

Nebraskans Care

Changes in Guardianship and Conservatorship Laws and Rules effective January 1, 2012

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In 2010, Nebraska had 247,000 residents who were over the age of 65. By 2030, that number is projected to grow to 404,000.¹ While the total population of the state is expected to grow 11.1 percent by 2030, the percentage of those between the ages of 70 and 79 is expected to grow more than 80 percent.² The Nebraska Judiciary, which has a constitutional mandate to provide access to justice for all of Nebraska's citizens, recognizes the special needs of the elderly and the vulnerable. It is anticipated that the need for guardianships and conservatorships, in which individuals are appointed by a court to make personal health care and/or financial decisions for another, will increase as the population ages. This creates an ever greater need for vigilance on the part of Nebraska's families, law enforcement and other public and private entities.

In June 2010, Chief Justice Michael Heavican, in cooperation with the Legislature and the Nebraska State Bar Association, initiated the process to review state laws related

to the aging population. The Joint Review Committee on the Status of Adult Guardianships and Conservatorships in the Nebraska Court System was established and charged with reviewing the status of adult guardianships and conservatorships in Nebraska and recommending any changes needed in the statutes or court rules. Furthermore, the committee sought to ensure that any recommended changes should exhaust all current systemic opportunities for change without requiring an increase in revenue to support. The committee issued its final recommendations on October 1, 2010. They were substantially incorporated into legislation through LB 157, which was introduced by Sen. Colby Coash of Lincoln, Nebraska.

This article provides background about the process used to develop the revised laws and court rules. It also highlights some of the significant changes that were adopted and includes several flowcharts to help illustrate those procedures.



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NEBRASKANS CARE

LB 157 is a comprehensive legislative effort to bridge the gaps in checks and balances that left the courts at a disadvantage in knowing who would be best qualified to serve the needs of a vulnerable person and whether the needs of vulnerable persons were being met after the appointment of a guardian or conservator. Sen. Coash stated that because many Nebraskans require support in the form of a guardianship or conservatorship, he felt it incumbent to introduce legislation to provide additional safeguards. "We have an amazing network of dedicated citizens who step up when asked to provide this service [as guardians and conservators]. It is my hope that LB 157 provides them and the courts with additional tools to provide this invaluable service. It was a pleasure working with so many dedicated stakeholders throughout this process." At the time the committee was formed there were more than 12,000 Nebraskans being served by guardians and conservators. (See figure 1).

The Joint Review Committee determined that current laws provided inadequate information for courts to effectively review guardianship and conservatorship cases. In the rare occasion when a guardian or conservator failed to act consistently with the best interests of the ward, the courts themselves often had incomplete information upon which to act. This disadvantage left the courts with few tools at their disposal to address both the necessity and effectiveness of services being provided by guardians and conservators to their wards. This problem was a seminal point used by the committee to develop a more comprehensive system of checks and balances of the services provided by guardians and conservators and the procedures in place to monitor their effectiveness.

While many families, volunteers, and professional caregivers are fully committed to meeting the needs of our aging population, when an adult becomes vulnerable, there were systemic changes identified which would serve to deter exploitation of that person's financial and health care needs. The Legislature recognized that the courts cannot and should not act on their own, but rather should maintain the role of providing a venue where conflicts are brought for resolution.

It is particularly challenging to anticipate at any given time how the needs of a person will change. The uniqueness of each individual's health and economic necessities varies as broadly as the number of individuals themselves. These needs often ebb and flow depending on the person's own set of circumstances. It was not lost on the committee that any changes in the law had to protect the discretion of the courts in crafting orders that were designed to meet the best interests of each individual. One size does not fit all. The decisions of the courts remain dependent on the quality of information they are provided by the parties.

