

# GUARDIANSHIP/CONSERVATORSHIP – AN OVERVIEW

## Introduction

Guardianship, also, referred to as conservatorship, is a legal process, utilized when a person can no longer make or communicate safe or sound decisions about his/her person and/or property or has become susceptible to fraud or undue influence. Because establishing a guardianship may remove considerable rights from an individual, it should only be considered after alternatives to guardianship have proven ineffective or are unavailable.

## Alternatives to Guardianship

Alternatives to guardianship may include:

- Representatives or substitute payees.
- Case/care management.
- Health care surrogacy.
- Trusts.
- Durable powers of attorney for property.
- Durable powers of attorney for health care.
- Living wills.
- Community advocacy systems.
- Joint checking accounts.
- Community agencies/services.

## Rights that Might be Affected

A good guardian will take into account the wishes and desires of the ward when making decisions about residence, medical treatments, and end-of life decisions. The courts will remove *only* those rights that the proposed ward is incapable of handling.

When the courts appoint a guardian, the following rights of the ward may be removed.

These rights may include the right to:

- Determine residence.
- Consent to medical treatment.
- Make end-of-life decisions.
- Possess a driver's license.
- Manage, buy, or sell property.
- Own or possess a firearm or weapon.
- Contract or file lawsuits.
- Marry.
- Vote.

## Due Process

Because establishing guardianship is a legal process that involves the removal of the individual's rights, considerable due process protection often exists when the guardianship is established. They include:

- Notice to the individual of all proceedings.
- Representation of the individual by counsel.
- Attendance of the individual at all hearings/court proceedings.
- Ability of the individual to compel, confront and cross examine all witnesses.
- Allowance of the individual to present evidence.

- Appeal of the individual to the determination of the court.
- Presentation of a clear and convincing standard of proof.
- The right of the individual to a jury trial.

Individual rights removed and due process rights may vary from state to state, the final authority is the state statutes where the person with the disability lives. In any type of guardianship the court may limit the guardian's authority. The guiding principle in all guardianship is that of least intrusive measures to assure as much autonomy as possible. The guardian's authority is defined by the court and the guardian may not operate outside that authority. A guardian may be a family member or friend or a public or private entity appointed by the court.

### **Guardianship of the Person**

When the court appoints a guardian of the person, the guardian may have the following responsibilities:

- Determine and monitor residence.
- Consent to and monitor medical treatment.
- Consent and monitor non-medical services such as education and counseling.
- Consent and release of confidential information.
- Make end-of-life decisions.
- Act as representative payee.
- Maximize independence in least restrictive manner.
- Report to the court about the guardianship status at least annually.

### **Guardianship of the Estate or Property**

“Estate” is defined as real and personal property, tangible and intangible, and includes anything that may be the subject of ownership.

When the court appoints a guardian of the estate, the guardian is assigned the following responsibilities:

- Marshall and protect assets.
- Obtain appraisals of property.
- Protect property and assets from loss.
- Receive income for the estate.
- Make appropriate disbursements.
- Obtain court approval prior to selling any asset.
- Report to the court or estate status.

### **The Professional Guardian's Duties and Responsibilities**

The professional guardian does not take the place of a family member, although the guardian may form an emotional bond with the incapacitated person. The professional guardian will coordinate and monitor professional services needed by the incapacitated person, such as selecting a caretaker, in-home care, and other services.

Funds that belong to the ward remain the property of that person, and do not become property of the guardian. All funds are accounted for and kept separate from the guardian's personal funds. The estate guardian acts on behalf of the incapacitated person only to the extent of the person's assets. For each person that a professional guardian serves, the guardian stands ready to give an accurate accounting of those funds to the court. The professional guardian is an advocate and acts on behalf of the incapacitated person only to the extent of the court order.

## **Guardianship is Not a Long-Term Arrangement**

The goal of effective guardianship is to be able to restore the rights of the individual who, for whatever reason, has had some of them removed by a court after due process. It is true that in many instances once a guardianship has been initiated by a court, it is in place until the incapacitated person dies. However, an annual review and assessment will monitor the need for maintaining or terminating a guardianship, and alert the court to a potential restoration of some or all of the incapacitated person's rights.

## **Conclusion**

This brief summary does not attempt to cover all of the aspects of guardianship. Especially in your local area where the law and local court rules may vary from county to county, or from state to state, it is a good idea to make inquiries as to what is appropriate for your specific circumstances. Consult your local professional elder law advocate, or contact the National Guardianship Association.