



GUARDIANS AND ALTERNATIVES

Many calls come into the Legal Hotline seeking general information about guardianship. Most people have only a vague idea of what constitutes a guardianship and when it is necessary to have a guardian. Sometimes a well-meaning family member or medical professional suggests the need for a guardian when there may be a quicker, easier and less costly alternative.

WHAT IS A GUARDIAN?

A guardian is a person appointed by the Probate Court, with power to make decisions about the care of another person, referred to as a Legally Incapacitated Person, or LIP.

WHEN CAN THE COURT APPOINT A GUARDIAN?

The Court can appoint a guardian only if it is satisfied by clear and convincing evidence that:

1. The person is "legally incapacitated*" and
2. The appointment is necessary to provide continuing care and supervision for the person.

* Guardians can also be appointed for persons under the age of 18 or developmentally disabled individuals.

WHAT IS A LEGALLY INCAPACITATED PERSON?

A legally incapacitated person is one found to be impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other causes, to the extent that the person lacks sufficient understanding or capacity to make or communicate *informed* decisions concerning his or her day-to-day care.

CAN A GUARDIAN BE APPOINTED JUST BECAUSE A PERSON IS OLD?

No. Never.

HOW IS A GUARDIAN APPOINTED?

Guardianship proceedings are started when a petition is filed in the Probate Court. The petition may be filed by anyone interested in the proposed ward's welfare, including the person him/herself. Once the petition is filed, the Court sets a date for a hearing. Notice must be sent to the person him/herself, certain relatives and others who have sufficient interest in the proceedings. At the hearing the Court will consider the evidence presented by the parties. In addition, the Court may appoint a *guardian ad litem* (a person to do an investigation and make a report to the Court), and a physician or mental health professional to examine the person. The Court can only appoint a full guardianship if the clear and convincing evidence shows the legally incapacitated person to be totally without capacity to care for himself or herself. In all other circumstances, the Court is only to appoint a limited guardianship, which specifically sets out the rights, powers and duties given to the guardian.

WHAT RIGHTS DOES A PERSON HAVE IN THE PROCEEDING?

The person for whom a guardianship is requested has the following rights:

- * To be present for the hearing and contest the proceeding.
- * To request limits on the guardian.
- * To object to a particular person being appointed guardian.
- * To be represented by a lawyer and to have a lawyer appointed for him/her by the Court if s/he is unable to afford a lawyer.
- * To present evidence.
- * To cross examine all witnesses.
- * To have a jury trial.
- * To have a closed hearing without a jury, if s/he requests.

WHAT SHOULD A PERSON DO AFTER RECEIVING NOTICE THAT A PETITION FOR APPOINTMENT OF A GUARDIAN HAS BEEN FILED?

It is always wise to contact a lawyer whenever you receive any legal papers. Those who cannot afford a private attorney may request an appointed attorney through the Court or guardian ad litem.

WHAT IS A GUARDIAN AD LITEM?

A *guardian ad litem* is a person appointed by the Court to tell the alleged Legally Incapacitated Person about the guardianship petition and the person's rights, do an investigation of the situation and then make a report to the Court. It is usually a lawyer.

CAN THE PERSON FOUND TO BE LEGALLY INCAPACITATED CHOOSE HIS OR HER OWN GUARDIAN?

Yes. The Legally Incapacitated Person, sometimes also called a ward, can designate any competent person to be the guardian. The Court is required to appoint the designated person as long as s/he is suitable in the Court's opinion and is willing to serve. If you have chosen someone to act for you through an advanced directive like a medical power of attorney, that person has priority to make medical decisions for you.

WHAT CONSEQUENCES DOES APPOINTMENT HAVE ON THE INDIVIDUAL'S RIGHTS?

A limited guardianship gives specific rights, powers and duties to a guardian to handle for the individual. The full guardian is responsible for the care, custody and control of the ward. However, the guardian is not liable to third parties for acts of the ward. Thus, the individual (the ward) loses many personal rights. In particular, the guardian has power to choose where the ward will live, to consent to medical care or other professional treatment for the ward, and to receive money and property that belong to the ward and apply it to the ward's support and care.

The amount of control a guardian has over the ward's financial affairs and estate varies, depending on whether the guardian is also appointed conservator of the estate. A description of what a "conservator" does is discussed later.

DOES A WARD LOSE THE POWER TO WRITE A WILL?

No, not necessarily, but as a practical matter, the ward may not have the necessary understanding to make a valid will.

CAN A GUARDIAN COMMIT THE PERSON TO A MENTAL HOSPITAL?