Under the previous law there was no requirement for nominated guardians and conservators to submit to background checks. The courts were left to rely on self reporting or objections raised by interested parties in challenging qualifications

Figure 1
JUSTICE 93 County Courts
Case Counts of Active Guardianships and Conservatorships
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as of 05/28/2010

Adams County Court	431	Johnson County Court	25
Antelope County Court	45	Kearney County Court	86
Banner County Court	5	Keith County Court	82
Blaine County Court	4	Keya Paha County Court	4
Boone County Court	30	Kimball County Court	30
Box Butte County Court	60	Knox County Court	40
Boyd County Court	7	Lancaster County Court	1,625
Brown County Court	16	Lincoln County Court	384
Buffalo County Court	200	Logan County Court	6
Burt County Court	54	Loup County Court	4
Butler County Court	64	Madison County Court	310
Cass County Court	87	McPherson County Court	3
Cedar County Court	59	Merrick County Court	73
Chase County Court	18	Morrill County Court	43
Cherry County Court	44	Nance County Court	64
Cheyenne County Court	65	Nemaha County Court	47
Clay County Court	47	Nuckolls County Court	31
Colfax County Court	62	Otoe County Court	95
Cuming County Court	45	Pawnee County Court	31
Custer County Court	121	Perkins County Court	21
Dakota County Court	75	Phelps County Court	78
Dawes County Court	47	Pierce County Court	45
Dawson County Court	185	Platte County Court	195
Deuel County Court	3	Polk County Court	19
Dixon County Court	40	Red Willow County Court	91
Dodge County Court	316	Richardson County Court	70
Douglas County Court	3,582	Rock County Court	5
Dundy County Court	12	Saline County Court	23
Fillmore County Court	21	Sarpy County Court	626
Franklin County Court	33	Saunders County Court	118
Frontier County Court	12	Scotts Bluff County Court	405
Furnas County Court	37	Seward County Court	88
Gage County Court	381	Sheridan County Court	64
Garden County Court	15	Sherman County Court	22
Garfield County Court	11	Sioux County Court	5
Gosper County Court	4	Stanton County Court	33
Grant County Court	3	Thayer County Court	39
Greeley County Court	21	Thomas County Court	6
Hall County Court	583	Thurston County Court	24
Hamilton County Court	51	Valley County Court	51
Harlan County Court	31	Washington County Court	93
Hayes County Court	6	Wayne County Court	46
Hitchcock County Court	25	Webster County Court	51
Holt County Court	99	Wheeler County Court	3
Howard County Court	54	York County Court	88
Jefferson County Court	48	TOTAL	12,451

of the nominee in light of their criminal or financial history. It was determined that a process was needed to make this information available to the courts. The Joint Review Committee recommended and LB 157 as well as court rule provides that criminal, financial record, and sex offender checks of nominees must be submitted before a guardian or conservator is appoint-

NEBRASKANS CARE

ed unless the requirement is waived by the court. These background checks will be provided to the court and made available to interested parties as part of the initial nomination process.

The Joint Review Committee further explored the quantity and quality of evidence provided to the courts, including the initial nomination of a guardian or conservator and the thoroughness of annual reports. The committee made it a priority to enhance the role of interested parties in developing more effective checks and balances. The role of interested persons was identified as an under-utilized resource in the oversight process. The committee determined that these individuals were uniquely positioned to evaluate the information being provided to the courts. They, more than anyone else, were more likely to have firsthand knowledge of the accuracy of the information being reported to the courts. If the interested person questions the accuracy of the representations made by the guardian or conservator, he or she may file an objection which will trigger the scheduling of an evidentiary hearing. (See forms: 16:2.10; 16:2.16; 16:2.17) This process is intended to deter exploitation and abuse by shedding light on the services being provided by the guardian or conservator. If disputes in care or services arise, courts will continue to provide the venue to resolve conflicts and address the best interests of the ward.

Thanks to the assistance of representatives of the Nebraska Bankers Association, the collection of financial information prior to the issuance of letters of appointment has evolved. The process of identifying the actual assets that will be managed by a conservator has consistently proved challenging. Therefore, unless the assets are valued at less than \$10,000 or the requirement is waived by the court, conservators will be required to post a bond. Under the new procedures, a nominated conservator who has been appointed by court order will be required to identify the entirety of assets in the estate of the ward. A nominated conservator must present proof of the order of appointment along with an Acknowledgement of Financial Institution form, on which the financial institution will confirm the existence of accounts and their values. These accounts will also be listed on the inventory along with all other assets of the ward which will be sent to each interested person for review. If there are unreported assets, interested parties should bring this to the court's attention. Then, prior to issuance of letters of appointment, the information provided to the court will form the basis upon which the sufficiency of the bond will be determined. Once letters of appointment are issued, the financial institution will complete another Acknowledgement of Financial Institution form to verify that the accounts have been transferred into conservatorship accounts. Should additional or new assets be discovered after the letters of appointment have been issued, or at any time upon order of the court, the bond may be amended.

