

GUARDIANSHIP
Office of Legal and Advocacy Services
Heritage Centers

Introduction

A guardianship is a legal relationship created and regulated by New York State law. In general, parents are recognized as the legal guardian of their children under the age of 18 years. Parents have the right to make most decisions on behalf of their children. When a child, however, turns 18, the law presumes that he or she is a competent adult with the ability to manage his or her own affairs and property. The legal rights of the parents terminate at this time.

In 1969, parents of children with mental retardation and/or developmental disabilities sought the help of New York Legislature in obtaining legal authority to continue to make decisions on behalf of their children beyond adulthood. As a result of this request, Article 17-A of the Surrogate's Court Procedure Act was enacted, creating a guardianship for persons with mental retardation and/or a developmental disability.

In 2002, the rights of 17-A guardians were expanded by the passage of the Health Care Decisions Act for Persons with Mental Retardation. This statute allows an Article 17-A guardian of a person with mental retardation and/or developmental disability to have the authority to make all health care decisions that the person with the disability, otherwise referred to as the "guardianee", could make if they had capacity, including decisions to withhold or withdraw life-sustaining treatments if certain conditions are met.

What is Guardianship?

The most common type of guardianship is called Guardian of the Person. This type of guardian has the legal authority to make personal decisions for the guardianee, such as living arrangements, employment, health care and education, but only to the extent that the guardianee cannot make their own decisions.

The guardian, once appointed, serves for life or until they are removed by the court, resign or expire. The guardian has a *Fiduciary* duty to the guardianee. This means that the guardian has the legal responsibility of utmost good faith, loyalty and care when making decisions on behalf of the guardianee. At all times, the decisions made by the guardian must be in the guardianee's best interest. The guardian, to the extent possible, will encourage the guardianee to participate in decisions and to act on his or her own behalf.

Sometimes, more than one individual would like to be named as a primary guardian. These persons are known collectively as co-guardians. All co-guardians have equal decision-making authority.

Often, standby guardians and/or alternate standby guardians are named in the petition. These people have agreed to step into the role of a guardian should the named guardian or co-guardians be removed by the court, resign or expire. The standby and alternate standby guardians will need to initiate the guardianship process through the Surrogate's Court in order to be named as primary guardians.

Process of Obtaining Guardianship

Guardianship is obtained in a legal proceeding brought in Surrogate's Court. Any person over the age of 18 years can be appointed as a guardian including parents, siblings, another relative, a friend or a qualified organization such as NYSARC, Inc. A person seeking to become a guardian, called a "petitioner", initiates the process by submitting to the court a Petition for Guardianship. The court also requires other documents to be submitted such as the person with a disability's Birth Certificate, consent of persons who are to serve as the standby guardians and/or alternate standby guardians, consent of any family member not directly involved in the guardianship process and certification by two physicians (one physician and one psychologist or two physicians, one of whom is familiar with the care and treatment of persons with developmental disabilities).

Once the Court obtains all the necessary paperwork, then a hearing date will be scheduled. The hearing is brief and informal and held in the

Surrogate's Court Chief Clerk's Office. Present at the hearing are the petitioner(s), the person with a disability and, if applicable, the individual with whom the person with a disability lives. It is an opportunity for the court to observe the person with a disability with the purpose of confirming the need for guardianship.

If the court is satisfied that the best interest of the person with a disability will be promoted by the appointment of the Petitioner(s) as Guardian(s), the court will submit a Decree Appointing Guardian and Letters of Guardianship will be issued.

Conflicts Between the Guardianee and the Guardian

The importance to a guardianee in making choices which affect his or her life must be recognized by guardians. A sense of having some control in one's life increases one's self-esteem and productivity. At the same time, protection and guidance of the guardianee by the guardian is also important. Maintaining a balance between these two values can become tricky and lead to conflict between the guardianee and the guardian. It is always best to try to resolve conflicts by thoughtful discussions and understanding.

If, however, a conflict cannot be resolved, either party may petition Surrogate's Court to review the guardianship. The guardianee may use the assistance of Mental Hygiene Legal Services. A petition can also be filed with the court by family members of the guardianee or any concerned party. The court will order a hearing at which the party bringing the petition presents evidence. At the conclusion of the hearing, the court may order the guardian to consider a different course of action, dissolve or otherwise amend the guardianship.