

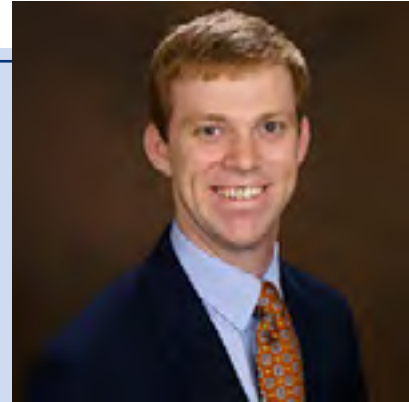
Guardianship and Conservatorship

Introduction

When an individual turns 18, he or she is presumed competent to make decisions about his or her person and property unless a court determines otherwise. Up until age 18, parents are the “natural guardians” of their minor child and have legal authority to make decisions about their child’s health, education, safety and support. If you feel that at 18, your child is not or will not be able to make important legal decisions on his or her own behalf, you may want to consider pursuing guardianship so that you can retain your ability to make such decisions for him or her. Guardianship and conservatorship are legal relationships between the guardian/conservator and the ward that are created by court Order.

Each state has established formal court procedures to appoint a guardian and/or conservator for an adult or child in need of a legal decision maker (the “ward”), and each state has its own terms. In some states, the term “guardian” refers to the person appointed by the court to make decisions of a personal nature – such as medical treatment, place of residence and general health and safety concerns – and the term “conservator” refers to the person appointed to make decisions concerning financial matters. Other states use the terms “guardian of person” and “guardian of property” to distinguish the two roles. Terminology, legal procedure, and court oversight varies from state-to-state; it is important to seek legal advice to determine how best to proceed in your state.

When seeking guardianship for an adult, the court must determine that the ward lacks the capacity to make or communicate significant responsible decisions regarding his or her health and safety or management of his or her property. For a minor, state law



This section was prepared by Reilly Morrison and Ginny Duhon. Reilly is a Trust Advisor in the Special Needs Trust Group at SunTrust Bank and is admitted to practice law in the state of Georgia.



Ginny is a Trust Advisor with SunTrust Bank’s Special Needs Trust Group and is an experienced attorney who has practiced in the specialized fields of elder law and special needs law. She is the proud sister of a special needs brother who perseveres in spite of his challenges.

determines when it is appropriate to appoint a guardian in place of the natural guardian or a conservator to manage property of the minor. Parents may designate in their Will their choice of a guardian for their minor child.

An individual may serve as both guardian and conservator, and courts generally favor those who are most involved in the ward's life and who understand the ward's needs. Parents, siblings, relatives, friends, professional guardians, and non-profit agencies are all potential candidates to serve as guardians and conservators. The court may choose to appoint co-guardians if two individuals wish to serve together.

Ultimately, an Order of guardianship or conservatorship terminates or severely limits the ward's rights and freedoms. State laws require that less restrictive alternatives are explored before guardianship or conservatorship is ordered. Some alternatives include **Power of Attorney** - a grant of shared authority by one person (the principal) to another (the agent or attorney-in-fact) to make decisions regarding finances or health care – and **Representative or Protective Payee** – a person appointed to manage benefits like Social Security.

Minor Guardianships

In the absence of parental authority, it may be necessary for a court to appoint a guardian for the child. Minor guardianship is a court proceeding to grant custody of a minor to someone other than the minor's parent or to appoint an individual to manage and administer the minor's property. Similar to adult guardianship, an individual can be appointed to make decisions regarding the minor's person or property – or both.

A guardianship of the person of a minor is most frequent when the child's parents pass away or are currently unable to care for him or her. In this circumstance, the guardian of the minor is granted the same power and authority as the minor's parent to make decisions regarding the child's health, education, safety and support. A guardianship of the person of a minor does not terminate the parental relationship and is not necessary if you are the child's parent. As a child's parent, you are considered the child's "natural guardian" and have the authority without court intervention to make most decisions regarding the minor's residence, medical treatment, confidential information and other decisions regarding the child's personal well-being.

We weren't sure about pursuing guardianship for our adult son, Sam, but after a recent experience, we are so grateful that we did. He has been able to hold a steady job and live semi-independently with some supports in place since moving out of our home five years ago, but Sam recently had a behavior crisis that involved a run in with the police and resulted in a pending court appearance. After this incident, he was placed in a hospital setting. We were terrified. While he was hospitalized, as his guardian, I was able to coordinate with several different doctors who were able to provide medication management and outpatient therapy to help him stabilize and get back to his full life outside of our family home as smoothly as possible. His father and I were also able to advocate for him and set him up with appropriate legal representation for his court appearance. Because of the guardianship arrangement, we were also able to make financial decisions for Sam while he was in the hospital so he was not late with his bills. Otherwise, we would not have been able to have a say in his medical or legal decisions during this difficult time for us.

