



Guardianships And Conservatorships

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Background

If an individual becomes unable to handle his or her own affairs there are two major areas of concern. These are the individual's physical welfare decisions and the management of the individual's finances. A guardianship is the appointment of an individual to provide care and to make personal decisions for a minor or incapacitated person. A [GUARDIAN](#) may be nominated by a Will, by a Trust document, or by any via a petition with the court. The person for whom a guardian is appointed is called a ward. Generally, the ward cannot provide food, clothing, or shelter for himself or herself welfare without assistance. A conservatorship is the appointment of an individual or a corporation with [TRUSTEE](#) powers, to manage the financial affairs of a minor or other person who cannot manage his or her own financial matters. A conservator is not authorized to make decisions regarding the personal care as a guardian does. The person for whom a conservator is appointed is called a protected person. The court may appoint a conservator for a single transaction or indefinitely. A person may need a guardian or a conservator or both and the same person can be appointed in both capacities.

Guardianship

Guardianship is established by a court order. The court grants the guardian authority and responsibility to act on behalf of another person. The relationship is [FIDUCIARY](#), which means that the guardian is obliged to act in the best interests of the ward. The court supervises the guardian to assure proper actions on behalf of the ward. An individual may serve as guardian of a minor or of an incapacitated person. For a minor, the court considers which individual's appointment will be in the best interest of the minor. In some states, a minor ward over fourteen can nominate his or her own choice for guardian. Any competent person may be appointed guardian for an incapacitated person. The appointee might be the spouse, an adult child or parent of the ward, or any responsible adult with whom the ward is residing.

To establish a guardianship, a petition is typically filed in state court where the ward lives. This petition usually names the potential guardian and provides information about the parties' relationship (if any) and

usually any pertinent information about the heirs or estate of the ward. If the ward is a minor, information about the minor's parents and whether and where they are living is generally necessary. In the case of an adult ward, if mental incapacity is the reason for the petition, medical documentation should accompany the filing. Notice of the time and place of the [HEARING](#) is given to the potential ward and other persons specified by [STATUTE](#).

The documents are served on the interested parties at which point the proposed ward or his or her relatives can object to the guardianship request. A hearing is held. If the court finds sufficient [EVIDENCE](#) to order the guardianship, it may issue subsequent orders, which govern the relationship and the guardian's actions. The court may appoint a guardian if it finds the person is incapacitated and the appointment is necessary to provide continuing care and supervision of the person. Incapacity can result from any number of conditions, including, but not limited to mental illness, mental deficiency, mental disorder, physical illness or [DISABILITY](#), chronic use of alcohol or other drugs. Essentially, the court must be convinced that the individual lacks sufficient understanding or capacity to make or communicate responsible decisions. The court may terminate a guardianship if a subsequent hearing proves that the need for a guardian no longer exists, or in the case of a minor, when the child reaches the [AGE OF MAJORITY](#).

A guardianship restricts the individual's right to contract, marry, spend money, make decisions about their own care, or create a new will. The guardian may make personal decisions for the ward such as living arrangements, education, social activities, and authorization or withholding of medical or other professional care, treatment, or advice. A guardian must submit written reports to the court according to the court's orders and the law of the [JURISDICTION](#) in which the guardianship takes place. Generally, a guardian is not charged with managing the income or property of the incapacitated person; however, the guardian may receive funds payable for the support of the ward such as social security as a representative payee.

If a guardianship is contested, the court may appoint a disinterested third party to investigate and make recommendations. Usually called a [GUARDIAN AD LITEM](#), this person evaluates both the necessity for a guardianship, and the appropriateness of the proposed guardian. The ward may also hire separate legal [COUNSEL](#). If the proposed ward is indigent, the court sometimes appoints counsel.

Guardianship of Minors

Guardianship of a minor is typically appropriate when a child is permanently living with someone other than a parent. This might occur if both parents died, or if one parent died and the other is incarcerated or otherwise absent. Guardianships of minors are often established when neither parent is able to provide a safe, secure home for the child because of drug abuse, alcoholism, and other serious personal problems.

The difference between guardianship and [ADOPTION](#) is that guardianship does not sever the biological parents' rights and responsibilities. Guardianship of a child means that a caregiver is responsible for the care and [CUSTODY](#) of the child. This arrangement allows the guardian to access services on behalf of the child. Unlike adoption, a birth parent can return to court at any time and ask for the guardianship to be terminated.

When a guardian is appointed for a minor child, the court may impose conditions. One common condition is a requirement that the guardian attend parenting classes. Courts sometimes require that grandparent guardians attend grandparent caregiver support groups. Not only are judges aware that parenting techniques have changed in recent years, but if the child's parents are drug addicts, alcoholics, or abusive toward children, it may be appropriate to question why the grandparents will do a better job raising the grandchildren than they did raising their own children. Grandparents seeking guardianship should be prepared to address these issues.

