

OVERALL GUARDIANSHIP AND CONSERVATORSHIP INFORMATION

There is a very important need in Montana for attorneys who are willing to do guardianships and conservatorships for incapacitated individuals, either as the attorney representing the guardian, the protected person or to serve as the attorney representing the ward. The incapacitated individual may be a young person soon to turn 18, or who has recently turned 18, someone older who is also incapacitated or a person who cannot effectively manager his affairs. Montana Code Annotated [§ 72-5-101\(1\)](#) defines “incapacitated person” as, “. . . any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate reasonable decisions concerning his person or which cause has so impaired the person’s judgement that he is incapable of realizing and making a rational decision with respect to his need for treatment.” This Program is not set up to do guardianships based solely on minority or that are contested as part of an ongoing contentious divorce or custody proceeding.

Depending on the client, it is contemplated that attorneys doing guardianships and conservatorships through this Program will do so on a fee for services basis, a reduced fee basis or a pro bono basis depending on the agreement with the client. [Rule 6.1](#) of the Montana Rules of Professional Conduct provides that, “Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should render at least fifty (50) hours of pro bono publico legal services per year.” The Rule goes on to recommend either providing legal services without fee or at a “substantially reduced fee.” Hopefully this Program will provide the opportunity to do that.

The purpose of this overall statement is to provide a narrative explanation, in chronological order, of the law, forms, checklists, suggested letters and procedure involved in the guardianship process. It is not a complicated process. After you have done a couple of guardianships you will find them easy to do, generally not time-consuming and allows you a lot of flexibility with your schedule. And, you will understand how important they are to the families involved and how grateful those families are for your help. Separate references will also be made to the conservatorship progress.

There are many specific references to the guardianship and conservatorship law in this overview and hopefully they will be of assistance to you. However, as you are doing guardianships or conservatorships it is important you do your own independent review of the law in addition to what is in this outline to make sure it fits the particulars of your case. Included, in addition to statutory references, are suggested forms, checklists and letters to work from and discussions of suggested procedures for various stages of the process all of which need to fit the particulars of your case.

LAW

Montana statutory law concerning “Persons Under Disability – Guardianship and Conservatorship” is found at Montana Code Annotated §§ 72-5-101 to 72-5-502:

Part 1, § 72-5-101 to 104 provides information basic about guardianships and protective proceedings as well as the definitions of an “Incapacitated person;” “Protected person;” “Protective proceeding;” and “Ward.”

Part 2, § 72-5- 201 to 234 covers guardians of minors when the guardianship is based only on the fact that the Ward is a minor but not an incapacitated minor.

Part 3, § 72-5-301 to 325 provides for guardians of incapacitated persons be they a minor or an adult. *See* § 72-5-321 which spells out the powers and duties of a guardian of an incapacitated person.

Part 4, § 72-5- 401 to 438 provides for the PROTECTION OF THE PROPERTY OF MINORS AND PERSONS UNDER DISABILITY. That is to say, this Part provides for the appointment of a Conservator to manage a person’s property as opposed to a guardian who cares for the person. Often, for an incapacitated person, a Conservator isn’t necessary because the guardian has the authority to manage the Ward’s finances which is often just the Social Security Disability income. If there is any other property you should consider whether to ask the Court, in the Petition for Appointment of Full Guardian, for some special authority unique to this guardianship which would then be incorporated in the Order Appointing Full Guardian; or have the Guardian also appointed as the Conservator. The law concerning the managing of a person’s financial affairs is very detailed. You will see references to some of those statutory sections. However, it is important you review all of them to clearly understand how the conservatorship is created and the rights and responsibilities of the Conservator.

CHECKLIST

First contact with the client. Your first “contact” concerning the guardianship or the conservatorship, may be in person but more likely by phone. The next checklist is a helpful reminder of the information you must obtain from the client to be able to prepare the Petition for Appointment of (either Full or Limited) Guardian or a Conservator.

CHECKLIST OF QUESTIONS TO ASK AND INFORMATION NEEDED TO SET UP A GUARDIANSHIP OR A CONSERVATORSHIP FOR AN INCAPACITATED PERSON

(date) _____

1. Alleged Incapacitated Person:

Name: _____
Address: _____
Phone: _____
DOB/Age: _____
SSN: _____

2. **Basis of Alleged Incapacity or Need for Conservatorship:**

3. **Expected Length of Guardianship or Conservatorship:** _____

4. **Proposed Guardian(s) or Conservator(s):** A guardian is set forth in § [72-5-312](#). Also, § [72-5-306](#) states, “Guardianship for an incapacitated person may be used only as is necessary to promote and protect the well-being of the person.” The order of priority of appointment of a conservator is set forth in § [72-5-410](#) and the causes for the appointment of a conservator are set forth in § [72-5-409](#).

Name: _____
Address: _____
Phone: _____
DOB/Age: _____
SSN: _____

Relationship to Alleged Incapacitated Person: _____

Name: _____
Address: _____
Phone: _____
DOB/Age: _____
SSN: _____

Relationship to Alleged Incapacitated Person: _____

Length of Relationship: _____

If the proposed guardian is a parent, and the parents are no longer together (divorced, separated or never married) the following information is needed:

5. Where and when were the parents married (if ever married): _____

6. When and where were the parents divorced (or separated): _____

7. What are the nonresidential parenting rights: _____

8. What are the child support obligations---and are they current: _____

9. Do the parents talk, text or email: _____
10. Does the nonresidential parent consent to the guardianship---and if not, why not.

11. Are there any problems or disagreements between the parents that need to be resolved so the guardianship can be completed on a non-contested basis---or will a resolution of the problems require a hearing in court.

12. See paragraph 22 below for suggestions about how a disagreement between the parents might be resolved to avoid a contested hearing.

13. Name, phone number and address of **Physician**: _____

14. Name, phone number and address of **Visitor**: _____

15. Name, phone number and address of **Attorney for Ward**: _____

16. **Property Owned by the Ward (Other than Personal Property)**: _____

17. **Persons Required to be Given Notice. Section [72-5-314](#) Provides for Notices in a Guardianship. Section 72-5-403 Provides for Notice in a Conservatorship.**

NAME	ADDRESS	RELATIONSHIP TO ALLEGED INCAPACITATED PERSON

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18. Are there any conditions that necessitate an immediate appointment of a temporary guardian or a temporary conservator on an emergency basis: _____

19. Explain the out-of-pocket expenses: Fee for filing the Petition \$100 and the charge certifying a copy of the Letters of Guardianship \$2-\$3. _____

- A. If applicable explain the District Court's Affidavit of Inability to Pay Filing Fees and Other Costs.

20. Any other information or questions: _____

21. If the parents are separated or divorced, the nonresidential parent is entitled to 14 days notice before the guardianship hearing. Pursuant to § [72-1-301](#) that notice can be given by mail, personal delivery or newspaper publication. If by newspaper publication there could be an expense for the publication of notice of approximately \$200.

22. There are several possible ways to try to resolve disputes if there is a disagreement between parents who are now divorced or separated, as to who should be guardian and the conditions of that guardianship. Two suggestions are as follows:

- A. As soon as the Petition for Appointment of Guardian has been filed, so you now know the Cause Number and the Judge assigned to the guardianship,

immediately mail a copy to the nonresidential parent with a copy of the letter going to the residential parent. The purpose of such a letter would be to see if the nonresidential parent will call or write back to you to tell you they have no objection to the guardianship. Or, in the alternative, you can advise the nonresidential parent if they do not respond you will represent to the Court that they have no objection to the guardianship. A proposed letter in that regard is as follows:

This firm represents _____ in his/her Petition for appointment as the permanent guardian of your natural born son/daughter, _____. It is my understanding you have no objection to _____ being appointed as _____'s guardian. Enclosed is a copy of the Petition that has been filed for those purposes in _____ County. Under the circumstances, it appears this would be in the best interest of _____. If you do have any questions, I would be happy to answer those by mail or by email and my email address is _____, or by phone at _____. If I do not hear from you, I will advise the Court at the time of the hearing that this letter and the enclosed Petition were forwarded to you and you have no objection to the guardianship.

Thank you for your consideration.

If you hear nothing further from the nonresidential parent, you have to decide whether you can conclude the guardianship without further notice to the parent or just to be safe, give at least 14 days notice in advance of when you propose to ask the Judge to sign the Order Appointing Full Guardian.

B. Another thing that has worked in some guardianships is for the attorney to call and talk to the nonresidential parent and see if you can find out what objections the nonresidential parent has. Once you have that information then discuss that with the residential parent and see if there is some agreement the parties can come to that will remove the objection to the guardianship. For example, on two different occasions the nonresidential parent felt that he wasn't being kept advised of major decisions in the Ward's life and so it was agreed that if there were any "major lifestyle changes, major medical decisions or major financial decisions" that would be made on behalf of the Ward, the residential parent would let the nonresidential parent know about that and if there was then any disagreement between the parents the nonresidential parent would retain the right to petition the Court for a hearing on that issue before the guardianship was finalized. In both of the cases, once the parties had agreed on those three conditions, those three conditions were incorporated into the Court's final order appointing guardian. Those conditions, however, were not included in the Letters of Guardianship because the conditions would be protected by being in the order and there was a

possibility that kind of extra language in the Letters of Guardianship might raise unnecessary questions about the Letters.

