

Guardians/Conservators

A guardian or conservator is appointed by a court to make personal and/or property decisions for a person who does not have *decision-making capacity*. Appointment of a guardian or conservator may be necessary to protect an older person from elder abuse. Sometimes, however, guardians or conservators misuse their legal authority in ways that result in financial exploitation or neglect of the incapacitated person.

Key Definitions and Facts

- A court may appoint someone to make personal and/or financial decisions for a person if a judge or a jury decides that the person lacks *decision-making capacity*.
- In most states, the person appointed to make personal decisions is known as either the guardian or the guardian of the person. Usually the person named to make financial decisions is called the guardian of the property, the guardian of the estate, or the conservator. Some states use different terminology, however. For simplicity, this guide generally will use **guardian/conservator**.
- States use different terms for the person who needs help making decisions. Some of those terms include disabled person, incapacitated person, incompetent, protected person, or ward. This guide will use **incapacitated person**.
- A guardian/conservator may be an incapacitated person's family member or friend, or may be a professional (e.g., a lawyer or a *trust officer*), a public agency, or a private non-profit or for-profit agency. Guardians/conservators may charge a fee for their services, but the fee must be reasonable according to state law or court rules, and generally must be approved by the court. Guardians/conservators must keep careful records of their services and time spent.
- The court issues an order or a letter listing the authority that the guardian/conservator has over the incapacitated person. The authority may be limited or full (**plenary**). The incapacitated person loses the right to make the decisions that the court has authorized the guardian/conservator to make.
- A guardian/conservator has a legal duty to act as a **fiduciary**. This means, generally, that the guardian/conservator must act in a totally trustworthy manner and make decisions that are consistent with decisions that the incapacitated person made before losing *decision-making capacity* or that are in the incapacitated person's best interest.

- Courts have a responsibility to monitor the actions of the guardians/conservators they have appointed, but the extent of this oversight varies widely from court to court. Guardianship monitoring practices may include:
 - Requiring a baseline inventory of the incapacitated person's assets.
 - Requiring guardians/conservators to file financial plans and accountings, plans for future care, and periodic status reports.
 - Requiring a guardian/conservator to get a bond for the incapacitated person's assets and assuring the bond has been approved.
 - Reviewing the inventories, accountings, plans, and reports.
 - Requiring court approval for expenditures above a certain amount.
 - Verifying reports and then investigating and sanctioning irregularities.

Relevance to Elder Abuse

- Someone may wrongfully take an individual to another state to get or avoid a guardianship/conservatorship.
- A guardian's/conservator's misuse of legal authority may result in financial exploitation or neglect. For example:
 - The guardian/conservator exceeds the authority given by the court (e.g., makes health care decisions when not given that authority).
 - The guardian/conservator self-deals (e.g., pays his/her own bills with the incapacitated person's money or sells the incapacitated person's house below market rate to a relative).
 - The guardian/conservator acts contrary to incapacitated person's best interest (e.g., because of financial motives, the guardian/conservator fails to pay for adequate health care services, isolates the incapacitated person from family or friends, or fails to ask the court to end the guardianship/conservatorship when the incapacitated person regains *capacity*).
- Appointment of a guardian/conservator may be necessary to stop elder abuse. For example, if an agent is abusing the authority given by a *power of attorney* and the principal has lost the *capacity* to revoke the *power of attorney*, a judge may need to appoint a guardian/conservator to monitor the agent or to act instead of the agent.

Actions to Consider

- Consider whether a guardian's/conservator's breach of fiduciary duty violates local, state, or federal laws relative to:

- Elder abuse
 - Embezzlement
 - False instrument
 - Financial exploitation
 - Forgery
 - Fraud (e.g., credit card, tax, or Medicaid)
 - Larceny
 - Money laundering
 - Neglect
 - Theft
- Obtain and analyze the court's monitoring documents as evidence; determine whether reports have been submitted when required.
 - Ask the person claiming to be a guardian/conservator to produce a court's order or letter. Investigate further if that person cannot or will not produce a court document, if the document does not name that person as the guardian/conservator, or if the document does not appear to allow the actions in question. If it is not clear whether the document names that person as guardian/conservator or allows the actions in question, contact the court or ask the prosecutor's office for an opinion.
 - If allowed by law, initiate actions to freeze the incapacitated person's assets or take other steps to stop the guardian/conservator from dissipating remaining assets.
 - Consider whether the guardian/conservator is in a position to do this to others.
 - Consider notifying the court if a guardian/conservator is under criminal investigation.
 - If the incapacitated person has died, consider whether death may have been caused or hastened by actions or inactions of the guardian/conservator.
 - Encourage the incapacitated person or concerned individual to seek legal assistance, per departmental policy.
 - Abuse or misuse of authority by a guardians/conservator is a civil problem too. Civil law remedies may stop the guardian/conservator from exploiting or neglecting the incapacitated person or may lead to recovery of exploited money and property.
 - Make a report to *adult protective services*.