

When Guardianships Are Necessary and Why Thomas E. Simmons

Some Terminology

In South Dakota, a “guardian” is a person appointed by a court to be responsible for the personal affairs of an individual while a “conservator” is a person appointed by a court to be responsible for managing the estate and financial affairs of an individual.¹ (In other jurisdictions, there may be a similar distinction between a “guardian of the person” and a “guardian of the estate.”)

In many cases, both a guardian and conservator are appointed and one individual may serve both roles. In other cases, the guardian is a different person than the conservator, while in still others there may be a guardian appointed but not a conservator, or vice versa. The law also permits co-guardians and co-conservators to be appointed.

A person for whom a guardian/conservator is appointed is either a minor (an individual under the age of eighteen) or a “person in need of protection.”² (In other jurisdictions, a “person in need of protection” may be referred to as a “ward” or “incompetent.”)

In this article, the use of the word “guardian” includes a “conservator.” This article omits discussion of minor’s guardianships.

The Need for Guardianships

A guardianship may become necessary when a disabled child turning eighteen, or when an adult experiences dementia or a traumatic brain injury and powers of attorney were not executed prior to incapacity. A guardianship vests a guardian with the legal power to make decisions on behalf of the person in need of protection, and grants the guardian the power to manage the individual’s assets and property.

Guardianships are legal proceedings governed by state, not federal, law. The guardianship statutes in South Dakota are based upon the Uniform Guardianship and Conservatorship Act, a set of laws which is intended to be largely uniform among the states which adopt it.

The guardianship act is found in chapter 29A-5 of South Dakota Codified Laws.

¹ SDCL 29A-5-102(2), (4).

² South Dakota also recognizes “Veterans’ Guardianships.” SDCL ch. 33-17A.

Who Can Serve as a Guardian?

Four types of persons can serve as a guardian: (1) an adult individual who is capable of providing an active and suitable program of guardianship; (2) a public agency or nonprofit corporation; (3) a bank or trust company authorized to provide trustee services; (4) the South Dakota Department of Human Services or Department of Social Services if there is no one else qualified and willing to serve. No one can serve as a guardian who is employed by a public agency or facility which is providing substantial services or financial assistance to the person in need of a guardianship.³

When a Guardianship May be Unnecessary or Unavailable

A guardian can be appointed only when the person in need of protection has had his or her ability to respond to people, events, and environments impaired to such an extent that he or she lacks the capacity to meet the essential requirements for health care, safety, habilitation, or therapeutic needs without the assistance of a guardian.⁴

A conservator can only be appointed when the person in need of protection has had his or her ability to respond to people, events and environments impaired to such an extent that he or she lacks the capacity to manage property or financial affairs or to provide for their own support (or the support of legal dependents) without the assistance of a conservator.⁵

If the court is not satisfied that the individual is not sufficiently impaired to warrant a guardianship, then a guardianship will not be available. The law presumes every individual to be competent, and that presumption must be affirmatively overcome with a statement from a physician before a guardianship can be ordered. In some circumstances, the court will order a “limited guardianship” which vests the guardian with only certain enumerated responsibilities, leaving the protected person with authority over certain aspects of their life.

A guardianship may be unnecessary if the person in need of protection has no assets, or the assets can be managed without a guardianship.

WHERE TO FIND THE LAW

The law is generally comprised of statutes, regulations and caselaw (reported opinions by a court to specific facts). The law cited within the above discussion can be found at the links provided in the “Law” section of the ThomasESimmons.com website. South Dakota statutes are abbreviated as “SDCL” for South Dakota Codified Laws. South

³ SDCL 29A-5-110.

⁴ SDCL 29A-5-302.

⁵ SDCL 29A-5-303.

Dakota administrative rules are abbreviated as “SDAR.” Federal statutes are abbreviated as “USC” for United States Code.

DISCLAIMERS

Pursuant to IRS Circular 230, these materials are not intended or written to be used -- and cannot be used -- by taxpayers for the purpose of avoiding tax penalties; taxpayers should seek advice from independent tax advisors based upon their particular circumstances; these materials do not promote any particular plan or arrangement; general information is provided here.

These materials are provided as educational and informational resources only. Consult with a lawyer before making a legal decision since many rules contain exceptions and refinements which are not summarized here. This information should not be interpreted as legal advice. No one legal rule can be applied to all individuals or situations. State law varies tremendously from state to state and unless otherwise indicated, the law discussed here is applicable only in South Dakota. Since the law often changes when new statutes are enacted and cases are decided, no representations are made to the accuracy, completeness or timeliness of the discussions of law provided above.

© 2009 Thomas E. Simmons Inc.

Thomas E. Simmons
Attorney-at-Law
P.O. Box 8045
Rapid City, SD 57709-8045
Tel. (605) 342-1078
Email: Tom@gpnlaw.com