Unfortunately, in some instances there are enough hard feelings between the parents that they cannot come to an agreement. In those instances 14 days notice of the hearing for appointment of guardian needs to be given to the nonresidential parent and the presiding judge needs to be advised that the hearing will be contested in order to schedule the appropriate amount of time.

VENUE

Section [72-5-311](#) provides that, “The venue for guardianship proceedings for an incapacitated person is in the place where the incapacitated person resides or is present.” This section also provides that, “If the incapacitated person is admitted to an institution pursuant to order of the court of competent jurisdiction, venue is also in the county in which that court sits.”

Some incapacitated persons reside in Group Homes or other residential facilities. If that living arrangement was agreed to by the necessary people, but was not ordered by a Court, venue would be where the incapacitated person resides. If on the other hand, the incapacitated person is residing in a facility pursuant to a Court order then venue would also be in the county in which that Court sits. However, as a practical matter the guardianship process is usually going to be most convenient if the guardianship is filed in the county where the attorney practices.

Montana law makes that possible pursuant to Montana Code Annotated § [25-2-202](#), of the Montana Rules of Civil Procedure which allows for the parties to an action to stipulate to a change of venue.

If for any reason a change of venue is not used, another possibility, if permitted by the court, is to handle the hearing to get the guardian appointed by using an unopposed motion. For a further discussion of that issue see the discussion of **Order Setting Hearing and Notice** at page 34.

Section [72-5-407](#) provides for venue in a conservatorship.

POWERS AND DUTIES OF A GUARDIAN

The powers and duties of a guardian based on the minority of the Ward are set forth at § [72-5-231](#). And for an incapacitated person at § [72-5-321](#).

Full guardian, guardian and limited guardian. Section [72-5-305](#) defines “Full guardian;” “Guardian;” and “Limited Guardian.” A full guardian possesses all the legal

duties and powers enumerated in § [72-5-321](#); the term guardian includes both a full guardian and a limited guardian; and a limited guardian means a guardian who possesses fewer than all of the legal duties and powers of a full guardian and whose powers have been specifically enumerated by the court. This arises only if there is some limited unique need of the Ward.

POWERS AND DUTIES OF A CONSERVATOR

Powers and duties of a conservator as set forth in §§ [72-5-427](#) and [428](#). Section [72-5-430](#) also provides that the Court can enlarge or limit the powers of a conservator. Sections [72-5-411](#) and [412](#) set forth what may be required concerning a Bond. Section [72-5-421](#) sets forth the powers that may be exercised by the Court directly, or through a conservator, with respect to the estate and affairs of the protected person and also provides for a **Temporary Conservator**.

TEMPORARY GUARDIAN

Section [72-5-317\(2\)](#) provides that, “If an incapacitated person has no guardian and an emergency exists, the court may exercise the power of guardian pending notice and hearing.” That is to say, you could petition the court for the appointment of a temporary guardian to do whatever is necessary on behalf of the ward in light of the emergency that exists. A temporary guardian can be appointed in a very short period of time because there is not a requirement for a report from a Physician, Visitor and Attorney for the Ward. The Petition for Appointment of Temporary Guardian can include much of the same information as the Petition for Full Guardian mentioned above, absent the need for a Physician, Visitor and Attorney, and with the additional information of whatever issue has created this need for a temporary guardian. A temporary guardian may serve for only six months unless you petition the Court for the reappointment for an additional six months.

TEMPORARY CONSERVATOR

Section [72-5-421](#) provides for a temporary conservator.

AFFIDAVIT OF INABILITY TO PAY FILING FEES AND OTHER COSTS

Presently (year 2017) the filing fee for the Petition for Appointment of Guardian is \$100 and once the guardianship is completed a fee of \$2 or \$3 (depending upon whether the copy is provided to the clerk) to obtain a certified copy of the Letters of Guardianship. The checklist of questions to review with the client at the outset of the guardianship includes a paragraph concerning these fees and whether the client is unable to pay them. If so, the attorney should assist the client in preparing, and filing with the District Court, an Affidavit of Inability to Pay Filing Fees and Other Costs. (You should check with your Clerk of Court to see what procedure is followed in your District concerning this

Affidavit. In some Courts the Affidavit can be filed with the Petition for Appointment of Guardian and the Clerk of Court will “park” the Petition---that is not actually file it and assign it a Cause Number and a Judge---until the court has either granted or denied the Affidavit.) If granted, the fees will be waived by the court and if denied other arrangements will have to be made. Under those circumstances some law firms agree to pay the fees.

The exact form of the Affidavit of Inability to Pay, and the exact form of the Order granting that Affidavit, vary among Montana’s judicial districts. You will need to contact the clerk of court, or get online, to get the Affidavit and Order used in the judicial district where your guardianship is filed. The Affidavit and Order below, which are used in Missoula County, will give you overall information of the kind of information that will be needed.

AFFIDAVIT OF INABILITY TO PAY FILING FEES AND OTHER COSTS

Name

Address

City State Zip Code

Phone Number

Email Address

[☐] WIFE [☐] HUSBAND CO-PETITIONER

MONTANA FOURTH JUDICIAL DISTRICT COURT MISSOULA COUNTY

In re the _____ of:

Dept. _____

_____,

Cause No. _____

Co-Petitioner,

and

_____,

Co-Petitioner.

AFFIDAVIT OF INABILITY TO PAY FILING FEES AND OTHER COSTS

[WRITE CLEARLY -- ANSWER ALL QUESTIONS. USE N/A IF NOT APPLICABLE.]

STATE OF MONTANA)

:ss.

COUNTY OF _____)

I, _____,
(Your Name)

1. I have a good cause of action or defense and am unable to pay the costs.
2. I request that the Court issue an order waiving prepayment of my fees.
3. I understand the court may order me to answer questions about my finances.
4. I understand if the court waives my fees, I may still have to pay later if I cannot give the court proof of my financial eligibility or if my financial situation improves before this case is over.

I am:

Single _____ Married _____ Divorced _____ Separated _____

5. I am asking the court to waive my fees because I receive (check all that apply):

- ☐ SSI \$ _____
- ☐ Food stamps \$ _____
- ☐ TANF (Welfare) \$ _____
- ☐ Medicaid \$ _____

AND/OR

- ☐ The **gross** monthly income **for all household members** (before deduction for taxes) **that I support or who help support me is less than listed in the table below.** I am including all sources of income (such as child support, benefits, unemployment, dividends, interest, business rental income, etc.) [Mark the box below that describes your household size and monthly income before taxes.]
- ☐ I am the **only person** living in my household and I make less than \$1,128.00 a month.
- ☐ There are **(2) people** living in the household and together we make less than \$1,517.00/month.
- ☐ There are **(3) people** living in the household and together we make less than \$1,907.00/month.
- ☐ There are **(4) people** living in the household and together we make less than \$2,296.00/month.
- ☐ There are **(5) people** living in the household and together we make less than \$2,686.00/month.
- ☐ There are **(6) people** living in the household and together we make less than \$3,076.00/month.
- ☐ There are **(7) people** living in the household and together we make less than \$3,465.00/month.
- ☐ There are **(8) people** living in the household and together we make less than \$3,855.00/month.

Are persons dependent on you for support? Yes _____ No _____

If yes, list each person and that person's age and relationship to you:

AND/OR

☐ I have unusual medical or care expenses or am experiencing an emergency (*describe*):

EMPLOYMENT INFORMATION

Employed: Yes _____ No _____ Self-Employed: Yes _____ No _____

Hourly wage \$ _____ Hours you work per week _____

Type of employment _____ Length of current Employment _____

Employer's name and address _____

Is there any reason, such as disability, family responsibilities, or pursuit of an education that prevents you from being able to work full-time?

___ Yes, please explain: _____.

___ No.

Note: You may be asked for documentation before the court makes a decision on granting your request to waive the filing fees.

If unemployed:

Month/Year last employed _____ Last hourly wage \$ _____

Why did you leave your last employment? _____

ASSETS

REAL ESTATE

Do you own or are you buying any land or other real estate? Yes _____ No _____ If yes, what is the approximate current market value? _____ What was the purchase price? _____ When did you purchase the land or other real estate? _____

Is it paid for? Yes _____ No _____ If not, how much do you owe on the land or other real estate? \$ _____

FINANCIAL ACCOUNTS: Do you have:

Checking accounts? Yes _____ No _____ If yes, total amount \$ _____

Savings accounts? Yes _____ No _____ If yes, total amount \$ _____ List the banks where the accounts are held:

Do you have stocks or bonds? Yes _____ No _____

If yes, what is the total amount of the stocks or bonds \$ _____
Do you have wages due but not received? Yes _____ No _____
If yes, list total amount \$ _____
Is there money owed to you? Yes _____ No _____
If yes, total amount owed to you: \$ _____

MOTOR VEHICLES: (You must check one box)

- ☐ **I do not own my own vehicle**
☐ **I own vehicle(s) as listed below:**

1. _____ Year Make Model _____ Value \$ _____ Loan Balance \$ _____ Monthly Payment \$ _____	2. _____ Year Make Model _____ Value \$ _____ Loan Balance \$ _____ Monthly Payment \$ _____
3. _____ Year Make Model _____ Value \$ _____ Loan Balance \$ _____ Monthly Payment \$ _____	4. _____ Year Make Model _____ Value \$ _____ Loan Balance \$ _____ Monthly Payment \$ _____

PERSONAL PROPERTY: List the value of your personal property for each category.
The value can be what you would sell all the items, in each category, at a yard sale. "Other personal property" includes clothing, kitchen items, bathroom items, books, DVDs, etc...

