

**HANDBOOK FOR GUARDIANS
AND CONSERVATORS OF
ADULTS IN GEORGIA**



**Gloria P. Dubberly, Judge
Probate Court of Tattnall County
Georgia, GA**

CONTENTS

INTRODUCTION FROM COURT.....2

GENERAL INFORMATION AND INSTRUCTIONS.....5

APPOINTMENT OF GUARDIANS AND/OR CONSERVATORS OF INCAPACITATED ADULTS.....6

GUARDIANS.....8

CONSERVATORS.....11

REPORTING REQUIREMENTS.....15

PERSONAL STATUS REPORTS.....16

INVENTORY AND ASSET MANAGEMENT PLAN.....16

ANNUAL RETURNS (ACCOUNTINGS).....17

TAX RETURNS.....18

DISMISSAL AND DISCHARGE.....19

PETITIONS FOR LEAVE TO SELL20

PETITIONS FOR LEAVE TO ENCROACH.....20

COMPENSATION, COMMISSIONS AND EXPENSES.....21

FORMS AND OTHER RESOURCES.....22

GLOSSARY23

INTRODUCTION FROM COURT

You have been appointed by the Probate Court as a **GUARDIAN** of or **CONSERVATOR** for another person. The person for whom or over whose property you are guardian or conservator is referred to in the law and in this Handbook as the **WARD**. The proceedings in the Court, as well as the property over which you serve as conservator, are referred to as the **ESTATE**.

This Handbook has been designed as a helpful reference. It will briefly cover the general information about guardianships with which you are expected by the Court to become familiar. It will also provide certain information about the reporting requirements placed upon you by Georgia law. It is prepared in what is hoped to be easily understood language, with as few "legal terms" as possible.

This Handbook is **NOT** intended to completely cover all of the many laws governing guardianships and conservatorships in Georgia, nor is it intended to take the place of good legal advice from an attorney when appropriate. It is hoped that the Handbook will give you the basic information necessary for you to comply with the legal requirements and limitations placed upon you, thereby avoiding problems or difficulties with the Court. However, the Court encourages you to confer with an **attorney** whenever you have questions or concerns about your obligations, **responsibilities**, duties, authority or liability, and, whenever possible, you should consult an attorney **BEFORE** taking any action about which you are concerned.

It is important for you to understand the relationship between you and the Court and its staff. The Judge of the Probate Court is an elected public official with specific responsibilities. The Judge is **NOT** and must not serve as your legal advisor. The law requires the Judge to remain impartial. The Judge is prohibited from discussing certain aspects of any case which *is or may become* contested with any party to the case unless all interested parties are present.

Therefore, you should not attempt to contact the Judge to "privately" discuss your case, either before or after it has been filed. You should not be offended if you are informed that the Judge cannot discuss the matter with you outside a hearing with all interested parties present.

The Judge's staff are employees of the Court who work for and at the direction of the Judge. It is their responsibility to process the paperwork filed in the office and to attend to the administrative aspects of the office. They are here to serve you, and they want to do so to the best of their abilities. However, they also cannot serve as your legal advisors, and you should not expect them to perform legal or clerical services for you. It is **NOT** their responsibility or duty to complete any paperwork for you, and they cannot make a legal determination and advise you on which proceeding may be the most appropriate to your circumstances. Again, please consult an **attorney** for such advice.

It is the responsibility of the Judge and staff of the Court to enforce all of the requirements of the guardianship/conservatorship laws and the rules of the Court upon **every** guardian and/or conservator. You have taken an oath to properly perform your duties and to comply with those laws and rules - in other words, to fulfill **your** responsibilities. The Judge has also taken an oath to enforce the laws and to fulfill **his/her** responsibilities. The Judge did not **make** the laws but has the duty to **enforce** them. The Judge and staff understand that serving as a guardian or conservator for another person is not always an easy task. It is often a **burden**, and it is not the intent or desire of the Court to make that burden any greater.

Finally, please understand that the Court monitors many guardianships/conservatorships, in addition to the many other Probate Court proceedings. The Judge and staff do try to maintain a certain familiarity with the Court files. However, everyone is best served when there is certainty about the subject of discussion. It will always be best for you to clearly identify yourself, the ward and the file (by

Docket or Estate No.) in any conversation or correspondence with Court staff. It may become necessary for the Judge or staff member to retrieve the particular file for review to properly and fully discuss the case. You may need to provide information to "refresh the memory" of the Court staff when referring to earlier conversations with or correspondence from the Court.

It is suggested that you **read this Handbook in its entirety** and keep it with your records. A quick reference to this Handbook may answer many questions which arise from time to time during your service as guardian or conservator, and it will be important for you to be able to find it when needed.

The Court appreciates your willingness to serve in this capacity and looks forward to working with you for the benefit of the ward. Do call upon the staff of the Court if they may be of service to you.

Thank you.

Your Probate Court:	
Court:	TATTNALL COUNTY PROBATE COURT HON. GLORIA P. DUBBERLY, JUDGE
Address:	P. O. BOX 699 111 NORTH MAIN STREET REIDSVILLE, GA 30453
Telephone:	(912) 557-6719
Fax:	(912) 557-3976
Primary Contact Person For Your Case is:	_____
Your Case No. is:	_____

GENERAL INFORMATION AND INSTRUCTIONS

Guardianship and conservatorship are **legal relationships** between the guardian or conservator and the ward (much like that of an agent or attorney-in-fact) which are created by Order of a court with proper jurisdiction. In Georgia, the Probate Courts have exclusive jurisdiction over the appointment of guardians and/or conservators for incapacitated adults. A guardianship may be created for the **person** of the ward and a conservatorship for the **property** of the ward. It may be necessary to create both a guardianship of the person and a conservatorship for the property of the ward. The guardian and conservator need not be the same person, although one person may be appointed as both. If two or more guardians or conservators are appointed, they would be referred to as **co-guardians** or **co-conservators**.

