



Thinking About Guardianship?

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Thinking About Guardianship?

Thinking about guardianship?

Eighteen may seem like a young age, but in Kentucky it means a person is an independent adult. Being an adult means a person can do such things as vote, sign contracts, or consent to surgery without anyone's permission. That's 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 (award) if a court after a jury has ruled in a disability hearing that the person cannot take care of her personal needs or manage her finances. At the same time the court declares a person to be disabled, it appoints a guardian or a conservator to help with personal or financial needs in the areas the disabled person can't manage alone.

In deciding this at the disability hearing, the court will look to see if the person can take care of some things on her own. Can she take care of her own money, her nutrition and her 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. There are also many alternatives to guardianship that might be a better way to help.

What are a guardian's duties?

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

- Arranging for a place for the ward to live in the least restrictive environment
- Arranging for educational, social, vocational, and rehabilitation services
- Arranging for other services the ward needs to meet his needs
- Consenting to medical treatment for the ward
- Managing the ward'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 ward is doing. The report includes information on where the ward is living, in what programs the ward is involved, and whether guardianship continues to be needed. If the guardian is responsible for the ward's finances, the guardian must tell the court within 60 days of being appointed what all of the ward's assets and income are. In addition, the guardian must give a financial report to the court every two years. The financial report is a simple accounting of what money was received by the ward (for instance, the SSI check) and how it was distributed. Forms for these reports are available from the district court or the Periodic/Final Settlement of Guardian/Conservator for Minor/Disabled Person is available at <http://courts.ky.gov/resources/legalforms>

What is a conservatorship?

A conservator is a type of guardian who manages finances only. The court may appoint a conservator alone or in combination with a guardian to handle a legally

disabled person's financial affairs. After the conservator's appointment, within 60 days she must file a list of the person's property with the court. She must then file a report every two years saying how much money and property she has received as conservator and how she is using it on behalf of the ward.

What kinds of guardians and conservators might the court appoint?

If the court finds that a person is legally disabled and needs help with his personal business or finances, it might appoint a

- Full guardian if the person is unable to take care of all his personal needs
- 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 conservator and a guardian

If the person lives in an institution or doesn't know anyone willing to serve as his guardian, the court may appoint

a state guardian or conservator. A state guardian can work as a guardian, conservator, limited guardian, limited conservator, or any combination that the court decides to assign.

Guardianship has consequences

Establishing a guardianship has significant implications for the legally disabled adult. On one hand, it can put protections into place so the person can live life more safely, with as much self-determination as possible. On the other hand, it limits civil rights. Many rights can be lost through 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. Consider the disabled person's needs and wishes. Less restrictive options are often available.

What are some alternatives to guardianship?

Advance Directives

An advance directive states, in writing, an adult's choices about medical care or names someone to make medical choices for him if he becomes unable to speak for himself. It is called an advance directive because it is signed in advance to let the person's family and doctor know his 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 living will packet can be found at <http://ag.ky.gov/family/consumerprotection/livingwills/documents/livingwillpackets.pdf>.

Bank Account 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, an account should only be established with a trusted relative or friend.

Citizen Advocacy

Citizen advocacy programs match a volunteer with someone who needs help taking care of their personal or

financial affairs. A citizen advocate might serve as a guide and advisor, assist with budgeting and paying bills, help make purchases, or perform all the supportive activities that family and friends usually provide when they are present. Citizen advocacy services are offered through The Council in Louisville, <https://councilondd.org> or (502) 584-1239. Many churches and faith-based programs work with people with disabilities to help them manage their money and pay their bills. Contact a local community center for more information.

Curator

In Kentucky, anyone who thinks that they need help managing their property or finances because of old age or physical disability can ask a district court to appoint a curator for them. The proceeding is done without notice to others or a hearing. There is no legal determination of disability.

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.

