

Guardianship Toolkit: A Legal Professional's Guide to Guardianships and Conservatorships in Montana.

The Department of Public Health and Human Services' Legal Services Developer Program is excited to provide professionals in Montana with a comprehensive guide to guardianships and conservatorships. We hope to shed some light on the differences between the two, the pros and cons of each, the best way to structure each, the best ways to defend against and argue for each, and more. It is our hope that if guardian/conservatorships are better understood in Montana, the abuses and over-prescription of these tools can be reduced.

What is a Guardianship?

A guardianship is a court-ordered protective arrangement for an Adult Under Guardianship/Conservatorship who has been declared incapacitated and needs someone (the Guardian or Conservator, hereafter referred to as "Guardian") to oversee his/her/their personal care and decision-making. Under a full guardianship, the Guardian has the same rights over the Adult Under Guardianship/Conservatorship as a parent has over a minor child. To be clear, a Guardianship is the removal of the Adult Under Guardianship's rights and should not be the first option considered.

This does not mean that Guardianships are always a bad option. Many states are adopting statutory language from the Uniform Guardianship, Conservatorship, and other Protective Arrangements Act which is aimed at limiting guardianship abuse and making these arrangements better, less-restrictive tools. Montana has yet to adopt, but we are hopeful that our state will join the list of states committed to the UGCPA.

Guardianships are also highly customizable and can be made to be less restrictive than a traditional Guardian - Adult Under Guardianship relationship. Limited guardianships will be discussed in more detail later.

Applicable Montana Laws and Codes:

- "Guardian" means a person who has qualified as a guardian of a minor or incapacitated person pursuant to testamentary or court appointment but excludes on who is merely a guardian ad litem. MCA 72-1-103 (21)
- "Ward" means a person for whom a guardian has been appointed [referred to herein as Adult Under Guardianship/Conservatorship]. A "Minor Ward" is a minor for whom a guardian has been appointed solely because of minority [referred to herein as Minor Adult Under Guardianship/Conservatorship]. MCA 72-5-101(5)

What is a Conservatorship?

Conservatorships are court ordered protective relationships whereby an individual (Conservator) is appointed to manage the Adult Under Conservatorship's financial affairs after they are no longer able to do so. The court must be petitioned to establish a conservatorship, and that petition can come from any source, including the potential Adult Under Conservatorship.

A conservatorship helps protect the Adult Under Conservatorship from abuse while still making sure their finances are being controlled. Conservators are required to provide a yearly

accounting of all receipts and disbursements of the Adult Under Conservatorship's property, as well as a statement of remaining assets. Before the conservatorship is enacted, the Conservator must provide a complete inventory of all the property of the Adult Under Conservatorship.

Conservatorships are much less restrictive than guardianships, being that the Adult Under Conservatorship retains most of their rights, like the right to marry, vote, or draft a Will. They are also highly customizable.

Applicable Montana Laws and Codes: "Conservator" means a person who is appointed by a court to manage the estate of a protected person MCA 72-1-103(8)

Common Issues with Guardianships

Often, a guardianship will be too restrictive or is simply unnecessary. This occurs when the potential Guardian or a concerned third party uses "emergency protocols" to force through a guardianship. Emergency guardianships are usually put into place hastily. This prevents the courts from properly assessing the potential Adult Under Guardianship.

Overly restrictive/unnecessary guardianships can also occur when the potential Adult Under Guardianship's representation does a poor job constructing the original guardianship. They may even possess mal-intent, and plan to exploit the Adult Under Guardianship.

Another potential situation that may result in an overly restrictive or unnecessary guardianship is when the potential Adult Under Guardianship has a temporary condition which is altering their capacity. This could result in a court enacting a guardianship that is much too restrictive, based on the behaviors of the Adult Under Guardianship, behaviors being caused by a temporary condition like a UTI, a traumatic brain injury, or some other externality. An ill-intended or uninvolved guardian may not report changes in their Adult Under Guardianship's capacity to the court, preventing the guardianship from being made less restrictive.

