

GUARDIANSHIP / CONSERVATORSHIP AND ESTATE PLANNING



Guardianship / Conservatorship & Estate Planning

Disclaimer: This communication is intended to provide general information and does not constitute legal advice. This information is not intended as a substitute for obtaining legal advice from an attorney.

- Guardianship is a legal (not a medical) determination that the individual is unable to make informed decisions regarding his personal or financial responsibilities.
- It involves a court process that results in the determination that the individual is not competent to make decisions independently (declaration of incompetence). Only the Court can appoint a guardian or conservator over an adult.
- Guardianship gives an individual the legal power to care for another person and manage his or her affairs.
- Guardianship is governed by state-specific laws. This is critical when moving in or out of state.

Why is guardianship sometimes necessary?

- The adult (any person 18 years of age or older) is unable to make legal, financial, medical decisions, or daily living decisions.
- The adult is incompetent and is vulnerable to others who may take advantage of them.

What does guardianship do?

Guardianship provides a means to gain access to records or other important documentation when the adult who is incompetent may not be able to give consent. It ensures that assets are used for their intended purposes (providing medical care, residential services, financial support, etc.).

What is the difference between guardianship and a conservatorship?

A guardianship is necessary when an individual is unable to make or communicate significant responsible decisions concerning his/her health, safety, or welfare. The guardian of the person is responsible for decisions regarding personal issues such as where the person will live, with whom and how he or she will spend his/her time, as well as medical treatment. A conservatorship is necessary when an individual who has financial resources or significant property and is unable to make or communicate significant responsible decisions concerning their money or property. The conservator manages financial matters and must be bonded.

The conservator may be ordered to repay any losses incurred by the individual. A conservator reports periodically to the court regarding the conservator's decisions on behalf of the individual. A conservator's records must be available to the court and must be kept in order.

Types of guardianship

Guardianship

- Guardianship that covers both personal and financial matters includes conservatorship.
- Guardianship for both personal and financial matters can be done in the same proceeding.
- This type of guardianship is the most widely used method and most restrictive type of guardianship.
- In this guardianship the individual retains certain rights.
- This is often used with adults with severe mental retardation or other disorders that affect cognitive abilities.

Limited Guardianship

- This applies to specific issues in areas where the individual does not have the capacity to make certain decisions.
- This meets the individual's specific needs.
- This also requires future planning to address every possible scenario the individual may encounter.
- This type of guardianship promotes self-determination by the individual.

Temporary Guardianship

- This guardianship is issued to address specific situations as necessary.
- It continues until the issue is resolved.
- Temporary guardianship includes issues such as drug use and rehabilitation, short-term illness a recurring debilitating situation caused by the disability.

Emergency Guardianship

- This can be established in approximately one week to ten days.
- There must be an emergency situation
- It can only last for a limited duration.
- This should not be relied upon for long term incapacity.

Public Guardian

- This guardianship is appropriate when relatives or family friends are unavailable, unqualified, unwilling or unworthy and all other options have been exhausted.
- These services can be provided by non-profit organization.
- The funding for this is usually through state resources.

Power of Attorney

Individuals have the option of assigning power of attorney to a trusted family member or friend. Contact the Georgia Bar Association at www.gabar.org for questions regarding all legal matters. An individual must be competent to execute power of attorney. (*NOTE: The Court will give you only what you ask for, so be careful and clear in selecting.*)

ESTATE PLANNING

Because eligibility for many public benefits have income or resource limits, it is essential that parents of individuals with disabilities properly prepare their own estates to provide the maximum benefit for their loved ones without jeopardizing access to public benefits. Parents should utilize professionals to assist with planning the medical, residential, financial and legal aspects of maintaining adequate and appropriate care of the individual. Parents can nominate a guardian for their adult children, but this is only a nomination, the Court still has to make the appointment of the guardian. Parents should also inform all family members of the decisions made on behalf of the individual.

WILLS AND TRUSTS

Financial matters need to be discussed with family members, financial advisors, and attorneys. It is important for families and individuals to consider establishing a will or trust for the disbursement and management of money and property while the individual is alive and when the individual becomes deceased.

Things to Remember

- The type of guardianship selected should best meet the family's specific needs.
- Selection of the guardian to nominate to the Court must be carefully made. Whether choosing an individual or an agency to act as a guardian, investigations must be made in order to protect the interest of the individual with disabilities. The Court will actually appoint the guardian.
- Estate planning is critical regardless of the economic status of the family. The ultimate issue is the well being of the beneficiary, not the family's financial status.
- Life insurance is a monetary asset, not a substitute for a will or trust.
- A will must coordinate with a trust and can address matters not addressed by the trust.

- The professional Trustee charges a fee. The size of the trust will dictate who acts as Trustee. The person or institution should have a good relationship with the beneficiary or be familiar with the family.
- Someone chosen by the family to suit the best interest of the beneficiary should supervise the Trustee. This may be an added expense to managing the trust.
- Estate planning can be expensive, depending on the amount of time required to develop the plan and the attorney's hourly rate. Assistance in choosing an attorney is provided by advocacy groups. It is recommended that the family choose an attorney who focuses his/her practice in Trust and Estate Law.
- Each aspect of providing for a disabled dependent has a financial factor, whether it is establishing guardianship, making a will, or preparing a trust.
- The estate planning should be coordinated so that all aspects work together and do not conflict with each other.

Additional information can be found in the Internet at the following website:

The Arc	www.TheArc.org
Academy of Special Needs Planners	www.specialneedplanners.com
Special Needs Alliance	www.specialneedsalliance.com

The previous sources may be of help to you as you consider the transitional needs of your student. While these sources are provided to assist you in your search, it is your responsibility to investigate them to determine their value and appropriateness for your situation and needs. These sources are provided as a sample of available resources and are for informational purposes only. **THE GEORGIA DEPARTMENT OF EDUCATION DOES NOT MONITOR, EVALUATE, OR ENDORSE THE CONTENT OR INFORMATION OF THESE RESOURCES. NONE OF THESE RESOURCES SHOULD BE CONSIDERED THE ADVICE OR GUIDANCE OF THE GEORGIA DEPARTMENT OF EDUCATION.**