Sporting Equipment \$ _____ Guns \$ _____
Boats \$ _____ Trailers/Campers \$ _____
Tools \$ _____ Electronics \$ _____
Furniture \$ _____ Appliances \$ _____
Other personal property \$ _____ ATV/motorcycles \$ _____ Describe
and value other personal property you are buying:

MONTHLY EXPENSES

List your **monthly** expenses:

Rent \$ _____ House Payment \$ _____
Food \$ _____ Clothing \$ _____ Phone \$ _____
Utilities: Water \$ _____ Gas \$ _____ Electric \$ _____

Insurance: Health \$ _____ Auto \$ _____
Electronic: Cable \$ _____ Satellite TV \$ _____ Internet \$ _____

Other (List each item):

1. _____ 2. _____
3. _____ 4. _____

DEBTS:

Credit Card Debt \$ _____

Medical Debt \$ _____ --Describe: _____

Other (List each item):

1. _____ 2. _____
3. _____ 4. _____

Please complete the following:

_____ I prepared all of the pleadings and papers to be filed in this case myself, and no one has been, or will be, paid on my behalf. I have not paid anyone or any organization for the preparation and processing of these documents or for the forms to be used in this case.

_____ I further declare that I am the person above named, that I have read the foregoing questions and information and know the same to be true to the best of my knowledge, and that IF ANY PART OF THE ABOVE IS MADE FALSELY, I AM SUBJECT TO PROSECUTION FOR PERJURY.

(Signature of Affiant)

SUBSCRIBED AND SWORN TO before me, a notary public, this
_____ day of _____, 20_____.

Notary Public for State of Montana

Residing at _____

My Commission Expires: _____

ORDER OF INABILITY TO PAY FILING FEES AND OTHER COSTS

Hon. _____

Fourth Judicial District

Missoula County Courthouse

200 West Broadway
Missoula, Montana 59802
(406) 258-4780
Fax (406) 258-4899

MONTANA FOURTH JUDICIAL DISTRICT COURT MISSOULA COUNTY

In re the _____ of:
_____,
Petitioner,
and
_____,
Respondent.

Dept. No.
Cause No.: DR-

ORDER ON INABILITY TO PAY FILING FEES AND OTHER COSTS

Having considered the information contained in [_____] Wife [_____] Husband Co-Petitioner's Affidavit of Inability to Pay Filing Fees and Other Costs, IT IS HEREBY ORDERED that, pursuant to §25-10-404, MCA et seq., all officers of the Court shall perform all services associated with this action, including filing, issuance and service of all pleadings and Court orders, without demanding or receiving fees in advance. Leave to file the Petition expires thirty (30) days from the date of this Order.

Dated this _____ day of _____, 20 ____.

DISTRICT COURT JUDGE

ENGAGEMENT LETTER

After you have agreed to represent the client you should send the client an engagement letter. The first time you do a Guardianship you should read completely through this **OVERALL GUARDIANSHIP AND CONSERVATORSHIP INFORMATION** so you have an overall understanding of what is involved. Doing that will help you better understand what should be covered in your engagement letter. Also, the *Lawyers' Deskbook & Directory*, in the section on *Forms*, has a sample Engagement Letter with specific paragraphs on: Engagement, Rates, Costs, Billing and Payments, and Termination.

A sample engagement letter to consider is as follows:

Dear _____:

This will confirm that you have retained (your name or the name of your firm) to prepare a guardianship on your behalf for your (daughter/son). What will be involved in this process is as follows:

1. We will prepare a Petition for Appointment of Full Guardian and once prepared make arrangements with you to have the Petition signed and notarized.
2. We will file the Petition with the District Court together with an Order asking the Court to appoint a Visitor, Physician and Attorney. The guardianship law requires that an independent attorney be appointed to represent your (daughter/son---who is referred to as the Ward) separate and distinct from our representation of you. (More information on this at paragraph four below.)
3. Once we have received the Order from the Court we will write to the Visitor and the Physician and ask them to prepare a report concerning their knowledge of your (daughter/son) and the necessity of the guardianship. In respect to the report from the Physician, please know that it is not necessary to have an updated examination, but instead a report confirming the physician's diagnosis of your (daughter's/son's) diagnosis, inability to properly care for (herself/himself) and that a guardianship would be helpful. At the appropriate time we will write that letter to the Physician specifying what needs to be covered in the report.
4. Once we have received the reports from the Visitor and the Physician, we will forward those to the attorney representing your (daughter/son) together with your contact information. That attorney will arrange to meet with you and your (daughter/son).
5. Once we have the information from the attorney for your (daughter/son) we will file the report from the Physician and the Visitor, and the information from the Attorney with the Court and make the necessary arrangements for the court to issue its Order appointing you as the Full Guardian.
6. When we receive the Order appointing you as guardian, we will make arrangements with you to come to the office to sign the Letters of Guardianship and then have the Letters issued by the Clerk of Court which then gives you full authority as the guardian. At some time in the future it may be necessary for you to produce a copy of your Letters of Guardianship---and also, but only rarely, you may sometime need to produce a certified copy of the Letters of Guardianship. If you are asked for a copy of the Letters, but not a certified copy, you can just make a photocopy of your certified copy. If, on the other hand, a certified copy is required you can give them your copy. If that should happen, or if you should misplace your certified copy, it is easy to get another certified copy by going to the Clerk of Court's office at the courthouse and asking for another certified copy and there will be a \$3 charge. If you do that it will be helpful to the Clerk

of Court if you have the cause number from the guardianship which is on the front page of all of the Court documents.

7. [We will not be billing you for our attorney's fees. We will, however, bill you for any costs that we advance on your behalf. Those costs are approximately \$100 for filing the Petition, and \$3 for each certified copy of the Letters, charged by the Clerk of Court's Office. We will send you a statement for those costs advanced.]

Or

7. [We understand that it may be difficult for you to pay the filing fee. The Court does have a program where you can apply for a waiver of having to pay filing fees. To do that you need to contact the Clerk of Court and tell them you would like to fill out an "Affidavit of Inability to Pay."]

Or

7. [We understand that it may be difficult for you to pay the filing fee and the cost for the certified copy of the Letters. Under those circumstances, we will pay those expenses on your behalf.]

8. [Remind the client, in general terms, about the importance of a Special Needs Trust; that this guardianship program does not include the preparation of a Special Needs Trust; and it will be necessary for them to retain a different attorney to advise them on that issue and prepare any necessary documents.]

9. Please note that to finalize the guardianship takes more time than it sometimes seems like it should. Sometimes that is just due to the demands on my schedule. The Physician, Visitor and Ward's Attorney, all have demands on their individual schedules and as a result it takes time for them to get to the reports we need. However, if you ever have any concerns or questions about the time involved, I would encourage you to call so you will know exactly where we are at any given time. You can reach me during business hours at _____. If at any time you are trying to reach me and you are not able to, please contact my legal assistant, _____ at _____.

[Please note that the above letter deals only with the appointment of a guardian. If, at the same time, a conservator is being appointed, or if only a conservator is being appointed, modify the engagement letter to cover those differences.]

COURT DOCUMENTS – PROCEDURE TO FOLLOW – AND SAMPLE FORMS

This section will discuss the court documents that need to be prepared, the procedure to

follow in doing the guardianship and the suggested forms to use.

Petition for Appointment of Full Guardian of an Incapacitated Person. The guardianship process is started by filing a Petition for Appointment of Full Guardian based on the information you have obtained from your client. To make sure everything is correct in the Petition, you may want to mail/email a copy to the client to review before the final Petition is prepared.) When the final Petition is filed send an extra copy of the first page for the Clerk of Court to email or mailed back (if to be mailed enclose self-addressed stamped envelope) to you so we have the cause number and the name of the Judge.

Note, this Petition does not include the appointment of a conservator. If a conservator is also required, in addition to a guardian, that can be included in the Petition. Or, on the other hand, if the appointment involves only a conservator, and not a guardian, the necessary changes can be made in the Petition to accomplish that.

**SAMPLE FORM FOR THE PETITION FOR APPOINTMENT
OF FULL GUARDIANS WHEN THE GUARDIANS ARE
MARRIED AND ARE THE PARENTS OF THE WARD**

FIRM/ATTORNEY CAPTION

Attorneys for Petition(s) and Proposed Guardian(s)

MONTANA ____ JUDICIAL DISTRICT COURT, ____ COUNTY

IN THE MATTER OF THE
GUARDIANSHIP OF

An Incapacitated Person.

