

On Guard:

**Making Sensible
Decisions about
Guardianship**

ALABAMA DISABILITIES



ADVOCACY PROGRAM



On Guard:

Making Sensible Decisions about Guardianship

The purpose of this pamphlet is to provide information about guardianships in Alabama. This pamphlet is not designed to provide legal advice. Anyone interested in obtaining additional information about guardianships should contact their local county probate office.

The Alabama Disabilities Advocacy Program (ADAP) does not assist persons in obtaining guardianships over persons with disabilities. ADAP believes all persons, regardless of disability, have the right to make personal choices and help make decisions about their own lives. This includes living arrangements, personal relationships, daily activities, personal finances, and employment.

This booklet makes numerous references to Alabama state law. Title 26 of the Alabama Code spells out all aspects of guardianships. The full text of the Alabama Code can be found on the following website: <http://www.legislature.state.al.us/CodeofAlabama/1975/coatoc.htm>.



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What is a Guardianship?

A guardianship is a creation of law. If the court finds a guardian is needed, the court has the power to assign a guardian to a minor or an incapacitated person, potentially including a person who has a developmental disability. This pamphlet discusses guardianships over persons with disabilities.

An incapacitated person, as defined by Alabama law, is any person who has one or more of the following impairments: mental illness, mental deficiency, physical illness or disability, physical or mental infirmities accompanying advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority), and lacks the ability to make or communicate responsible decisions. To be an “incapacitated person” a person must have one of the impairments AND not have the ability to make responsible decisions. Not every person with a disability is “incapacitated.”

Joe is a person with mental illness. Joe takes medication to control the symptoms of his mental illness. Joe lives independently and works full-time. Joe does not need a guardianship.

A Probate Court makes the decision as to whether a person is incapacitated when a petition is filed for guardianship. If a Probate Court believes a person has an impairment that causes him/her to be unable to make or communicate responsible decisions, then that court may appoint a guardian over that person.

Under Alabama law, the definition of an “incapacitated person” may include persons

with developmental disabilities. A developmental disability is a physical or mental disability that is present prior to the age of 22 and substantially limits certain daily life activities. The law provides for some limits on guardianships for a person with developmental disabilities in that guardianships should be used chiefly to protect an individual from abuse and neglect. The person with a disability should retain as much independent decision-making as possible.

Molly is a person with moderate mental retardation. Molly lives in a small group home with two other people. Molly has a guardian who makes sure that Molly receives good care at her home. Molly chooses her own daily activities and who her friends are.

Alabama law refers to a person for whom a guardian has been appointed as a “ward.”

A consequence of a full guardianship is that all decision-making ability is taken from the ward and vested in the appointing court and guardian. If a person has a full guardianship, all decisions can be made by the guardian, rather than the person.

Jimmy is a person with Alzheimer's. Jimmy's daughter gets a full guardianship over him. Jimmy's daughter can decide where Jimmy lives, how Jimmy spends his days and who Jimmy can be friends with.

Alabama law also provides for limited guardianships, which are discussed below.

Limited Guardianships

There is more than one type of guardianship. Alabama has created its laws in order to prevent an all-or-none status of guardianships. A limited guardianship is an effective alternative to a full guardianship. Alabama law favors a limited guardianship.

A limited guardianship is a guardianship in which the guardian has more specific authority in caring for the ward. The guardian's limitations are usually explicitly expressed in an Order by a Probate Court granting guardianship. Alabama law prefers limited guardianships so that the freedoms and choices of the ward are retained to the extent possible and the guardian makes other necessary decisions.

Under a full guardianship, the guardian can make decisions for the ward in all parts of the ward's life. In most, if not all cases, persons with disabilities have the ability to make many of their own decisions. Decisions

made by guardians often deal with finances, where to live, social interaction and medical treatment. If a person has the ability to make a decision in any of these areas, the person should be able to make those decisions without the interference of a guardian. Limited guardianships for persons with disabilities should be the rule rather than the exception.