Guardianships can also be a devastatingly effective tool for an exploiter. Once a guardian is named, under a general guardianship, they have the same rights over the Adult Under Guardianship as a parent has over their child. That means unlimited access to and unfettered control over the Adult Under Guardianship's finances. An ill-intended guardian can empty a bank account, change the address of pension payments, apply for lines of credit and credit cards, or anything else they want to do. A guardianship can be an invaluable tool for a person who is incapable of caring for themselves, but it can also be the key an exploiter has been waiting for.

How and When Guardianships and Conservatorships are Terminated?

When an Adult Under Guardianship/Conservatorship's situation changes, and they no longer require the amount of assistance that they once did (or if they never needed the amount of assistance imposed by the court) and the Adult Under Guardianship/Conservatorship is capable of caring for themselves, then a request for termination of a guardian/conservatorship can be filed. Again, anyone, including the Adult Under Guardianship/Conservatorship or the Guardian/Conservator, can make this request of the court and it can be done through the formal request system or informally. In Montana, there is a minimum amount of time specified by the court (not exceeding 6 months) that must pass before a request for adjudication can be filed.

When hearing a case for adjudication, courts look for three main types of evidence:

- Clinical statements from medical professionals,
- Statements from the Adult Under Guardianship/Conservatorship and others,
- In-court observation of the Adult Under Guardianship/Conservatorship.

It is important that you have gathered friends and family and that they are prepared to testify as to the amount of assistance the Adult Under Guardianship/Conservatorship needs to carry out daily tasks. You will also want to find a physician, social worker, or some other healthcare professional that is willing to examine the Adult Under Guardianship/Conservatorship and testify that their condition does not merit a guardian/conservatorship. Finally, it is important that the Adult Under Guardianship/Conservatorship behaves as they usually would and doesn't appear overly stressed or otherwise bothered during the trial. Their actions will be observed as evidence and can vastly alter the outcome of an adjudication case. Make sure the Adult under Guardianship/Conservatorship is not dehydrated or malnourished, doesn't have a UTI or some type of infection, isn't ill, etc. Whatever you can do to make them more comfortable.

Applicable Montana Laws and Codes: Any person who knowingly interferes with transmission of the request to the court or judge may be held In contempt of court [§ 72-5-325(2)].

The following is an example of an order granting the removal of a guardianship/conservatorship and a reversal of the ruling of incapacitation:

FILED

FEB 18 2020

ANGIE SPARKS, Clerk of District Court
By _____ Deputy Clerk

JREIJGERS

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS & CLARK COUNTY, MONTANA

In the Matter of the Guardianship/Conservatorship
of

An Incapacitated Person.

**ORDER GRANTING
PETITION FOR REMOVAL OF
GUARDIAN AND CONSERVATOR, AND
TERMINATION OF INCAPACITY**

On February 18, 2020, this Court heard the Petition for Removal of Guardian and Conservator and Termination of Incapacity.

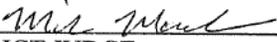
The Court heard testimony from [REDACTED] and those individuals most familiar with his abilities and needs. The evidence and testimony showed that [REDACTED] is not an incapacitated person and is capable of, and entitled to, live as independently as possible. His development of maximum self-reliance and independence in his person will be served without the services of a guardian. Further, a Supported Decision Making Agreement was signed and submitted to assist [REDACTED] in limited areas in which he has concerns, including assistance with finances, health care and personal care.

Based on the current circumstances of [REDACTED] and based on the evidence presented, the Court makes the following Findings of Fact and Conclusions of Law:

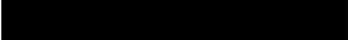
1. Notice has been given as required by law.
2. Venue for these proceedings is proper.
3. [REDACTED] is not an incapacitated person.
4. [REDACTED] is not in need of a Guardian.
5. [REDACTED] is not in need of a Conservator.
6. [REDACTED] has a Supported Decision Making Agreement in place to assist with areas in which there is any concern.
7. There being no objection to the Petition, and upon a finding that [REDACTED] is not an incapacitated person or in need of a guardian or conservator, the Petition is GRANTED.

