

Incapacity, Conservatorships & the Probate Court



Domenick N. Calabrese, Judge

Region 22 Probate District

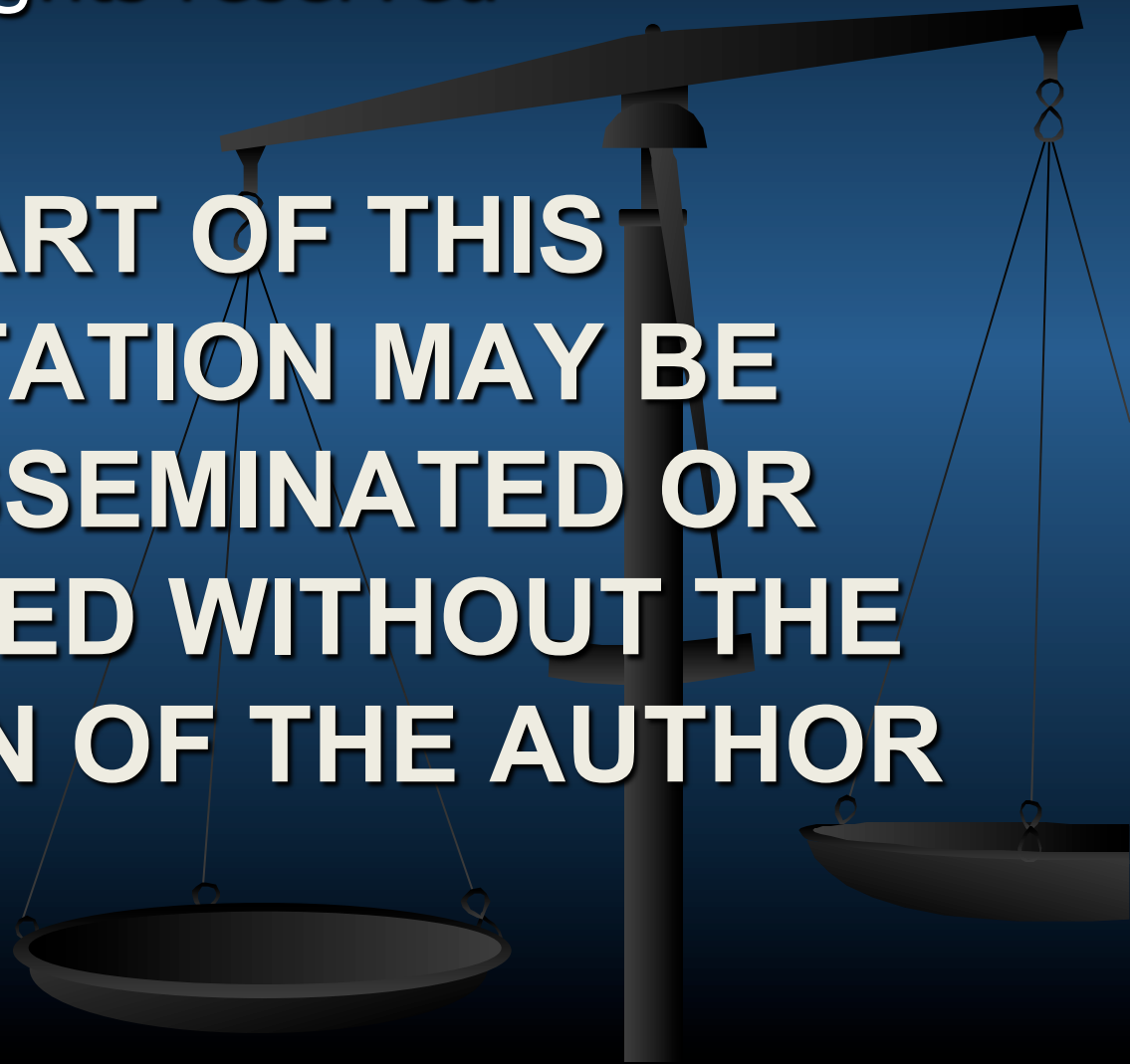
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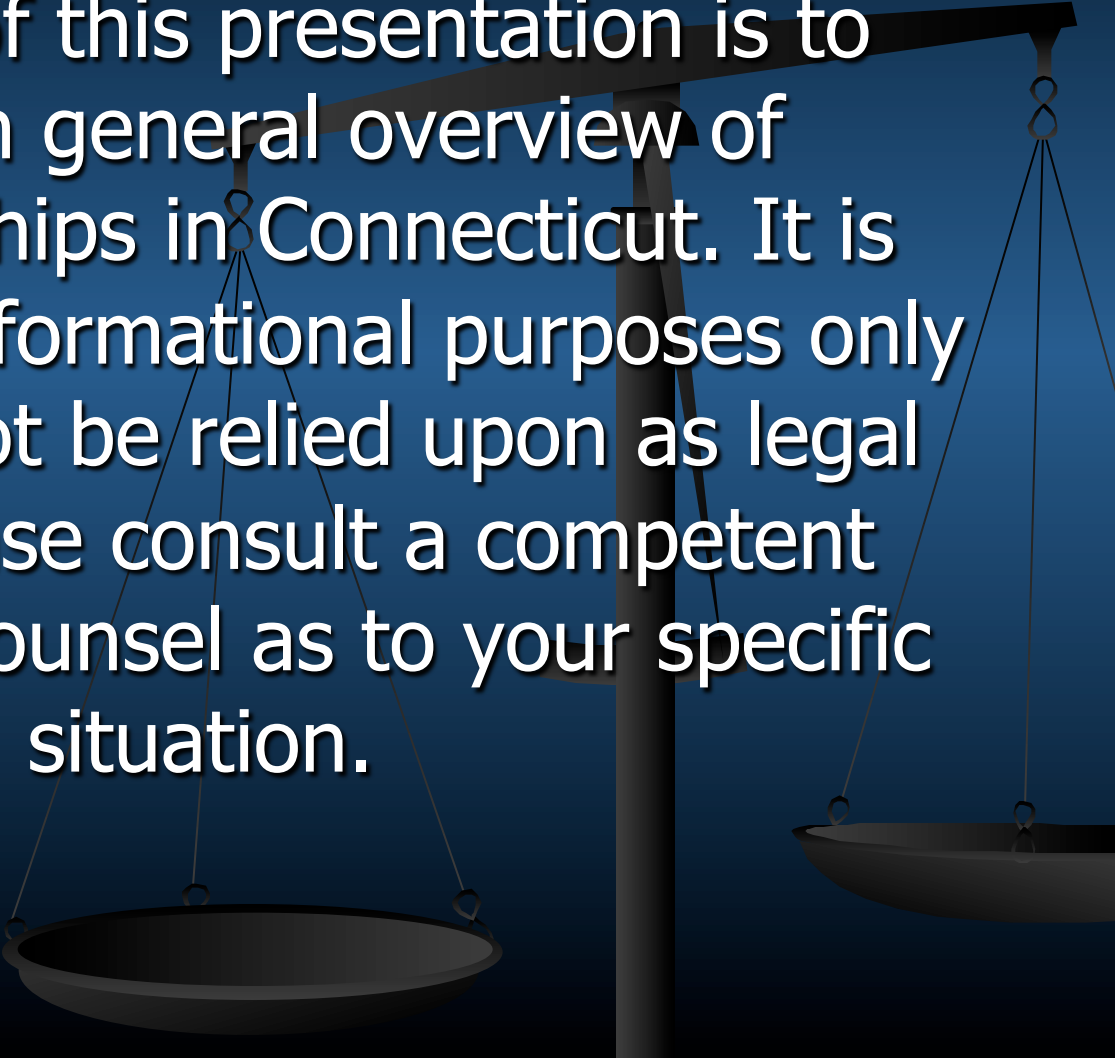
Seminars

- Living Trusts: Myths versus Reality
- Real Estate & Probate
- Probate: How, What and Why After Loss of a Loved One
- Probate & Unclaimed Property
- Conservatorships
- Estate Taxes in Connecticut
- Guardianships
- Wills in Connecticut



Disclaimer

The purpose of this presentation is to provide an general overview of conservatorships in Connecticut. It is intended for informational purposes only and should not be relied upon as legal advice. Please consult a competent attorney for counsel as to your specific situation.



Agenda

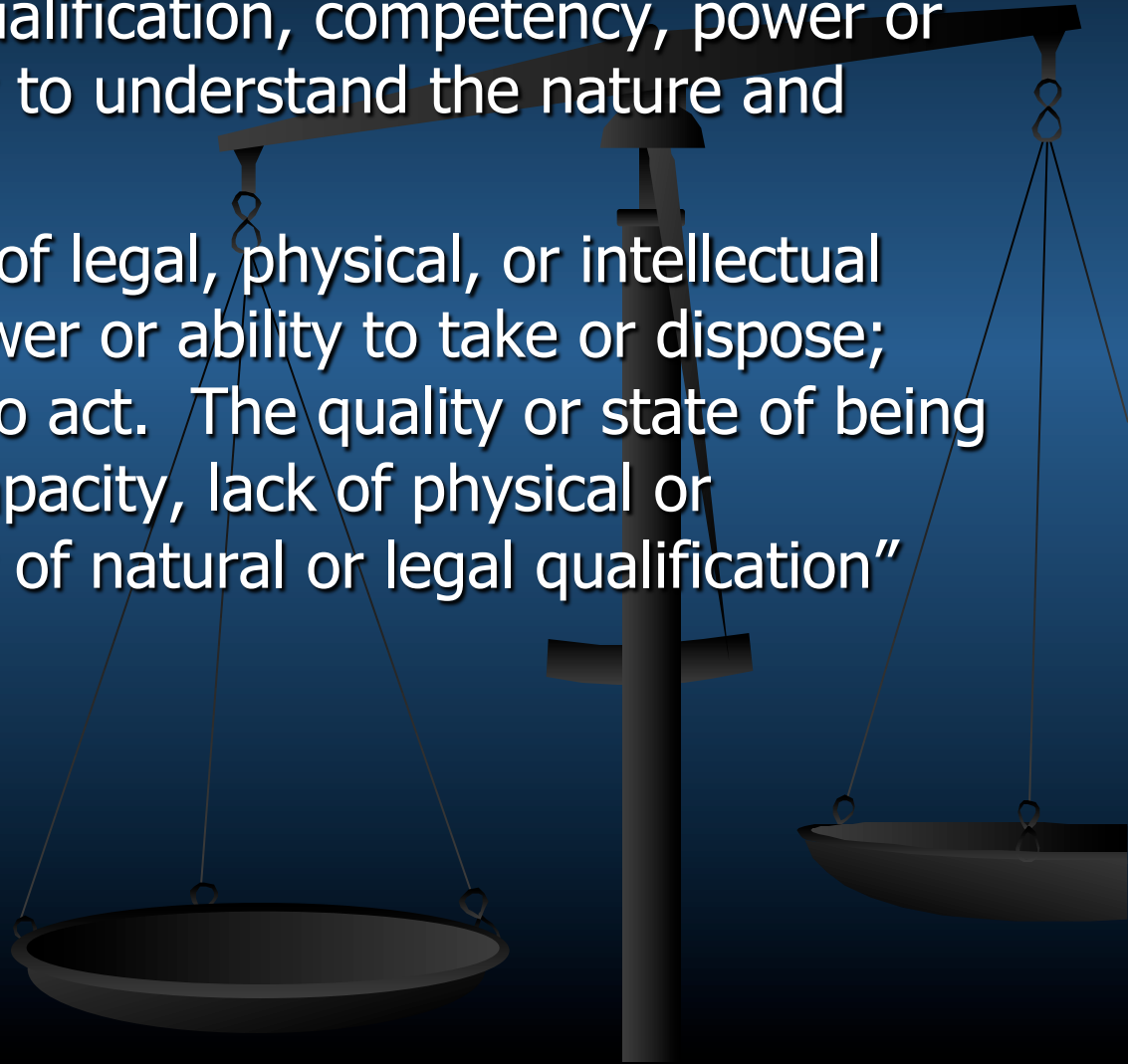
- Legal Incapacity
- Role of the Probate Court
- Types of conservatorships
- Restrictions on conservators
- Responsibilities of conservators
- Conservator of the Person
- Conservator of the Estate
- Planning for Incapacity



Legal Incapacity

- *Capacity = “legal qualification, competency, power or fitness. Mental ability to understand the nature and effects of one’s acts”
- *Incapacity = “want of legal, physical, or intellectual capacity; want of power or ability to take or dispose; want of legal ability to act. The quality or state of being incapable, want of capacity, lack of physical or intellectual power, or of natural or legal qualification”

*Black’s Law Dictionary 1991



Legal Incapacity (cont'd)

- Different legal standards:

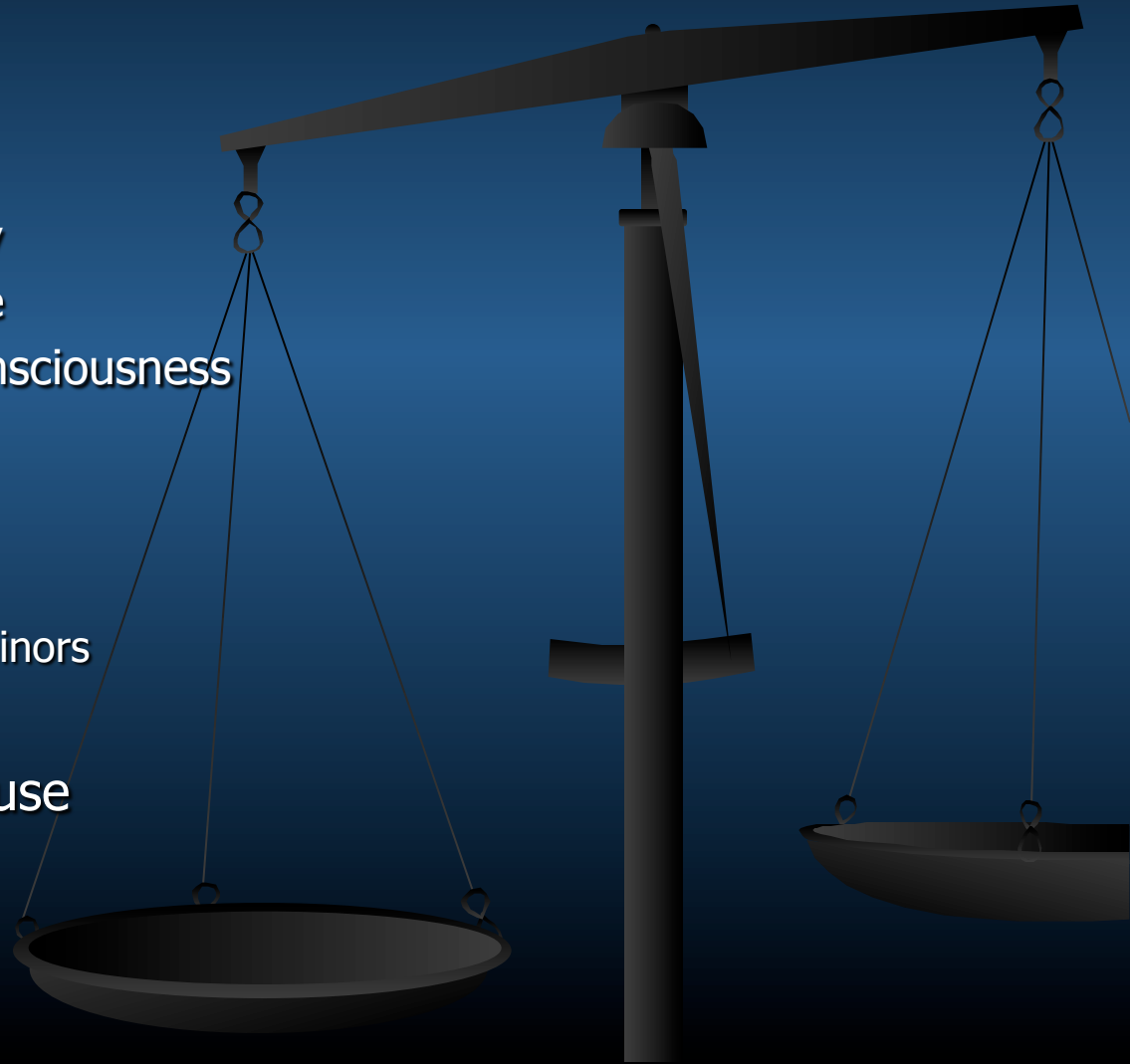
- Criminal matters
- Enter into a contract
- Execute a Will
- Conservatorships
- Commitments
- Guardianships



Legal Incapacity (cont'd)

■ Causes:

- Medical Condition
 - Dementia
 - Intellectual disability
 - Down's Syndrome
 - Extended loss of consciousness
 - Coma
- Mental Illness
- Age
 - Under age 18 - minors
- Injury
- Chronic substance abuse



Role of the probate court

"Protect people's rights, not to protect people."

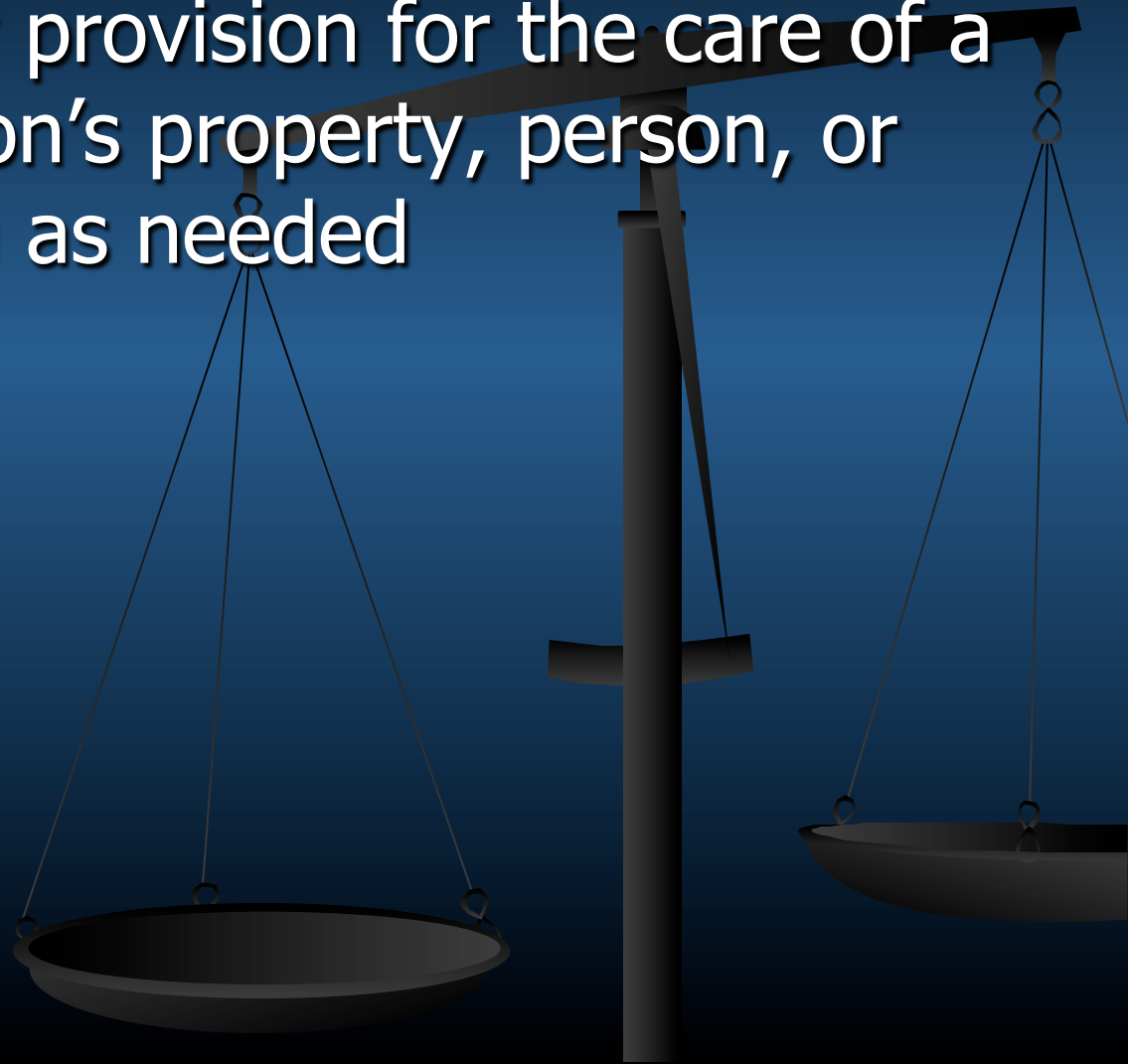


Purposes of Conservatorships



Why Conservatorship?

- Make necessary provision for the care of a conserved person's property, person, or both for as long as needed



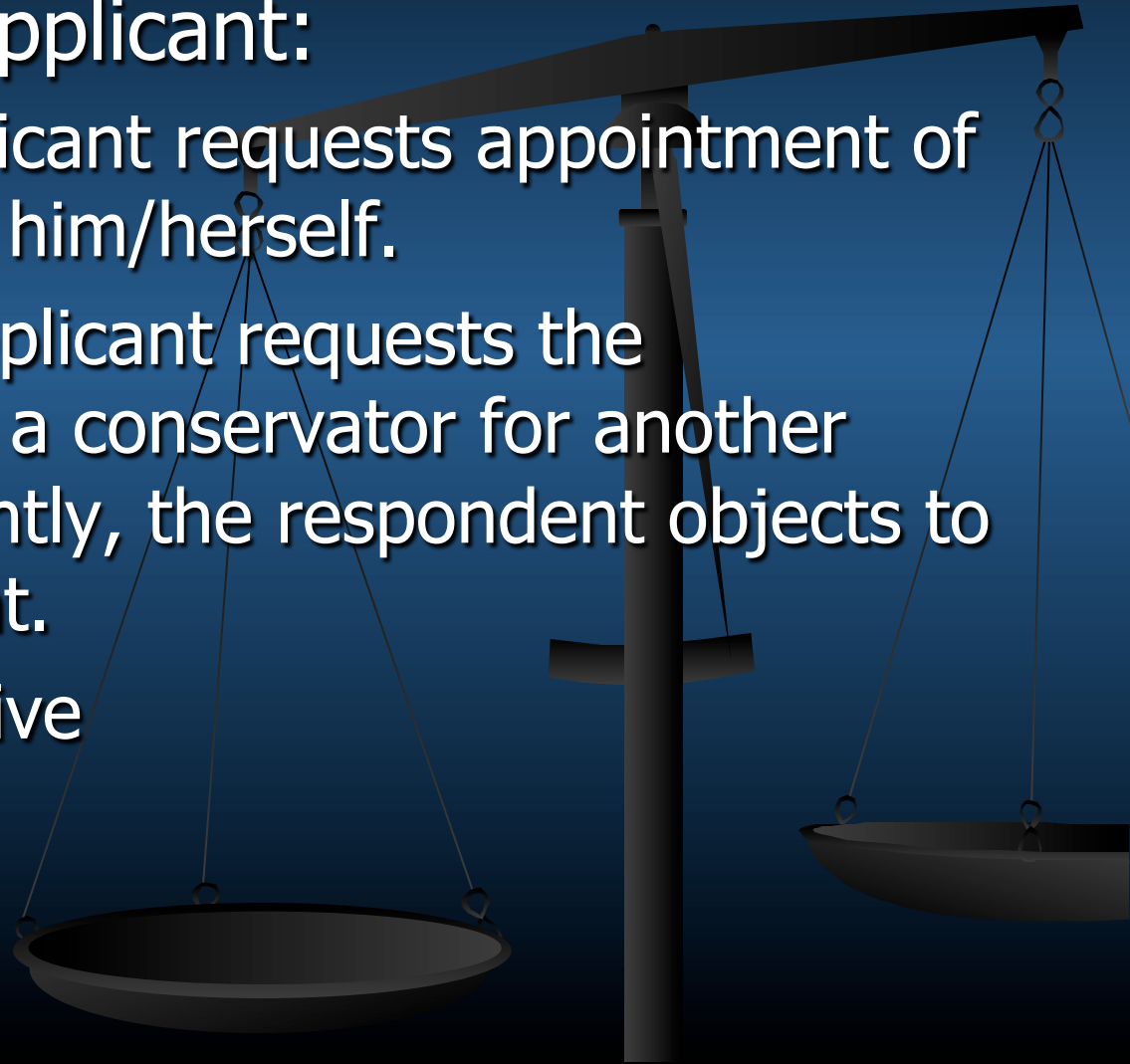
Types of Conservatorships



Types of Conservatorships

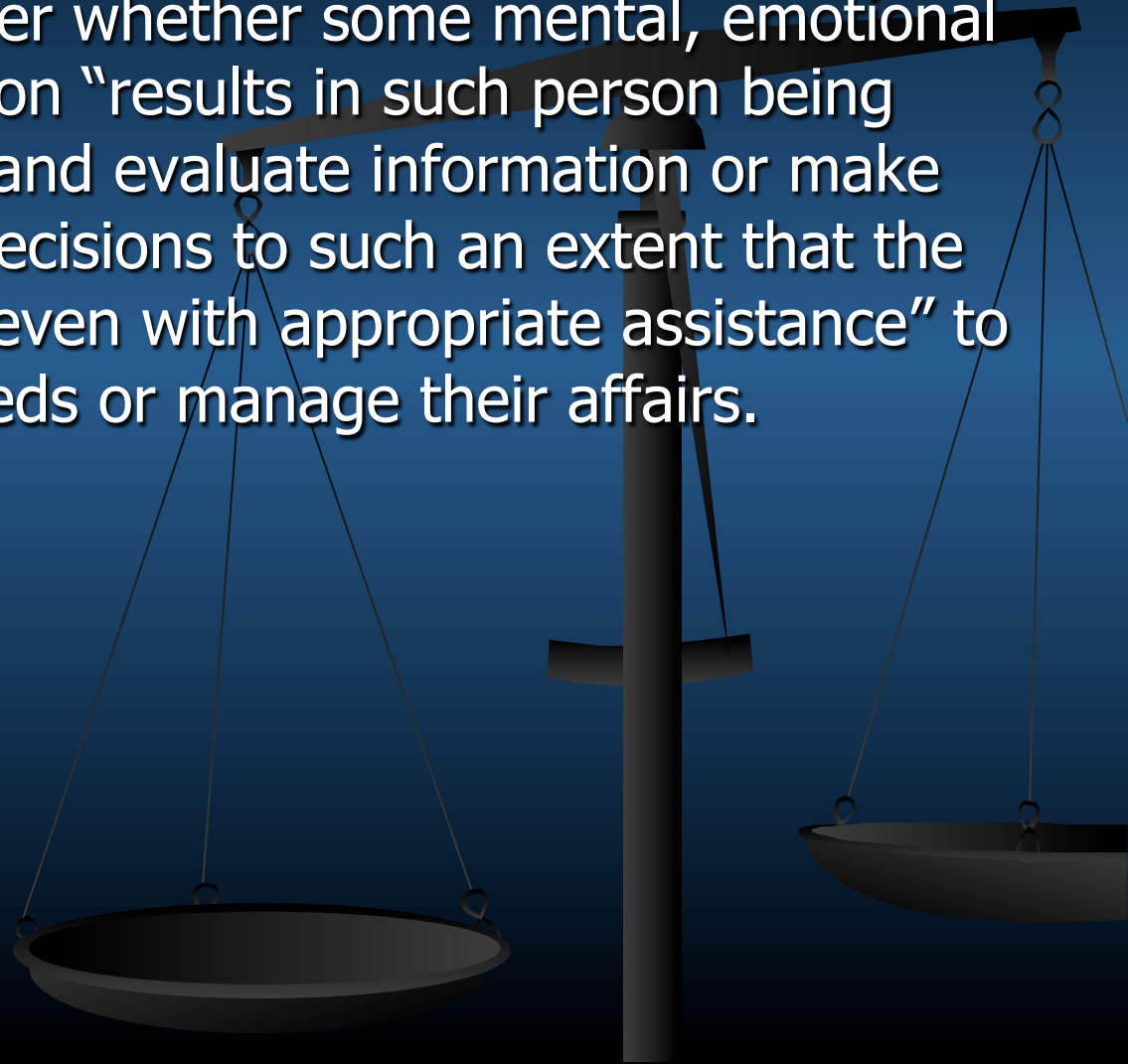
1. Based on the applicant:

- Voluntary: Applicant requests appointment of conservator for him/herself.
- Involuntary: Applicant requests the appointment of a conservator for another person. Frequently, the respondent objects to the appointment.
- Mutually exclusive



Involuntary Conservatorships

- Court must consider whether some mental, emotional or physical condition “results in such person being unable to receive and evaluate information or make or communicate decisions to such an extent that the person is unable, even with appropriate assistance” to meet essential needs or manage their affairs.



