

QUESTIONS AND ANSWERS ON GUARDIANSHIP ISSUES

What is a Guardian?

A guardian is a person, institution, or agency appointed by a court to manage the affairs of another individual. The guardian may be given the authority to manage personal and/or financial matters. Each state has specific laws, which govern guardianship proceedings and the guardian's activities. States also have separate laws and procedures for guardianships for minors and for adults with disabilities.

Who may have a guardian appointed to manage his/her affairs?

The state laws presume that an adult 18 years of age or older is capable of managing his/her own affairs. In order to have a guardian appointed a court must find that the individual has demonstrated a lack of capacity to make or communicate responsible decisions concerning personal or financial matters. The laws of the state in which the individual resides must be reviewed to learn the specifics governing the definition of an incapacitated person.

How is it determined that a person may need a guardian?

The fact that someone has some sort of diagnosis, or disability does not equate to the need for a guardian. The primary test for determining the need for guardianship focuses on the ability to make decisions, and to communicate the decisions once made. Most guardianships focus on the ability to make decisions regarding living arrangements, medical care, vocational and educational services, ancillary professional services, care for dependents, and managing finances. The essence of decisional capacity may be encompassed in the following questions:

1. Does the individual understand that a decision needs to be made?
2. Does the individual understand the options available in making a decision?
3. Does the individual understand the potential consequences of the decision and options?
4. Can the individual direct the decision to appropriate parties?

Who can act as a guardian?

The following qualifications for guardians are fairly universal:

- Individuals over the age of 18, who have not been convicted of a felony, and have not adjudicated disabled
- Non-related professional guardians
- A public or private institution, as long as they do not provide services to the individual.
- Financial institutions (for estate matters only.)

In some states there is a statutory preference for family member as guardian, but in all states the selection of the guardian is in the court's discretion. While most states do not have education or experience requirements to be appointed as guardians, some states provide some assistance such as videos, guardian manuals, or training sessions. For specifics about who may be a guardian review the individual state guardianship statutes.

How does a guardian get appointed?

A court must determine based on the evidence presented that (1) the individual is incapacitated according to the law of that state and guardianship is appropriate; (2) the individual or entity to act as guardian is qualified; and (3) the authority granted to the is necessary for the safety of the individual.

What are the usual steps to appointing a guardian?

Most states require a preliminary investigation in to the need for a guardianship. While the requirements of the investigative report vary greatly, at a minimum the report should (1) provide a description of the nature and type of disability and an explanation of how that disability impacts the individual's decision making; (2) offer an analysis and results of evaluations of the individual's mental and physical condition, educational level, adaptive behavior and social skills as appropriate; (3) state an opinion about the need for guardianship, and provide supporting reasons for this opinion; and (4) recommend suitable living arrangements and treatment or habitation plans and again the supporting reasons for the recommendations. The report should accurately reflect the skills and abilities of the person as well as the deficits and problems. The report must be timely and meet a time frame that is usually stated in the statute.

A petition must be filed to start the proceedings. The petition is the official request for the appointment of a guardian. It is prepared and signed by the person alleging the need for guardianship. Although an attorney may not be required to establish guardianship in some areas, this is a legal process. It may be best to consult an attorney familiar with guardianship proceedings before filing a guardianship petition.

After a hearing date is set a summons to appear at the proceeding is served on the individual. The summons is the official notice to the person with disabilities about guardianship proceedings, the time, and place.

Notice of the date, time and place of the guardianship proceedings is given to any interested parties, family members, proposed guardian, etc., in order that they can be present at the hearing if they choose.

A hearing is held and evidence presented about the need for guardianship. The alleged disabled person is usually represented by an attorney during the hearing process. Although the hearing may seem to be quite informal, this is an adversarial process and the petitioner must clearly demonstrate to the court that the individual needs a guardian.

During the appointment proceedings the alleged disabled person has specific due process rights that are defined in the various state laws.

Can guardianship be used in an emergency?

Most states have a special procedure for an emergency appointment of a guardian for a specific purpose. They are usually time-limited and not renewable without a full guardianship proceeding. There is usually a cursory hearing about the specific issue and a guardian's authority is limited to those decisions necessary to address the emergency. Usually this is not a full finding of incapacity, and a full hearing on the guardianship must be scheduled or the emergency/temporary guardianship expires.

What are the different types of guardianship available?

This also varies from state to state but generally:

- Guardianship of the person in which the guardian is granted the authority to make decisions about medical care, residential placement, and release of confidential information.
- Guardianship of the estate in which the guardian is granted the authority to manage and make decisions about financial matters, benefits, real estate and other property.
- Limited guardianship means that the guardian has only the authority specifically given by court order. The individual keeps all other decision-making rights not specifically outlined by the court order.

Most guardianships fall within these general categories although the names or categories of guardians may differ greatly. Review your state laws for specifics.

How long does the guardianship process take?

While temporary or emergency guardianships may be appointed quickly within a few days after the petition is filed, it may be two weeks to as long as two months between petitioning and appointment.

How does a guardianship end?

The court may modify, revoke, or terminate the guardianship if the individual's ability to make and communicate decisions is demonstrated to the court. The procedures governing the modification of guardianships again may vary but every state has procedures to terminate a guardianship.

Are there alternatives to guardianship?

Guardianship as a highly intrusive intervention should be used only as a last resort when all other alternatives have been examined. Some of the alternatives to guardianship may be powers of attorney for health care or financial management, living wills, trusts, case/care management services, representative payeeship for public benefits and health care surrogate acts. Individuals may get additional information on alternatives from the bar association, state guardianship association and local social service agencies.