

Guardianship & Alternatives to Guardianship in Massachusetts

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The subject of guardianship for an adult child who is disabled is of concern to most parents. Parents of children who are intellectually challenged or have other significant physical or mental disabilities often assume that they continue to be their child's legal guardian during their entire lifetime.

Although one's child may not have the capacity to make informed decisions, legally, the adult individual is presumed competent unless otherwise adjudicated in an incompetency proceeding. In other words, once your child reaches the age of 18, you, the parent, are no longer his/her legal guardian.

The act of giving reasoned and well informed consent when making a decision may be beyond your child's ability. Although your child may not have the actual capacity to understand a legal contract, unless s/he has been adjudicated incompetent, there is a legal presumption that s/he is competent. In order to protect one's child from unscrupulous individuals who may exploit your child's inability to make informed choices, it is necessary for families to familiarize themselves with the various options of legal protection for their disabled adult child. Following is a brief description of guardianship and alternatives to consider.

Guardianship is a legal means of protecting children and incompetent adults who cannot take care of themselves, make decisions that are in their own best interest or handle their assets. When the court determines that a person is incapable of handling either their personal or financial affairs, the person who is disabled is thereafter referred to as a "Protected Person".

WHAT IS GUARDIANSHIP?

Guardianship is just one means of protecting an adult who is not fully competent.

Trusts

Trusts may be an appropriate alternative to guardianship or conservatorship. A trust is a legal plan for placing funds and other assets in the control of a trustee for the benefit of an individual. A trust will be less expensive in that no bond is required, it will keep the courts out of one's life (permission of a court is not needed to

make disbursements from the trust or to make investments), and it protects the ward's assets without him/her having to be declared incompetent. Trusts for the benefit of a person who is disabled should be established with the help of a lawyer experienced in wills and trusts and familiar with the law relating to government disability benefits. A trust set up without regard to the eligibility laws may disqualify a person who is disabled for SSI and Medicaid which may be critical benefits.

Special Bank Accounts

Joint bank accounts can be created to prevent rash expenditures. Arrangements can be made with most banks for a disabled person's benefit check, such as Social Security or SSI, to be sent directly to the bank for deposit. Additionally, a permanent withdrawal order can be arranged with the bank, authorizing the bank to send certain sums of money on a regular basis to a specified party, such as the landlord or the person who is disabled for pocket money, thus providing structure to allow for budgeting and money management.

Representative Payee

For persons with a disability who receive benefit checks from Social Security, SSI, or Veteran's pensions, considers obtaining a representative payee to manage these funds. Benefit checks are sent to the representative payee who manages them and spends them for the benefit of the individual with the disability. The representative payee has authority only over income from the particular checks for which she is payee. The person who is disabled would still make personal decisions.

CONSERVATORSHIP VS. GUARDIANSHIP

Conservatorship

Conservatorship should be considered for persons who are intellectually challenged who are too disabled to manage their finances and who have income from sources other than benefit checks. It is not as broad a form of control as guardianship; a conservator handles only the Protected Person's financial affairs, allowing the Protected Person to make personal decisions. The court may appoint a conservator if by reason of "mental weakness" the person is "unable to properly care for his property." Physical incapacity

A Conservator handles only the Protected Person's financial affairs, allowing the ward to make personal decisions.

is also a legally sufficient reason for appointing a conservator, provided the person agrees to the appointment. For a person with an intellectual or developmental disability, the court must find that (1) the person “is incapable of making informed decisions with respect to the conduct of his financial affairs” and (2) “failure to appoint a conservator would create an unreasonable risk to the person’s property.”

The conservator is responsible for paying the Protected Person’s bills and debts out of the Person’s funds, and managing the Person’s assets so as to maximize the benefit of the ward. The conservator is also responsible for filing an annual accounting of the Protected Person’s funds with the appointing probate court. Anyone over 18 whom the court feels will act in the ward’s best interests can become a conservator. If the conservator does not reside in Massachusetts, a local resident must be appointed as agent.

Guardianship

Guardianship is an option for persons who are incapable of making decisions about both personal and financial affairs. The Probate Court requires evidence of incompetence caused by either the person’s mental illness, his/her cognitive impairment, or in some cases by his/her inability to communicate wishes due to a physical or medical problem. For an individual with an intellectual or developmental disability, the Court also requires evidence of an unreasonable risk to the person’s health, welfare or property if a guardian is not appointed, and evidence that a conservatorship would not eliminate this risk.

