

## The Court Process to Appoint a Guardian or Conservator

If you've been going through this series, you know we have talked about everything *except* how to actually get a guardianship or conservatorship. The reasons are two-fold. First – guardianship and conservatorship are drastic interferences with a person's decision-making rights. And second, for that reason, every alternative should be explored before seeking a guardianship or conservatorship over someone. A court must find a person to be *incapacitated* before appointing a guardian or conservator. That means the person must have a mental illness, condition, or deficiency, a physical illness or disability, or be chronically addicted to drugs or alcohol. *And*, that condition must prevent them from communicating their decisions, or causes them to make irresponsible, harmful decisions about themselves or their property. Guardianship and conservatorship should not be easy things to get. At the same time, there may be good reasons why someone else may need to be appointed to take care of, make decisions for, and protect someone who is incapacitated. Here's how it works.

It starts with filing a petition with the Probate Court in the county where the incapacitated person lives. You will need a lawyer to help you with this. Let's say your Mom passed away five years ago. Your Dad's physical health is declining and he has advancing dementia. He lives in an apartment. You suspect he is being financially exploited. You try as much as you can, but without having control over Dad's bank and retirement accounts, you have a hard time stopping him from giving money to any scammer who calls. Dad has never done a power of attorney. One of his newest caregivers has really cozied up to Dad and you're certain this person is taking his money as well. But Dad likes this person, won't fire them, and all of the sudden, you aren't allowed to come around the apartment. You've heard from the landlord that they just served an eviction notice on Dad for failing to pay rent for the last three months. You can file a petition alleging that Dad is incapacitated and ask the court to appoint you as his guardian and conservator. For the conservatorship over Dad's money and property, you must get bonded. A surety bond is a special type of insurance policy that protects Dad's assets from loss or misuse by the conservator.

Once the petition is filed, the court will do two things. First, it will set a date for a hearing on the petition. Second, it will require notice of the hearing be given to several people. Notice must be given to the alleged incapacitated person (Dad in our case), his spouse if he wasn't a widower, and all of Dad's adult children.

The probate judge will then appoint three people who have different responsibilities in the proceeding: a physician, court representative, and guardian ad litem. Let's talk about their roles. The court-appointed physician will examine Dad and submit a report to the court. The court representative will talk to you, Dad, and others familiar with his situation. The court representative will also visit Dad's apartment, and submit a report to the court. The guardian ad litem is a lawyer. Their job is to represent Dad's interests in the case, interview him and investigate the facts, and recommend what they think is in Dad's best interests. All of this information will be presented to the judge by the time for the hearing.

At the hearing, the judge will hear the evidence, potentially take testimony, and decide if Dad is incapacitated and needs a guardian or conservator. You as the petitioner, your lawyer, the court

representative, and the guardian ad litem are typically present at the hearing. Other people, including the examining physician, other medical experts, anyone contesting the guardianship, and others who have information about the incapacitated person may also be present and testify at the hearing. Finally, and most importantly, Dad has a right to be at the hearing and speak for himself.

If the judge grants the petition, you will receive what are called “Letters of Guardianship and Conservatorship.” Read these carefully to make sure you understand what you are authorized to do. For example, Dad may be adamant that he wants to decide where he will live. Even if Dad is not at the hearing, his guardian ad litem could express this wish to the court. The judge may decide to limit your authority and allow Dad to make decisions about where he lives. You would then have the authority to make other decisions, including hiring and firing caregivers, arranging his medical care, and securing his finances. Pay close attention to the court’s orders, also. They will tell you what other things you need to file with the court and when.

Like any other legal proceeding, there are attorney’s fees and court costs to pay. Court costs will vary from county to county. So, make sure you ask what those costs are and when they will be due.

In the next two videos, we will go into more detail about the duties of guardians and conservators.