

Chapter 16

Conservatorship of Adults

M. Carl Glatstein, Esq.
Glatstein & O'Brien LLP

SYNOPSIS

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16-1. Introduction

What is a conservator? You may have heard the term, but do you understand what it means? A conservator is a type of trustee or fiduciary who is appointed by the court for an individual who is unable to manage his or her own financial affairs. Confusion arises because in some states, such as California, the term “conservator” is used interchangeably with the term “guardian.” Other states, such as Texas and Florida, use the term “guardian” to also mean a conservator.

Colorado distinguishes between these two terms. Here, a conservator is placed in charge of a person’s financial matters, while a guardian is placed in charge of the care and custody of a person and is responsible for making health care and placement decisions. Guardianship requires a determination of incapacity for an adult. (Minors need a guardian appointed because they are not legally competent until they reach age 18 — the age of majority.) Conservatorship, on the other hand, does not require that the person be found incapacitated or incompetent, although the two proceedings often go hand-in-hand.

It is important to understand that the appointment of a conservator affects a person’s property rights, while the appointment of a guardian affects a person’s civil liberties and personal freedoms. Since these are all constitutionally protected interests, they can only be taken away or limited by a court of competent jurisdiction, and only after due process is provided, which requires notice and a hearing. Certain safeguards are built into the law and the procedures

required for imposing a conservatorship. The court retains jurisdiction over these matters and requires conservators to report on the finances of the protected person at least annually.

If the conservator is not acting in the best interest of the protected person, or is mismanaging the assets, the court may suspend or remove the conservator. The court may also impose a fine or surcharge, which means the conservator will have to repay the funds that were misappropriated. In some cases, the conservator may even be charged with a crime for taking advantage of an at-risk adult. Assuming the role and duties of a conservator is serious business and should not be done lightly.

16-2. Alternatives to Conservatorship

There are alternatives to conservatorship that should be considered first. Financial powers of attorney are very flexible and inexpensive. A power of attorney can give an agent the legal authority to manage the finances and act on behalf of the principal, who is the person granting the authority. However, at the time the principal signs the power of attorney, the principal must have sufficient capacity to know and understand what the document authorizes. If an individual is already incapacitated, or subject to undue influence, it may be too late to rely upon powers of attorney.

Forms for financial powers of attorney can be found in office supply stores, and many versions are available in software packages and on the internet. However, relying upon powers of attorney without fully understanding their uses and potential for abuse can be penny-wise and pound foolish. While powers of attorney can be simple and useful tools, they can also wreak devastating results. An agent with a duly signed power of attorney can empty out your bank accounts, sell your investments, and even sell your house.

For limited purposes, a joint bank account may also be a simple alternative. With joint bank accounts, either party named on the title to the account may write checks, regardless of what the funds are used for. However, joint bank accounts, just like powers of attorney, may be abused. On top of that, when adding someone else's name to your account as a joint tenant, that person is entitled to ownership of everything in the account upon your death — regardless of what your will says.

With both financial powers of attorney and joint bank accounts, there is no court involvement and therefore no court oversight. It is very important to make sure that your agent or joint tenant understands the legal obligation to furnish you with information about his or her activities. It is also wise to make sure that a trusted friend or family member has the right to this information in the event of your incapacity or disability. Studies have consistently found that financial abuse of the elderly happens under the guise of a power of attorney. Unfortunately, most of this exploitation happens at the hands of family members. This suggests that it may be wise to have several sets of eyes watching your financial affairs when you are no longer able to do so. You may also wish to consider turning to a professional fiduciary to take on this role. Often lawyers are needed to fix the damage done by trying to do things the easy way. By then it may be too late for the courts to do anything but preserve what's left of your assets.

Finally, one other alternative to conservatorship is the use of trusts. When creating a trust, you may designate who will be your trustee. You may even be your own trustee while you have the capacity and ability to manage your own assets. Upon your incapacity, a successor trustee can take over managing your assets. Trusts are also very flexible and can be used to hold

specific assets or everything you own. Unlike conservatorships, trusts are private and generally only require court involvement if there are problems. However, there may also be significant tax ramifications in using a trust. Transferring your assets into trust may jeopardize your ability to qualify for Medicaid. Since there are often complex legal and tax matters involved, it is generally advisable to have an attorney work with you in the drafting and administration of the trust.

