

SPECIAL REPORT

What is a Guardianship or Conservatorship

Oast & Hook is frequently consulted by the families of incapacitated persons. Where there is no power of attorney and advance medical directive, the appointment of a guardian or conservator may be necessary.

What is guardianship?

Guardianship is a legal relationship whereby the circuit court gives one person (the guardian) the power to make personal decisions for another (the incapacitated person). A guardian may be appointed when a circuit court determines that an individual is incapacitated.

What is conservatorship?

Conservatorship is a legal relationship whereby the circuit court gives one person (the conservator) the power to manage the estate and financial affairs of an incapacitated person (the incapacitated person).

When is a guardianship or conservatorship appropriate?

Guardianship or conservatorship is appropriate when a person is unable to receive and evaluate information effectively or respond to people, events or environments to the extent that the ward

lacks the capacity to (1) meet the essential requirements for his or her health, care, safety, or therapeutic needs without the assistance or protection of a guardian or (2) manage property or financial affairs or provide for his or her support or for the support of his or her dependents without the assistance or protection of a conservator.

How can I become a guardian or conservator?

A petition must be filed with the circuit court requesting the appointment of a guardian, a conservator, or both. Anyone may file the petition. After the filing, the circuit court will appoint a guardian ad litem to represent the interests of the ward and the ward will be given notice of the date and time of the hearing. An evaluation report will be prepared by a physician or psychologist and filed with the court and guardian ad litem. The incapacitated person is entitled to a jury trial, upon request, and may compel witnesses, present evidence, and cross examine witnesses. If, after considering the evidence presented at the hearing, the court or jury determines on the basis of clear and convincing evidence that the person is incapacitated and in need of a guardian or conservator, the court shall appoint a suitable person. A guardian or conservator appointed by the court must qualify before the clerk of court. The qualification process

includes: (1) signing an oath promising to faithfully perform his or her duties, (2) posting bond (usually with surety for conservators), and (3) acceptance of educational materials.

How long does this appointment last?

The court order appointing a guardian or conservator may specify that the appointment is limited to a specified length of time. If no time limitation is specified, the appointment will last until the death of the incapacitated person or the guardian or conservator, until the incapacitated person is able to establish that he or she is competent, or until the guardian or conservator resigns or is removed by the court.

What authority does the guardian and conservator have?

Except as limited by the court, the guardian has control over the personal affairs of the incapacitated person. This includes deciding where the incapacitated person will live and making routine medical decisions for the incapacitated person. The guardian's authority does not extend to decisions addressed in a valid advance directive or power of attorney previously executed by the incapacitated person. Subject to the limitations in the court order, the conservator has the authority to take care of and preserve the estate of the incapacitated person and to manage it to the incapacitated person's best advantage. A guardian or conservator must obtain court approval to revoke or amend a durable power of attorney.

What are the responsibilities of the guardian and conservator?

A guardian must maintain sufficient contact with the incapacitated person to know his or her capabilities and visit the incapacitated person as often as necessary. The guardian shall encourage the incapacitated person to participate in

decisions and to develop or regain capacity. The guardian must file annual reports with the Department of Social Services. A conservator is required to file an inventory of the assets under the conservator's control and file annual accountings.

What is a petition for restoration, modification or termination?

The incapacitated person, guardian, conservator, or any other person may petition the circuit court to declare the incapacitated person restored to capacity, modify the order appointing the guardian or conservator, terminate the guardianship or conservatorship, remove the guardian or conservator, or order other relief.

What are public guardians and conservators?

If the circuit court determines that the incapacitated person has insufficient funds to compensate a private guardian or conservator, the court may appoint a local or regional program authorized by the Department of Aging as the guardian or conservator.

Are there alternatives to a guardianship or conservatorship?

Yes. A guardianship or conservatorship may not be necessary due to the use of trusts, durable powers of attorney, joint accounts or representative payees. An experienced Elder Law Attorney can assist in determining if a conservatorship or guardianship is necessary, in petitioning the court for the appointment of a conservator or guardian, and in the administration of the conservatorship or guardianship. Oast & Hook is experienced in the representation of persons seeking appointment as a guardian or conservator and in the administration of guardianships and conservatorships.

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Oast & Hook, P.C.
Tel: 757-399-7506
Fax: 757-397-1267
mail@oasthook.com

Oast & Hook, P.C.
www.oasthook.com

521 Middle Street Mall
Portsmouth, Virginia 23704
Tel: 757-399-7506
Fax: 757-397-1267

295 Bendix Road, Suite 170
Virginia Beach, Virginia 23452
Tel: 757-399-7506
Fax: 757-397-1267