



DEL MAR CAREGIVER RESOURCE CENTER

A program of Health Projects Center

Fact Sheet

Protective Proceedings: Guardianships and Conservatorships

When someone is no longer able to handle his or her own financial or personal affairs, the Court can appoint an individual or professional to act on behalf of the incapacitated person. The legal terminology for these protective proceedings varies state by state. In some states, the term “*guardianship*” is used for all protective proceedings, whether for a minor or adult. In others, the term “*guardianship*” is used to describe a proceeding giving authority over an individual’s financial affairs and “*conservatorship*” is used to describe a proceeding giving authority over an individual’s personal affairs. This Fact Sheet applies to California law; for advice on protective proceedings in other states, consult a knowledgeable attorney.

Q. What is a probate conservatorship?

A probate conservatorship is a judicial procedure in which someone (a conservator) is appointed to manage another person’s (the conservatee’s) financial and/or personal affairs. The establishment of a conservatorship restricts the conservatee’s powers over financial and personal care decisions.

Q. When is a conservatorship needed?

A conservatorship may be needed when someone is incompetent to manage his or her own financial affairs and/or personal care, and has no viable alternative method of delegating these duties to another (either through a durable power of attorney, living trust or other means).

Q. What is a conservator of the person?

A conservator of the person is responsible for making decisions about personal matters for the

conservatee, including decisions about medical care, food, clothing, and residence. Under a probate conservatorship, the conservator may not place the conservatee into a locked mental institution against his or her will.

Q. What is a conservator of the estate?

A conservator of the estate is responsible for handling the financial affairs of the conservatee. The conservator has the power to collect all the conservatee’s assets, pay bills, make investments, etc. However, the conservator must seek court supervision for major transactions, such as the purchase or sale of real property, borrowing money and gifting of assets.

Q. How is a conservatorship established?

A relative, friend or a public official may petition the court for the appointment of a conservator of an individual. The petition must contain facts establishing why the individual cannot manage his financial affairs and/or make decisions concerning his personal care.

Once a petition is filed with the court, a court investigator is appointed to interview the proposed conservatee. The investigator reports back to the court with an opinion on whether or not the appointment of a conservator is justified.

The petition is set for hearing and the conservatee must appear in court unless medically unable to do so. The judge determines, based on the petition, the investigator’s report, and any evidence taken during

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the hearing, whether or not the conservatorship is required and what types of special powers may be granted to the conservator.

Q. What are the disadvantages of a conservatorship?

Because a conservatorship is a court supervised proceeding, there may be substantial costs in establishing it, such as court filing fees, legal fees, investigator's fees and conservator's fees.

In addition, a conservatorship is a public proceeding and the conservatee's assets, income and expenses become a matter of public record.

The conservatorship can be a cumbersome method of managing a person's financial affairs, as the conservator must return to court for approval of certain transactions, such as the sale of real property, borrowing money, setting up a trust, etc. These formal court hearings require additional attorney's fees and can create delays in completing these transactions.

Q. What are the advantages of a conservatorship?

While the court supervision makes a conservatorship more costly and time consuming than other methods of management, it offers a higher degree of protection to the conservatee than other management mechanisms. The conservator must file an inventory which lists all the property of the conservatee and must file accountings with the court that reflect all transactions involving the conservatee's assets.

A conservatorship allows for the management of an incapacitated person's affairs when he or she does not have an alternative mechanism in place to do so.

Another advantage to a conservatorship proceeding is that it provides a structured method to assist an incapacitated individual who may be reluctant to accept such assistance.

Q. How can a conservatorship be used to plan for Medi-Cal benefits for a person who is incapacitated?

A conservator can petition the court for approval of appropriate Medi-Cal planning transactions such as purchasing a home or other real property, or transferring the family home or other assets to the conservatee's spouse or child, where appropriate.

Q. Do I need a conservatorship to place my relative in a nursing home?

It depends—if a person does not object to going into a nursing home, a relative may sign the admission agreement as an agent or as a “responsible party” to place a person in a nursing home. That person may not make medical care decisions on behalf of the individual unless he or she has authority to do so as an agent under a durable power of attorney for health care or as a court-appointed conservator. However, if a person objects or is unwilling to go to a nursing home, a conservatorship is required.

