

# Guardianship and Conservatorship in Iowa

## Issues in Substitute Decision-Making

This chapter discusses the basic steps to set up a guardianship or conservatorship.

### How to Set Up a Guardianship or Conservatorship

#### Is a Guardianship or Conservatorship Needed?

A family member or other person will need the help of doctors, nurses, social workers, caregivers and other people to decide whether a guardianship or conservatorship is needed. The person who may need a guardianship or conservatorship (called “the respondent”) must be found to be “incompetent” before a court would grant a guardianship or conservatorship. It is not enough that a person has a mental disability. The disability must seriously limit the respondent’s ability to function. The respondent’s decision-making capacity must be so impaired that he/she is unable to care for his/her personal safety or attend to or provide for necessities (food, shelter, clothing, or medical care) without which physical injury or illness might occur. There should be no other less restrictive alternatives that would meet the needs of the respondent. (See the article “Determining if Guardianship or Conservatorship is Necessary.”)

#### How to Get a Guardianship or Conservatorship

If a guardian or conservator is needed, the court will appoint an appropriate person to assist the respondent, who is called “a protected person,” once the guardianship or conservatorship is set up. A guardian or conservator may be a relative, other person, or a public or private agency. Two or more people may be co-conservators or co-guardians. Guardians or conservators should live in Iowa, although the court may appoint someone who does not live in Iowa if there is also an Iowa resident appointed or if the court finds there is a good reason to appoint the out-of-state person.

Any person may file a petition for the appointment of a guardian or conservator. The person asking the court to set up the guardianship or conservatorship is called the “petitioner.” The petitioner files a petition for appointment of a guardian or conservator, asking the court to appoint a person or agency to act as guardian or conservator. The petition should be filed in the county where the respondent lives.

### **Can a Respondent Choose a Guardian or Conservator?**

A respondent who has some limitations may file a petition to set up a guardianship or conservatorship. That respondent may want a certain person to help make decisions on his or her behalf. The respondent may choose the person to serve as guardian or conservator. The court would still need to approve.

An adult of “sound mind” may sign a petition that sets up a guardianship or conservatorship on a standby basis. This kind of guardianship or conservatorship would only go into effect if a specific event happens or if a particular mental or physical condition exists.

### **What Information has to be in the Petition?**

#### **For a Guardianship:**

The petition must be verified by a person with an interest in the welfare of the adult and include:

- A statement of the factual basis for the petition;
- A statement of why there is no less restrictive alternative to the appointment of a guardian;

- The name and address of the petitioner and the petitioner’s relationship to the respondent;
- The name and address of the proposed guardian and the reason the proposed guardian should be selected;
- List the names and addresses of
  - any spouse, adult children or parents of the respondent;
  - any adult who has had primary care of the respondent or with whom the respondent has lived for at least six months prior to filing of the petition or any institution or facility where the respondent has resided for at least six months prior to the filing of the petition;
  - any legal representative or representative payee of the respondent;
  - any person designated as an attorney in fact in a durable power of attorney.

The respondent is entitled to a written notice that must be served along with the petition. The notice must include:

- That a guardianship or conservatorship takes away rights;
- What actions the guardian or conservator may take without prior court approval;
- What actions the guardian or conservator may take only with prior court approval;
- That the respondent has the right to be represented by an attorney;
- That the respondent has the right to hire a private attorney rather than use one appointed by the court.



## **For a Conservatorship:**

The petition includes the same information as needed for a guardianship. However, a petition asking for a conservator looks at the respondent's ability to manage financial affairs. The petition must include a description of the respondent's alleged functional limitations that make the respondent unable to communicate or carry out important financial decisions. The petition must include information about the value of the real estate and personal property owned by the respondent, and the estimated gross annual income of the respondent.

A single petition can ask for both a guardianship and conservatorship.

## **Paying the Costs to File a Petition**

There are costs to file a petition. In the case of a conservatorship, the fees would be paid out of the protected person's assets. If the protected person does not have enough assets, a conservatorship is usually not needed.

In the case of a guardianship, the protected person would have to pay the court costs of the guardianship. A petition can still be filed if the person cannot afford to pay the filing fees. The person may ask the court to waive the filing fees. To do so, the person must show that he or she is not able to pay the fee. If the protected person is ever able to pay the cost, the costs must then be paid.

## **Notice to the Respondent**

After the petition is filed, the respondent must get notice of the case. A respondent must get:

- A copy of the petition;
- A notice telling the respondent that he or she has 20 days to file an "Answer" with the court.

## **The Respondent's Right to Representation**

A respondent who is an adult and who is not a petitioner has the right to legal representation. The court shall appoint an attorney to represent the respondent. If the respondent chooses to hire a private attorney, the appointed attorney may be discharged.

The costs of the attorney for a respondent who does not have money, are paid by the county where the guardianship or conservatorship was filed.