A guardianship of the property of a minor is most common when a minor receives an inheritance or proceeds from a lawsuit or settlement. Some states will allow these proceeds to be managed by the child's parent without a court appointment, but other states require a guardian to be appointed to manage and administer these funds if the value of the proceeds exceeds an amount set out in the state's statutes. The guardian of the property is typically required to obtain a bond and is responsible for investing the funds, filing tax returns, and making distributions for the minor in accordance with the law. A guardianship of the property of a minor is typically not necessary if the child's only income and resource

are payments from the Social Security Administration. The Social Security Administration will appoint a Representative Payee to receive and distribute these funds for the minor and the Representative Payee will file an annual report with the Social Security Administration accounting for the funds.

Minor guardianships terminate when the child reaches 18 years of age.

Adult Guardian of the Person

Adult guardianship is a court proceeding to appoint an individual to make decisions about a person's health, safety, support, care, and place of residence. The procedure for obtaining a guardianship varies from state-to-state, but generally the process is initiated by an interested party filing a Petition with the court that states probable cause as to why a guardianship is necessary.

The proposed ward and other interested parties – such as the proposed ward's spouse, children and relatives – will receive a copy of the Petition, and the court will appoint an independent evaluator to assess the ward and make a written recommendation about the ward's capacity. A hearing is held after the completion of the evaluation where the court will make a determination regarding the necessity of a guardianship. The ward has a right to hire counsel to represent him or her or the court will provide counsel.

Once a guardian is appointed, the court may limit or terminate the ward's right to consent to medical treatment, establish a residence, change domicile or vote. A guardian of the person may exercise most of the ward's personal rights with the exception of the right to vote. The guardian must make decisions that are always in the ward's best interests, cooperate with the conservator, if any, and encourage the ward's participation in personal decisions so he or she may become more independent and regain the ability to manage his or her own personal affairs. The guardian must also file an annual report with the court to advise of the ward's personal status



Conservatorship

Conservatorship is intended to provide protection and management for the property of adults who lack sufficient capacity to make or communicate significant responsible decisions regarding the management of their property. Conservatorship not only appoints an individual with the authority to make these decisions on behalf of the ward, but it also removes the ward's right and ability to make certain decisions and enter into agreements of his or her own.

Some of the rights that are removed from the ward are:

the right to make, modify, or terminate contracts;

the right to buy, sell or otherwise dispose of property;

the right to conduct business or commercial transactions;

the right to revoke a revocable trust; and

the right to bring or defend an action at law.

The process for obtaining a conservatorship is similar to the process of obtaining a guardianship, and the two are most often done in tandem. Courts generally seek the least restrictive alternative to conservatorship and will tailor the conservatorship so that the ward is allowed to maintain those rights that he or she is still capable of exercising in a responsible manner.

Typically, courts will not require a conservator if the ward's only income and resources are payments from the Social Security Administration. The Social Security Administration has its own process for selecting and appointing an individual to receive and administer Social Security payments on the behalf of individuals who lack sufficient capacity to manage the payments themselves. This process is called the Representative Payee program and the Representative Payee will be responsible for accounting to the Social Security Administration for the use of the recipient's funds. Most courts view the Representative Payee program as a less restrictive alternative to conservatorship. Additionally, most courts will often find a durable power of attorney or trust to be a less restrictive alternative, provided they are adequately protecting the proposed ward's interests.

The conservator owes the ward a duty of loyalty, reasonable care, diligence, and prudence and is responsible for receiving, collecting, and making decisions regarding the ward's property. The conservator should strive to encourage the ward to participate in decisions and assist the ward, to the extent feasible, to develop the ability to manage his or her own property. The conservator should consider the ward's expressed desires and values while also acting in the ward's best interest when making decisions on the ward's behalf.

The conservator is required to provide annual accountings to the court and the court will remain involved throughout the conservatorship. Conservators are granted the authority to retain, invest and disburse funds for the ward, but this authority is also limited by state statute. From time-to-time, the conservator will need additional court approval to take certain actions, such as conducting estate planning, gifting or selling personal property, and purchasing or selling real estate. The conservatorship will continue until the ward regains capacity or passes away.

Conclusion

Guardianship and conservatorship laws vary from state-to-state. It is encouraged that local counsel is consulted at the initiation and on a regular basis throughout the administration of the guardianship and conservatorship. It is also important to remember that guardians and conservators are fiduciaries and are therefore held to a higher standard when conducting the ward's business than the guardian/conservator would be when conducting his or her own business.

