

Guardianship and Alternatives

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Presentation Objectives

- What is guardianship/what rights are limited
- Alternatives to guardianship
- Assessing the whole person to determine need for guardianship
- The court process for awarding guardianship & terminating guardianship

Why Guardianship?

- Turning 18
- The individual makes decisions that person(s) in her life disagree with

What Is Guardianship?

Guardian

- A GUARDIAN is a person appointed by the court to make decisions on behalf of their WARD.
- A court appoints a guardian for persons who lack the capacity to make reasonable decisions.

Powers Of A Guardian

- A FULL guardian has the same powers and responsibilities as a parent of a minor child.

Guardianship Is A Blunt Tool

At best, guardianship will provide personal care and property management that an individual with a disability alone cannot handle. At worst, it will deprive that individual of decision-making authority that he or she does have the capacity to handle, and will, at the same time, create the opportunity for personal and financial abuse.

Michael L. Perlin, "Striking for the Guardians and Protectors of the Mind": The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law, 117 Penn State L. Rev. 1159, 1171 (2013).

The Good

- A form of protection
- Some safeguards against abuse
- A format and a standard for decisionmaking
- Clarity about who is the “decider”
- Someone to act in an emergency

The Bad: Loss of Civil Rights

Takes away a person’s right to make decisions about his or her life. Loss of legal personhood: “civil death”.

- Where to live
- Control finances
- Property
- Freedom of association
- Marriage & family
- Accept/refuse medical treatment
- Enter into contracts
- Consent to sexual relations

Rights Retained Under Full Guardianship

- Vote (unless court order specifically limits this right)
- Seek termination of guardianship
- To not undergo sterilization without a court order

Practical Realities

- Most guardianships are “full” guardianships
- Typically life long
- Guardianship often the norm for people with developmental disabilities (“I am my own guardian”)
- Loss of ability to learn and grow from mistakes
- Takes away dignity/dignity of risk

Full Guardianship Alternatives

Community Supports

- Natural supports – friends and family
- Community services and supports – residential programs, community programs, case management, etc.

Consent Forms/Releases

- To allow a parent or other trusted individual to remain involved in care planning and education decision making. Can permit providers or school officials to contact parents in coming to PCP meetings, IEP meetings, contacted about thing related to health, services, etc.

Representative Payee

- A representative payee is a person appointed by the Social Security Administration to manage an individual's SSI/SSDI, when that individual is unable to manage it on their own.

Power Of Attorney

- Giving someone else the right to make medical and/or financial decisions when unable to make them for oneself.

Advance Directives

- In cases where someone's decision making ability may decline in the future. This communicates the person's wishes in the event that the person does not have capacity. An agent is appointed to carry out the person's wishes.

Conservator

- A person appointed by the court to make decisions concerning property and finances.

Limited Guardianship

- The court appoints a guardian who has decision making authority over some, but not all, areas of a person's life.
- Examples include medical guardian, residential guardian, conservator etc.

Things To Consider When Assessing Whether An Individual Needs A Guardian.



Why Guardianship?

- Why is guardianship being considered?
- What needs and/or problems will guardianship solve?

What resources are available?

- Natural supports
- Case management
- Community programs
- Residential programs
- Alternate financial arrangements: representative payee, joint checking account, automatic bill payment
- Alternative legal arrangements: power of attorney, advance directive, consent forms

Sample Team Meeting Questions:
Considering Guardianship

- What things does the person need help with?
- How does Guardianship specifically allow the person to get help with the things they need?
- Does the person accept help with these things?
- What things do you think this person is unable to do or understand-even with assistance?
- What things could the person learn to do, or do part of with help and practice?
- Does the person understand financial contracts enough to enter into one? (classic examples: credit cards, cell phone contracts) (It is important to be realistic about this one! College students are given credit cards all the time and we enter into cell phone contracts and rarely read the fine print!)

Sample Team Meeting Questions:
Considering Guardianship (Cont.)

- Does the person understand day-to-day conversations with their medical providers about their health and medications (with help if needed)?
- Does the person ask for help or accept help with medical decisions or scheduling appointments?
- What are your biggest fears about this person not having a guardian?
- How will a court-ordered guardian help with those fears?
- Thinking about all of the options between no guardian and no help all the way to full guardianship, what do you think would be the most helpful for this person to be safe and have the support they need to make decisions?

