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# SO NOW YOU ARE A GUARDIAN

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If you are reading this pamphlet, you are likely either considering accepting appointment as a Guardian or you have been appointed by a Court after an application and hearing. Guardians have many responsibilities, and in addition to carrying out any specific Court orders, are responsible for the Ward's general welfare and care. Guardians are usually given the authority over where the Ward resides, their educational and/or vocational development, and medical decisions after the Court finds that, due to mental incapacity, the Ward is unable to do so for his or her self.

Under Colorado law, a Guardian is deemed to be a fiduciary, and as such, held to a very high standard of care. A Guardian is accountable to the Ward, other Interested Persons, and the Court, and is expected to act prudently and in the best interests of the Ward at all times. A Guardianship may involve a variety of duties, situations, and parties, and, unless otherwise instructed by the Court, annually reports to the Court and all Interested Persons.

This pamphlet is intended to give general information to Guardians and individuals considering accepting appointment as a Guardian, and is not intended to be legal advice specific to your situation. If you have questions beyond the scope of this pamphlet, you are strongly encouraged to consult with an attorney.

### **Guardianship v. Conservatorship**

Generally, Guardianships and Conservatorships are both legal proceedings that are initiated to establish an individual's inability to manage their affairs, and result in the taking of that individual's rights. In a Conservatorship, the Court takes away the Protected Person's property rights and appoints a Conservator to exercise the Protected Person's property rights for them. A Guardianship, on the other hand, is a legal proceeding in which an individual's civil liberties are taken away and given to a Guardian to exercise (decisions regarding the health and welfare).

There are many cases in which a Guardianship and Conservatorship are sought. A Guardian may also be the Conservator, but if not, the two fiduciaries are expected to work together in the best interests of the Ward/Protected Person. If both are sought, the actions may be consolidated and

*The information provided in this document is meant for the sole use of Active Duty service members, retirees, their families, and those individuals eligible for legal assistance. The information is general in nature and meant only to provide a brief overview of various legal matters. Rights and responsibility vary widely according to the particular set of circumstances in each case. Laws can vary across states, services, and civilian jurisdictions and laws are changed from time to time. Do not rely upon the general restatements of background information presented here without discussing your specific situation with a legal professional.*

only one hearing is required to address both Petitions. In some situations, if there are not enough assets to warrant the appointment of a Conservator, the Guardian may be given authority to manage the Ward's assets.

### **A Guardian's Authority**

A Guardian's authority is evidenced by two documents—the "Letters of Guardianship" and the "Order Appointing Guardian." The Guardianship may be limited in duration, scope, level of Court involvement, and usually involves at least an annual reporting and accounting requirement. The Court's direction is given with the intent to maximize the Ward's independence and involvement, and may require specific actions to achieve this standard. It is important to read the Court's Order thoroughly and comply with the terms of the appointment.

Once appointed, the Guardian usually has the authority to make most or all decisions related to the Ward's health, education, and welfare. A Guardian usually signs legal documents on behalf of the Ward, chooses an appropriate living situation for the Ward, and grants, withholds, and withdraws consent to medical treatment. In most situations, it is necessary to disclose the Guardian/Ward relationship.

A Guardianship may end for several reasons, including the Ward regaining capacity to manage his or her personal affairs; upon the death of the Ward; the resignation, removal, or death of the Guardian; or a date set by the Court. A Guardian's duties to the Ward continue until a Successor Guardian is appointed or otherwise directed by the Court. It is prudent for a Guardian to ask the Court to appoint a Successor Guardian upon the happening of some event, usually the Guardian's death, to avoid unnecessary disruption in the Ward's life.

### **A Guardian's Duties**

#### ***Ethical Duties***

Generally speaking, a Guardian owes a fiduciary duty to the Ward, meaning that the Guardian must always act in the best interest of and with undivided loyalty to the Ward, avoid transactions that cause a conflict of interest, and make all decisions with care and prudence.