Guardianship of the Estate

Even if a minor child lives with one or both parents, in some states a guardianship is required if the child inherits property worth more than \$20,000. After the court appoints a guardian, an inventory and [APPRAISAL](#) must be filed, and annual or bi-annual accountings must also be filed with the court until the child reaches age eighteen.

De Facto Custodian

De Facto Custodian laws give caregivers the same standing as parents in custody cases if they satisfy the definition of de facto custodian. They must be the primary caregiver and must be providing financial support of a child who has lived with the de facto custodian for a certain period of time.

Standby Guardianship

These laws were originally designed in response to the AIDS crisis and allow a terminally ill parent to designate a standby guardian to take over the day to day care of a child in the event of parental incapacity. There is a Sense of Congress in the Adoption and Safe Families Act (ASFA) that States should pass these laws.

Permanent Guardianship

Permanent guardianships are for children in state custody. In some states permanent guardianship status may be granted by the juvenile court after it is proven that it is in the best interest of the child that the birth parent should never have physical custody of the child. A birth parent is prohibited from petitioning the court to terminate this permanent guardianship once it is granted.

Subsidized Guardianship

Some states have programs that provide a monthly subsidy payment to grandparents and other relatives who obtain guardianship of the children they are raising. Subsidized guardianships are designed for those children who have been in state custody, with a relative or non-relative providing the care, for at least six months and in some states up to two years. The subsidy is sometimes less than the foster care payment in that state but usually more than the Temporary Assistance for Needy Families (TANF) child-only grants. Continued eligibility for the subsidy is typically re-determined annually. The subsidy payments usually end when the guardianship terminates or when the child turns 18, although several states continue the subsidy until the child reaches age 21 or 22 provided he or she is attending school. States have some similar programs that do not require the child to be in state custody.

Conservatorship

Unlike a guardian, a conservator has no power or responsibility over the individual. Only the money and property falls within the conservator's jurisdiction. A conservator has power to invest funds of the estate and to distribute sums reasonably necessary for the support, care, education or benefit of the protected person and any legal dependents of the protected person. Either an individual, or a corporation with general power to serve as a trustee may be appointed conservator for a protected person. Typically, state laws provide a preferred order of priority for those who may be considered by the court for appointment. A conservator has the powers and responsibilities of a fiduciary and is held to the standard of care applicable to a trustee. The conservator files an inventory of the estate of the protected person with the court and accountings of the administration of

the estate.

Conservatorship is established by petitioning the court. The petition can be filed by the person to be protected, or by any person interested in the estate, affairs, or welfare of the protected person. This appointee could be a parent or guardian, or by any individual or entity adversely affected by improper management of the property and affairs of the protected person. In most states, the person to be protected must be represented by an attorney. The court also typically requires an independent physician's report. The court may appoint a conservator if it finds that an individual is unable to manage property and financial affairs effectively for reasons including, but not limited to, mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic [INTOXICATION](#), confinement, detention by a foreign power, or disappearance.

A conservatorship terminates upon the death of the protected person or upon a court determination that the disability of the protected person has ceased. The protected person, the personal representative of the protected person, the conservator, or any other interested person or entity may petition the court to terminate the conservatorship. Upon termination, title of the assets passes to the former protected person, or if deceased, as provided by the protected person's will.

Involuntary Commitment

A person who is a danger to self or others can, under certain conditions, be court ordered to a mental hospital. Most states allow commitment to public and private mental hospitals, either as a voluntary patient accepted by the institution or under a court order of involuntary commitment. Legal standards surround the process by which those who are mentally ill can be forced to receive treatment. State laws and rules regarding involuntary commitment are subject to the due process clause of the Fourteenth Amendment, which guarantees the right to be free from governmental restraint and the right not to be confined unnecessarily.

If a guardian or person is not agreeable to a voluntary commitment, state law provisions typically provide a procedure for emergency involuntary hospitalization. In the event of a voluntary hospitalization, a person, or that person's court-ordered guardian, requests admission to the hospital. The hospital can retain the patient indefinitely or discharge the patient provided the staff determines discharge is in the best interest of the patient and the community. In many states, a patient on a voluntary admission who wishes to leave must give the institution three days notice. This gives the hospital the opportunity to apply for involuntary commitment of the patient, if the staff determines that is appropriate. The facility will then typically retain the patient until the court hearing.

Public Fiduciary

A public fiduciary is a governmental official appointed to serve as guardian, conservator, or personal representative for those individuals or estates with no one else willing or capable of serving. The public fiduciary may file a petition with the court to be named guardian/conservator if the public fiduciary believes such a request is warranted. The court appoints the public fiduciary if the court finds sufficient evidence that a person or estate is in need of the services of the public fiduciary.

