

Frequently Asked Questions Regarding Guardianships and Conservatorships

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1. What is a guardianship?

Answer:

Guardianship is a legal relationship that gives one or more individuals or agencies the responsibility of the personal affairs of a specified individual, usually a protected person unable to manage their affairs, or a minor.

2. What is a conservatorship?

Answer:

Conservatorship is similar to guardianship in that it is a legal relationship between an individual and one or more other appointed by the Court to make decisions on behalf of that individual. However, while a guardianship may encompass all personal affairs (support, care, health habilitation, therapeutic treatment, and if not inconsistent with an order of commitment or custody, the residence) of an individual, a conservatorship is limited to the management of the property and financial affairs of the individual.

3. *Who can be a guardian/conservator?*

Answer:

A family member or other interested individual may petition for the appointment of guardian/conservator for a protected person. However, when a relative or other appropriate person is not qualified and willing to act in this capacity, an agency may step in to act.

❖ *What are the duties of a guardian/conservator?*

Answer:

A guardian/conservator must maintain contact with the individual to become familiar with need and limitation, and only exercise their decision-making authority to the extent required by those limitation. The guardian/conservator must respect the fact that their relationship with the individual is a confidential one and should encourage the individual's participation in decision-making to the extent possible. Obviously, the guardian/conservator must always act in the best interest of the individual, and never become involved in the situation that might give the appearance of a conflict of interest. Finally, the court does require that the guardian/conservator provide some information to the court, including information pertaining to the individual's finances and personal inventory, and an annual personal status report.

❖ *What is the potential liability of a guardian/conservator?*

Answer:

A guardian or conservator is not individually liable for the action of the individual unless the guardian/conservator was personally negligent. Also, a guardian/conservator is not required to expand his/her own funds on behalf of an individual. However, a guardian may be held liable if they have failed in taking reasonable steps to assure that the individual person receives proper care and/or services or have improperly managed the individual's property or finances.

❖ *What rights does an individual give up when a guardian/conservator is appointed?*

Answer:

An individual retains all rights not granted to the guardian/conservator through the appointment by the court. For example, the guardian/conservator does not

have the right to change an individual's state of residence, marital status, parental rights, or power of attorney without the court's specific authorization.

- ❖ *What is the procedure for the appointment of a guardian/conservator?*

Answer:

First, a petition for the appointment of guardianship/conservatorship outlining the need for the appointment and the type of appointment requested is filed in the appropriate county. A statement of financial resources and a report from a physician, psychologist, or psychiatrist describing the person's level of impairment, ability to appear at the hearing, and need for protection is also filed. The court then conducts a hearing and determines whether a guardianship/conservatorship is appropriate, and if so, whether a full or limited appointment is more appropriate.

- ❖ *Why did I receive this guardianship/conservatorship letter?*

Answer:

This letter is a generic reminder to all ongoing guardianships and conservatorships. This letter was designed to remind guardians and conservators to update their contact information and that of their minor or protected person.

The letter also provided notice that you as the guardian/conservator may be required to file an annual report or accounting, depending on what the court ordered in your case. If you are not required to file anything, or you have already filed what you needed to for this year, that's great. The letter was only meant to provide notice to update your information and direct you to resources that might answer the guardianship or conservatorship questions you may have.

- ❖ *I need to change/terminate this guardianship/conservatorship. What do I do?*

Answer:

Your first choice should be contact your attorney to professionally assist you with any petition to modify or petition to terminate. But if you would like further information regarding how to modify or terminate a guardianship or conservatorship, read [SDCL 29A-5](#). You can find an electronic copy of this chapter of our Code on the South Dakota Legislature website. Instructions to find that webpage are also provided at the beginning of this document. You will also likely need to make a request to the court to change your

guardianship or conservatorship.

Note, however, that an attorney would be able to explain any wording in statute that is confusing. An attorney may also be able to provide you with additional, specialized information that is unique to your case, which you may have otherwise missed on your own.

❖ *I am not sure how to be a guardian or conservator. What do I do?*

Answer:

You should contact your attorney to professionally assist you with your duties and authority as a guardian or conservator. An attorney will likely be able to explain what those duties and powers are and tailor the explanation to your particular guardianship or conservatorship.

But if you would like further information regarding your duties and authority as guardian or conservator, read [SDCL 29A-5](#). You can find an electronic copy of this chapter of our Code on the South Dakota Legislature website. Instructions to find that webpage are also provided on the front cover of the document.

Note, however, that an attorney would be able to explain any wording in statute that is confusing. An attorney may also be able to provide you with additional, specialized information that is unique to your case, which you may have otherwise missed on your own.

Also, in the coming months, a handbook from the State Bar of South Dakota should be made available that explains in greater detail (and in less technical language) the duties and authority of guardians and conservators in South Dakota.