Types of Conservatorships (cont'd)

2. Based on the responsibilities of the conservator

- Conservator of the Estate
- Conservator of the Person
- Temporary conservatorship



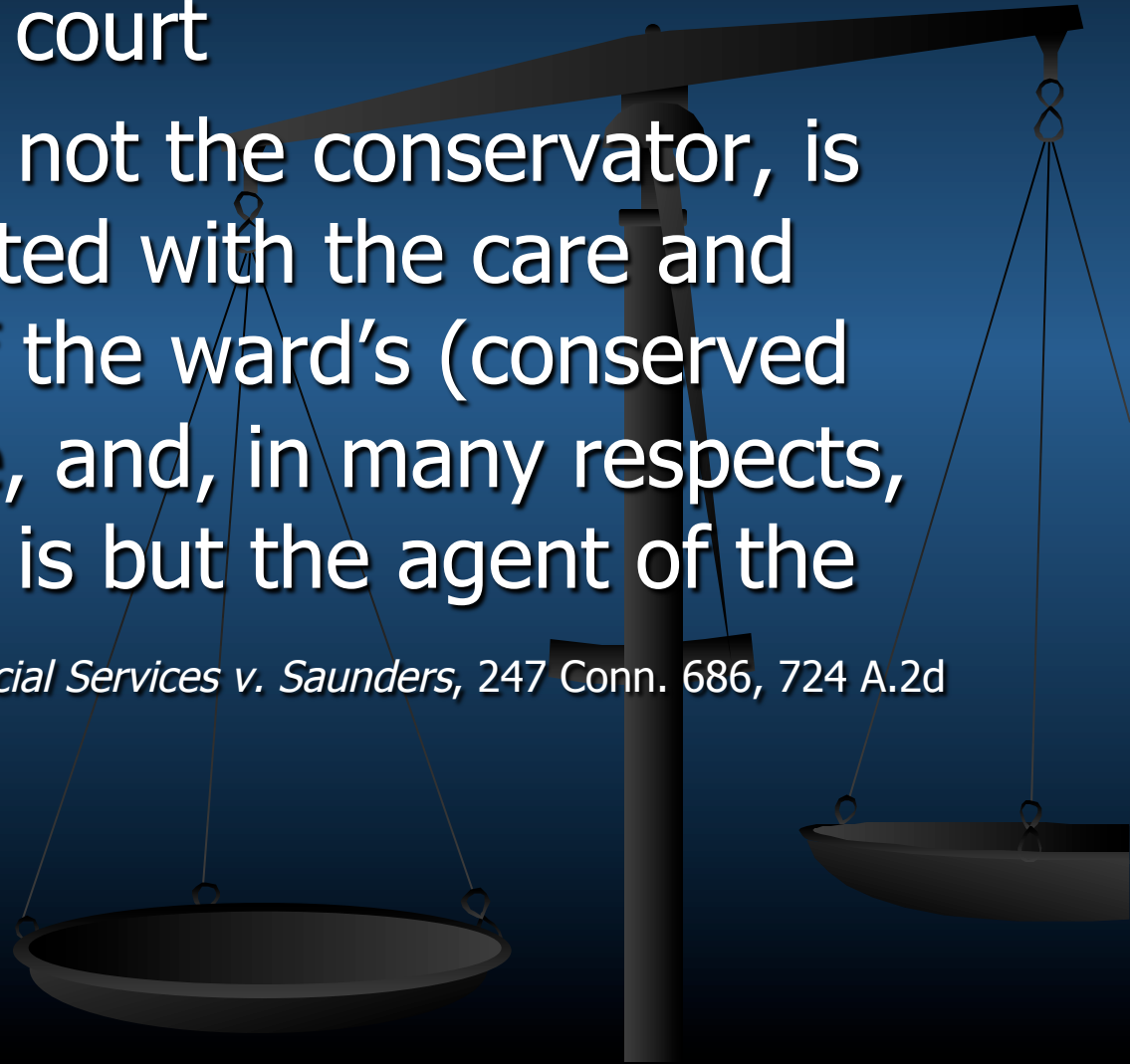
Conservator: Responsibilities & Limitations



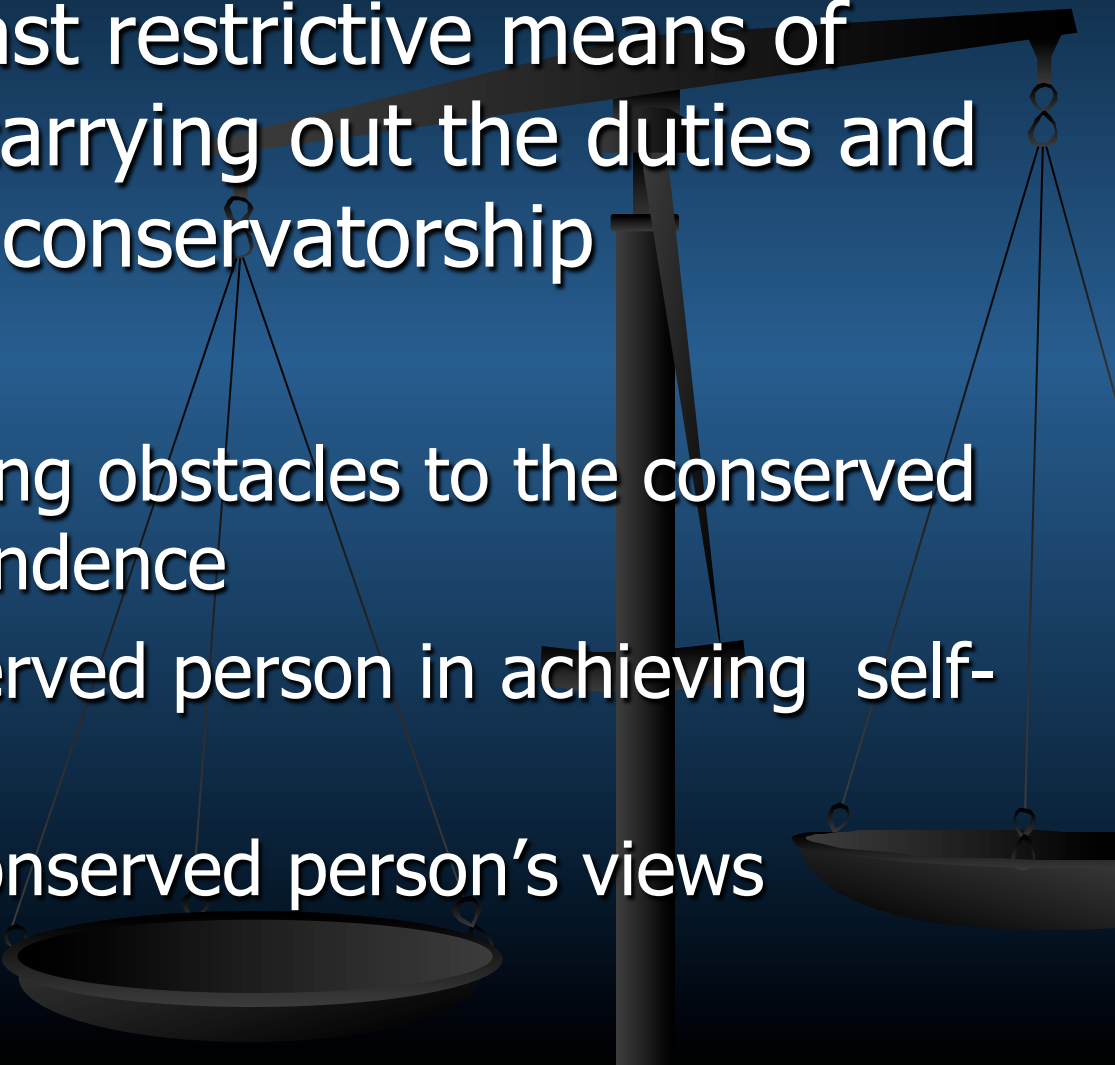
Conservator

- An agent of the court
- “The court, and not the conservator, is primarily entrusted with the care and management of the ward’s (conserved person’s) estate, and, in many respects, the conservator is but the agent of the court”

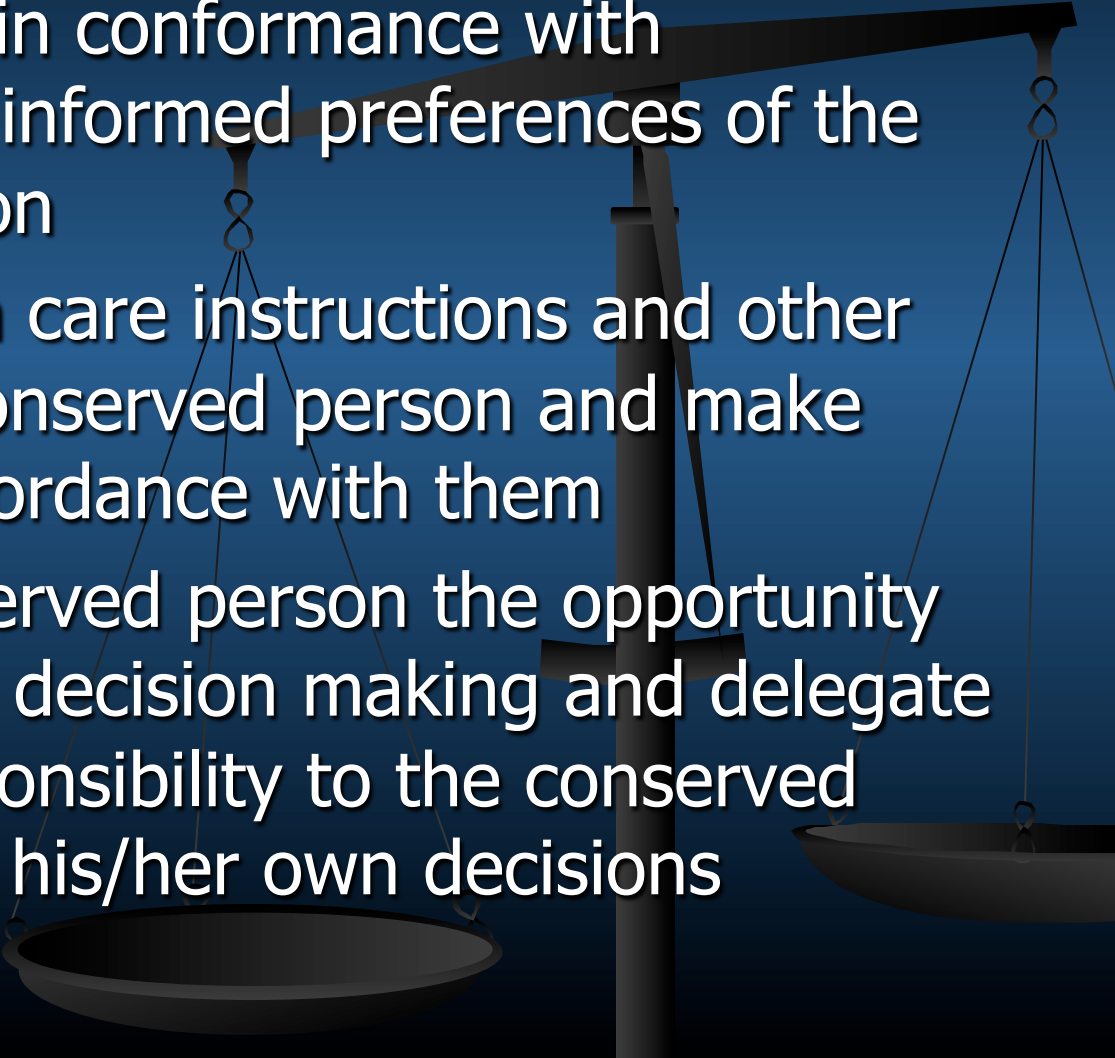
Department of Social Services v. Saunders, 247 Conn. 686, 724 A.2d 1093 (1999)



Conservator (cont'd)

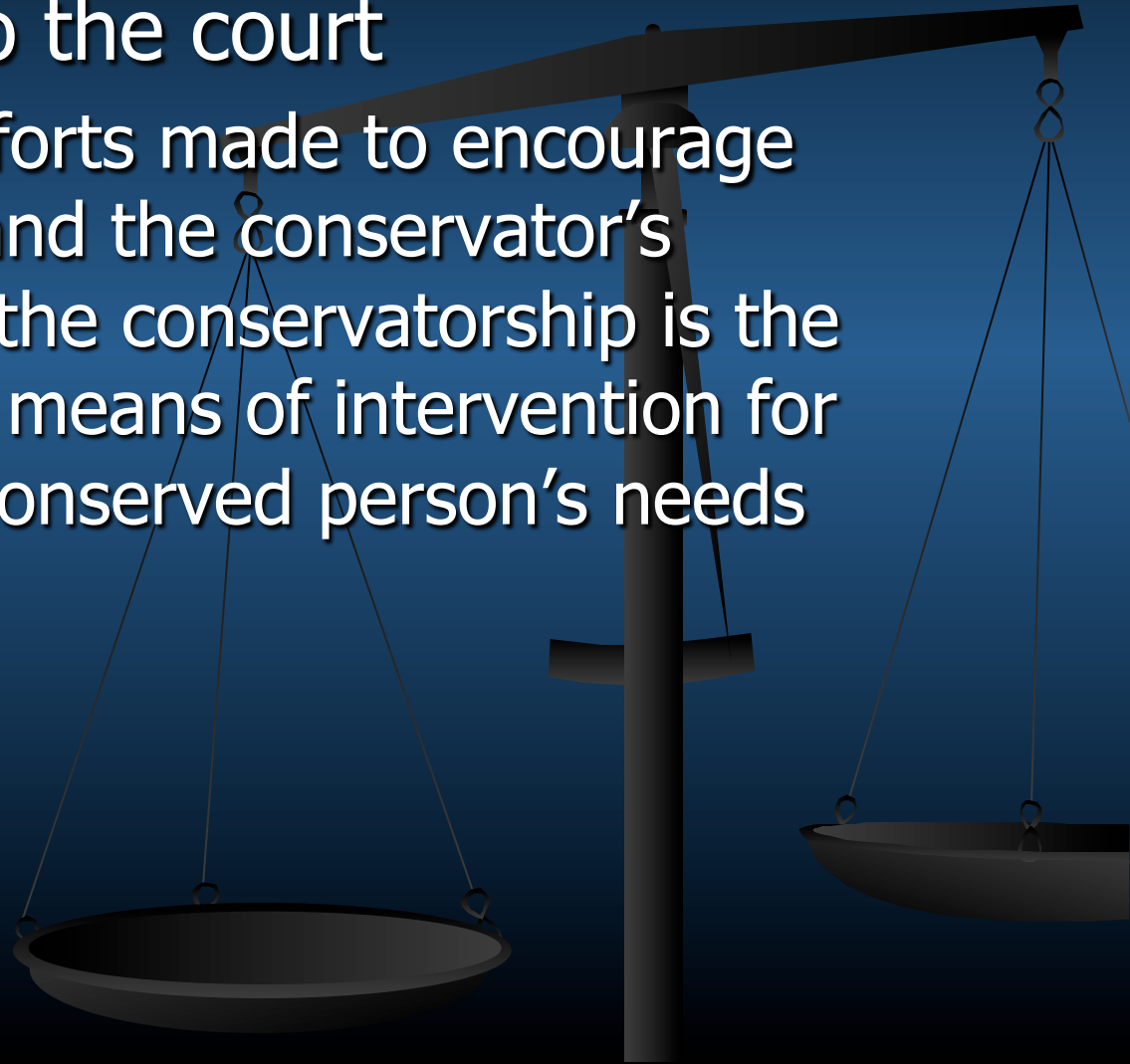
- Must use the least restrictive means of intervention in carrying out the duties and authority of the conservatorship
 - Must:
 - Assist in removing obstacles to the conserved person's independence
 - Assist the conserved person in achieving self-reliance
 - Ascertain the conserved person's views
- 

Conservator (cont'd)

- Must (cont'd):
 - Make decisions in conformance with reasonable and informed preferences of the conserved person
 - Ascertain health care instructions and other wishes of the conserved person and make decisions in accordance with them
 - Afford the conserved person the opportunity to participate in decision making and delegate reasonable responsibility to the conserved person to make his/her own decisions
- 

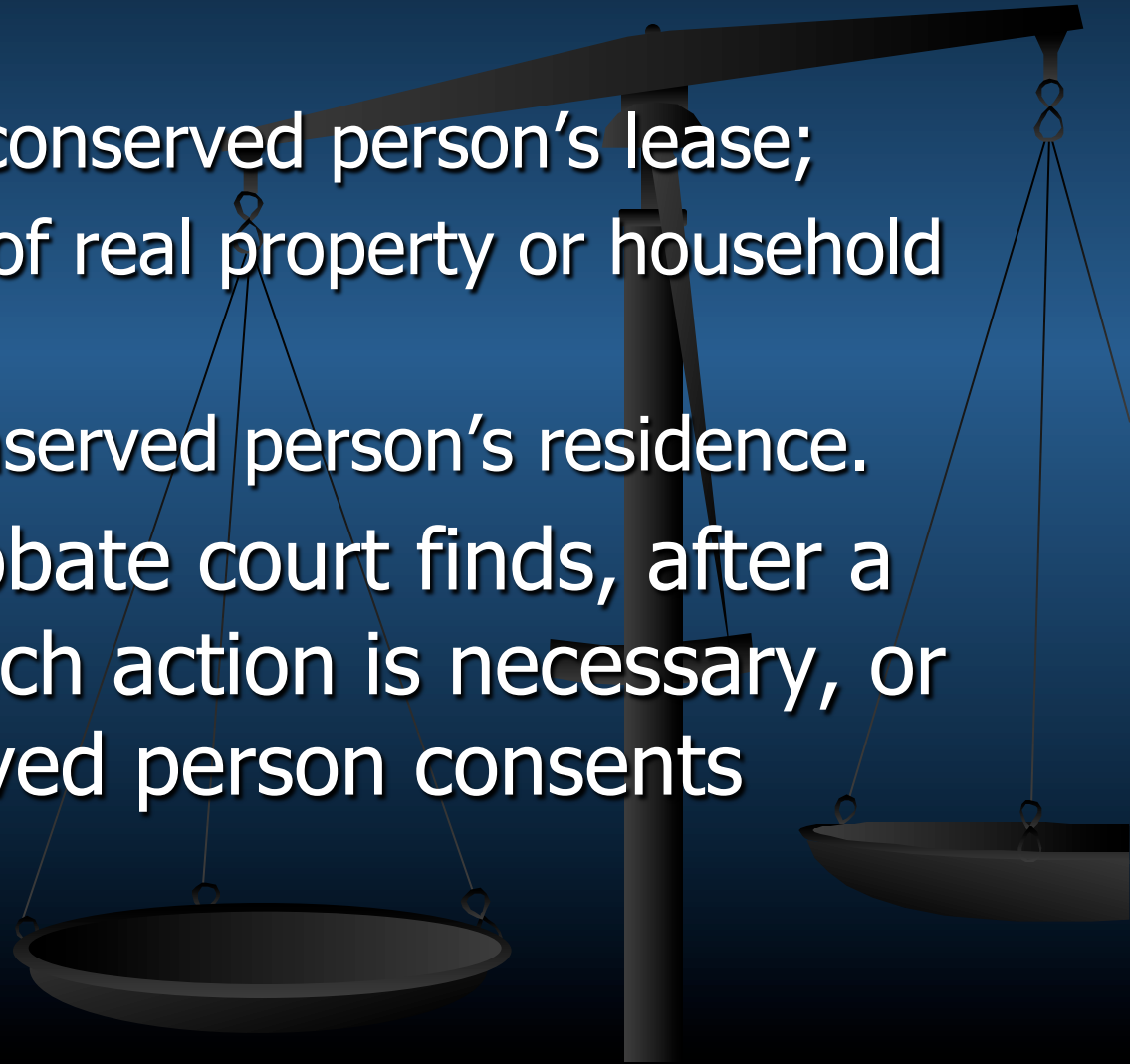
Conservator (cont'd)

- Annual report to the court
 - Must include efforts made to encourage independence and the conservator's statement that the conservatorship is the least restrictive means of intervention for managing the conserved person's needs

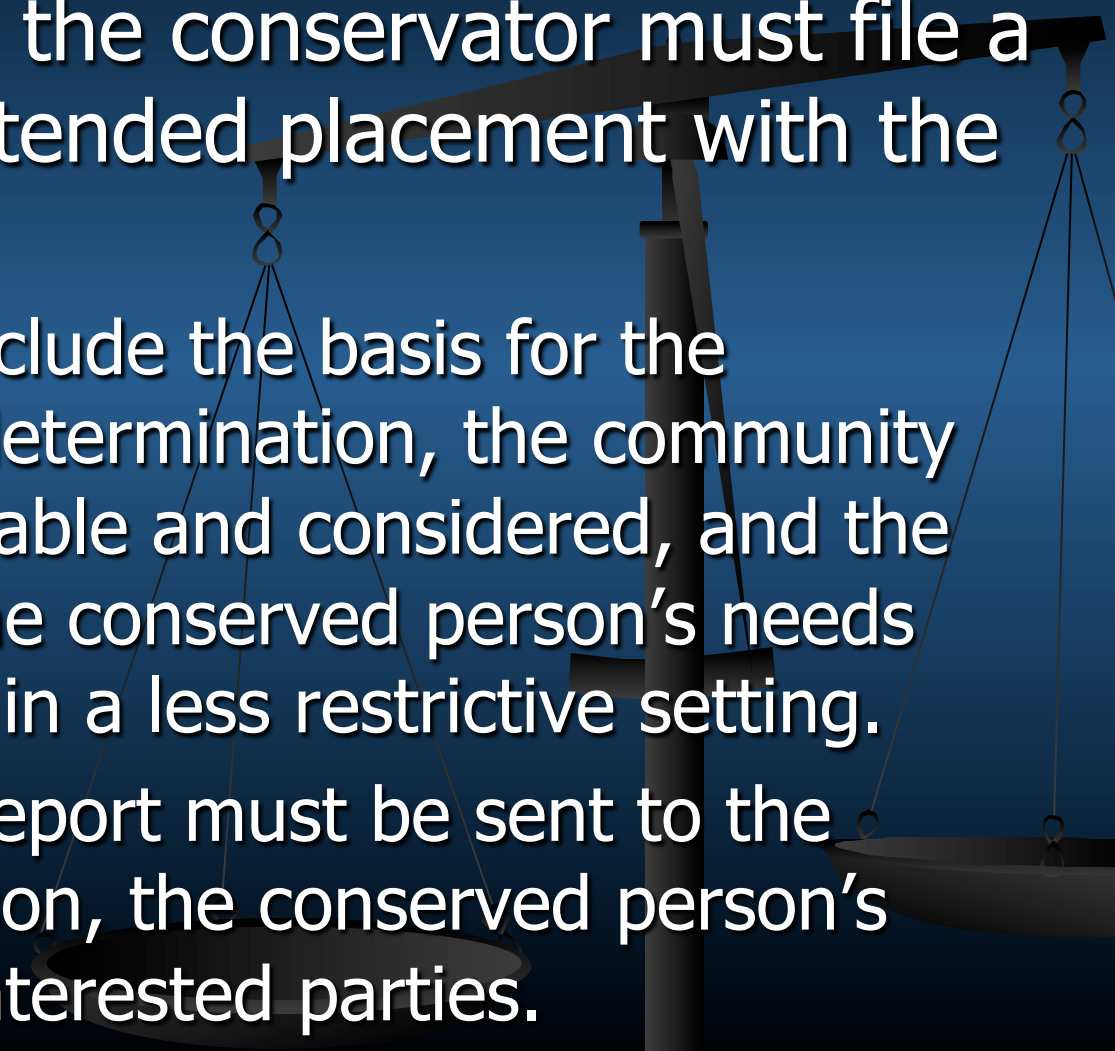


Conservator (cont'd)

- May not:
 - Terminate the conserved person's lease;
 - Sell or dispose of real property or household furnishings;
 - Change the conserved person's residence.
- ...unless the probate court finds, after a hearing, that such action is necessary, or that the conserved person consents

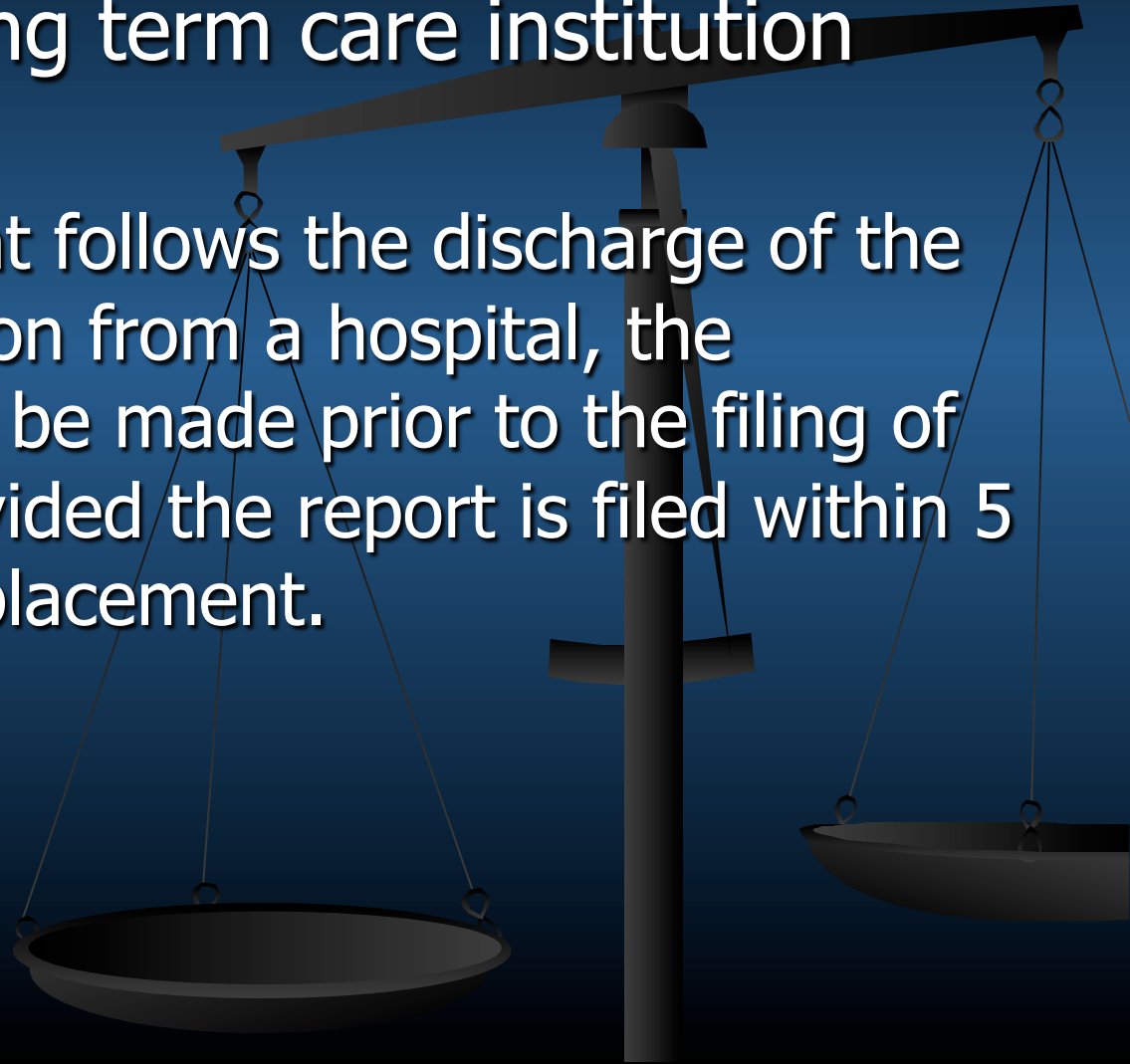


Conservator (cont'd)

- Prior to placement in an institution for long term care, the conservator must file a report of the intended placement with the probate court.
 - Report must include the basis for the conservator's determination, the community resources available and considered, and the reasons why the conserved person's needs cannot be met in a less restrictive setting.
 - Copies of the report must be sent to the conserved person, the conserved person's attorney and interested parties.
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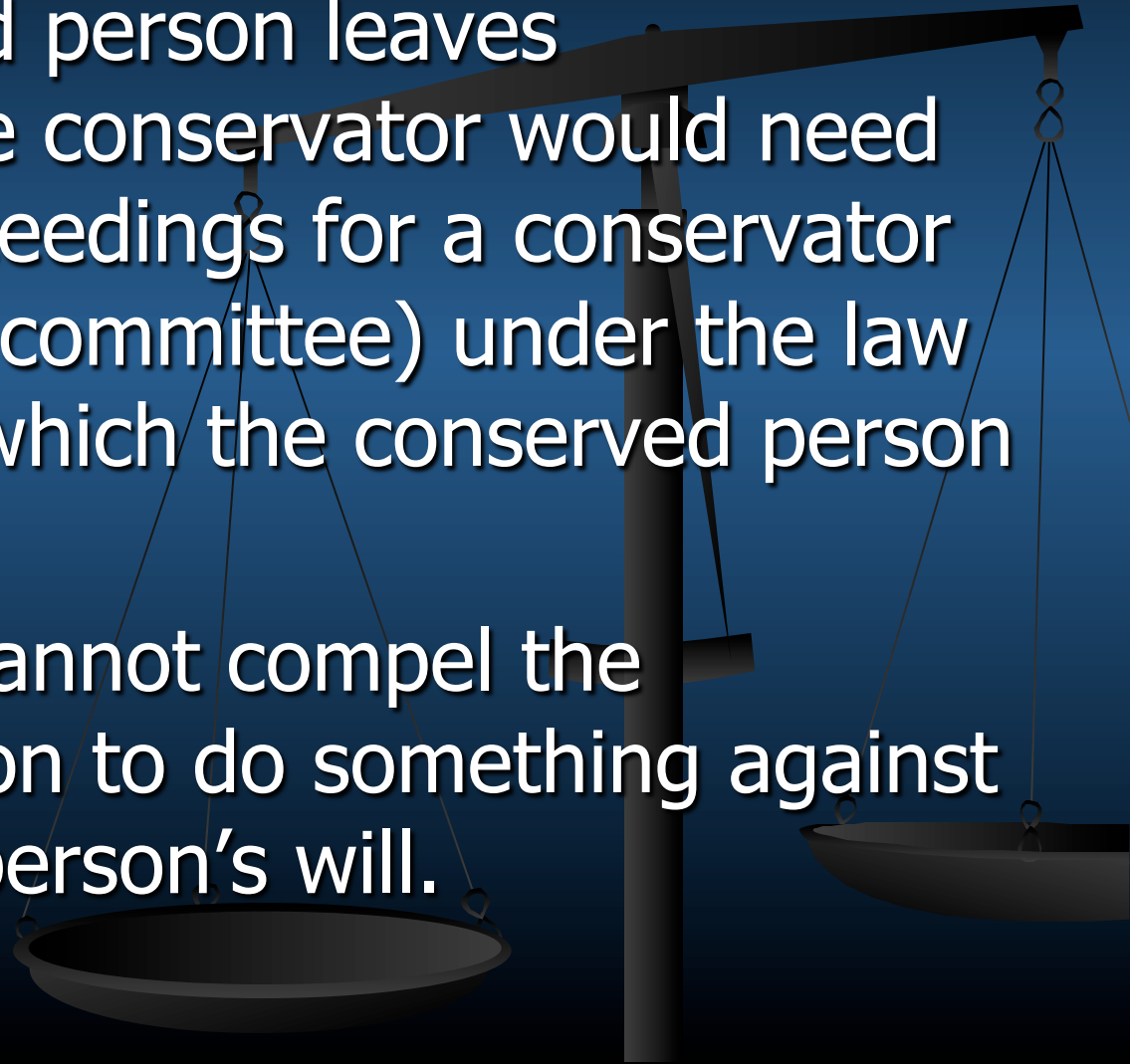
Conservator (cont'd)

- Placement in long term care institution (cont'd)
 - If the placement follows the discharge of the conserved person from a hospital, the placement may be made prior to the filing of the report, provided the report is filed within 5 days after the placement.