Representative Payee

Sometimes involuntary commitment or even a guardianship or conservatorship is not the best solution. If an elderly person is no longer able to remember to write out checks but can still remember how to eat regularly and take medication appropriately, a representative payeeship may often be an option. A representative payeeship is an arrangement whereby a person's Social Security and/or Supplemental Security Income (SSI) checks, or even his or her private [PENSION](#) checks, are issued to another person who is the representative payee. This person can be a family member, friend, social worker, attorney, or accountant. Additionally, many utility companies, if requested, will contact a representative third party prior to the termination of services to an elderly person. Sometimes this is sufficient to assure that an elderly person does not have essential services disconnected.

Power of Attorney

A [POWER OF ATTORNEY](#) is an authorization for one person to transact business on behalf of another. It can be specific as to one instance, or it can include any conceivable business transaction. Power of attorney documents were once considered void if the maker became mentally incompetent. Most states have now adopted the Uniform Durable Power of Attorney Act which provides that a power of attorney will survive even though its maker has become mentally incompetent.

While a power of attorney is a simple document to draft, it has inherent pitfalls. Power of attorney can be a useful safeguard against potential unknown future incapacity, but it empowers someone else to handle the financial affairs of an incapacitated person. As a result, it may give rise to family disputes and even emergency court filings in a time of family crisis. And, unlike a court appointed guardian or conservator, there is no one charged with overseeing the action of the individual with the power of attorney.

Joint Ownership

Most common in married couples' financial situations is joint ownership. Individual access to bank accounts can be had by either joint owner, even if the other joint owner is incapacitated. For this reason, elderly people sometimes place an adult child's name on their accounts. This is a simple and effective way of insuring that the child can continue to pay the parent's bills if the parent is unable to do so. It does, however, give the child the legal ability to withdraw everything from the entire account. Placing an adult child's name jointly on an asset can also present problems to the parent if the child incurs debts, is sued, or gets divorced. Since joint ownership means just that, the result can be that the asset which was once solely the parent's can become subject to the adult child's creditors or soon to be ex-spouse.

While joint [TENANCY](#) can transfer assets at death without any type of [PROBATE](#) proceedings, the legal implications of joint tenancy are governed by state law and will vary from state to state. In some states with [COMMUNITY PROPERTY](#) law, property owned by spouses in joint tenancy will not receive the same tax treatment when one spouse dies. The joint tenancy property can lose important benefits otherwise available to the survivor. Finally, because jointly-owned assets transfer directly to the survivor, such property passes outside of a will. A parent can unintentionally leave his or her property to the child who is the joint owner, rather than having the property divided equally among several children.

Selected State Law Provisions

FLORIDA: A grandparent, adult aunt or uncle or person with power of attorney can consent to medical care or treatment of a minor after a treatment provider has failed in his or her reasonable attempt to contact a parent, legal custodian or legal guardian. Under this law, no writing is necessary to convey consent power.

LOUISIANA: Relatives who become either a child's legal custodian or guardian and have an income less than 150% of the federal poverty guidelines are eligible to receive the monthly subsidy payments.

MISSOURI: Grandparents (or other relatives) who become either the child's legal custodian or guardian and attend foster parent training are eligible to receive the monthly subsidy payments.

NORTH CAROLINA: An adult who is raising a child informally can enroll the child in a school district where the adult is a domiciliary provided an [AFFIDAVIT](#) is submitted of the parent, legal guardian or legal custodian or the adult with whom the child lives. If the parent is unable, refuses or is unavailable to submit the affidavit, the adult's affidavit should include a statement that the parent is unable, refuses or is unavailable.

PENNSYLVANIA: A parent, legal guardian or custodian may give an adult, including a relative caregiver, authorization to consent to medical or mental health care for the child. The authorization can be in any written form and must be signed by the parent, legal guardian or custodian and witnessed by two adults, neither of whom is the person to whom authorization is being given. There is no time limit on this authorization, but can be revoked at will. Furthermore, the death of the parent, legal guardian or custodian who executed the authorization will automatically revoke the authorization.

Additional Resources

"Bringing Some Sense to Civil Commitment Hearings." Davoli, Joanmarie I. 2 Catalyst 9 (2000).

Organizations

The Elder Law Project Legal Services for Cape Cod and Islands, Inc.

460 West Main Street
Hyannis, MA 02601 USA
Phone: (508) 775-7020

National Academy of Elder Law Attorneys, Inc.

1604 North Country Club Road
Tucson, AZ 85716 USA
Phone: (520) 881-4005
Fax: (520) 325-7925
URL: <http://www.naela.com/>

National Alliance for the Mentally Ill

2107 Wilson Blvd., Suite 300
Arlington, VA 22201 USA
Phone: (703) 524-7600
URL: <http://www.nami.org/>

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