Bill is a person with autism. He lives at home with his parents, who handle his finances. Bill has often said he never wants to live in an institution and would someday like to have his own apartment. If the court grants Bill's parents a guardianship over him, the court should limit the guardianship and allow Bill to decide where he will live.

What is a Conservatorship?



To obtain a conservatorship, the court must decide that the ward has a disability that keeps him/her from making decisions about financial affairs. A conservatorship is similar to a guardianship in that a conservator is appointed by a Probate Court to make decisions on behalf of another person. However, a conservator is limited to making decisions regarding the property of a ward.

A conservator controls the property of the ward and is required to use the property for the health, support, maintenance, or education of the ward. In other words, a conservator may control how much money is given to a ward for regular expenses and may use the property of the ward to pay bills on behalf of the ward.

Jane is a person with mild mental retardation. Jane's mother is her conservator. Jane's mother uses Jane's income to pay all of Jane's bills. Jane likes to go shopping for clothes. Jane's mother gives Jane \$25 of Jane's money per week to buy clothes.

Alabama law also provides for limited conservatorships. The conservator's limitations are usually spelled out in an Order by the Probate Court granting conservatorship. The limited conservator may, for example, be ordered to manage payment of living expenses of the ward, but not interfere in the ward's choices in spending excess income.

Fred has a traumatic brain injury. Fred receives social security that pays for Fred's living expenses. Fred's limited conservator is responsible for making sure Fred's social security is used to pay his living expenses. Fred has a special trust fund that pays for other expenses. Fred loves to watch movies. Fred uses the money from the trust fund to buy DVDs for his movie collection.

Guardianship Process

Although the effects of a guardianship and conservatorship are different (as described in Sections II, III, & IV), the process for obtaining a guardianship and/or conservatorship is very similar. Often, persons will seek both a guardianship and conservatorship at the same time over an individual who may be unable to care for himself or herself.

Both proceedings begin with the filing of a Petition for Letters of Guardianship and/or Conservatorship. This petition usually is filed by a family member of the person subject to guardianship. The law does not require that the applicant be a family member of the potential ward.

Once a petition has been filed, the court will issue a series of orders appointing a court representative, a doctor to examine the potential ward and a guardian ad litem to represent the ward's interest. The court will also set a date for a hearing to determine whether an individual should be placed under a guardianship and/or conservatorship.

The court representative has the following duties:

- 1) interview the potential ward;
- 2) interview the person who has filed the guardianship and/or conservatorship petition;
- 3) interview the proposed guardian/conservator;
- 4) visit the current residence of the potential ward;
- 5) visit the potential ward's new home if it is different from the current residence; and
- 6) report to the Probate Court the results of the court representative's investigation.

Alabama law requires a doctor to examine and review the medical records of the potential ward and report to the court the results of the examination. The law does not require that the doctor personally know the potential ward. But, it is good practice for the potential ward's primary doctor to examine him/her. The doctor generally will provide an opinion as to whether the person has the capacity to make independent decisions based upon medical evidence of the person's abilities. The potential ward and/or his/her lawyer may also ask another doctor to examine the potential ward and/or medical records to provide a second opinion.

Once the court representative, doctor, and guardian ad litem have prepared reports for the court, the court will hold a hearing to determine whether appointing a guardian and/or conservator is appropriate. The potential ward is entitled to notice of the hearing. Also, spouses, adult children and, in some cases, the parents of the potential ward are entitled to notice of the hearing. The notice of the hearing must be personally given to the potential ward and other interested persons.

Guardianship and conservatorship hearings are generally informal. However, the court must find that there is no alternative to guardianship and that a guardianship is necessary to meet the individual's needs. The court will generally rely upon the reports and/or testimony of the court representative to determine whether a guardianship and/or conservatorship are appropriate. The guardian ad litem will also have an opportunity to provide the court with arguments and evidence about the guardianship and/or conservatorship. The responsibilities of the guardian ad litem are explained in Section VII below.