The State Court Administrator is creating a central data-

base of guardians and conservators. In the past, there has never been an effective way to notify the public when the authority of a guardian or conservator has changed. Once implemented, this web-based resource will provide the public with a tool to access if questions arise regarding the authority the guardian and conservator has in acting on behalf of the ward. Anyone interested will be able to independently verify whether the person acting on behalf of a ward remains in good standing.

The Hon. Susan M. Bazis, Douglas County Court, recipient of the Chief Justice's Award for Distinguished Service to the Community for her work on the task force, stated: "The most significant changes in the law and rules are that the court will have more information about the person who seeks appointment as a guardian or conservator and about the ward's assets before the nominated guardian or conservator has access to the ward's financial assets, and interested parties will receive copies of documents filed with the court." This will in turn facilitate greater checks and balances of the actions taken by guardians and conservators in meeting the needs of their wards.

Highlights of the new laws include:

- The guardian or conservator is required to file a copy of the letters of appointment with the Register of Deeds in any county where the ward has real property or an interest in real property to reduce the risk of the unauthorized sale or encumbrance of the ward's property.
- The definition of an "interested person" has been clarified, which will increase the safety net of persons monitoring the actions of a guardian or conservator.
- A court may enter an ex parte order after a guardian or conservator is appointed upon application of an interested person. The application must be accompanied by an affidavit showing to the court that the safety, health or financial welfare of the ward or protected person is at issue. Anyone violating such an order shall be guilty of a Class II misdemeanor.
- A nominee for a guardianship or conservatorship must obtain a criminal history and financial record check and submit it to the court prior to the hearing on appointment, unless waived by the court.
- A guardian or conservator may not move a ward outside of Nebraska without first obtaining permission from the court.
- A complete inventory of the ward's estate must be filed if there has been no conservator appointed, which increases the responsibility and financial accountability of a guardian. This also brings to the attention any potential need for creating a conservatorship.
- Copies of all essential reports must be mailed to all listed

NEBRASKANS CARE

interested parties, which increases the oversight and monitoring of the guardian or conservator.

- It is now mandatory that a conservator file a bond when the ward's estate has a net value of more than \$10,000.
- The law shortens the time frame, from 90 to 30 days, within which essential inventory and financial information must be submitted to the court prior to the issuance of formal letters of appointment. This provides the court with important information upon which to make decisions about bonds.
- The conservator must file an updated inventory every year, which increases the ability for oversight of year-to-year consistency.
- Funds from the protected person's accounts cannot be co-mingled with other funds.
- A court may refer a contested guardianship or conservatorship to mediation.

New court rules were adopted to implement the new laws. They also enhance the court's monitoring functions by requiring the guardian or conservator to:

- Notify the court regarding changes in the ward's address or demise.
- Acknowledge by affidavit, annually and as needed, that copies of essential reports and other documents regarding the ward were mailed to the listed interested persons.
- File proof of restricted accounts within 10 days of appointment.
- Notify the court within 30 days when new assets are discovered.
- File additional notarized financial institution forms identifying assets of the ward.
- Obtain a court order prior to making ATM withdrawals or receiving cash back on debit transactions.
- Submit the following reports: criminal history record, abuse and neglect registry reports, sex offender registry reports, and credit checks.

The court rules also establish requirements for courts, including that the court must:

- Provide guides, instructions and forms to guardians and conservators;
- Ensure that all interested parties are included in the guardian or conservator's affidavit of mailing;
- Send 45-day reminders to guardians and conservators before the annual filing due date;
- Review all initial inventories before issuing letters to determine if a bond needs to be set or changed;

- Perform a review of all inventories and assets whenever filed to determine if a bond needs to be changed;
- Monitor all cases for timeliness and compliance with annual accountings and issue an order to show cause why the guardian or conservator should not be removed if the accounting is 30 days delinquent;
- Specify detailed requirements and limitations on the guardian and conservator letters of authority; and
- Accept for filing only the standardized forms approved by the Office of the State Court Administrator.

