

SB 202: Guardianship & Conservatorship

Overview of State Laws

Prepared for the Children, Families, Health, and Human Services Interim Committee
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Legislative Council has asked the Children, Families, Health, and Human Services Interim Committee to study the 2017 Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act, which was introduced as Senate Bill 202 in the 2019 Montana Legislature. This paper provides a brief overview of existing Montana guardianship¹ and conservatorship laws.

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 "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."²

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."³

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 disqualifying reasons, such as a conflict of interest, exist.⁴

¹ This overview does not include laws concerning guardianship of minors. (See Title 72, ch. 5, part 2, MCA.)

² § 72-5-306, MCA.

³ § 72-5-101(1), MCA.

⁴ § 72-5-312, MCA.

How is a guardian appointed?

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

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.

⁹ § 72-5-317, MCA.

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, MCA, 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. 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 for room and board provided to the ward.¹²

How does a guardianship terminate?

A guardianship terminates when the person under guardianship or the guardian dies, the person under guardianship 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 own estate (referred to as the person to be protected or the protected person) and another person, a 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 order of priority established in statute, but a court may, for good cause, pass over a person having priority or appoint a person with less priority or no priority.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 person was represented by an

¹⁰ § 52-3-804, MCA.

¹¹ § 72-5-321, MCA.

¹² § 72-5-321(4), MCA.

¹³ § 72-5-325, MCA.

¹⁴ § 72-5-410, MCA.

attorney,¹⁵ that (1) 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 (2) the person has property that will be wasted or dissipated unless proper management is provided or 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.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, including but not limited to investing and reinvesting estate funds, participating in business operations or other enterprises, borrowing money, paying taxes, and expending or distributing income for the support, education, care, or benefit of the protected person and the protected person's dependents.¹⁸

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

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¹⁵ While 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.

¹⁹ § 72-5-424, MCA.

²⁰ § 72-5-438, MCA.

²¹ § 72-5-432, MCA.

²² § 72-5-414, MCA; § 72-5-437, MCA.