IT IS HERBY ORDERED that [REDACTED] is not an incapacitated person, and the prior Orders setting guardians and conservators are hereby removed.

DATED: February 18, 2020.


DISTRICT JUDGE

C: Roberta R. Zenker, Disability Rights Montana,


Jennifer Morgan and Erin MacLean, Freeman & MacLean, P.C.


How are Guardianships and Conservatorships Transferred?

A Guardian who is either the spouse or parent of the Adult Under Guardianship/Conservatorship can name a successor in his/her/their Will, or in any other form of writing signed by the Guardian and attested to by two witnesses.

A petition can be made to the court, by anyone, to transfer the guardianship of an Adult Under Guardianship/Conservatorship to another potential Guardian. This is vital in the case of financial exploitation, as an Adult Under Guardianship/Conservatorship may be being exploited by their Guardian, but still need assistance with day-to-day life. In this case, it would be negligent to revoke the guardianship without a plan to replace it. Transferring the existing guardianship to a new, willing, and trustworthy Guardian will stop the exploitation while still ensuring the Adult Under Guardianship/Conservatorship receives the assistance they need.

How to Build a Case for a Guardianship

When requesting a guardianship for a client, there must be clear evidence of a lack of capacity to make or communicate rational decisions as well as a cause for the lack of capacity. The request for a Guardian can come from anyone, but it may add leverage to your case if the request comes from a known agency like Adult Protective Services. Having the support of a government agency will go a long way to demonstrate the need for such a restrictive action.

In an effort to stress the gravity of requesting a guardianship, the American Bar Association created the PRACTICAL tool:

- P = Presume the Guardianship is not needed. Be wary of the assumption that any Adult Under Guardianship/Conservatorship who needs help should have a guardianship.
- R = Reasons. Identify the reasons for concern, i.e. what the Adult Under Guardianship/Conservatorship needs help with. Go through the issues of Money, Healthcare, Relationships, Community Living, Decision Making, Employment, Personal Safety, etc., and make a list of each issue.
- C = Community. The Adult Under Guardianship/Conservatorship's community may be able to meet his or her needs without restrictive formal measures. Programs like in-home care, day programs, Meals on Wheels, and other social programs can help bridge the gaps in an Adult Under Guardianship/Conservatorship's care without using more restrictive means.

- T = Team. Find out who the Adult Under Guardianship/Conservatorship trusts and enlist their help. Start to create the care network that can assist the Adult Under Guardianship/Conservatorship with his/her/their needs and decision making.
- I = Identify the Adult Under Guardianship/Conservatorship's ability levels. What can they do and how well can they do it? What decisions can they make on their own? Are their decisions consistent across time? Are the consequences of those decisions understood? By identifying abilities, the team can focus on supporting what the Adult Under Guardianship/Conservatorship can do and filling the gaps left by their inabilities.
- C = Challenges. What challenges will your plan encounter? Have you and the team discussed possible solutions? Is the team reliable and dedicated to the plan?
- A = Appoint and legally empower agents for healthcare and financial decisions with Powers of Attorney documents. The team will need legal authority if they hope to enforce the Adult Under Guardianship/Conservatorship's wishes.
- L = Limit any guardianship order as much as possible. The guardianship should cover only those issues that cannot be handled by the Adult Under Guardianship/Conservatorship or by the team.

Applicable Montana Laws and Codes:

- MT defines incapacitation as “anyone who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause to the extent he or she [or they] lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his or her [or their] person.”
- “Incapacitate person” means any person who is impaired by reason of mental illness, metal 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 MCA 72-5-101(1)
- Purpose and basis for guardianship: Guardianship for an incapacitated person may be used only as is necessary to promote and protect the well-being of the person. The guardianship must be designed to encourage the development of maximum self-reliance and independence in the person and may be ordered only to the extent that the person's actual mental and physical limitation require it. An incapacitate person for whom a guardian has been appointed 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. MCA 72-5-306