Current guardians and conservators will receive information to explain the changes in their responsibilities under the new law. The Nebraska Judicial Branch's website has a page devoted to guardianships and conservatorships in Nebraska, which includes informational guides, a video, links to the statutes, rules, and required reporting forms, and additional references.³ "It was recognized early on that Judicial Branch Education would play a key role in implementing any changes that were adopted. JBE was successful in securing a grant from the State Justice Institute to facilitate training of court staff and judges. They identified faculty from a number of disciplines familiar with the complexities of elder care law. In developing an education plan, it was decided to utilize the latest in distance learning technology as a complement to traditional seminars. In both settings, practice and procedure sessions are further defining the roles and skills that will be called upon by the court staff and judiciary. Practice sessions have been designed to give court staff experience in processing these cases under the new guidelines. Additionally, judges have been actively involved in identifying best practices techniques to facilitate case progression through the court system. Lastly, JBE has been a valuable resource in creating training modules for financial institutions as well as guardians and conservators," according to Carol McMahon-Boies, Director of Judicial Branch Education.

Concerns for the elderly and the vulnerable are of national interest, as well. On October 20, 2011, a bill was introduced in the U.S. Senate to provide funding for state courts to assess and improve the handling of guardianship and conservatorship proceedings.⁴ The Guardian Accountability and Senior Protection Act (S 1744) would also authorize a pilot program for conducting background checks and promote the use of information technology to better monitor, report, and audit conservatorships. The Office of the State Court Administrator will be following the proposed legislation.

Nebraskans care about the well-being of our elderly population and those most vulnerable to exploitation and abuse. They recognize the important considerations that must be made to define the appropriate moment of intervention without sacrificing privacy, care and dignity of our fellow citizens. They under-

NEBRASKANS CARE

stand that aging is our common destiny and warrants our continued attention. The Legislature and the Judiciary have worked together to enhance current procedures to address the needs of this growing population in our communities. While the changes in both law and rule give promise to deter exploitation, abuse, and mishandling of wards' funds, it remains a Nebraska priority that each citizen takes a renewed interest in providing a safe and healthy environment for those of us in need of assistance. 

Questions were submitted to estate planning attorney William J. Lindsay, Jr., Shareholder, Gross & Welch, P.C., L.L.O. Omaha, NE. regarding the history of guardianship and conservatorship law in Nebraska.

Q. Would you provide a brief summary of the legislative history of Nebraska's creation of laws pertaining to the establishment of guardians and conservators?

A. Prior to 1977 the law used the terms "guardian of the person" and "guardian of the property." This area of the law was changed with the adoption of the Uniform Probate Code, which modernized the law in this area. Experience with the probate code led to changes in practices and procedures including the adoption of limited guardianships, which can work well for certain medical diagnoses. Changes in the notice requirements provided that the rights of the proposed ward be included. There were negotiations involved in the legislative process which were done to reflect the practical needs of administration. Nebraska has adopted standby guardianship provisions that can work well in the case of a parent who wants to remain a guardian for their adult, incapacitated child, but yet someone needs to be in place. The courts have been taking a more active role in recent years. The Supreme Court has adopted a number of rule changes. An example of a positive change is the requirement that the petition state whether the proposed guardian or a conservator is a debtor or creditor of the incapacitated person.



Q. Are there certain legislative milestones or case law in Nebraska that have helped define Nebraskan's efforts in trying to address exploitation and abuse of vulnerable adults?

A. The adoption of limited guardianships was such a milestone. For adults who have some impairment it is good to recognize that they should be involved in their own decision making to the extent of their capacity. In the 1990's there was an adoption of changes that were later modified to make the procedures more administratively practical as well as to preserve privacy. Many families do not want the exact medical diagnosis of the ward in the pleading, particularly now that the documents are electronically available. Both Neb. Rev. Stat. §§ 30-2360

Endnotes

- ¹ Center for Public Affairs Research, University of Nebraska at Omaha, based on U.S. Census Bureau statistics.
- ² *Id.*
- ³ www.supremecourt.ne.gov/guardian/guardian-info.shtml
- ⁴ *Washington Update*, National Center for State Courts, Government Relations Office, Vol. XXI, No. 10, November 2011.

and 30-2619 (Reissue 2008) specifically provide that a motion to make more definite and certain may be filed if there is a desire to have more information in the petition. This is an example of balancing the privacy of the individual along with the right to know what is involved in the action. Another of the changes is the requirement that the notice provide a listing of the rights of the allegedly incapacitated person. The adoption of the standby guardian provisions is another milestone, as is the new law with its authorization of mediation.