Power of Attorney

A power of attorney allows a parent or other adult to pay bills and make financial decisions for another person without taking away any basic civil rights, as guardianship does. A person can appoint someone to act as his attorney-in-fact only if he fully understands what he is authorizing the other person to do for him. He then can change or revoke the power of attorney at any time. However, a power of attorney may be written so that it continues if the person becomes unable to make decisions. This is called a durable power of attorney.

Representative Payee

A number of government agencies, such as the Social Security Administration and the Veteran's Administration, permit another person to receive and manage funds for the person with the disability. The person who manages the funds 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 the person with the disability develop skills in weak areas. Centers for Independent Living treat housing, transportation, attendant services, employment and discrimination as the interlocking problems they often

are for people with disabilities. And the Centers serve people with all kinds of disabilities, not just one group. They provide a package of services including information and referral, peer counseling, advocacy, and independent living skills training. These programs teach self-help skills, inform people about existing disability programs, and create new services to fill gaps. The Centers for Independent Living are non-profit and community-based. They are also controlled by people with disabilities. 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 The Center for Independent Living in Covington at 859-341-4346 or Center for Accessible Living in Louisville at 502-589-6620.

Trusts

If parents' major concern is how a person with a disability will manage an inheritance, they may choose to establish a trust fund rather than a guardianship. A trust permits one person to manage property and money for another person according to the directions of the person who set up the trust. The success of a trust depends on the selection of the trustee, the person or agency that will administer the trust. A trustee has no authority to make personal decisions for an individual for whom a trust is established. A trust set up without regard to the eligibility laws may disqualify a person who is disabled from SSI, Medicaid, and other important benefits.

Special Needs Trusts

A special needs trust or supplemental needs trust is a trust which protects the assets of a person with a disability and still allows her 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 her parents, other third parties or by court order, Medicaid won't 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 she became disabled, Medicaid must be reimbursed from those assets. This would include job earnings and any assets not court-ordered into the special needs trust.

A nonprofit pooled income special needs trust is run by a nonprofit association, and a separate account is maintained for each individual beneficiary. All accounts are pooled for investment and management purposes. The trust (or more accurately, an account in the pooled trust) may be created by a parent, grandparent, guardian, or court, and it can also be created by the disabled individual himself. Upon the death of the disabled individual, the balance is either retained in the trust for the nonprofit association or paid back to Medicaid for its medical assistance.

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 own personal needs for physical health, food, clothing, or shelter?
- Is he able to manage personal financial resources effectively?
- Would he be taken advantage of if no one was 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 unsafe sexual practices, 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 home communities with a helping hand from family and friends. They do not need formal legal assistance. But if a person can't take care of himself and his friends and relatives aren't able help enough, guardianship may be needed so that another adult can legally make decisions for him and act on his behalf.

If you do opt for a guardianship, you will want 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 die 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 where the person thought to be disabled lives. (The disabled person is called a respondent.) The person asking for guardianship or conservatorship is called the petitioner and 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 or 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 respondent lives, who 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 must file an Application for Appointment of Fiduciary for Disabled Persons. This application is also available from the district court or at <http://courts.ky.gov/resources/legalforms/LegalForms/745.pdf>. The district court will not begin the disability determination process until this application is filed.

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

Before a hearing can be held, a physician, a psychologist, and a social worker must examine the person with the disability. They will interview her to determine her mental, physical, social, and education abilities and needs. If the person has mental retardation or a mental illness, at least one of the examiners must be a professional qualified in mental retardation or mental health. The team of examiners will recommend to the court whether a guardianship is needed. If it is, they will also recommend the kind and amount of guardianship, a living arrangement and a treatment program.

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 can't pay for them. If the person lives in a facility for persons with mental illness or mental retardation and the facility files the petition, the facility will provide the court the evaluation. But the person with the disability can ask for a second set of evaluations if it she thinks the first evaluation is biased. The county will pay for the evaluation if the she can't.

If the evaluation reports are filed with the petition, the district court will hold a hearing within 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 weeks before the hearing, the district court will send notice of the hearing date to everyone involved in the hearing.