Cause No.: _____

Judge: _____

PETITION FOR APPOINTMENT OF
FULL GUARDIAN(S) OF
INCAPACITATED PERSON

In accordance with Montana Code Annotated § 72-5-301 et seq., and more particularly §§ 72-5-306 and 72-5313, Petitioner(s), _____ and _____, file this Petition for the Appointment of Full Guardian(s) of his/her/their incapacitated son/daughter, _____. Venue is proper under Montana Code Annotated § 72-5-311 because the person to be protected resides in _____ County. The Court has

jurisdiction over this proceeding pursuant to Montana Code Annotated § 72-1-202.

In that regard, Petitioner(s) state(s) as follows:

1. Petitioner, resides at _____ and whose mailing address is _____ is the (relationship to the Ward) of the Ward.

2. Petitioner, resides at _____ and whose mailing address is _____ is the (relationship to the Ward) of the Ward.

3. _____ (“_____”) is an unmarried incapacitated person, born on _____, and is the child of the Petitioner(s) and resides at _____ and whose mailing address is _____.

4. _____ is an incapacitated person as a result of _____, which has caused her/him to lack sufficient understanding or capacity to make or communicate responsible decisions concerning her/his person or which has so impaired his/her judgment that she/he is incapable of realizing and making reasonable decisions with respect to her/his health, safety, and medical affairs.

5. It is expected that the guardianship will last the remainder of _____’s life. (If the Petition is for a limited guardianship then designate the particular powers and areas of authority that the Petition seeks to have vested in the limited guardian, as provided in § 72-5-320, and the term for which the limited guardianship is requested. The Petition also may include a request for temporary guardianship as provided in § 72-5-317.)

6. Petitioner(s) has/have priority for appointment as guardian(s) of _____ pursuant to Montana Code Annotated § 72-5-312. Due to _____’s incapacity, (s)he is unable to make a reasonably informed choice as to who should be appointed as her/his

guardian(s). In addition, ____ is unmarried and has no children. Therefore, Petitioner(s), as _____'s parent(s), have priority under Montana Code Annotated § 72-5-312(2)(d).

Pursuant to Montana Code Annotated § 72-5-306, the well-being of ____ will be served by the appointment of a full guardian because she/he is incapacitated, and judicial intervention in her/his personal freedom of action is necessary to meet essential requirements for her/his physical health and safety.

7. _____ has no property other than his/her personal property.
(Or, if the Ward owns property designate what it is.)

8. Pursuant to Montana Code Annotated § 72-5-315, ____ must be examined by a physician appointed by the Court, and the physician must submit a written report. Petitioner(s) request(s) the Court appoint _____ M.D., _____, _____, MT 5980__ as _____'s examining physician. Dr. ____ will be able to provide a competent report regarding _____'s condition, which will satisfy the requirements of the statute.

9. Pursuant to Montana Code Annotated §§ 72-5-313 and 315, ____ must be interviewed by a Visitor appointed by the Court. This Visitor is also to interview the Petitioner(s). Petitioner(s) request(s) the Court appoint ____ as Visitor, (state the Visitor qualifications and place of employment) whose address is _____, MT 59____. The Visitor will be able to provide a report concerning _____'s condition, which will satisfy the requirement of the statute.

10. Pursuant to Montana Code Annotated §§ 72-5-315(2) and (4), _____ has the right to be represented by counsel. Petitioner requests the Court appoint _____ as attorney to represent _____ in their guardianship. The attorney for the Ward shall

represent the Ward to ensure that the statutory requirements are satisfied and that judicial intervention in the Ward's personal freedom of action and decision is necessary to meet the Ward's essential requirements for physical health and safety and to promote and protect the wellbeing of the Ward. The Ward's attorney shall make that information known to counsel for the proposed guardian and to the Court in whatever manner is deemed most appropriate.

11. _____'s welfare and best interests will be best served by the requested appointment of this full guardianship.

12. By signing, accepting, or acting under this appointment, Petitioner acknowledges that he/she will assume the duties and responsibilities of a fiduciary and that he/she must work exclusively for the benefit of the protected person under the guardianship. He/she also acknowledges that the primary duty of a guardian is the duty of loyalty to and protection of the best interests of the protected person. Therefore, he/she acknowledges that he/she: (a) may not use any of the property or other assets of the protected person for his/her own personal benefit; (b) must direct any benefit derived from this appointment to the protected person; and (c) must avoid conflicts of interest and must use ordinary skill and prudence in carrying out the duties of this appointment.

13. Pursuant to Montana Code Annotated §§ 72-5-321(2)(e) a full guardian is required to report the condition of the ward and of the estate that has been subject to the full guardian's possession or control annually for the preceding year unless waived by the Court. Because the ward's condition is permanent and because the ward has no estate of any value, Petitioner(s) request(s) the Court to waive the necessity of that reporting.

(Please note, each attorney will have to decide whether they want to ask the court to waive the annual reporting on the Ward's condition or the Ward's estate or not. Some may take the position that the Ward's condition and estate should be reported on an annual basis---and there may be additional reasons to do that if the Ward in fact has any estate---however that is usually not the case. Another consideration is that the parents already have lots of responsibilities caring for their special needs daughter/son and the parents should not be burdened with the additional reporting requirement.)

14. This guardianship will ensure ____'s overall well-being by allowing Petitioner(s) to make all necessary care decisions, decisions concerning medical treatment or other professional care.

WHEREFORE, Petitioner(s), ____ and ____, respectfully request the following relief:

1. Find that ____ is an incapacitated person for whom appointment of a full guardian is proper.

2. Find the appointment of Petitioner(s) as full guardian(s) will serve the best interests and welfare of ____, an incapacitated person.

3. Find venue is proper in ____ County.

4. Appoint Dr. ____ as the examining physician.

5. Find that Dr. ____'s report satisfies the requirements of Montana Code Annotated § 72-5-315.

6. Appoint ____, as Visitor to interview ____ and Petitioner(s).

7. Find that ____'s report satisfies the requirements of Montana Code

Annotated § 72-5-315.

8. Appoint an attorney _____ to represent _____'s interests in this matter.

9. The attorney shall make known to the attorney for the guardian, and to the Court, what the attorney believes is necessary to promote and protect the well-being of the Ward pursuant to Montana Code Annotated § 72-5-306.

10. Find that judicial intervention in _____'s personal freedom of action and decision is necessary to meet essential requirements for _____'s physical health, safety and overall wellbeing.

11. Find that Petitioner(s) has/have first priority for the appointment as guardian(s).

12. Find that the notice required by law has been given.

13. Waive the annual reporting of the ward's condition and the estate of the ward which is subject to the full guardian('s) possession or control.

14. Appoint Petitioner(s) as the full guardian(s) of _____ to serve without bond.

15. Find that this guardianship is expected to last for an indefinite period.

Dated this ____ day of _____, 20____.

Attorneys for Petitioner(s) and Proposed Guardian(s):

Attorney's address block

By _____

VERIFICATION

[illegible]

____, being first duly sworn, upon oath deposes and states:

That she/he has read the foregoing Petition for Appointment of Permanent Guardian(s) for _____, that he/she is the Petitioner(s) named therein, and that the facts and matters contained therein are true, accurate, and complete to the best of his/her knowledge and belief.

(name)

SUBSCRIBED AND SWORN TO before me, a Notary Public, this ____ day of _____, 20__, by _____.

Dated this ____ day of _____, 20____.

(name)

VERIFICATION

[illegible]

_____, being first duly sworn, upon oath deposes and states:

That she/he has read the foregoing Petition for Appointment of Permanent Guardian(s) for _____, that he/she is the Petitioner(s) named therein, and that the facts and

matters contained therein are true, accurate, and complete to the best of his/her knowledge and belief.

(name)

SUBSCRIBED AND SWORN TO before me, a Notary Public, this ____ day of _____, 20____, by _____.

(Please note this sample Petition deals only with an appointment of a guardian. If, in your case, a conservator is also being appointed, or if the appointment deals with only a conservator, modify the Petition to make the necessary changes.)

**LETTER TO PROPOSED GUARDIAN(S) SENDING THE PETITION FOR
APPOINTMENT OF GUARDIANSHIP WHEN THE PROPOSED GUARDIAN(S)
RESIDES IN A CITY DIFFERENT THAN THE ATTORNEY**

If so, the following is a proposed covering letter to mail the Petition for Appointment of Guardian to the proposed guardian(s):

Enclosed is the original, and one copy, of the Petition for Appointment of Full Guardian(s). What you need to do with the Petition is:

1. Take the **original** Petition to be signed and notarized before a notary. (Please note, that most Clerk of Court's Offices have a notary and will notarize your signature in that office. If for any reason the Clerk of Court's Office will not notarize your signature arrange to go before a notary somewhere else.)
2. Once you have signed and dated the **original** Petition, in the presence of a notary, and the notary has completed the notarization, the original Petition needs to be filed with the Clerk of Court at the ____ County Courthouse.
3. The Clerk of Court will require that you pay the filing fee which is \$100. (As of April 2017.)
4. Some Clerk of Courts will, at your request, email us a copy of a Petition which has been filed.

5. If the Clerk of Court will not send us an email copy of the Petition, please ask them to make a photocopy of just the first of the original Petition and then mail that to us in the enclosed self-addressed stamped envelope. Please keep the copy of the Petition for your records.

