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Guardianship Basics

LAST UPDATED: 10/13/2007

If you are a parent who has a child with special needs, it is important to know your options when it comes to managing the medical and financial well-being of your child. Once your child turns 18, your legal relationship with her changes, because suddenly, it is presumed that your child has the ability to make decisions on her own, regardless of her abilities. At this point, one option worth exploring is becoming your child's legal guardian, so that you can continue to make the important medical and financial decisions on behalf of your child. The following is a basic explanation of what guardianship is, when it is appropriate and how to pursue one.

Every adult is assumed to be capable of making her own decisions unless a court determines that she is incompetent. If an adult becomes incapable of making responsible decisions due to a mental disability, the court will appoint a substitute decision maker, often called a "guardian," but in some states called a "conservator" or another term. Guardianship is a legal relationship between a competent adult (the "guardian") and a person who because of incapacity is no longer able to take care of his or her own affairs (the "ward").

The guardian is authorized to make legal, financial, and health care decisions for the ward. Depending on the terms of the guardianship and state practices, the guardian may or may not have to seek court approval for various decisions. In many states, a person appointed only to handle finances is called a "conservator." Some incapacitated individuals can make responsible decisions in some areas of their lives but not others. In such cases, the court may give the guardian decision-making power over only those areas in which the incapacitated person is unable to make responsible decisions (a so-called "limited guardianship"). In other words, the guardian may exercise only those rights that have been removed from the ward and delegated to the guardian.

The guardianship process

In most states, anyone interested in the proposed ward's well-being can request a guardianship. An attorney is usually retained to file a petition for a hearing in the probate court in the proposed ward's county of residence. Protections for the proposed ward vary greatly from state to state, with some simply requiring that notice of the proceeding be provided and others requiring the proposed ward's presence at the hearing. The proposed ward is usually entitled to legal representation at the hearing, and the court will appoint an attorney if the allegedly incapacitated person cannot afford a lawyer.

At the hearing, the court attempts to determine if the proposed ward is incapacitated and, if so, to what extent the individual requires assistance. If the court determines that the proposed ward is indeed incapacitated, the court then decides if the person seeking the role of guardian will be a responsible guardian.

A guardian can be any competent adult -- the ward's spouse, another family member, a friend, a neighbor, or a professional guardian (an unrelated person who has received special training). A competent individual may nominate a proposed guardian through a durable power of attorney in case she ever needs a guardian.

The guardian need not be a person at all -- it can be a non-profit agency or a public or private corporation. If a person is found to be incapacitated and a suitable guardian cannot be found, courts in many states can appoint a public guardian, a publicly financed agency that serves this purpose. In naming someone to serve as a guardian, courts give first consideration to those who play a significant role in the ward's life -- people who are both aware of and sensitive to the ward's needs and preferences. If two individuals wish to share guardianship duties, courts can name co-guardians.

Reporting requirements

Courts often give guardians broad authority to manage the ward's affairs. In addition to lacking the power to decide how money is spent or managed, where to live and what medical care he or she should receive, wards also may not have the right to vote, marry or divorce, or carry a driver's license. Guardians are expected to act in the best interests of the ward, but given the guardian's often broad authority, there is the potential for abuse. For this reason, courts hold guardians accountable for their actions to ensure that they don't take advantage of or neglect the ward.

The guardian of the property inventories the ward's property, invests the ward's funds so that they can be used for the ward's support, and files regular, detailed reports with the court. A guardian of the property also must obtain court approval for certain financial transactions. Guardians must file an annual account of how they have handled the ward's finances. In some states guardians must also give an annual report on the ward's status. Guardians must offer proof that they made adequate residential arrangements for the ward, that they provided sufficient health care and treatment services, and that they made available educational and training programs, as needed. Guardians who cannot prove that they have adequately cared for the ward may be removed and replaced by another guardian.

For a discussion of "Making Decisions for a Special Needs Child Who Becomes an Adult", [click here](#).

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