Guardianship also may be limited to certain areas of decision making, (for example, decisions about medical treatment), allowing the individual with mental disabilities to continue making his/her own decisions in all other areas. The benefit of limited guardianship is in tailoring guardianship decrees to fit the special needs of the Protected Person in the least restrictive manner.

The individual named guardian has responsibility for monitoring the care of the Protected Person. The guardian need not use his/her own money for the Person’s expenses, provide daily supervision of the Person, or even live with the Person. However, the guardian must attempt to ensure that the Protected Person is receiving proper care and supervision. For highly unusual decisions which were not anticipated at the time of the original guardianship hearing, the guardian may and probably should ask the court for instructions. Decisions involving intrusive forms of treatment such as administration of antipsychotic medication, sterilization and the withdrawal of life-prolonging treatment, must be made by the court.

As with conservatorship, the guardian must file an annual accounting of the Protected Person’s funds with the appointing probate court. The guardian must also be over 18, and if the guardian does not reside in Massachusetts, a local resident must be appointed as agent.

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HEALTH CARE PROXY

A health care proxy should be considered for individuals who presently are capable of making decisions about their health care and wish to anticipate possible future incompetency. A health care proxy is a legal document that enables a competent individual, (the “principal”), to designate a health care agent to make health care decisions should the individual become incompetent to make them. The health care agent is permitted to make all health care decisions, including decisions about life-sustaining treatment, and in many ways eliminates the need for a guardian. The proxy must be a written document that is signed by the principal, age 18 or older, and witnessed by two adults. The principal may revoke the proxy at any time and in any manner that demonstrates specific intent to terminate the power. A health care proxy goes into effect when a person’s doctor determines in writing that the person does not have the capacity to make or communicate health care decisions.

DURABLE POWER OF ATTORNEY

A durable power of attorney for property is useful where the person is mildly or moderately incapacitated, and is capable of choosing another to handle his/her money. The power of attorney (P.O.A.) is a legal document that grants one person the legal authority to handle the financial affairs of another. A durable P.O.A. continues the authority in the event the individual becomes disabled or incapacitated. Both a drawback and an advantage is the fact that the incapacitated person still has the legal power to make decisions. If s/he commits him/herself to a contract which is not in his/her best interest, s/he can be held to that contract. Also a strength and a drawback is the fact that a person can withdraw the P.O.A. anytime s/he wants, and can remove the agents by verbal or physical action of destroying the P.O.A. (A person with a history of mental illness may remove his/her agent at a time when s/he needs an agent most.) A benefit is that P.O.A.’s are inexpensive, quick and do not require court involvement.

Legal Procedure for Obtaining Guardianship or Conservatorship

1

A petition has to be filed with the local Probate Court in the county in which the Protected Person is an inhabitant or resident. The petition can be filed by a parent, two or more relatives or friends, certain non-profit corporations (e.g., The Arc), or any agency within the Human Services (e.g., DMH and DDS). Executive Office of Human Services (e.g., DMH and DDS).

2

The petitioner need not be the person who will act as guardian or conservator. However, a person willing to become the guardian or conservator should be available in court when the petition is filed; otherwise the petition might not be heard.

3

Prior to filing the petition, the petitioner should obtain documentation from medical experts about the person's inability to handle her own affairs.

(a) For persons with a mental illness: a medical certificate should be obtained attesting to the Person's inability to care for him/herself or his/her finances. The physician must examine the person and sign the certificate no more than thirty (30) days prior to the entry of the guardianship or conservatorship decree.

(b) For persons who have an intellectual or developmental disability: a "clinical team report" must be obtained from a physician, social worker and a licensed psychologist, all experienced with intellectual or developmental disabilities, stating that they have examined the person and believe s/he is incapable of making informed decisions about his/her personal and/or financial affairs by reason of an intellectual or developmental disability. The examinations must take place no more than 180 days prior to the filing of the petition.

4

Notice of the petition must be given to the person who is disabled, his/her "heirs at law", and other interested parties, such as the closet living relatives, in order to give them an opportunity to object.

5

A hearing is held at which the judge weighs the evidence and either approves or rejects the guardianship or conservatorship. In certain emergency situations, the court may authorize guardianships for a period of time without the Protected Person having an opportunity to be heard. A temporary guardianship or conservatorship lasts up to 90 days and may be renewed once for an additional 90 days. When a temporary appointment is requested, permanent guardianship or conservatorship must also be requested.

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Ask us about providing a seminar for groups of parents, professionals and advocates on special education issues.

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