When an Order has been issued appointing a guardian, **Letters of Guardianship** are issued by the Court to the person appointed. The Letters of Guardianship serve as evidence that the guardian has authority over the person of the ward. The guardian is first required to take and sign an **oath** that the guardian will comply with all of the requirements of Georgia law applicable to guardians. The Court may require a guardian to post a surety bond.

Likewise, when an Order has been issued appointing a conservator, **Letters of Conservatorship** are issued. In addition to taking the required oath, every conservator is required to post a surety **bond** with the Court, in such amount as may be set by the Court, to secure the faithful performance of the conservator's duties and responsibilities. The bond is, in effect, an insurance policy against any misappropriation or mismanagement of the ward's property by the conservator. Probate Courts generally prefer, and often require, the use of corporate sureties (insurance companies) on bonds. The premium for the bond, as will also be shown under the section on "Compensation, Commissions and Expenses," is payable from the

Ward's estate as an expense of administration, and there is no requirement that the conservator bear this expense personally.

Guardians and conservators owe a duty of undivided loyalty to the ward and must act in the **best interest** of the ward. Guardians and conservators should avoid even the appearance of a **conflict of interest** in making decisions about the ward's person and/or in the management of the ward's property. A person who owns property or funds jointly with a proposed ward has an inherent conflict of interest and should not seek appointment as guardian or conservator of the ward unless there has been full disclosure of the potential conflict. The Court may determine that the conflict is insubstantial and allow the appointment. A conservator having a conflict of interest found to be substantial might be required to resign or to forfeit any property interest which is the source of the conflict, particularly if it arises from property or funds jointly owned by the conservator and the ward. Likewise, self-dealing (that is buying property from or selling property or services to the ward) is inherently suspicious and will be closely scrutinized by the Court. It should be avoided except in unusual circumstances with full disclosure to the Court. Additionally, expenditures which benefit or even appear to benefit someone other than the ward, especially the guardian or conservator, more than the ward will be subject to scrutiny by the Court.

APPOINTMENT OF GUARDIANS AND/OR CONSERVATORS OF INCAPACITATED ADULTS

In Georgia, the Probate Courts may grant guardianship of an adult resident of the state (or an adult located in this state) who is found by the Court to lack sufficient capacity to make or communicate significant responsible decisions concerning his/her health or safety, and may grant conservatorship of an adult resident of the state (or an adult located in this state) who is found by the Court to lack sufficient capacity to make or communicate significant responsible decisions concerning management of his/her property.

The petition seeking guardianship and/or conservatorship of a proposed ward must be filed either by two individuals having knowledge of the pertinent facts or by one individual together with an affidavit of a physician, psychologist or licensed clinical social worker who has examined the proposed ward. Notice must be given to the ward's spouse and all living adult children, if any. If there are no adult children whose addresses are known, the notice must be given to the two known next of kin or, if none, then to two known adult friends of the proposed ward. Notice must also be given to the proposed ward, who has a right to be represented by counsel. The Court will appoint an attorney for the proposed ward if he/she does not employ counsel. An independent evaluation of the proposed ward is then performed by a physician, psychologist or licensed clinical social worker appointed by the Court. The evaluator must file a written report of the evaluation with the Court. Unless the petition is dismissed by the Court, a final hearing is held, and a decision is made by the Court based upon the evidence presented regarding the need for a guardian and/or conservator.

If the petition is granted, the Probate Court has the authority to restrict or revoke certain rights or powers of the ward, including: the power to contract marriage; the power to make, modify or terminate other contracts; the power to consent to medical treatment; the power to establish a residence or dwelling place; the power to change domicile; the power to revoke a revocable trust established by the ward; the power to bring or defend any action at law or equity, except an action related to guardianship or conservatorship; the power to buy, sell, or otherwise dispose of or encumber property; and the power to enter into or conduct other business or commercial transactions.

The Court may appoint a guardian and/or conservator for a ward. The court may appoint the same person as both guardian and conservator, if deemed appropriate. The respective responsibilities of the guardian and the conservator are more fully explained below.

Adult guardianships and conservatorships may be permanent or of limited duration, as the Court may direct. If the Court's order sets a specific duration, the guardianship/conservatorship will terminate at the time set by the Court. The guardianship and/or conservatorship will also terminate, by operation of law, upon the death of the ward. Additionally, the powers and authority of a guardian or conservator are limited by law and may be further limited by the Court's order.

GUARDIANS

A guardian has those rights and powers reasonably necessary to provide adequately for the support, care, education, health and welfare of the ward. A guardian is much like the parent of a child who has both the authority and the responsibility of making decisions for the child. This may mean that a guardian must make decisions which are considered to be in the ward's best interest even if the ward voices an objection, much like a parent requiring a child to attend school or receive medical treatment. It is the guardian's duty to encourage the ward to develop maximum self-reliance and independence, to encourage the ward to participate in decisions and act on the ward's own behalf, and to develop or regain the capacity to manage the ward's personal affairs.