A Guardian must always act in the best interest of the Ward, and must make efforts to include the Ward in decision-making and encourage self-sufficiency. A Guardian is also expected to consider the Ward's known and reasonable desires and personal values when making decisions on behalf of the Ward, and must become and/or remain personally acquainted with the Ward.

A Guardian must make decisions (and manage any of the Ward's assets, if applicable) as a prudent person in similar circumstances would, and, while the Guardian is ultimately accountable and unless otherwise specified by the Court, he or she may employ the use of professionals and other agents in order to carry out his or her duties.

#### ***Administrative Duties***

In addition to the ethical duties above, a Guardian has many administrative duties. Such duties include:

- **Reporting to Court and Interested Persons**—Unless the Court orders otherwise, Guardians must submit an initial report and annual reports that require a thorough

description of the Ward's wellbeing, growth, health needs, financial resources available for care, any changes in the Guardian's or Ward's life, and the need for the Guardianship to continue (forms available at [www.courts.state.co.us](http://www.courts.state.co.us)). In addition to filing these documents with the Court, the Guardian must send them to all Interested Persons as dictated in the original Order of Appointment and/or any subsequent orders.

- **Accounting**—If a Guardian is given any authority over the Ward's assets, usually because there are not enough assets to warrant a Conservator, a Guardian must set up and keep complete financial records. The accounting system and reports to the Court should reflect in detail all income, disbursements, and liabilities, and should show the opening and closing balances for all accounts for the accounting period.
- **Taxes**—In most cases the Guardian is managing all or most of the Ward's affairs, and is required to file any required tax returns on the Ward's behalf (if a Conservator is not appointed).
- **Distributions to Ward or on Ward's Behalf**—A Guardian will often make distributions to the Ward for their care and expenses or to third parties directly who provide some beneficial service to the Ward. The terms under which distributions must or may be made can be restricted by the Court, or may be made mandatory for the Ward's health, education, and maintenance. Under certain circumstances, a Guardian may be personally liable for improper distributions, and may be compelled by a Court to make a distribution at the Ward's or Interested Person's request.

### **A Guardian's Personal Liability**

A Guardian may be personally liable to the Ward or a third party in certain circumstances, including when the relationship is not disclosed, the Guardian is directly at fault, was grossly negligent, or acted criminally. In some situations, a Guardian may be personally liable even though their improper actions were not intentional or negligent, and for that reason, some Guardians secure Errors and Omissions insurance.

### **Compensation and Expenses**

A Guardian is entitled to reasonable compensation and reimbursement of expenses from the Guardianship Estate for acts on behalf of the Ward for the duration of the Guardianship. Reasonable compensation is determined on a case-by-case basis, and good record keeping and accounting is absolutely necessary. Any compensation is considered income to the Guardian, and as such, is generally taken as a tax deduction by the Ward and is claimed as income by the Guardian.

A Guardian will likely incur expenses related to the care of the Ward, and in addition to their own fee, may hire professionals, including an attorney to advise them as a Guardian, with the Ward's assets. Guardian fees, anticipated expenses, and professional advisement fees are usually included in the annual reports, and are therefore approved or denied by the Court.

### **Words Of Caution**

These guidelines cannot tell you everything you need to know about being a Guardian, and are simply intended to alert you to your duties and responsibilities as a Guardian. Given the very serious risks of harm to the Ward and personal liability, if you are uncertain about any of your

responsibilities, rights, or powers as a Guardian, you are strongly encouraged to consult with an attorney. It is often less complicated and expensive to get advice to prevent a problem than it is to defend a problem later.

*This pamphlet is published as a public service by the Colorado Bar Association. It was updated Casey L. Williams in 2010. Its purpose is to inform citizens of their legal rights and obligations and to provide information regarding the legal profession and how it may best serve the community. Changes may have occurred in the law since the time of publication. Before relying on this information, consult an attorney about your individual case. This document, as well as other useful information, can be found at [www.cobar.org](http://www.cobar.org)*