Conservator (cont'd)

- If the conserved person leaves Connecticut, the conservator would need to institute proceedings for a conservator (or guardian or committee) under the law of the state to which the conserved person has moved.
- A conservator cannot compel the conserved person to do something against the conserved person's will.

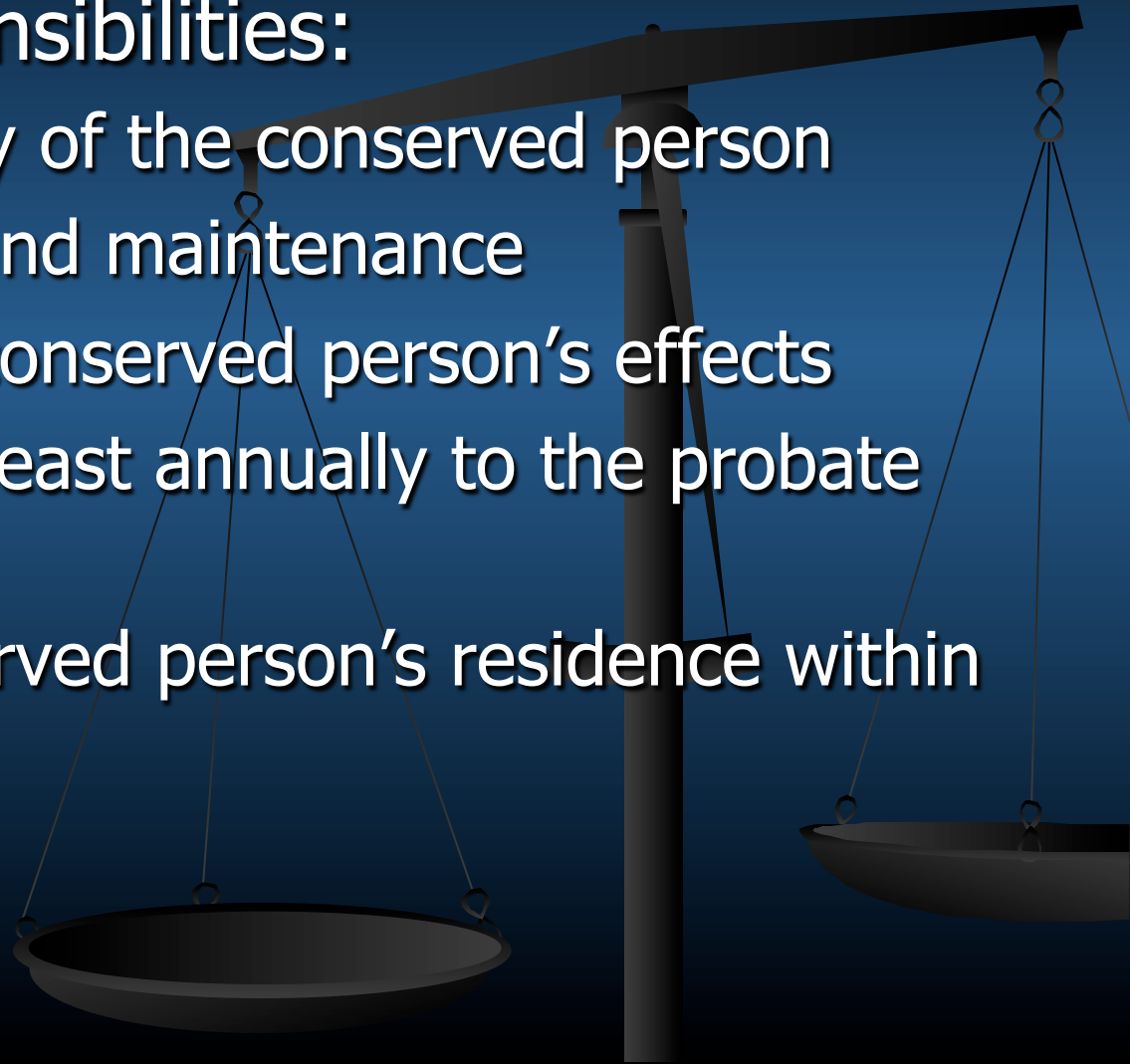


Conservator of the Person



Conservator of the Person

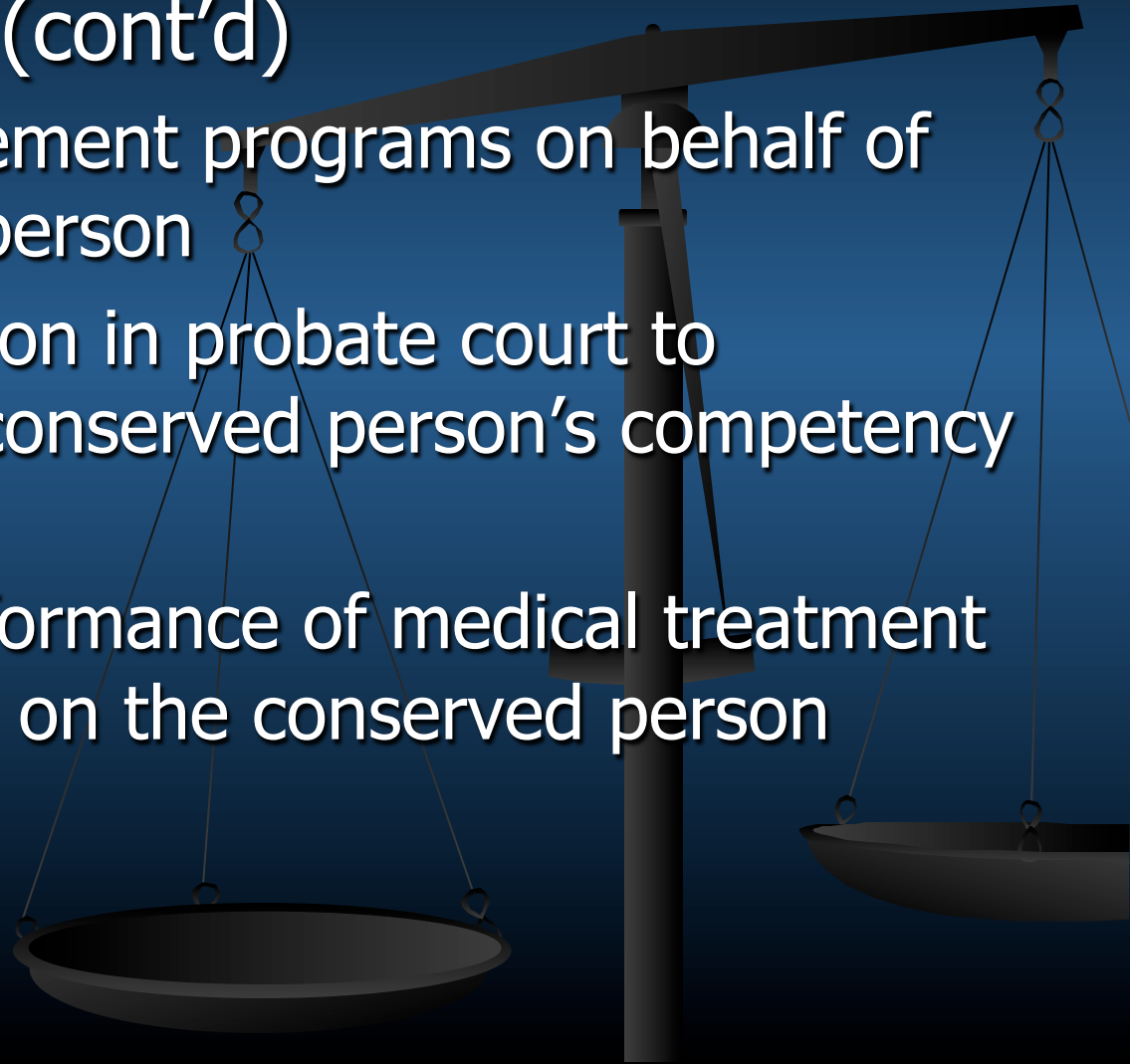
- Potential Responsibilities:
 - General custody of the conserved person
 - Care, comfort and maintenance
 - Caring for the conserved person's effects
 - Must report at least annually to the probate court
 - Establish conserved person's residence within Connecticut



Conservator of the Person (cont'd)

■ Responsibilities (cont'd)

- Apply for entitlement programs on behalf of the conserved person
- File an application in probate court to determine the conserved person's competency to vote
- Consent to performance of medical treatment and procedures on the conserved person

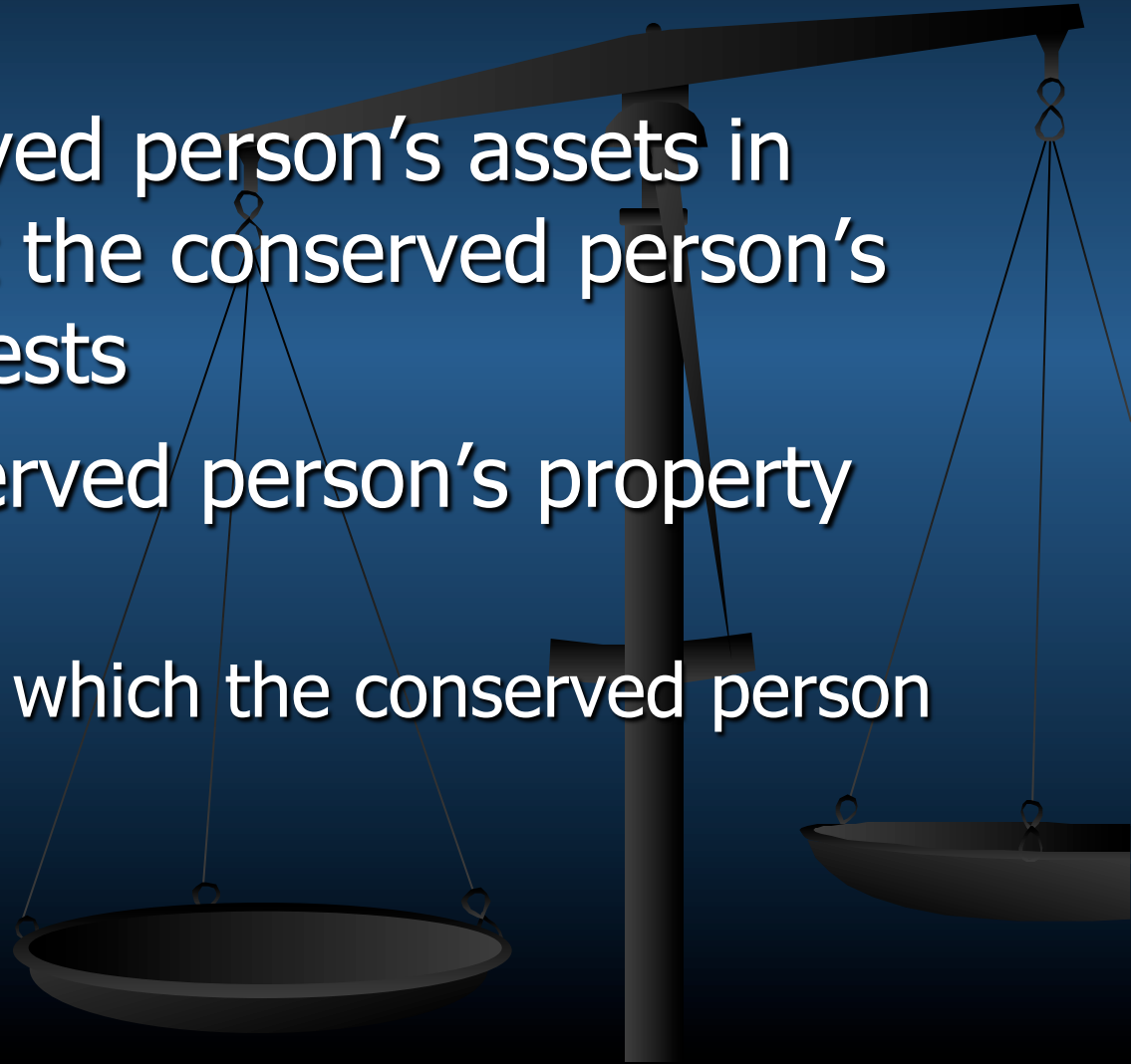


Conservator of the Estate

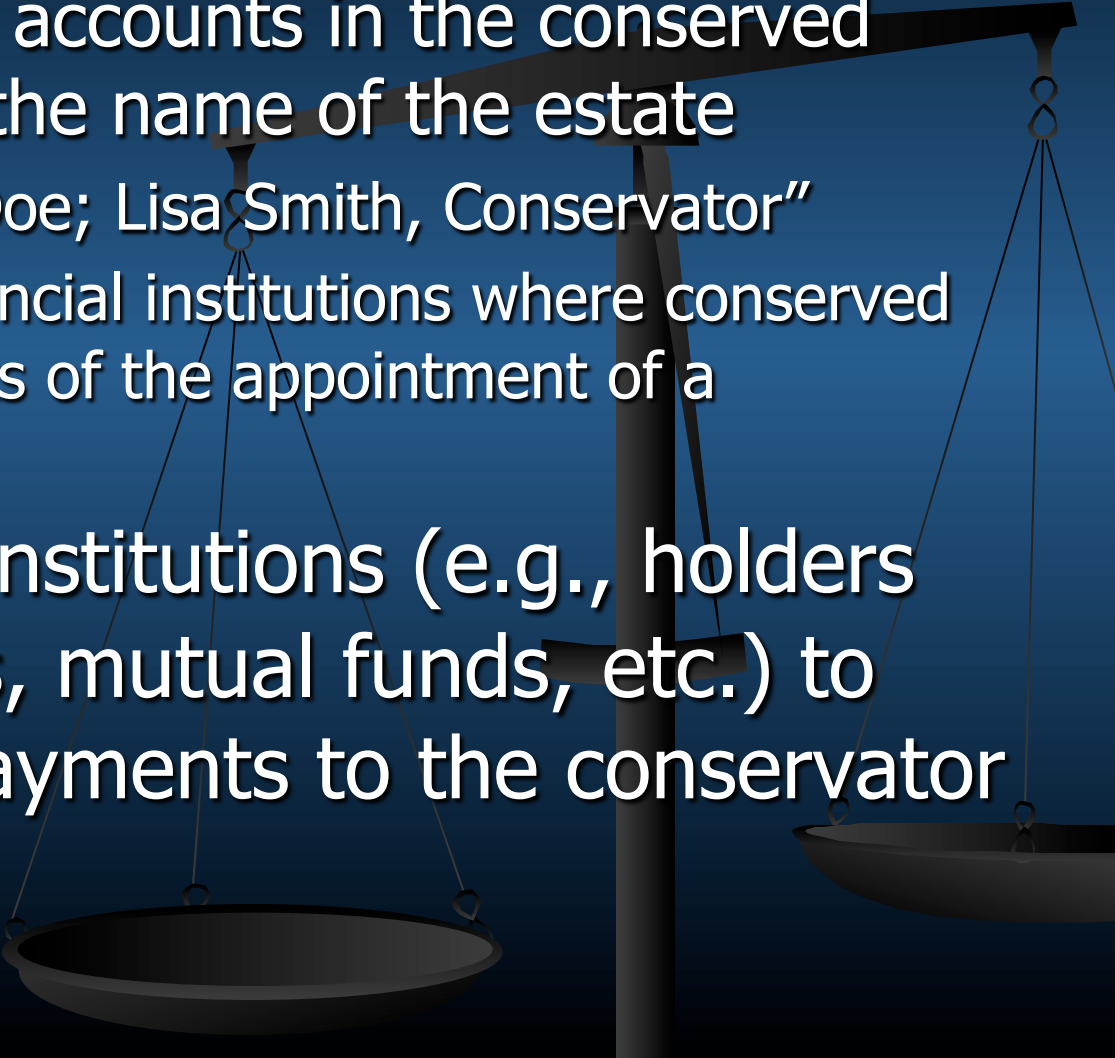


Conservator of the Estate

- Manage conserved person's assets in order to protect the conserved person's rights and interests
- Inventory conserved person's property and assets
 - ALL property in which the conserved person has an interest

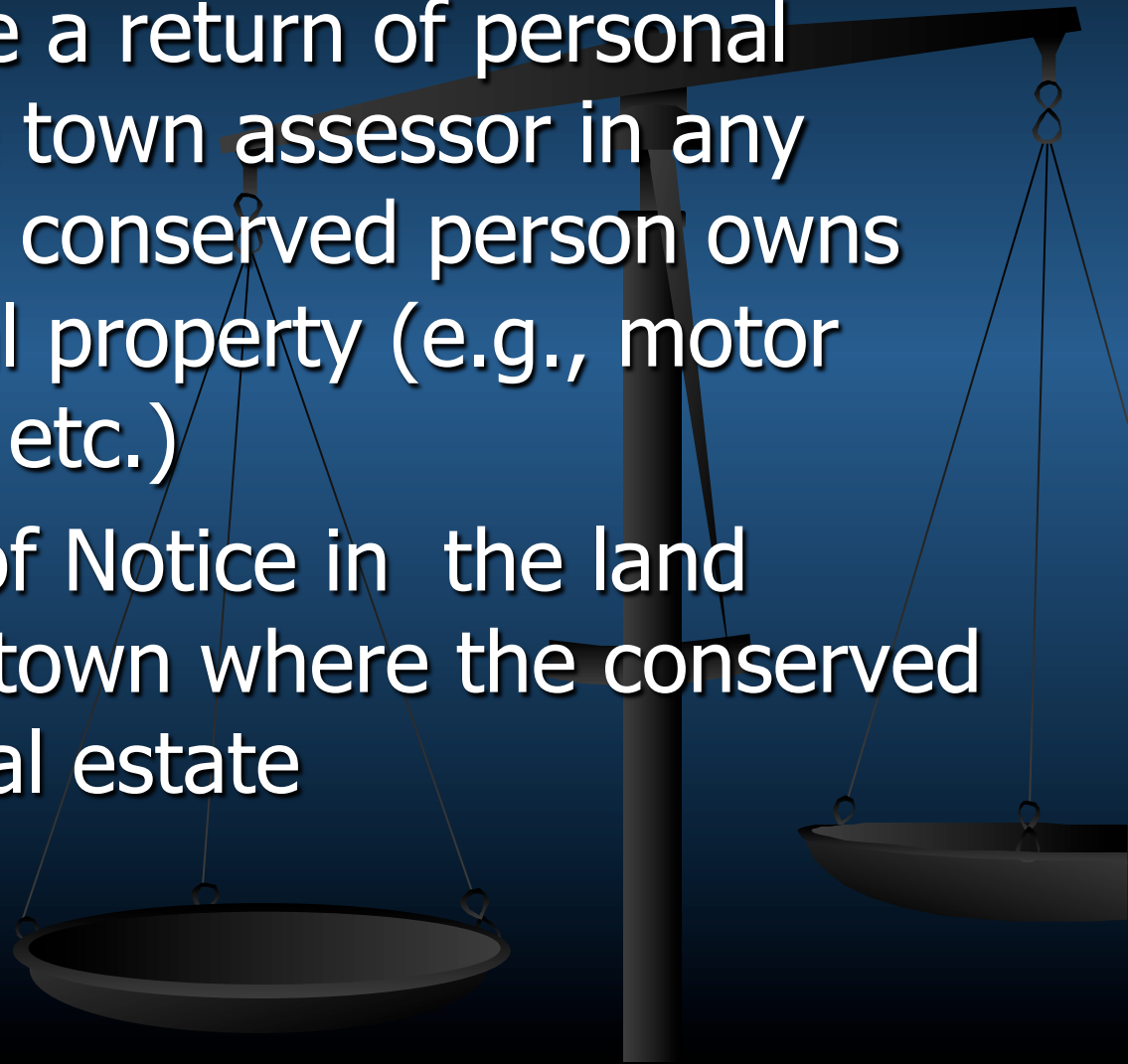


Conservator of the Estate (cont'd)

- Transfer any bank accounts in the conserved person's name to the name of the estate
 - "Estate of Susan Doe; Lisa Smith, Conservator"
 - Must notify all financial institutions where conserved person owns assets of the appointment of a conservator
 - Notify financial institutions (e.g., holders of bonds, stocks, mutual funds, etc.) to direct income payments to the conservator of the estate
- 

Conservator of the Estate (cont'd)

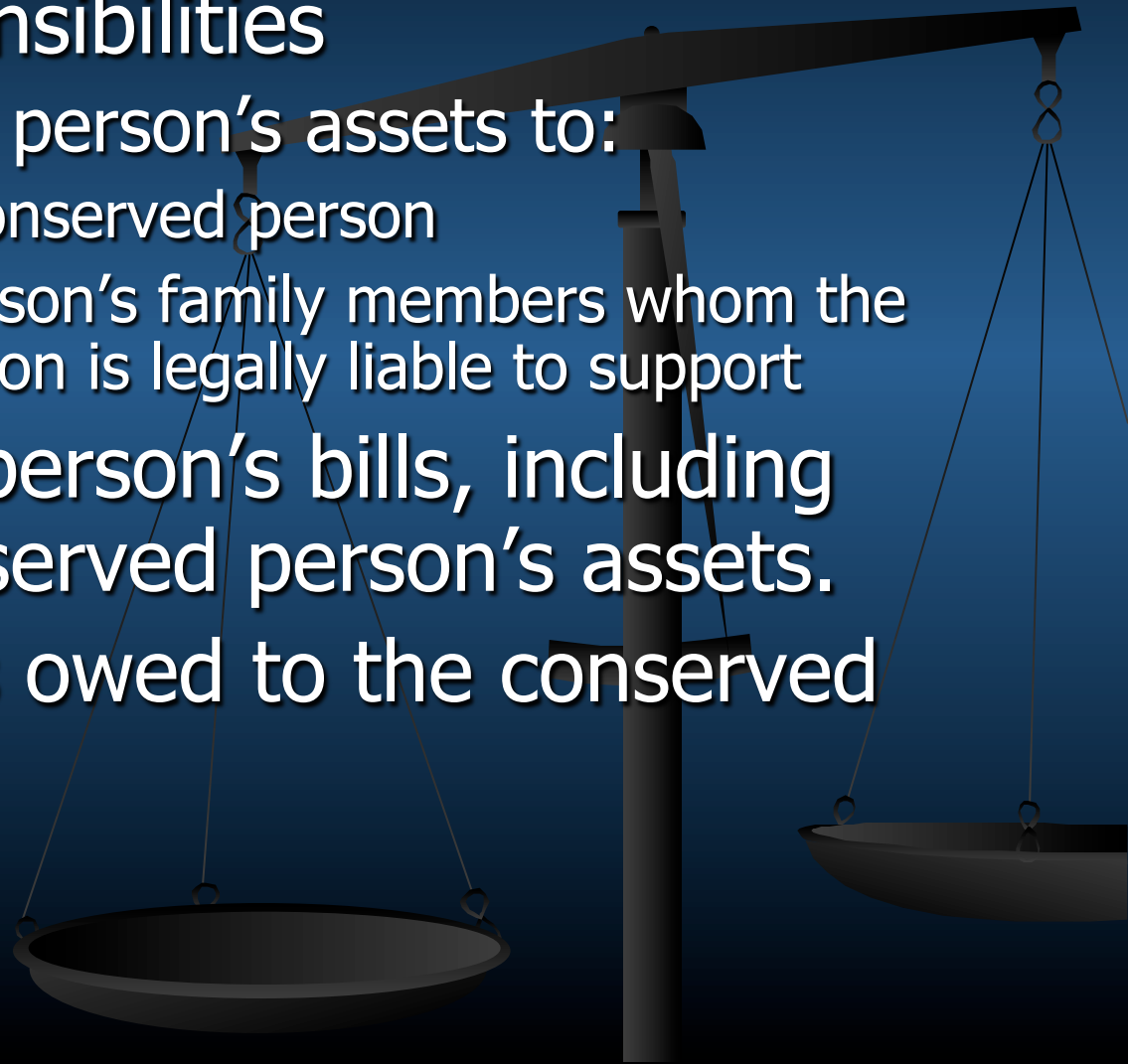
- Notify and make a return of personal property to the town assessor in any town where the conserved person owns taxable personal property (e.g., motor vehicles, boats, etc.)
- File Certificate of Notice in the land records in any town where the conserved person owns real estate



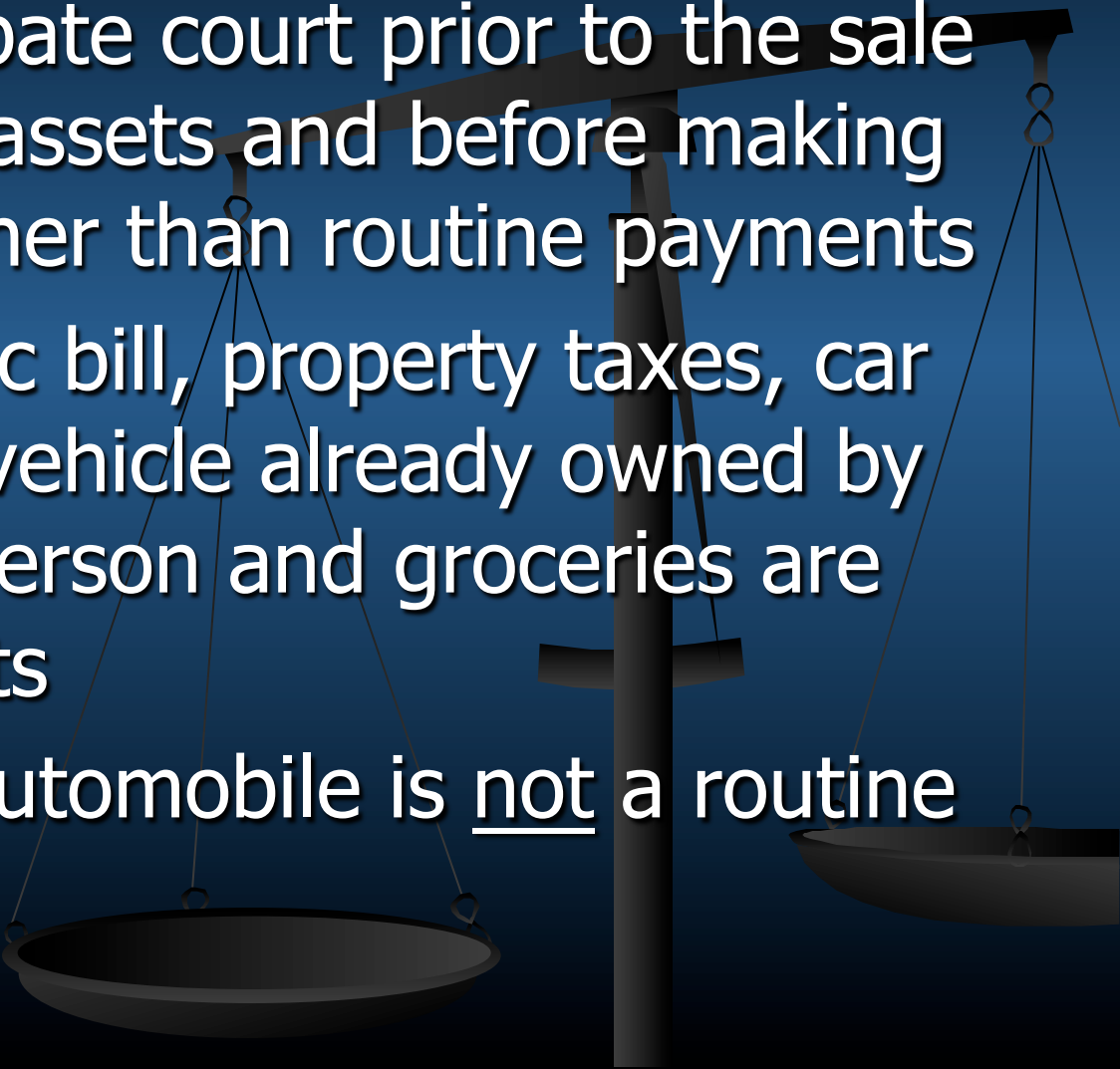
Conservator of the Estate (cont'd)

■ Potential Responsibilities

- Use conserved person's assets to:
 - Support the conserved person
 - Conserved person's family members whom the conserved person is legally liable to support
- Pay conserved person's bills, including taxes, with conserved person's assets.
- Collecting debts owed to the conserved person

