

Guardianship and Caregiver Liability

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At some point while caring for an older person, a caregiver may realize that the older person can no longer manage her personal care or finances, or both, on her own. The caregiver, often an adult child or other relative of the older person, may find themselves awkwardly navigating interpersonal and legal terrain previously unknown to them. The older person may not acknowledge the change in her abilities, presenting potentially emotional and tense circumstances for both parties. Even if the older person understands her situation is changing, she must still deal with the feelings associated with her loss of independence and declining health. Solutions are available to the caregiver and older person, but the caregiver must remain mindful of the moral and legal obligations associated with each option. The most dramatic and potentially stressful option is guardianship of the older person. However, the older person may consider implementing various alternatives to guardianship if she is competent to understand the consequences of her decisions. Attorneys serving both parties should always be aware of the complex interpersonal issues that underlie this particular area of practice.

Legal guardianship is a fiduciary relationship created between a person determined to be incapacitated by a court (the ward), and a person or organization deemed suitable by a court to manage the ward's personal care and or finances (the guardian). In most states, the county probate court where the proposed ward lives is vested with jurisdiction to oversee guardianship proceedings. The person or organization who seeks to be appointed guardian begins the guardianship proceeding by filing a petition or application for appointment of guardianship with the court. The application must identify which type of guardianship is necessary to best protect

the person and assets of the proposed ward. The court must determine if the older person is incapacitated, and, if she is, which type of guardianship is the least restrictive alternative for the prospective ward. The “least restrictive alternative” is important in guardianship proceedings because appointment of a guardianship is a change in legal status for the older person – she loses legal rights in those areas which she has been determined incapable of managing for herself. The court may appoint a limited guardian if there is one particular area of her life the older person is incapable of managing on her own.

Various terms are used across the country to describe types of guardianship.¹ Generally speaking, a guardianship may be limited or unlimited in scope, and may cover the ward’s personal care, financial assets, or both. A court may limit guardianship duties to a specific matter, making specific medical decisions or selling a home as examples, or may grant unlimited guardianship responsibility and authority if incapacity is pervasive. In some situations, a court may appoint an emergency guardian to address an immediate danger to the proposed ward. If a guardian has already been appointed by the court, some courts may allow for the appointment of a temporary substitute guardian. Caregivers who are also guardians may want to give some consideration to this form of guardianship, if it is available in their jurisdiction, as a way to prevent caregiver fatigue.

A guardian may be appointed “guardian of person” and charged with the custody, support, and maintenance of the ward. This includes all day-to-day decision making of a personal nature,

¹ Guardianship proceedings are a matter of state law. Terminology and procedures may differ from state to state. Some states use the term “guardian” to describe an individual with the legal authority and duty to care for another’s person, and “conservator” as one who has the legal authority and duty to manage another’s financial affairs. For the purposes of this article, the terms “guardian of person” and “guardian of estate” will be used, respectively, to discuss these two types
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including arrangements for food, clothing, housing, medical care, and recreation. A guardian may be appointed “guardian of estate” with the responsibility to manage the finances of the ward in the ward’s best interest. The court may determine that the ward needs both a guardian of person and estate. In this situation, the court may appoint two individuals to act in each capacity separately, or may appoint one person to act as guardian of person and estate. Courts in some jurisdictions may prefer to appoint a relative to serve as guardian of person, and a bank, or even an attorney, to serve as guardian of estate.

Most states require a recent medical evaluation completed and signed by a physician, psychologist, or other court-authorized professional to accompany the guardianship application. Generally, the evaluation describes the proposed ward’s specific cognitive and functional limitations, mental and physical condition, prognosis for improvement, and a recommendation as to the appropriate treatment or habilitation plan for the proposed ward. In most states, an incapacitated person is defined as someone who is unable to receive and evaluate information or to make or communicated decisions to the point that the person’s ability to care for her health, safety, or self is compromised. A diagnosis of a particular illness or disease is not conclusive evidence for the finding of incapacity. Instead, courts will look to a pattern of behaviors and judgments, paired with medical information, to assess the degree incapacity.