The attorney appointed to represent the respondent in a guardianship has a number of duties. The attorney appointed to represent the respondent must:

- Make sure that the respondent has been told about the guardianship;
- Make sure that the respondent has been told of the respondent's rights in a guardianship case;
- Personally talk to the respondent;
- Advocate for the wishes of the respondent to the extent that the attorney can determine the respondent's wishes; if the wishes can be determined, the attorney shall advocate for the least restrictive alternative consistent with respondent's best interests;
- File a report stating that the attorney has complied with the requirements of the law;
- Represent the respondent; and
- Make sure the guardianship meets the requirements of Iowa law.

If an order setting up a guardianship is entered, the attorney must:

- Tell the protected person about the effects of the order;
- Tell the protected person about his or her rights to ask the court to change or end the guardianship; and
- Tell the protected person of the rights he or she still has.

After a guardianship or conservatorship is created, the court may again appoint an attorney to represent the protected person in any other proceedings in the case. The court does this if it is in the protected person's best interest to have legal representation.

### **Emergency Appointment of Temporary Guardian or Conservator**

An application for the emergency appointment of a temporary guardian or conservator can be filed and must include information regarding the name and address of the respondent and the proposed guardian or conservator, and the reason for the emergency appointment. The court may enter an order without a hearing if the court finds that there is not sufficient time to file a regular petition and hold a hearing, that the appointment is necessary to avoid immediate and irreparable harm to the respondent, and there is reason to believe that there is a basis for the appointment of a guardian or conservator. The powers are limited to those necessary to address the emergency. If such an order is entered, the respondent may file a request for a hearing. The temporary guardianship or conservatorship ends within 30 days after the order is issued.

### **Mediation**

The court, either on its own or on the request of one of the parties, may order the parties to participate in mediation. Participation can be waived if there is domestic or elder abuse involved. If the parties must mediate, they are not required to reach agreement but will have to attend a session and engage in good faith negotiations.

### **Preparing for the Hearing**

The court sets a hearing date, which is usually no less than twenty days after the date notice of the hearing is served. The hearing is the time for the petitioner to tell the court why a guardianship or conservatorship should be created.

The case may be contested if the respondent or some other interested person thinks there is no need for a guardian or conservator. Someone may also say that the proposed guardian or conservator will not act in the best interests of the respondent. The court will have to decide what is in the best interests of the respondent.

### **Who Must Contact Witnesses and Gather Evidence?**

The petitioner or the petitioner's attorney must find witnesses who can talk about why a guardianship or conservatorship is needed. Any papers that show the respondent needs help should be given to the court. The law assumes that the respondent is "competent." The burden of proof is on the petitioner. The petitioner must show by clear and convincing evidence that the respondent is "incompetent."

## **What Kind of Information does the Court Want to Hear?**

The court will want to know about specific examples of how the respondent has acted against his or her own interests in the past. The court will want to know how these past acts show that the person needs a guardianship or conservatorship. Information might include the latest psychological report, any medical reports and evaluations, current service or care plans, and any other current assessments.

The petitioner is responsible for getting all these reports and bringing them to the hearing. It helps to bring along someone who can support the petitioner's statements, such as a social worker.

## **Court-ordered Professional Evaluation**

The court must order a professional evaluation of the respondent unless the court finds it has sufficient information to decide that a guardianship or conservatorship is needed, or a professional evaluation has already been filed. Even if a professional evaluation has been filed, the court may decide that an additional evaluation will assist the court and order another evaluation. If a report is ordered, it must include certain information such as a description of the respondent's cognitive and functional abilities, evaluation of the respondent's condition as well as prognosis for improvement and recommendation for an appropriate treatment, support or habilitation plan. The cost is to be paid by the respondent unless indigent in which case it shall be paid by the county in which the proceedings are pending, unless the court orders otherwise.

## **Court Visitor**

The court may appoint a court visitor if it would be in the best interest of the respondent. The visitor does not have to be an attorney. The visitor cannot also be the attorney for the respondent. The court may limit or expand the duties of the court visitor but would normally include:

- Conducting an in-person interview with the respondent;
- Explaining the substance of the petition, the proceeding, the rights of respondent and general powers and duties of a guardian or conservator;
- Determining the views of the respondent regarding the proposed guardian or conservator, powers and duties of a guardian or conservator and the scope and duration of the guardianship or conservatorship.

If directed by the court, other duties can be added. The court visitor must submit a written report which contains recommendations regarding limited guardianship or other less restrictive alternatives, qualifications of the guardian and whether the respondent agrees with the appointment of the proposed guardian or conservator. Other matters may be added.

## **Court-ordered Background Checks of Proposed Guardian or Conservator**

The court shall request criminal record checks and checks of the child abuse, dependent adult abuse and sexual offender registries in this state for all proposed guardians and conservators, other than certain financial institutions. The court shall review the results in deciding the suitability of the proposed guardian or conservator. The person filing the petition is required to pay the fee for the background checks.

## Should the Respondent Attend the Hearing?

The respondent should be at the hearing and has a right to be personally present at all hearings. The respondent may waive the right to appear in person. In some cases, the respondent's medical condition may make it impossible for the respondent to appear. It is strongly encouraged that the respondent attend the hearing.