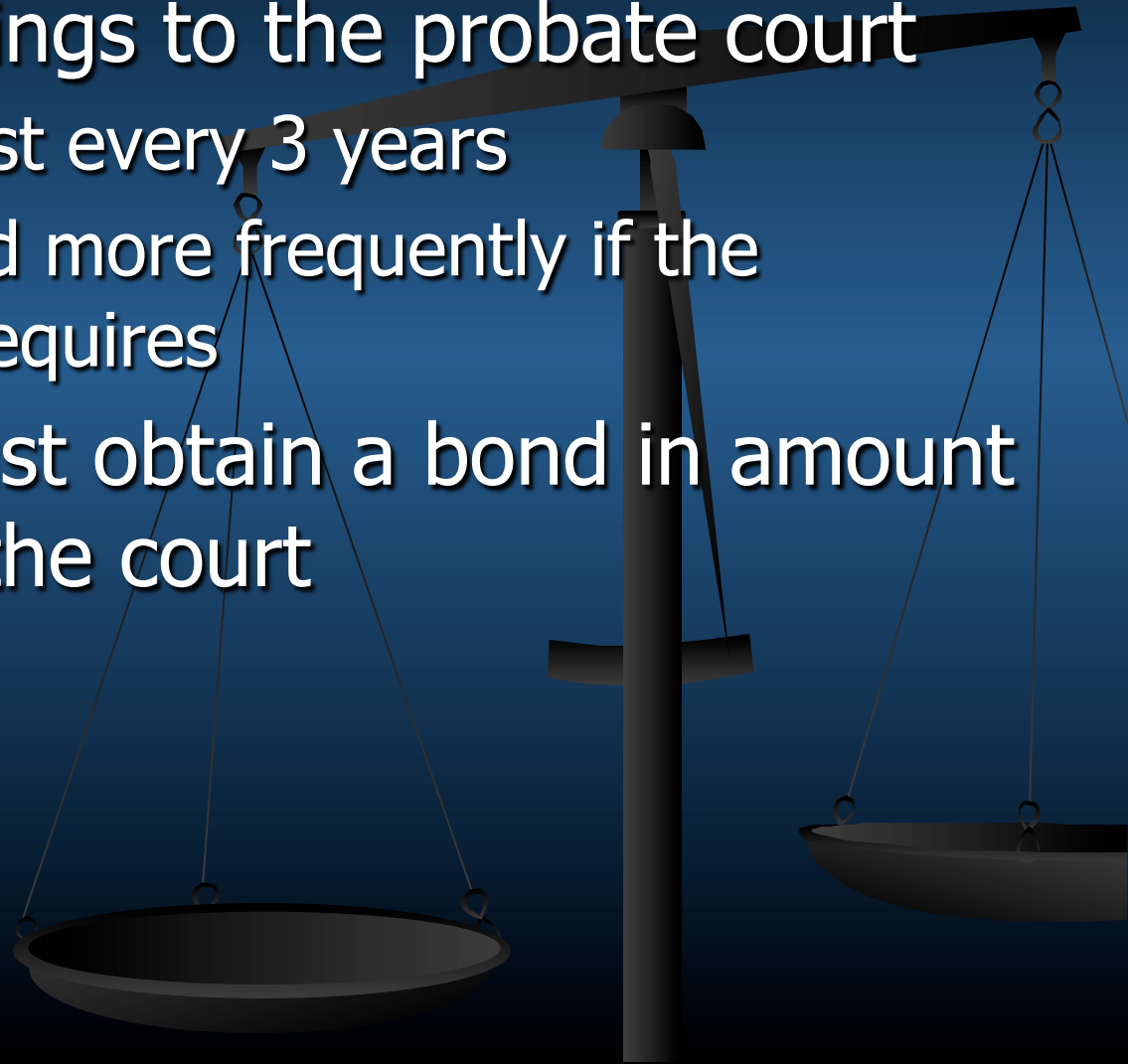


Conservator of the Estate (cont'd)

- Consult the probate court prior to the sale or mortgage of assets and before making expenditures other than routine payments
 - Example: Electric bill, property taxes, car payments on a vehicle already owned by the conserved person and groceries are routine payments
 - Purchasing an automobile is not a routine payment
- 

Conservator of the Estate (cont'd)

- Submit accountings to the probate court
 - Required at least every 3 years
 - May be required more frequently if the probate court requires
- Conservator must obtain a bond in amount determined by the court

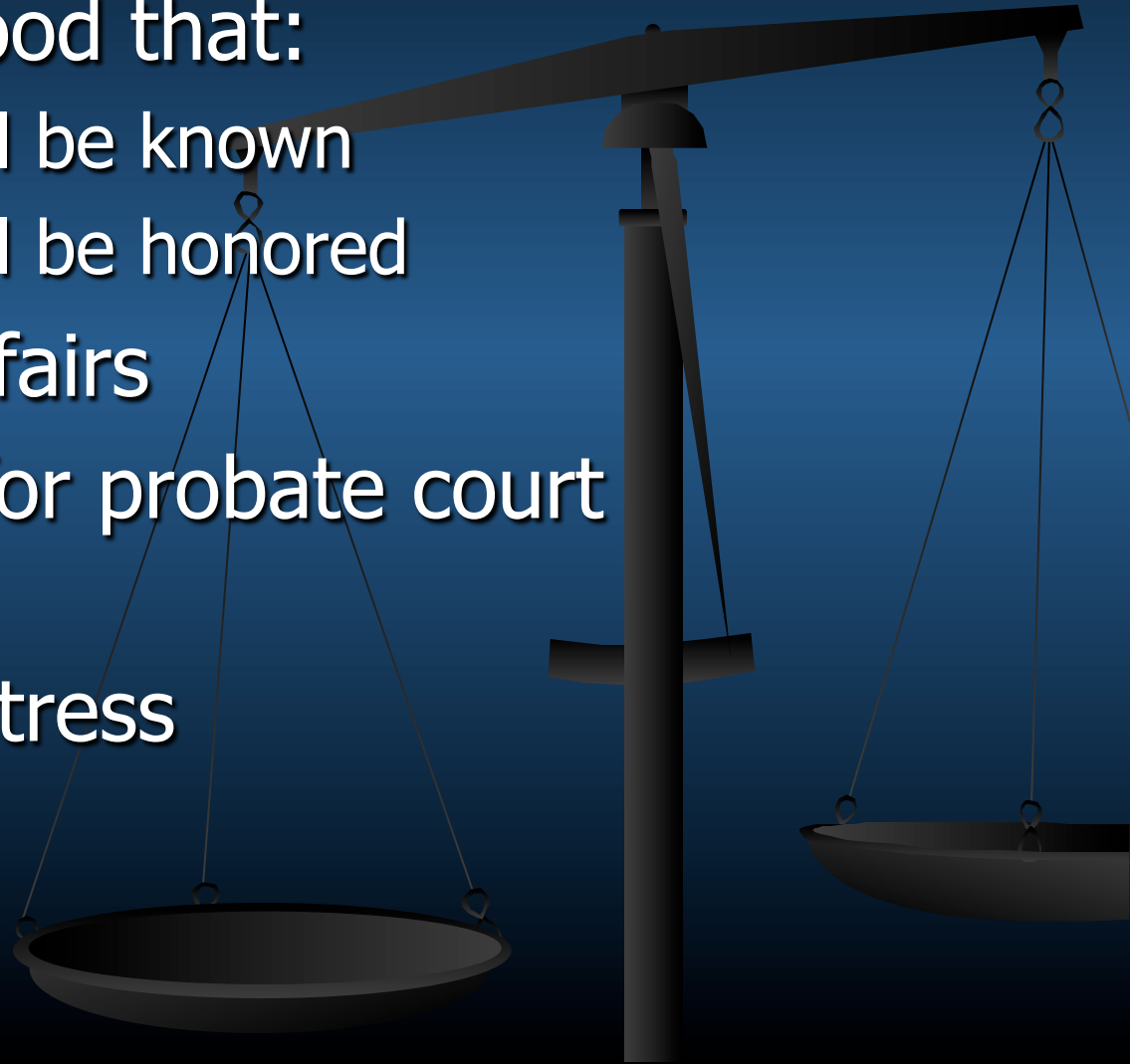


Planning for Incapacity



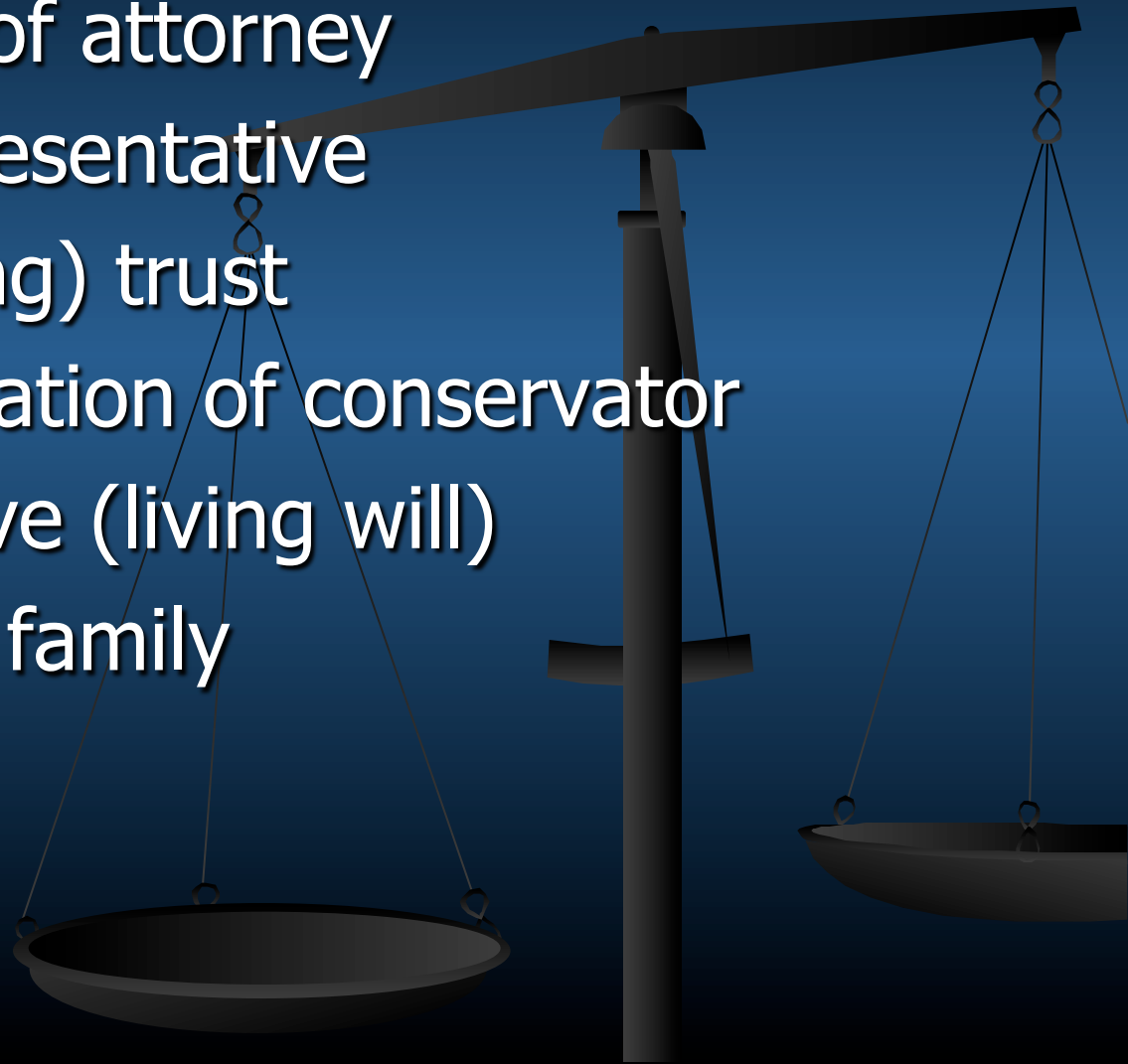
Planning Objectives

- Increase likelihood that:
 - Your wishes will be known
 - Your wishes will be honored
- Manage your affairs
- Minimize need for probate court intervention
- Reduce family stress



Planning for Incapacity

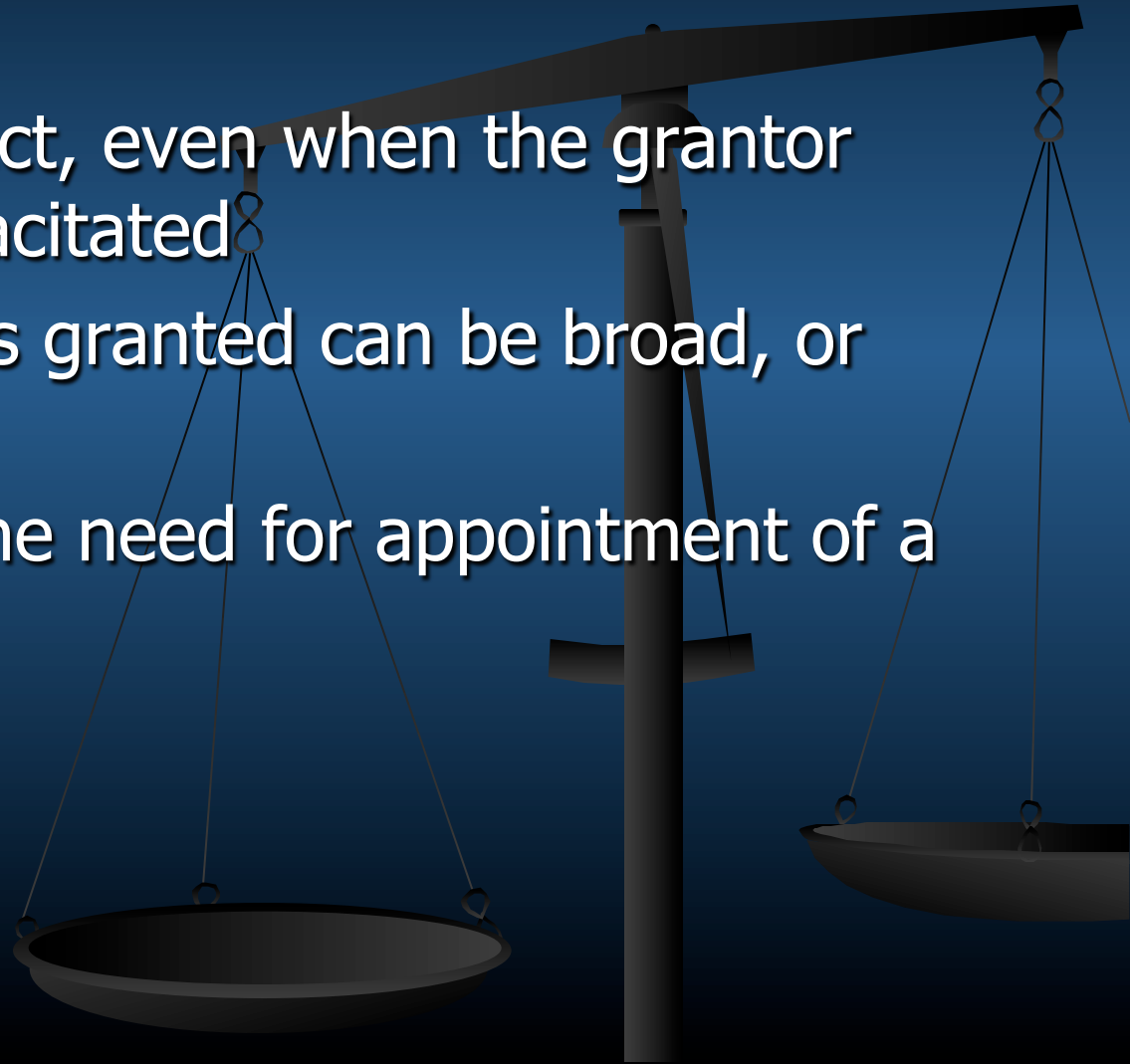
- Durable power of attorney
- Healthcare representative
- Inter vivos (living) trust
- Advance designation of conservator
- Advance directive (living will)
- Discussion with family



Durable Power of Attorney

■ Advantages:

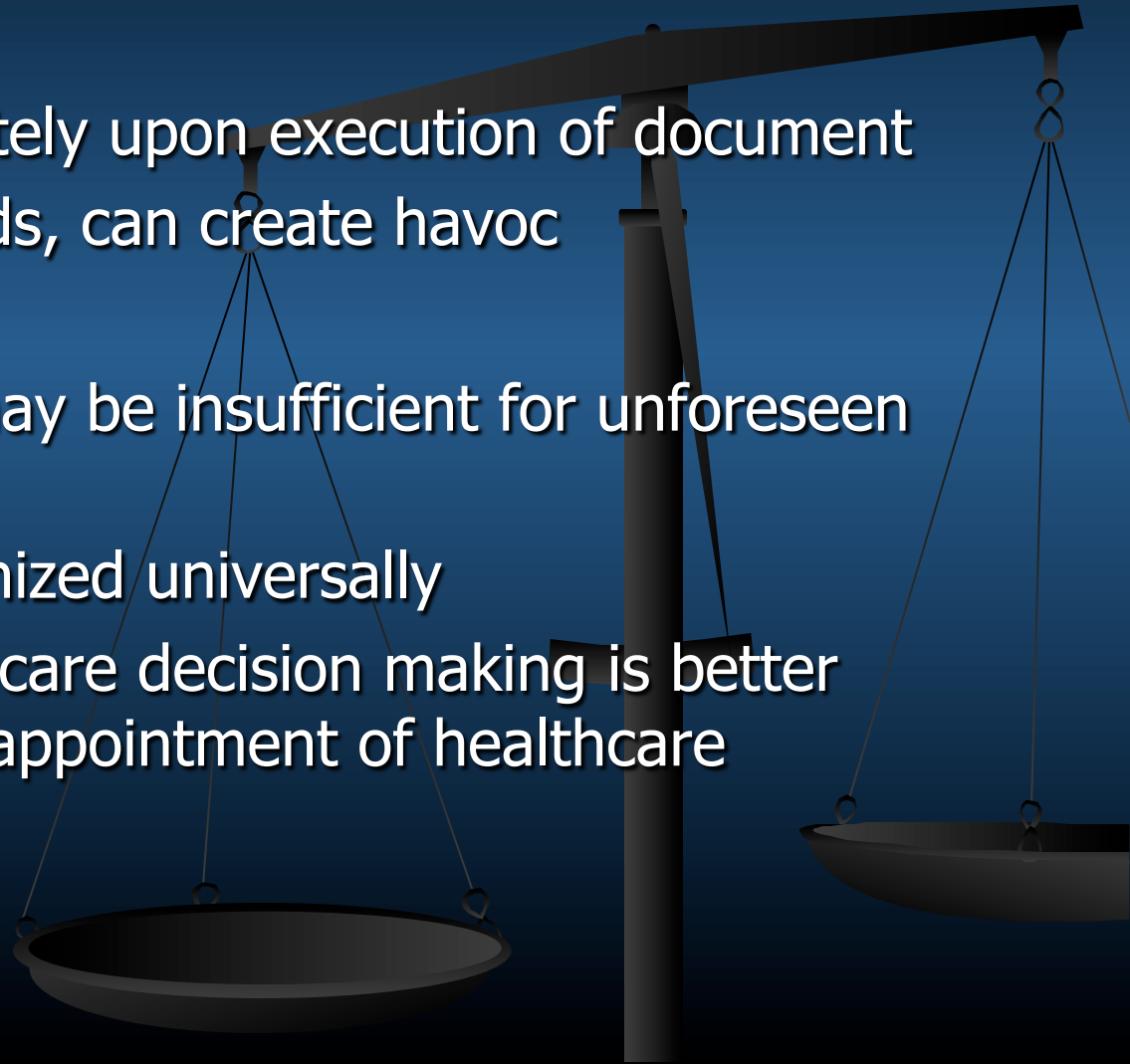
- Remains in effect, even when the grantor becomes incapacitated
- Flexible: powers granted can be broad, or very narrow
- May preclude the need for appointment of a conservator



Durable Power of Attorney (cont'd)

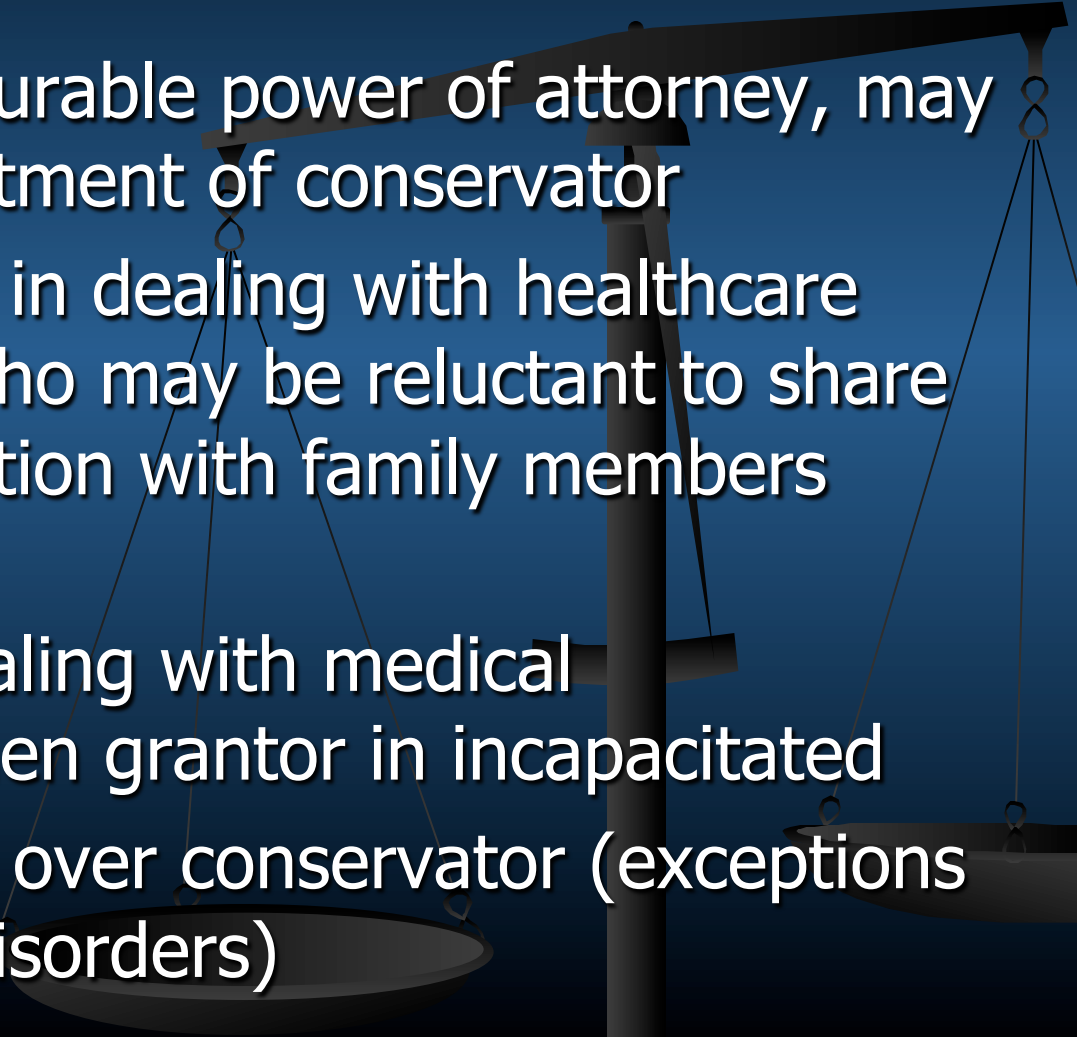
■ Disadvantages:

- Effective immediately upon execution of document
- In the wrong hands, can create havoc
- May get lost
- Powers granted may be insufficient for unforeseen circumstances
- May not be recognized universally
- Granting of healthcare decision making is better accomplished via appointment of healthcare representative



Healthcare Representative

■ Advantages:

- Together with durable power of attorney, may preclude appointment of conservator
 - Allows flexibility in dealing with healthcare professionals, who may be reluctant to share medical information with family members (HIPAA)
 - Provision for dealing with medical emergencies when grantor is incapacitated
 - Has precedence over conservator (exceptions for psychiatric disorders)
- 

Healthcare Representative (cont'd)

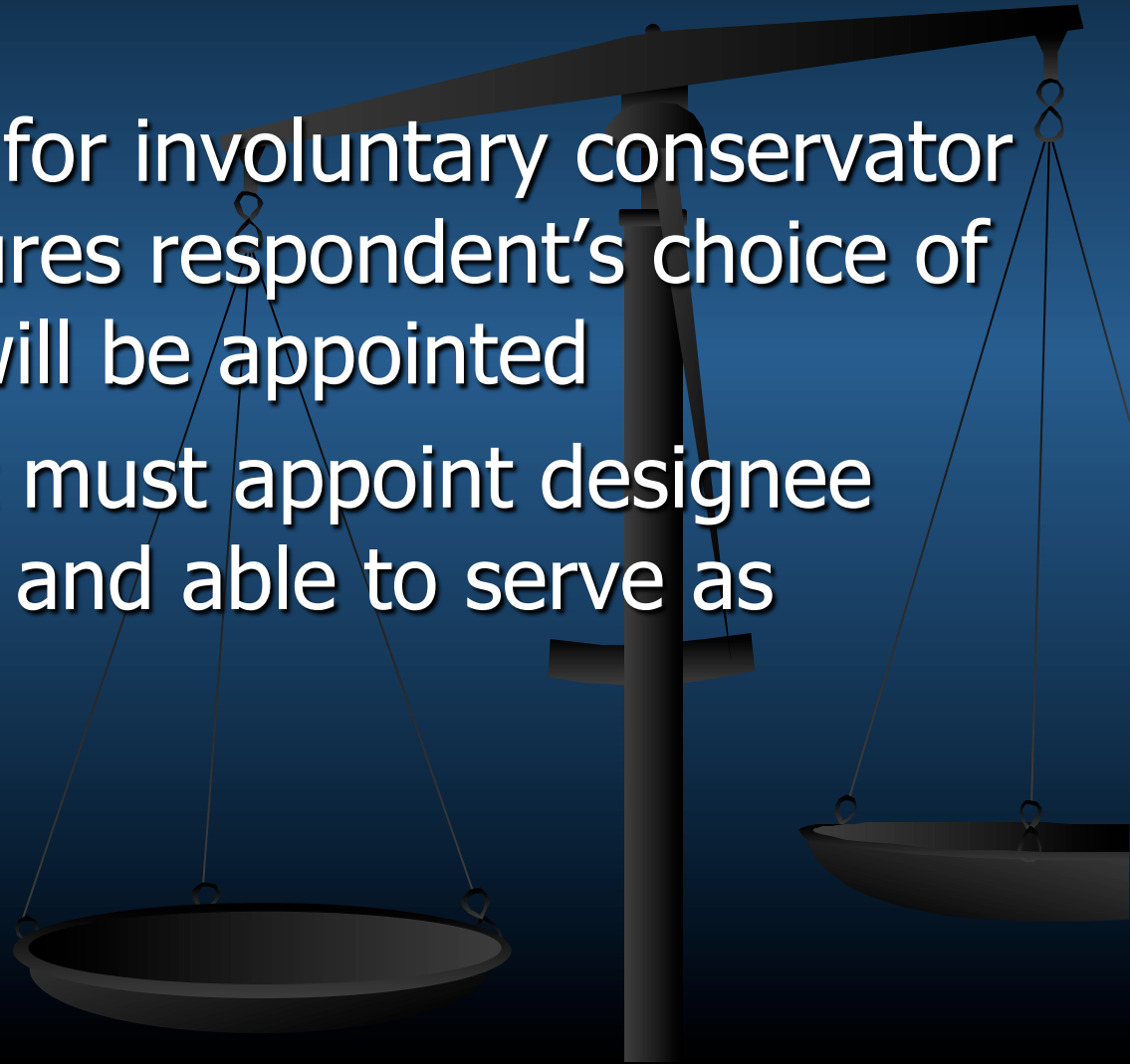
- Disadvantages:
 - May not be recognized by healthcare providers
 - If designated representative is unwilling or incapable of serving, no utility



Advance Designation of Conservator

- Advantage:

- If application for involuntary conservator is made, ensures respondent's choice of conservator will be appointed
- Probate court must appoint designee who is willing and able to serve as conservator



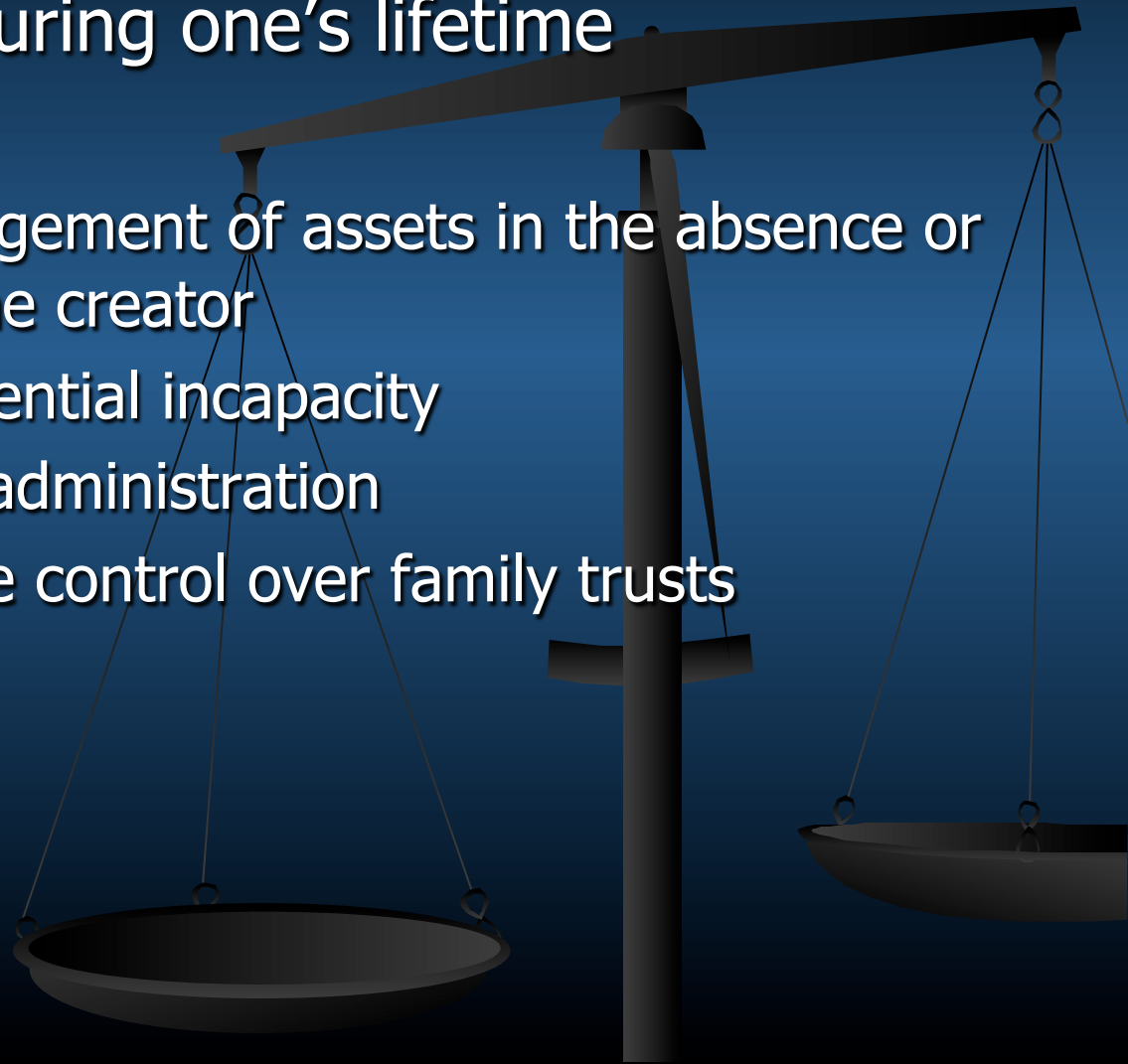
Advance Designation of Conservator (cont'd)