Once I have received the Petition I will prepare an Order to send to the Judge appointing the Physician, Visitor and Attorney. (Add anything else you think should be added and then sign the letter.)

ORDER APPOINTING PHYSICIAN, VISITOR AND ATTORNEY

Once the Petition for Appointment of Guardian has been filed, and you now have the cause number and the name of the judge in jurisdiction, you should submit to the Court the Order Appointing Physician, Visitor and Attorney. A sample order is as follows:

JUDGE'S ADDRESS BLOCK

MONTANA _____ JUDICIAL DISTRICT COURT, _____ COUNTY

IN THE MATTER OF THE
GUARDIANSHIP OF _____,

An Incapacitated Person.

Cause No. _____

Judge: _____

**ORDER APPOINTING PHYSICIAN,
VISITOR AND ATTORNEY**

Petitioner(s) has/have filed a Petition for appointment of permanent guardian(s) for _____ (name of the child) ("_____"). Pursuant to Montana Code Annotated § 72-5-315, _____ (name of the child) must be examined by a Physician appointed by the Court and that Physician must submit a written report; a Visitor must be appointed by the Court and that Visitor must interview Petitioner(s) and _____ (child's name); and an Attorney should be appointed to advocate for what the ward would like done. The Court finds the Petitioner's(s') petition well taken and hereby appoints _____ (name of the doctor) to examine _____ (the child's name) and submit a written report to counsel for the Petitioner(s). The Court appoints _____ (name of the Visitor) as the Visitor to interview Petitioner(s) and _____ (child's name) and submit a written report to counsel for the Petitioner(s). The Court appoints _____ to represent _____ (child) and be prepared to advise the Court and counsel for the guardian of the Ward's position as to the guardianship.

WHEREFORE, the Court makes the following:

ORDER

1. Pursuant to Montana Code Annotated § 72-5-315, the Court hereby appoints _____ (doctor) to examine _____ (child) and prepare a written report of that examination.

2. Pursuant to Montana Code Annotated § 72-5-315, the Court appoints _____ (name and address) as the Visitor to interview Petitioner(s) and _____ (child's name) and prepare a written report as to the appropriateness of this guardianship.

3. Pursuant to Montana Code Annotated § 72-5-315, _____ is appointed to represent _____ and make known to the Attorney for the Guardian and the Court the Attorney's opinion as to the Ward's wishes as to the Guardianship.

DATED this ____ day of _____, 20____.

_____, District Judge

c: (Name of attorney to receive copy back from the Court.)

INFORMATION CONCERNING THE APPOINTED PHYSICIAN, VISITOR AND ATTORNEY

PHYSICIAN. Section [72-5-315](#) sets out the procedure for Court appointment of guardians. Subsection (3) provides that the incapacitated person must be examined by a physician appointed by the Court and that physician must submit a report in writing to the Court. In the guardianship law there is no definition of who is considered a physician. However, in the Montana Code Annotated chapter on *Medicine*, and more particularly § [37-3-102\(7\)](#) defines physician as, "A person who holds a degree as a doctor of medicine or a doctor of osteopathy and who has a valid license to practice medicine or osteopathic medicine in this state."

In that respect, something to be aware of is that with some families the health care provider with the most current knowledge about the Ward is not a physician but some other health care provider. It may be a physician's assistant, a nurse practitioner or some other medical person. Under those circumstances it may be necessary for the proposed guardian to trace back in the Ward's earlier medical history to see if there are any medical records from a physician that can be used in combination with the current opinion of the physician's assistant, nurse practitioner, etc. Or, if the Ward's condition is obvious the Court may be okay with a report from a non-physician who is otherwise qualified. Other options to consider would be:

1. If the medical person with knowledge of the Ward works under the supervision of a physician, ask if that physician would also be willing to sign off on the letter written by the medical person.
2. Put in the Order Appointing Physician, Visitor and Attorney a specific request to the Court to authorize the medical report to be written by some designated person other than a physician.
3. Or, if necessary, schedule a current examination of the Ward by a physician.

When writing to the physician (whoever that might be depending on the circumstances of your guardianship) send a copy of the Order Appointing Physician, Visitor and Attorney so the Physician will understand that he/she has the necessary legal authority to communicate with you without violating any patient confidentiality. But it is not necessary to send a copy of the Petition for Appointment of Full Guardian of Incapacitated Person. Request the examination and a written report that should include the diagnosis, how that diagnosis relates to the Ward's capacity to make or communicate responsible decisions concerning the Ward's finances, health and safety and what the Ward's long term prognosis is.

Usually the Ward's physician will be familiar with the Ward's condition and you can advise the physician that it isn't necessary to go to the time and expense of doing an updated examination but instead just send a report confirming the physician's opinion as to the Ward's condition and because of that the Ward's capacity to make and communicate responsible decisions concerning the Ward's finances, health and safety and whether the Ward's condition is permanent.

A proposed sample letter to send to the physician is as follows:

Confidential

**** Doctor ****

RE: Guardianship of _____

Dear Dr. _____:

This firm represents _____ who are the parents of (or, who is the parent of) _____. (Or whatever the relationship is between the proposed guardian and the Ward.) We have petitioned the Court for their/her/his appointment as full guardian for _____. Enclosed please find a copy of the Court's order appointing you as the Physician to provide a report concerning _____'s condition which is a requirement for the guardianship proceeding. Please note it is not necessary for you to do an updated examination of the Ward if you are familiar with the Ward's condition. Instead, we would need a report confirming _____'s

condition, whether that condition makes it impossible for _____ to make reasonable and well informed decisions concerning _____'s finances, health and safety. Finally, it would be helpful to have your opinion as to the long term prognosis and whether this condition is permanent.

Please send that report to my attention, and if you have any questions, I can be reached at _____. Thank you.

(copy to parents)

VISITOR. Section [72-5-313](#) sets forth who qualifies as a Visitor and [72-5-315\(3\)](#) explains the Visitor's duties and the guardianship process. You should be able to identify an appropriate Visitor by talking with the proposed guardian in terms of who has the most knowledge concerning the Ward in addition to the physician. That may be someone within the school system who is knowledgeable about the Ward; it may be a social worker or case worker with an agency who has worked with the Ward; it may be a counselor separate from the school system who has worked with the Ward; or, some other person who meets the qualifications of § 72-5-313 and knows the Ward. When writing to the Visitor send a copy of both the Petition for Appointment of Full Guardian of an Incapacitated Person and the Order Appointing Physician, Visitor and Attorney.

A sample letter to the Visitor is as follows:

**** Visitor ****

RE: Guardianship of _____

Dear _____:

Enclosed is a copy of the Petition for Appointment of Guardian and the Order Appointing the Physician, Visitor and Attorney in the Guardianship of _____. I understand you have agreed to act as the Visitor in this guardianship and to prepare a report for the Court. As a part of your report we would request:

1. If you are not familiar with where the Ward lives we request you visit that place. Most likely that visit can take place in connection with your interview with the Ward and the proposed guardian.
2. Provide an overview of the Ward's condition and more particularly the Ward's capacity to make and communicate reasonable and informed decisions concerning her/his finances, health and safety and whether the Ward can manage her/his affairs or not.
3. Please also comment on the proposed guardian's overall ability and qualifications

to serve as the guardian.

Please send your report directly to me. If you have any questions, I can be reached at _____. Thank you.

(copy to parent)

ATTORNEY FOR THE WARD. Once you, as the attorney for the guardian, have received the reports from the Physician and Visitor, send copies of both reports to the Attorney for the Ward. You should also send the Attorney a copy of the Petition for Appointment of Guardian and a copy of the Order Appointing Physician, Visitor and Attorney.

It is important you understand, and convey to the Attorney for the Ward, what the attorney's responsibilities are in a guardianship because the applicable law in Montana was changed in 2007. Prior to 2007 that attorney's powers and duties were those as a *guardian ad litem* (GAL). The GAL was an officer of the Court and frequently served as the "eyes and ears" for the Court. The GAL's duties included investigating and reporting and doing so as a witness who could not be cross-examined. Those reports frequently required personal opinions from the attorney representing the Ward together with recommendations what action the Court should take. The law, § 72-5-315(2) was changed in 2007 and omitted the prior language describing the attorney's role as, "The official or assigned counsel has the powers and duties of the duties of a guardian ad litem." The change in the law reverted the relationship between the attorney and the Ward back to a classic attorney/client relationship which is governed by the Rules of Professional Conduct are. The law, before it was amended in 2007, required the GAL to act in the client's "best interest" which in some cases may not be what the Ward desires. Now, as a result of the change in the law, the Attorney for the Ward is to advocate for the Ward's wishes.

Montana Code Annotated § [72-5-315\(2\)](#) provides that the incapacitated person may have counsel of that person's choice or the Court may appoint an attorney. That section does not specify that a report needs to be filed with the Court but as a practical matter something in writing needs to go to the Court unless the attorney for the Ward plans to attend the guardianship hearing on the Ward's behalf.

To give you some perspective on your working with the Attorney for the Ward, and the kinds of reports that the Attorney for the Ward may write, next you will find a sample affidavit report as well as two examples of actual reports from a Ward's Attorney.