Q. What are the alternatives to a conservatorship?

- **Revocable living trust.** Through the establishment of a revocable living trust the individual can appoint a trustee to manage his or her financial affairs and thus can avoid the need for an appointment of a conservator of the estate. A person must be competent to establish a living trust.
- **Durable Power of Attorney for Asset Management.** A durable power of attorney is a document in which the individual can delegate to an agent the power to make financial transactions on his behalf if he is unable to do so himself. However, the individual must be competent to execute a durable power of attorney and the agent acting under the durable power of attorney is not subject to court review of his or her actions.
- **Durable Power of Attorney for Health Care.** An individual can nominate an agent to make health care decisions on his behalf in a durable power of attorney for health care. These health care decisions can also include the decision to withdraw or continue life support systems. As with a living trust and durable power of attorney for asset management, a person must be competent to execute a durable power of attorney for health care.
- **Joint tenancy property.** While the joint tenant may make decisions regarding property held in joint tenancy, significant risks make this form of ownership a poor choice for the purposes of asset management. In particular, a joint tenancy allows either joint tenant access to the funds and thus one joint tenant can withdraw all the joint tenancy funds. Further, there can be adverse tax and estate planning consequences as a result of creating a joint tenancy.

- **Management of community property by a spouse.** A spouse who is competent may manage the community property on behalf of the spouse who is incompetent without the need of a conservatorship. The well spouse must seek court approval in order to conduct some transactions on behalf of the incapacitated spouse. These transactions include sales, borrowing money, leases, and gifts of property.
- **Establishment of representative payee.** It is possible to have a substitute payee appointed for an incapacitated person who receives only governmental benefits, i.e., Social Security or SSI. The substituted payee, a trustworthy relative or friend, can manage that person's funds without the need of obtaining a conservatorship.

Q: What is an LPS (Lanterman-Petris-Short Act) conservatorship?

An LPS conservatorship is a court proceeding in which a conservator is appointed for a person who has been found to be “gravely disabled” and can be used to involuntarily commit an individual to a mental institution.

It is designed for persons with serious mental disorders, or who are impaired by chronic alcoholism. An LPS conservatorship, unlike a probate conservatorship, must be initiated by the county government—a spouse or other relative cannot petition for an LPS conservatorship.

Recommended Readings

Handbook for Conservators, Judicial Council of California, 2002 revised edition.
www.courtinfo.ca.gov/selfhelp/seniors/handbook.htm

The Conservatorship Book, Lisa Goldoftas and Elizabeth A. Hendrickson, fifth edition, 2002, Nolo Press, (510) 549-1976.

Resources

MONTEREY COUNTY

Health Projects Center's

Del Mar Caregiver Resource Center

(831) 424-4359

Web site: <http://www.delmarcaregiver.org>

SANTA CRUZ COUNTY

Health Projects Center's

Del Mar Caregiver Resource Center

(831) 459-6639

Web site: <http://www.delmarcaregiver.org>

SAN BENITO COUNTY

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(831) 459-6639

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Del Mar Caregiver Resource Center supports and assists caregivers of brain-impaired adults through education, research, services and advocacy.

For residents of Central California, Monterey, Santa Cruz and San Benito Counties, Del Mar CRC provides direct family support services for caregivers of those with Alzheimer's disease, stroke, head injury, Parkinson's and other debilitating brain disorders that strike adults.

National Academy of Elder Law Attorneys

(520) 881-4005

Website: www.naela.org

Information on how to choose an elder law attorney.

State Bar of California

(415) 561-8200 (Legal Services Section, Subcommittee on Legal Problems of Aging)

Website: www.calbar.ca.gov

California Advocates for Nursing Home Reform (CANHR)

(415) 474-5171

Website: www.canhr.org

CANHR provides advocacy, consumer education and legal information throughout California on nursing home-related issues.

Written by Harriet P. Prensky. Ms. Prensky is a certified elder law attorney and partner in the law firm of Prensky & Tobin in Mill Valley, California. She focuses on legal problems of the elderly and disabled, estate planning and probate, and is a Fellow on the National Academy of Elder Law Attorneys. Prepared by Family Caregiver Alliance in cooperation with California's Caregiver Resource Centers. Funded by the California Department of Mental Health. © 2004 Family Caregiver Alliance. All rights reserved.