

PLANNING FOR YOUR FUTURE

What is guardianship?

By Bernard A. Krooks, Certified Elder Law Attorney

The attorneys at Littman Krooks LLP are frequently consulted by the families of incapacitated persons. Where there is no durable power of attorney or advance medical directive (health care proxy or living will), the appointment of a guardian may be necessary.

What is a guardian? A guardian of the person is someone appointed by the court that is responsible for the personal affairs of an incapacitated person, including responsibility for making decisions regarding the person's support, care, health, safety, education, therapeutic treatment, and residence.

A guardian of the property is someone appointed by the court that is responsible for managing the assets, income and financial affairs of an incapacitated person. In many cases, the guardian of the person also serves as the guardian of the property.

When is a guardianship appropriate? Guardianship is appropriate when a person has diminished capacity and is no longer able to understand and appreciate the consequences of their actions or inactions. A finding that an individual displays poor judgment, alone, is not considered sufficient evidence that the individual is incapacitated.

How does one become a guardian? A petition must be filed with the court requesting the appointment of a guardian. Generally, anyone interested in the well-being of the alleged incapacitated person may file the petition. After filing the petition, the court will appoint a court evaluator who serves as the eyes and ears of the court. This person will file a report to the court and will testify at the hearing. The incapacitated person is entitled to a jury trial, upon request, and may compel witnesses, present evidence, and cross-examine witnesses. If, after considering the evidence presented at the hearing, the court or jury determines on the basis of clear and convincing evidence that the individual is incapacitated and in need of a guardian, the court appoints a suitable person as guardian. A guardian appointed by the court must qualify before receiving a commission to act. The qualification process includes: (1) signing an oath promising to faithfully perform his or her duties, (2) posting bond, and (3) attending a guardianship training course.

How long does this appointment last? The court order appointing a guardian may limit the appointment to a specified length of time. If no time limitation is specified, then the appointment will last until the death of the incapacitated person or the guardian, until the incapacitated person is able to establish that he or she has regained capacity, or until the guardian resigns or is removed by the court.

What authority does the guardian have? Except as limited by the court, the guardian has control over the personal affairs of the incapacitated person. This includes deciding where the incapacitated person will live and to make routine medical decisions for the incapacitated person. Subject to the limitations in the order, the guardian has the authority to take care of and preserve the estate of the incapacitated person and to manage it for the benefit of the incapacitated person.

What are the responsibilities of the guardian? A guardian must maintain sufficient contact with the incapacitated person to know his or her capabilities and visit the incapacitated person at least four times a year. The guardian must also file annual reports with the court. These reports are reviewed by a court examiner.

Are there alternatives to guardianship? There certainly are alternatives to guardianship. By executing a properly drafted health care proxy, living will and durable power of attorney, a guardianship can be avoided.

A guardianship is a time-consuming and expensive process which can be avoided by planning in advance. Why not take the time to make sure your affairs are in order? You and your family will be glad you did.

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