

Guardianship for Persons with Developmental Disabilities and Related Conditions

Q & A

NOTE: The following information has been prepared for educational purposes only. Nothing contained herein should be construed or relied upon as a legal opinion. It is advised that legal counsel be consulted to address specific issues, concerns and/or questions.

What is guardianship?

Guardianship is a legal process whereby a person(s) is appointed the guardian(s) of an incapacitated person/ward. A guardian may be appointed by a parent or the court. The appointment of a guardian is typically sought when a person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning their own person and they have demonstrated an inability to meet their needs for medical care, nutrition, clothing, shelter and/or safety and that no alternative less restrictive alternatives for substitute decision making exist including use of appropriate technology.

What is the difference between guardianship and conservatorship?

Guardianship covers the decision making powers over the person/ward and conservatorship involves decision making involving a person's estate and/or financial affairs.

How do you know if someone needs a guardian?

The need for a guardian can arise for many different reasons and assessing the need for a guardian is generally the first step in the process. For individuals with developmental disabilities, once they turn 18 they become their own legal guardians. Often it is in anticipation of this event that prompts parents to assess the need for guardianship. Where individuals with developmental disabilities have a team of people supporting them it is recommended that the team participate in the process of assessing the need for guardianship.

The criteria that is used in establishing a guardianship includes: the person is incapacitated and needs the supervision and protection of a guardian and that no less restrictive alternative exists and the person chosen to act as guardian in the best interests of the ward.

Determining incapacity requires looking at three factors, impairment, functional capacity and decisional capacity. Assessing IQ alone should not be relied on as the sole reason for establishing a guardianship for a person with developmental disability rather assessments should be comprehensive, individualized and multi-disciplinary. The types of assessments and/or documents that are helpful in assessing accessing capacity of an individual with a developmental disability include individual service plans (ISP), psychological assessments, physician statement, individual

education summary evaluation reports and plans (IEP), risk management and/or health and safety plans and any other documentation available pertaining to the proposed ward's medical, behavioral, activities of daily living, social history and intelligence.

Does a guardian have the power to make all the decisions about a person/ward's life?

It depends on what powers the guardian has been granted by the court. A guardianship may be unlimited or limited. The court may have granted all of the powers in which case the guardianship is considered to be unlimited. However even with an unlimited guardianship, the ward retains certain civil rights and liberties and those may only be restricted to the extent necessary to provide needed care and services. In the case of the limited guardianship, the court grants certain powers to the guardian. The guardian then is limited to making decisions within those powers. In a nutshell there are seven powers prescribed in the statute. They are:

- (a) Establish ward's place of abode;*
- (b) Provide for ward's care, comfort and maintenance needs;*
- (c) Take reasonable care of ward's personal effects;*
- (d) Give any necessary consent or withhold consent to necessary medical care, counsel, treatment or service;*
- (e) Approve or withhold approval of any contract, except for necessities;*
- (f) Apply on behalf of ward for public assistance, services or benefits*
- (g) Exercise supervisory authority over ward.*

The guardian becomes the legal representative for the person/ward. It is expected that they will make decisions on behalf of the ward that encourage and allow the maximum level of independence or self-reliance and will safeguard decision making powers so that they are reasonable and based on a clearly established need.

How do you establish a guardianship?

Once you have assessed the need for guardianship, the next step requires filing a petition with the district court in the county where the proposed ward resides and then going to court for a hearing regarding the appointment of a guardian. Recent changes in the statute now allow parents to nominate or appoint a guardian in their wills however the most common way to establish a guardianship is through judicial appointment.

At the hearing, the judge or referee, depending on the county, will review the petition and evidence and make a determination whether to grant the petition requesting appointment of a guardian. The court must have evidence to support two key findings: that a guardian is needed and that the person being appointed is the most suitable and best qualified among those available and willing to act as guardian. Generally the judge makes a decision whether or not to grant the petition at the hearing and then issues an order and letters of guardianship that are usually sent out after the hearing, if the petition is granted.

Do you need an attorney to become a guardian?

The District Courts continue their efforts to make the process of establishing guardianships for individuals with developmental disabilities more user friendly for family members who wish to proceed on their own (pro se = without an attorney). In doing so, however, the court must ensure the due process rights of the proposed ward are not compromised. Therefore, establishing the guardianship involves completing and filing several legal forms and many families choose to retain an attorney to assist them with the process.

How much does it cost to establish a guardianship?

The two most common areas for fees are court fees and attorney's fees. The court fees include fees for filing petitions and obtaining copies of documents. The current rates for filing fees and copy fees are available by contacting the court administrator or court clerk in the county where the petition will be filed. In 2006 the filing fee in Hennepin County is \$252. Attorney's fees will vary.

If a ward is indigent it is possible to request that the court order the fees to be paid by the county where the petition has been filed. This is called proceeding In Forma Pauperis. If granted the court fees and copy fees will be paid for by the county. The court also has the discretion to order the payment of reasonable attorney fees. Not all attorneys provide this type of representation therefore when interviewing attorneys to assist with guardianship it is recommended that you ask whether they will consider proceeding In Forma Pauperis.

Can a guardianship be changed?

Guardianships can be modified to restore an individual to partial or full capacity if the court, after reviewing all the evidence, determines that an individual no longer needs the level of supervision and protection granted in the initial guardianship petition. A ward must receive an annual notice of their right to petition for restoration of capacity if they and/or their team feel that a unlimited or limited guardianship is no longer needed. This involves the same process of going to court to establish the original guardianship.

A guardian with limited powers may also petition the court for additional powers using the same process as the original guardianship.

In addition to changing the powers of the guardian, there may be times with the guardian must also be changed. When a guardian is no longer able to act as a guardian either because they resigned, died or are removed, then a successor guardian may be appointed. This is often done concurrently with the discharge of the original guardian and involves going back to court.

Finally, a guardianship terminates upon the restoration of capacity or death of the ward.