No. A finding of legal incapacity does not mean a person is mentally ill. Whether a person should be involuntarily committed depends on whether the person is dangerous to him/herself or others. This must be determined in formal commitment proceedings. A guardian, however, can decide on other places where the person will live, such as a foster care home.

HOW CAN A GUARDIANSHIP BE TERMINATED OR CHANGED?

Termination or modification proceedings are started when the ward or any person interested in the ward's welfare files a "petition" asking for an order that the ward is no longer incapacitated. The petition may be in the form of a letter from the ward to the Probate Court requesting the termination or change. The Court sets a hearing date within 28 days of the petition. Legally interested persons receive notice. The ward must be prepared to show that he or she is able to make informed decisions about him/herself. The Court may appoint a physician to examine the ward, and a mental health professional to interview the ward and guardian and to observe the ward's living situation.

WHAT RIGHTS DOES A WARD HAVE IN THIS PROCEEDING?

All the rights listed for appointment of a guardian also apply to a termination proceeding. If a ward does not have an attorney the Court can appoint one to represent his/her interests during the termination proceedings.

CAN A GUARDIANSHIP BE TERMINATED BECAUSE THE GUARDIAN IS NOT PROPERLY CARING FOR THE WARD OR HIS/HER PROPERTY?

The ward, or any person interested in the ward's welfare, may petition to remove a guardian. The Court can remove the guardian and appoint another guardian if the Court decides that it is in the best interest of the ward to do so.

CAN A PERSON WITH A GUARDIAN HANDLE ANY OF HIS/HER OWN PERSONAL AND FINANCIAL MATTERS?

Sometimes the Court may give the ward permission to handle part of his or her money or property. For example, the Court may allow him/her to manage a checking account to help encourage self-reliance and independence.

Additionally, a guardian has the legal responsibility to help the ward obtain services that will help the ward return to self-management as soon as possible.

WHAT ALTERNATIVES ARE AVAILABLE INSTEAD OF GUARDIANSHIP?

Guardianship deprives a person of the right to control many important decisions. There are less restrictive options that may be appropriate and should be discussed with an attorney before filing for guardianship. These options include:

- A Appointment of Conservator

A conservator is a person or corporation, appointed by the Probate court to handle the property, money and financial affairs of another person. The Court may appoint a conservator or may make a 'protective order' about a particular matter. (For example, about an amount of money or a particular piece of property).

The petition process is similar to petitioning for a guardian. The person has a right to be represented by an attorney, and a *guardian ad litem* will be appointed if the person has no attorney.

The petitioner does not need to show that the person is legally incapacitated, but must show:

1. That the person is unable to manage his or her property and affairs effectively; and
2. That the person's funds will be wasted or dissipated without an order, and
3. That funds are needed for the support of the person or the person's dependents and that some type of protection is necessary or desirable to obtain the funds.

The conservator has a legal duty to use the person's funds for the individual's care, to keep detailed records, and to account to the Court about the use of all money and property. The conservator must file a written accounting of receipts and expenditures each year.

B Power of Attorney

A power of attorney is a written document signed by a competent person, giving another person power to handle some or all the first person's affairs. A power of attorney may be very narrow (for example, power to deposit your social security check and pay your rent) or very broad (giving authority to handle all of your financial affairs).

An ordinary power of attorney ends when the principal (the person who writes the power) becomes incompetent. A person may write a 'durable' power of attorney, which does not stop at incompetence or which goes into effect only if the person becomes disabled.

A power of attorney may provide the reasons and way to revoke. Powers of attorney are usually revocable by the person who made them. If a conservator is appointed s/he may revoke a previous power of attorney. All powers of attorney stop with the death of the principal.

An advantage of the power of attorney is that the principal him/herself has more control over choosing the person and the powers given. A disadvantage is that the person does not

have regular accounting requirements to a Court, as does a conservator. Talk to your attorney or financial counselor about your options.

C Representative Payee

If a person (beneficiary) is receiving Social Security or certain other government benefits, another person can be named "Representative Payee" and receive the money to use for the beneficiary. If Social Security is the person's only income, usually a power of attorney or conservator will not be needed. Talk to the Social Security office, Veteran's Administration or Railroad Retirement Board about setting this up.

D Other Options

Other options include trust accounts or other agreements. Depending on how they are set up a person has more control and protection in these arrangements. You should talk to your lawyer or financial counselor about these.

If you are a senior, you can get specific questions answered, free of charge, at the Legal Hotline for Michigan Seniors. Call 1-800-347-5297 weekdays to set an appointment to have a lawyer call you.