A guardian is entitled to physical custody of the ward and may establish the ward's place of dwelling, consistent with the terms of any restrictions or directions from the Court. A guardian should be friendly, courteous and tactful toward the ward at all times. The Court's order may limit or remove from the ward certain rights or may reserve to the ward certain rights, and the authority of the guardian will be governed by the Court's order and Georgia law. Unless otherwise directed by the Court, the guardian will succeed to the rights removed from the ward, except that a guardian may not exercise the right to vote if removed from the ward, and a guardian is without authority to execute a will, power of attorney, or durable

power of attorney for health care for the ward. The mere appointment of a guardian does not revoke an existing durable power of attorney for health care, which remains in full force and effect unless the Court's order revokes the authority and the power, and the mere appointment of a guardian does not remove from the ward the right to vote or the capacity to make a valid will.

Under Georgia law, in every guardianship, **the ward has the right to:**

- (1) A qualified guardian who acts in the best interest of the ward;
- (2) A guardian who is reasonably accessible to the ward;
- (3) Have the ward's property utilized to provide adequately for the ward's support, care, education, health, and welfare;
- (4) Communicate freely and privately with persons other than the guardian, except as otherwise ordered by a court of competent jurisdiction;
- (5) Individually, or through the ward's representative or legal counsel, bring an action relating to the guardianship, including the right to file a petition alleging that the ward is being unjustly denied a right or privilege granted by Georgia law, and including the right to bring an action to modify or terminate the guardianship pursuant to Georgia law;
- (6) The least restrictive form of guardianship assistance, taking into consideration the ward's functional limitations, personal needs, and preferences; and
- (7) Be restored to capacity at the earliest possible time.

Under Georgia law, **a guardian shall:**

- (1) Respect the rights and dignity of the ward;
- (2) Become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward's capacities, limitations, needs, opportunities, and physical and mental health;
- (3) If necessary, petition to have a conservator appointed;

- (4) Endeavor to cooperate with the conservator, if any;
- (5) Take reasonable care of the ward's personal effects;
- (6) Arrange for the support, care, education, health, and welfare of the ward, considering the ward's needs and available resources;
- (7) Expend money of the ward that has been received by the guardian for the ward's current needs for support, care, education, health, and welfare;
- (8) Conserve for the ward's future needs any excess money of the ward received by the guardian; provided, however, that if a conservator has been appointed for the ward, the guardian shall pay to the conservator, at least quarterly, excess money to be conserved for the ward's future needs;
- (9) Within 60 days after appointment and within 60 days after each anniversary date of appointment, file with the Court and provide to the ward and to the conservator, if any, a **Personal Status Report** concerning the ward, which shall include:
 - (A) A description of the ward's general condition, changes since the last report, and needs;
 - (B) All addresses of the ward during the reporting period and the living arrangements of the ward for all addresses;
 - (C) A description of the amount and expenditure of any funds that were received by the guardian; and
 - (D) Recommendations for any alteration in the guardianship order;
- (10) Promptly notify the Court of any change in the ward's condition that in the opinion of the guardian might require modification or termination of the guardianship;
- (11) Promptly notify the Court of any conflict of interest between the ward and the guardian when the conflict arises or becomes known to the guardian and take any action as is required by Georgia law; and
- (12) **Keep the Court informed of the guardian's and the ward's current addresses and telephone numbers.**

The **Personal Status Reports** are covered more fully under the section on "Reporting Requirements."

CONSERVATORS

A conservator is a fiduciary entrusted with the management of the funds and property of another, much like a trustee. Except as otherwise provided by law or by the Court's order, a conservator shall receive, collect, and make decisions regarding the ward's property. A conservator shall, to the extent feasible, encourage the ward to participate in decisions, act on the ward's own behalf, and develop or regain the ability to manage the ward's property. A conservator, in making decisions, shall consider the expressed desires and personal values of the ward which are known to the conservator. A conservator shall at all times act in the ward's best interest and exercise reasonable care, diligence, and prudence. The mere appointment of a conservator does not remove from the ward the right to vote or the capacity to make a valid will.

Under Georgia law, in every conservatorship, **the ward has the right to:**

- (1) A qualified conservator who acts in the best interest of the ward;
- (2) A conservator who is reasonably accessible to the ward;
- (3) Have the ward's property utilized as necessary to provide adequately for the ward's support, care, education, health, and welfare;
- (4) Communicate freely and privately with persons other than the conservator, except as otherwise ordered by a court of competent jurisdiction;
- (5) Individually, or through the ward's representative or legal counsel, bring an action relating to the conservatorship, including the right to file a petition alleging that the ward is being unjustly denied a right or privilege granted by Georgia law, and the right to bring an

action to modify or terminate the conservatorship pursuant to Georgia law;

- (6) The least restrictive form of conservatorship, taking into consideration the ward's functional limitations, personal needs, and preferences; and
- (7) Be restored to capacity at the earliest possible time.

Under Georgia law, **a conservator shall:**

- (1) Respect the rights and dignity of the ward;
- (2) Be reasonably accessible to the ward and maintain regular communication with the ward;
- (3) If necessary, petition to have a guardian appointed;
- (4) Endeavor to cooperate with the guardian, if any;
- (5) Provide for the support, care, education, health, and welfare of the ward and persons who are entitled to be supported by the ward, to the extent consistent with the current and future needs and resources of the ward;
- (6) Give such bond as required by law and as set by the Court;
- (7) Within two months of appointment, file with the Court and provide to the guardian, if any, an inventory of the ward's property and a plan for administering the property, as required by law (the **Inventory and Asset Management Plan**);
- (8) Take into account any estate plan of the ward known to the conservator in the administration of the conservatorship;
- (9) Keep accurate records, including adequate supporting data, and file **annual returns**, together with updated Inventory and Asset Management Plans, as required by law;
- (10) Promptly notify the Court of any change in the ward's condition that in the opinion of the conservator might require modification or termination of the conservatorship;
- (11) Promptly notify the Court of any conflict of interest between the ward and the conservator when the conflict arises or becomes known to the conservator and take such action as is required by Georgia law; and

(12) **Keep the Court informed of the conservator's and the ward's current addresses and telephone numbers.**

The **Inventory and Asset Management Plan** and **Annual Return** are covered more fully under the section on "Reporting Requirements."