How to Defend Against a Guardianship

To defend against an unnecessary or overly restrictive guardianship, it must be proven that less restrictive means exist to sufficiently meet the needs of the Adult Under Guardianship/Conservatorship and protect him/her/them from harm. To do so, one can use some of the same elements included in the ABA's PRACTICAL tool. Identify reasons for

concern as well as the Adult Under Guardianship/Conservatorship's abilities. Form a team of trusted, dedicated friends and family members of the Adult Under Guardianship/Conservatorship that are willing to shoulder some of the responsibility of the Adult Under Guardianship/Conservatorship's care. Identify community services that may exist and could help handle some of the issues that the Adult Under Guardianship/Conservatorship needs assistance with. Have an action plan that designates who will handle what issues and how presumed challenges will be handled. Identify what members of your care team will be empowered as agents and make sure there are safeguards in place in case that power is abused. Powers of attorney can be modified to require multiple signatures, third party accounting, and other protective measures that may help a care team to protect the Adult Under Guardianship/Conservatorship. If you hope to defend against a guardianship, you must provide a viable alternative.

Alternatives to Guardianships

Utilizing a Power of Attorney in coordination with a living will can sometimes avoid a guardianship. There are Powers of Attorney for Healthcare and Financial decisions. Both designate an agent to make decision on the principle's behalf, regarding healthcare and finances respectively. A POA is much less restrictive than a guardianship, however, because it only grants the agent the rights specified by the POA; it is not a blanket removal of rights, but rather a specified list of decisions that can be handled by the agent. A Living Will allows the Adult Under Guardianship/Conservatorship to designate their end-of-life medical wishes, such as whether they want to be kept alive on life support, feeding tubes, etc. This document is especially useful because it allows the individual to make those important decisions before they lose capacity, rather than relying on someone else to make those decisions down the road.

In addition to Powers of Attorney and Living Wills, one can also be named on an Adult Under Guardianship/Conservatorship's bank account in order to monitor and be party to all transactions. When including another on an Adult Under Guardianship/Conservatorship's bank account, there are two options: A) to add a person that is authorized to complete transactions from the account and B) create a joint account. Joint accounts are great for married or long-term couples but should be used with great caution with anyone else. Joint accounts make both parties liable for account transactions. For instance, if two people are joint account holders and one defaults on their student loans, the other is responsible for making the payments. In contrast, simply adding a person to the account gives them the ability to monitor the account and transact business but does not create an ownership interest in the account. Sometimes, banks are willing to work with individuals and send copies of invoices/statements to a third party. In this way, if an Adult Under Guardianship/Conservatorship doesn't want someone added to their account, they can at least have a second set of eyes monitoring their finances. Perhaps an even easier method is to set up online banking for the Adult Under Guardianship/Conservatorship and grant access to an agent or trusted third party by sharing log-in information.

Some responsibilities can be handled without a legal remedy. Utilizing direct deposit, an Adult Under Guardianship/Conservatorship's income (retirements, settlements, etc.) can be deposited to their account each month, without any input from them. The same is true for recurring payments. It can be arranged for payment to be taken from an Adult Under Guardianship/Conservatorship's account (or payed with a credit/debit card) each month,

automatically. In this way an Adult Under Guardianship/Conservatorship's bills and income are taken care of without requiring any work on his/her/their part.

"Supported Decision-Making" is a concept that has been gaining traction with the elder care community. It is the concept of assembling a team of friends, family, and loved ones (ahead of any aging-related difficulties) that can assist the individual in decision making after they have lost the capacity to make decisions themselves.

Supporters' role is to:

1. Communicate with the Adult Under Guardianship/Conservatorship.
2. Explain issues effectively to the Adult Under Guardianship/Conservatorship.
3. Fragment larger decision into smaller, more manageable choices.
4. Provide guidance in accordance with the Adult Under Guardianship/Conservatorship's wishes.
5. Make sure the Adult Under Guardianship/Conservatorship makes the decision and that it is honored.
6. Assist in carrying out the decision.
 - For Adult Under Guardianship/Conservatorships with dementia or memory-related illnesses, it is important that this network is in place and utilized before memory-loss becomes severe. If an Adult Under Guardianship/Conservatorship is used to relying on the SDM Network to make life decisions, hopefully they will be more receptive to it when they are no longer at full capacity.
 - This model is not without its challenges. Assembling such a network of willing and able individuals is not easy and requires a large pool of family and friends. This will not be a practical option for all Adults Under Guardianship/Conservatorships.