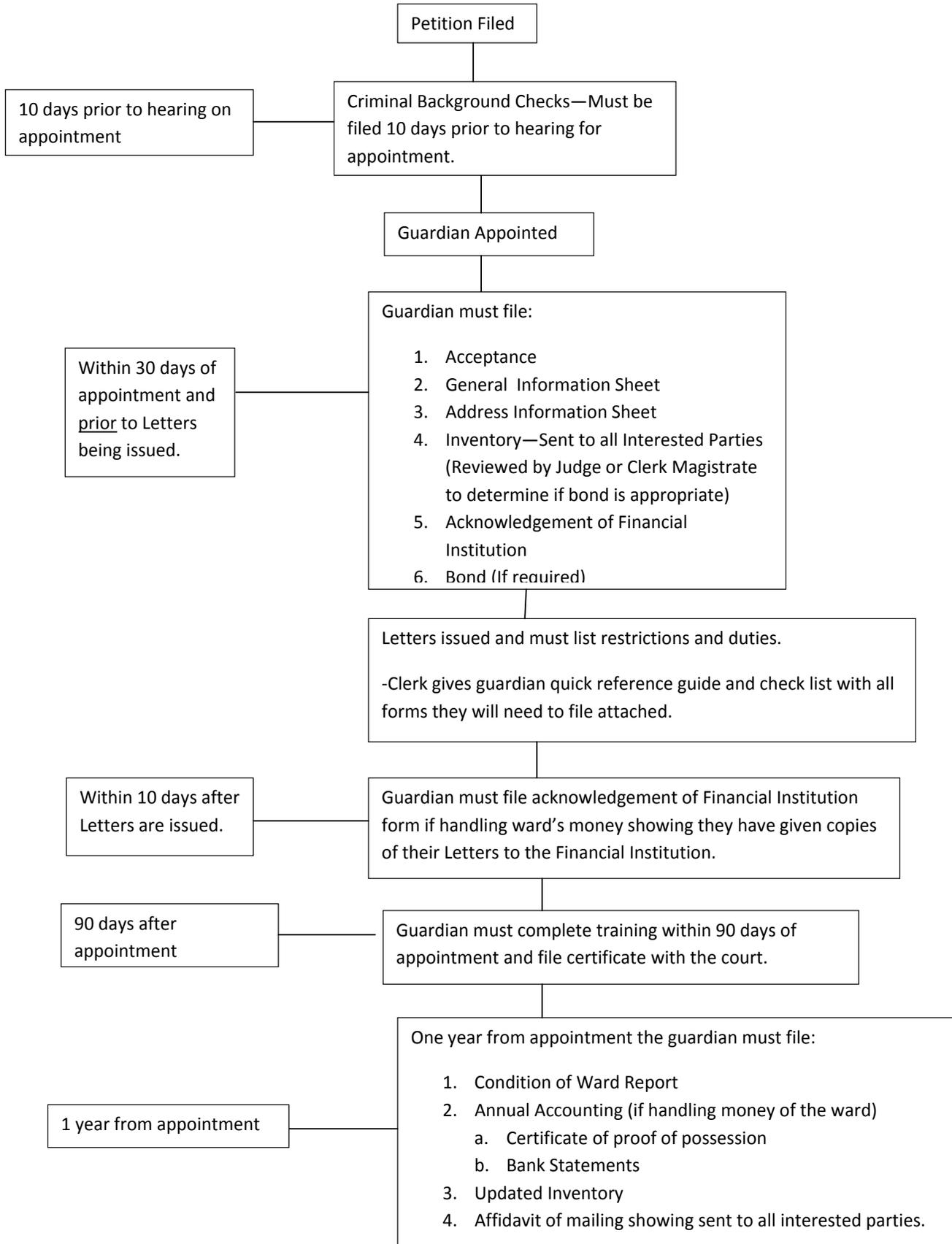
Q. How would you describe the most recent legislative changes pertaining to the role of guardians and conservators when viewed in context against the original purpose of guardian and conservator laws?

A. This entire area of law is a balancing act. The rights of the individual need to be protected so that while an individual is capable he or she can make his or her own decisions. We need to respect the dignity of each human being. We also need to be aware of the constitutional limits and comply with due process before a permanent court order is issued. It is important to protect the individuals involved and some of the changes made will be helpful. This is a process and as more experience is gained in the administration of these new laws other changes will be needed. The availability of mediation should provide help in the contested case area.

