

WHAT YOU NEED TO KNOW BEFORE FILING A PETITION TO APPOINT A GUARDIAN FOR AN INCAPACITATED ADULT

»» What is a guardian?

A guardian is a person appointed by a probate court and given power and responsibility to make certain decisions about the care of another individual. These decisions might include treatment decisions or where the individual should live. If the individual has a reduced life expectancy due to advanced illness, the guardian may have power to make an informed decision on behalf of the individual regarding receiving, continuing, discontinuing, or refusing medical treatment. The duties of a guardian are listed in statute.

A **full guardian** can make all decisions for the individual. A **limited guardian**, can only make the decisions for the individual that the court allows.

»» When can the court appoint a guardian?

The court can appoint a guardian when it finds the person is a legally incapacitated individual and determines that a guardian is necessary.

»» What is a "legally incapacitated individual"?

A legally incapacitated individual is an adult the court finds to be so impaired by mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, that he or she lacks the understanding or capacity to make or communicate informed decisions.

»» Is a guardian needed for an individual who may be legally incapacitated?

A guardian might not be necessary if someone else already has legal authority to make decisions for the person and there are no problems with the decisions they are making.

»» How is a proceeding for a guardian started?

Any person interested in the individual's welfare may complete a Petition for Appointment of Guardian of Incapacitated Individual (form PC 625) and file it, along with the filing fee, with the probate court where the individual resides or is presently located.

»» Is a lawyer necessary?

No, but a lawyer can be helpful, especially if someone objects to the appointment of a guardian, the authority you are asking to be given, or the person you are asking to be appointed guardian.

»» Can mediation be used for disagreements about a guardianship?

Certain disagreements about a request for a guardian may be mediated outside the court if all parties agree to attend mediation or if a judge order parties to attend mediation. The court clerk can tell you if mediation services are available in your court.

»» **What happens when the court accepts a petition for filing?**

After the petition is accepted for filing, the court will appoint a *guardian ad litem* to visit the individual to explain the guardianship proceedings and to make recommendations to the court as a result of the visit.

It is important for you to cooperate with the guardian ad litem. The guardian ad litem does not have the authority to make decisions for the individual. The individual may have to pay for the guardian ad litem. If necessary, the court may also order the individual to be examined by a physician or a mental health professional.

»» **What will the guardian ad litem do?**

The guardian ad litem will personally visit the individual and explain to the individual the nature, purpose, and legal effects of the appointment of a guardian.

The guardian ad litem will:

- 1) explain the hearing procedure and the individual's rights during the hearing;
- 2) inform the individual of the name of anyone seeking appointment as guardian; and
- 3) inform the court of his or her determinations about the individual's wishes.

»» **Can the individual get a guardian immediately in an emergency?**

If an emergency exists, the judge may appoint a temporary guardian to serve until a hearing on the petition can be held.

Alternatives to a Full Guardian

The following five alternatives must be planned by the individual before he or she becomes mentally incapable of making the decisions.

1. Health Care Power of Attorney

Also called a *patient advocate designation* or a *durable power of attorney for health care*. This document enables a person to name an agent (called a *patient advocate*) to make his or her health care decisions when not capable or not competent to do so. The document may cover any type of health care decision including guidance to the agent about the type and extent of health care desired. It can also include authority to withhold or to withdraw life support services.

2. Do-Not-Resuscitate Order

A do-not-resuscitate order is a document directing that the patient named in the order not be resuscitated if the patient's spontaneous respiration and circulation stop in a setting outside a nursing home, hospital, or mental health facility owned or operated by the Department of

Community Health. The patient must sign the document in the presence of his or her attending physician and two adult witnesses.

If the patient is an adherent of a religious denomination or a church whose members depend upon spiritual means through prayer alone for healing, the adult patient may sign a do-not-resuscitate order that meets special statutory requirements and does not require the signature of an attending physician.

3. Power of Attorney

A power of attorney is a document signed by a competent person giving another person the power to manage some or all of his or her affairs. The document must be signed by a notary in the presence of at least one witness.

A power of attorney is durable if it remains valid even if the maker of the power of attorney later becomes disabled or incapacitated. A durable power of attorney is the means for a mentally competent adult to grant a person (called an *agent*) authority to act for him/her if incapacity occurs. It usually affects property decision-making but may affect health care decisions. See the Health Care Power of Attorney stated in item 1.

4. Trust

A trust may be a substitute for a conservator and a will. The trust expresses the desires of the maker (called a *settlor*) about the management of his or her assets during his or her lifetime and when physically or mentally unable to manage the

assets.

Under a trust, assets are owned by the trust and managed by the trustee for the benefit of the persons to be protected. The trust also names the individuals to whom the assets will go upon the settlor's death. A trustee usually is the maker of the trust at first and frequently names a relative to be the successor. Professional trustees often serve in this highly responsible position.

5. Joint Ownership

Joint ownership involves certain assets to be held by two or more persons and may entitle any of the owners to have control and management of the assets.

Some of the assets that can be held in joint ownership are real estate, bank accounts, corporate stocks, and mutual funds. A joint owner can apply the funds of an account for the disabled co-owner without court action. This can involve the loss of sole control over the funds by the disabled person and can result in dishonest use of funds by the co-owner.

The following five alternatives do not need to be planned by the individual before he or she becomes mentally incapable of making the decisions.

1. Limited Guardian

A guardian who makes only those decisions for the individual that the court allows.

2. Conservator

A conservator is a person appointed by probate court and given power and responsibility for the estate (financial assets and property) of an adult (called a *protected individual*).

If an individual has property such as real estate, large bank accounts, or stock that he or she can no longer manage, it may be appropriate to file a petition for a conservator. See separate instructions on **Conservatorship Proceedings**.

3. Protective Order

When only a single transaction affecting the property of a disabled person is required, the probate court may enter a protective order for this one time matter.

At a hearing, the court may authorize, direct, or ratify any contract, trust, or other transaction relating to that person's financial affairs or estate without appointing a conservator or a guardian.

4. Representative Payee

A representative payee is appointed by a government agency to receive, manage, and spend government benefits for a beneficiary. This is most often done for Social Security benefits. The beneficiary may request a representative payee, but usually the agency requires one when the beneficiary is no longer able to manage benefits.

A payee is approved by the agency and there is no court involvement. The representative payee's authority is limited to the government funds for

which he or she is the payee.

5. Special Services for the Aging

Many communities have voluntary services available upon request to help the aging with their financial affairs. Services may include depositing and writing checks, balancing checkbooks, paying bills, preparing insurance claims, preparing tax information and counseling, and applying for public benefits and counseling.

The Commission on Aging and the Family Independence Agency provide these services in many communities as well as church organizations. A person capable of asking for or accepting the services must request the services to receive them.