Utilization of the ward's funds and property for the ward's own benefit should take into account all income and support of the ward and the expected duration of the conservatorship. Utilization of the ward's funds or property for persons who are entitled to be supported by the ward should be determined after taking into account all other income of or support for such dependents. While preservation of the ward's property for the heirs or beneficiaries of the ward's estate should not be of primary concern for the conservator, preservation and utilization of the estate over the expected duration of the conservatorship is important and should be given due consideration by the conservator. On the other hand, the conservator should **not** waste the ward's assets or expend them exorbitantly or above the usual standard of the ward simply to avoid preservation for the heirs or those who may be beneficiaries of a will of the ward.

It is the duty and responsibility of the conservator to properly manage and invest the ward's estate. The conservator is required to invest funds (money) in a manner approved by Georgia law as a "**legal investment**," unless otherwise authorized by law or court order; the conservator may be held liable for any loss suffered by the ward or the ward's estate on account of unauthorized or imprudent investments. A conservator is given specific authority by law to maintain investments which were made by the ward prior to the appointment of the conservator.

Non-cash assets of the ward must also be properly managed and protected for the benefit of the ward. If an asset is reasonably capable of earning income, it should be dedicated to that purpose

unless there is a compelling reason otherwise. Non-income-producing assets should be preserved and protected or liquidated (after proper authority is granted), as may be appropriate under the circumstances.

Except as specifically authorized by law, a conservator does **NOT** have authority to sell, convey, transfer, mortgage, pledge, give away or otherwise dispose of property of the ward **without authority by an order** from the Court. The Court may, upon the application of the conservator and after appropriate notice is given as required by law, grant the conservator such authority if the proposed transaction is considered by the Court to be appropriate, proper and in the ward's best interest. Generally, the ward's assets are to be preserved for the ward's use and benefit, and sales of property of the ward are usually permitted only when necessary to provide for the care and support of the ward (and/or those persons who are entitled to be supported by the ward) or when preservation of the asset is burdensome to the estate. The Court may grant authority to the conservator to sell the asset at a public sale (a legal auction) or at a private sale under a specific contract. Sales of perishable items or items which may rapidly decline in value may be authorized more quickly than other sales.

All property of the ward titled or registered in the name of the conservator must be titled or registered in the **fiduciary capacity** of the conservator (i.e., as a conservator) and not in the conservator's name alone. Typically, the title, account or deed will be registered as "John Doe, as Conservator for Richard Roe," although any variation which clearly shows the fiduciary nature of the registration for the benefit of the named ward may be accepted and approved by the Court. Bank accounts should be especially clearly designated so as to avoid unintentional co-mingling of funds or attachment for debts of the conservator, and the ward's Social Security number should be provided to the Bank for the reporting of all interest income to the Internal Revenue Service. A conservator should never combine or

mix funds of the ward with funds of the conservator. Tangible items and other personal property of the ward should be maintained and protected by the conservator and not be so commingled with the property of the conservator as to lose its identity as the ward's property. Absent the Court's approval, a conservator has no authority to use property of the ward in such a manner as to dissipate, depreciate, waste or consume it or otherwise use it for the conservator's own benefit.

A conservator has the responsibility of filing, on behalf of the ward, all federal and state income tax returns which might be required from the ward. Ad valorem and intangibles tax returns in Georgia and any other states in which the ward has property or income also must be filed by the conservator.

REPORTING REQUIREMENTS

[NOTE: All Reports must be approved by the Court.]

Guardians and conservators are required to file certain reports with the Court having jurisdiction over the proceedings. These reports are intended to provide the Court certain information to properly supervise the affairs of the ward and to supervise and monitor the performance of the guardian and/or conservator. Failure to comply with any of the reporting requirements can subject the guardian or conservator to citation to appear before the Court. The Court is granted broad discretion in dealing with guardians or conservators who fail to comply with the lawful duties and responsibilities, including the failure to timely file properly completed reports. Guardians and conservators may be removed from office by the Court, and the Court may take such other actions as in the Court's judgment may be appropriate under the circumstances of the case. This may include an assessment (money judgment) against a guardian or conservator and the surety on the bond for any amount found by the Court to have been mismanaged or misappropriated by the guardian or conservator.

PERSONAL STATUS REPORTS

Guardians are required to file reports with the Court which disclose the status, condition, needs and circumstances of the ward. The **Personal Status Reports (PSR)** inform the Court where the ward is located, how the ward is doing generally, how the ward's needs are being met, and whether there has been any change in the condition or status of the ward which might warrant the Court's intervention or a change in the **guardianship order**. The first PSR is due from the guardian **within sixty (60) days** after the date of appointment of the guardian. Thereafter, PSRs are filed **annually, within sixty (60) days** of the anniversary of the date of appointment. The **Personal Status Report** is not a standard form, and a guardian must use and file such form as is approved or required by the Court having jurisdiction over the guardianship.