If a court finds a guardianship and/or conservatorship is necessary, it will issue an order appointing a guardian over the ward. If a court finds a limited guardianship and/or conservatorship is appropriate, its order will specifically describe the powers of the guardian/conservator. The court will also issue Letters of Guardianship and/or Conservatorship, which allow the guardian/conservator to conduct personal business on behalf of the ward.

Responsibilities of the Guardian



A guardian is someone who is responsible for the personal well-being of an individual and looks after the person. Personal well-being includes making sure the ward has proper clothing, food, education, health care and protection from neglect, exploitation, and abuse. The guardian must, at all times, act in the best interests of the ward, even if that conflicts with the interests of the guardian.

The guardian must perform the following duties: 1) get to know the ward, including the ward's abilities, needs, limitations, and health condition; 2) take care of the ward's personal effects; 3) apply the ward's money to the ward's current needs for health, support, education, or maintenance; 4) conserve any excess money of the ward for his/her future needs; and 5) report the condition of the ward to the court when ordered to do so.

Tim is Mark's uncle. Tim has never met Mark. Tim has been appointed as Mark's guardian because Mark has no other living relatives. Tim goes to Mark's home to meet him and get to know him. Tim takes Mark to dinner once a week to get to know Mark better and make sure all of Mark's needs are being met.

Unless limited by a court, a guardian may do the following: 1) receive money payable to the ward; 2) determine where the ward lives; 3) consent to medical and other treatment of the ward; 4) consent to marriage or adoption of the ward; and 5) allow the ward to make some decisions about the ward's life.

A guardian generally is responsible for health, support, education, and maintenance of the ward. The guardian is responsible for making decisions that affect virtually every part of the ward's life. The guardian must take this responsibility very seriously. All decisions should be made with the ward's best interests in mind.

Responsibilities of the Guardian Ad Litem

A guardian ad litem is a lawyer appointed by a court to represent the interests of a potential ward. A guardian ad litem is usually appointed if the potential ward is not already represented by a lawyer.

A guardian ad litem, as a lawyer, should represent a ward with the same ethical commitment as he/she would provide any other client. During the hearing, the guardian ad litem is obligated to represent the interests of the potential ward and should oppose the guardianship and/or conservatorship if that is in the best interests of the potential ward. In the alternative, when appropriate, the guardian ad litem should seek to limit the guardianship and/or conservatorship so that the guardian's authority is limited to specific areas in which the court determines the ward needs help in making decisions.

Luke is a local lawyer who has been appointed as a guardian ad litem in Tina's guardianship proceeding. Luke meets with Tina. Tina tells Luke that she has a part-time job and likes her job very much because she uses the money from her job to go out to eat. At the guardianship hearing, Luke seeks to limit Tina's guardianship so that Tina can continue to choose for herself where she works and how she spends the money she earns from her job.

Changes in or Termination of a Guardianship

Alabama law allows a guardianship to be terminated by filing a petition asking the probate court to end the guardianship. The petition and other evidence must show a change in circumstance so that the ward is no longer in need of a guardian. In other words, the ward must show he/she is able to make his/her own decisions about his/her personal affairs. Very rarely will a court remove a guardianship once it has been put in place. A court is more likely to consider the idea of establishing a limited guardianship as opposed to ending a full guardianship.

Alternatives to Guardianship

Because guardianships severely limit a person's ability to make decisions about his/her life, less limiting options may be a better alternative. A few less restrictive alternatives include: trust, limited bank account, power of attorney, and durable power of attorney for health care. Each of these options allows persons to assist a person with a disability with his/her personal affairs. However, each alternative allows a person with a disability to retain some decision making authority. As previously explained, a full guardianship gives all decision making authority to the guardian.

Although a guardianship hearing may seem informal and parties sometimes appear to be going through the motions, persons should think very carefully before deciding to place a potential ward under a guardianship. A guardianship can severely limit a person's freedom and ability to make decisions about his or her own life. Once established, guardianships are often difficult to remove. If a guardianship is considered, all parties involved should work closely together to make sure the guardianship places the fewest possible limits on personal freedom, choice, and dignity.



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