

*Thomson Reuters Law for the Layperson*

---

---

GUARDIANSHIP, CONSERVATORSHIP  
AND THE LAW

---

---

Margaret C. Jasper

---

---

Legal Almanac Series

---

---

THOMSON REUTERS  
**WESTLAW**

# GUARDIANSHIP, CONSERVATORSHIP AND THE LAW

---

*by*  
**Margaret C. Jasper**

---

Legal Almanac Series:  
*Thomson Reuters' Law for the Layperson*

---

**WEST®**

A Thomson Reuters business

*For Customer Assistance Call 1-800-328-4880*

© 2011 Thomson Reuters

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

*ISBN # 978-0-314-60521-4*

To My Husband Chris

Your love and support  
are my motivation and inspiration

To My Sons, Michael, Nick and Chris

-and-

In memory of my son, Jimmy

## ABOUT THE AUTHOR

---

MARGARET C. JASPER is an attorney engaged in the general practice of law in South Salem, New York, concentrating in the areas of personal injury and entertainment law. Ms. Jasper holds a Juris Doctor degree from Pace University School of Law, White Plains, New York, is a member of the New York and Connecticut bars, and is certified to practice before the United States District Courts for the Southern and Eastern Districts of New York, the United States Court of Appeals for the Second Circuit, and the United States Supreme Court.

Ms. Jasper has been appointed to the law guardian panel for the Family Court of the State of New York, is a member of a number of professional organizations and associations, and is a New York State licensed real estate broker operating as Jasper Real Estate, in South Salem, New York.

Margaret Jasper maintains a website at <http://www.JasperLawOffice.com>.

In 2004, Ms. Jasper successfully argued a case before the New York Court of Appeals, which gives mothers of babies who are stillborn due to medical negligence, the right to bring a legal action and recover emotional distress damages. This successful appeal overturned a 26-year old New York case precedent, which previously prevented mothers of stillborn babies from suing their negligent medical providers.

Ms. Jasper is the author and general editor of the following legal almanacs:

Adoption Law

AIDS Law

The Americans with Disabilities Act

Animal Rights Law

Auto Leasing

Bankruptcy Law for the Individual Debtor  
Banks and their Customers  
Becoming a Citizen  
Buying and Selling Your Home  
Commercial Law  
Consumer Rights and the Law  
Co-ops and Condominiums: Your Rights and Obligations As Owner  
Copyright Law  
Credit Cards and the Law  
Custodial Rights  
Dealing with Debt  
Dictionary of Selected Legal Terms  
Drunk Driving Law  
DWI, DUI and the Law  
Education Law  
Elder Law  
Employee Rights in the Workplace  
Employment Discrimination Under Title VII  
Environmental Law  
Estate Planning  
Everyday Legal Forms  
Executors and Personal Representatives: Rights and Responsibilities  
Harassment in the Workplace  
Health Care and Your Rights  
Health Care Directives  
Hiring Household Help and Contractors: Your Rights and Obligations Under the Law  
Home Mortgage Law Primer  
Hospital Liability Law  
How To Change Your Name  
How To Form an LLC

How To Protect Your Challenged Child

How To Start Your Own Business

Identity Theft and How To Protect Yourself

Individual Bankruptcy and Restructuring

Injured on the Job: Employee Rights, Worker's Compensation and Disability Insurance Law