The degree to which the older person is incapacitated should drive the type of guardianship most necessary for their situation. Unfortunately, as noted by a local probate court magistrate in Cuyahoga County, Ohio, most older persons face deteriorative-type illnesses, and

of authorities.

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guardianship is often sought not to stabilize the older person's condition as may be the case with younger persons, but to provide ongoing care to the older person who may not realize the extent of her need for help. The least restrictive alternative necessary to care for the ward may initially be a limited guardianship in which the guardian is authorized to make specific medical decisions related to a particular illness, but then expands over time into unlimited guardianship of person and estate where the guardian, under court supervision, is managing every detail of the ward's life.

The application for appointment of guardian will, in most states, be set for hearing by the court. The court must provide a copy of the application and notice of the hearing to the proposed ward who is entitled to due process protection during guardianship proceedings, though any additional rights afforded the proposed ward vary by state. The next of kin of the proposed ward may also be required to receive notice of the hearing on the application. The proposed ward is also entitled to legal counsel. Few states require the appointment of counsel, but most make counsel available to indigent persons. The court may appoint a guardian ad litem to represent the best interests of the proposed ward, however, this person acts as an independent evaluator for the court rather than advocate for the proposed ward. Some courts may send out their own investigators, in place of a guardian ad litem, to interview the prospective ward before the guardianship hearing. The proposed ward is generally permitted to compel, confront, and cross-examine witnesses, present evidence, and appeal the determination of the court during guardianship proceedings. Jury trials are very rare. If a guardianship application is contested, the most typical procedure calls for a judge to hold a bench trial.

Applicants for appointment as guardian must meet minimum requirements imposed by each state. The most common minimum requirements prevent anyone who is a convicted felon, a minor, or under guardianship themselves to serve as guardian for another. In addition, most states also give priority to certain individuals when applying as guardian for a proposed ward. Typically, a person already acting as guardian for the ward in another state, a person nominated as guardian in the proposed ward's power of attorney (executed before the alleged incapacity), and the spouse or adult child of the proposed ward all may be considered as preferred applicants in guardianship proceedings.

However, in the majority of states, no one may become the guardian of an adult person, regardless of preference under state law, until appointed by the court. The court, acting in the best interest of the proposed ward, retains the ultimate authority to appoint whomever it deems as most qualified to act as guardian. The court may ask the proposed ward who she would like appointed guardian, if the situation is appropriate for such questions. In many areas of the country, volunteer guardianship programs are available to serve the needs of indigent older persons who do not have a family member to serve as legal guardian of person. After appointment, a guardian of estate is most often required to post a fiduciary bond with the court to insure the guardianship assets in case of mismanagement or misappropriation by the guardian. All newly appointed guardians must attest to the court that he or she will fulfill all of his or her legal obligations to the ward as imposed by the court. These obligations include regular reporting requirements, and may also include guardianship training. If any obligation is not satisfied, the court may remove the guardian at the guardian's expense.

Once appointed, the guardian of person is charged with the daily care, maintenance, and support of the ward. The guardian must provide, or contract to provide for, the ward's housing, meals, administration of medication, and health care. These services and expenses are paid for from the ward's own funds; the guardian is not expected to pay for these items from the guardian's personal funds. The guardian must help and support the ward – the guardian cannot make the ward do anything against her own will, unless specified by the court. In some jurisdictions, the guardian may want to formally petition the court when faced with major decision like whether to place the ward in a nursing home or consent to certain medical treatments. Prior court approval will help insure the guardian does not face any additional caregiver liability besides the guardianship obligations imposed by the probate court. Most states require a periodic report to the court by the guardian on the ward's health and well-being, and a report from a medical professional indicating whether a guardianship continues to be necessary. The court, upon its own motion or motion by the ward, may terminate guardianship of person if the ward regains her ability to care for her person. If a guardian of estate was also appointed for the older person, the court may continue the guardianship of estate so as to best manage the guardianship assets.