16-3. Court Process

A conservatorship is a legal proceeding, which is started by filing a petition for the appointment of a conservator. The filing fee with the court is \$199. The person filing this pleading is the "petitioner" and is responsible for paying the filing fee. The person who is alleged to need the protection of a conservator is the "respondent" or "protected person." The petition is filed in the county where the respondent lives. A supporting doctor's letter should be attached to the petition. If the respondent is also incapacitated and no one has legal authority to make medical decisions for the respondent, a guardianship petition should be filed at the same time. This saves having to pay another filing fee later on. (See Chapter 15, "Guardianship of Adults," for more information.)

Many courts have packets of information with instructions for simple and uncontested conservatorships. More detailed information is also available on the internet from the Colorado State Judicial Branch website at www.courts.state.co.us and by clicking on "Self Help / Forms" then "Conservatorship." Most courts now have Self-help Centers staffed by Self-represented Litigant Coordinators ("Sherlocks") who are trained to provide limited assistance. (See Exhibit 15A for a list of the Self-help Centers.) Court staff are often very helpful, but remember, they cannot give legal advice. Often, family or friends may be able to follow the rules and file the pleadings without the assistance of counsel. However, if the respondent is objecting to the imposition of a conservator, an attorney must be appointed by the court to represent the respondent.

To further protect due process, the court will appoint a court visitor, who is required to meet personally with the respondent. The court visitor serves as eyes and ears for the court and files a written report. The court visitor tries to inform the respondent about the nature of the proceedings and interviews the respondent as to his or her wishes. The court visitor advises the respondent about the right to be present at the hearing, to cross-examine witnesses, to introduce testimony, and to have a medical or psychological evaluation performed. The court visitor also advises that the respondent has the right to be represented by counsel at his or her own expense. If the assets are insufficient, the representation is at the state's expense. If the respondent tells the court visitor that he or she wants an attorney, the court must appoint one. The fees charged by the court visitor must be paid by the petitioner prior to the hearing. In Denver, the court visitor charges a flat fee of \$200. In other counties, an hourly fee may be charged.

Due process requires reasonable advance notice of the hearing. The respondent must be personally served with the notice of hearing and the petition for appointment of a conservator. Other interested parties must also be given advance notice, but this may be mailed. Interested persons include the respondent's spouse and all adult children, agents under powers of attorney, representative payees and other legal representatives, anyone the respondent has nominated to serve as conservator, and the respondent's primary care physician. If there is no spouse but the respondent has lived with someone during the previous six months, that person should be given notice as well. In the absence of immediate family, notice may have to be given to the closest relative by degree of kinship.

Without going into all the technicalities, at the hearing, the petitioner has the burden of proof to establish by clear and convincing evidence that the respondent is unable to manage his or her property due to some form of incapacity or deficit. The petitioner must also show that the respondent has assets that will be wasted or dissipated without proper management, or that the respondent or the respondent's dependents need funds for support, and that the appointment of a conservator will facilitate getting those funds.

16-4. Acceptance of Office

An individual nominated to serve as the conservator generally must submit an Acceptance of Office form. This requires the nominee to sign an affidavit disclosing any criminal history and judgments against him or her, among other things. The nominee is also required to submit a credit report, a name-based Colorado Bureau of Investigation criminal background check, and a copy of his or her driver's license or passport.

16-5. Responsibilities

Once an order of appointment is entered, the conservator has many duties and responsibilities. The court often requires the conservator to first obtain a fiduciary bond from an insurance company. The cost of the bond is payable out of the conservatorship assets. The purpose of the bond is to ensure that the conservator faithfully carries out his or her duties and to preserve the assets covered by the bond. The bond company often reviews the accountings and reports that the conservator files more carefully than a court's staff has time to allow.

The conservator is required to file an inventory and financial plan within 90 days of appointment. The inventory is a snapshot of all the assets under the conservator's control as of the date of appointment. The financial plan is a budget that describes the protected person's monthly income and expenses, as well as how the assets under the conservator's control will be managed. Once this information is gathered, it should be possible to determine whether the protected person's income is sufficient to cover expenses, or whether assets will need to be sold to pay for his or her care. The financial plan should be reviewed and approved by the court, and should be followed faithfully. Failure to do so may create significant problems for the conservator, including removal or surcharge. If the protected person's situation changes, the financial plan should be amended and again approved by the court.