International Adoption

Juvenile Justice and Children's Law

Labor Law

Landlord-Tenant Law

Law for the Small Business Owner

The Law of Attachment and Garnishment

The Law of Buying and Selling

The Law of Capital Punishment

The Law of Child Custody

The Law of Contracts

The Law of Debt Collection

The Law of Dispute Resolution

The Law of Guardianship and Conservatorship

The Law of Immigration

The Law of Libel and Slander

The Law of Medical Malpractice

The Law of No-Fault Insurance

The Law of Obscenity and Pornography

The Law of Personal Injury

The Law of Premises Liability

The Law of Product Liability

The Law of Speech and the First Amendment

Lemon Laws

Living Together: Practical Legal Issues

Marriage and Divorce

Missing and Exploited Children: How to Protect Your Child  
Motor Vehicle Law  
Nursing Home Negligence  
Patent Law  
Pet Law  
Prescription Drugs  
Privacy and the Internet: Your Rights and Expectations Under the Law  
Probate Law  
Protecting Your Business: Disaster Preparation and the Law  
Real Estate Law for the Homeowner and Broker  
Religion and the Law  
Retirement Planning  
The Right to Die  
Rights of Single Parents  
Small Claims Court  
Social Security Law  
Special Education Law  
Teenagers and Substance Abuse  
Trademark Law  
Trouble Next Door: What to do With Your Neighbor  
Victim's Rights Law  
Violence Against Women  
Welfare: Your Rights and the Law  
What if It Happened to You: Violent Crimes and Victims' Rights  
What if the Product Doesn't Work: Warranties & Guarantees  
Workers' Compensation Law  
Your Child's Legal Rights: An Overview  
Your Rights in a Class Action Suit  
Your Rights as a Tenant  
Your Rights Under the Family and Medical Leave Act  
You've Been Fired: Your Rights and Remedies

# INTRODUCTION

---

Until a child reaches the legal age of majority, he or she is considered legally incapable of taking care of his or her personal needs, or of managing his or her finances. If a child does not have a parent who is willing or able to care for him or her, the state may appoint a “guardian” to fill the parental role and protect the child. The minor is referred to as the “ward” of the guardian.

Once a person reaches the legal age of majority, he or she is presumed by law to be legally competent, and able to manage his or her affairs. However, when an adult, due to physical or mental incapacity or incompetence, is no longer able to manage his or her affairs, or function safely in society, the state may appoint a “conservator” who will manage that person’s affairs on his or her behalf. The legally incapacitated person is known as a “conservatee.”

This Almanac discusses the appointment of a guardian and a conservator, and their respective duties. The manner in which a court determines incapacity is examined. Termination of a guardianship or conservatorship is also discussed. In addition, this Almanac explores alternatives to guardianship, including advance directives, trust funds, social security representative payees, and adult protective services.

The Appendix provides statutory citations, applicable forms, and other pertinent information and data. The Glossary contains definitions of many of the terms used throughout the Almanac

# Table of Contents

---

ABOUT THE AUTHOR .....	vii
INTRODUCTION .....	xi

**CHAPTER 1:**

**AN OVERVIEW OF GUARDIANSHIPS AND CONSERVATORSHIPS**

THE INDIVIDUAL'S RIGHT TO SELF-DETERMINATION .....	1
ADVANCE PLANNING FOR INCAPACITY .....	2
GUARDIANSHIP AND CONSERVATORSHIP DEFINED .....	2
TERMINOLOGY .....	3
THE UNIFORM PROBATE CODE .....	4
THE UNIFORM GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT .....	4
THE UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION ACT .....	5

**CHAPTER 2:**

**GUARDIANSHIP OF A MINOR**

IN GENERAL .....	7
PURPOSE .....	8
DUTIES AND RESPONSIBILITIES .....	8
Basic Responsibilities .....	8
Custody .....	8
Education .....	9
Residence .....	9
Medical Treatment .....	9
Support and Services .....	10
Visitation .....	10
Driver's License .....	10
Military Service .....	10
Marriage .....	10

Misconduct .....	10
Additional Responsibilities .....	10
THE GUARDIANSHIP PETITION.....	11
Filing the Petition .....	11
Determining the Venue .....	11
Notice Requirement.....	11
Consent Requirement .....	12
THE GUARDIANSHIP INVESTIGATION.....	12
The Home Study.....	13
THE GUARDIANSHIP HEARING .....	13
LETTERS OF GUARDIANSHIP .....	13
Limitations .....	14
TERMINATION OF THE LEGAL GUARDIANSHIP.....	14
Duration .....	14
Removal.....	14
Resignation .....	14
ADOPTION DISTINGUISHED.....	15