- Even if the team decides that guardianship may be appropriate, what things can the individual do or decide for themselves that these things in the guardianship plan.

Guardianship: The Court Process

A Brief Overview

How Are Guardianship Proceedings Started?

The incapacitated person or any person interested in his welfare may petition for a finding of incapacity and appointment of a guardian. Maine’s probate courts have exclusive jurisdiction over guardianship.

Guardianship Plan

The person seeking to serve as guardian shall file a plan that includes:

- the type of proposed living arrangement
- how the ward's financial needs will be met
- how the ward's medical and other remedial needs will be met
- how the ward's social needs will be met
- a plan for the ward's continuing contact with relatives and friends

**Physician's Report – PP-505
(See handout)**

- A form filled out by a medical provider (usually a primary care physician or psychologist)
- Indicates the physician's opinion about the allegedly incapacitated person's ability to make reasonable decisions concerning finances, residential placement, and health care. Given without context of implications of opinions.

What Does The Court Do After The Petition?

- Sets a hearing date
- Unless the allegedly incapacitated person has an attorney, appoints:
 - A visitor,
 - A guardian ad litem, or
 - An attorney

What Does The Visitor Or Guardian Ad Litem Do?

- Visit the home of and interview the allegedly incapacitated person,
- Explain the meaning and possible consequences of the requested appointment to the allegedly incapacitated person,
- Inquire if the allegedly incapacitated person wishes to attend the hearing, to contest any aspect of the proceeding or to seek any limitation of the proposed guardian's powers.

What Does The Visitor Or Guardian Ad Litem Do?

- Interview the person who is seeking appointment as guardian
- Visit the place it is proposed that the person will reside if the requested appointment is made
- Submit a written report to the court and specifically indicate whether the person wants to contest any issue, to seek a limited appointment, and whether the person has counsel of his/her choice.

Allegedly Incapacitated Persons Rights

- Right to an attorney if he/she wishes to contest any aspect of the guardianship proceeding
- Right to be present in court, present testimony, cross examine witnesses

Legal Standards: Finding

“The court may appoint a guardian or co-guardians as requested if the court finds by clear and convincing evidence that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision of the incapacitated person.” 18-A M.R.S.A. § 5-304(B).

Legal Standards: Incapacitated Person

“Incapacitated person” is defined as “any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or other cause except minority to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.” 18-A M.R.S.A § 5-101(1).

Legal Standards: Limited Guardianship

“The court shall exercise the authority . . . so as to encourage the development of maximum self reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person’s actual mental and adaptive limitations or other conditions warranting the procedure.” 18-A M.R.S.A. § 5-304(A).

The specific duties and powers of a limited guardian shall be set out in the decree or court order. A person for whom a limited guardian has been appointed retains all legal and civil rights except those which have been suspended by the decree or order.

**Post Guardianship Order:
Removal, Resignation,
Termination**

The authority and responsibility of a guardian for an incapacitated person terminates upon the death of the guardian or ward, the determination of incapacity of the guardian, or upon removal or resignation of the guardian.

Termination Request By The Ward

A request for this order may be made by informal letter to the court or judge. Any person who knowingly interferes with transmission of this kind of request to the court or judge may be adjudged guilty of contempt of court.

Tools And Resources

Where do I find the laws that apply?

- The Maine Probate Code: 18-A M.R.S.A. §§ 1-101-9-404. Specifically, Protection Of Persons Under Disability And Their Property 18-A M.R.S.A. §§ 5-101 - 5-964. Both available at: www.mainelegislature.org/legis/statutes/18-A/title18-Ach0sec0.html.
- The Maine Rules of Probate Procedure: available at: http://www.courts.state.me.us/rules_adminorders/rules/mr_prob_p_2013-4.pdf. These rules tell you how the court proceeding works: deadlines, length of documents, etc.

Other Resources

- DHHS Guardianship Guide, Guardianship Tutorial. Both available at: <http://www.maine.gov/dhhs/oads/guardianship/index.shtml>
- Probate court records available at: www.maineprobate.net