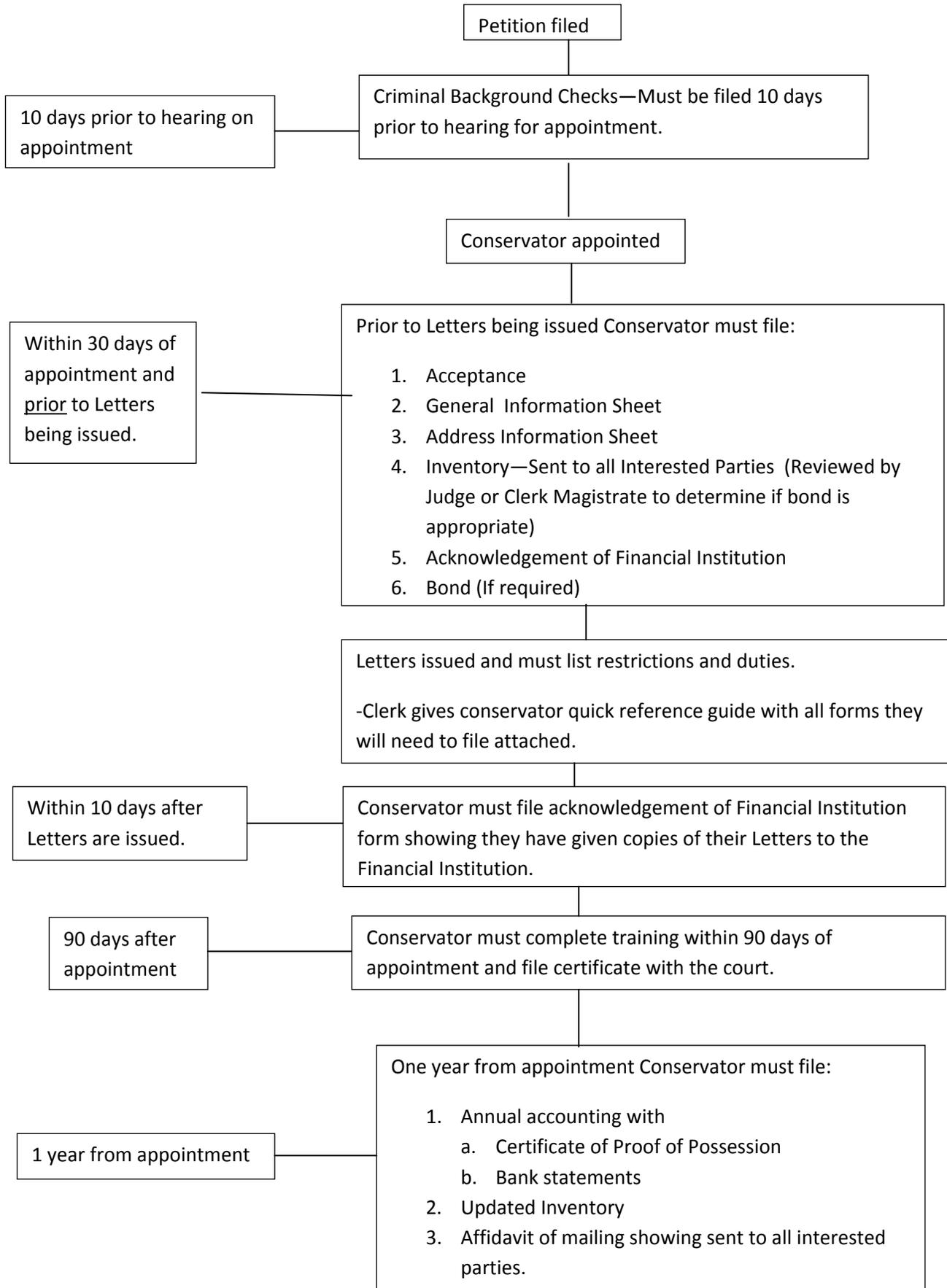
Q. Has the role that attorney's play in the establishment of guardianships and conservatorships changed through the years and in what manner?