- Disadvantage:
 - If designated conservator is incapable or unwilling to serve, court must appoint someone else



Living Trusts

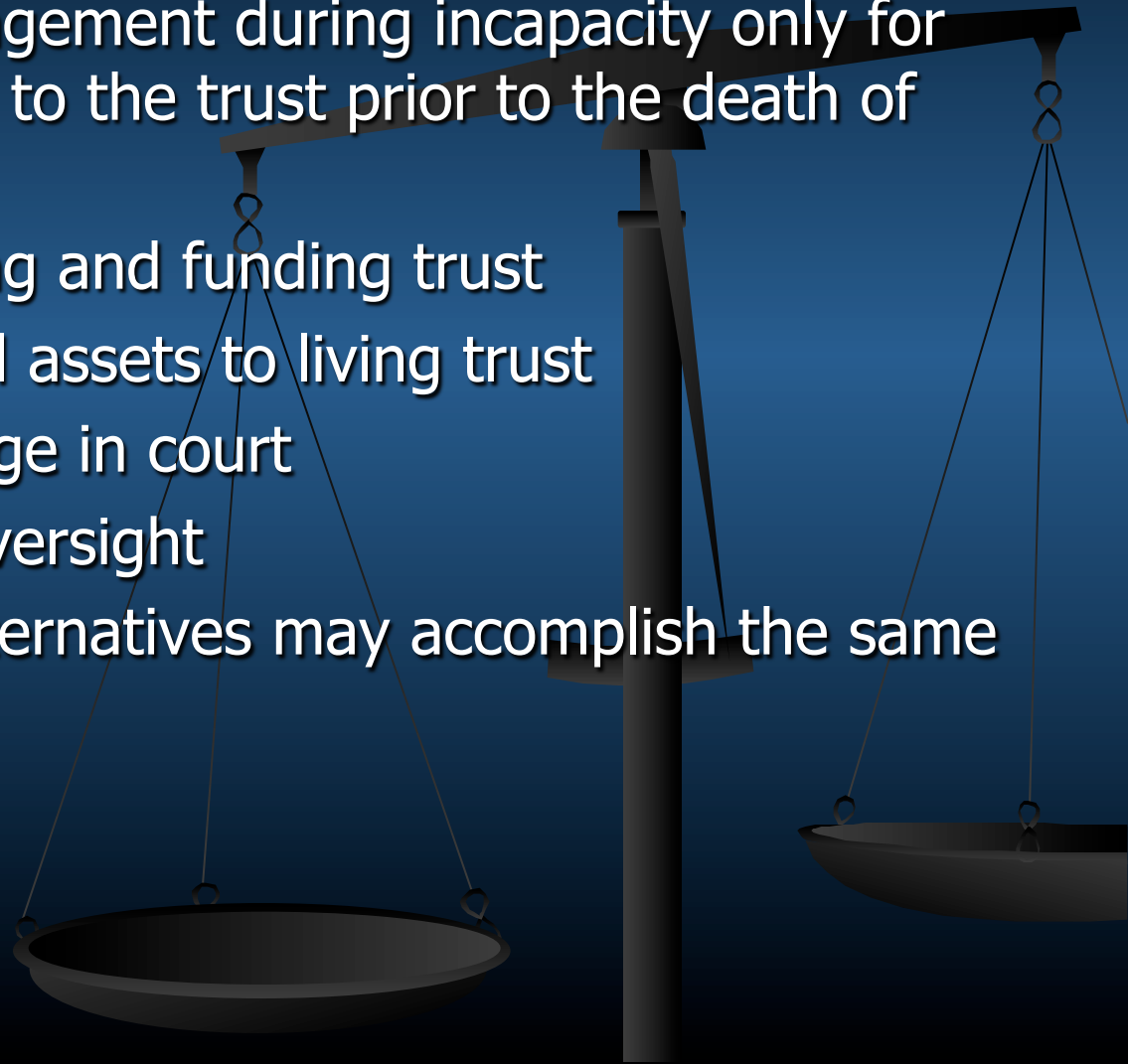
- Trust created during one's lifetime
- Advantages:
 - Allow for management of assets in the absence or incapacity of the creator
 - Provide for potential incapacity
 - Avoid probate administration
 - Reduce probate control over family trusts
 - Privacy



Living Trusts (cont'd)

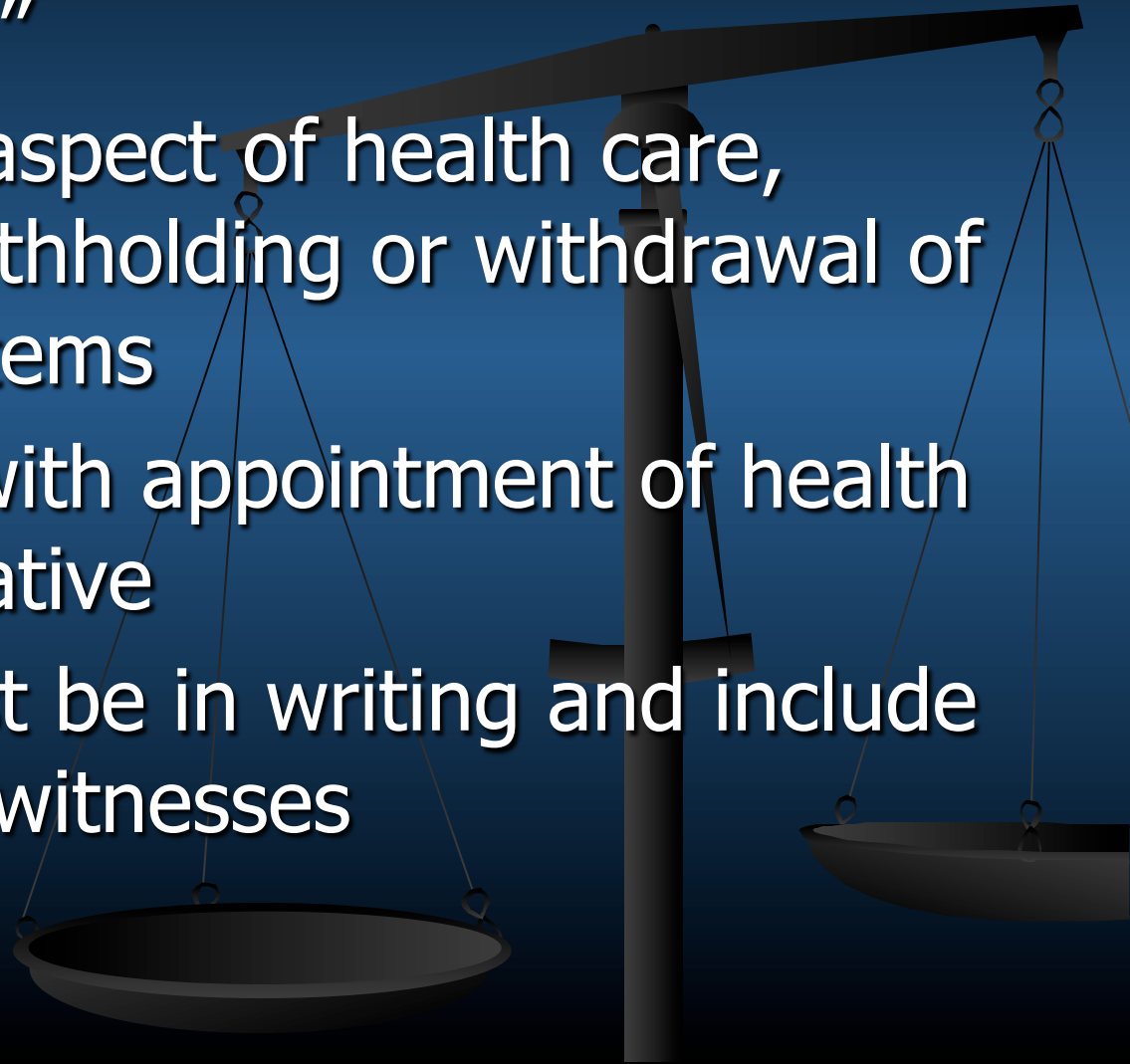
■ Disadvantages

- Effective for management during incapacity only for assets transferred to the trust prior to the death of the trust creator
- Expense in creating and funding trust
- Cannot transfer all assets to living trust
- Subject to challenge in court
- Lack of probate oversight
- Less expensive alternatives may accomplish the same objectives



Advance Directive

- AKA "Living Will"
- May cover any aspect of health care, including the withholding or withdrawal of life support systems
- Often coupled with appointment of health care representative
- Revocation must be in writing and include signatures of 2 witnesses



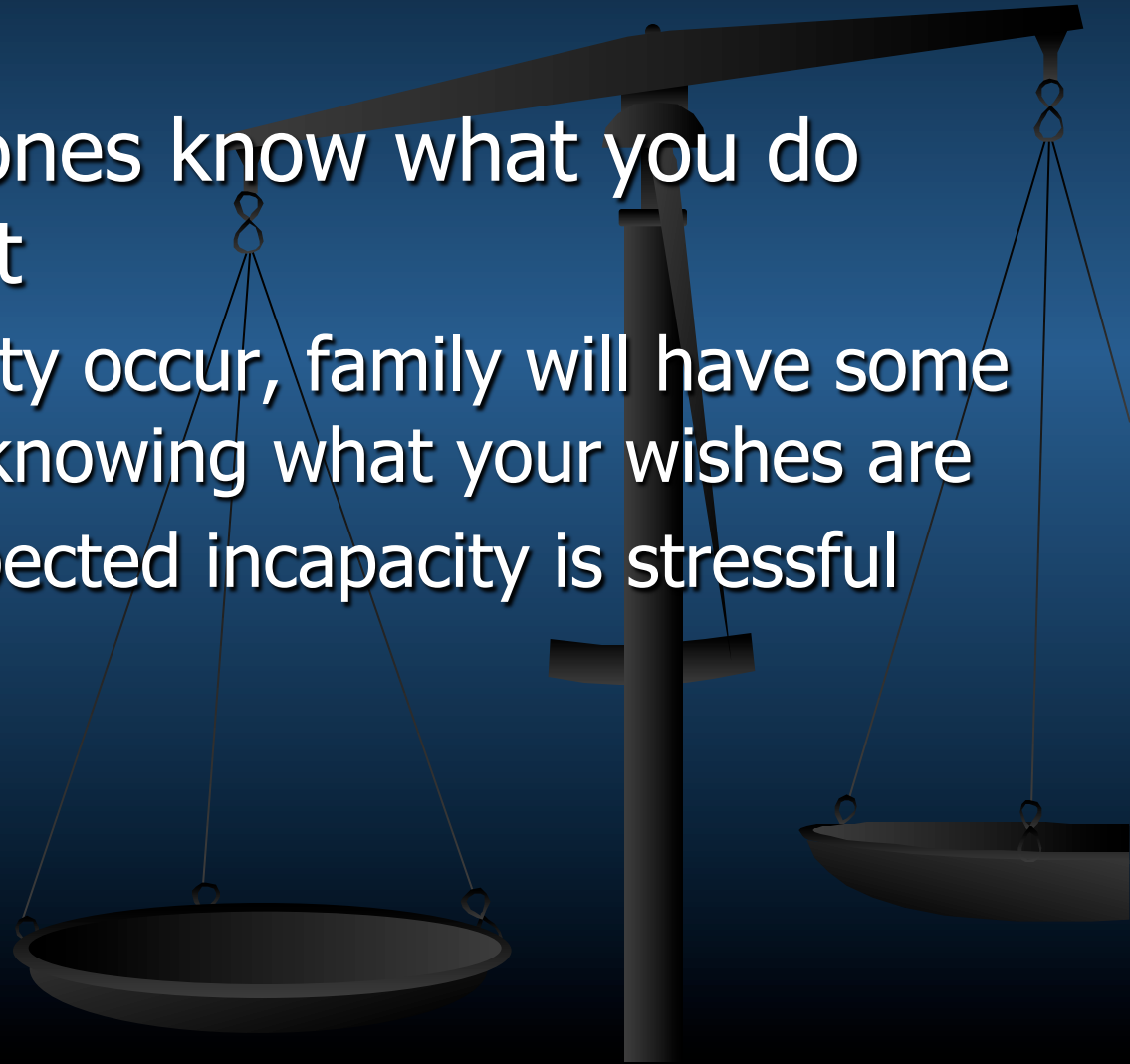
Advance Directive (cont'd)

- Must be executed in accordance with state law



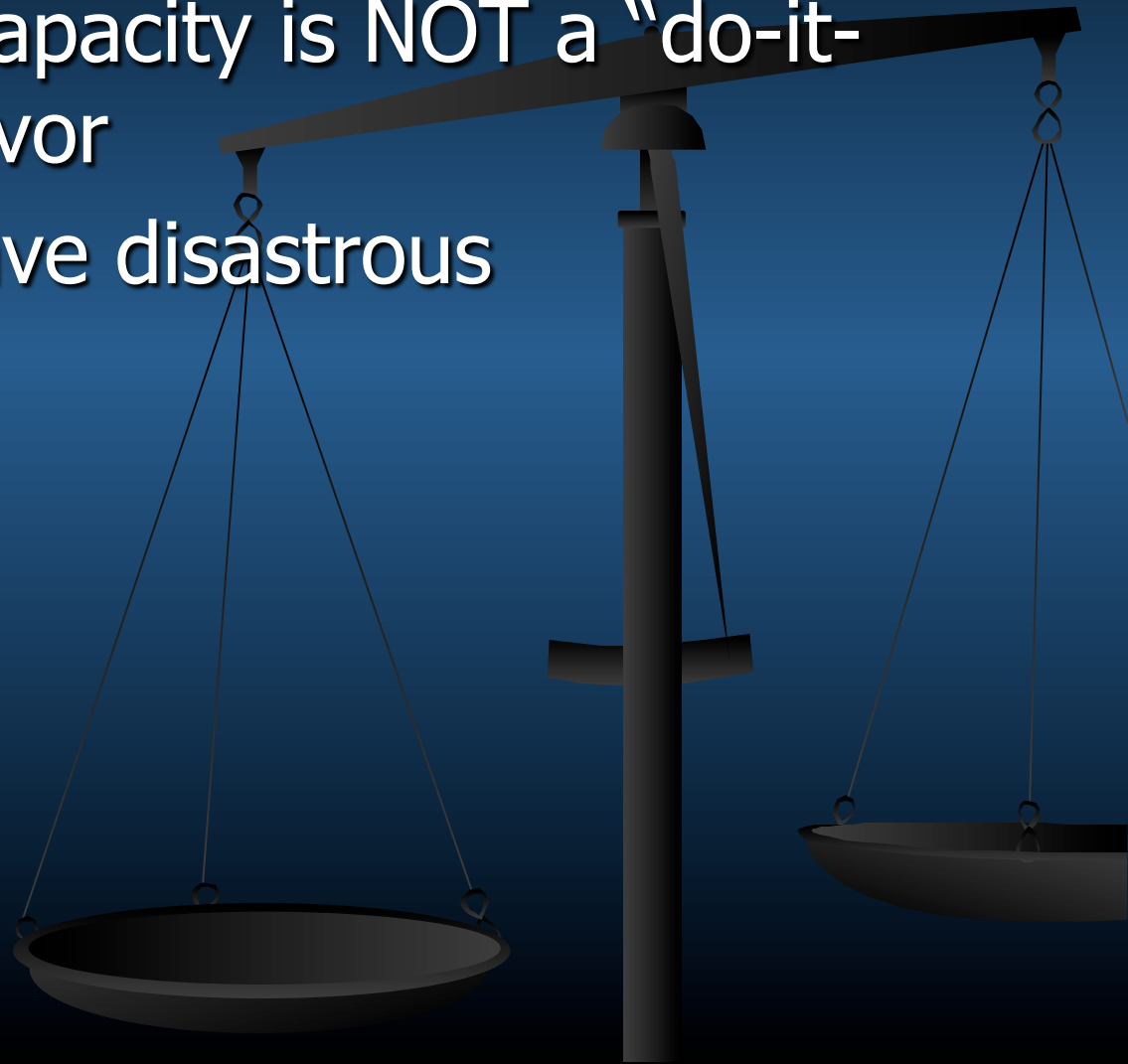
Discussion with Family

- Let your loved ones know what you do and do not want
 - Should incapacity occur, family will have some peace of mind knowing what your wishes are
 - Sudden, unexpected incapacity is stressful



A Word of Caution...

- Planning for incapacity is NOT a “do-it-yourself” endeavor
- Mistakes can have disastrous consequences

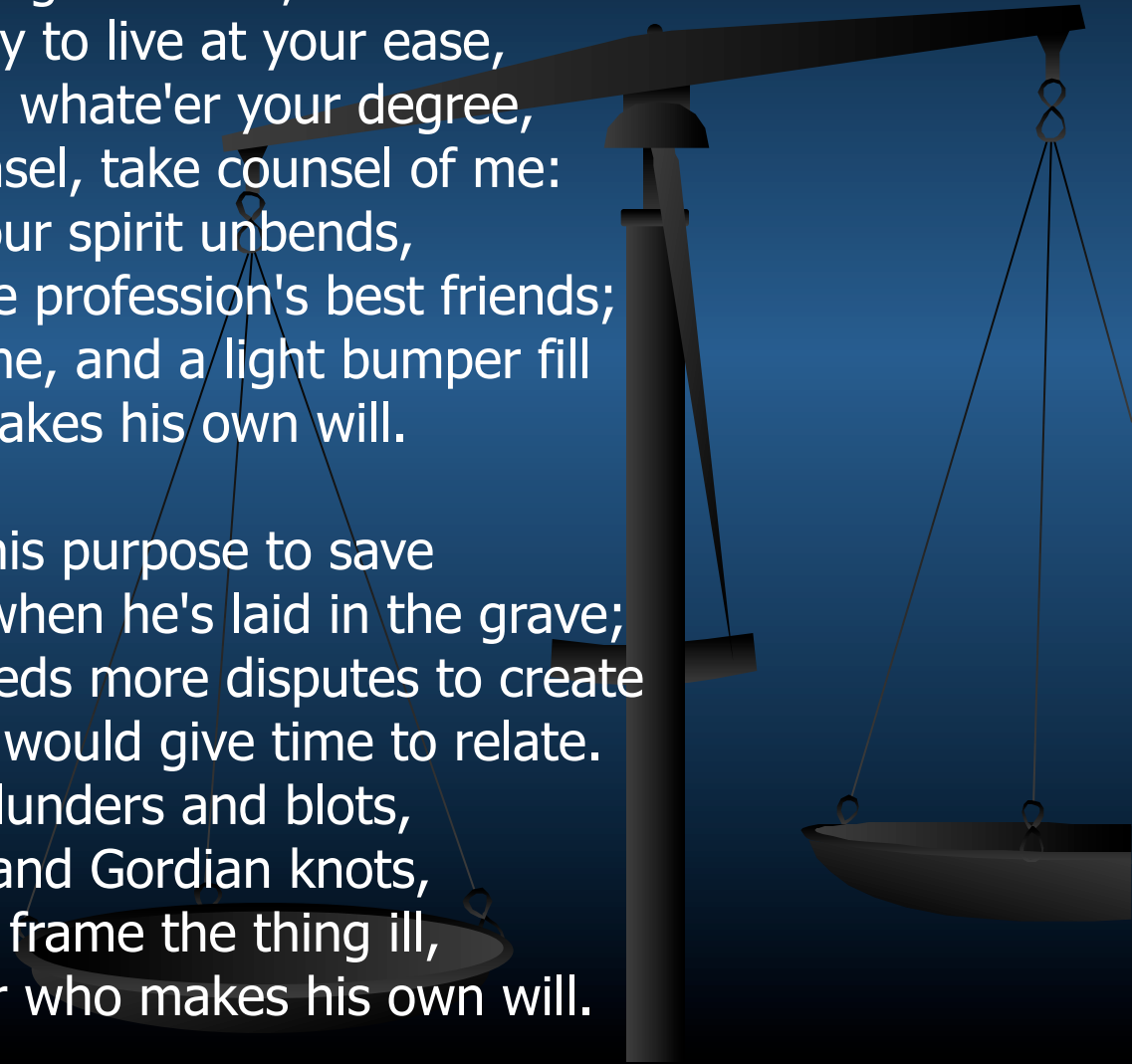


The Jolly Testator Who Makes His Own Will

Lord Neaves

Ye lawyers who live upon litigants' fees,
And who need a good many to live at your ease,
Grave or gay, wise or witty, whate'er your degree,
Plain stuff or Queen's Counsel, take counsel of me:
When a festive occasion your spirit unbends,
You should never forget the profession's best friends;
So we'll send round the wine, and a light bumper fill
To the jolly testator who makes his own will.

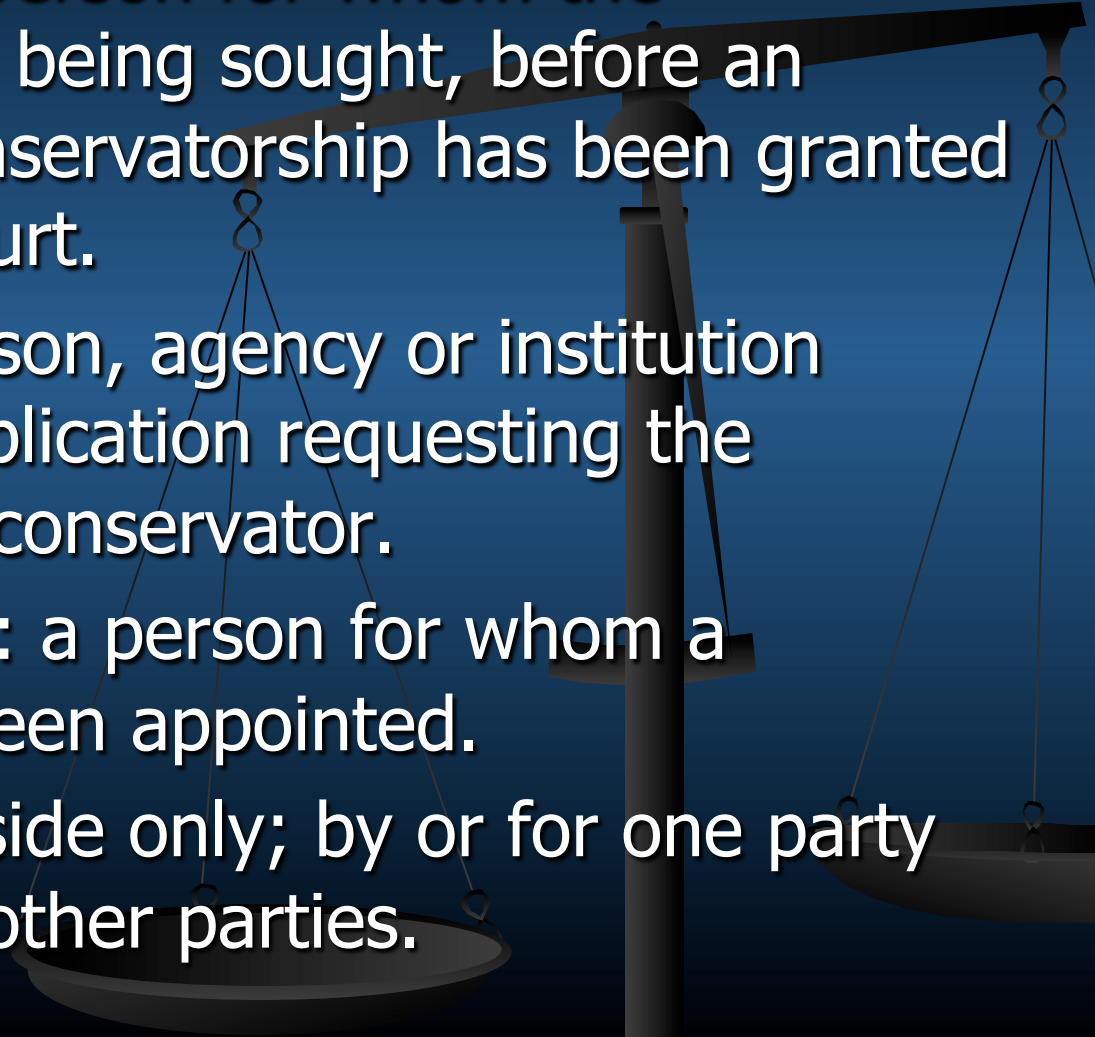
He premises his wish and his purpose to save
All dispute among friends when he's laid in the grave;
Then he straightway proceeds more disputes to create
Than a long summer's day would give time to relate.
He writes and erases, he blunders and blots,
He produces such puzzles and Gordian knots,
That a lawyer, intending to frame the thing ill,
Couldn't match the testator who makes his own will.