❖ *What should a guardianship report or a conservatorship accounting look like?*

Answer:

You should contact your attorney to professionally assist you with filing a guardianship report or conservatorship accounting. An attorney will likely clarify whether you are required to file a report or accounting. An attorney also will likely be able to compile all of the relevant information that statute and (possibly) court order require you to provide in a report or accounting.

But if you would like further information regarding your duties and authority as

guardian or conservator, including reporting and accounting requirements, read [SDCL 29A-5](#). You can find an electronic copy of this chapter of our Code on the South Dakota Legislature website. Instructions to find that webpage are also provided on the front cover of the document.

Annual guardianship report forms and annual conservatorship accounting forms are available on the South Dakota Unified Judicial website, at [Guardians and Conservators | SD UJS Self Help | SD UJS](#) .

While we cannot provide you information on how to fill out these documents, the statutes that list the information you must file with the court are, for guardian reports, [SDCL 29A-5-403](#), and for conservator accountings, [SDCL 29A-5-408](#). They are provided in the document I just handed you. You will also need to look at the court orders in the file to see if the court required you to report or account for any information in addition to what is required in these statutes. You may also need to serve these documents on interested parties. Read [SDCL 29A-5-410](#) for more information.

[If they are a conservator or guardian/conservator]: Now, it is also possible that the court waived your accounting requirement entirely. Check your file to see whether the court noted either in your order of appointment or in another order in the file that your accounting requirement was waived. If you serve as both a guardian and conservator, however, you may still have a guardianship reporting requirement that was not waived.

❖ What are the grounds for terminating a guardianship or conservatorship?

Answer:

That depends on whether your guardianship or conservatorship is for a minor or protected person, as ordered by the court. You may know which type you have. If you do not, the order of appointment (and, often, the caption on all of your legal documents) will indicate whether this is for a minor or a protected person.

Also, you should contact your attorney to professionally assist you with terminating the guardianship or conservatorship. An attorney will have the knowledge to advise you and may be able to terminate the guardianship or conservatorship on your behalf.

But if you would like further information regarding your duties and authority as guardian or conservator, including how to and on what grounds you can terminate a guardian or conservatorship, read [SDCL 29A-5](#). You can find an electronic copy of this chapter of our Code on the South Dakota Legislature

website. Instructions to find that webpage are also provided on the front cover of the document.

Statutes outlining the grounds for terminating a minor guardianship or conservatorship can be found at [SDCL 29A-5-505](#) and [SDCL 29A-5-506](#). These grounds for termination include the minor's death, attaining age of majority, transfer of jurisdiction over the minor to another state, emancipation and adoption (guardianships terminated only) or otherwise after a hearing on a petition to terminate. The petition to terminate is further described in [SDCL 29A-5-508](#).

Statutes outlining grounds for terminating a protected person guardianship or conservatorship can be found at [SDCL 29A-5-507](#), and include death of the protected person, transfer of jurisdiction over the guardianship or conservatorship to another state, or if ordered by a court on a petition to terminate. Again, the Petition to terminate is further described in [SDCL 29A-5-508](#).

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- ❖ *Why should I file a certified copy of a death certificate to terminate the guardianship or conservatorship on account of death?*

Answer:

[For non-attorney guardians & conservators]: [SDCL 29A-1-107](#) outlines the ways in which a determination of death can be established with a court. The most straightforward of these is the certified copy of a death certificate, which you may already have. If you do not have a certified copy of the death certificate, you can obtain one from the County Register of Deeds Office or the State Office of Vital Records (207 E. Missouri, Ste. 1-A, Pierre, SD 57501). The cost of obtaining a certified copy of a death certificate is \$15.00 (as of March 2016). Please feel free to check SDCL 29A-1-107 to see if you can provide other formal proof of death.

[For attorneys]: Only certain documents provide proof of death per statute. That statute is [SDCL 29A-1-107](#). See also [SDCL 29A-6-101\(11\)](#) (defining "proof of death" in the non-probate UPC chapter as requiring "a death certificate or record or report which is prima facie proof of death under § 29A-1-107"). An attorney's representation is not listed among the documents that formally indicate determination of death. See SDCL 29A-1-107. For instance, an attorney's letter is insufficient—even if liberally construed as a certificate or affidavit—because terminating a guardianship or conservatorship on death is not "verify[ing] a pleading, [proving] the service of a summons, notice, or other process in an action, [obtaining] a provisional remedy, an examination of a witness, a stay of proceedings, or upon a motion, and in any other case permitted by law." See

[SDCL 19-4-2](#); see also [SDCL 16-18-9](#) (powers of attorneys to execute “necessary and proper” instruments on behalf of clients).

As further support for this interpretation, the relevant guardianship forms (specifically petitions to terminate—Forms 5-501A.1, 5-501B.1, and 5-501C.1 for protected persons, and Forms M5- 505A.1, M5-505B.1, and M5-505C.1 for minors) on Dakota Disc assume that the death certificate is attached. But please feel free to check [SDCL 29A-1-107](#) to see if you can provide other formal proof of death.

If an attorney still insists after that analysis, have them contact SCAO.
