



Guardianship and Alternatives to Guardianship in Kentucky

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Thinking about guardianship?

In Kentucky, a person is considered an independent adult at age eighteen (18). Being an adult means a person can do such things as vote, sign contracts, or consent to medical procedures without someone else's permission. That is true even for people with disabilities who might need help taking care of themselves or managing where they will live and work. Some families choose guardianship as a way to help a family member who is not able to make or communicate personal decisions or who is unable to take care of personal needs.

What is guardianship?

Guardianship is a legal tool that grants a parent or other adult the legal authority to make decisions for a legally disabled adult. An adult is considered to be legally disabled after a court has ruled in a disability hearing that the person cannot take care of their personal needs or manage their finances. If the court finds a person to be legally disabled, the court will appoint a guardian or a conservator to help with personal or financial needs in the areas the disabled person cannot manage alone.

During the disability hearing, the court will also consider if the person can take care of some things on their own. For example, can they take care of their own money, living arrangements and physical health and safety? If the person needs help in some areas, but not others, the court may appoint a limited guardian or a conservator. Before pursuing guardianship, people should consider the many alternatives to guardianship that may be a better way to help their loved ones.

What are a guardian's duties?

A guardian should focus on the legally disabled adult's well-being. The goal of guardianship is 1) to protect the personal, civil, and human rights of the person and 2) encourage them to make their own decisions and act on their own behalf to the extent possible. Depending upon the specific rights the court takes away, the guardian's duties may include:

- Arranging for a place for the person to live in the least restrictive environment
- Arranging for educational, social, vocational, and rehabilitation services
- Arranging for other services the person needs to meet his needs
- Consenting to medical treatment for the person
- Managing the person's finances, unless the court has appointed a separate conservator
- Carrying out only those duties the court requires

A guardian, however, may not consent to abortion, sterilization, psycho-surgery, removal of a bodily organ, or amputation of a limb without court approval unless there is an emergency that requires it.

A guardian also must report to the court every year about how the person under guardianship is doing. The report includes information on where they are living, what programs they are involved in, and whether guardianship continues to be needed.

If the guardian is also responsible for the person's finances, a financial report about their assets and income must be filed with the court within sixty (60) days of appointment. In addition, the guardian must file a financial report with the court every two (2) years. The financial report is a simple accounting of what money was received by the person (for instance, a SSI check) and how it was used for the person's benefit. Forms for these reports are available at: <http://courts.ky.gov/resources/legalforms>.

What is a conservatorship?

A conservator is a type of guardian who only manages the person's finances. The court may appoint a conservator alone, or in combination with a limited guardian, to handle a legally disabled person's financial affairs.

After the conservator's appointment, within sixty (60) days they must file a list of the person's property with the court. They must then file a report every two (2) years saying how much money and property they have received as conservator and how they are using it on behalf of the person with the disability.

What kinds of guardians and conservators might the court appoint?

If the court finds that a person is legally disabled and needs help with all or some of their personal needs or finances, the court can appoint a

- Full guardian if the person is unable to take care of all their personal needs and financial affairs
- Limited guardian if a person can take care of some personal needs but needs help in other areas
- Conservator if the person only needs help with his finances
- Both a limited guardian and a conservator

If the person lives in an institution or there is no one willing to serve as their guardian or conservator, the court may appoint the state guardian or conservator. The state can act as guardian, conservator, limited guardian, limited conservator, or any combination that the court decides is needed under the circumstances.

Guardianship has consequences

Being under guardianship has significant implications for the legally disabled adult. While it may be necessary in order for the person to live life more safely, it also limits many of their civil rights. In fact, many of their rights will be lost altogether when under guardianship so it should not be undertaken lightly. The rights that can be lost include:

- The right to marry or divorce
- The right to vote or hold office
- The right to make a contract
- The right to make a will
- The right to get a drivers' license
- The right to own or sell property
- The right to rent property
- The right to decide about medical treatment
- The right to make decisions about one's own social life

Balancing the values of independence and protection can be a challenge. One should consider the person's needs and wishes and explore less restrictive options when available.

What are some alternatives to guardianship?

Advance Directives

An advance directive is a written document that states an adult's choices about medical care or names someone to make medical decisions on their behalf if they become unable to speak for themselves. It is called an advance directive because it is signed in advance to let the person's family and doctors know their wishes about medical treatment. Kentucky recognizes many types of advance directives, including living wills, healthcare surrogate designations, durable powers of attorney and mental health advance directives. The Kentucky Attorney General's office has created a living will packet that can be found at:

<http://ag.ky.gov/family/consumerprotection/livingwills/documents/livingwillpackets.pdf>

General Adult Services

General Adult Services are provided through the Kentucky Cabinet for Health and Family Services. General adult services help adults attain or maintain self-sufficiency in the community. They include preventive services, counseling, transitional services, and referral or coordination of services, such as arranging transportation. General adult services are voluntary; adults can refuse them if they want to. General Adult Services may be requested by the adult, or at the direction of the adult, who is in need of services.