During the course of a guardianship of estate, the guardian must apply to the court for permission prior to spending or investing the ward's funds. The guardian is also required to make periodic accountings to the court for funds received and expenses paid on behalf of the ward from the ward's funds. The guardian must continually show the court that all decisions on the ward's behalf are in the ward's best interests, not merely convenient for the guardian, and that all funds are spent on the ward. The guardian must use the ward's funds to maintain the ward at a standard

of living that is consistent with the size of the ward's estate and adequately meets the ward's medical and other needs.

If the guardian of person or estate fails to meet his or her legal obligations to the ward, he or she may be removed as guardian by the court. Family members or public agency workers may inform the court that the ward is receiving improper or insufficient care, or that her funds are being improperly managed either by the guardian as caregiver themselves or by a caregiver retained by the guardian. The court, or family members, may file a motion to remove the guardian and require the guardian to testify in court as to the facts behind such allegations. The local probate court in Cuyahoga County, Ohio typically holds three removal hearings per week as an example of the frequency of alleged guardian failures. If the allegations of maltreatment or misappropriation of funds are justified, the guardian may also face charges of neglect, abuse and or theft under local criminal laws.

As a court-supervised alternative to guardianship, some jurisdictions may also allow for the appointment of a conservator. A conservator is typically appointed by a court when a physically-impaired individual, who is otherwise capable, requires the assistance of another to care for her person or her assets. A conservatorship may be for a definite or indefinite period of time, and may be limited or unlimited. The appointment is voluntary, made upon the application of the individual, and preserves the individual's legal competency.

If appropriate planning was done prior to an older person's failing physical or mental health, guardianship should be the last option for the older person and her caregiver. Alternatives to guardianship include healthcare power of attorney and durable power of attorney (which are

similar in scope to guardianship of person and estate, respectively), jointly owned bank accounts, designation of a representative payee to receive the older person's Social Security income, or a trust. Probate courts over the years have seen increased use of estate planning documents reduce the courts' involvement in matters previously requiring the appointment of a guardian. For example, a local probate court in Northeastern Ohio is typically reluctant to overturn a trust agreement and a power of attorney for health care executed by a proposed ward while the ward was still competent. These estate planning documents, according to the court, best represent the proposed ward's intentions in managing her personal affairs after she becomes incapacitated.

These alternatives to legal guardianship can help avoid excessive legal fees and probate court supervision. However, the older person must be legally competent and have a family member or friend who can be trusted to make decisions in her best interests, and who is willing to take on the added responsibility of caring for the older person and managing her assets. The older person, and those around her, should be careful to spot exploitation and prevent undue influence by persons who do not have the best interests of the older person in mind when agreeing to take over these kinds of responsibilities. Any legal documents should be drafted and executed with the assistance of an attorney experienced in estate planning, elder, and probate law who can help identify potential situations of concern. While executing one of these alternatives does not guarantee avoidance of guardianship proceedings, it may go a long way to delaying court involvement until absolutely necessary and preserving an older person's sense of independence which may contribute significantly to her overall well-being.

If none of the alternatives to guardianship are available and a caregiver find themselves

dealing with guardianship-related issues, a local probate court magistrate provides the following advice:

- Be a good listener;
- Don't go into the guardianship with preconceived ideas about what you want for the ward;
- Don't cut out the ward's other family members or acquaintances – you could see a motion for removal as guardian and find yourself testifying before the court in a removal hearing;
- Don't ignore the prior expressed desires of the ward – honor the ward's previously executed living will; and
- Do pay close attention to the admonitions of the court and remember a guardian's duties and obligation to the ward, i.e. don't spend guardianship assets without prior court approval.

Attorneys for both the caregiver and older person should be attuned to what their clients are going through when involved in guardianship proceedings, or when trying to implement any of the alternatives to guardianship. Clients may face multiple stressors related to changing familial roles and the declining health of the older person. Caregivers should exercise empathy and regularly put themselves in the older person's position as well. Attorneys, who may be dealing with aging parents of their own, provide the best advice when they try to see a situation from both the perspective of the caregiver and older person, providing solutions grounded in sensitivity and flexibility.

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