INVENTORY AND ASSET MANAGEMENT PLAN

Conservators are required to file with the Court, **within two months** from the date of appointment, an **Inventory** of the ward's property and a **Plan** for managing, expending, and distributing the property of the ward. The **Inventory** must describe **all the assets and liabilities** of the ward, list **all the personal and real property** owned by the ward, and describe how all property is titled. The conservator must swear or affirm that the inventory contains a true statement of all the assets and liabilities known to the conservator. The inventory should set forth the reasonable, current value of all assets owned by the ward. If the interest of the ward in the property is less than full title, the limitation should be reflected in the description, and the value of the ward's interest should be shown. (For example, a one-half interest in a residence worth a total of \$100,000 would be so reflected, and the value of the ward's interest would be shown as \$50,000). Inventories are designed to disclose to the Court the full value of the estate, which is often not known or only estimated at the

time the proceedings are filed, and the conservator is given two months to make the complete and more accurate determination. The Court may require verification of balances shown by the banking or financial institution(s) where the funds are deposited and verification that all conservatorship accounts have been properly titled. Inventories also allow the Court to determine the sufficiency of the bond posted by the conservator.

The **Plan** for managing, expending, and distributing the ward's property must be based on the actual needs of the ward and take into consideration the best interest of the ward. The plan shall include an estimate of the duration of the conservatorship, projections for expenses and resources, any proposed changes in title to assets in the conservatorship estate, and a proposed budget for the expenditure of funds.

The conservator is required to provide a copy of the Inventory and Asset Management Plan to the ward's guardian, if any. With each annual return, the conservator is required to file an updated Inventory and Asset Management Plan.

The **Inventory and Asset Management Plan** is a standard form [GPCSF 58], and the standard form may be used in any Court.

ANNUAL RETURNS (ACCOUNTINGS)

Conservators are also required to file returns **annually** with the Court **within sixty (60) days** of the anniversary of the date of qualification. The return shall consist of a statement of the receipts and expenditures of the conservatorship during the preceding year, an updated Inventory and Asset Management Plan, a statement of any fact necessary to show the true condition of the estate, and a statement of the current amount of the conservator's bond. Annual returns render an **accounting** to the Court of the actions, transactions and dealings of the conservator. The Court is required by law to audit

the returns of conservators, and conservators are required to maintain complete and accurate records of all of their actions, transactions and dealing. Conservators are required to maintain all records and documents that support every return and may be required to provide the same to the Court for its use in reviewing or auditing the return. Since conservators are also required to file income tax returns for their wards, conservators should maintain all records for not less than three years and may want to maintain all records until after the conservatorship has been terminated and the applicable statute of limitations on the conservator's liability has expired.

The conservator is required to mail a copy of each return to the surety on the conservator's bond, the ward, and the ward's guardian, if any.

The **Annual Return** is not a standard form, and a conservator must use and file such form as is approved or required by the Court having jurisdiction over the conservatorship.

TAX RETURNS

The conservator has the legal responsibility of filing income, ad valorem and intangibles tax returns for the ward. The Internal Revenue Code provides for the assessment of certain penalties against the conservator **personally** for failure to file returns under certain circumstances. In addition, there are usually penalties and/or interest payable for delinquent returns (including ad valorem and intangibles returns), and such penalties or interest may be assessed by the Court against the conservator personally if the same result from the intentional act or inexcusable neglect of the conservator. Unless otherwise directed by the Court, copies of tax returns are not filed with the Court.

DISMISSAL AND DISCHARGE

A **Guardianship** automatically terminates on the death of the ward and may be terminated earlier by Court order. A person may also petition to resign as guardian. Upon the termination or resignation, the guardian must deliver any money or property in the hands of the guardian to the ward's conservator, if any, to the ward, or to the personal representative of a deceased ward's estate. Upon termination or resignation, a guardian **may** petition the Court for an order dismissing the guardian from office. If the guardian had been required by the Court to post a bond, a formal dismissal will be necessary to discharge the bond.

A **Conservatorship** automatically terminates on the death of the ward and may be terminated earlier by Court order. A conservator may also petition to resign as conservator. Upon the termination or resignation, the conservator must deliver any money or property in the hands of the conservator to the successor conservator, to the former ward (if restored to capacity), or to the personal representative of a deceased ward's estate. Upon the termination or resignation, a conservator **may** petition the Court for an order dismissing the conservator from office only, or proceedings for final settlement of the conservator's accounts and discharge of the conservator from office and all liability may be filed. Formal discharge will be necessary to discharge the conservator's bond. **NOTE: The Court may require a former conservator after termination or after resignation to petition for final settlement and discharge.**

The **Petition of Conservator for Final Settlement of Accounts and Discharge from Office and Liability** is a standard form [GPCSF 34], and the standard form may be used in any Court.

PETITIONS FOR LEAVE TO SELL

Conservators do **NOT** have authority to sell or mortgage any property of the ward without authority from the Court, except that stocks or bonds of the ward that are either listed or admitted to unlisted trading privileges may be sold by a conservator for not less than the published bid prices. The authority to sell, rent, lease, exchange, or otherwise dispose of any real or personal property of the ward must be obtained by the filing of a petition with the Court. Depending upon the property or the circumstances, a conservator may seek leave to sell property at a public sale (a legal auction) or a private sale (pursuant to a proposed, actual contract). Conservators may be authorized by the Court to sell perishable items, property which depreciates rapidly, or property which is overly burdensome to maintain more quickly than more durable assets.

