have the powers of a guardian or conservator and does not act as the child's attorney, but the person will provide a report to the court regarding the child's condition and make recommendations to the court. The Wyoming Office of the State Public Defender maintains a program that supervises and manages attorneys acting as GALs (<http://gal.state.wy.us/>).

How is a Guardian or Conservator Appointed?

A guardian or conservator must be appointed by a court. Such an appointment requires adherence to legal procedures, which likely will require assistance of a licensed Wyoming attorney.

In our example, a grandmother seeking to act as guardian or conservator for her son or granddaughter would need to "petition" or ask the court to become a guardian or conservator. First, the court would

determine whether an appointment is necessary. If so, the court would then use a statutory priority list and the best interests of the child to select and appoint a guardian. Preference may be given to a guardian appointed in a parent's will or some other document taking effect at the parent's death. A guardian may also be selected by the potential ward in some circumstances. Alternatively, a person who can demonstrate a genuine interest in the potential ward's well-being may request to be the guardian. Generally, a court will not appoint a person as a guardian unless he/she has shown a strong desire and an ability to care for the individual in need, regardless of any presumed obligations and requests. Typically, a spouse, a parent, an adult child, a relative, a friend, a person appointed by the court, a person with a guardianship program, or any other person who can act in the best interests of a person in need can be appointed as a guardian.

Guardianship and conservatorship petitions can be voluntary or involuntary. An adult may insist on his or her own competence and contest whether a guardian is necessary. Parents may also object to the appointment of a guardian. A child's natural parents are presumed to be his or her natural guardians unless they consent to terminate their parental rights. The court may also determine that they are unfit parents and terminate their rights as parents. Natural parents have a powerful constitutional right to prevent the involuntary appointment of a guardian unless a court determines that the natural parents are unfit.⁶

If the grandmother's guardianship or conservatorship petition is granted, she would sign a sworn oath and undertake the statutory rights and responsibilities of a guardian or conservator.

What are the Powers and Duties of a Guardian?

As a fiduciary (e.g., a person required to act for another's benefit),⁷ a guardian must act in the "best interests" of the ward. Courts will consider many factors—including social and economic factors—when determining the best interests of a person.

A guardian of a ward has the powers and responsibilities that a parent would have for a child in his or her custody. Some guardianship duties include:

- Ensuring that the ward has appropriate living arrangements,
- Facilitating the ward's education, social, and other activities,
- Authorizing or withholding consent for medical treatment (with certain exceptions),
- Protecting the ward's property, and
- Spending funds received from a conservator for the ward's benefit.

A guardian may also perform other duties as directed by the court. Certain extraordinary powers require court authorization. A court may limit the responsibilities of a guardian depending on the circumstances and needs of the ward.

These powers and duties indicate the importance of obtaining a proper guardianship order when a non-parent takes care of a minor child. In our example, the daughter will likely need someone to make medical, educational, and other decisions because one parent is dead and the other lies in a coma. For instance, someone might need to consent to a surgical procedure to repair a torn tendon. Someone seeking to make these decisions (for example, the daughter's grandmother), would need to petition the district court in the county where the daughter lives for authority to act as a guardian. The court would then be tasked with determining that the daughter needed a guardian and that appointing the grandmother would be in the daughter's best interest.

The parents could have had some control over this process if they had nominated the grandmother—or someone else—as guardian of their daughter in their will, which would give that person priority over certain other family members seeking to act as guardian. Otherwise, the court would look to other factors to determine who should be appointed guardian. Ultimately, though, the court's decision will be based on the daughter's best interests.

A guardianship appointment order would help ensure that the grandmother or other person acting as guardian can make medical and other necessary decisions to protect the daughter's well-being. This person could generally make such decisions over the objection of other family members, although certain types of medical treatment require court authorization (i.e., psychosurgery, electroshock therapy, etc.), and any person who believes a guardian is not prop-

erly discharging his or her duties can file a complaint with the court.⁸

Guardians are normally required to file regular reports with the district court to ensure that the guardianship remains in the best interests of the ward.

What are the Powers and Duties of a Conservator?

Like a guardian, a conservator is a fiduciary who must act in the ward's best interests. The conservator must protect, preserve, spend, and prudently invest the ward's property for the ward's benefit. A conservator can take a variety of other actions on behalf of the ward, such as suing or defending claims, voting at corporate meetings, and applying the conservatorship funds for the child's maintenance, education, support, and care. Like a guardian, a conservator must receive court approval for certain actions, such as settling civil lawsuits and executing trusts. At the end of the conservatorship, the conservator must deliver the ward's assets to whomever is entitled to receive them, which may be a child who has turned 18 or the child's guardian.

