

The personal right to make decisions about living one's own life is taken for granted by most adults. Yet, inevitably, mental illness, mental retardation, physical illness or disability may render some adults incapacitated during the course of their lives and thereby prevent them from making some or all of the necessary decisions concerning life or property. When this occurs, guardianships and conservatorships are one means of substituting the judgment of other people for the decisions of incapacitated individuals.

### **Other Forms Of Substituted Decision-**

**Making:** Before guardianship/conservatorship is sought for an adult who is incapacitated, a number of less intrusive means of substituted decision-making should be examined. Some forms of substituted decision-making allow an individual to plan for his or her incapacity. These fall into several categories:

- **General power of attorney** allows a competent individual to grant another person (the agent) the authority to make decisions in specified areas, generally financial.
- **Advanced Directive for Health Care** grants authority for health care and end-of-life decisions.
- A **living trust** is a legal plan for placing property with a trustee for the benefit of another person, a beneficiary.
- **Joint property** allows two or more persons to own property together.

There are other means to respond to an existing incompetency:

- A **representative payeeship** exists where the Veterans Administration or Social Security Administration appoints someone to handle benefit checks for a person determined incapable of doing so.

- **Money management** is an informal device wherein third persons act in a paid professional capacity to assist individuals in managing their financial affairs.

Nevertheless, sometimes none of the above alternatives is available and the only means of substituted decision-making for an incapacitated person is guardianship or conservatorship.

### **Types of Court-Established Substituted Decision Making**

The Probate Court can create two types of substituted decision making for incapacitated adults. These are guardianships and conservatorships.

A guardianship generally removes from the ward the powers to contract marriage, to make other contracts, to consent to medical treatment, to establish a residence, to bring or defend an action in court, to vote and to execute a Will.

A conservatorship generally removes from the ward the powers to bring or defend actions in court, to make contracts, to buy and sell property, and to enter into business and commercial transactions and to manage their own funds. Often, a court appoints one person both guardian and conservator.

### **Who Can Be A Guardian or Conservator?:**

Any person who is not a minor, is not incapacitated or does not have a substantial conflict of interest can be a guardian/conservator. The law lists preferences starting with the person chosen by the ward prior to their incapacity. Yet a court may pass over someone with a preference, and if nobody is available, may appoint Adult Protective Services.

**Procedure For Appointment Of A Guardian and Conservator:** Any interested person may file a petition, a blank copy of which is available from the county probate court. The court will advise the amount of the filing costs. Usually, the petition must be filed either with two petitioners or with one petitioner and a report of incapacity from a physician or psychologist who has examined the proposed ward within fifteen days of filing. If a further evaluation report presents probable cause of incapacity, the judge will then schedule a hearing to determine if a guardianship and conservatorship will be created and who should act in those roles. While the petitioner is not required to have an attorney assist them with the process, their assistance can be invaluable for this complicated process.

After the petition is filed, the court will appoint an attorney to represent the proposed ward's interest and will order an independent evaluation of the proposed ward. A hearing will be held before a probate judge to determine whether a guardianship and conservatorship will be established, who will fill those roles and what authority will be removed from the ward.

### **Duties And Powers Of The Guardian and Conservator:**

Once appointed the guardian has the powers reasonably necessary to provide adequately for the support, care, education and well-being of the ward. A guardian must make arrangements for such provision from the ward's funds, even to the extent of participation in legal proceedings. Georgia law requires that a ward receive care in the least restrictive setting. Subject to certain restrictions, the guardian may give medical consent on behalf of the ward and, generally, may establish a ward's abode.

A guardian **must** respect and maintain the individual rights and dignity of the ward at all times. The guardian shall be reasonably accessible to the ward and shall maintain regular communication with the ward. A status report describing the ward's general condition, living situation, progress, development and needs as well as recommendations for change must be filed sixty days after appointment and thereafter annually on the anniversary of appointment.

Like the guardian, a conservator **must** respect and maintain the individual rights and dignity of the ward at all times and should consult with the ward about financial decisions when appropriate. A conservator may sell, lease, encumber or exchange property of the ward for payment of the ward's debts, for support and education of the ward or dependents of the ward, or for reinvestment upon order of the court. The conservator must file both an annual report and inventory with the court. The conservator is entitled to commissions for what he or she has received and paid out.

Both guardians and conservators must file a petition in court to obtain permission to perform any act not specifically authorized.

**Rights Of The Ward:** Georgia recognizes that making personal decisions is the most basic of rights. By law, no adult person is presumed to be incapacitated and, out of respect for a person's dignity, the right to make any decision cannot be casually removed. Hence, a ward **retains those rights not removed by statute** as well as those rights the court specifically exempts because it finds their removal unnecessary.

In all cases, a ward cannot be denied any civil, political, personal or property right without due process of law. The ward has the right to communicate freely and privately with others. His property must be used for his support,

care, education and well-being. The ward also has a right to petition to have the guardianship and conservatorship modified or terminated or to claim that a right or privilege is unjustly denied.

**Summary:** If less intrusive means are unavailable, a guardianship and conservatorship can be an appropriate device to provide for substituted decision-making on behalf of an incapacitated adult. Georgia law recognizes the dignity of all human persons by authorizing the removal of decision-making abilities only to the extent necessitated by the limitations of the ward. Accordingly, guardians and conservators have special duties to the ward and to the court. For his or her part, the ward retains all rights not removed and can petition the court to have his or her right to make decisions restored. When the law and its spirit are followed, guardianships and conservatorships can be a relationship which can help fulfill and educate the ward and the guardian as well.



This informational brochure is not intended to be used as legal advice. Please consult with your attorney.

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# GUARDIANSHIP AND CONSERVATORSHIP OF ADULTS IN GEORGIA

## Rights and Duties

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*Presented as a public service by:*

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John Cline, Assoc. Judge**

**Cherokee County Probate Court  
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Cherokee County Justice Center  
Canton, Georgia 30114**

**Take exit 19 off of I-575; then Hwy. 20  
West into Canton**

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