Bank Accounts Requiring Co-Signatures

This type of account protects a person's finances, while giving the person the opportunity to develop money management skills. Of course, this type of bank account should only be established with a trusted relative or friend.

Power of Attorney

A person can appoint another adult as power of attorney by giving written permission to pay bills and make other decisions without giving up their civil rights. A person can appoint someone as power of attorney only if he/she fully understand what he/she are authorizing the other person to do for them. They then can change or revoke the power of attorney at any time. However, a power of attorney can be written so that it continues if the person becomes unable to make decisions. This is called a durable power of attorney.

Representative Payee

Many government agencies, such as the Social Security Administration and the Veteran's Administration, get to decide if another person is appointed to receive and manage funds for the person with the disability. This person is called a representative payee. The government agency appoints the representative payee, so no court is involved. Representative payees must report how the funds have been spent to each agency. The representative payee has no authority beyond managing income from the particular agency.

Skills Training

Service providers, such as the Centers for Independent Living, can help people with disabilities develop skills in weak areas. The Centers serve people with all kinds of disabilities. Their services include information and referral, peer counseling, advocacy, and independent living skills training.. The Centers for Independent living are non-profit and community-based. If you would like to learn about a Center for Independent Living in your area, call Protection and Advocacy at 1-800-372-2988 or visit: <http://silc.ky.gov/Pages/Centers-for-Independent-Living.aspx>.

Supported Decision-Making

Supported Decision-Making (SDM) is a term that describes how a person works with a team of trusted people to assist in making important life decisions. SDM teams can include family, friends, co-workers, and past and present providers. Team decisions may include medical, financial, living arrangement, and personal relationships. Everyone use SDM some way or another when making choices; people with disabilities are no different. SDM can be a great tool to use as an alternative to guardianship and or even as a part of guardianship. Guardians have the statutory obligation to “encourage [persons under guardianship] to participate to the maximum extent of their abilities in all decisions which affect him.” KRS 387.640. To learn more go to: <http://www.supporteddecisionmaking.org/>.

Special Needs Trusts and Pooled Trusts

A special needs trust (sometime called a supplemental needs trust) is a trust which protects the assets of a person with a disability while allowing them to qualify for and receive benefits, such as SSI and Medicaid. The trust must be created by a parent, grandparent, guardian, or a court. When the person dies, if the trust was funded by their parents, other third parties, or by court order, Medicaid will not require it to pay back the cost of any medical assistance that the person received during her lifetime. If, however, the trust has assets that originally belonged to the person before they became disabled, Medicaid must be reimbursed from the assets that remain.

A pooled special needs trust is run by a nonprofit association. Separate accounts are maintained for each individual beneficiary but the assets are pooled for investment and management purposes. While each trust beneficiary has a separate count, the trustee chosen by the nonprofit spends money on behalf of each beneficiary. Upon the death of the disabled individual, the balance is either retained in the trust for the nonprofit association or paid back to Medicaid to reimburse any medical assistance.

Special needs trust are complex and many specific rules apply. Consultation with an attorney experienced in special needs planning is recommended.

Kentucky STABLE Accounts

STABLE accounts give individuals with disabilities the ability to save and invest money without losing or affecting other benefits, such as Medicaid and Supplemental Security Income (SSI). Congress passed the Achieving a Better Life Experience (ABLE) Act in 2014, which established the savings/investment accounts that can improve the quality of lives of individuals with disabilities. Funds in the accounts can be used for disability-related expenses and earnings are tax-free. Annual contribution limits are \$15,000 and if employed, you have the ability to contribute an additional \$12,060. For more information, you can go to: www.stablekentucky.com.

When should guardianship be considered?

Before pursuing guardianship, everyone should think about the specific problems the person is having. If the person is disabled but capable of making some, though not all, decisions, consider one or more of the alternatives to guardianship discussed above. Some questions to ask are:

- Can the person provide for his/her own personal needs for physical health, food, clothing, or shelter?
- Are they able to manage personal financial resources effectively?
- Would they be taken advantage of if no one were appointed to act as guardian?
- Is there another way to help other than guardianship, which takes away rights?

Guardianship is not a way to force someone to do what another person thinks he should do. Some problems, like drinking too much or not taking prescribed medications are not the kinds of problems that guardianship can fix. Within the limits of the law, adults have the right to make decisions others may view as unwise.

Many people with disabilities continue to live in their communities with a helping hand from family and friends. They do not need formal legal assistance. However, if a person cannot take care of himself and people closest to them are not able to help enough, guardianship may be needed

When considering guardianship, you need to think about who should become the guardian. In many families, parents take on that role for as long as they are able. When parents dies or can no longer do the job, someone else must be named. That person might be a sibling, relative, or trusted friend. Some people select co-guardians, such as a parent and a sibling to share the responsibility.

How does the court appoint a guardian or conservator?

Generally, disability hearings take place in the county where the person thought to be disabled lives. The person asking for guardianship or conservatorship must first complete a Petition to Determine if disabled form and file it with the court. The form is available from the local District Court. The form can also be found online at:

<http://courts.ky.gov/resources/legalforms/LegalForms/740.pdf>.