Questions



Terms

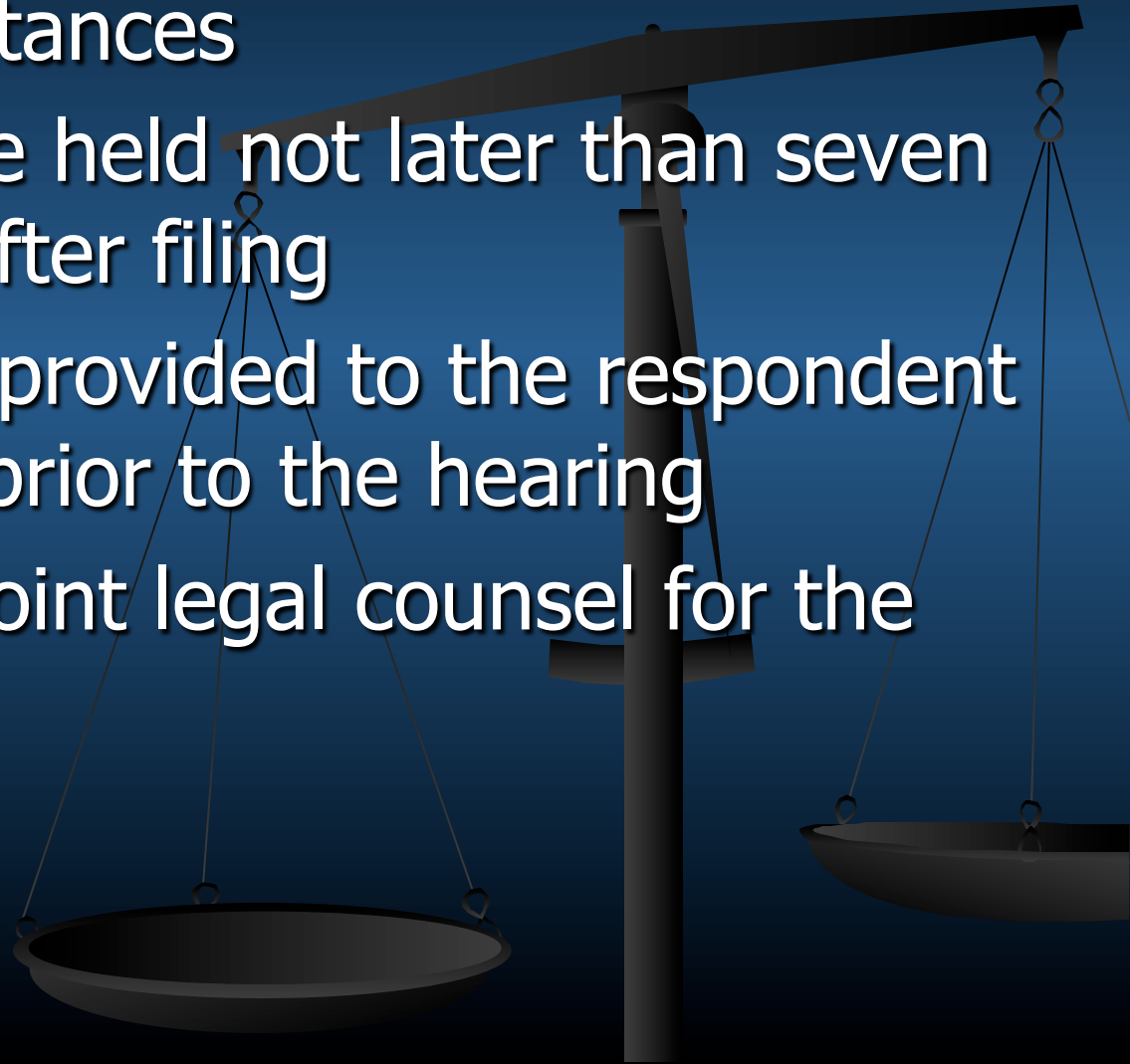
- Respondent: the person for whom the conservatorship is being sought, before an application for conservatorship has been granted by the probate court.
 - Applicant: the person, agency or institution submitting the application requesting the appointment of a conservator.
 - Conserved person: a person for whom a conservator has been appointed.
 - Ex Parte: on one side only; by or for one party without notice to other parties.
- 

Temporary Conservatorships



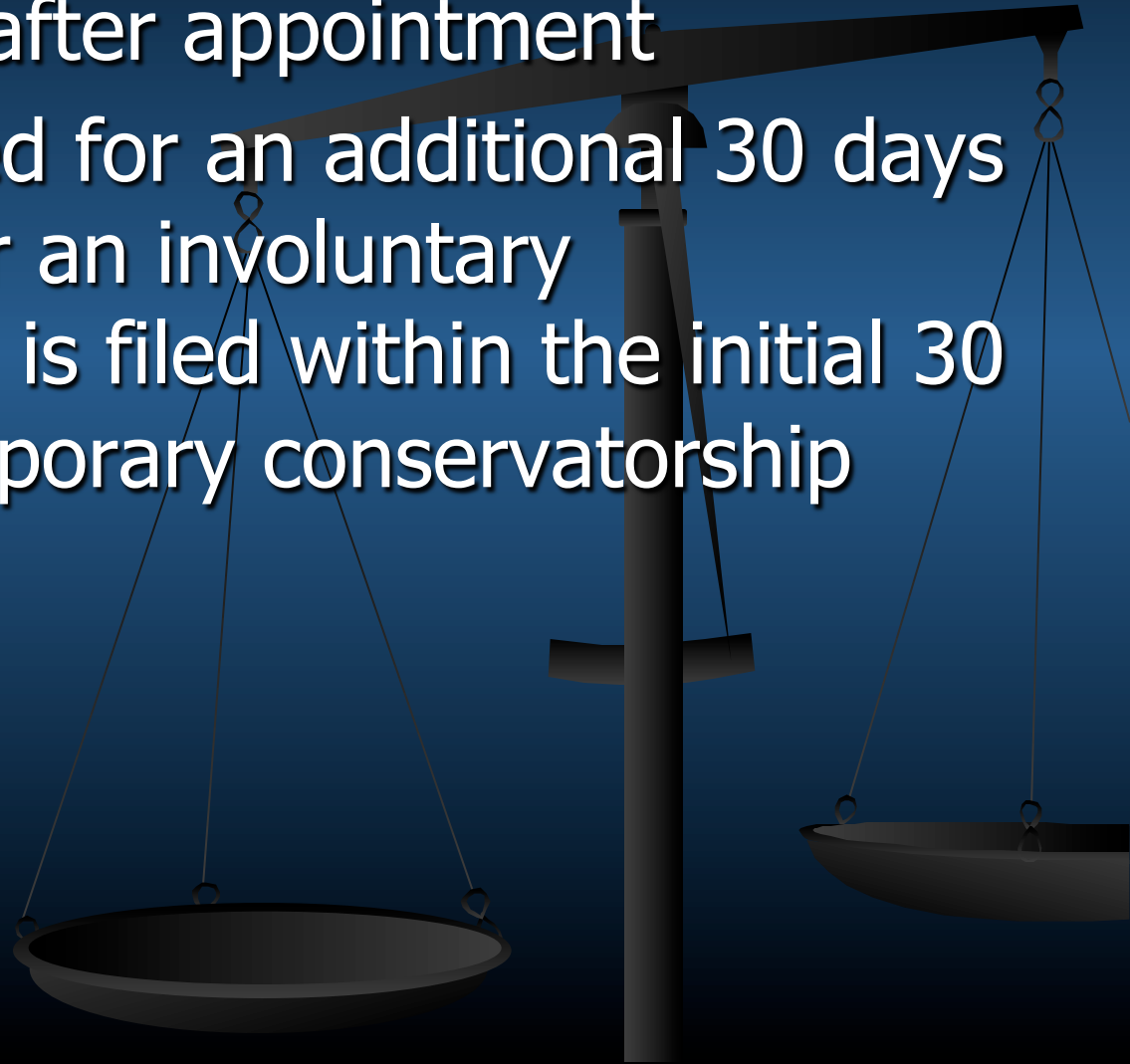
Temporary Conservatorships

- Exigent circumstances
- Hearing must be held not later than seven business days after filing
- Notice must be provided to the respondent at least 5 days prior to the hearing
- Court must appoint legal counsel for the respondent



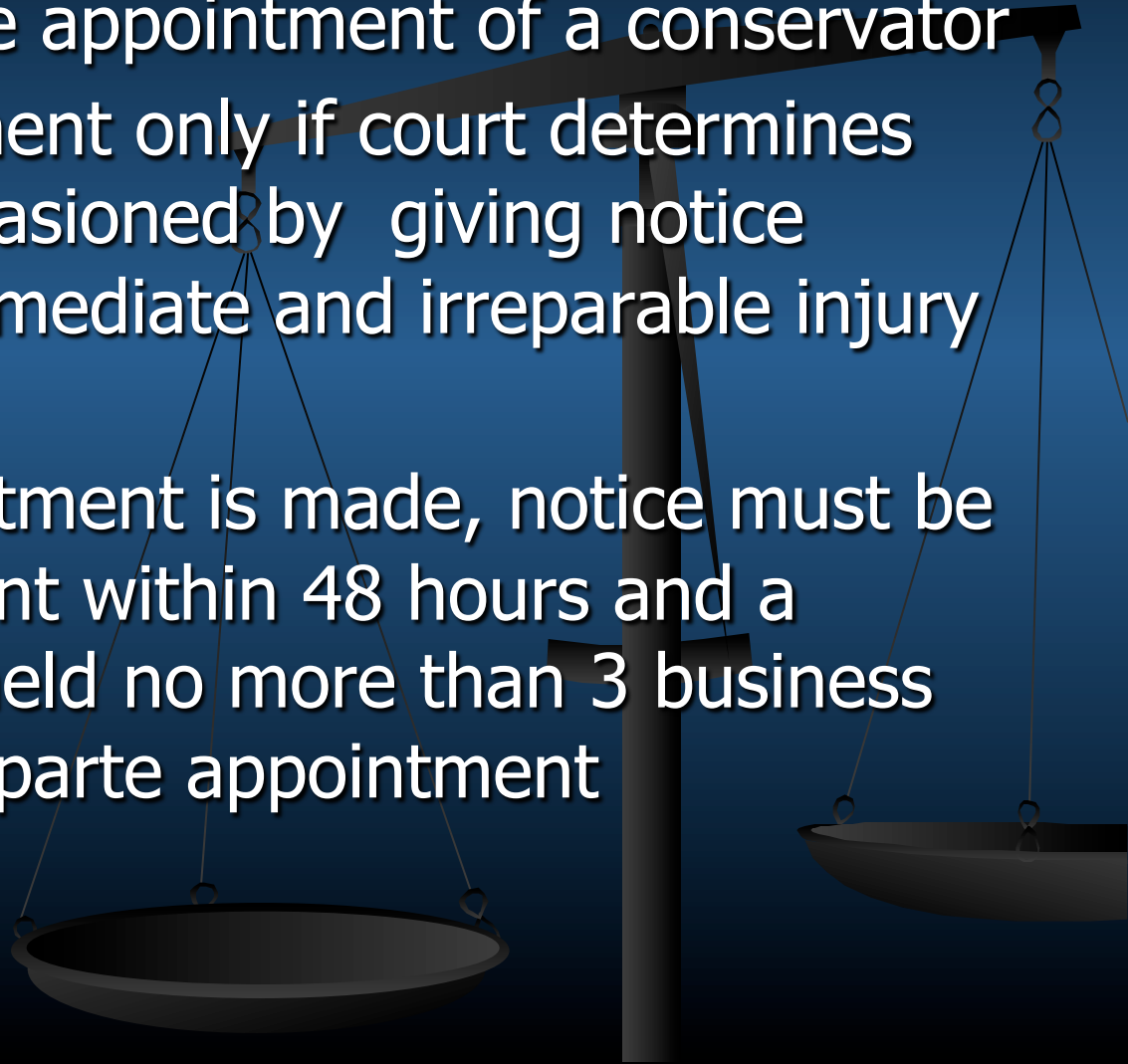
Temporary Conservatorships (cont'd)

- Expire 30 days after appointment
- May be extended for an additional 30 days if application for an involuntary conservatorship is filed within the initial 30 days of the temporary conservatorship



Temporary Conservatorship (cont'd)

- Allows for ex parte appointment of a conservator
- Ex parte appointment only if court determines that the delay occasioned by giving notice would result in immediate and irreparable injury to the respondent
- If ex parte appointment is made, notice must be given to respondent within 48 hours and a hearing must be held no more than 3 business days following ex parte appointment



Temporary Conservatorships (cont'd)

- Ex parte (cont'd)
 - Ex parte appointments automatically expire in three days, unless a hearing has been commenced and continued for good cause shown

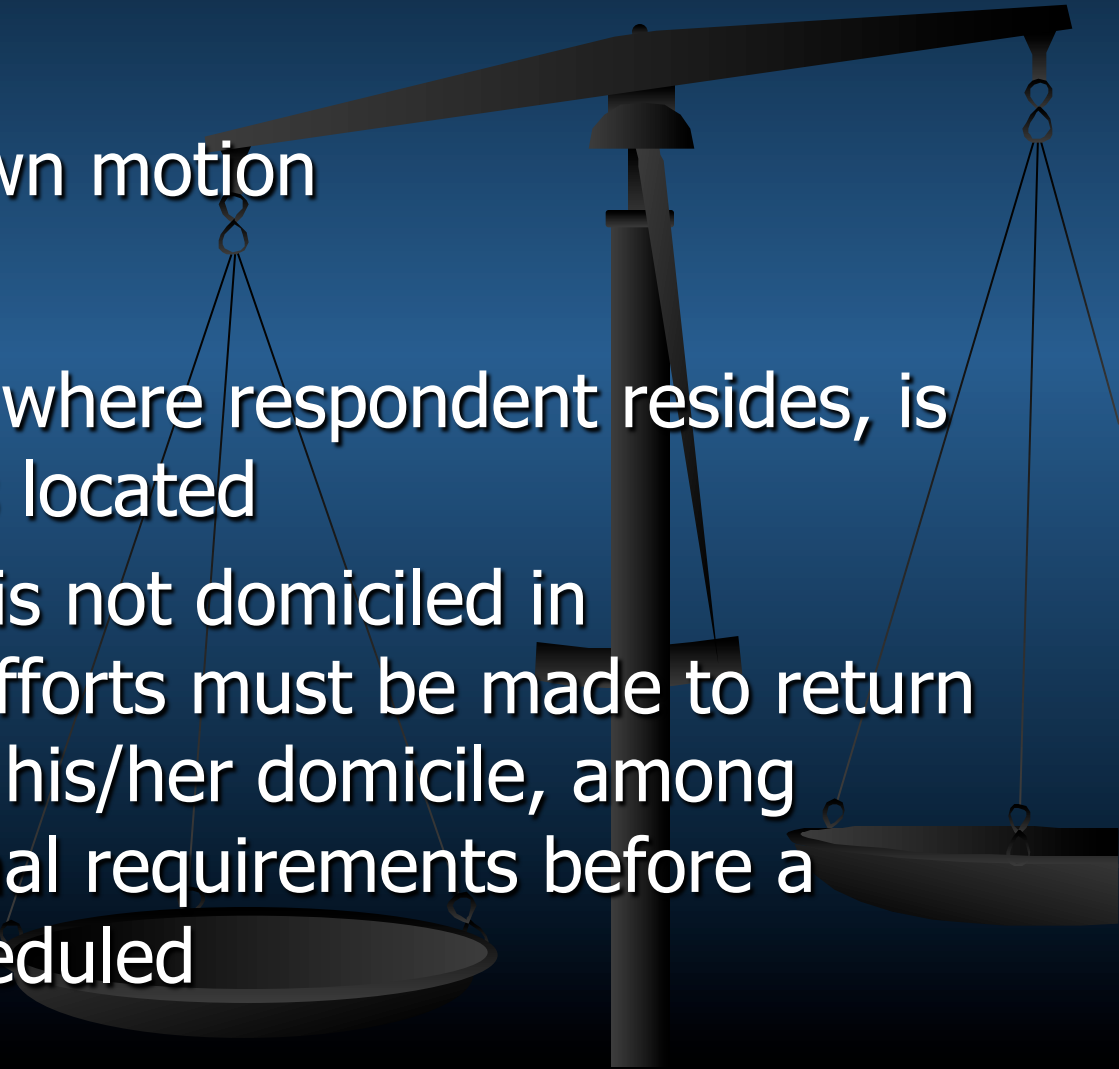


Applications for Involuntary Conservatorships

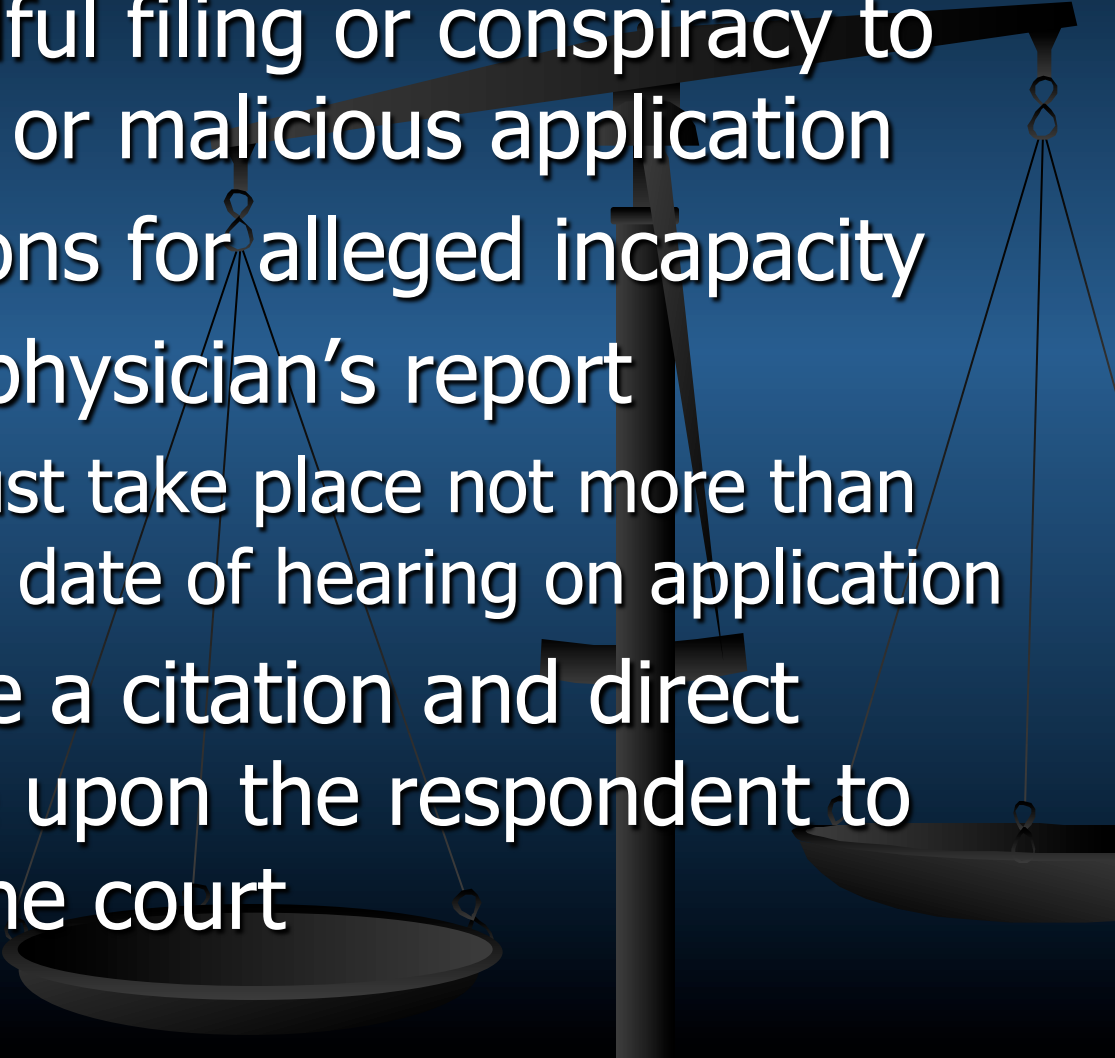


Application

- Who:
 - Any adult
 - Court on its own motion
- Where:
 - Probate Court where respondent resides, is domiciled or is located
 - If respondent is not domiciled in Connecticut, efforts must be made to return respondent to his/her domicile, among other, additional requirements before a hearing is scheduled

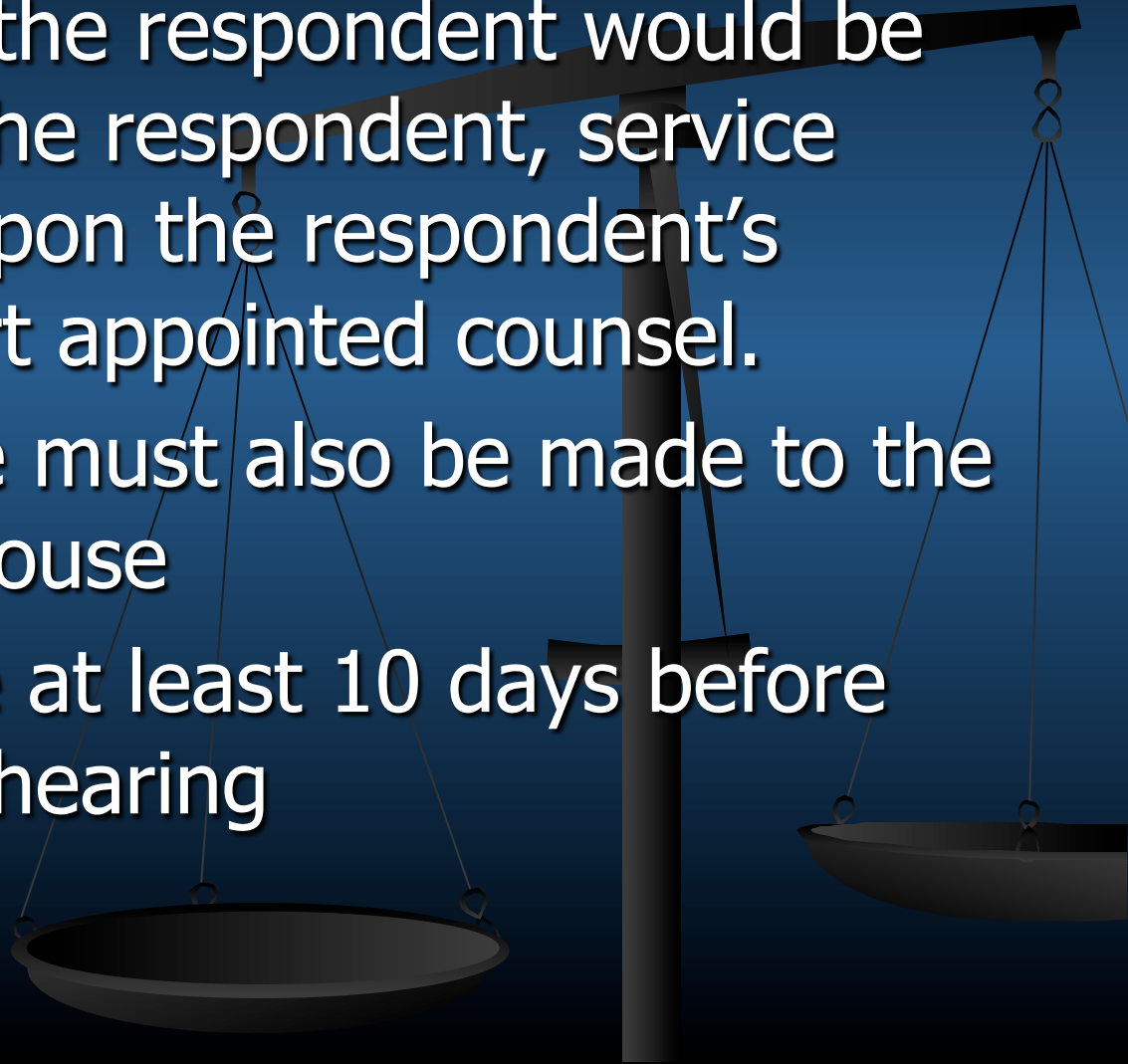


Application

- Penalties for willful filing or conspiracy to file a fraudulent or malicious application
 - Must state reasons for alleged incapacity
 - Must provide a physician's report
 - Examination must take place not more than 45 days prior to date of hearing on application
 - Court must issue a citation and direct personal service upon the respondent to appear before the court
- 

Application (cont'd)

- If service upon the respondent would be detrimental to the respondent, service may be made upon the respondent's selected or court appointed counsel.
- Personal service must also be made to the respondent's spouse
- Service must be at least 10 days before the date of the hearing



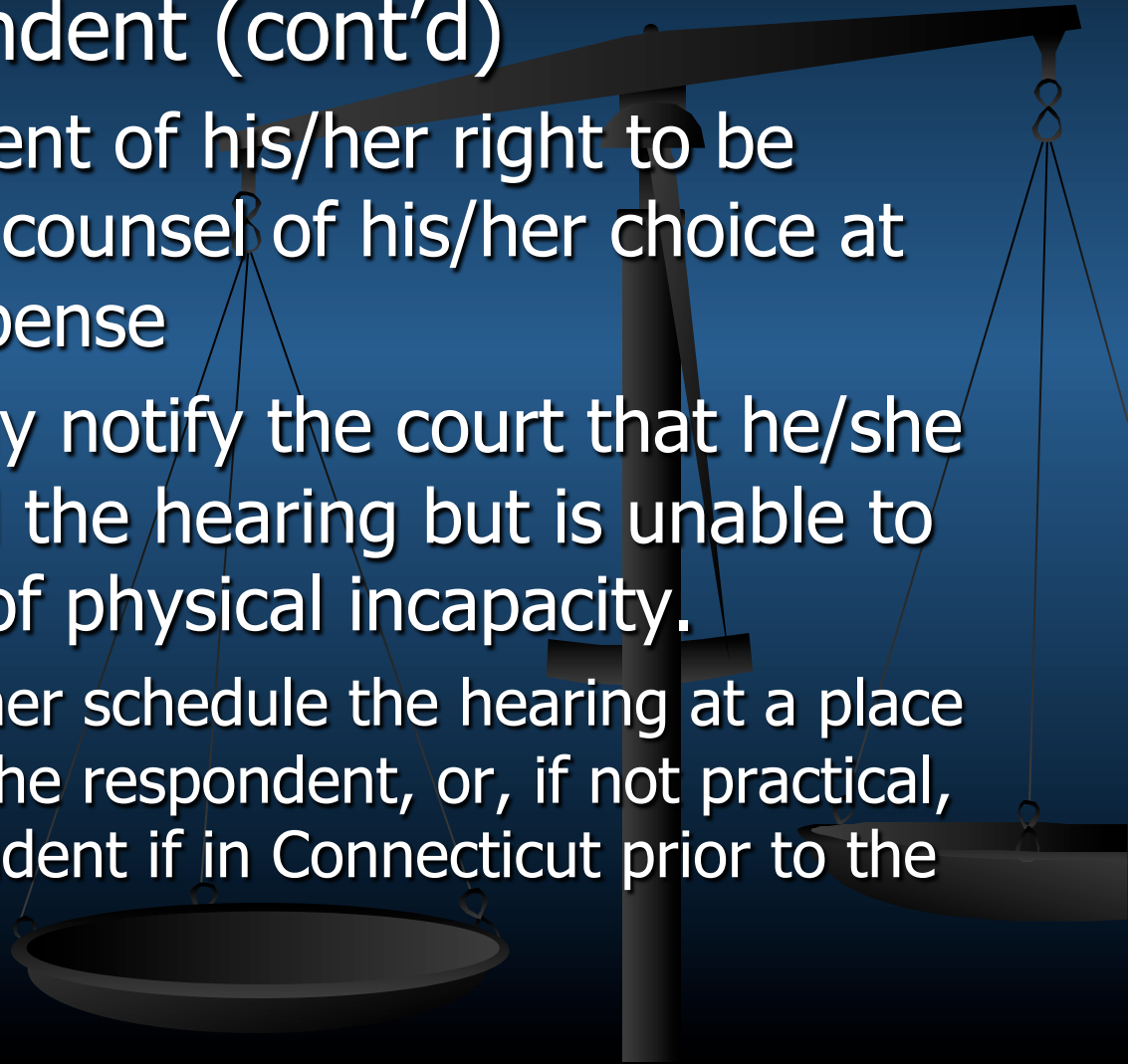
Application (cont'd)

- Notice of hearing to respondent must include:
 - Nature of the involuntary representation sought;
 - Legal consequences;
 - Facts alleged in the application;
 - Time & place of the hearing;



Application (cont'd)

- Notice to respondent (cont'd)
 - Advise respondent of his/her right to be represented by counsel of his/her choice at his/her own expense
 - Respondent may notify the court that he/she wants to attend the hearing but is unable to do so because of physical incapacity.
 - Court must either schedule the hearing at a place convenient to the respondent, or, if not practical, visit the respondent if in Connecticut prior to the hearing.