### CHAPTER 3: GUARDIANSHIP OF AN INCAPACITATED ADULT

IN GENERAL .....	17
DETERMINING INCAPACITY .....	17
DUTIES AND RESPONSIBILITIES.....	18
THE GUARDIANSHIP PETITION.....	19
Filing the Petition .....	19
Eligible Petitioners .....	19
Procedural Steps .....	20
Required Information .....	20
Determining the Venue .....	20
Notice Requirement.....	21
Withdrawing the Petition.....	21
THE GUARDIANSHIP INVESTIGATION.....	22
THE MEDICAL REPORT.....	22
THE GUARDIANSHIP HEARING .....	23
Contested Case.....	23
Uncontested Case.....	23
LETTERS OF GUARDIANSHIP .....	24
Limitations .....	24
Appeal Rights.....	24
LIMITED GUARDIANSHIP .....	25
VOTING RIGHTS.....	25

**CHAPTER 4:**  
**MENTAL HEALTH GUARDIANSHIP AND CIVIL COMMITMENT**

<b>IN GENERAL</b> . . . . .	27
<b>MENTAL ILLNESS</b> . . . . .	27
<b>ROLE OF THE GUARDIAN</b> . . . . .	28
<b>CHALLENGING THE GUARDIANSHIP</b> . . . . .	28
<b>CIVIL COMMITMENT</b> . . . . .	29
Required Standard. . . . .	29
<i>O'Connor v. Donaldson</i> . . . . .	29
<i>Addington v. Texas</i> . . . . .	30
Civil Commitment Procedure . . . . .	31
Challenging Confinement. . . . .	31

**CHAPTER 5:**  
**STANDBY GUARDIANSHIP**

<b>IN GENERAL</b> . . . . .	33
<b>STATE STANDBY GUARDIANSHIP LAWS.</b> . . . .	34
<b>ESTABLISHING THE STANDBY GUARDIANSHIP</b> . . . . .	35
Petition . . . . .	35
Written Designation. . . . .	35
<b>ACTIVATING THE STANDBY GUARDIAN'S AUTHORITY.</b> . . . .	36
<b>THE COURT HEARING.</b> . . . .	37
<b>RIGHTS OF THE NON-CUSTODIAL PARENT.</b> . . . .	37
Notice Requirement. . . . .	38
<b>MAINTAINING PARENTAL AUTHORITY</b> . . . . .	38
<b>REVOKING THE STANDBY GUARDIANSHIP</b> . . . . .	38
<b>THE UNIFORM GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT</b> . . .	39

**CHAPTER 6:**  
**CONSERVATORSHIP: PROTECTING THE PROPERTY OF THE WARD**

<b>IN GENERAL</b> . . . . .	41
<b>THE ROLE OF THE CONSERVATOR</b> . . . . .	41
Fiduciary Role . . . . .	41
Costs and Expenses . . . . .	42
<b>QUALIFICATIONS</b> . . . . .	42
<b>DUTIES OF THE CONSERVATOR</b> . . . . .	42
Manage the Estate . . . . .	43
Make Prudent Investments . . . . .	43
Keep Estate Assets Separate . . . . .	43
Interest-Bearing Accounts . . . . .	43
Blocked Accounts . . . . .	44
Miscellaneous Restrictions . . . . .	44
Inventory the Estate. . . . .	45

Locate Estate Property . . . . .	45
Determine Value of Estate . . . . .	45
File Inventory and Appraisal . . . . .	45
Obtain Insurance Coverage . . . . .	45
Record Keeping . . . . .	45
Accounting . . . . .	45
<b>POWERS OF THE CONSERVATOR</b> . . . . .	46
Without a Court Order . . . . .	46
With a Court Order . . . . .	46
Estate Planning . . . . .	47
<b>THE CONSERVATORSHIP PETITION</b> . . . . .	47
Filing the Petition . . . . .	47
Determining the Venue . . . . .	48
Notice Requirement . . . . .	48
Petition to Appoint Temporary Conservator . . . . .	48
<b>THE CONSERVATORSHIP HEARING</b> . . . . .	48
<b>LETTERS OF CONSERVATORSHIP</b> . . . . .	49
Appeal Rights . . . . .	49
Limitations . . . . .	49
<b>ENDING THE CONSERVATORSHIP</b> . . . . .	50