Attorney for Incapacitated Person's Address Block

MONTANA _____ JUDICIAL DISTRICT COURT, _____ COUNTY

IN THE MATTER OF THE
GUARDIANSHIP OF _____,

An Incapacitated Person.

Cause No. _____

Judge: _____

AFFIDAVIT AND REPORT OF
ATTORNEY FOR INCAPACITATED
PERSON

STATE OF MONTANA)
): ss
COUNTY OF _____)

_____, being first duly sworn, states:

1. I am the appointed attorney for _____ (hereinafter _____).
_____ has petitioned to be his/her guardian.

2. On _____, I met and interviewed _____ at _____ where
he/she resides with _____. _____ is [describe incapacitated person
and provide details about living arrangement, content of person and anything else
pertinent to the guardianship.]

3. _____ is [diagnosed] and lacks sufficient understanding or
capacity to make reasonable decisions regarding his/her health, safety and wellbeing.
He/she lacks the capacity to manage his/her affairs. The Petitioner assists him/her with all
decisions regarding his/her personal care and affairs.

4. I have reviewed the Physician and Visitor reports filed in support of the
guardianship.

5. Based upon my interviews and my investigation, _____

(here state your opinions as to what best represents the Ward's wishes and ability to understand the consequences of the guardianship.)

Dated this ____ day of _____, 20__.

By _____

**

Attorney for Incapacitated Person

TWO ACTUAL REPORTS FILED BY ATTORNEYS FOR WARDS. The first report is of a Ward who was living at home with her/his parents and the second of a Ward who was living in a group home.

WARD'S ATTORNEY'S ADDRESS BLOCK

Attorney for Respondent

MONTANA _____ JUDICIAL DISTRICT COURT, _____ COUNTY

IN THE MATTER OF THE
GUARDIANSHIP OF _____,

An Incapacitated Person.

Cause No. _____

Judge: _____

NOTICE OF NON-OBJECTION TO
PETITION FOR PERMANENT
GUARDIAN

I, _____, counsel for the Respondent, _____, hereby provide notice that Respondent does not object to the appointment of a permanent guardian in this matter. Accordingly, I have no basis to object to Petitioners' request.

Following my appointment as counsel, _____, counsel for Petitioners, provided me copies of the Physician and Visitor reports ordered by the Court. I reviewed those reports and met with _____ at my office.

I initially met with _____ and the Petitioner, _____. _____ and I then discussed the Petition in this matter. _____ appeared to understand the basic nature of a guardianship, how a guardianship would affect her rights as an adult, and her right to object to the Petition. _____ indicated that she does not object to the Petition. Therefore, as counsel for Respondent I do not have any basis to object to Petitioner's request.

Dated this ____ day of _____, 20__.

Attorney for Respondent
Attorney for Guardian

I, _____, counsel for Respondent, _____, hereby provide notice that counsel is unable to determine whether _____ consents or objects to Petitioner's request for appointment of a permanent guardian for her. Accordingly, I have no basis to object to petitioner's request.

Following my appointment as counsel, _____, counsel for Petitioner, provided me copies of the physician and visitor reports ordered by the Court. I reviewed those reports and spoke with the proposed guardian, _____. _____ indicated (s)he intends to maintain _____'s current residence and additional supports.

_____ lives in a group home operated by _____. I met with _____ at that residence. _____ primarily communicates using a non-standard form of sign language that substantially composed of expressive hand signals (s)he has invented, which caretakers have learned to use to communicate with her/him. During my visit, _____ did not accept acknowledge my presence or interact with me. _____ appeared occupied with writing her/his name on construction paper using large felt-tipped pens. She/He then picked up an Apple Tablet and flipped through several digital pictures to find a photo of her/his with her mother, _____. To a staff person who indicated that _____ wanted to Skype with her mother, _____ the Petitioner in this matter. From statements made by staff, I believe the Skype call was pre- scheduled and not a response to my meeting with _____.

I have attempted to explain the Petition to _____ and her/his right to object to the Petition. _____ appears unable to understand the nature of a guardianship or her right to oppose it. Furthermore, _____ appears incapable of communicating her wishes regarding the petition. Nevertheless, _____ does appear to have a positive relationship with the petitioner, as evidenced by _____'s photo with blank and scheduled a Skype call with her mother. From the content of our meeting, I am unable to identify any indication of _____'s wishes regarding the petition. Therefore, as counsel for Respondent, I do not have a basis to object to the Petitioner's request.

Dated this ____ day of _____, 20____.

Attorney for Respondent

Attorney for Guardian

(The information required for the appointment of a conservator is different than that for the appointment of a guardian. However, what is needed in terms of the contents of the Petition, notice, jurisdiction, venue, procedure concerning the hearing, causes for appointment of conservator, who has priority for appointment, bond requirements and orders subsequent to appointment are all spelled out in the statutes.)

ORDER SETTING HEARING AND NOTICE

See §§ [72-5-301](#), [314](#) and [318](#) for notice requirements in a guardianship. See §§ [72-5-403](#), 404 and 405 for notice requirements in a conservatorship.

Section [72-5-315](#), discusses the process of finding a person incapacitated and appointing a guardian. Section 72-5-315(2) says in part that, “Upon the filing of a Petition, the court shall set a date for hearing on the issues of incapacity.” However, until the attorney for the guardian has received the written reports from the physician and the Ward, and forwarded them to the attorney for the Ward, and that attorney has completed his/her work, it can be impossible to know what date to set for a hearing. There is further uncertainty in that regard if notice is required to be given to anyone.

Some practitioners ask the Court to set the hearing on the law and motion calendar at the same time they file the Petition and ask that the setting be out six or seven weeks. Later, if they find that all the information they need hasn’t yet been completed, they ask the Court to reset the hearing.

Other practitioners do not ask the Court to set a hearing at the time of filing the Petition, but wait until the attorney for the Ward has completed her/his work, and any notice issues are identified, and then set the date for the hearing. If anyone is opposing the guardianship the hearing needs to be set on the law and motion calendar.

The preference for many judges in a guardianship is to require a court hearing and some judges require it. Currently one judicial district requires not only the presence of the guardian but also of the Ward. So it is important you find out what your judge requires. On the other hand, there can be situations where the judge won’t require an in-person Court hearing because of the time and distance involved. The uncontested hearings can take as little as five minutes of actual Court time. So, if you would be driving 50-100 miles to be in Court, and the guardianship is uncontested, check to see if the Court will allow the guardianship to be done by mail by allowing the filing of an Unopposed Motion for Order Appointing Full Guardian(s). That way the Court can review the reports from the physician and the visitor and the position of the Ward’s attorney, and if there are no notice issues, and no one is contesting the guardianship, which is often the case, the Court can enter its order appointing the guardian.

A final option, if you were handling a guardianship by mail in a county other than where your office is located, is to make arrangements with the Court for you to appear by teleconference if that is allowed.

Sample form for Unopposed Motion for Order Appointing Full Guardian.

ATTORNEY'S ADDRESS BLOCK

MONTANA ____ JUDICIAL DISTRICT COURT, _____ COUNTY

IN THE MATTER OF THE
GUARDIANSHIP OF _____,

An Incapacitated Person.

Cause No. _____

Judge: _____

UNOPPOSED MOTION FOR ORDER
APPOINTING FULL GUARDIAN(S)

Come(s) now the Petitioner(s), __ and ____, by and through their/her/his counsel of record, _____, and hereby file(s) their UNOPPOSED MOTION FOR ORDER

APPOINTING FULL GUARDIAN(S). Attached with this motion is:

1. A medical report from Dr. ____ dated ____.
2. The report of Visitor ____ dated ____.
3. (Whatever documentation has been prepared by the Ward's attorney.)

No one opposes this guardianship and all three of the attached reports confirm the appropriateness of the guardianship.

Petitioner(s) request(s) the Court to enter its order appointing full and permanent guardians for ____ and to do so without requiring a hearing. The reasons in support of this motion are as follows:

1. Montana Code Annotated § 72-5-316(1) provides in pertinent part that:

(1) If the court is satisfied that the person for whom a guardianship is sought is incapacitated and that judicial

intervention in his personal freedom of action and decision is necessary to meet essential requirements for his physical health or safety, it may appoint a full guardian having the powers described in § 72-5-321 or a limited guardian having the powers described in the order.

2. (Point out to the Court, given the facts and circumstances of your case, why you do not believe that a hearing is necessary and should be waived by the Court.)

3. Finally, entering the enclosed order without requiring a hearing would save time for the Court, the guardian and counsel.

Filed with this motion is the proposed ORDER APPOINTING FULL AND PERMANENT GUARDIAN(S).

DATED this ____ day of _____, 201__.

Attorneys for Petitioner(s) and Proposed Guardian(s):

Attorneys address block

By_____

REQUEST, AND ORDER, FOR HEARING

ATTORNEY’S ADDRESS BLOCK
Attorneys for Petitioner(s)

MONTANA _____ JUDICIAL DISTRICT COURT, _____ COUNTY

IN THE MATTER OF THE
GUARDIANSHIP OF _____,

An Incapacitated Person.