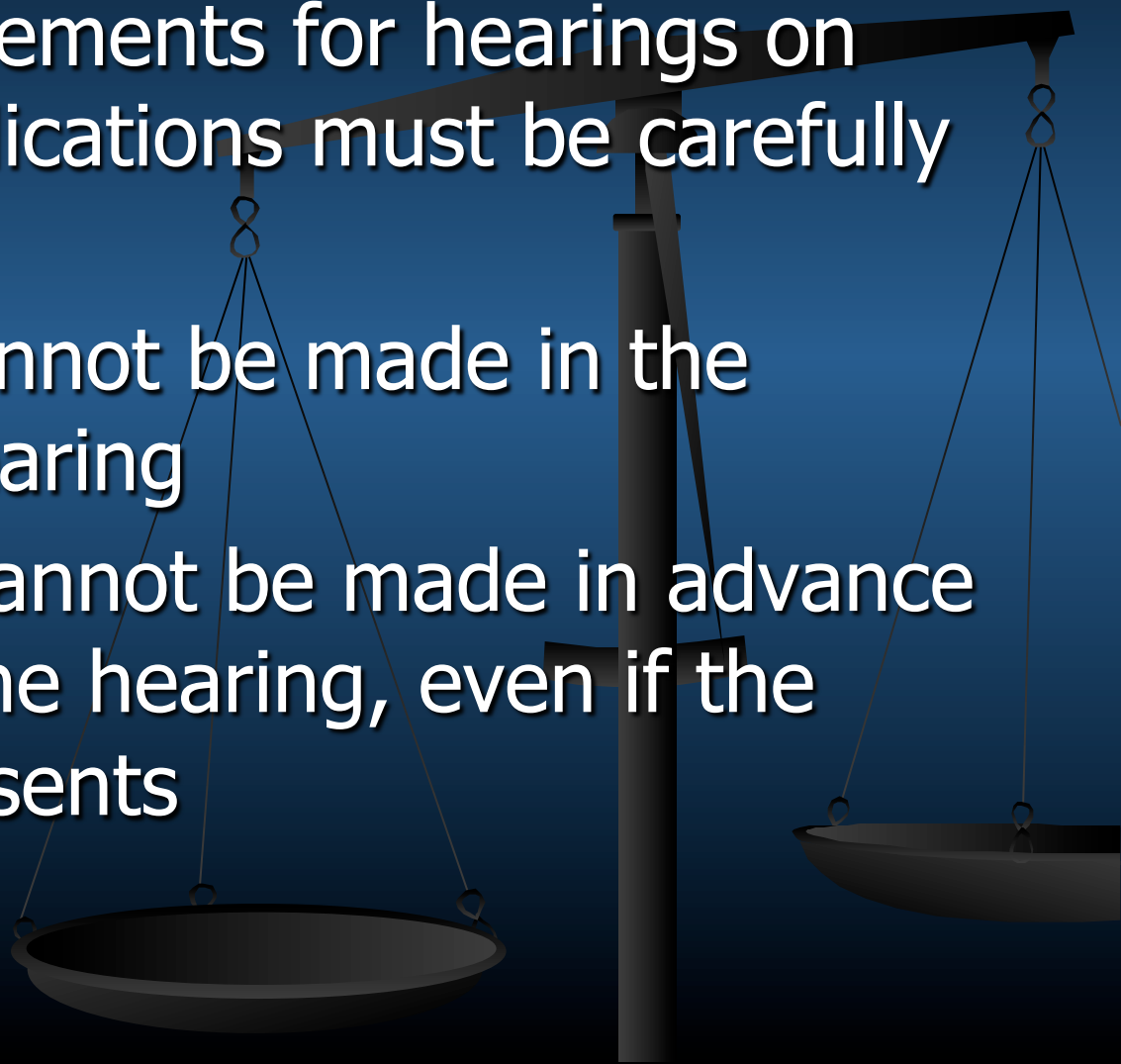


Hearings on Involuntary Applications



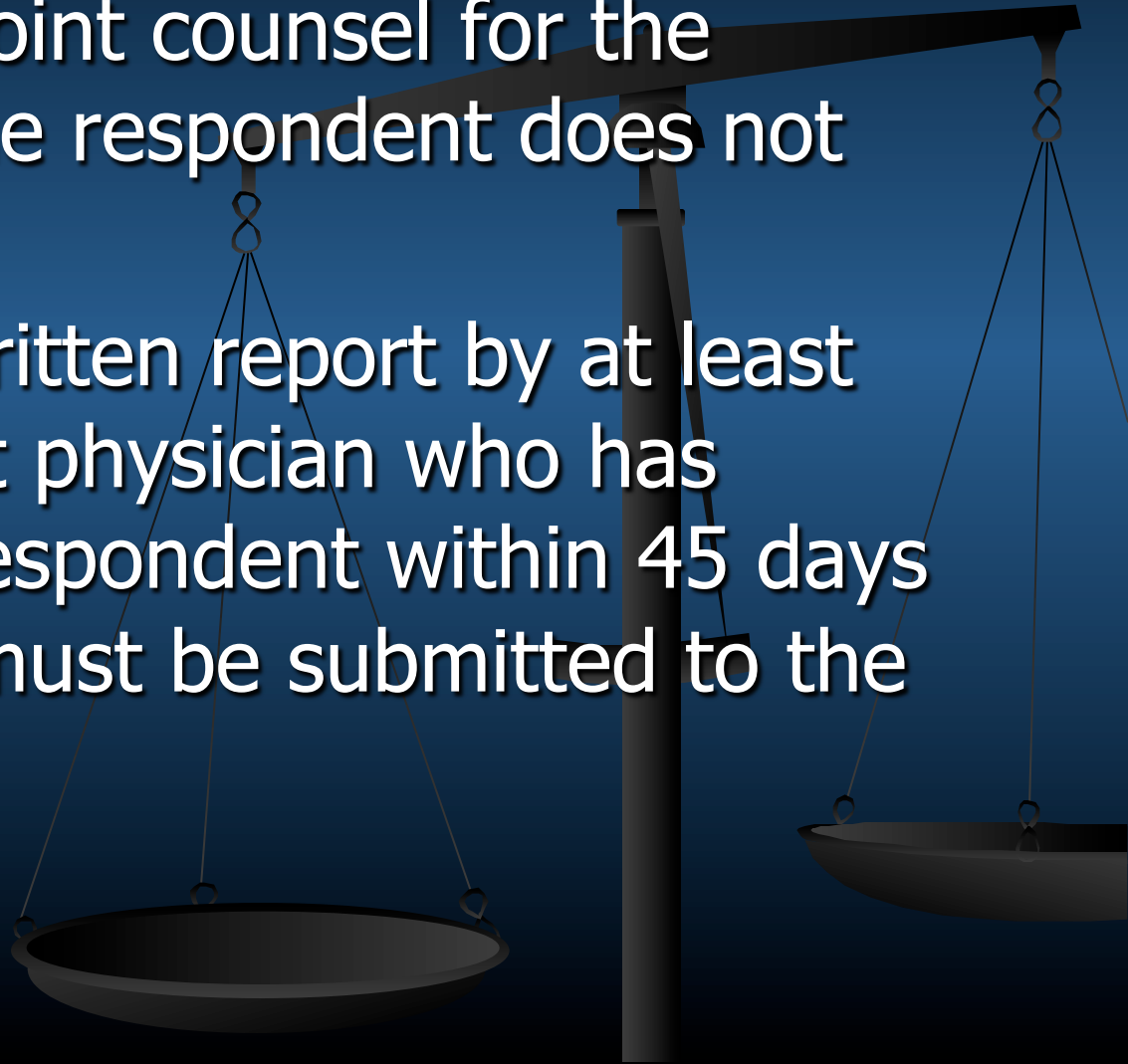
Hearings

- Statutory requirements for hearings on involuntary applications must be carefully followed
- Appointment cannot be made in the absence of a hearing
- Appointments cannot be made in advance of the date of the hearing, even if the respondent consents



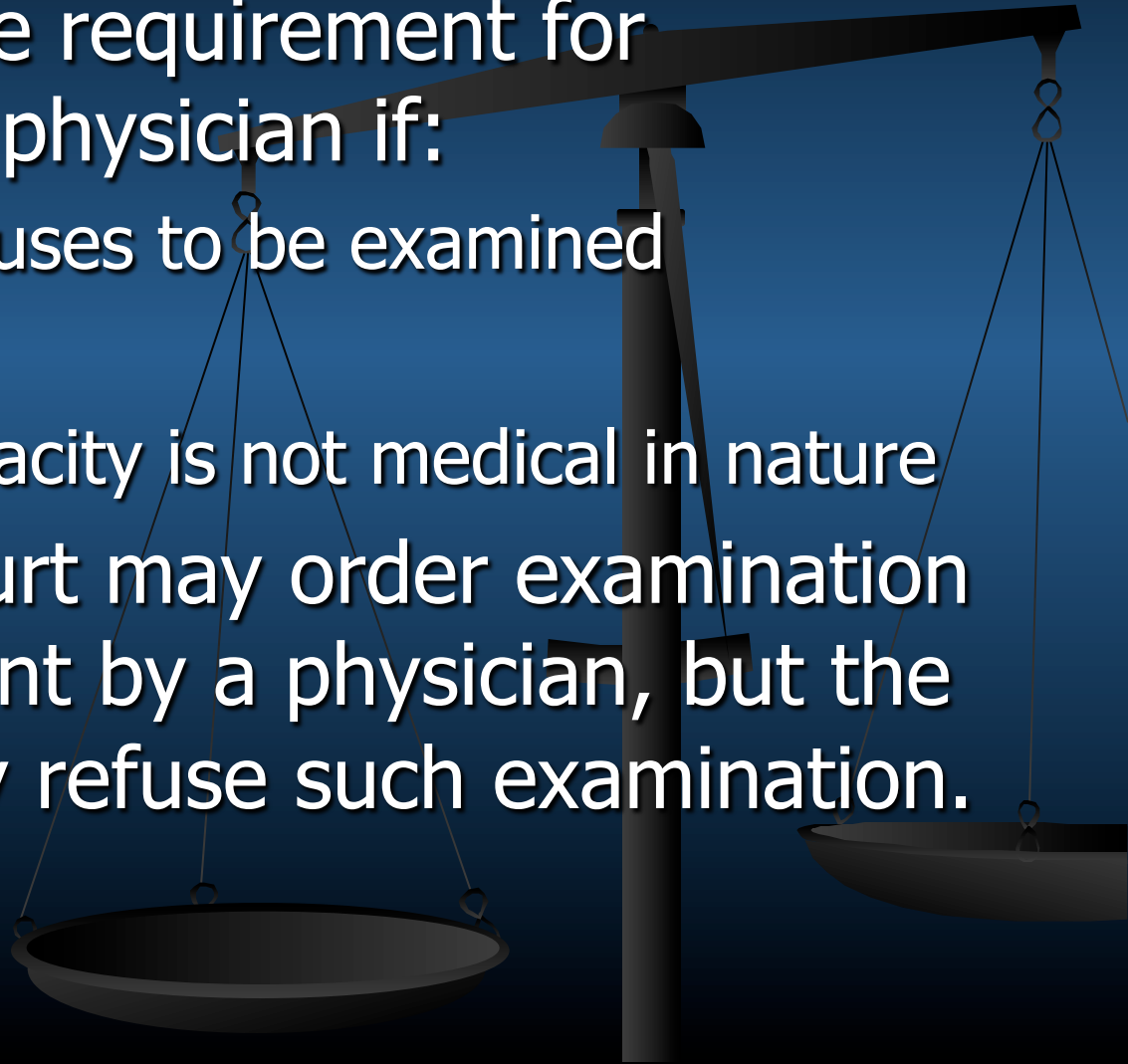
Hearings (cont'd)

- Court must appoint counsel for the respondent if the respondent does not retain counsel.
- Testimony or written report by at least one Connecticut physician who has examined the respondent within 45 days of the hearing must be submitted to the court.



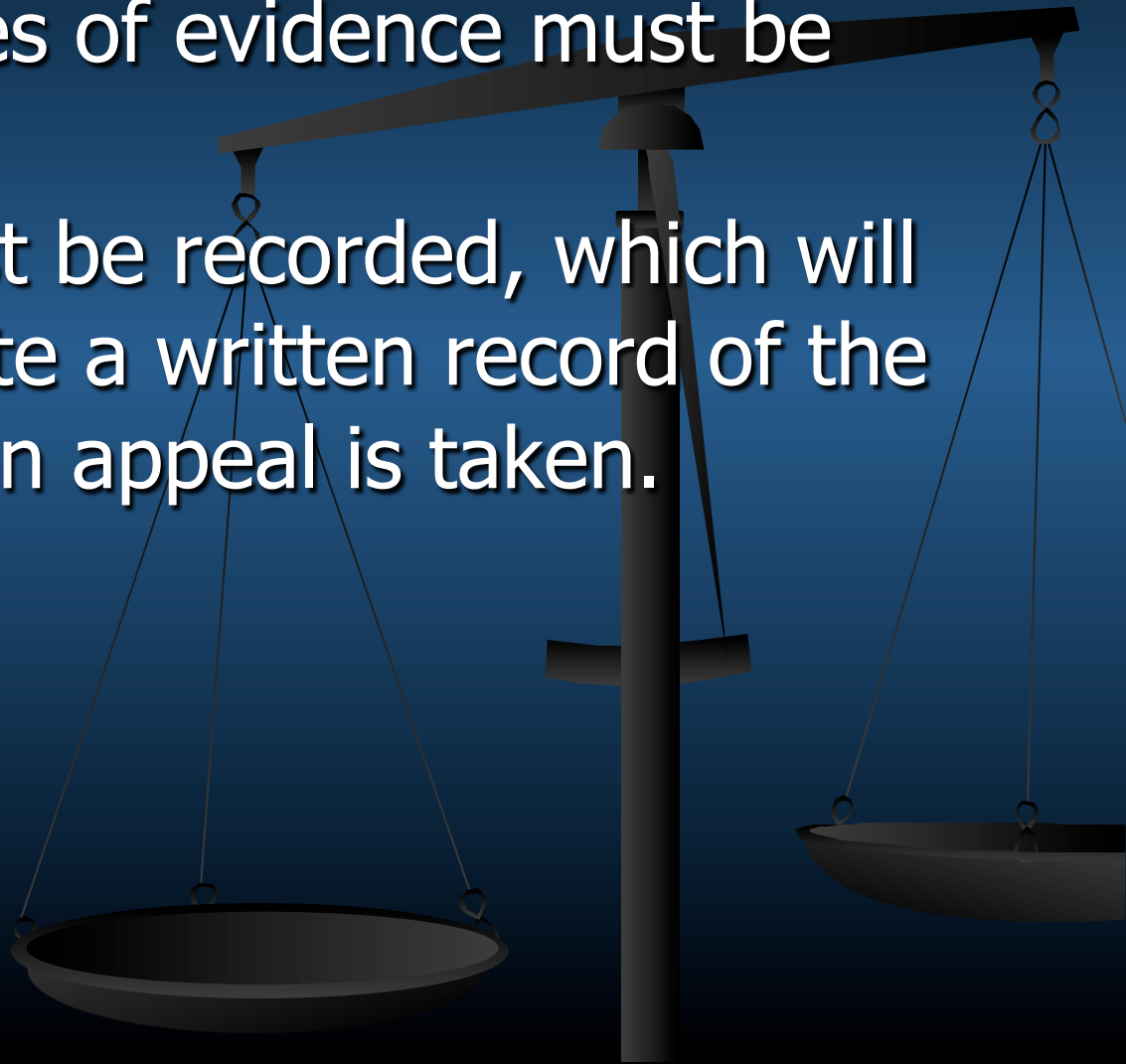
Hearings (cont'd)

- Court may waive requirement for examination by physician if:
 - Respondent refuses to be examined
 - Is absent
 - If alleged incapacity is not medical in nature
- The probate court may order examination of the respondent by a physician, but the respondent may refuse such examination.



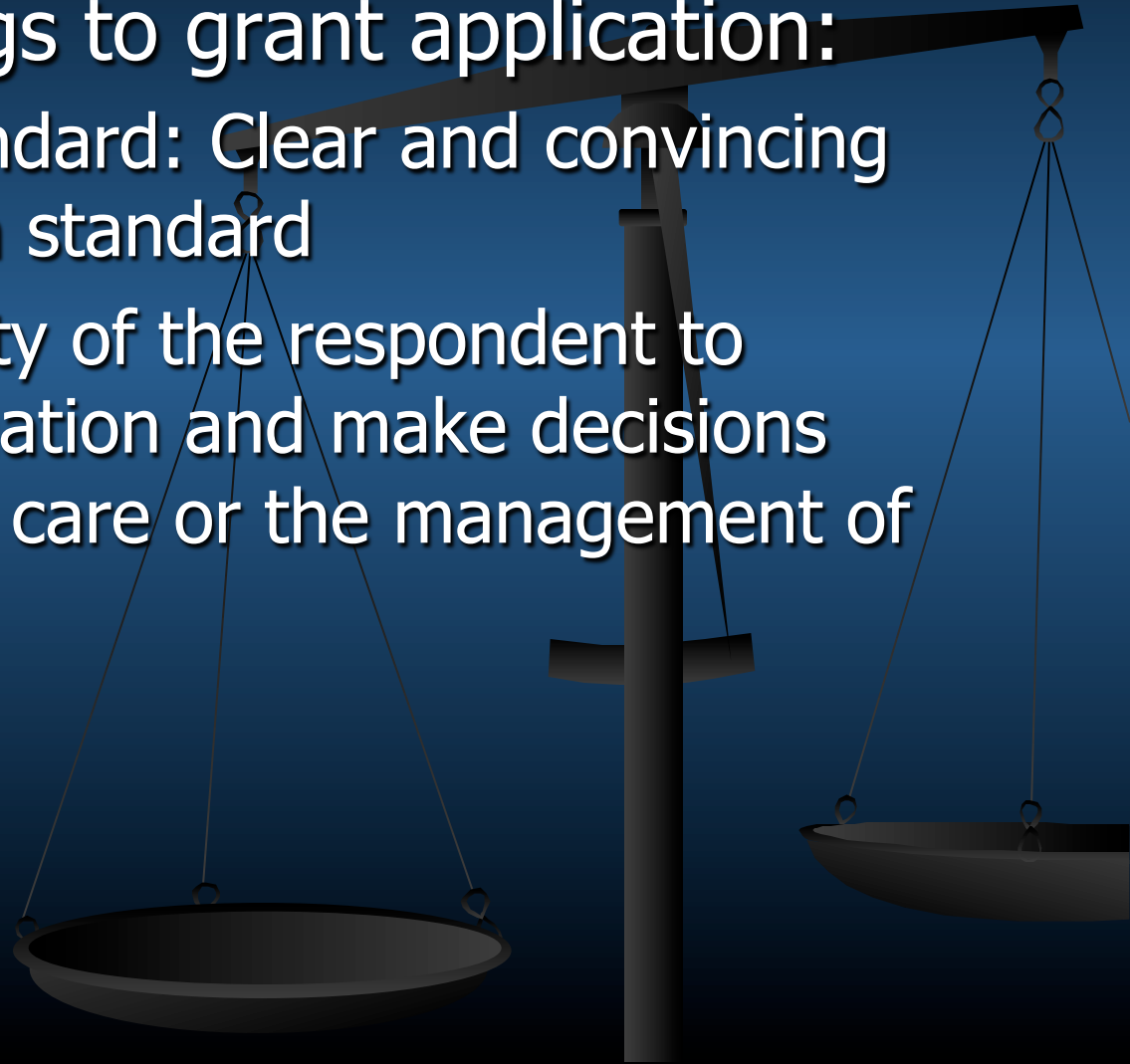
Hearings (cont'd)

- Connecticut rules of evidence must be followed.
- Proceeding must be recorded, which will be used to create a written record of the proceedings if an appeal is taken.



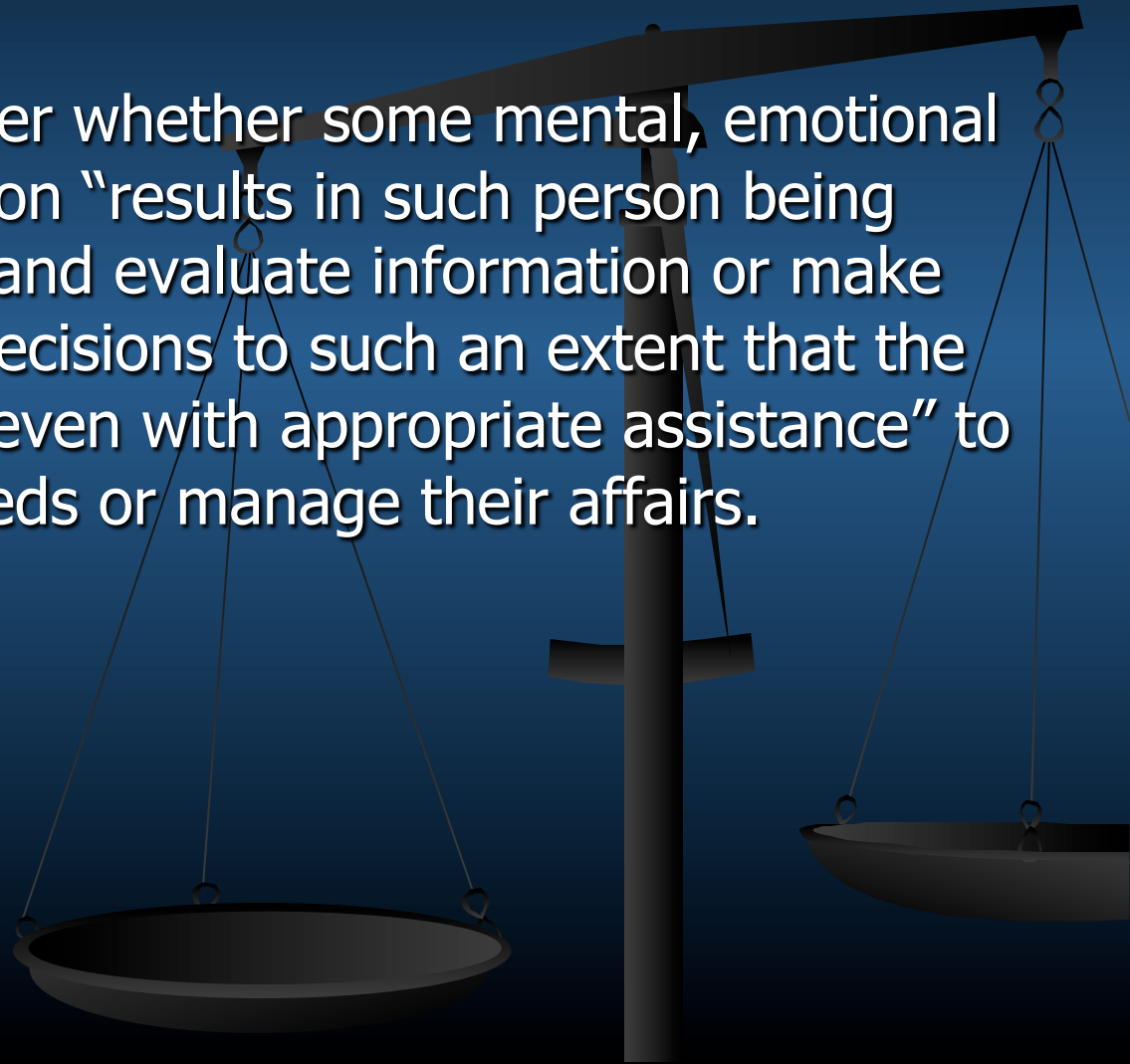
Hearings (cont'd)

- Required findings to grant application:
 - Evidentiary standard: Clear and convincing evidence – high standard
 - Focus: the ability of the respondent to evaluate information and make decisions relative to their care or the management of their affairs.



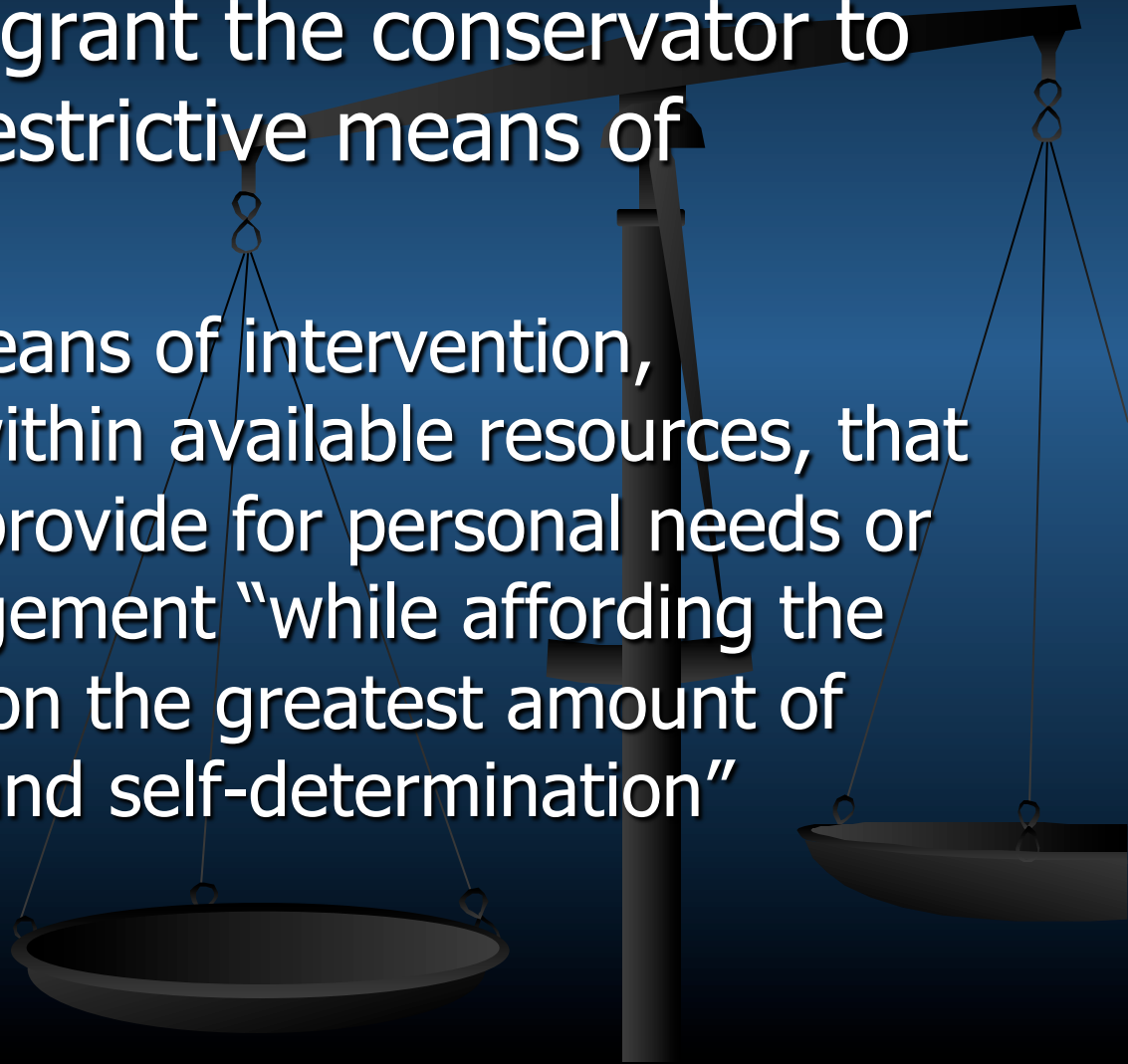
Hearings (cont'd)

- Findings (cont'd)
 - Court must consider whether some mental, emotional or physical condition “results in such person being unable to receive and evaluate information or make or communicate decisions to such an extent that the person is unable, even with appropriate assistance” to meet essential needs or manage their affairs.



Hearings (cont'd)

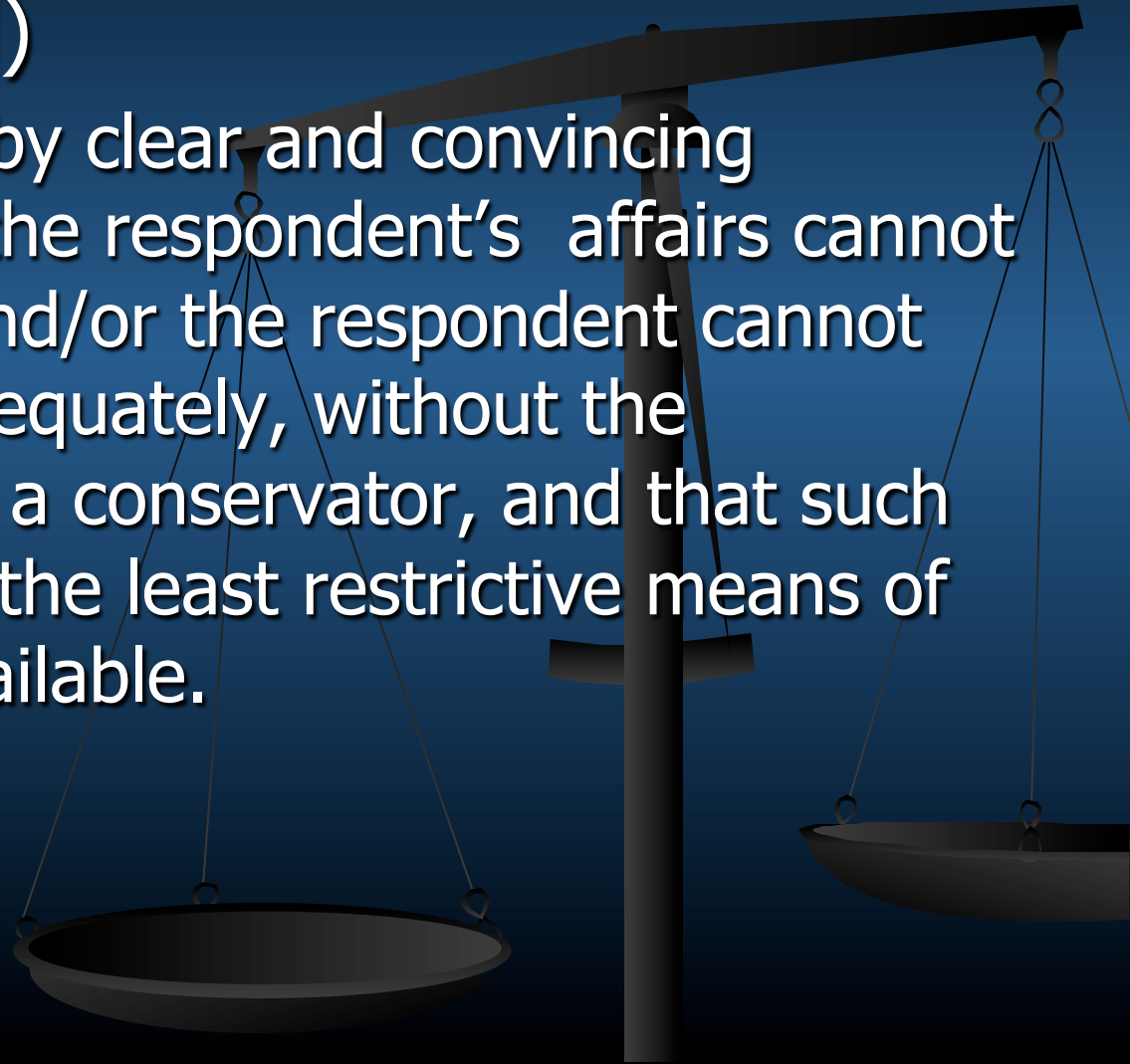
- Court may only grant the conservator to use the “least restrictive means of intervention”
 - Definition: A means of intervention, accomplished within available resources, that is sufficient to provide for personal needs or property management “while affording the conserved person the greatest amount of independence and self-determination”



Hearings (cont'd)

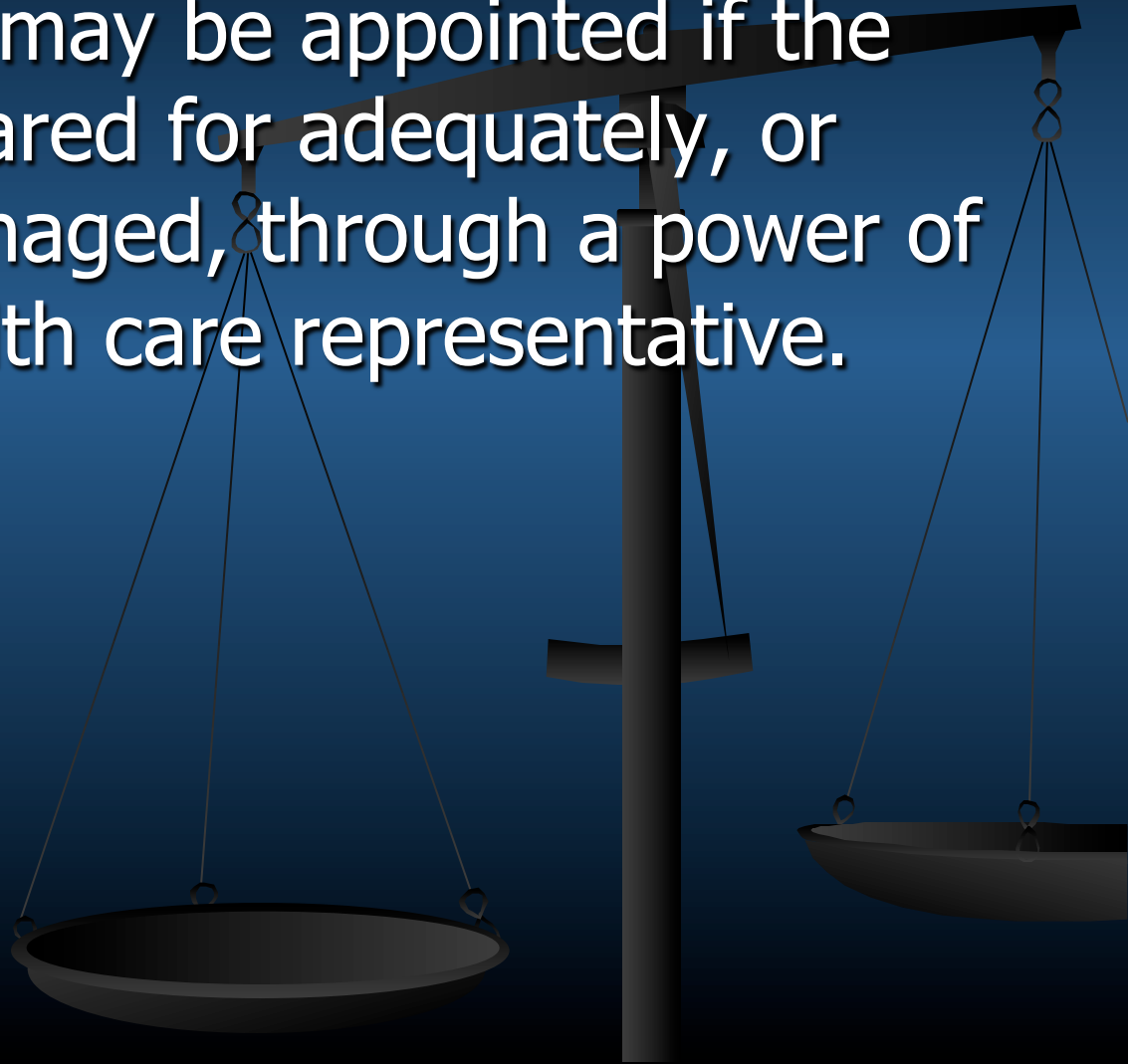
- Findings (cont'd)

Court must find, by clear and convincing evidence, that the respondent's affairs cannot be managed, and/or the respondent cannot be cared for adequately, without the appointment of a conservator, and that such appointment is the least restrictive means of intervention available.



