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## WHAT IS A GUARDIANSHIP OR A CONSERVATORSHIP?

The attorneys of Oast & Hook are frequently consulted by the families of incapacitated persons. Where there is no power of attorney and advance medical directive, the appointment of a guardian or conservator may be necessary.

### What is a guardian?

“Guardian” means a person appointed by the court who is responsible for the personal affairs of an incapacitated person, including responsibility for making decisions regarding the person’s support, care, health, safety, habilitation, education, and therapeutic treatment, and, if not inconsistent with an order of commitment, residence.

### What is a conservator?

“Conservator” means a person appointed by the court who is responsible for managing the estate and financial affairs of an incapacitated person.

### When is a guardianship or conservatorship appropriate?

Guardianship or conservatorship is appropriate when an adult is unable to receive and evaluate information effectively or respond to people, events or environments to the extent that this individual lacks the capacity to: (1) meet the essential requirements for his or her health, care, safety, or therapeutic needs without the assistance or protection of a guardian, or (2) manage property or financial affairs or provide for his or her support or for the support of his or her legal dependents without the assistance or protection of a conservator. A finding that the individual displays poor judgment, alone, shall not be considered sufficient evidence that the individual is incapacitated.

**How does one become a guardian or conservator?**

A petition must be filed with the circuit court requesting the appointment of a guardian, a conservator, or both. Anyone may file the petition. After filing the petition, the court will appoint a guardian ad litem to represent the interests of the incapacitated person who will be given notice of the date and time of the hearing. An evaluation report will be prepared by a physician or psychologist and filed with the court and guardian ad litem. The incapacitated person is entitled to a jury trial, upon request, and may compel witnesses, present evidence, and cross-examine witnesses. If, after considering the evidence presented at the hearing, the court or jury determines on the basis of clear and convincing evidence that the individual is incapacitated and in need of a guardian or conservator, the court shall appoint a suitable person. A guardian or conservator appointed by the court must qualify before the clerk of court. The qualification process includes: (1) signing an oath promising to faithfully perform his or her duties, (2) posting bond (usually with surety for conservators), and (3) accepting educational materials.

**How long does this appointment last?**

The court order appointing a guardian or conservator may limit the appointment to a specified length of time. If no time limitation is specified, then the appointment will last until the death of the incapacitated person or the guardian/conservator, until the incapacitated person is able to establish that he or she has regained capacity, or until the guardian/conservator resigns or is removed by the court.

**What authority does the guardian and conservator have?**

Except as limited by the court, the guardian has control over the personal affairs of the incapacitated person. This includes deciding where the incapacitated person will live and making routine medical decisions for the incapacitated person. The guardian's authority does not extend to decisions addressed in a valid advance directive or power of attorney previously executed by the incapacitated person. Subject to the limitations in the conservatorship order, the conservator has the authority to take care of and preserve the estate of the incapacitated person and to manage it to the incapacitated person's best advantage. A guardian or conservator must obtain court approval to revoke or amend a durable power of attorney.

**What are the responsibilities of the guardian and conservator?**

A guardian must maintain sufficient contact with the incapacitated person to know his or her capabilities and visit the incapacitated person as often as necessary. The guardian shall encourage the incapacitated person to participate in decisions and to develop or regain capacity. The guardian must also file annual reports with the Department of Social Services. A conservator is required to file an inventory of the assets under the conservator's control and file annual accountings.

**What is a petition for restoration, modification or termination?**

The incapacitated person, the guardian, the conservator, or any other person may petition the circuit court to declare the incapacitated person restored to capacity, modify the order appointing the guardian or

conservator, terminate the guardianship or conservatorship, remove the guardian or the conservator, or order other relief.

### **What are public guardians and conservators?**

If the circuit court determines that the incapacitated person has insufficient funds to compensate a private guardian or conservator, then the court may appoint a local or regional program authorized by the Department of Aging as the guardian or conservator of the incapacitated person.

### **Are there alternatives to a guardianship or conservatorship?**

Yes. A guardianship or conservatorship may not be necessary due to the use of trusts, advance medical directives, durable powers of attorney, joint accounts or representative payees.

### **Oast & Hook**

Oast & Hook is an Elder Law firm. We represent older persons, disabled persons, their families, and their advocates. The practice of Elder Law includes estate planning, estate and trust administration, powers of attorney, advance medical directives, guardianships, conservatorships, and public entitlements (Medicaid, Medicare, Social Security, and SSI), disability planning, estate, gift and income tax matters, bill paying, care management, and fiduciary services. We also handle litigation involving these issues, such as will contests and estate administration disputes. For more information about Oast & Hook, please visit our website at [www.oasthook.com](http://www.oasthook.com).

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**By**

**Oast & Hook, P.C.**

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