While the same person may be both the guardian and conservator, this is not necessarily the case if a different person has been nominated by the parents or the court simply determines that a different conservator would better ensure protection of the child's best interests. If the child required funds for a medical procedure, the conservator could direct those funds in a variety of ways, including to the medical provider or the ward's guardian. Like a guardian, a conservator may be subject to a court complaint from someone who believes the conservator is not acting appropriately in managing the ward's estate. For example, if the conservator refused to release funds for the granddaughter's treatment, a family member could bring a court claim challenging the conservator's failure to conduct his or her duties.

During the conservatorship, the conservator must file regular reports and accountings of the conservatorship assets, including changes in the inventory of the conservatorship property, according to a schedule established by the district court.

Conservatorship Alternatives

It is not always necessary to appoint a conservator for a ward. In some situations, a guardian may be capable of managing the ward's property. This is particularly true of many children who have no significant assets of their own. If no conservator has been appointed, a person who has a duty to pay money or property to a minor may pay amounts of less than \$5,000 per year to an emancipated or married minor, the minor's guardian, or a financial institution holding an interest-bearing account in the minor's name.⁹ Persons other than the minor or a financial institution must apply the money or property for the minor's benefit. Wyoming's Uniform Transfers to Minors Act governs many transfers of property or money to or for the benefit of minor children.

Assets may have been set aside in a trust for the benefit of the father or daughter. The parents could have created these trusts while they were living and competent or instructed the trust be created upon their deaths in their will. The creation of a trust by a third party commonly involves the proceeds of a wrongful death lawsuit on the child's behalf, or insurance policies on a parent's life, being held in trust. It is also common for a deceased person's will to provide that any property distributable to a minor be held in trust until the minor reaches a certain age. The father could have also transferred his property during his life and provided for a standby trustee to manage the property if he becomes incapacitated. If assets are held in trust for the ward's benefit, then the trustee—rather than a conservator—will manage the assets. A trusteeship provides flexibility that is not available to a conservator and may save the administrative difficulties and expenses associated with requesting court permission to apply funds for the ward's support. Trusts can be more expensive to set up than simple wills, Durable Powers of Attorney, and Advance Health Care Directives. Because of this, consider discussing the cost-effectiveness of different options, based on your situation.

How Long Does a Guardianship or Conservatorship Last?

A person can act as another person's guardian or conservator on an emergency, temporary, or permanent (also known as "plenary") basis, depending on the needs of the specific person. In addition, a court may terminate a guardianship or conservatorship if the relationship is no longer necessary, is no longer in the best interests of the person, or if the guardian, conservator, or person who is being cared for no longer desires to continue the relationship. Conversely, the guardianship may also be extended, if necessary.

Getting Started

If you are interested in beginning the process of planning for the appointment of a guardian or conservator for yourself or a loved one, consider consulting an attorney. If you are simply planning for the future possibility of appointing a guardian for a minor child, it may be sufficient to nominate guardians and conservators in your will, which can typically be accomplished as part of a standard simple estate plan. It may be a good idea to consider someone's finances, values, time, health, and willingness before nominating them. Wills and trusts can also be drafted to plan for the management of assets in the event that a child becomes entitled to receive property or a parent becomes incapacitated.

If it becomes necessary to appoint a guardian or conservator at the present time, the process will require court filings and possibly litigation if there is a dispute over who should be appointed or whether a guardian or conservator is necessary in the first place. Consultation with an attorney is often a good idea, especially if there is a possibility of a dispute. Attorneys' fees and court costs vary widely depending on whether the guardianship is voluntary or not. A dispute may require hearings and the testimony of witnesses, which can be time-consuming and expensive.

For this reason, it is often a good idea to plan for future guardianships and conservatorships (including the possible use of trusts) as soon as possible (think back to our example of the automobile crash). Your friends, relatives, and the courts may not know what you intended for the care of yourself or a child if you do not make your wishes known.

Other Resources

- Wyoming Guardianship Corporation, <http://www.wyomingguardianship.org/guardianship-program.html>
- Legal Aid of Wyoming Inc., http://www.lawyo-ming.org/legal_forms/family-law/guardianship/
- AARP Legal Services Network, <http://www.aarpls-n.com/lsn/jsp/legalInfo.jsp>
- National Guardianship Association Inc., <http://www.guardianship.org/>

¹ Wyo. Stat. Ann. § 3-2-201.

² A. Kimberley Dayton et al., 2012, *Advising the Elderly Client*, Westlaw, v. 32.

³ Wyo. Stat. Ann. § 3-1-101(a)(ix).

⁴ Wyo. Stat. Ann. § 3-1-101(a)(xii).

⁵ Wyo. Stat. Ann. § 3-3-108.

⁶ In the Matter of the Guardianship of MEO, a minor child, 2006 WY 87, ¶ 21.

⁷ Black's Law Dictionary, 2009, 9th edition.

⁸ Wyo. Stat. Ann. §§ 3-1-111, 3-2-202.

⁹ Wyo. Stat. Ann. § 3-3-108.

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