Questionnaire for Challenging or Removing a Guardian or Conservator

This questionnaire may be useful for assisting individuals in assessing whether or not to undertake legal action to seek removal of a guardian or conservator who has been appointed to manage the affairs of another person, and whether or not to enlist the services of an attorney. It will also be helpful for those wanting to be appointed as a guardian or conservator. The questionnaire will help you to focus on key questions you should consider as you decide on your best course of action. For those with questions regarding probate of an estate, please see our Probate Questionnaire.

DISCLAIMER: This questionnaire is for educational and informational purposes and does not constitute legal advice regarding any specific issue(s) or claim(s) you may be dealing with. You agree that you may not and will not rely on this information in making decisions related to removal or appointment of a guardian or conservator. If you do not understand information presented here, or if you have more questions or uncertainty, you should consult an attorney who handles guardianship cases. You also understand that this questionnaire provides only a general guide and is not specific to your county or state, where laws and court rules, and guardianship practices may differ from the generalized descriptions provided here. You should particularly consult an attorney where the ward is personally reporting concerns with the guardian or the care.

This Questionnaire will provide a general overview of the key questions to consider before proceeding. It also helps explain important terms used in the associated court processes, the legal rights of the ward, and responsibilities of a guardian. Note that some material may be important in more than one area, and so may be repeated in different sections and elsewhere on the Dayspring Resources website.

I. Questionnaire – Key Questions:

1. Do I need an attorney?

While you are not required to have an attorney for this process, a request to remove a guardian or conservator can be a complex matter. An attorney experienced in guardianship and conservatorship matters (and perhaps in litigation outside of those areas) can help you navigate the process, and may save you time and money on complicated matters, or simply answer questions about the process. After reviewing the details of your case, an attorney should be able to give you an opinion as to your likelihood of success.

It is especially important to consider using an attorney when the claims or issues are likely to have significant impact on the care or finances of the ward, where there are minors involved, where the interests of a party (especially a loved one) are of grave importance to themselves, family members, or others with an interest in the outcome,

or where you suspect or have evidence of abuse, mistreatment, or financial misconduct in connection with the care of any ward.

2. Do I understand the role of the Court?

Most states have a court or judicial process establishing a guardianship or conservatorship over a living person (generally called the "ward" and sometimes "protected person") who is unable to oversee their own financial interests, care, or other personal affairs. The ward may not be competent in one or more areas, or they be a minor, or both. The court that handles these proceedings is usually called the Probate Court, although in some states, the court is the Orphans' Court or the Surrogate's Court. The process and procedures involved vary from state-to-state.

3. What is my relationship to the ward?

Before you may challenge the appointment or actions of a guardian or conservator, the court will require you to show that you are an "interested person" or an "interested party," as that term is defined by the law of your state. As a general rule, the term is defined to include close family members but may include a person who has lived with the ward for a period of time, his or her attorney, or a health care proxy named in the ward's living will.

4. Do I understand the important terms used in probate court?

There are several important terms worth understanding before proceeding to court. Therefore, it is recommended that you review the key terms defined in Section II, below.

5. Do I understand the process used in probate court?

Understanding the process will help you decide what the best next step for your case is. Section IV below provides a general overview of the guardianship process and is meant to help guide you through the legal system.

6. Who is the conservator or guardian?

Is the guardian or conservator a family member or close friend, or is it an agent of the state itself (such as a state department, or a commercial guardian or conservator)? While the law is supposed to be the same for all guardians and conservators, as a practical matter, the court may apply a more rigorous standard to a request to remove a commercial guardian, on the dubious theory that "as professionals, they must know what they're doing."

7. Why should the guardian or conservator be removed?

This is the key question for the court. The laws in many states say that a guardian or conservator will be removed if it is in the "best interests" of the ward. The assumption is that the guardian or conservator will follow the law and act primarily for the ward's benefit. In practice, courts tend to defer to the judgment of the guardian or conservator in deciding what the best interests of the ward are.

When a guardian or conservator is removed, it is often for financial misdealing, such as acting with a conflict-of-interest, or enriching him- or herself at the expense of the ward (apart from the normal fees a guardian or conservator is allowed to charge). A guardian or conservator can also be removed for exceeding his or her authority from the court.

8. How do I know what authority the guardian or conservator has?

What powers does the court order appointing the guardian or conservator actually grant? A guardian or conservator gets his or her authority to act from a court order. If the guardian or conservator is clearly acting outside the powers granted to him or her by the court order (for example, making decisions about what family members may be allowed to visit when he or she was appointed only to manage the ward's financial affairs), the court might be inclined to consider removing him or her.

Note that it may be difficult in some states to obtain copies of the court documents. If you do not have copies, and are not being given copies when you request them from the court, it may be wise to consult an attorney regarding your options.

