

SJR 22: Guardianship Laws and Services

Overview of State Laws

Prepared for the Children, Families, Health, and Human Services Interim Committee
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INTRODUCTION

SJR 22 calls for the Children, Families, Health, and Human Services Interim Committee to study Montana's existing guardianship laws to determine if changes to the laws could improve protections for elderly and disabled adults. This paper summarizes current guardianship laws that apply to adults and, in addition, provides information on conservatorship laws, which may be used along with or in place of a guardianship to manage a person's estate, as well as advance directives, which allow a person to plan ahead by specifying the person's wishes and delegating decision-making should the person become incapacitated.

GUARDIANSHIP

A guardianship is a legal relationship between an incapacitated person and another person, a guardian, who is appointed by a court to make decisions on behalf of the incapacitated person concerning the person's care and well-being. Under Montana law, a guardianship must encourage maximum self-reliance and independence in the person and must be tailored to the extent of the person's actual mental and physical limitations. A person under guardianship (referred to as a ward) "is not presumed to be incompetent and retains all legal and civil rights except those that have been expressly limited by court order or have been specifically granted to the guardian by the court."¹

Who is an incapacitated person?

An incapacitated person is "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 that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning the person or which cause has so impaired the person's judgment that the person is incapable of realizing and making a rational decision with respect to the person's need for treatment."²

¹ § 72-5-306, MCA.

² § 72-5-101(1), MCA.

Who can serve as a guardian?

Any competent person, including an institution, association, or nonprofit corporation or any of its members, may serve as a guardian unless, during the guardianship, the person:

- ! provides or is likely to provide "substantial" professional or business services in a capacity other than that of guardian;
- ! has or is likely to have interests that conflict with the incapacitated person's interests;
- ! is or is likely to become a creditor of the person, other than in the capacity of guardian; or
- ! is employed by a person, institution, association, or nonprofit that would be disqualified for the reasons above.³

Section 72-5-312(2) sets forth the following nonbinding order of priority for courts to follow in appointing a guardian:

- [1.] a person, association, or private, nonprofit corporation nominated by the incapacitated person if the court specifically finds that at the time of the nomination the incapacitated person had the capacity to make a reasonably intelligent choice;
- [2.] the spouse of the incapacitated person;
- [3.] an adult child of the incapacitated person;
- [4.] a parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent;
- [5.] any relative of the incapacitated person with whom the incapacitated person has resided for more than 6 months prior to the filing of the petition;
- [6.] a relative or friend who has demonstrated a sincere, longstanding interest in the welfare of the incapacitated person;
- [7.] a private association or nonprofit corporation with a guardianship program for incapacitated persons, a member of the private association or nonprofit corporation approved by the association or corporation to act as a guardian for the incapacitated person, or a person included on an official list of the association or organization as willing and suitable to act as guardian of incapacitated persons;
- [8.] a person nominated by the person who is caring for the incapacitated person or paying benefits to the incapacitated person.

A state or federal agency may serve as a guardian if there is no qualified person willing or able to serve.⁴

How is a guardian appointed?

The appointment process is initiated by petitioning a court to designate a person as

³ § 72-5-312, MCA.

⁴ § 72-5-312(5), MCA.

incapacitated and to appoint a guardian for that person. The alleged incapacitated person or any person interested in the person's welfare, including a county attorney, may file the petition. Once a petition is filed, the court will set a hearing date regarding the issue of incapacity. Notice of the hearing must be served on the following:

- ! the alleged incapacitated person;
- ! the person's spouse, parents, and adult children;
- ! any person who is serving as the alleged incapacitated person's caregiver, guardian, or conservator; or
- ! the alleged incapacitated person's closest adult relatives if no one else can be found.

The alleged incapacitated person may be represented by an attorney the person chooses, or the court may order the Office of the State Public Defender to assign counsel to represent the person, regardless of whether the person is indigent. The alleged incapacitated person is entitled to be present at the hearing and to a trial by jury. The alleged incapacitated person must be examined by a physician who is appointed by the court and who reports in writing to the court concerning the person's incapacity. A visitor⁵ also must be appointed to interview the alleged incapacitated person, the person who filed the petition, and the person nominated as guardian and must report in writing to the court.⁶

If the court determines that the person is incapacitated and that judicial intervention is needed to ensure the person's physical health or safety, the court may appoint a full guardian or a limited guardian. Or, if the court believes that the person could handle the essential requirements for physical health and safety if another person managed the person's financial resources, the court may treat the petition as a petition for a conservator.⁷

If an emergency exists, the court may exercise the power of a guardian pending notice and hearing. A guardian also may be appointed on a temporary basis⁸ (no longer than 6 months) if a guardian is not performing or if there is no guardian and the court determines that the welfare of

⁵ "A visitor is, with respect to guardianship proceedings, a person who is trained in law, nursing, social work, medical care, mental health care, pastoral care, education, or rehabilitation and is an officer, employee, or special appointee of the court with no personal interest in the proceedings." § 72-5-313, MCA.

