

Geriatric Clinic ECHO

Guardianship and Conservatorship
(and Alternatives)

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General Concepts

- Guardianship (and Conservatorship)—provide the legal mechanism by which the judgment of a more capable person is substituted for the judgment of an incapacitated person—decisions necessary to manage personal affairs and property.
- Only a court can appoint a guardian for a ward or a conservator for a protected person.
- The Court adjudicates incapacity—testimony by a health care professional is usually required. (Psychiatrist, psychologist, geriatrician, or other professional with skills to assess subject's alleged incapacity)
- Judges balance autonomy/self-determination, and protection/best interests.

Guardianship and Conservatorship Threshold

"Incapacitated person" is defined as an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance.

Guardianship and Conservatorship Jurisdiction and Proceedings

- The Hawai`i courts have jurisdiction over guardianships for individuals domiciled or present in the state and conservatorships for individuals who are domiciled or own property in Hawai`i.
- Guardianship cases are usually held in the Family Court.
- Conservatorship cases are held in the Circuit Court
- Guardianship and conservatorship cases may be consolidated in the Circuit Court.
- (Probate Court in First Circuit)

Guardianship HRS § 560:5-311

(a) The court may:

(1) Appoint a limited or unlimited guardian for a respondent only if it finds clear and convincing evidence that:

(A) The respondent is an incapacitated person; and

(B) The respondent's identified needs cannot be met by less restrictive means, including the use of appropriate and reasonably available technological assistance.

Conservatorship HRS § 560:5-401(2)

- The appointment of a limited or unlimited conservator or other protective order in relation to the estate and affairs of any individual, including a minor, may be made if the court determines that, for reasons other than age:
 - By clear and convincing evidence, the individual is unable to manage property and business affairs effectively because of an impairment in the ability to receive and evaluate information or to make or communicate decisions, even with the use of appropriate and reasonably available technological assistance, or because of another physical, mental, or health impairment or because the individual is missing, detained, or unable to return to the United States; and
 - By a preponderance of evidence, the individual has property that will be wasted or dissipated unless management is provided or money is needed for the support, care, education, health, and welfare of the individual or of individuals who are entitled to the individual's support and that protection is necessary or desirable to obtain or provide money.

Duration

- A guardianship/Conservatorship will last until the death, resignation, or removal of the guardian/conservator or when the court terminates the guardianship – without regard for location of the guardian/conservator or the ward.
- [Note--Emergency Guardianships and Conservatorships for a Specific Purpose are not intended to last indefinitely].

Guardianship and Conservatorship

Positives and Negatives

Positives:

1. Court Order
2. Court Supervision

Negatives:

1. \$\$\$\$\$\$\$
2. Time \pm 6 Months
3. Potential Deprivation of Rights and Autonomy

Basic Alternatives to Guardianship and Conservatorship

Personal

- ✓ Legal/Financial Powers of Attorney
- ✓ Advance Health Care Directives
- ✓ Surrogates under Hawai`i law

Financial

- ✓ Living Trusts
- ✓ Powers of Attorney
- ✓ Joint Accounts/Property Management, etc.

Supported Decision-Making (Future?)

Future Law in Hawai`i?

The Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA)

- Encourages courts to impose the least-restrictive orders possible to adequately protect vulnerable minors and adults, and to monitor the protective arrangement to continuously adapt to an individual's changing capabilities and needs.
- Imposes clear duties upon guardians and conservators charged with protecting others and requires regular monitoring to ensure compliance.
- Allows courts to address specific problems with limited orders and preserve individual rights when possible.
- Requires a court to determine whether Supported Decision Making is an appropriate less restrictive alternative.

QUESTIONS?