

Understanding the Role of a Fiduciary

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Caring Transitions supports many family members who are suddenly thrust into the role of “fiduciary,” one who holds something in trust for another. Family members are encouraged to seek legal and financial advisors to help them navigate new responsibilities as guardian or conservator, and the following article may provide some general insight and understanding of the role.

In the past decade, the number of adults suffering from cognitive limitations and mental/emotional illness has increased by more than 10 percent, for a total of 16.4 million Americans. When this happens, the courts legally appoint *fiduciaries* to help these people manage their personal assets and to serve as guardians, conservators and personal representatives of estates. They also serve by agreement as trustees, representative payees or as agents under powers of attorney.

The word “fiduciary” is a derivative from the Latin word “fides” meaning faith, honest, or honor.

Under some circumstances, it may be necessary to petition the court to appoint a legal guardian for persons who have a physical or mental problem that prevents them from taking care of their own basic needs or may pose a danger to themselves or others. In other situations, it may be necessary for a court to appoint an emergency guardian who can act on a person’s behalf during a crisis following an accident or until the person regains their ability to make decisions. A guardianship, or conservatorship, however, is a deprivation of a person’s right to make his or her own decisions and should be considered only after other methods of protecting a person or their assets fail.

Incapacity and Assignment

A person is determined by the court to be incapacitated when he or she lacks sufficient understanding or “capacity” to make or communicate responsible decisions concerning his or her daily living needs.

Anyone who believes a person may need help with daily living activities and/or finances can initiate the process to appoint a fiduciary as a “conservator” or guardian. The concerned person may contact a professional fiduciary to investigate the situation. If the fiduciary identifies sufficient need, he or she will retain an attorney to petition the probate court for appointment as conservator.

Typically, the alleged incapacitated person, who maybe called a “conservatee” or “ward,” is represented by an attorney as the court investigates and rules on the need for guardianship or conservatorship. A court investigator is also appointed. All issues and information are brought before a probate court judge who decides if the person is incapacitated or in need of protection. If so, the judge appoints a conservator. The appointed fiduciary is accountable to the court for his or her work. The fiduciary must report to the court and receive the court’s approval in carrying out his or her responsibilities.

Fiduciary Responsibilities

1. **The fiduciary under Power of Attorney.** For financial matters, the fiduciary conducts personal and financial business in accordance to the principal's written instructions. For health care, the fiduciary acts as attorney-in-fact to make healthcare decisions, including placement, medical treatment and final burial arrangements. In recent years, [Advance Health Care Directive](#) provides this guidance.

Often, this type of arrangement is preferred by the principal (the ill, disabled or elderly adult), as it can be reassuring for them to know they have selected their own agent. They also have the ability to revoke the Power of Attorney and the option to make the Power of Attorney *durable*, meaning the document can stay in effect after his or her incapacity. This Durable Power of Attorney may be critical, as an ordinary Power of Attorney becomes useless when the principal becomes mentally incapacitated. The principal can also decide when the durable power of attorney goes into effect, again maintaining some control over events both before and after incapacity.

2. **The fiduciary as personal representative** is an individual appointed by the court to administer the estate of a person who has died. A personal representative will either act as an Executor if named in the will, or as an Administrator if not named in the will, or if there is no will. The personal representative inventories and safeguards assets, collects income, pays obligations, identifies and notifies heirs and beneficiaries and distributes assets.
3. **The fiduciary as representative payee** is a person designated by the Social Security Administration or other retirement plans to receive the income and pay the expenses of an incapacitated individual. Again, the principal may make this choice before incapacity by filing the appropriate forms with the Social Security Administration.
4. **The fiduciary as trustee** has the responsibility of carrying out the terms of the trust as set forth in a trust document. A trust can be created by the language found in a will, a *testament trust*, or a document created during life, a *living trust*. In cases where a trustee cannot carry out his or her duties because of incapacity or death, and if they have not named a successor, the court assumes the responsibility of appointing a trustee.

Trustee duties can include funding the trust with appropriate assets, safeguarding assets, investing the trust assets, reporting to beneficiaries, filing income tax returns for the trust and making distributions in accordance with the trust terms.

5. **The fiduciary as conservator** (or guardian) is a legal tool to provide management for the financial and/or personal affairs of individuals deemed by the court to be physically or mentally incapacitated. A *conservatee* (or "ward") is a person who is the subject of a conservatorship. The conservator can be a parent, spouse, child, other relative, friend, or a professional conservator. There are different forms of Conservatorships.
 - **A Conservatorship of the Estate** is responsible for the prudent use and protection of the conservatee's assets. The conservator is responsible for inventorying, managing all assets and benefits belonging to the conservatee.
 - **A Conservatorship of the Person** is for a person who needs assistance due to aging, illness, or an accident. The conservator of the person typically arranges for the conservatee's care and protection, decides where the conservatee will live, and makes decisions about personal matters such as food, clothing, recreation, transportation and medical care.
 - **Limited Conservatorship** is for a person with a developmental disability is called a limited conservatorship. With a limited conservatorship, the conservator has powers only over certain aspects of the conservatee's life that are specifically identified by the court. The conservatee retains all other legal and civil rights.