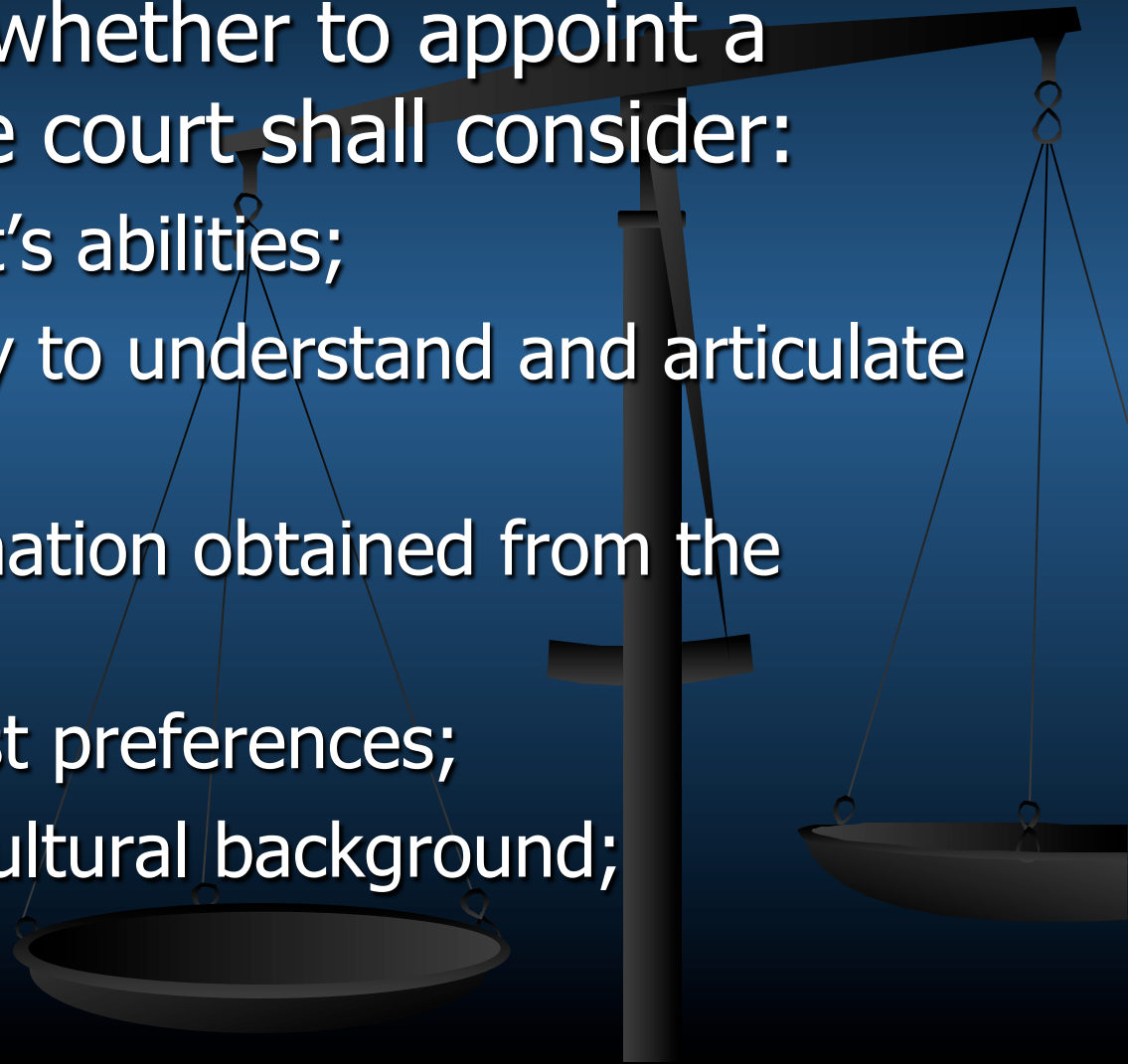
Hearings (cont'd)

- No conservator may be appointed if the respondent is cared for adequately, or their affairs managed, through a power of attorney or health care representative.



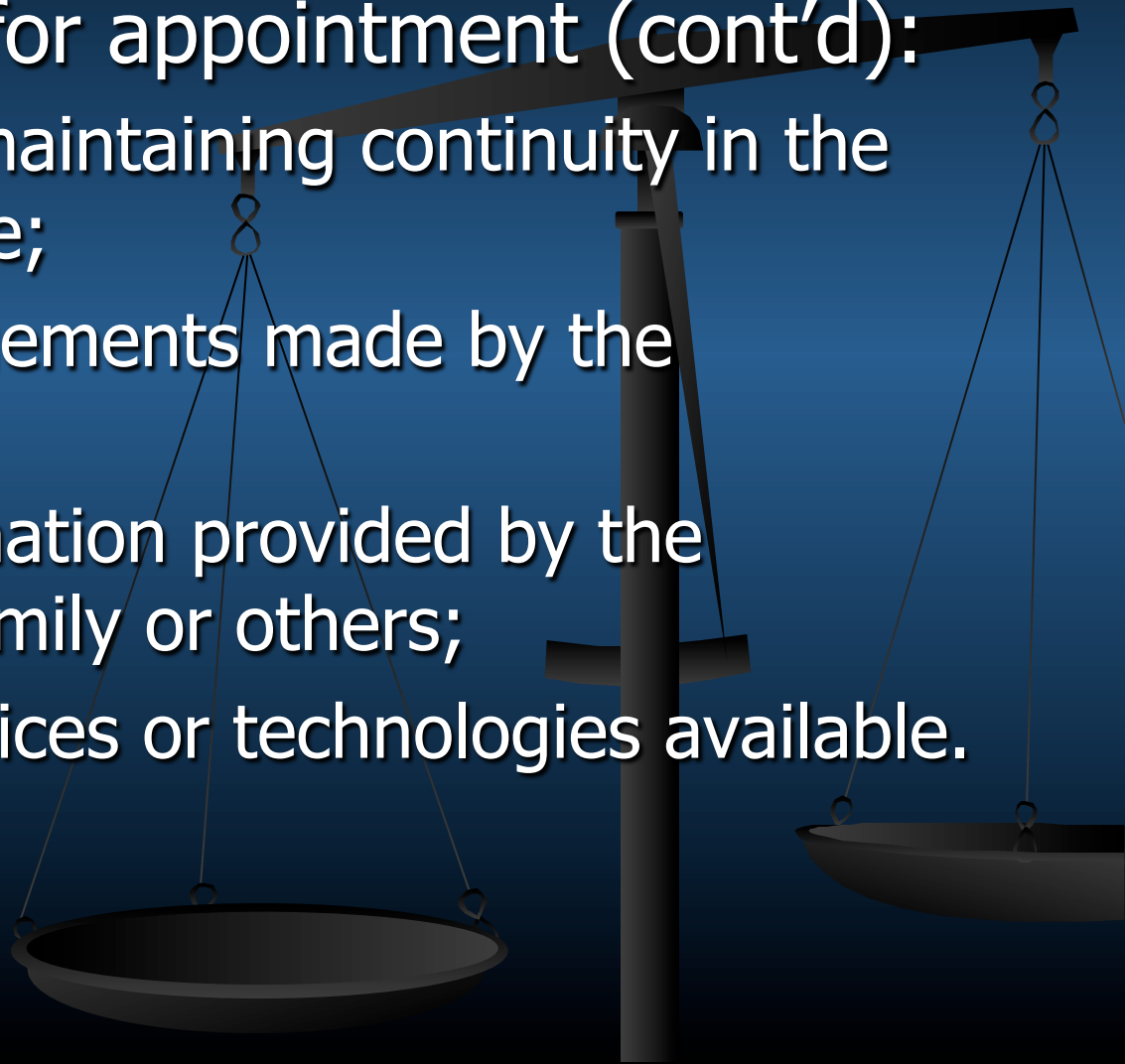
Hearings (cont'd)

- In determining whether to appoint a conservator, the court shall consider:
 - The respondent's abilities;
 - His/her capacity to understand and articulate preferences;
 - Relevant information obtained from the respondent;
 - Evidence of past preferences;
 - Respondent's cultural background;



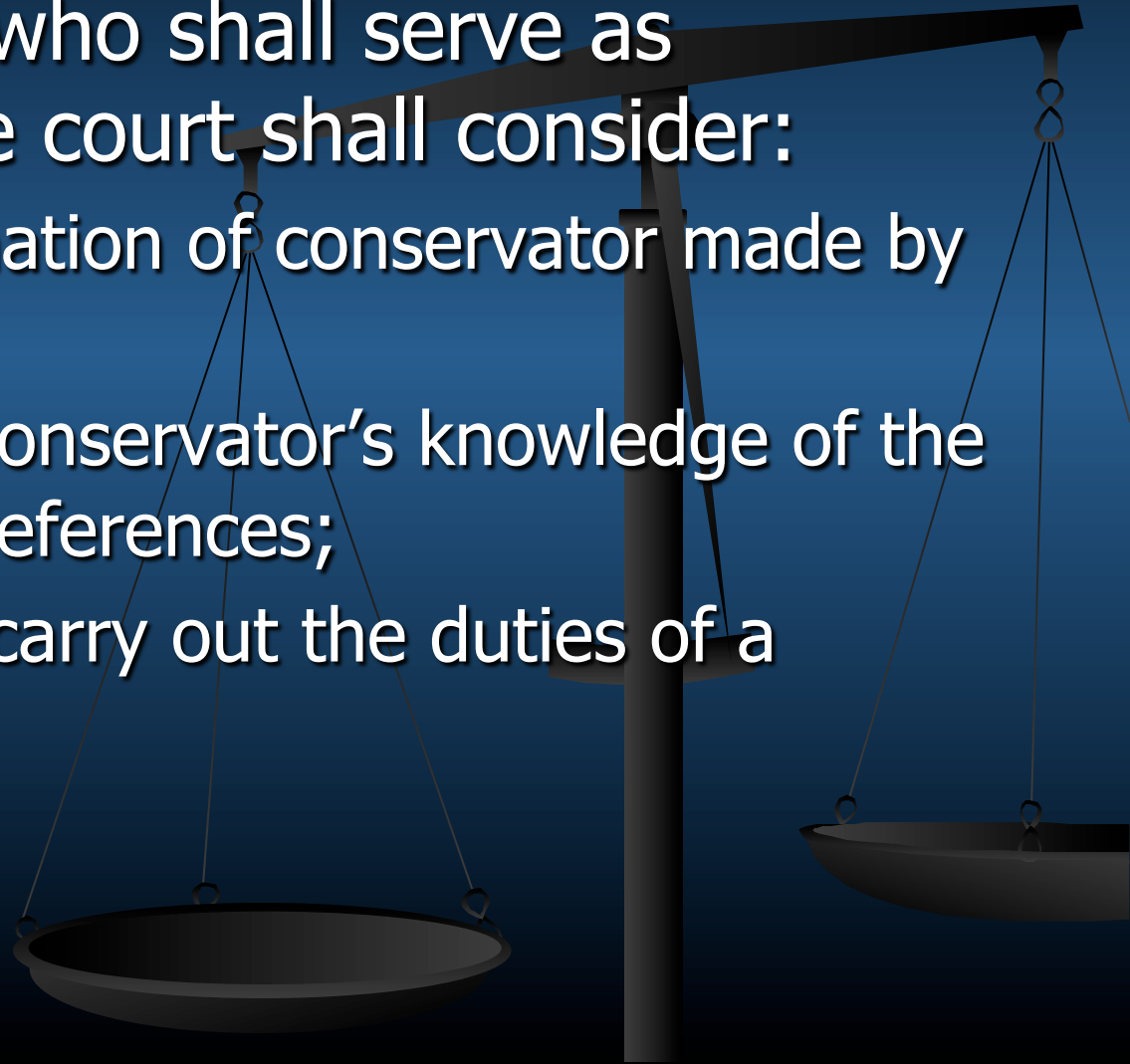
Hearings (cont'd)

- Considerations for appointment (cont'd):
 - Desirability of maintaining continuity in the respondent's life;
 - Previous arrangements made by the respondent;
 - Relevant information provided by the respondent's family or others;
 - Supportive services or technologies available.



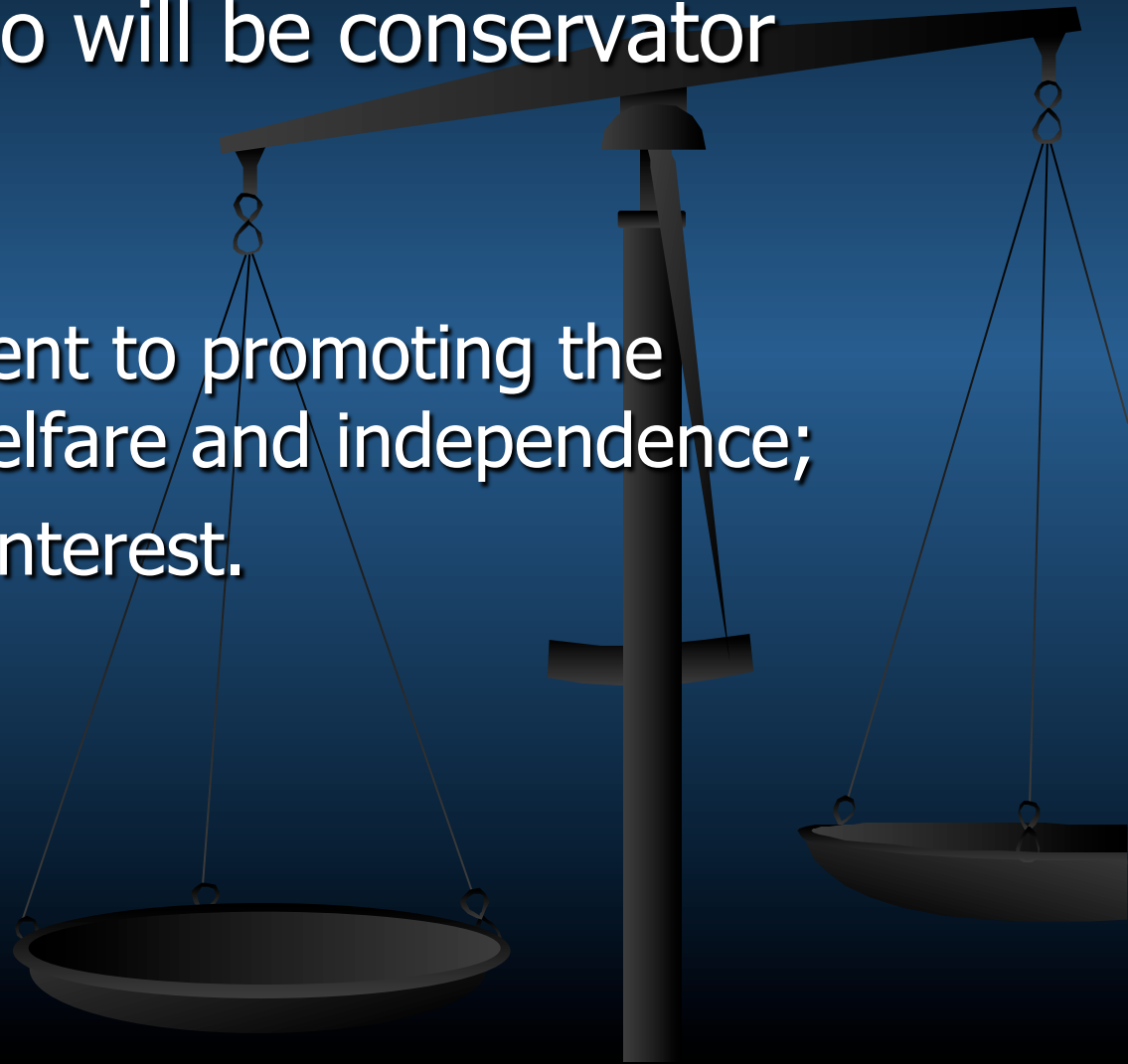
Hearings (cont'd)

- In determining who shall serve as conservator, the court shall consider:
 - Advance designation of conservator made by respondent;
 - The proposed conservator's knowledge of the respondent's preferences;
 - Their ability to carry out the duties of a conservator;



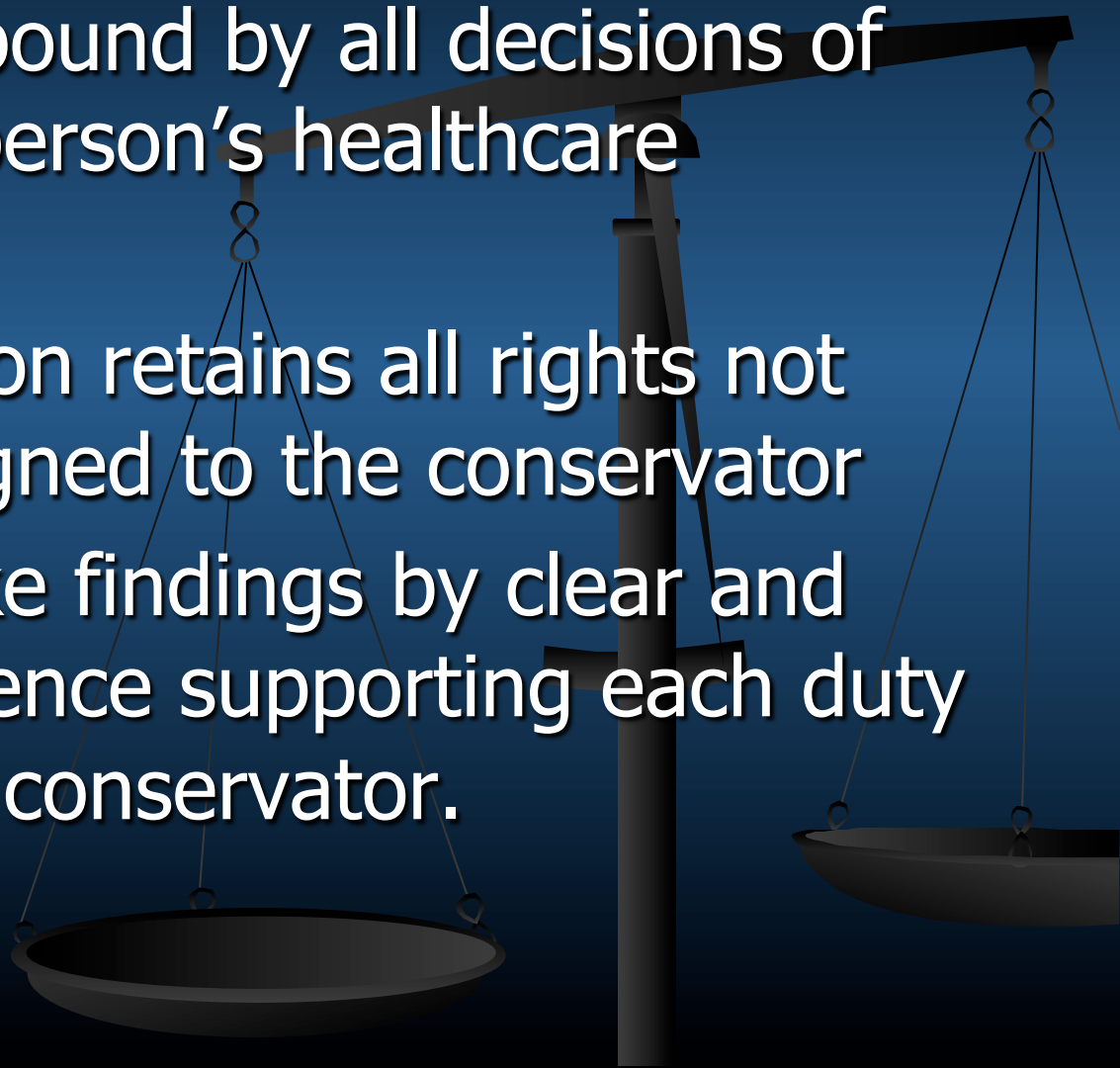
Hearings (cont'd)

- Determining who will be conservator (cont'd):
 - The costs;
 - Their commitment to promoting the respondent's welfare and independence;
 - Any conflict of interest.



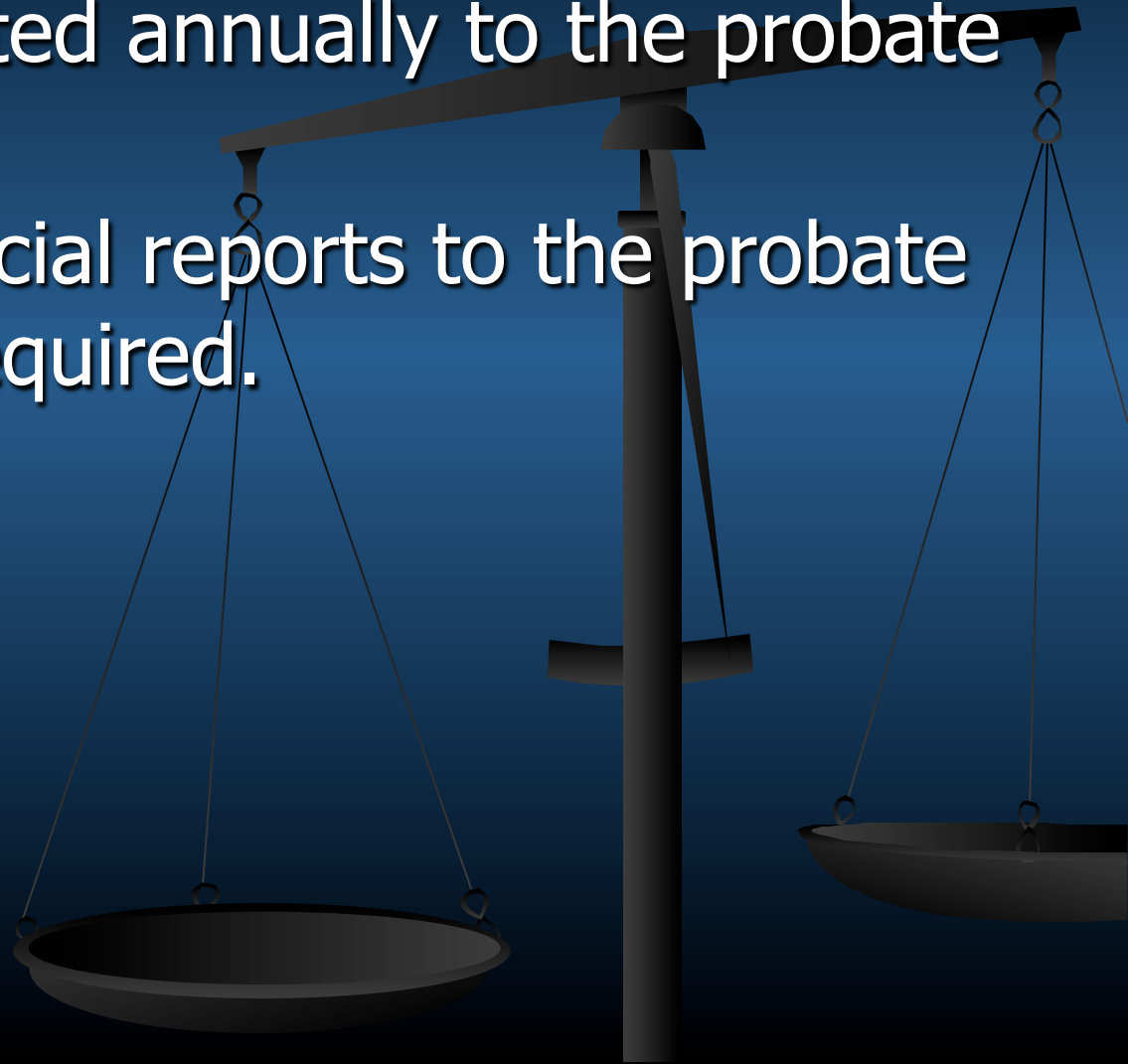
Hearings (cont'd)

- Conservator is bound by all decisions of the conserved person's healthcare representative
- Conserved person retains all rights not specifically assigned to the conservator
- Court must make findings by clear and convincing evidence supporting each duty assigned to the conservator.



Annual Reports

- Must be submitted annually to the probate court.
- In addition, special reports to the probate court may be required.

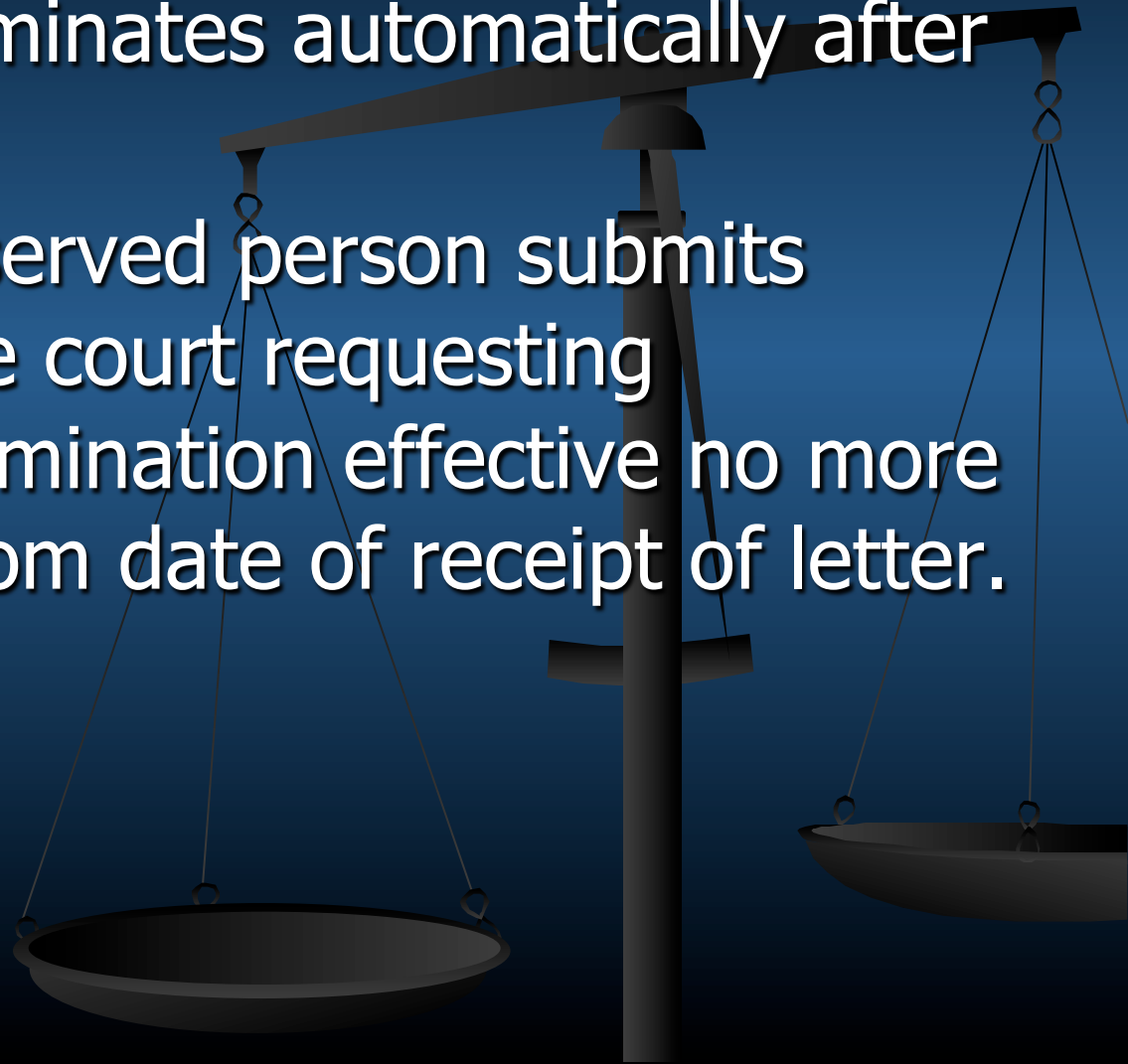


Terminating Conservatorships



Terminating Conservatorships

- Temporary: terminates automatically after 30 days.
- Voluntary: Conserved person submits letter to probate court requesting termination; termination effective no more than 30 days from date of receipt of letter.



Termination (cont'd)

- Involuntary: Conserved person may request a hearing on termination at any time. The court must hold a hearing within 30 days, unless continued for good cause. Conserved person is not required to present medical evidence. Court's determination shall be made upon a preponderance of the evidence. Final account must be submitted by conservator of the estate.