## **CHAPTER 7:**

### **ALTERNATIVES TO GUARDIANSHIP AND CONSERVATORSHIP**

<b>IN GENERAL</b> . . . . .	51
<b>WILL PROVISION APPOINTING A GUARDIAN FOR A MINOR CHILD</b> . . . . .	52
<b>THE LIVING WILL</b> . . . . .	53
Purpose . . . . .	53
Requirements . . . . .	53
Competency . . . . .	53
Diagnosis . . . . .	54
Form . . . . .	54
Witnesses . . . . .	54
Medical Condition . . . . .	54
Life-Sustaining Treatment . . . . .	55
Pregnancy Exclusions . . . . .	55
Amending or Revoking Your Living Will . . . . .	56
<b>DURABLE POWER OF ATTORNEY FOR HEALTH CARE</b> . . . . .	56
Purpose . . . . .	57
Persons Authorized to Make Health Care Decisions . . . . .	57
Health Care Agent . . . . .	57
Alternate Health Care Agent . . . . .	57
Court-Appointed Guardian . . . . .	58

Surrogate .....	58
Relative .....	58
Exclusions .....	58
Treatment Decisions .....	59
<b>DURABLE POWER OF ATTORNEY .....</b>	<b>60</b>
Executing the Durable Power of Attorney .....	60
The Meaning of “Durable” .....	61
Revoking the Durable Power of Attorney .....	61
<b>SOCIAL SECURITY REPRESENTATIVE PAYEE .....</b>	<b>62</b>
Authority of the Representative Payee .....	62
Necessity of the Representative Payee .....	62
Appointment of the Representative Payee .....	62
Duties of the Representative Payee .....	63
Use of Benefits .....	64
Current Maintenance of the Beneficiary .....	64
Support of the Beneficiary’s Family .....	64
Debts of the Beneficiary .....	64
Accounting Requirement .....	64
Replacement of the Representative Payee .....	65
Restoring the Beneficiary as Payee .....	65
<b>TRUSTS .....</b>	<b>65</b>
Revocable Living Trust .....	66
<b>JOINT TENANCY ACCOUNTS .....</b>	<b>66</b>
<b>SKILLS TRAINING .....</b>	<b>66</b>
<b>ADVANCE DESIGNATION OF GUARDIAN .....</b>	<b>67</b>

## **APPENDICES**

<b>APPENDIX 1 - GUARDIANSHIP AUTHORIZATION</b>	
<b>AFFIDAVIT .....</b>	<b>69</b>
<b>APPENDIX 2 - PETITION FOR GUARDIANSHIP</b>	
<b>OF A MINOR .....</b>	<b>73</b>
<b>APPENDIX 3 - NOTICE OF GUARDIANSHIP HEARING .....</b>	<b>77</b>
<b>APPENDIX 4 - LETTERS OF GUARDIANSHIP .....</b>	<b>81</b>
<b>APPENDIX 5 - ORDER APPOINTING GUARDIAN</b>	
<b>OF MINOR .....</b>	<b>83</b>
<b>APPENDIX 6 - CAPACITY DECLARATION .....</b>	<b>87</b>
<b>APPENDIX 7 - PETITION FOR APPOINTMENT</b>	
<b>OF STANDBY GUARDIAN .....</b>	<b>91</b>
<b>APPENDIX 8 - PETITION FOR APPOINTMENT</b>	
<b>OF CONSERVATOR .....</b>	<b>97</b>
<b>APPENDIX 9 - PETITION FOR APPOINTMENT OF</b>	
<b>TEMPORARY CONSERVATOR .....</b>	<b>105</b>