⁶ § 72-5-314, MCA; § 72-5-315, MCA.

⁷ § 72-5-316, MCA.

⁸ In addition to temporary appointments, Montana law provides for testamentary appointments. A parent of an unmarried incapacitated person or the spouse of an incapacitated person may appoint a guardian by will or other writing. The appointment becomes effective when, after providing notice, the guardian files acceptance of appointment in the court in which the will is probated or if the writing is nontestamentary, in the court where the incapacitated person resides or is present. If the incapacitated person objects in writing, the appointment is terminated. § 72-5-302, MCA; § 72-5-304, MCA.

an incapacitated person requires immediate action.⁹ In addition, if a representative of the Department of Public Health and Human Services believes that an older person or a person with a developmental disability is incapacitated; is being abused, sexually abused, neglected, or exploited; and is at substantial risk of death or serious physical injury, the department may petition a court to act as a temporary guardian or to appoint a temporary guardian.¹⁰

What are a guardian's powers and duties?

Section 72-5-321 sets forth a guardian's powers and duties. A guardian's powers and duties depend on whether the guardian is a full guardian or a limited guardian. The powers and duties of a full guardian are the same as those that a parent has with an unemancipated minor child, including the following:

- ! having custody of the ward;
- ! providing for the care, comfort, maintenance, training, and education of the ward; and
- ! providing any consents or approvals necessary for the ward to receive professional care, counsel, treatment, or service, except that the guardian may not consent to the withdrawal or withholding of life-sustaining treatment or to a do not resuscitate order unless the guardian has received those consents under the Montana Rights of the Terminally Ill Act or the do not resuscitate provisions. The guardian may petition the court for this authority.

If a conservator has not been appointed, a full guardian also has the following powers:

- ! instituting proceedings to compel a person with a duty to support the ward to pay sums to support the ward or perform support; and
- ! receiving money and property deliverable to the ward and using it for the ward's support, care, and education.

Unless waived by the court, a full guardian is required to report annually to the court on the condition of the ward and the ward's estate.

The powers and duties of a limited guardian are those that are specified by the court in the order appointing the limited guardianship.¹¹

A guardian is entitled to receive reasonable compensation for the guardian's services and

⁹ § 72-5-317, MCA.

¹⁰ § 52-3-804, MCA.

¹¹ § 72-5-321, MCA.

for room and board provided to the ward.¹²

How does a guardianship terminate?

A guardianship terminates when the ward or guardian dies, the ward regains capacity, the guardian becomes incapacitated, or the guardian resigns or is removed.¹³

CONSERVATORSHIP

A conservatorship is a legal relationship between a person who lacks the ability to effectively manage the person's estate (referred to as the person to be protected or the protected person) and another person, the conservator, who is appointed by a court to manage the protected person's estate.

Who may be appointed as a conservator?

An individual or a corporation may be appointed as a conservator in the following order of priority, but a court may, for good cause, pass over a person having priority or appoint a person with less priority or no priority:

- [1.] a conservator, guardian of property, or other like fiduciary appointed or recognized by the appropriate court of any other jurisdiction in which the protected person resides;
- [2.] an individual or corporation nominated by the protected person if the person is 14 years of age or older and has, in the opinion of the court, sufficient mental capacity to make an intelligent choice;
- [3.] the spouse of the protected person;
- [4.] an adult child of the protected person;
- [5.] a parent of the protected person or a person nominated by the will of a deceased parent;
- [6.] any relative of the protected person with whom the protected person has resided for more than 6 months prior to the filing of the petition;
- [7.] a person nominated by the person who is caring for the person or paying benefits to the person;
- [8.] a conservator corporation organized under Title 35, chapter 2;
- [9.] the public administrator.¹⁴

How is a conservator appointed?

A conservator is appointed when a petition is filed with a court and the court subsequently determines, following a hearing at which the incapacitated person was represented

¹² § 72-5-321(4), MCA.