At least once a year, the conservator is required to file a conservator's report, detailing the income and expenditures over the past accounting period. The conservator's report provides a comparison between actual expenditures and the court-approved financial plan. It should be easy to determine at a glance whether the financial plan has been carefully followed and whether there have been extraordinary expenditures. The conservator's report should also indicate whether the financial plan is adequate to meet the protected person's needs or whether it should be amended. In recent years, each court in Colorado has added staff whose job it is to review the conservator reports. These Protected Proceedings Monitors closely scrutinize the reports and alert the court if problems are seen.

16-6. Duties

A conservator is a type of fiduciary and has power and authority much like that of a trustee. Fiduciary duties include that of undivided loyalty to the person whose interests the

conservator protects. The conservator may not engage in “self-dealing,” which means profiting off the assets controlled. Although a conservator is entitled to reasonable compensation, family members often serve without pay. In any event, compensation paid to the conservator must first be authorized and approved by the court.

The conservator has a duty to exercise due care. The conservator must handle the conservatorship assets prudently, using reasonable care and caution in investing and managing the assets under the conservator’s care. If there are sufficient assets to warrant investments, it may be prudent to rely upon a financial advisor to diversify and structure an investment portfolio, balancing risk and return. Sometimes it may be necessary to liquidate investments or even to sell the protected person’s house. Any time there is a significant change in financial matters, it is advisable to seek court approval. This will limit the conservator’s liability to the protected person and those who may inherit his or her estate.

16-7. Terminating Conservatorship

A conservatorship may need to terminate for various reasons: (1) the protected person may have regained capacity and no longer require assistance and oversight; (2) the protected person may have died; (3) the assets may have been depleted; or (4) if the conservatorship was for a minor, it is no longer needed when the minor becomes 21 years old. When such an event arises, the conservator is then required to prepare and file a final report and petition for the termination of the conservatorship. The final report covers the period since the last accounting and indicates what assets remain in the conservatorship to be distributed. After the death of the protected person, the conservator generally should take no action, other than to pay for funeral expenses and to preserve and protect the assets remaining, without obtaining a court order.

If the conservatorship terminated because the protected person is no longer incapacitated, then the assets should be transferred back into the name of the individual. If the conservatorship terminated because the protected person has died, then the assets are turned over to the personal representative of the individual’s estate or as directed by the court. The conservator should ask the court to approve the final report, and then provide the court with proof that the assets have been distributed in accordance with the court’s order. Once this is accomplished and the court is satisfied that the conservator has fulfilled all of the duties and obligations required, a decree of discharge will be entered, relieving the conservator of any further liability.

16-8. Recent Developments

Additional Background Checks

Effective beginning January 1, 2022, new legislation requires all petitions for appointment of a guardian or conservator for an adult to be accompanied by a written authorization to request a CAPS check. CAPS is the Colorado Adult Protection Services database system. The court will forward the CAPS authorization to the state agency which promptly provides an additional background check to determine whether the person nominated as guardian or conservator has any substantiated findings of involvement in mistreatment, physical or sexual abuse, caretaker neglect, exploitation, or other harmful acts. The report is sealed and is only available to the court.

Supported Decision-Making

Another new requirement since the last publication of the *Senior Law Handbook* recognizes the importance of supported decision-making. “Supported decision-making” is the informal way an adult with a disability or diminished capacity makes their own decisions by relying upon friends, family members, professionals, and other trusted persons.

This new requirement only applies in limited situations when appointment of an emergency guardian or special conservator is requested, without the normal advance notice and hearing required by statute. This is further limited to cases in which the petitioning party is asking the court to appoint a professional guardian or the county department of human services as the emergency guardian. For conservatorships, it is limited to cases where the petitioning party is asking for appointment of a professional conservator or the judicial district’s public administrator.

In these limited situations, the court must immediately appoint a visitor to investigate and report back to the court within 14 days. The report should inform the court whether there are members of the individual’s supported decision-making community who may have relevant information about the individual’s wishes and personal values and who should be involved in the proceedings.

The visitor should also report on the respondent’s view of any such members and interview those people as well. The court must review this visitor’s report within seven days of filing and enter an order determining whether it is in the best interest of the person to include those additional people and whether there should be limits on the authority of the emergency guardian or special conservator.

This process is designed to better ensure that people with a connection to the respondent are involved in the process. However, it also increases the costs as a second visitor’s report is required once the emergency situation subsides. The petitioning party is usually responsible for the visitor’s fees.