The **Petition of Conservator for Leave to Sell Property or Rent, Lease or Otherwise Dispose of Property** [GPCSF 14] and the **Petition for Leave to Sell Perishable Property by Conservator** [GPCSF 15] are standard forms, and the standard forms may be used in any Court.

PETITIONS FOR LEAVE TO ENCROACH

Conservators are authorized to make disbursements from the current, annual income of the ward for the support, care, education, health, and welfare of the ward and those persons who are entitled to be supported by the ward. Conservators may not expend any portion of the principal or corpus of a ward's estate without specific authority from the Court. Such authority may be sought in the original petition to the Court; thereafter, such authority may be sought by the filing of a petition for leave to encroach or in an Asset Management Plan filed with the Court. Whenever such authority is requested for purposes of the ongoing support and maintenance of the ward, the conservator must present a budget to the Court for an approved amount in excess

of annual income. When such authority is requested for a single or one-time purchase or purpose, the petition must fully explain the need and the amount requested.

The **Petition for Leave to Encroach on Corpus** is a standard form [GPCSF 20], and the standard form may be used in any Court.

COMPENSATION, COMMISSIONS AND EXPENSES

Guardians may be compensated for services rendered to the ward only if compensation is set and approved by the Court upon a request made either in the original petition or by subsequent petition by the guardian. Although there is no clear statutory authority for reimbursement of expenses, guardians will generally be allowed by the Court to receive reimbursement for out-of-pocket expenses reasonably incurred in the performance of their duties. The expenses must be reasonable in amount (not excessive) and must have been incurred by the guardian as a consequence of performance of some duty the guardian owes to the ward, that is, be related specifically to the guardian's duties and responsibilities to the ward *as guardian*, as opposed to some other relationship. Reimbursable expenses do NOT include expenses incurred by a guardian in carrying out other duties or responsibilities or other matters related to natural affection. For example, a son who is also his mother's guardian is not entitled to reimbursement of expenses incurred in a familial visit or for presents given his mother. Reimbursable expenses may include transportation costs, lodging and meals during out-of-town travel (when appropriate), and other costs, losses and expenses actually incurred by the guardian.

Conservators are entitled to compensation in accordance with a statutory schedule. The basic commission payable to conservators is 2.5% of all sums of money received and 2.5% of all sums of money paid out by the conservator, plus 10% of all interest earned. The

commission on interest earned is in lieu of, and **not in addition to**, the basic commission on sums received. No commission may be paid on the payment of a commission to any conservator. In addition, conservators are entitled to a commission equal to .5% of the market value of the conservatorship estate as of the last day of the conservator's reporting period, proportionately reduced for any reporting period of less than 12 months. Conservators may be reimbursed for all reasonable expenses incurred in the administration of the conservatorship estate upon approval by the Court. Conservators may petition the Court for additional compensation when deemed appropriate and for compensation for delivery of property in kind. Commissions and other compensation of conservators and the premiums on the bonds of the guardian and/or conservator are part of the expense of administering the estate and may be charged against the corpus of the estate as well as the income.

Conservators who fail or refuse, without just cause, to file returns with the Court within the time set by law forfeit the right to commissions for the year or period covered by the return. A Conservator who is removed from the office by the Court for waste or mismanagement is not entitled to receive commissions.

FORMS AND OTHER RESOURCES

The Probate Court having jurisdiction over the guardianship or conservatorship proceedings will provide you an original of each form you are required to file with the Court. The Court may require you to make copies of an original form to use from time to time for filing purposes.

All standard forms, known as Georgia Probate Court Standard Forms [GPCSF], are maintained by every Probate Court. These forms may also be downloaded from the Georgia Probate Court Online System at www.gaprobate.org, which is also a resource for other helpful information and related links.

GLOSSARY

[Definitions of terms as used in this Handbook]

adult - a person 18 years of age or older

affidavit - a statement taken under oath and signed before a notary or other authorized person

Asset Management Plan - written plan for managing, expending and distributing property of a ward; the Asset Management Plan and the Inventory are filed together

audit - a complete review by court staff of the annual returns and supporting documentation filed by conservators

beneficiary - the designated recipient of a benefit under a will or contract

bond - the obligation of another to guarantee the proper performance of a duty and to pay any loss caused by the failure to so perform; in guardianship law, a guarantor, called a "surety," agrees to pay any loss suffered if a guardian or conservator fails to properly perform the duties of the office (mismanagement, loss through negligence, misappropriation, theft, etc.)

commingle - to put together or combine funds or property of the conservator and the ward

commission - the compensation to which a conservator is entitled for his/her services as such

conflict of interest - a division or clash between what is in the best interest of the ward and what is in the best interest of the guardian or conservator; any act or actions which create such a conflict

conservator - a person who has been given control and authority over the funds and property of the ward; the conservator is a fiduciary who owes fidelity and loyalty to the ward and who must always act in the best interest of the ward

county guardian - the person named by the judge of the probate court to serve as guardian or conservator when there is no one else available or qualified to serve

court - unless the context suggests otherwise, the probate court having jurisdiction over the guardianship or conservatorship case

date of appointment - the date of the filing of the order making the appointment of a guardian or conservator

date of qualification - the date on which Letters of Guardianship or Conservatorship were issued, after the taking of the oath of office and the posting of any required bond

discharge - the formal dismissal from office and liability of a guardian or conservator who has properly performed and completed all the duties of office