The hearing will be held before a six-person jury. The person with the disability must attend the hearing unless the court decides it will subject her to a serious risk of harm. The jury will decide whether the person is fully or partially disabled in her personal and financial affairs. Based on the jury's findings, the judge will appoint a guardian or conservator. The person with the disability has the right to tell the

judge whom she prefers to be appointed, but the judge will appoint whomever she 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, the courts don't 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 isn't 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 hasn't ever 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 that the person needs a guardians. 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, his guardian or conservator, or anyone else on his behalf may ask the court to

- end the guardianship
- change the guardianship order
- remove or replace the guardian or conservator
- or renew the appointment of a 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, he can simply ask the court or the clerk of the court or write a letter to the court. The court will appoint someone to help him 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 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. But guardianship does not have to be forever. If the adult with a disability becomes able to manage his 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 renegotiated, 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 him to make his own decisions and act on his own behalf, regaining as many rights as possible.

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	Guardianship	Conservatorship	Power of Attorney (POA)	Representative Payee
Declaration of disability?	Person must be declared by a jury as either (wholly) disabled or partially-disabled. This is not the same as declaration through Social Security, Veterans Affairs, or employer (for disability retirement).	Person must be declared by a jury as either (wholly) disabled or partially-disabled. This is not the same as declaration through Social Security, Veterans Affairs, or employer (for disability retirement).	There is no declaration for a general power of attorney. Durable power of attorney continues or becomes effective when the person becomes incapacitated as outlined in the POA documents.	Social Security, Veterans Affairs, or employer (for disability retirement) makes decision about disability. This is not the same as a legal declaration by court.
How appointed?	Court appoints individual or an agency after a person is declared as (wholly) disabled or partially-disabled.	Court appoints individual or an agency after a person is declared as (wholly) disabled or partially-disabled in managing financial resources.	The individual authorizes someone else to make certain decisions on his/her behalf	Social Security and Veterans Affairs appoints an individual or agency. This may be different than the guardian, conservator, or power of attorney.
Authority?	(Full) Guardian has the complete authority over a person's needs and finances. Limited guardian has authority over court-specified areas.	Conservator has the complete authority over a person's finances placed over supervision. Limited conservator has authority over court-specified areas.	Power of attorney has the authority to make decisions specified in the POA documents.	Representative payee has the authority over the individual's check.
Duties?	(Full) Guardian makes all legal decisions about individual's life – healthcare, place of abode, finances, etc. The guardian (unless someone else appointed) also pays the individual's bills out of the individual's funds. Required to make formal financial reports back to the appointing court.	Conservator makes all legal decisions about the individual's finances placed over supervision. He/she pays the individual's bills out of the individual's funds. Required to make formal financial reports back to the appointing court.	Power of attorney duties are only over the areas specified by the individual.	Representative payee is required to pay the individual's bills out of his/her check and provide spending money to the individual, if there is any left over. Required to do formal accounting of check disbursement back to appointing agency.
Duration?	Courts can appoint guardian for "unlimited duration" but limited guardianship shall not be more than 5 years. Petitions may be done any time to change or remove guardianship.	Courts can appoint conservator for "unlimited duration" but limited conservator shall not be more than 5 years. Petitions may be done any time to change or remove conservator.	General power of attorney ends when the individual becomes disabled. Durable power of attorney extends beyond that time.	Representative payee can be changed by appointing agency. Requests for changes may be made directly to appointing agency.

Created by Kentucky Protection and Advocacy. This chart is for general information purposes only and should not be considered legal advice. For assistance with your specific situation, please contact your attorney or Protection and Advocacy.

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This booklet was adapted from the *Guardianship in Kentucky Handbook* by Kentucky P&A. The Handbook contains more detail 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, Issue 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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Tel 0870 740 4887.
www.inspiredservices.org.uk.

Kentucky Protection and Advocacy receives funding from the US Department of Health and Human Services, the US Department of Education, and the US Social Security Administration.

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