A. There are now more pro se filings, particularly after the appointment. Accountings and reports of guardians are often filed pro se. The availability of the new forms should help the pro se filers. Most attorneys obtain medical reports prior to filing so that the court may make an informed decision. The attorneys have more of a role in obtaining temporary guardianships and conservatorships. The attorneys discuss the case and determine the need for a bond and have the prospective conservator check on the availability of a bond before filing. In more recent years there seems to be more use of discovery and other more formal litigation procedures in contested cases. Except as specifically displaced by the probate code the probate area is subject to all the rules of civil procedure. The attorneys should make more use of mediation now that it has been authorized.

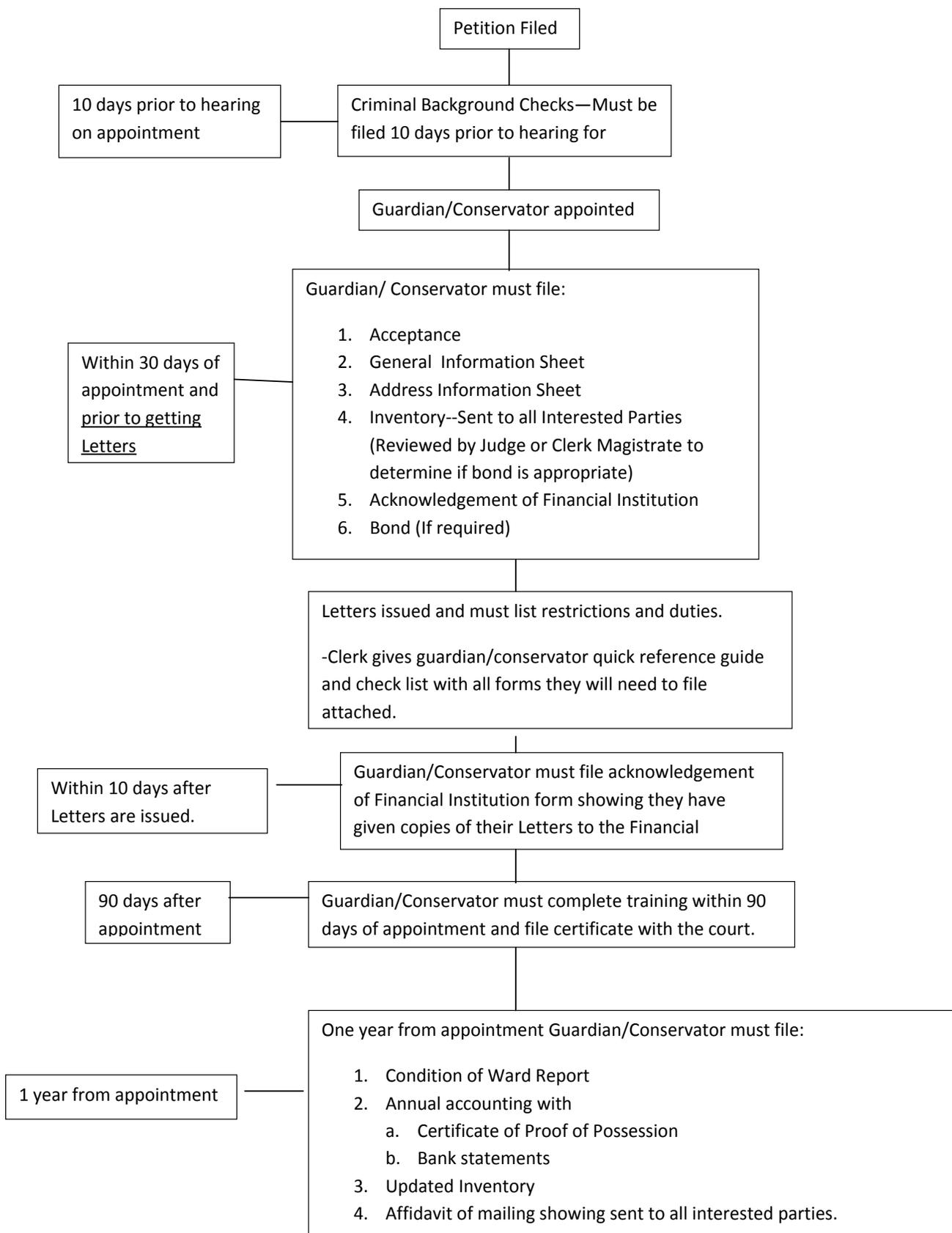
GUARDIANSHIP



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GUARDIANSHIP AND CONSERVATORSHIP



RESTRICTED ACCOUNTS