9. What evidence do you have that justifies removal?

Proving the justification for removal is likely to be the most difficult part of the case. Again, consider the services of a good attorney at this stage. Although the rules of evidence might say that your testimony based on your personal observations of the ward and your interactions with him or her may be considered by the court, in practice, courts may be dismissive of the opinions of a person not trained in medicine or psychology. A conservator or guardian may also limit your interactions with a ward, or may supervise your visits with him or her, making it next to impossible for you to get an accurate picture of the ward's condition. He or she may also bar you from speaking with the ward's caregivers, thus depriving you of their observations.

If you are able to get access to any of the ward's medical or financial records, that will be the place to start compiling evidence. Guardians and conservators are also supposed to file regular accountings of the ward's finances, and those financial reports should be reviewed carefully. If you can, speak with the ward's caregivers and find out if they would be willing to testify on the record about their observations. They may be reluctant to speak on the record, so it may be necessary to subpoena the caregivers if there is an evidentiary hearing in court. If there is an evidentiary hearing

before the court, and if the ward is able to testify or allowed to testify, he or she may give evidence regarding his or her dissatisfaction with the guardian or conservator's actions. Your attorney can advise you on gathering evidence, and if needed, issuing subpoenas, and testifying.

10. How do I get copies of the ward's records?

In states that make guardianship or conservatorship proceedings confidential, an interested person (as defined by the laws of that state) may have access to records.

If there is no automatic right to access, a court is often granted the authority to give access "for good cause." This is another difficult hurdle. You will have to give the court specific reasons why you want to see the records, and you will have to convince the court that those reasons justify making an exception to the general rule of confidentiality of the records.

11. What is the procedure for removal of a guardian or conservator?

You will be required to file a petition or a motion for removal. While the procedures and requirements for such a petition vary from state-to-state, it is common for the records or documentation supporting your petition or motion to be filed along with your initial documents. You may be able to supplement that filing later, especially if there is new evidence that comes to light later.

The petition is filed with the same court that appointed the guardian or conservator initially. After the petition is filed, the court should schedule a hearing. In some states, courts may allow live in-person testimony. Even if such testimony is allowed, though, the court may have the discretion to refuse to allow it.

12. What documentation will I need to file?

Every state has different forms and different requirements, but typically, you will need to file the following documents with the court:

- Notice of the motion or petition, stating when and where the hearing on the petition will be held (this is obtained from the clerk of court when you file);
- Your motion or petition;
- The original order appointing a guardian or conservator;
- Any modifications to that original order;
- Relevant medical and financial records that support your request;
- Affidavits or statements of witnesses in support of your request; and
- A proposed order, showing the court exactly what relief you are seeking.

13. How will the court make its decision?

A court is generally supposed to base its decision on what is in the "best interests" of the ward (different states may articulate this standard differently). This decision will be based upon any evidence and records provided with the filed petition, as well as any testimony, if the court allows it. As noted above, courts tend to defer to the judgment of the guardian or conservator when deciding if actions were in the ward's "best interests," so any information you can provide that shows otherwise will help make your case that removal is necessary.

14. What happens if the guardian or conservator is removed?

The court should appoint a new, substitute guardian or conservator. This appointment should be a part of the removal order. You may want to nominate a new guardian or conservator in your petition to remove. Be sure to set out in detail the reasons why he or she would be better than the current guardian or conservator. No matter who is nominated, the final choice of guardian or conservator rests with the court (actually with the judge). Only the judge in the case has the power to issue an order naming or changing a guardian or conservator.

15. If the court does not grant my request, what can I do?

You have the right to appeal a decision that goes against you. If you appeal, you will not be allowed to present new evidence or new testimony. There is always one party who is unhappy with a court's decision - the appeals court can't overrule the lower court because you disagree with the decision. The questions for the appeals court relate to whether the court that decided the case was wrong – e.g. it made a mistake in the law it used, or improperly weighed your evidence proving the need to remove the guardian or conservator. Unless you can show such an error, the appeals courts will defer to the lower court's judgment in these matters.

Appealing is difficult and can get expensive. You will not be able to simply re-file a petition with a different court to try and get a different decision. For example, if you disagree with the decision of a state district court, you cannot later file the same complaint in federal court. Prior to filing an appeal, you can also request that the judge who decided the case reconsider his/her decision by filing a motion. You can then try to better explain the case or your evidence more clearly. Or you can find a case like yours where the court decided differently and show that to the judge in your motion (In states where the hearings and transcripts in guardianship cases are kept secret, it is extremely difficult to find such local precedents). If you provide nothing to convince the judge he/she was or may have been incorrect, they will deny your motion to reconsider, or grant your motion and then simply reach the same decision again.

