

PRACTICE AREAS >> ELDER AND DISABILITY LAW



Guardianships:

A guardian is appointed by the courts to assist with the personal and medical affairs and day-to-day life of a minor or a person who is functionally impaired. The person you are appointed to help is referred to as a "ward". The impairments can be mental illness, mental deficiency, brain injury or disease, physical illness or disability. Functional impairment for guardianship purposes means the ward cannot effectively receive or understand information or make or communicate decisions to such an extent that the ward cannot satisfy essential requirements for his or her physical health, safety and self-care, even with reasonably available technological assistance. A guardian must be appointed by a court that issues "Letters of Guardianship" as evidence of the guardian's authority to act for the ward. The guardian must report to the court on the ward's condition, residence and care plan. A guardian is not the same as a "conservator". A conservator is appointed to manage someone's financial affairs. A person may have either a guardian or a conservator or both. Where there is both a guardian and conservator, the same person might serve in both capacities, especially if it is a family member. A professional caretaker or case manager cannot serve as both guardian and conservator.

Conservatorships:

A conservator is a person appointed by the courts to manage the financial affairs of another person who cannot functionally or effectively manage his or her own financial affairs. A person whose functional disabilities qualify him or her for a conservatorship is generally referred to as a "protected person".

A conservator is primarily responsible for the protected person's overall financial situation while a guardian is more concerned with day-to-day matters that affect the protected person's personal affairs, care and health. When a person is appointed conservator, he or she acquires title as trustee to all real and personal property of the protected person. The court issues Letters of Conservatorship as evidence of the conservator's authority over the protected person's property or assets. A conservator is a fiduciary who must keep the protected person's property separate from his or her own property. Typically, a separate checking account is established for the management of the protected person's money. The court requires a conservator to file an annual accounting as well as a financial plan.

Personal Injury Settlement Planning and Structure:

A child younger than age 18, for whom a personal injury lawsuit has been filed, is not old enough to consent legally to a settlement of his or her claim. An injured adult might be too severely disabled, either physically or mentally, to agree legally or reliably to a settlement of his or her claim. In such situations, the probate court has a role, in which the court is called

upon to review a personal injury settlement and determine whether it serves the injured person's best interests or not. To commence that review process, a particular kind of petition is filed describing the circumstances, the settlement, the prospective risks and benefits involved in proceeding to trial and the plan for how the settlement will be used to benefit the injured person, along with other considerations.

If the injured adult or child is a Medicaid recipient, or a Medicaid application is anticipated, the "disability trust" becomes a crucial feature of personal-injury settlement planning and the petition to the court for approval of the settlement.

The disability trust is an instrument created by statute. The disability trust enables an injured and disabled adult or child to retain eligibility for Medicaid benefits and still receive the benefit of the personal injury settlement. Without the disability trust, such settlement or award could disqualify the injured person from Medicaid, since Medicaid eligibility is based chiefly on amount of income and assets.

Personal injury settlement planning can involve complex components, including but not limited to "up-front" cash for purchase of needed medical equipment, structured annuities producing periodic income and lump-sum payments, disability trust and other types of trusts. Accordingly, from a probate perspective, personal injury settlements can involve probate court appointments of guardians, conservators and trustees.

For more information about the Elder and Disability area of law, please visit our [Publications](#) page.

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