¹³ § 72-5-325, MCA.

¹⁴ § 72-5-410, MCA.

by an attorney,¹⁵ that:

- ! the person is unable to manage the person's property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance; and
- ! the person has property that 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 that protection is necessary or desirable to obtain or provide funds.¹⁶

A court may also appoint a temporary conservator or authorize certain protective arrangements or transactions without appointing a conservator.¹⁷

What are a conservator's powers and duties?

Unless restricted by the court, a conservator has fairly broad powers in managing a protected person's finances and property, such as the ability to:

- ! invest and reinvest estate funds;
- ! collect, hold, retain, acquire, or dispose of estate assets;
- ! continue or participate in business operations or other enterprises;
- ! make ordinary or extraordinary repairs or alterations to buildings or other structures or demolish any improvements;
- ! subdivide, develop, or dedicate land to public use;
- ! enter into leases;
- ! insure estate assets;
- ! borrow money;
- ! pay taxes;
- ! employ individuals;
- ! prosecute or defend actions, claims, or proceedings or pay, contest, or settle claims;
- ! expend or distribute income for the support, education, care or benefit of the protected person and the protected person's dependents; and
- ! if the estate is ample, make gifts to charity and other objects as the protected person might have been expected to make.¹⁸

¹⁵ Whereas appointment of an attorney is permissive in guardianship proceedings, it is mandatory in a conservatorship. See § 72-5-408(2), MCA.

¹⁶ § 72-5-409, MCA.

¹⁷ § 72-5-421, MCA; § 72-5-422, MCA .

¹⁸ § 72-5-427, MCA; § 72-5-428, MCA.

Within 90 days after appointment, a conservator is required to file with the court a complete inventory of the incapacitated person's estate.¹⁹ The conservator is required to account to the court annually regarding the incapacitated person's estate, unless otherwise ordered by the court.²⁰ A conservator is entitled to reasonable compensation from the estate.²¹

How does a conservatorship terminate?

A conservatorship terminates when the conservator resigns or dies, the conservator is removed for good cause by a court, or the protected person regains the ability to manage the protected person's estate.²²

ALTERNATIVES -- ADVANCE DIRECTIVES

In some circumstances, a person may be able to use advance directives to plan ahead regarding the person's care and estate if the person were to become incapacitated, thereby avoiding a guardianship or a conservatorship.

Power of Attorney

A power of attorney is a document in which a person, the principal, designates another person, the agent, to act on the person's behalf. In order to be effective, the document must be signed by the principal and notarized. The principal outlines in the document which powers the principal wants the agent to exercise on the principal's behalf. The powers may be very broad, such as covering financial matters and health care decisions, or may be very limited, such as a single instance of signing a loan application on the principal's behalf. A power of attorney is executed without court involvement and may be used when the principal has capacity, when the principal becomes incapacitated, or both. Forms for executing a power of attorney are available online, or a person may consult an attorney for assistance in drafting one.²³

Living Will

Under the Montana Rights of the Terminally Ill Act, a person of sound mind may execute a declaration providing for the withholding or withdrawal of life-sustaining treatment or designating another person to make those decisions should the person lack capacity to make medical decisions and develop a terminal condition that, without the administration of life-sustaining treatment, would result in the person's death in a short time. The declaration must be

¹⁹ § 72-5-424, MCA.

²⁰ § 72-5-438, MCA.

²¹ § 72-5-432, MCA.

²² § 72-5-414, MCA; § 72-5-437, MCA.

²³ Title 72, ch. 5, part 5, MCA; Title 72, ch. 31, part 3, MCA; see also http://courts.mt.gov/library/topic/end_life.

signed by the person and two witnesses.²⁴

Do Not Resuscitate Order

A person may also direct that emergency, life-sustaining procedures be withheld from the person.²⁵

Mental Health Care Advance Directive

Similar to a power of attorney, a person may designate an agent to make decisions concerning the person's mental health treatment, medical treatment directly or indirectly affecting the person's mental health, and the general care of the person once the person becomes incapacitated.²⁶ A mental health care advance directive must be signed by the person and notarized, and it takes effect upon the person's incapacity. The person may revoke the directive at any time, unless the directive provides that it is not revocable when the person is incapacitated.²⁷

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²⁴ Title 50, ch. 9, MCA.

²⁵ Title 50, ch. 10, MCA.

²⁶ § 53-21-1304, MCA.

²⁷ § 53-21-1324, MCA.