Durable Power of Attorney for Health Care - a written document designating an agent to act and make health care decisions on behalf of another in the event of incapacity; the agent must act in accordance with the instructions set forth and in the best interest of the person granting the agent the power

encroachment - an expenditure of the principal or corpus of a fund by a conservator; requires an order granting the authority from the court

estate - the name given to all of the collective assets of a ward; also may be used to refer to the entire case involving a particular ward (e.g., Estate of John Doe)

fiduciary - a person having the duty to act primarily for another's benefit in matters assigned or undertaken by the person; a person holding the character of a trustee

guardian - a person who has been given control and authority over the person of the ward; the guardian holds a position similar to that of a parent over a minor child; the guardian is a fiduciary who owes fidelity and loyalty to the ward and who must always act in the best interest of the ward

guardian-ad-litem - a person appointed by the court to investigate and represent the best interest of the ward with regard to a particular matter pending before the court

guardianship order - the final order of the court appointing a guardian and/or conservator for a ward

heirs - those persons who inherit by law the estate of an individual who dies without a valid will

incapacitated adult - an adult who has been found by the court to lack sufficient capacity to make or communicate significant responsible decisions concerning his or her person or concerning the management of his or her property

inventory - a description of all assets and liabilities of a ward, including a list of all the personal and real property owned by the ward; the Inventory and the Asset Management Plan are filed together

legal investments - those investments in which a conservator may invest funds of the ward without prior court approval; the list is set forth in Code Section 29-5-32 and includes insured accounts; bonds issued by counties and municipalities in Georgia and by other State and federal agencies; and certain loans secured by real property

Letters of Conservatorship - the formal document issued by the court to evidence the appointment of a conservator for a ward and the authority of the conservator then to act; a conservator appointed by the court's order has no authority to act until the Letters have been issued

Letters of Guardianship - the formal document issued by the court to evidence the appointment of a guardian for a ward and the authority of the guardian then to act; a guardian appointed by the court's order has no authority to act until the Letters have been issued

Living Will - a written directive instructing a person's physician to institute, withhold or withdraw life-sustaining procedures in the event of a terminal condition, a coma, or a persistent vegetative state

next-of-kin - after a spouse and all children, the lineal descendants first and the parents and siblings next who are to be given notice of guardianship/conservatorship proceedings

notice - the official notification from the court to parties at interest of a pending proceeding; the notice states any deadlines for filing objections and any hearing dates set at the time of the notice

oath - an attestation or pledge by a person that he or she is bound in conscience to act faithfully and truthfully under an immediate sense of responsibility

personal property - any property other than real estate; everything which is subject to ownership other than land or an interest in land; personal property includes not only tangible things (e.g., furniture, automobiles, merchandise, clothes and jewelry, etc.) but also intangible things (e.g., stocks, bonds, money on deposit, patents, copyrights, etc.)

Personal Status Report - the periodic report of a guardian on the condition, circumstances and needs of a ward

petition - a formal, written application to a court requesting judicial action on a certain matter

power of attorney - an instrument authorizing another to act as one's agent or attorney-in-fact (as opposed to an attorney at law); the agent is called an "attorney-in-fact"; a power of attorney may be given for financial affairs

or for health care decisions or both; a power of attorney may be general or limited

proposed ward - an adult for whom a petition for the appointment of a guardian or conservator has been filed

real property - land and generally whatever is erected, growing upon or affixed to the land

returns - the periodic reports or accountings of a conservator, consisting of a statement of all receipts and expenditures together with an updated Inventory and Asset Management Plan

self-dealing - transactions in which a guardian or conservator acts both in his or her own interest while acting on behalf of the ward; any transaction undertaken by a guardian or conservator on behalf of a ward which also benefits in some manner the guardian or conservator (e.g., buying property from the ward or selling property or services to the ward)

surety - one who undertakes to pay money or to do any other act in the event the principal fails to pay or to act; the guarantor on the bond of a fiduciary, usually an insurance company specially licensed to write surety bonds

ward - an adult for whom a guardian or a conservator has been appointed

MY CASE

Estate of _____

Docket (Estate) No. _____

Date of Guardianship Order _____

Date Letters issued to Guardian _____

Date Letters issued to Conservator _____

DUE DATES FOR REPORTS

Report

Personal Status Reports

First Report (w/in 60 days after Letters issued) _____

Annual Reports (due January of Each Year) _____

Inventory and Asset Management Plan

First Report (w/in 2 mos. after Letters issued) _____

Annual Returns

January of Each Year _____

Other Reports Specially Required by Court Order

ALTERNATIVES TO GUARDIANSHIP AND CONSERVATORSHIP OF ADULTS IN GEORGIA

"Caring for the needs and affairs of those incapable of caring for themselves"

INTRODUCTION

Is the formal appointment of a guardian or conservator by the Probate Court necessary to care for or conduct the affairs of an adult who has become incapacitated? The answer to this very important question depends on the circumstances of each individual case. Asking it is both appropriate and prudent, because adult guardianship and conservatorship proceedings are fairly complicated and time-consuming, primarily as a result of the due process protections afforded the proposed ward. They can also be expensive. This is not to say that the proceedings are overly complex; the legal protections help assure that the Court receives clear and convincing evidence of incapacity before removing the rights of an adult citizen and that the order issued in every case is "fashioned" to the particular circumstances.

However, there are often available alternatives to guardianship/conservatorship which may accomplish the needed ends in any particular case. These alternatives should be considered and should be utilized in every case when doing so would accomplish the underlying purpose AND provide any needed protection for the adult.

It is important to distinguish physical disability or incapacity from mental disability or incapacity. One can be physically incapacitated yet retain full mental competence. On the other hand, one might be mentally incapacitated but be physically quite fit and well.

