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GUARDIANSHIPS AND CONSERVATORSHIPS: Protecting Adults and Their Assets

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GUARDIANSHIPS AND CONSERVATORSHIPS: Understanding the Options to Protect Adults and Their Assets

By Chiara Mattieson

Michigan's probate courts appoint substitute decision-makers for adults without developmental disabilities[1] in Michigan in two types of proceedings: adult guardianships and adult conservatorships. Guardians and/or conservators are appointed to protect those adults when it is determined that their decision-making ability is impaired to the extent that their welfare and safety are at risk. When guardianships or conservatorships are imposed, the protected individuals' fundamental rights of self-determination are significantly curtailed for the sake of these individuals' own well-being. Anyone considering seeking appointment of a guardian or conservator for another person should understand the gravity of this relief and the factors considered in determining whether to impose it *before* they file to start the proceeding. The purpose of this chart is to help lawyers and families considering or involved in these proceedings gain that understanding.

	GUARDIANS	CONSERVATORS
What decisions do they make?	Personal decisions, like: - Medical treatment. - Residence.	Decisions regarding management of finances or assets, like: - Budgeting. - Paying bills. - Buying/selling/renting real property. - Managing investments. - Asserting or defending legal claims.
What findings must the court make in order to appoint them?	- The person is an incapacitated individual*; AND - Appointing a guardian is *necessary* as a means of providing continuing care and supervision of the proposed ward. *"Incapacitated individual" means an individual who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, not including minority, to the extent of lacking sufficient understanding or capacity to make or communicate informed decisions. MCL 700.1105(a). - Old age or physical disabilities alone are **not** sufficient. - There must be evidence that the individual is, in fact, unable to make informed decisions or to manage his or her affairs effectively. (Medical experts are often used.)	- The person is unable to manage property and business affairs effectively for reasons *such as* mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance; AND - Either: • The person has property that will be wasted or dissipated unless proper management is provided, or • Money is needed for the person's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money. MCL 700.5401(3). Notes: - No finding of incapacity is required. - Inability to manage property and business affairs effectively can be for reasons OTHER than those listed. An increasingly common example: serial susceptibility to scams. - A question the court must consider: Is this impaired decision-making ability, or is this person just eccentric, or does this person have unconventional priorities or motivations?
Are there less restrictive options?	- Limited guardianships: • Limited in duration. • Limited in scope. - Patient advocate designations. - Powers of attorney.	- Trusts. - Financial powers of attorney. - Protective orders (used, for example, when someone needs a legal representative to manage a particular asset or transaction that is more complicated, but not the rest of someone's assets or financial affairs).

	GUARDIANS	CONSERVATORS
Is there an effect on legal capacity?	Yes. The person subject to a guardianship loses the right to make all personal decisions that are within the scope of the guardianship. Note that the scope can vary — it can be limited.	No. A conservatorship transfers title to the individual's assets to the conservator as a fiduciary for the benefit of the individual. However, if a guardian is also appointed, the limitations on rights described to the left will result.
Practical/ self-help options:	Sometimes, something short of formal court supervision will keep a person safe and adequately cared for: - Restrict/revoke driving privileges (request an examination via a *Request for Driver Evaluation* from the secretary of state's office): • Must state facts that would give the secretary of state reason to believe that the individual has a mental or physical condition that impairs their ability to drive safely. • Medical statement: not absolutely necessary, but very, very helpful. • Name of the person who requested the examination will NOT be disclosed. - Use of community resources: • Adult day care. • Meal delivery. • In-home care/caregivers.	Likewise, in some situations, some self-help steps can be taken to help preserve and manage assets: - Family/friends assist with paying bills. - Addition of a trusted friend or family member to a bank account to monitor and manage funds.[2]

TAKEAWAYS

Guardianship and conservatorship proceedings can cause considerable strain in families and even cause rifts in relationships, *especially* if the person for whom guardianship or conservatorship is sought does not agree that they need this protection and do not want it. That does not necessarily mean these proceedings should not be commenced by loving family members even if there is protest. When necessary and appropriate, guardianships and conservatorships provide valuable protections for vulnerable people who are in danger of losing assets or even their lives otherwise. Understanding when each can and should be used can ensure the processes are effective and more helpful than harmful to those in need of protection and the people interested in their welfare.

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Footnotes:

1. Decision-makers for adults with developmental disabilities are appointed pursuant to Chapter 6 of the Mental Health Code.
2. Unfortunately, use of this device can sometimes lead to theft and misuse of funds or post-death claims from the person added to the account that they are entitled to all of the assets in the account, even if that does not correspond to the rest of the family's information about a decedent's wishes. Much caution should be used with this, and ideally it should only be used if the financial institution provides some means to document that the friend or family member added to the account to help the original account owner is added only for that purpose.