**APPENDIX 10 - LETTERS OF TEMPORARY  
CONSERVATORSHIP ..... 109**

**APPENDIX 11 - ORDER APPOINTING TEMPORARY CONSERVATOR .... 111**

**APPENDIX 12 - LETTERS OF CONSERVATORSHIP ..... 115**

**APPENDIX 13 - ORDER APPOINTING CONSERVATOR..... 119**

**APPENDIX 14 - WILL PROVISION APPOINTING  
A GUARDIAN FOR A MINOR CHILD ..... 123**

**APPENDIX 15 - LIVING WILL ..... 125**

**APPENDIX 16 - TABLE OF STATE LIVING WILL  
STATUTES ..... 129**

**APPENDIX 17 - DURABLE POWER OF ATTORNEY  
FOR HEALTH CARE ..... 133**

**APPENDIX 18 - SSA REQUEST TO BE SELECTED  
AS REPRESENTATIVE PAYEE  
(FORM SSA-11-BK)..... 137**

**GLOSSARY ..... 151**

**BIBLIOGRAPHY AND ADDITIONAL RESOURCES ..... 173**

# **CHAPTER 1:**

## **AN OVERVIEW OF GUARDIANSHIPS AND CONSERVATORSHIPS**

---

### **THE INDIVIDUAL'S RIGHT TO SELF-DETERMINATION**

The right to make decisions regarding one's personal affairs, and to manage one's property, is a fundamental right of every American citizen. However, hundreds of thousands of adults are denied these basic rights, and lose all control of their personal and financial affairs.

Once a court determines that an individual is legally incompetent or incapacitated, a guardian or conservator is appointed to make decisions on behalf of that individual. Unfortunately, research has revealed that many of those individuals who have been deprived of their right to independent decision-making, are not being adequately treated.

It is an unfortunate reality that many persons and agencies appointed to manage the personal and financial affairs for mentally incapacitated individuals do not make decisions that are in the best interests of the ward or conservatee and, in some cases, actually exploit these individuals.

An improperly conducted guardianship or conservatorship can result in fraud and thievery, and can jeopardize the health and safety of the ward or conservatee, particularly when non-family members are appointed as guardians or conservators.

On the other hand, depending on the degree of disability, a properly conducted guardianship or conservatorship may allow the individual to participate in the management of his or her finances and health care, and allow the individual a certain degree of autonomy.

For this reason, it is essential that the appointment of a guardian or conservator be made with the utmost care, and that there is careful and

ongoing oversight of this relationship. The proposed guardian or conservator must be required to comply with the duties and responsibilities as directed by the appointing court. A guardian or conservator, as a fiduciary, is required to act at all times in the best interests of the ward or conservatee.

### **ADVANCE PLANNING FOR INCAPACITY**

Although a properly administered guardianship or conservatorship can be beneficial and work in the best interests of an incapacitated individual, it is better to avoid this option if at all possible.

Incapacity generally refers to an individual's inability to make reasonable and sound decisions regarding his or her personal and financial affairs. This scenario is not limited to senior citizens. A disabling condition—e.g., a serious illness or accident—can happen to any person at any time. When such a tragedy occurs, it can create serious problems for loved ones, who must now stand in the shoes of the incapacitated individual, and make decisions that are in their loved one's best interests.

For example, if an individual becomes incapacitated, and has never appointed another person to make legal or medical decisions on his or her behalf, it may result in disputes among family members regarding how to handle the incapacitated individual's personal, medical and financial affairs. Often, a guardian or conservator must be appointed to make these important decisions.

There are a number of alternatives you can choose that will avoid the necessity of such legal proceedings. Once you have determined how you would want certain situations handled—e.g., management of your health care and finances—and the individual you trust to make those decisions on your behalf, you should consult an attorney to discuss the various options available.

Alternatives to guardianship and conservatorship are discussed more fully in Chapter 6, "Conservatorship; Protecting the Property of the Ward," of this Almanac.

### **GUARDIANSHIP AND CONSERVATORSHIP DEFINED**

A guardian is a court-appointed official who may be appointed to care for unemancipated minors who have lost their parents to death or incapacitation or for whom parental authority has been legally terminated. Guardians may also be appointed to care for adults who have become incapacitated and who cannot, therefore, take care of themselves.