

Chapter 26

Guardianship of Adults

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26-1. Guardianship Under Colorado Law

In Colorado, the court can appoint a guardian for either a minor or an adult who is deemed incapacitated. The person for whom a guardian is appointed is called the “ward.” Different rules apply depending upon whether the ward is a minor or an incapacitated adult.

Each state has its own laws regarding guardianships and uses its own terminology, so do not be confused if you hear the term “guardian” used differently elsewhere. For example, in a number of states a guardian manages an individual’s finances and makes

decisions regarding his or her ward's physical health, safety, or self-care. That is not the case in Colorado, where a conservator is appointed to manage finances and property for a minor or an adult, unless there are limited assets and the ward does not have a conservator.

A person for whom a conservator is appointed is called a "protected person" in Colorado. It is possible for the court to appoint a guardian, a conservator, or both. The appointment of a conservator for an adult in Colorado is not a determination that the adult is incapacitated, as is the case when a guardian is appointed by the court. For a more complete discussion relating to conservatorships, please see Chapter 25, "Conservatorship of Adults."

26-2. When Does a Guardian Need To Be Appointed?

An incapacitated adult is defined in the Colorado Probate Code as an adult "who is unable to effectively receive or evaluate information or both or make or communicate decisions to such an extent that the individual lacks the ability to satisfy essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance."

This statute requires that a functional analysis be used in determining incapacity. The determination should not be based upon a particular diagnosis, although the court will want to know that information. Rather, the issue is whether the person can make decisions that are in that individual's best interest regarding his or her personal affairs. For example, if an adult is diagnosed with mild dementia but retains the ability to make decisions regarding his or her personal affairs that are in his or her best interest, that individual does not require a guardianship and a guardian will not be appointed.

The other important aspect of the definition of an incapacitated adult is its encouragement of the use of appropriate, reasonably available technological assistance. If such technological assistance enables an otherwise incapacitated adult to receive the information necessary to make decisions regarding his or her personal affairs that are in his or her best interests and/or to communicate such decisions, then a guardianship is unnecessary. For example, missing eyeglasses or hearing aids may make all the difference in whether a person can function independently.

26-3. Who Can Serve As a Guardian in Colorado?

Any person age 21 or older may be appointed as a guardian, regardless of whether that person is a resident of Colorado. Family members, professional guardians, volunteers, or in some counties, the Department of Human Services may serve as guardians. However, the nominated guardian must first submit for the court's review an Acceptance of Office form to which is attached a name-based criminal history check and current credit report.

There is a statutory priority for appointment as guardian, which sets forth that the court shall consider persons otherwise qualified in the following order of priority: (1) a currently acting guardian; (2) a person nominated as guardian by the respondent; (3) an agent under a medical durable power of attorney; (4) an agent under a general durable power of

attorney; (5) the spouse of the respondent or a person nominated by a will or other signed writing of a deceased spouse; (6) an adult child of the respondent; (7) a parent of the respondent or an individual nominated by a will or other signed writing of a deceased parent; and (8) an adult with whom the respondent has resided for more than six months immediately before the filing of the petition. If good cause is shown, the court can appoint as guardian someone who has lower priority or no priority at all.

Under Colorado law, long-term care providers are prohibited from serving as guardian or conservator of a person for whom they provide care unless related by blood, marriage, or adoption. In addition, a professional guardian ordinarily will not be allowed to serve as both guardian and conservator, or as guardian and direct service provider, unless the court determines that good cause exists to allow the professional to serve in dual roles.

26-4. Types of Guardianships

Limited Guardianships

A limited guardianship restricts the guardian's authority to certain specified matters only. The underlying philosophy is that the guardian's powers should be no greater than necessary to see to the needs of that particular ward. If an unlimited guardianship is believed necessary, the petitioner (the person bringing a guardianship petition) will have to explain to the court's satisfaction why an unlimited guardianship is necessary. Otherwise, a limited guardianship will be ordered.

In fact, all guardianships are limited to the extent that a guardian may not initiate the commitment of a ward to a mental health care institution or facility except in accordance with the state's procedure for involuntary civil commitment. In essence, this means that the guardian has to follow Colorado mental health statutes when seeking psychiatric treatment or substance abuse treatment for the ward.

Emergency Guardianships

The court will appoint a guardian on an emergency basis only if it finds that substantial harm to a person's health, safety, or welfare is likely to result if an emergency guardian is not appointed, and no other person has authority to act under the circumstances. This means that there must be an imminent threat to the respondent. "Respondent" is the term for the individual for whom a guardianship is being sought.