The following is an example of a Supported Decision-Making Agreement. These agreements are completely customizable and can be tailored to fit each individual's life and their wishes for their future care.

SUPPORTED DECISION MAKING AGREEMENT

I, [REDACTED] am the Engineer of my life. Sometimes I need a Conductor to help me make decisions and run things. Some people call these helpers "Supporters," but, I like trains. Conductors help people figure out which way to go, so "Conductor" makes sense to me. My Conductors/ Supporters are people I trust to help me make decisions.

I am the Engineer because I am in charge of my own life. I am my own man. I just need some help in a few areas. I need Conductors to help me make decisions about:

1. Taking care of my finances and money, like bank accounts. My sister, [REDACTED] has agreed to help me with my finances.
2. My health care, including large and small health care decisions. My sister, [REDACTED] has agreed to help me with my health care.
3. Personal care (like where I live, the support services I need, managing the people who work with me, my diet, exercise, education, safety and activities); things like helping me order on line. [REDACTED] where I live has agreed to help me with my personal care.

I am asking that my Conductors help me in the following ways:

1. Give me information in a way I can understand
2. Explain my wishes to other people. Sometimes, it might be helpful to explain when people do not understand the way I say things.
3. Treat me like an adult and not talk down to me, like a kid.
4. My Health care Conductor [REDACTED] can help me sometimes with check ups or getting medications from the drug store. She may also help me if I got hurt or had to make a big decision about an operation or something like that.
5. My Financial Conductor [REDACTED] can help me talk to my representative payee about paying the rent and the bills on time, and keeping a budget so I know how much money I have and how much I can spend. She can also help me decide on big money things like a bank account and saving for things I want to buy. [REDACTED] and my representative payee can also help make sure no one is taking my money or using it for themselves.

I can do the following things myself:

1. Tell people what I like and do not like.
2. Tell people what I want to do, and what I do not want to do.

I know as the Engineer that I can decide to end this agreement at any time. I also know that I can add or remove Conductors when it is necessary or helpful to do so. I and my conductors are going to sign below to show that we agree to this Supported Decision Making plan

I have gone over all the information in this agreement and I understand it. I am signing this because I want to. It is my free choice and my decision. This agreement will begin once everyone has signed below.

[Redacted Signature]

2-18-2020
Date

[Redacted Signature]

2/18/2020
Date

[Redacted Signature]

2-18-2020
Date

Below are tools and materials that were added by presenters from our Guardianship Webinar Series. These are real-world reference materials and tools used by legal professionals when approaching guardianship cases. Recordings of the webinar series can be found on our website, [here](#).

Resources from the American Bar Association:

[Advanced Directives: Counseling Guide for Lawyers](#)

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[PRACTICAL Tool for Lawyers: Steps in Supporting Decision-Making](#)

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[Legislative Fact Sheet: Guardianship and the Right to Visitation, Communication, and Interaction](#)

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[WINGS ACTION TOOLS: Right to and Role of Counsel](#)

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Resources from Indiana Disability Rights:

[Support Assessment Tool](#)

Provided with permission from Indiana Disability Rights.

[Person Driven Support Worksheet](#)

Provided with permission from Indiana Disability Rights.

[Free To Be: A Documentary about Jamie Beck](#)

Provided with permission from Indiana Disability Rights.

Resources from University of Montana Rural Institute for Inclusive Communities:

[Alternatives to Guardianship Toolkit 2018](#)

Provided with permission from UM Rural Institute for Inclusive Communities.

[Fact Sheet: Least Restrictive Approaches to Supporting Individuals as Decision Makers](#)

Provided with permission from UM Rural Institute for Inclusive Communities.

Resources from The ARC: For People with Intellectual and Developmental Disabilities:

[Letter of Intent](#)

Provided with permission from The ARC.

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