Who May Have a Guardian Chosen to Manage His/Her Affairs?

The law takes for granted that an adult 18 years of age or older is able to manage his/her own affairs. For a person to have a guardian, it must be proven a person cannot make or communicate responsible decisions concerning personal or financial matters. Developmental disability, physical disability, or mental health can be reasons for a lack of responsible decision making. The laws of the state in which the individual resides must be reviewed to learn the state's definition of an incapacitated person (someone who can't make responsible decisions).

How is it Determined That a Person May Need a Guardian?

The fact that someone has a diagnosis or disability does not automatically mean there is a need for a guardian. The main test for determining the need for guardianship focuses on whether the person in question can make decisions and communicate the decisions made. The following questions help determine whether or not a guardian is needed:

1. Does the individual understand that a decision needs to be made?
2. Does the individual understand the options available in making a decision?
3. Does the individual understand what could happen as a result of the decision and options?
4. Can the individual tell the decision to the appropriate people?

The areas of decision-making in which most guardians are focused are living conditions, medical care, vocational (job) and educational services, professional services, caring for dependents, and managing finances.

Who Can Act as a Guardian?

- Individuals – 18 years of age, not convicted of a felony, and not labeled as disabled as a result of a court (legal) judgment.
- Non-related professional guardians, 18 years of age, not convicted of a felony, and not labeled as disabled as a result of a court (legal) judgment.
- A public or private institution, not supplying housing.
- Financial institutions (for estate matters only)

In some states there is a preference, stated in law, for family members as guardian; in others it is at the choice of the court. For specifics about who may be a guardian in various states, review the individual state's Guardianship statutes.

How is Guardianship appointed?

A guardian is appointed after a petition (an official request for guardianship) is filed, a court hearing is held, and the court determines, based on the evidence presented, that (1) the individual cannot make responsible decisions (is incapacitated) according to law of that state and guardianship is appropriate; and (2) who or what institution will act as guardian and (3) what the authority of the guardian will be.

"Questions and Answers on Guardianship Issues." National Guardianship Association. 1998
(Some text from pamphlet has been edited)

What are the Usual Steps to Appointing a Guardian?

Before starting any legal proceedings, a report must be obtained that confirms that the person has a disability and because of that disability needs a guardian. At a minimum the report should:

1) provide a description of the nature and type of disability and an explanation of how that disability impacts the individual's decision-making
2) offer an analysis and results of evaluations of the individual's mental and physical condition, educational condition, adaptive behavior and social skills as appropriate
3) state an opinion about the need for guardianship, and provide supporting reasons for this opinion
4) recommend suitable living arrangements and treatment or habilitation plans and again the supporting reasons for the recommendations.

This report should accurately reflect the skills and abilities of the person as well as the areas if assistance. Finally, the report must be signed by all involved in the evaluation, and in most states one of the signers must be a physician licensed to practice in that state. The report must be timely and meet a time frame that is usually stated in the statute.

A petition, which is the official request for guardianship, will be prepared and signed by someone who is declaring that the individual in question cannot make responsible decisions (is incapacitated), and the need for guardianship; it is then filed.

A hearing date will be set and usually a summons is served. The summons is the official notice to the person with disabilities about important information regarding guardianship, which includes date, time, and location. Notice of the date, time and place of the guardianship proceedings is given to any interested parties, family members, proposed guardian, etc., in order that they can be present at the hearing if they choose.

A hearing will be held and evidence is presented about the need for guardianship. The individual in question for whom the hearing is held is usually represented by an attorney during a hearing process. Although at times the hearing may seem to be quite informal, this is a process which features arguments for and against guardianship and the person requesting guardianship must clearly demonstrate to the court that the individual needs a guardian of some sort.

The above includes very broad and general descriptions. During the proceedings of a guardian, the person for whom the hearing is being held has specific due process rights which are listed in the state laws. Although an attorney may not be required to establish guardianship in some area, this is a legal process. It may be best to consult an attorney familiar with guardianship proceedings and disability.

Can Guardianship be Used in an Emergency?

In most states there is a method for an emergency guardianship for a specific purpose. They are usually time-limited and not renewable without a full guardianship proceeding. There is usually a brief hearing about the specific issue and a guardian's authority is only in the area of the issue presented. Usually this is not a full finding of an individual's not being able to make responsible decisions, and a full hearing on the guardianship must be scheduled or the emergency/temporary guardianship expires.

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