

Utah Spirit

June 2001

When Does a Court Appoint A Guardian or Conservator for You?

We generally recognize that we are mortal beings. But we do not anticipate that someday we may become incapacitated. This lack of anticipation results in a lack of planning for such incapacity.

If you become incapacitated, a Durable Power of Attorney may protect your interests and provide for your needs. On the other hand, it may be insufficient.

Or, an institution, financial or medical, may not accept the form of your Power of Attorney. If so, a guardian and/or a conservator play an important role.

A guardian is appointed to be responsible for a person; a conservator is over the assets of the person. A guardian is like a parent who makes all legal decisions for the parent's children. A conservator manages the financial affairs of the incapacitated person.

A guardian is appointed by the probate court. The procedure is generally simple and quick, assuming that nobody objects to the appointment. Similarly, a conservator is also appointed by the probate court. The guardian and the conservator may be the same person. And both appointments can be combined into the same court proceeding at the same time.

But what if one of your children (or any other person) seeks control of you through the appointment of guardian and/or conservator and you believe that no guardian is needed? If such a proceeding has begun in the probate court, you will most likely be required to be examined by a medical professional who can assess your capacity.

It is important to note that such examination is NOT a competency examination. A person can be competent and still be incapacitated. Likewise, a person may be competent but unable to manage his or her own financial affairs.

Remember, a guardian or a conservator may only be appointed by the probate court. Before the probate court will make such an appointment, a formal, written Petition must be filed with the court. Moreover, the Petition must identify all "interested persons," including their names and addresses.

The court then sends a notice to all those interested persons listed in the Petition. The notice alerts them that a Petition has been filed with the court, identifies the person who filed the Petition, and sets a date and time for a hearing on the Petition.

If the Petition seeks appointment of a guardian and/or conservator for you, then a copy of the Petition must be served on you personally. Also, you must have an attorney representing you at the hearing and during the proceedings. If you do not have an attorney, one will be appointed for you. The cost of such attorney, however, must be paid from your funds or from your estate.

After all of these procedural safeguards, the court must also find that you actually need a guardian and/or a conservator. The court must be guided by the definition set by our Legislature, which is:

"Incapacitated person" means any person who is impaired 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 of lacking sufficient understanding or capacity to make or communicate responsible decisions.

The standard for appointing a conservator is that the person:

(a) is unable to manage the person's property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance; and

(b) has property which will be wasted or dissipated unless proper management is provided or that funds are needed for the support, care, and welfare of the person or those entitled to be supported by the person and protection is necessary or desirable to obtain or provide funds.

If the court finds that a guardian is necessary to protect you, it will appoint a guardian to make all decisions for you. Likewise, if the court finds that your estate needs protection, it will appoint a conservator to manage your estate and annually report to the court and other interested persons.

You can designate in advance of any incapacity the person you would like to be appointed as your guardian and/or conservator. This is a simple procedure based on a 1997 law enacted in the State of Utah.