26-5. Duties and Responsibilities of a Guardian

A guardian may make decisions for the ward as allowed within the scope of the guardian's authority, as set forth in the order of appointment issued by the court. The limitations on the guardian's authority should also be stated in the letters of guardianship that the court issues. The guardian is required to see that the basic daily personal needs of the ward for food, clothing, and shelter are met; however, the guardian is not personally responsible for paying for the ward's care.

Frequently, the scope of a guardian's authority includes determining where the ward should live, and arranging for and making decisions regarding the ward's care, medical treatment, and other services. However, if the ward has an agent under a medical durable power of attorney, the guardian may not revoke the medical durable power of attorney without an order of the court. The agent still has the legal authority to make medical decisions unless the court rules otherwise and revokes the power of attorney.

If no conservator is appointed and the ward has limited assets, the guardian may also need to address basic financial management issues for the ward. This is the exception to the general rule that a guardian does not manage the financial affairs for the ward. A guardian usually is allowed to manage the ward's government benefits if there is no conservator.

The guardian should make decisions after consulting with the ward, taking into account the ward's wishes and personal values, to the extent that it is reasonably possible to do so. The guardian should encourage the ward to participate in decision-making. The guardian's scope of duties and responsibilities should be crafted to reflect the ward's limitations. In addition to encouraging the ward to participate in decisions, the guardian should encourage the ward to act on his or her own behalf and to develop or regain the capacity to manage his or her own personal affairs. However, the guardian is ultimately responsible for making the decisions on behalf of the ward.

Within 60 days after appointment, a guardian's report must be filed with the court, which includes a personal care plan for the ward. A guardian's report form can be obtained online at www.courts.state.co.us and by clicking on the "Self-Help Center." All guardian reports must be sent to the interested persons identified in the Order Appointing Guardian form who are to receive pleadings. The guardian's report addresses the ward's health, including his or her physical and mental condition, diagnosis, and prognosis; a personal care plan for the ward; plans for any therapies or treatments or other services; plans for future care; and any other issues that should be brought to the court's attention. Thereafter, the guardian must file annual reports with the court and interested persons as directed by the court.

The guardian must obtain prior permission from the court to move the ward out of Colorado. If the ward is to move permanently, consideration should be given to whether it would be in the ward's best interest to domesticate the guardianship (make the guardianship subject to the jurisdiction of the state where the ward plans to permanently reside), and whether a successor guardian who lives close to the ward's new home should be appointed. Likewise, if a ward is moving to Colorado from another state, it may be appropriate to domesticate the guardianship in Colorado. A guardian residing out-of-state can hire a local case manager to assist in carrying out the guardian's duties. If there is a significant change in the ward's condition, the guardian should file a status report with the court, sending a copy to all persons who are to receive pleadings as listed on the order of appointment.

26-6. The Appointment Process in Colorado

A petition for the appointment of a guardian is filed in the district court for the county in which the respondent lives. In the City and County of Denver, this is the Denver Probate Court. A petition can be filed by any person who is interested in the welfare of the respondent. There is a filing fee of \$164 (in 2009), which is payable when the petition is filed. There is also a fee for the court visitor, which the petitioner is required to pay. This fee varies by county. Where neither the petitioner nor respondent has the ability to pay the fees, the court may order that the fees be waived. To request such a waiver, ask the court staff for the appropriate forms.

The petition for the appointment of a guardian should have attached to it an evaluation from a physician, psychologist, or other professional qualified to evaluate the respondent's alleged impairment. The evaluation should contain:

- ▶ A description of the nature, type, and extent of the respondent's specific cognitive and functional limitations;
- ▶ An evaluation of the respondent's mental and physical condition and, if appropriate, educational potential, adaptive behavior, and social skills;
- ▶ A prognosis for improvement and a recommendation as to the appropriate treatment or rehabilitation plan; and
- ▶ The date of any assessment or examination upon which the report is based.

If such a report is unavailable because the respondent refuses to be evaluated, the petitioner can file a request for an order that the respondent undergo an evaluation by an appropriately trained professional. Likewise, the respondent always has the right to request an evaluation through the court, or to obtain an evaluation by professionals whom the respondent selects.

The nominated guardian must file a name-based criminal history check and a current credit report along with an Acceptance of Appointment form. If the nominated guardian lives out-of-state, an irrevocable power of attorney form also must be filed which allows the clerk of the court to accept service on behalf of an out-of-state resident.