If you are considering an appeal, or a motion to reconsider, it is particularly important that you consult an attorney as quickly as possible, even if you did not use one for the

original case. There are strict timelines for filing motions and appeals, and many other rules for submitting papers, briefs, and such. Although the courts will often try to give unrepresented parties a little latitude, the appellate courts are bound by many procedural rules that must be followed. Appeals are not all fruitful, and statistically speaking, the odds are already against you, if you go in without legal counsel, your odds go down further.

16. What will the guardian or conservator do if he or she is not removed?

A guardian or conservator is not supposed to do anything to retaliate against you for bringing a motion to have him or her removed, but that does not mean it will not happen. You should probably inform the court if the guardian or conservator is clearly retaliating.

17. How long does a request to remove a guardian or conservator take?

The time it takes to resolve a request to remove a guardian or conservator varies. However, the court will typically decide these matters relatively quickly (and here is meant "quickly" from a legal point of view), usually within a few months.

II. Important Terms Used in the Guardianship or Conservatorship Process

Assets: Property (both real and personal) owned in whole or in part that has or potentially has financial value. The term includes land, buildings, possessions, financial holdings, intellectual property, and cash.

Conservator: A person appointed by the court to oversee the affairs of a person who has been found unable to oversee those affairs by him- or herself (the "conservatee" or "protected person"). In some states, a conservator's duties are limited to overseeing a person's financial or business affairs, and other personal decisions are left to the conservatee. Other states have abolished the separate designation of a conservator.

Court Investigator: An employee of the court or the local welfare agency whose duties include meeting with a person who is the subject of a guardianship or conservatorship petition. The investigator is sometimes called the "court visitor."

Domicile: The county and/or state that is the primary residence of an individual.

Fiduciary: A fiduciary is a person who owes to another person the duties of confidence, good faith, trust, and candor. Examples of fiduciary relationships include an attorney's relationship to his or her client, or a doctor to a patient.

Guardian: A person appointed by the court to oversee the affairs of a person who has been found unable to oversee those affairs by him- or herself (the "Ward"). Guardians often have near total control over the ward's affairs, sometimes even to the point of

being allowed to make health care decisions for the ward without input from any other party.

Health Care Directive: Also known as a Living Will. A document signed by a person that sets out his or her wishes regarding health care in the event the person is unable to express them, him- or herself. A directive may designate a person to make healthcare decisions on behalf of the person. State laws vary on the obligation of medical personnel to follow the instructions in a directive.

Incapacitated: A person whose physical or mental condition is such that he or she is unable to make his or her own decisions in one or more areas of their life or affairs.

Interested Person A title for purposes of probate that usually includes:

- Heirs of a decedent;
- Devisees of a decedent;
- Children of a decedent;
- Spouse of a decedent;
- Creditors of a decedent;
- Beneficiaries;
- Anyone with priority for appointment as personal representative;
- Anyone else having a property right in or claim against a decedent's estate that may be affected by a probate proceeding, or the fiduciary representing someone who does, such as a guardian, conservator, or trustee; and
- Other individuals, as determined by the court.

Power of Attorney: A document that gives a person (the "attorney-in-fact") authority to take certain actions on behalf of another person. A "springing power of attorney" or "conditional power of attorney" is set up so that it takes effect only if the person granting the power becomes incapacitated or incompetent. Some commercial guardianship firms give lectures at senior centers and other venues frequented by elders and encourage them to name the firm to have a springing power of attorney in case of a later need. This makes it easier for the court to grant the same firm legal guardianship later; it convinces judges that the firm is preferred by the elder to anyone else to serve in this capacity.

Probate Court: The court that handles guardianship and conservatorship matters.

Protected Person: In some states, "protected person" is the term used for the person for whom a conservator has been appointed. See also, Ward.

Ward: A person for whom a guardian or conservator has been appointed. The rights a ward retains after a guardian has been appointed vary from state-to-state and sometimes from case to case.

III. Hiring an Attorney

1. Am I required to get an attorney to represent me?

See above. Hiring an attorney is not strictly required, but you should not rule it out until you are certain that you are capable of convincing the court to take the action or issue the order you think is warranted – whether that is removing or appointing a guardian, reversing or upholding decisions made by a guardian, etc. The more complicated the matter, or the more important the consequences are, the more you should consider consulting with and engaging an attorney.

2. How much will it cost me for an attorney?

The fee charged by an attorney is a matter for negotiation with the individual attorney. While you may want to ask others in your community about their experiences, attorneys are legally barred from agreeing with other attorneys to set a standard fee. There are three ways attorneys can be paid. The three ways are:

- Hourly;
- Flat or fixed fee-based; and
- Contingency.

An "hourly" arrangement is when the attorney is paid a certain amount per hour that he or she works on a matter. Most attorneys will give an estimate of the total number of hours that will be required. Keep in mind that this is only an estimate. The actual number of hours depends on a number of things, including how complex the matter is. Since it is difficult to know in advance exactly how many hours will be needed to resolve a matter, it is important to have an honest discussion with the attorney of what options are available and what a reasonable estimate of hours will be, based on each option. Additionally, attorneys that are hired on an hourly basis will require an upfront amount of payment to get the process started. This upfront amount is referred to as a "retainer". In most states, attorneys are required to deposit the retainer in a special account that can only be accessed after the work has started.