The availability and/or effectiveness of any of these alternatives will likely be dependent upon the type and extent of incapacity. To be legally effective, any documents discussed herein requiring the signature of the adult must be signed while the adult is capable and competent to understand the nature and purpose

of the documents. Proper preparation of the alternatives reviewed in this pamphlet may require the services of an attorney experienced in this field.

* * * *

LIVING WILLS and DURABLE POWERS OF ATTORNEY FOR HEALTH CARE:

The provisions of Georgia law establishing Living Wills and Durable Powers of Attorney for Health care were repealed by effective July 1, 2007, except that all Living Wills and Durable Powers of Attorney for Health Care executed prior to July 1, 2007.

GEORGIA ADVANCE DIRECTIVE FOR HEALTH CARE

Georgia's new Advance Directive for Health Care essentially combines into one document the elements of both the Living Will and the Durable Power of Attorney for Health Care. An ADFHC not only contains certain declarations but also names an agent to make health care decisions in accordance with the instructions and to enforce the person's stated intentions. It contains four parts: the designation of health care agents; a statement of treatment preferences; the nomination of a guardian in the event of incapacity; and the effective date and signatures. The appointment of a guardian for the adult does not revoke an ADFHC unless the court directs otherwise. The Georgia Code also contains the form for the ADFHC and sets forth the requirements of formality of completion and execution.

FINANCIAL POWER OF ATTORNEY

In addition to a health care power of attorney, one may also execute a financial or general power of attorney, which may be combined with or executed separately from the health care power. A financial power of attorney names an agent to act in the place of the individual, primarily in monetary and property matters, and defines the extent of or limitation on the authority given. The authority granted may be very limited and specific or be quite broad and include the authority to: write checks and make deposits; buy and sell real estate or other property or investments; negotiate and settle debts and claims; etc. Powers of attorney (both general and health care), executed while the adult is mentally competent, often allow for the conduct of all business and management of all personal affairs of the adult once incapacitated without the necessity of

guardianship or conservatorship. However, the appointment of a conservator for the adult revokes a financial power of attorney unless the court directs otherwise. The Georgia Code contains a form for a Financial Power of Attorney and an explanation of the nature of the power.

LIVING TRUST

A competent adult may also create an inter vivos, or "Living", trust which provides for the handling of all or certain financial affairs by a designated trustee over property transferred into the trust. It allows one to specify the person or entity (e.g., a trust department) to handle the affairs and manage the trust property and may define the exact manner of property management. It designates a trustee with whom third parties may deal regarding financial and other matters within the scope of the trust in the event of incapacity.

REPRESENTATIVE PAYEE STATUS

When a person receiving Social Security, Supplemental Security Income or VA benefits becomes incapable of managing those benefits, the Social Security Administration or Veterans' Administration can appoint a representative payee for such benefits without the necessity of conservatorship. If the person is a resident of a nursing or personal care home, the benefits may also be made payable directly to the care facility.

GEORGIA MEDICAL CONSENT LAW

It is also important to recognize that, in an emergency, the law allows physicians to treat anyone who is incapable of giving informed consent. In all non-emergency situations, the next of kin may consent if the patient is unable to do so. The Georgia Medical Consent Law lists the persons who may consent to medical care for another. Guardianship may not be necessary to consent to medical treatment, unless there is a dispute among those persons having equal voice under the law.

PLACEMENT DECISIONS AND PROCEDURES

Placement in a personal care home, assisted living facility, or nursing home often can be accomplished without a guardian, as long as the resident is either (a) cooperative or (b) incapable of objecting. A competent adult has the right to determine his own residence, and a facility is without authority to restrain an adult

absent consent, unless the authority to determine residence has been placed in another (a guardian). At times it may be difficult to gauge whether a new resident will ultimately "object," since he may be resistant at first but may adjust after a period of time and voluntarily remain resident. Of course, it is also necessary to make the financial arrangements for the care of the resident, which may be done by the resident (if competent), an attorney-in-fact, or by anyone accepting the obligation and guaranteeing payment.

In 1999, the Georgia Legislature passed the "Temporary Health Care Placement Decision Maker for an Adult Act." Under the Act, upon certification by an attending physician that an adult in a hospital, institution, medical center, or other health care institution is incapable of giving consent to a discharge from such facility and a transfer or admission to an alternative facility or placement (including nursing facilities, personal care homes, rehabilitation facilities and home or community based programs) is considered to be in the adult's best interest, authority to grant such limited consent is given to a list of persons similar to that in the Georgia Medical Consent Law. If no one authorized by such law is available or if all who are available waive the authority to consent or dissent, a petition may be filed in the probate court seeking an order solely authorizing such discharge, transfer or admission. The order will be limited in time to those purposes and does NOT result in the appointment of a guardian.

GUARDIANSHIP PROCEEDINGS

Of course, there are times when legal guardianship or conservatorship is needed and necessary. A Guardian is granted authority over the person of another, and a Conservator is granted authority over the property (including money) of another. The law provides appropriate protections for the adult, and guardians and conservators are monitored by and must file written, periodic reports on the condition of the ward and the ward's property with the probate court by which appointed. The proceedings should probably be pursued as a "last resort" but certainly should be pursued when appropriate.

NOTE: This pamphlet is provided as a public service for information only. It is NOT intended as a complete statement of the law applicable to every circumstance. If you have any questions about the alternatives discussed herein and their appropriateness to a particular situation or circumstance or if you need assistance in determining whether formal guardianship or conservatorship is necessary, please consult an attorney.