When seeking the appointment of a guardian, there are specific notice requirements that must be followed. The respondent must be personally served and must appear at the hearing on the petition, unless the court excuses the respondent for good cause. Likewise, persons interested in the ward's welfare must receive notice of the guardianship hearing. You must carefully follow the notice requirements. As with any other important legal matter, if you do not understand the notice requirements, you should seek legal advice.

Once a petition has been filed with the court, the court will appoint a court visitor. The court visitor will meet with the respondent, the petitioner, the proposed guardian, and anyone else deemed necessary. The role of the court visitor is to act as the eyes and ears of the court, investigating whether a guardian should be appointed. The court visitor files a written report with the court, including a recommendation regarding whether a guardianship is necessary.

Every respondent has the right to legal representation. This is because the appointment of a guardian takes away some of the ward's legal rights, such as making decisions regarding the ward's personal affairs, medical care, and place of abode. One of the questions the court visitor asks the respondent is whether the respondent has a lawyer and, if not, whether the respondent wishes to have legal representation. The court must appoint a lawyer to represent the respondent if legal representation is requested by the respondent or recommended by the court visitor, or if the court determines that the respondent needs representation.

The respondent and the petitioner are required to attend the hearing, unless excused by the court for good cause. At the hearing, the respondent has the right to cross-examine witnesses and to call witnesses on his or her behalf. The petitioning party must establish by clear and convincing evidence the respondent's need for a guardianship. At the conclusion of the hearing, the court generally rules from the bench, announcing whether a guardian will be appointed for the respondent and the limitations applicable to the guardianship.

26-7. Compensation and Reimbursement of Expenses

A guardian is entitled to reasonable compensation for his or her services and reimbursement of expenses, payable from the ward's funds. Compensation paid to the guardian is treated as taxable income to the guardian and as a tax-deductible expense for the ward. Family members frequently serve without compensation, accepting only reimbursement of expenses for mileage, parking, and similar costs. There is no statutory schedule or criteria for a guardian's fee. Rather, the Colorado Probate Code in the Colorado Revised Statutes simply mandates that these fees must be fair and reasonable, leaving compensation to be determined on a case-by-case basis.

If family members receive compensation, it should be less than what professionals would receive. Professionals should seek compensation based upon their hourly rate for performing guardian services, which should be reasonable for the area. Contemporaneous time records, describing the services provided and time taken to perform those services, must be kept by all who seek compensation for their services as a guardian. A guardian is entitled to have legal representation, paid for with the ward's funds.

A guardianship may be modified by the court either to expand or to restrict the scope of authority of the guardian to reflect the ward's then-current condition. Before a modification will be granted, it must be established that the requested modification is in the ward's best interest. Through the use of a power of attorney, a guardian may delegate to another person, for a period not exceeding 12 months, any power regarding care, custody, or property of a ward, except the power to consent to marriage or adoption. This procedure should be utilized when a guardian is going out of town on vacation or otherwise may be unavailable.

26-8. A Guardian May Be Removed or Resign

A ward, or person interested in the welfare of a ward, may petition for removal of a guardian on the ground that removal would be in the best interest of the ward or for other good cause. A guardian may petition to resign. Either a petition to resign or a petition for removal may include a request for appointment of a successor guardian.

26-9. Termination of a Guardianship

A permanent guardianship most frequently terminates upon the death of the ward. At that time, the guardian should file a pleading advising the court that the ward has died. The court may also terminate the guardianship if the ward no longer meets the standard for establishing a guardianship.

In order to cut off the guardian's potential liability once a guardianship has terminated, the guardian should file with the court a petition for decree of discharge. Seeking a decree of discharge most commonly occurs in conservatorships, but the procedure is also available in guardianships. It is a prudent step where the guardianship was contested, issues were encountered that caused dissension, or there are disgruntled family members or other interested persons.

26-10. Resources

Colorado State Judicial Branch

Office of the State Court Administrator
1301 Pennsylvania St., Ste. 300
Denver, CO 80203
(303) 861-1111
www.courts.state.co.us

Denver Probate Court

1437 Bannock St., Rm. 230
Denver, CO 80202
(720) 865-8310
www.denverprobatecourt.org

Department of Human Services

1575 Sherman St.
Denver, CO 80203
(303) 866-5700
www.cdhs.state.co.us