Anyone concerned with the welfare of a person with a disability may file the petition. The form asks for information about where the person lives, who the next of kin is, and why a guardian or conservator is necessary.

At the same time, the petition for a disability determination is filed, the person who wants to become the guardian or conservator can file an Application for Appointment of Fiduciary for Disabled Persons. This application is also available from the District Court or online at: <http://courts.ky.gov/resources/legalforms/LegalForms/745.pdf>.

If the adult with the disability does not have a lawyer, the court will appoint an attorney to represent them during the guardianship proceedings. The court will pay the lawyer's fees if it finds the person with the disability cannot. The county attorney will represent the state in the process and assists the petitioner. The petitioner is not required to have an attorney but may choose to do so.

Before a disability hearing can be held, a physician, a psychologist, and a social worker must examine the person with the disability. They will interview them to determine their mental, physical, social, and educational abilities and needs. If the person has an intellectual disability or a mental illness, at least one of the examiners must be a professional qualified in those fields. The team of examiners will recommend to the court whether guardianship is needed. If it is, they will also recommend the kind and type of guardianship that is needed.

If these evaluation reports are not filed with the petition, the county where the proceedings are held will pay for the evaluations if the court finds the person with the disability cannot pay for them. If the person lives in a facility for persons with mental illness or intellectual disabilities and the facility files the petition, the facility will provide the court the evaluation. However, the person with the disability can ask for a second set of evaluations if they think the first evaluations are biased. The county will pay for the evaluations if the person is unable to.

If the evaluation reports are filed with the petition, the District Court will hold a hearing within thirty (30) days. Otherwise, the court will order the evaluations and schedule the hearing within sixty (60) days unless more time is needed. At least two (2) weeks before the hearing, the court will send notice of the hearing date to everyone involved in the hearing.

The person with disability must attend the hearing unless the court determines it will subject them to a serious risk of harm. A judge or jury will decide if the person is fully or partially disabled in their personal and financial affairs. Based on the court's findings, the judge may appoint a guardian, limited guardian or conservator.

The person who is found legally disabled has the right to tell the judge whom they prefer to be appointed, but the judge will appoint whomever the judge thinks is best qualified and willing to serve. The order will specify the areas in which the court authorizes the guardian or conservator to act on behalf of the disabled person. The court order will be filed with the court but must also be indexed in the county clerk's office.

When would the court appoint a state guardian?

Generally, courts do not appoint a state guardian or conservator if there is a suitable person or entity that is willing and able to fill this role. However, if there is not anyone who is suitable, the Cabinet for Health and Family Services may be appointed. If a person or entity feels that a state guardian or conservator needs to be appointed, the following steps take place:

1. He/she must contact the Division of Guardianship by phone or in writing: <http://chfs.ky.gov/dail/guardianship.html>
2. If the person has never been appointed a guardian or conservator, Adult Protective Services (APS) will be asked by the Division to determine if there is a need for immediate protection. (If this need exists, emergency guardianship proceedings will occur.)
3. The Division decides if it appears the person needs a guardian. If so, it will then ask the referrer to complete an information packet about the person.
4. A court hearing takes place.

How to change or end guardianship or conservatorship

At any time, the legally disabled person, or their guardian or conservator, or anyone else on their behalf may ask the court to:

- end the guardianship
- change the guardianship order
- remove or replace the guardian or conservator
- renew the appointment of a limited guardian or conservator

A proceeding for any of the actions listed above may be begun by filing a petition with the district court where the legally disabled person lives. If the request is made by the disabled person, they can simply ask the court or the clerk of the court or write a letter to the court. The court can appoint someone to help them fill out the petition. The Petition for Relief, Modification or Termination of Guardianship can also be found at:

<http://kypa.net/publications.html>. The court will hold a hearing within thirty (30) days after the petition is filed (unless more time is needed) to decide whether to do what was asked in the petition.

Summary

Choosing guardianship is a big decision, but it still has some flexibility. Guardianship is a legal means of helping adults with disabilities, yet it is a complicated issue because it can remove personal freedom and choice. Guardianship does not have to be forever. If the adult with a disability becomes able to manage their affairs, the court can end the guardianship. Keep in mind, too, that the court reviews the guardianship arrangement each year. The scope of the guardianship can be changed, the guardianship can be ended, or a different guardian chosen. The goal of guardianship is to protect the personal, civil, and human rights of the person with the disability and to encourage them to make their own decisions and act on their own behalf, and retain or regain as many rights as possible.

This booklet was adapted from the Guardianship in Kentucky handbook by Kentucky P&A. The Handbook contains more details about Kentucky's guardianship laws. Call P&A if you would like a copy sent to you or visit: www.kypa.net/publications.html. Parts of this booklet were also adapted from Considering Guardianship, By Marcia Kelly, The Pacesetter, summer 2006, Vol. 29, Issues 2. Used with permission from PACER Center Inc., Minneapolis, MN, (952) 838-9000, www.pacer.org. All rights reserved. This booklet is not legal advice. Please talk to a lawyer if you have questions.

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