Emergency conservatorships may be filed with the courts when an accident takes place or in situations where it is suddenly discovered that an individual poses a danger to themselves or others due to incapacity, such as an Alzheimer's patient who forgets how to eat.

Private Conservators

A conservator or guardian of the estate has certain duties and responsibilities. If a family member, the conservator often loses their ability to act as a "normal" child or relative and must make tough decisions that may be in conflict with the wishes of other family members. In times of crisis, the added appointment of family-member conservator may make things a bit more stressful.

In the first few days of conservatorship, the conservator must gather and secure all the assets of the conservatee, or *ward*, and is responsible to purchase a surety bond to protect the assets. This protection is not only for the ward, but for "interested parties," which may include spouse, children, other family members or those with a financial claim to the estate.

Once a year, the guardian must also report on the condition of the conservatee, or ward, to the courts, as well as provide a complete and accurate accounting of the ward's estate. A fiduciary may need to apply for government benefits for the ward, such as Social Security, Veterans benefits or procure health care benefits, such as Medicare or Medicaid.

If the ward's assets and income are sufficient to pay existing debts and to provide for his or her current needs, a fiduciary may invest or reinvest any excess assets or income. They may hire an investment counselor or financial planner to assist; however, reasonable care, skill, and caution must be used in selecting the counselor or planner. Hiring an investment advisor does not relieve the fiduciary of the duty to oversee the investments, and they must continue to manage the assets to the benefit the conservatee. They may not profit from the purchase, sale or transfer of any of the ward's property and must avoid all conflict of interest including comingling of funds, buying or selling anything to the ward or investing in anything that may financially benefit themselves.

The ward, the fiduciary, or another interested person can petition to modify or end the conservatorship or guardianship. A petition to modify may involve a change in the powers of the fiduciary or removal of the fiduciary and replacing with another person or agency. A petition to terminate a conservatorship or guardianship may be filed for the reason that the ward can now handle his or her affairs.

Professional Fiduciaries

Many times, a Professional Fiduciary is appointed to avoid burdening family members. Professional fiduciaries are people who have set up small businesses serving as guardians, conservators and trustees in cases where no family member has been assigned that role. The standards governing Professional Fiduciaries are managed at the state level and while many professionals maintain high ethical standards, lack of oversight creates opportunity for those who wish to take advantage of their clients. Many articles have been published that tell a sad tale of estates lost by family members who did not fully understand how to choose a fiduciary. The North American Professional Insurance Liability Agency states there are now more claims against fiduciaries today than sexual harassment claims.

Most states have professional associations that can help you understand your state standards and help you locate a responsible individual. In general, you want to hire someone who is known to act in good faith, is proactive in any disclosure of potential conflicts of interest and does not accept compensation that is contingent upon the sale or purchase of any financial product. Professional fee schedules are similar to that of attorneys, and it is important to remember that once a professional is assigned by the courts, it is often very difficult to remove the person from the role of conservator. Therefore, choose wisely.

Avoiding the Issues

It is possible to avoid the necessity of a guardianship or conservatorship with proper estate planning. A good estate plan will include a medical power of attorney which will enable a trusted individual to make healthcare decisions in the event of incapacity, and a general durable power of attorney to permit a trusted individual to manage personal affairs. To a considerable extent, those documents can specify how a person wishes to live, and how they wish to be treated, in the event of disability. In most cases, when these documents have been executed in accord with the laws of state, it will not be necessary to seek the appointment of a guardian or conservator should something happen.

This article is not intended to provide legal advice. Find additional information through your state or county court's administrative offices, a local Fiduciary/Guardian/Conservator Association, the [National Association of Personal Financial Advisors \(NAPFA\) Consumer Education Foundation](#) or the [National Academy of Elder Law Attorneys \(NAELA\)](#).

Source: U.S. Census 2010

About Caring Transitions

As life changes, it may become necessary to leave a familiar home and part with personal belongings in order to downsize and relocate to a smaller home or retirement community. At Caring Transitions, we help our clients understand the process, evaluate their options and make informed decisions that suit their best interests. We are committed to making each client's experience positive by minimizing stress and maximizing results.

Visit us online at www.CaringTransitions.com.

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