# GUARDIANS AND CONSERVATORS UNDER MISSOURI LAW

THE FOLLOWING INFORMATION IS PROVIDED
COURTESY OF THE MISSOURI BAR ASSOCIATION:

## What is a Guardian?

A guardian is a person who has been appointed by a court (usually the probate division of the circuit court) to have the care and custody of a minor or of an adult person who has been legally determined to be **incapacitated.**

## What is a Conservator?

A conservator is a person or a corporation, such as a bank or trust company, appointed by a court (again, usually the probate division of the circuit court) to manage the property of a minor or of an adult person who has been legally determined to be **disabled.**

## Who May be Appointed Guardian and Conservator?

The same person is usually appointed both guardian and conservator, although it is possible for different persons to be appointed with respect to the same minor or incapacitated and disabled adult. Parents have the first priority for appointment as conservators for the estates of their minor children, although such appointment is necessary only if the minor will receive property from some source other than his or her parents, such as the settlement of a personal injury action, an inheritance from a decedent's estate or some other source of property or income. Parents are the natural guardians for their children and need not be appointed as such by a court. However, if a minor has no parents, then the court may consider a guardian and conservator chosen by the minor if the minor is over the age of 14 years. The court may also consider a person named in the will of the last parent to die. In any event, the person appointed by the court must be suitable and qualified. If the minor is unable to choose a guardian and conservator and if the last surviving parent failed to designate a guardian and conservator in his or her will, then the court will appoint the most suitable person, usually an adult brother or sister or other close adult relative who is willing to serve.

An incapacitated or disabled person may designate his or her own guardian or conservator if, at the time of the hearing, the person is able to communicate a reasonable choice to the court. In addition, any competent adult person may designate a suitable person to serve as guardian or a suitable person or eligible corporation to serve as conservator, if done in writing and witnessed by at least two witnesses within five years before the date of the hearing. (Frequently such designations are made in Durable Powers of Attorney, which are discussed elsewhere is this publication.) if no suitable person has been nominated by the incapacitated or disabled person, the court will consider appointing, in order: the spouse, parents, adult children, adult brothers and sisters and other close adult relatives. If there are no relatives willing or able to serve, the court may appoint any suitable person (such as a close friend) or, if no one steps forward, the public administrator. A person need not be a resident of the state of Missouri to qualify for appointment as a guardian or conservator. However, the court may consider the fact of non-residency when determining who may be suitable for appointment as a guardian or conservator.

**What Does it Mean to be Incapacitated or Disabled?**

As defined by Missouri law, "an incapacitated person is one who is unable by reason of any physical or mental condition to receive and evaluate information or to communicate decisions to such an extent that he [or she] lacks capacity to meet essential requirements for food, clothing, shelter, safety or other care such that serious physical injury, illness, or disease is likely to occur." Similarly, a disabled person is one who is "unable by reason of any physical or mental condition to receive and evaluate information or to communicate decisions to such an extent that the person lacks ability to manage his [or her] financial resources." Under certain circumstances, a conservator may be appointed by the court for a person who has disappeared or is detained against his or her will.

**What is the Legal Effect of a Judicial Determination of Incapacity or Disability?**

The answer depends upon whether the court has made a finding of **total** disability and incapacity or only **partial** disability and incapacity. If the court finds that a person is only partially disabled and partially incapacitated, the person is still presumed competent and loses only those rights specified in the order. A person who has disappeared or is being detained does not lose any rights. On the other hand, if the court finds a person totally incapacitated or totally disabled, or both, the person is presumed to be incompetent for all legal purposes. A person who has been determined by a court to be disabled is referred to as "protectee" and a person who has been determined by a court to be incapacitated is referred to as a "ward."

**How Are Guardianship and Conservatorship Proceedings Commenced?**

Proceedings are commenced when a "petitioner" files an application for the appointment of a guardian and/or conservator in the probate division of the circuit court in the county in which the minor or alleged incapacitated or disabled person (the "respondent") resides. The petitioner and the respondent must be represented by attorneys. After application is filed, the court will set a date for a hearing. In the case of a minor, notice of the application must be served before the hearing: upon the minor (if over the age of 14 years); his or her parents and spouse, if any; anyone having care and custody of the minor; and any agency charged with supervision, control or custody. In the case of an alleged incapacitated or disabled person, notice of the application must be served: upon the respondent; his or her spouse, parents, children or other close relative over the age of 18 years; any person acting in a representative capacity with respect to any of the respondent's financial resources; and any person having care and custody of the respondent.

**What Are the Duties of a Guardian and a Conservator?**

A guardian must always act in the best interest of the ward. The guardian of a minor is charged with responsibility for the minor's custody and control, and must act and make decisions relative to the minor's education, support and maintenance. A guardian of an incapacitated person must act and make decisions relative to the ward's care, treatment, shelter, education, support and maintenance. A guardian must assure that the ward resides in the least restrictive setting reasonably available and receives all medical care which he or she may need. A guardian may give necessary legal consent for the ward's treatment. However, a guardian may not admit

the ward to a mental health facility for more that 30 days without a court order. A guardian must report to the court, at least annually, on the ward's physical condition.

A conservator, under the supervision of the court, is responsible for the protection and management of the protectee's financial estate. The conservator must properly and prudently invest the protectee's assets, apply such assets for the protectee's care and maintenance, and account for all funds received and expended on behalf of the protectee. Because of the strict accounting requirements imposed by law and the necessity of obtaining a court order authorizing most expenditures from the estate, the conservator must work closely with an attorney in order to administer the protectee's estate properly, no matter how large or small it may be.

**Is the Conservator or Guardian Personally Liable for the Debts of the Protectee or Ward?**

No, as long as the conservator indicates that he or she is acting on behalf of the protectee or ward in a representative capacity. In addition, neither the conservator nor the guardian assumes personal responsibility for the protectee's or ward's debts which may have been incurred by the protectee or ward prior to the court's determinations that he or she is an incapacitated or disabled person. Of course, unauthorized use of the protectee's estate or misappropriation of the protectee's property by either the conservator or guardian will likely require revocation of legal authority as conservator or guardian by the court and may result in personal liability for any harm or loss suffered by the estate.

**How are Guardianship and Conservatorship Terminated?**

Guardianship and conservatorship for a minor terminate when the minor reaches 18 years of age. If there was a Conservatorship estate for the minor, the conservator prepares and files with the court a final accounting of the administration of the estate. Upon the court's approval of the final accounting, the conservator transfers the estate to the former protectee and, upon filing a final receipt with the court, the conservator and guardian are discharged by the court from any further responsibility.

On the other hand, guardianship and conservatorship for an incapacitated and disabled person terminate only when the protectee is found to be competent by the court or upon the death of the protectee. When either of these two events occur, the conservator prepares a final accounting for the court and the conservator and guardian are discharged in much the same manner as with the termination of a minor's estate. In some cases when the estate of the protectee has been completely exhausted, the conservator may be discharged by the court upon filing a final accounting but the duties of the guardian will continue until such time as the ward is found to be competent by the court or dies.