Cause No.: _____
Judge: _____

REQUEST FOR HEARING
AND ORDER

There is not a specific designation in the guardianship law in terms of the length of notice. However, § 72-1-301 does specify a 14 day period. Section 72-5-314 specifies to

whom notice must be given.

Petitioner(s) request(s) a hearing to be set before Judge ____ at a time that would be most convenient for the Court's schedule. (Or request a specific day and time if there is a need to do that.) Petitioner(s) estimate(s) the length of the hearing will be ____ minutes as no sworn testimony will be required. (Or whatever time will be necessary if there will be sworn testimony.)

Filed with this Request for Hearing is the Physician's report from Dr. ____, the Visitor's report from ____ and (whatever documentation has been filed the Ward's attorney). (Or point out that the Ward's attorney's documentation has been filed directly with the court.)

(If notice is required to be given to anyone you should add the following.)

Please note that in this guardianship it is necessary to give 14 days notice to the mother/father/or whoever. For that reason we request that the hearing be set three weeks in advance so that Petitioner(s) can provide the required 14 days notice.

DATED this ____ day of _____, 20__.

Attorneys for Petitioner(s) and Proposed Guardian(s)

Attorney's address block

By _____

ORDER

Hearing is set for _____, _____, 20__, at _____ O'clock ____m. by order of the Court.

DATED this ____ day of _____, 20__.

District Court Judge

c: Attorney for Petitioner(s)

THE ATTORNEY FOR THE WARD---A PRIVATE PRACTICING ATTORNEY OR AN ATTORNEY FROM THE PUBLIC DEFENDERS OFFICE?

Section [72-5-315\(2\)](#) explains that in the process of appointing a guardian, “The alleged incapacitated person may have counsel of the person’s own choice or the court may, in the interest of justice, appoint an appropriate official or the office of the state public defender, provided for in § [47-1-201](#), to assign counsel pursuant to the Montana Public Defender Act, Title 47, chapter 1, to represent the person in the proceeding.” Because of the workload of the Public Defenders in Montana this Guardianship Program intends to use private practicing attorneys as the attorneys for the Wards. It is very important that anyone reading this understand that the use of private practicing attorneys is in no way whatsoever a criticism of the Public Defenders but instead a recognition of their very demanding workloads. Furthermore, this has been discussed with, and agreed to, during a discussion on this topic with the Office of the State Public Defender.

On the other hand, if for any reason you are unable to find a private practicing attorney in some specific case you could try a Public Defender. The Public Defenders for the various counties in Montana can be found at <http://www.publicdefender.mt.gov>.

ORDER APPOINTING FULL GUARDIAN

There are two options for getting the Order signed by the Judge. Appear at the time set for the hearing with the appropriate Order for the Court. Courts differ in their requirement as to whether the guardian (and the Ward) need to be personally present in Court. So be sure you know that. So too do practitioners differ in their practice as to whether they prefer to have the guardian (and the Ward) present at the hearing or not. Obviously, the guardian needs to be consulted about that.

On the other hand, if the guardianship is Unopposed and the Court has no objection to proceeding without a hearing, then submit to the Court the Order Appointing Full Guardian at same time you file the Unopposed Motion for Order Appointing Full Guardian. If, on the other hand, your preference is to go to Court, or you are required to go to Court, prepare the Order and take it with you when you go to Court.

A sample Order Appointing Full Guardian is as follows:

JUDGE ADDRESS BLOCK

MONTANA ____ JUDICIAL DISTRICT COURT, _____ COUNTY

IN THE MATTER OF THE
GUARDIANSHIP OF _____,

An Incapacitated Person.

Cause No.: _____

Judge: _____

**ORDER APPOINTING FULL AND
PERMANENT GUARDIAN(S)**

The Petitioner(s), ____ and ____, by and through their/his/her counsel of record, **** of the law firm of _____, filed with the Court their/his/her Unopposed motion for order appointing full guardian(s) for _____. The Court makes the following findings:

1. Venue for this guardianship is proper.
2. Any required notices (have either been given or not required).
3. The written reports of the Physician, Visitor and (whatever documentation there is from the Ward's Attorney) have been submitted to the Court for review and are accepted by the Court.
4. _____ is the person for whom appointment of a full guardian is proper due to her/his condition which has impaired her/his ability to communicate responsible decisions concerning her/his person and which have so impaired her/his judgments so that she/he is incapable of realizing and making reasonable decisions with respect to her/his health, safety and management of her/his affairs.
5. Judicial intervention in _____'s personal freedom of action and decision is necessary to meet essential requirements for her/his physical health, safety and well-being.
6. _____'s appointment as full guardian is in the best interest of _____.

WHEREFORE, the Court makes the following:

ORDER

Pursuant to Montana Code Annotated § 72-5-316, the Court hereby appoints ____ and ____ to serve without bond as the full, guardian(s) of _____. (Or, designate that a bond must be set if so ordered by the Court.) Pursuant to Montana Code Annotated § 72-5-321(2)(e) the Guardian is required to report the condition of the Ward and of the estate which has been subject to the full guardian's possession or control annually for the preceding year. (Or, on a case-by-case basis you need to decide whether to omit the requirement of the annual reporting. If so, you should add to the Order the following: Also, pursuant to Montana Code Annotated § 72-5-321(2)(e) the Court specifically waives the full guardian(s') duty to annually report the condition of the ward and the estate of the

ward which has been subject to the full guardian(s') possession or control.) The Court directs the issuance of Letter of Guardianship to _____.

DATED this ____ day of _____, 201__.

_____, District Judge

c: Your name

Please note that the Order above can be used if you are filing an Unopposed Motion. If, on the other hand, a hearing has been scheduled that should be mentioned in place of the unopposed Motion. Also, if the Court took testimony from any witnesses, or considered any other evidence, before deciding to grant the Order, that should be mentioned before the WHEREFORE paragraph. Also, if at the Hearing you plan to present any witness testimony, other than your client, consider whether it is necessary for you to subpoena any witness and if so see Montana Rule of Civil Procedure 45.

Finally, if there have been any disputes between interested parties in the appointment of the guardian, and those parties have been able to come to some agreement to resolve that dispute, you should include the terms of that agreement as part of the Court's Order Appointing Full Guardian.

THE WARD'S PRESENCE IN COURT

If the Ward's presence in Court is not required, then discuss with the guardian whether the guardian would prefer the Ward to be present in Court or not.

LETTERS OF GUARDIANSHIP

Before the Letters of Guardianship are issued by the Clerk of Court's Office, your client, the Guardian, needs to sign the Letters and have their signature notarized. There are three different ways to do that:

1. Have the client come to your office and do the signing and notarizing there and have someone from your office take the Letters to the Clerk of Court's Office for issuance and obtaining the certified copy. (This is the most common way of doing that.)
2. Once the client has signed and had their signature notarized, have the client take the Letters to the Clerk of Court's Office to be issued and to obtain the certified copy. (This will be the option if the guardianship is being done in a county other than where the attorney for the guardian practices and everything is being done by mail.)

3. Or, you go with the client to the Clerk of Court's Office for the signing and notarizing, if not previously done in your office, and then have the Clerk of Court issue the Letters and the certified copy.

**THE FOLLOWING IS A SUGGESTED FORM
FOR LETTERS OF GUARDIANSHIP**

JUDGE ADDRESS BLOCK

MONTANA ____ JUDICIAL DISTRICT COURT, ____ COUNTY

IN THE MATTER OF THE
GUARDIANSHIP OF _____,

Cause No.: _____

Judge: _____

An Incapacitated Person.

LETTERS OF FULL GUARDIANSHIP

WHEREAS, on the ____ day of _____, 201__, Petitioner(s), _____, parents/mother/father of _____, were(was) duly appointed by this Court as Full Guardian(s) of the above-named incapacitated person and has been given all the powers of a full guardian as described in Montana Code Annotated § 72-5-321(2). (Change this paragraph accordingly if the guardianship is limited or temporary.)

NOW, THEREFORE, these Letters of Guardianship are issued as evidence of such appointment of qualification and authority. These Letters of Guardianship are effective from the date of this Court's Order.

WITNESS MY SIGNATURE AND THE SEAL OF THIS COURT, this ____ day of _____, 201__.

Clerk of Court, ____ County

(Court Seal)

By _____
Deputy Clerk

ACCEPTANCE

STATE OF MONTANA)

: ss.

County of _____)

I, _____, hereby accept the duties of Guardian of _____, and do solemnly swear that I

will perform, according to law and the duties of such Guardianship.

SUBSCRIBED AND SWORN to before me, a Notary Public, this ____ day of _____, 201__, by _____.

Notary

(When the final Letters of Guardianship are sent to the Clerk of Court's Office to be issued, you should consider sending an extra copy for the Clerk of Court to use if you are getting a certified copy otherwise you will be charged \$3 for that.)