Sometimes behavior problems may disrupt the hearing. Even then, it may be a good idea to have the respondent attend the hearing. The judge can see how the person acts. This may give the judge insight into the need to set up the guardianship or conservatorship.

## The Hearing

The petitioner first must give the court facts to show that the respondent needs the guardianship or conservatorship. The respondent can give the court other facts to show that a guardianship or conservatorship is not needed. A person with an interest in the welfare of the respondent may ask the court to participate in the hearing and other proceedings.

Usually, the court will decide the case without a jury. A person contesting the guardianship or conservatorship can ask for a jury.

After hearing the facts, the court can decide either:

- A full guardianship or conservatorship is needed.
- A limited guardianship or conservatorship is needed. The court then sets out the specific powers that the guardian or conservator has.
- No guardianship or conservatorship is needed. The case is ended.

## What is a Bond and When is it Necessary?

A bond is a promise by a bonding company to pay if the conservator does not take care of the protected person's money. The court cannot exempt a conservator, other than certain financial institutions, from giving a bond unless there is an alternative to a bond that will provide sufficient protection to the assets of the protected person. Each year, the conservator must continue to pay for the bond. Conservators can get a bond from any bonding company. Bonds are not required for guardianships of the person.

## After the Hearing

After the hearing, the court will enter a written order. If the court sets up a guardianship or conservatorship, additional action must be taken. If the court dismisses the petition, the petitioner may appeal.

If the court creates a guardianship or conservatorship, the protected person has 30 days to appeal the order. If the protected person appeals, a "stay" may be entered. A stay stops the guardian's or conservator's powers during the appeal process. Stays are not easy to get.

## Acceptance of Appointment by the Guardian or Conservator

The proposed guardian or conservator will need to sign a paper saying that he or she will faithfully perform his or her duties.

## Letters of Appointment

The clerk of court gives the guardian or conservator letters of appointment. These papers are proof that the guardian or conservator can act for the protected person. The letters should contain an explanation of the powers held by the guardian or conservator so that others will know what the guardian or conservator is able to do. The guardian or conservator should get extra copies of the letters.

## Inventory and Initial Plan

The conservator must file an inventory of the protected person's property within 90 days of the conservator's appointment. Also due within 90 days is an initial plan for protecting, managing, investing and distributing the assets of the conservatorship. The plan must include:

- a budget, including fees to be charged by the conservator;
- a statement as to how the conservator will involve the protected person in decisions about management of the assets;
- and estimate of the duration of the conservatorship.

The court must review and approve or reject the plan. If approved, the conservator has the power and authority described in the plan without further court order.

The guardian must file an initial care plan within 60 days of being appointed. The information in the initial care plan must include:

- Current residence of protected person and plan for future living arrangements;
- Plan for payment of protected person's living and other expenses;
- Current health status and needs and plan for meeting health care needs;

- Plan for meeting other needs of the protected person including education, training and vocation services;
- Plan for facilitating the protected person's participation in social activities;
- Plan for facilitating contacts with family members and other significant persons; and
- Guardian's plan for contact with and activities on behalf of protected person.

## Annual Report

Each year the guardian and conservator will have to file a report.

A guardian must file an annual report which cannot be waived by the court. The report includes information about:

- Current living arrangements of protected person;
- Sources of payment for living and other expenses;
- Current physical and mental health status and professional services provided to the protected person;
- Protected person's employment status and educational, training and vocational services provided;
- Contacts between protected persons and family members and other significant persons;
- Guardian's contact with and activities on behalf of the protected person; and
- Guardian's recommendation regarding continued need for the guardianship, the ability of the guardian to continue as guardian and any need of the guardian in providing or arranging for provision of care to protected person.

The conservator must report to the court every year within 60 days of the end of the reporting period. These reports cannot be waived. The report shall include:

- The amount of funds on hand at the beginning and end of the period;
- List of assets at end of the period;
- All disbursements made;
- Any changes in the conservator's plan;
- Amount of the bond and name of the surety;
- The residence of the protected person;
- The general physical and mental condition of the protected person;
- And such other information necessary to show the condition of the conservatorship.

If additional property comes into the estate, the conservator must tell the court about this in the next annual report.

The Iowa Judicial Branch has forms for the guardian or conservator to use. They are available at: <https://www.iowacourts.gov/for-the-public/court-forms/>.

A report must be filed when a guardianship or conservatorship ends or when the conservator or guardian resigns.

These materials are a general summary of the law. They are not meant to completely explain all that you should know about guardianship and conservatorship. You should see a lawyer to get complete, correct and up-to-date legal advice. Iowa's law on guardianship and conservatorship is found in Iowa's Probate Code starting at section 633.551.

Updated Oct 2023

By Iowa Legal Aid  
666 Walnut Street, 25th Floor  
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1-800-532-1503  
Funding was provided by the  
Iowa Developmental  
Disabilities Council

**IOWA DD**Council

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