

GUARDIANSHIP

This page explains what a guardianship and conservatorship is, when it is appropriate, and the legal relationships and duties it creates. Often times in our society the natural parents of children are unable or unwilling to care for their own children. It also covers a situation when there is an adult (called a protected person) who does not have the mental and/or physical ability to care for their own personal affairs or to manage their estates and financial affairs. In such situations a guardianship and/or conservatorship might be in order.

WHAT IS A GUARDIANSHIP

Under South Dakota law, a guardianship is created when someone, called the guardian, is appointed by the court to be responsible for the personal affairs of a minor or protected person. Personal affairs of another would include medical or school decisions. A conservatorship is created when someone, called the conservator, is appointed by the court to be responsible for managing the estate and financial affairs of a minor or protected person. A guardian and conservator can be the same person and can be appointed by filing one petition in court.

Under tribal law, a guardian is appointed by the court to be responsible for both the personal affairs and for managing the estate and financial affairs of a minor or a protected person.

HOW DO I FILE FOR GUARDIANSHIP AND/OR CONSERVATORSHIP

A guardianship or conservatorship is started by filing in court a petition in the county where the minor or protected person either resides or is present. Other paperwork, such as financial statements and reports of the condition of the protected person or minor child are also required to be filed. A petition can be filed by the minor child, the protected person, an interested relative, anyone nominated by a minor child's parent's will, or any public agency having the care or custody of the minor child or protected person.

WHO CAN BE APPOINTED GUARDIAN OR CONSERVATOR

Any adult individual who is an interested relative, anyone nominated by the will of a minor child's deceased parent, public agency or nonprofit corporation responsible for the care and custody of a minor child or a protected person can be appointed as the guardian, conservator, or both of a minor child or a protected person if its in their best interest for the court to do so.

The court will order a hearing to determine whether a guardian or conservator will be appointed. All interested parties must be given notice. This would include the minor child if older than 10, the protected person, the next of kin of the minor child or protected person and any facility having the custody and care of the minor child or protected person. In determining if a guardian or conservator or both will be appointed the court will consider the suitability of the proposed guardian or conservator, the minor's current or proposed living arrangements, the extent the minor has money or property requiring management or protection, the availability of less restrictive alternatives which is necessary to protect the minor from neglect, exploitation or abuse and the need for habilitation or therapeutic treatment.

A protected person has a right to a jury trial. In that case the jury will determine if a guardian or conservator or both of a protected person shall be appointed.

If the court does appoint a guardian or conservator of a minor child or protected person, the appointment does not take effect until the court issues letters of guardianship or conservatorship, the guardian or conservator has filed an acceptance of office and posted a bond unless the bond is waived by the court.

POWERS AND RESPONSIBILITIES OF GUARDIANS AND CONSERVATORS

The guardians of a minor is responsible for making decisions regarding the minor's support, care, health, education and determine custody if allowed in the court order and shall act in the minor's best interest.

The guardian of a protected person is responsible for making decisions regarding the protected person's support, care, health, rehabilitation, therapeutic treatment and place of residence. The protected person is to participate in these decisions to the extent they capable. The guardian may required to file an annual report with the court regarding these issues.

The conservator of a minor must apply the income and principal of the minor's estate as needed for the minor's support, care, health and education without prior court authorization.

The conservator of a protected person must apply the income and principal of the protected persons estate for the protected person's support, care, health and if applicable, habilitation and therapeutic needs without prior court authorization. The protected person is to participate in these decisions to extent they are capable.

Within ninety (90) days following appointment, a conservator is required to file an inventory of the real and personal property of the minor or protected person with the court. They also required to file an annual accounting listing the estate, any money acquired or expended on behalf of the minor's or protected person's estate. A conservator has a fiduciary duty to manage the estate in the best interest of the minor or protected person. Some transactions must get prior approval of the court.

A guardian or conservator or both can be removed as such for a variety of reasons including mismanagement, fraud, etc.