A "flat or fixed fee-based arrangement" is where the attorney charges you a total fee for the completion of all the work that is to be done. Generally, this will be the total cost that you will have to pay. There may be some additional fees, but an experienced attorney will be able to provide the client with a clear breakdown of how the total fee is derived, and what court-related costs are or are not included. Some attorneys who work on this basis will require the client to pay the full amount at the beginning, while some will start work on the case after a "retainer" or "deposit" is paid upfront.

A "contingency fee" is when the attorney is not guaranteed any payment to begin working on the matter, but receives a percentage of the monetary award at the completion of the case. The client is still liable for court costs, such as filing fees. It is important to know that doing probate work on a contingency basis is prohibited in many states.

It is crucial to know which arrangement you are entering into before the process begins. Most attorneys will want to make sure that it is completely clear which services will be needed, how they will be paid, and what is expected from the attorney and the client. This information should be provided to the client in a written engagement agreement specifying all of the terms of the representation prior to starting any legal work.

3. What should I ask the attorney?

Hiring an attorney can be a complicated process. The most important thing is to find an attorney that is experienced in the type of matter that you have. Most reputable attorneys will tell you what types of legal services they provide. It is important to find an attorney with probate court experience. While the majority of cases settle out of court, it is important that the attorney address expectations about the likelihood of going to court and the filing of paperwork. If the attorney you hire does not agree to go to court--should that become necessary--you will need to have an expert litigator as a back-up, someone who is willing to argue the case in court, should negotiations alone not result in a satisfactory resolution of your issues.

You should also discuss in advance what your role will be. Most attorneys will be able to tell you about their expectations for your participation. In addition, most attorneys will be willing to give you a preferred method of communication and tell you how frequently they will be updating you on the case.

IV. Overview of Guardianship or Conservatorship Process

Before a guardian or conservator is appointed, certain steps must be taken. While these steps may vary from state-to-state, the following are the most common steps in the order they are usually taken.

Step 1. Evaluate the physical and psychological condition of the person

The first step in appointing a guardian or conservator is to evaluate the condition of the person for whom the guardian or conservator will be appointed. A guardian or conservator will be appointed only if the court determines that a person is incapacitated or incapable of making his or her own decisions due to a physical or mental condition (a person who makes bad decisions, or decisions that may not make sense to others, is not necessarily incapacitated). The evaluation should look at the person's current behavior, social skills, mental and physical condition. It is also important to get an accurate description of the nature and type of any physical or

psychological medical conditions and explain how the condition(s) affect the person's decision-making ability. The person's physician or other health care provider should be asked for his or her opinion about the need for guardianship.

Step 2. The Petition

The Petition is the formal request to the court that a conservator or guardian be appointed. The requirements for filing a Petition vary, but a Petition usually includes a statement that a guardian or conservator is needed for a specified reason. It is common that someone specific will be nominated in the Petition as the guardian or conservator.

The Petition is filed with the Probate Court, which will set a date for the hearing. The person filing the Petition will serve it on the person for whom the guardian or conservator will be appointed and send copies to other interested parties (all of whom will usually be named in the Petition).

Step 3. The Investigation

An investigator for the Probate Court (sometimes referred to as the "court visitor") will meet with the person and make an independent assessment of the person and the need for a guardian or conservator. The investigator's report is submitted to the court and provided to the person filing the Petition.

The court may appoint an attorney (generally called the "guardian ad litem") to represent the person during the process. He or she will also meet with the person.

Some states also require an examination of the projected ward that must be conducted by a specialist (such as a psychologist or psychiatrist or other professional) designated by the court.

Step 4. The Hearing

A hearing will be held on the need to appoint a guardian or conservator. There may be testimony from witnesses who have had a chance to observe and interact with the person. However, in many cases, there is no testimony and the court makes its decision solely on the basis of documents, records, and affidavits submitted.

Step 5. The Appointment

If the court determines that it is in the person's best interests to appoint a guardian or conservator, an order (sometimes called "letters") is issued naming the guardian or conservator and specifying what powers he or she has.

In many states, a guardian or conservator may be required to post a bond to ensure the performance of his or her duties. The cost of a bond is usually paid for by the ward's estate.

Step 6. Reporting

After the guardian or conservator is appointed, he or she is obligated to provide periodic reports regarding the ward or conservatee's financial affairs. The court may also order updates on the physical and emotional state of the ward or conservatee. In some states, a court investigator or guardian ad litem or special master may be sent to visit the ward or conservatee, to make independent assessments.