

Is Guardianship/Conservatorship Necessary?

As a parent, a child, or a friend of an incapacitated adult, you have to decide whether a guardianship or conservatorship is needed. Trying to reach that conclusion may be the most difficult part of the whole process. You may find yourself second guessing constantly. Generally, if it is obvious that the individual is unable to make significant responsible decisions for themselves, then your decision is easier, they are in need of a guardian/conservator. If the individual is easily influenced, has demonstrated a history of not being able to make responsible decisions, or others have questioned the individual's capability of making responsible decisions, the decision is more difficult but they are probably in need of a guardian or conservator. It gets much more difficult when the incapacity is periodic, such as when there are brief periods of time when the individual is unable to make responsible decisions. This is much more difficult, both for the individual and for the person contemplating filing for guardianship. A possible solution would be for the person to grant powers of attorney while they have capacity. It is recommended to use an attorney to properly document that the individual has capacity at time of signing the powers of attorney.

Powers of attorney do not avoid all problems, because the incapacitated individual may terminate the powers of attorney. For example, if an individual is experiencing a schizophrenic episode, during which they declare that the powers of attorney are revoked, are they revoked or not? This can happen in a treatment facility for example, where an adult daughter had signed healthcare powers of attorney granting her mother the powers, the staff was communicating with the mother when the daughter became paranoid and did not want anyone talking with her mother and directed the staff to stop talking with her. Without a determination by the court that she was incapacitated, she has legal capacity to revoke her powers of attorney. The only way to get a legal determination that she was incapacitated is through a guardianship proceeding.

For a guardianship or conservatorship to be established the Court must determine first, that the proposed ward is incapacitated. There is a legal definition of incapacity. The court must determine that the proposed ward *lacks sufficient capacity to make or communicate significant responsible decisions concerning his/her health or safety* in order to establish a guardianship. In order to establish a conservatorship, the court must determine that the proposed ward lacks sufficient capacity to make or communicate significant responsible decisions concerning the management of his/her property. This is what you have to prove to the court with clear and convincing evidence. The Court must then determine who is the best person to be the guardian or conservator. The court uses several processes to determine both these prongs. The petitioner, however, has the burden of proving that the proposed ward is in need of a guardian or conservator. The court assumes that they do not need a guardian, so you have to prove that they do need one. This is done by presenting evidence that the court is allowed to rely upon to make its decision. If you do not provide legal evidence, the court cannot establish a guardianship.

The Petitioner has to prove to the court with “clear and convincing” evidence, that the proposed ward is in need of a guardian.