**WRITTEN INSTRUCTIONS TO BE USED IN CONNECTION WITH THE
ISSUANCE OF THE LETTERS OF GUARDIANSHIP WHEN THE
GUARDIANSHIP IS FILED IN A COUNTY OTHER THAN THE
ONE IN WHICH YOU PRACTICE**

When sending the letters of guardianship to the guardian(s), use this letter as a sample. (Note: There is at least one clerk of court's office in Montana that will not notarize signatures. And, some clerk of court offices will not email you a copy of the Letters and Orders after they are issued but only mail a photocopy if you have included a self-addressed stamped envelope. Therefore, before sending this letter find out what the practice is in the clerk of court's office handling the guardianship.)

If you are handling a guardianship in a county other than the one in which you practice, once you have received the Order Appointing Full Guardian from the Court you may want to use the sample letter that follows with whatever variations are applicable to your guardianship.

Dear _____:

Enclosed is the original of the Letters of Guardianship and a copy to get certified. What you need to do is the following:

1. Take the Letters and go to the Clerk of Court's office. Tell the Clerk you have been appointed guardian and you would like to have the Letters of Guardianship issued and one copy certified. (If for any reason the Clerk of Court's Office will

not notarize signatures, then have your client get their signature notarized someplace else before going to the Clerk of Court's office to have the Letters issued.)

2. The Clerk of Court's Office will ask for some form of identification---and you can just show them your driver's license. The Clerk of Court's office will then issue the Letters of Guardianship.
3. The original of the Letters is kept in the Court file. Please ask the Clerk of Court's office to certify one copy for you. There may be a \$2 or \$3 charge to certify your copy.
4. Please also ask the Clerk of Court if they would email me a copy of the Letters. My email address is _____. (Some Clerk of Court offices do NOT email copies to attorneys---so you may need to send the client an extra copy for the Clerk to conform and mail back to you in your self-addressed stamped envelope.)
5. There may be times when you need to show some person, or some agency, your Letters of Guardianship---and it is possible that on some occasions that person or agency may need a photocopy of the letters. Under those circumstances, have them photocopy your certified copy but keep your certified copy. In a rare occasion they may need a certified copy and if so just give them yours. If at any time you should need another certified copy you can get another certified copy by simply going to the Clerk of Court's office and asking for one. There will be a \$2 or \$3 charge for that.

If you have any questions, please call me at _____.

Sincerely,

EMERGENCY APPOINTMENT OF A TEMPORARY GUARDIAN

The time required to do a guardianship, from start to finish, for a full guardian can take, "A couple of months." It is dependent upon, among other things, the following:

- Your schedule at the time you were initially contacted and thereafter until completion of the guardianship.
- Delays your clients may encounter in getting back to you if you need further information from them or their availability.
- Receiving the necessary information from the Physician, Visitor and Attorney for the Ward.
- And, the Court's schedule.

Two common misconceptions by parents of an incapacitated minor is that it is mandatory that the guardianship be completed before the minor turns 18; and, that a guardianship cannot be instituted after the minor has turned 18. Neither of those is the case. The guardianship of an incapacitated person can be filed any time. In addition to there being a real need to assist with guardianships of younger people, so too is there a real need to assist with guardianships of older people. However, in any guardianship an occasion may arise where a guardianship is needed “right away” and cannot wait for the couple of months that a guardianship normally takes. Some examples of that kind of situation are:

- A Ward had been living in a group home for several years and a guardianship was in process but before completed the Ward turned 18 and the group home took the position that without a guardian appointed they had no authority to stop the ward from leaving the group home if the ward chose to do so.
- On one occasion disability benefits to which the Ward was entitled were dependent upon the guardianship being completed before age 18 and the parents didn’t find out about that until shortly before the Ward would have turned 18 and without a guardianship would have lost those benefits.
- In one case the Ward had spent four years in special education classes in high school and periodically needed to have his IEP (Individual Education Plan) updated. However, the Ward had turned 18 while his guardianship was in process but had not yet been completed. The school took the position that the since the Ward was now “of legal age” the Ward’s parents couldn’t sit in on the meeting to discuss the most recent IEP unless they were appointed guardian.

Under unusual circumstances, it is possible to have a temporary guardian appointed within a very short period of time. On one occasion the attorney was called about the emergency; the attorney got the necessary information about the emergency from the parents; prepared the Petition which doesn’t need to be signed by the parent(s) because the Court exercises the power of a guardian; filed it with the clerk of court; the judge to whom the guardianship was assigned was in the courthouse that day and had some free time so reviewed the Petition for Appointment of Temporary Guardian and signed the Order Appointing Temporary Guardian. All in one day. The temporary guardianship does not require the appointment of, and reports from, a Physician, Visitor or the appointment of an Attorney for the Ward. Section [72-5-317\(1\)](#) provides in pertinent part that, “If an incapacitated person has no guardian and an emergency exists, the Court may exercise the power of a guardian pending notice and hearing.” Section [72-5-317\(2\)](#) specifies that the period of the temporary guardianship is not to exceed six months and the Court may appoint either a full or limited temporary guardian depending on the needs and circumstances of the incapacitated person. In that respect also § [72-5-320](#) specifies the purposes for the establishment of a limited guardianship.

SPECIAL NEEDS TRUST

This Guardianship and Conservatorship Program does not include attorneys doing estate planning for the families involved. However, financial planning can enhance the financial security of a person with a disability and avoid financial penalties that can occur without that planning. The laws and regulations apply to means-tested benefits are complicated, they change from time to time, and require the advice and assistance of an attorney qualified in estate planning for families with a special needs member. Missoula attorney, Nancy Gibson, was asked to provide a brief overview of this area of the law so that you would have a basic understanding of the issues involved. Nancy has also prepared a more comprehensive article about this area of the law and that article will be posted at _____. Nancy's overview is as follows:

Third Party Trusts (Supplemental Needs Trusts)

Every family with a special needs family member should consider establishing a special needs trust for that individual. That is a document that provides specific directions that must be followed in managing the care and funds of the special needs individual. A "third party special needs trust" is one in which another person, such as a parent, creates a trust for a person with disabilities (or who is likely to need public benefits based upon financial need). It is funded with assets which do not belong to the person for whom the trust is set up. Often these trusts are referred to as supplemental needs trusts. Third party trusts provide wonderful opportunities in planning for a special needs family member, whether he or she is a child, an adult, or an infirm adult receiving long term care services. There is no need to repay Medicaid out of this type of trust, if it is properly set up. Any balance upon death can pass to other family members, or whomever one wishes.

ABLE Accounts

ABLE Accounts are savings accounts for individuals with disabilities and their families. The beneficiary of the account is the account owner, and income earned by the accounts is not taxed. Contributions to the account can be made by any person (the account beneficiary, family and friends).

Millions of individuals with disabilities and their families depend on a wide variety of public benefits for income, health care and food and housing assistance. Eligibility for these public benefits (primarily SSI and Medicaid) generally require meeting a resource test that limits eligibility to individuals with less than \$2,000 in cash savings, retirement funds and other items of significant value.

The ABLE Act limits eligibility to individuals with significant disabilities with an age of onset of disability before turning 26 years of age. If one meets this age criteria and is receiving benefits already under SSI and/or SSDI, he or she is automatically eligible to

establish an ABLÉ account. If not a recipient of SSI and/or SSDI, but still meeting the age of onset disability requirement, one may be eligible to open an ABLÉ account if Social Security's definition and criteria regarding significant functional limitations are satisfied. One need not be under the age of 26 to be eligible to open an ABLÉ account.

An individual may only have one ABLÉ account. The total annual contributions by all participating individuals, including family and friends, for a single tax year is \$14,000. The amount may be adjusted periodically to account for inflation. For individuals who are recipients of SSI, the first \$100,000 in ABLÉ accounts is exempted from the SSI \$2,000 individual resource limit. If and when an ABLÉ account exceeds \$100,000, the SSI cash benefit would be suspended until such time as the account falls back below \$100,000. While the beneficiary's eligibility for the SSI cash benefit is suspended in this manner, this has no effect on ability to receive or be eligible to receive medical assistance through Medicaid.

At the death of the ABLÉ owner, states are entitled to claim all or a portion of the funds in the account equal to the amount in which the state spent on the person with disabilities. This is known as a "Medicaid Pay-Back." If money is held in an ABLÉ account at death, and the account holder has received a considerable amount of services paid by Medicaid, the balance could be depleted and not available for the use of other loved ones, unlike a properly set up third party special needs trust. Thus, while ABLÉ accounts are very useful, they are generally not the best way for family members and others to accumulate funds for the use of the person with disabilities. A third party special needs trust would be preferred, or good planning may include both a special needs trust and an ABLÉ account.

CONCLUSION

Once the Guardianship/Conservatorship is finished your client may, or may not, ever run into a situation where producing a copy of the Letters is required. However, in some instances showing or producing a copy of the Letters is required---and in some instances showing or providing a certified copy of the Letters is required. Therefore, you should make sure your client has a certified copy of the Letters when everything is done or in the alternative explain to them how they can obtain a copy, certified or uncertified, of the Letters from the clerk of court's office and that there may be a \$2 or \$3 charge for a certified copy.

As motioned above, this program does not contemplate that the attorneys handling the guardianships or conservatorships will be expected to do a Special Needs Trust or advise the client about the details. However, because it is important, it is recommended that you make one final mention of that to your client(s).

Thank you for helping with this important work that is so valuable to the families involved and to access to justice in Montana.