

PFA Tips

Alternatives to Guardianship

In many cases, guardianship is absolutely necessary to protect the person from harm and to administer property that is in the person's name. However, it should be done only after other solutions have been considered.

What is adult guardianship?

Guardianship is a legal proceeding in which a petitioner (usually a family member or friend) asks the court to find that a person is unable to manage her own affairs effectively because of a disability. The court then appoints someone to act for that person and make decisions affecting her person, her property, or both.

Why would a person need a guardian?

A person may need a guardian if she is unable to make everyday decisions because of the effects of a disease or other disabling condition.

What are the different kinds of guardianship?

The court may either appoint a guardian of the person, a guardian of the property, or both. One person can serve as both guardian of the person and guardian of the property, or different people can take each role.

In general, a guardian of the person makes decisions about a person's medical care, housing, food, clothing, and other subjects that affect the person. In contrast, a guardian of the property typically makes decisions about a person's money, income, property of any kind, stocks and bonds, and other financial matters.

What is the effect of a guardianship?

The appointment of a guardian has a substantial effect on an individual's life. The adult may no longer have any authority to make decisions about her personal life or

property because that authority has been delegated to a guardian. This loss of personal freedom may have great significance, particularly when the person retains some decision-making ability, as with a person with an intellectual disability or mental illness. However, under Maryland law, the appointment of a guardian "does not modify any civil right of the disabled person unless the court orders, including any civil service ranking, appointment, and rights relating to licensure, permit, privilege, or benefit under any law."

Why avoid guardianship?

In general, the laws regarding guardianship of the person state that a guardian should be appointed only if there is no less restrictive alternative. In many cases, guardianship is absolutely necessary to protect the person from harm and to administer property that is in the person's name. However, it should be done only after other solutions have been considered.

Sometimes it is absolutely necessary to seek a guardian for a person who has a disability. In those cases, it is a welcome solution to a very difficult problem.

In other cases, however, there may be alternative ways to solve the problem. These alternatives may not be the easiest course, or the least expensive, but there are several reasons (noted below) why alternatives to guardianship are preferable if they are possible. This chapter discusses the reasons to search for alternatives and describes some solutions to common problems that prompt guardianship filings.



What are reasons to seek alternatives to guardianship?

- First, the appointment of a guardian is a serious measure. Guardianship has the potential to deprive a person of the right to make virtually all personal and financial decisions.

- Second, the law requires that a guardian of the person be appointed only when no less restrictive form of intervention is available which is consistent with the person's welfare and safety. Furthermore, the petition requesting guardianship must contain information about what other alternatives have been tried and failed.

- Third, filing for guardianship is costly and time consuming. Two attorneys (one representing the petitioner and one representing the alleged disabled person) must be paid. There may also be expert witness fees for the testimony of physicians, psychologists, or social workers. In some parts of Maryland, it will take several months for a guardian to be appointed, unless it is an emergency. Moreover, once appointed, the guardian will have an obligation to file

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annual reports with the court. At the end of the guardianship, a guardian must return to court and petition to terminate the guardianship.

- Fourth, a guardian of the person may have less authority to make decisions about life-threatening medical treatment than does a close relative who is not a guardian. A guardian may have to return to court for approval to withhold medical treatment if appropriate. A close relative or friend could make the same decision without court involvement, after consulting with the person's physicians.

Surrogate Decision Making

If a person does not have an advance directive, and is unable to consent to treatment, a surrogate decision maker can make health care decisions for her. A surrogate is a person who makes a decision for the incapacitated patient based on what that person would have wanted. If a surrogate decision maker is available, it may not be necessary to appoint a guardian of the person. The use of a surrogate most often happens in emergency medical situations.

Surrogate Decision Makers

The law lists these individuals as surrogate decision makers, in the following order of priority:

- a guardian previously appointed by the court;
- a spouse;
- an adult child;
- a parent;
- an adult brother or sister; or
- a competent friend or other relative who can demonstrate he or she has maintained regular contact with the patient sufficient to be familiar with the patient's activities, health, and personal beliefs.

Surrogates May Have More Authority than Guardians

A surrogate acting under the Maryland Health Care Decisions Act may have more authority than a guardian to make serious medical decisions. A surrogate decision maker who is not a guardian does not have to request the court's permission before making such a decision. The surrogate will only have to consult with the person's physicians and make a decision based on what he or she believes the person would have wanted. This simpler procedure is another reason to avoid the appointment of a guardian of the person unless necessary. The guardianship law states that a guardian must get the court's approval for a medical decision that poses a risk to the life of the person except under two conditions:

1. If the person has executed an advance directive that authorizes the guardian to

consent to the provision, withholding, or withdrawal of a medical procedure that involves a substantial risk to life but does not appoint a health care agent, the guardian does not have to seek the court's permission to make such a decision. However, any other guardian will have to get the court's approval before making a decision about life sustaining treatment.

2. If the guardian is within the class of individuals mentioned in the section of surrogate decision makers on the previous page and is determined by the court to be familiar with the personal beliefs, values, and medical situation of the disabled person.

For more information and assistance on guardianship and its alternatives, you are encouraged to seek counsel from a professional, specializing in guardianship law.

Portions of Guardianship and Its Alternatives: A Handbook on Maryland Law have been reprinted by Pathfinders for Autism.

Credit to:

Guardianship and Its Alternatives: A Handbook on Maryland Law, The University of Maryland Francis King Carey School of Law's Law & Health Care Program, and the Maryland State Bar Association.

Additional Resources

Guardianship and Its Alternatives: A Handbook on Maryland Law
<https://callegarylaw.com/guardianship-alternatives-maryland-law/>

The Law Offices of Ellen A. Callegary, P.A.
<https://callegarylaw.com/>

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