

Guardianship and Alternatives

When a student turns 18 all rights given to the parents under federal and state law transfers to the student. This transfer of rights means that the student may access his//her education records, make his/her own educational decisions, and sign consent for evaluations and placement. In some situations, young adults may need additional support in making educational and life decisions. In that case, there are options that the parent/guardian can explore ranging from guardianship to Supported Decision making Agreements. Guardianship can be very restrictive and take away many rights. Supported Decision Making Agreements are another option that is very flexible, allowing the individual to make life decisions while still maintaining parent/guardian involvement.

A guardian is someone appointed by a court who is responsible for the personal affairs of an incapacitated person, called a “ward” and making decisions for that ward. Guardianship may be awarded to make decisions, such as educational, medical, employment or it may be a full guardianship covering all personal affairs. A judge determines whether the individual has a physical or mental condition that prevents him/her from managing financial affairs, caring for physical health, or providing food, clothing or shelter. Guardianship limits the freedom of choice, self-determination, decision-making, and independence and is difficult to reverse. Guardianship can be an expensive process because both the parent and individual with a disability have legal representation and there are court costs. A guardian can be appointed any time after age 18 and does not have to be a parent. Guardians have reporting and training responsibilities especially when there is an estate. Over time, the individual who serves as a guardian may be changed with the approval of the court. If the person’s ability to care for themselves and make decisions improves, the guardianship can be ended and removed.

Types of Guardianship:

- The Guardian of the person is responsible for the physical well-being of the person under guardianship. Their responsibilities may include:
 - the right to make educational decisions
 - the right to have physical possession of you and determine living arrangements
 - the duty to provide care, supervision, and protection, and to provide the person with clothing, food, medical care and shelter
 - the authority to commit the person for medical, psychiatric and surgical treatment (*not include the authority to commit to an inpatient psychiatric facility*)
 - the authority to oversee a financial trust
 - the authority to sign documents necessary or appropriate to facilitate employment
- The Guardian of the estate is responsible for the person’s property and assets. When managing an estate, a guardian has the following authorities:
 - possess and manage property

- collect all debts, rentals, or claims
- enforce all obligations in favor of you
- bring and defend lawsuits by or against the ward
- have digital access

One person can be both guardian of the person and the estate or two people can take on these roles

Limited Versus Full Guardianship:

- Under limited guardianship the judge gives the guardian only certain rights and responsibilities, allowing the individual with a disability to keep the rights not granted to the guardian.
- Under full guardianship, an individual loses many of his/her civil rights, including the right to drive, choose where to live and work, vote, choose to get married and consent to medical treatment.

Steps to Obtaining Guardianship:

- The person seeking to become guardian is the “applicant” and along with an attorney provides the judge an application stating the reasons he or she believes that guardianship is necessary.
- A physician must provide an opinion by completing a physician’s certificate of medical examination (CME) indicating the individual is unable to make decisions independently or with support.
- Attorney ad litem is appointed to represent the desires of the person with a disability.
- A court hearing is held, and the judge has the ultimate authority to decide whether or not someone needs a guardian and if the guardianship should be full or limited. The judge determines who should be the guardian.
 - The court must consider alternatives to guardianship and supports and services before a guardianship is created. The court must find by clear and convincing evidence that alternatives to guardianship and supports and services have been considered and determined not to be feasible.

Responsibilities of the Guardian:

- Yearly the guardian of the estate must file an accounting, explain what money was received and how exactly money was spent
- Yearly a guardian of the person must file an annual report on the condition of the person under guardianship
- Guardians must fulfill all duties granted to them by the court and may be asked to justify decisions that they have made on behalf of the person with a disability.

Alternatives to Guardianship:

- Medical Power of Attorney
 - Legal document that allows an individual to delegate the authority to make health care decisions for him/her. The individual can make decisions for themselves as long as they are capable of doing so. The agent's authority begins when a physician certifies that the individual lacks the capacity to make health care decisions.
- Durable Power of Attorney
 - Legal document that appoints a person to conduct financial transactions and make business decisions for another person, including transferring property, banking, investing and taxes.
- Consent to Authorized Advocacy for Educational Decisions
 - Provides the parent the ability to make educational decisions. It is a good way for students who can express their desire to have their parent continue to be involved in educational opportunities. Here is the link for: [Consent to Authorize Advocacy and Release of Educational Information](#)
- Declaration for Mental Health Treatment
 - Allows a person to make decisions in advance about mental health treatment as it relates to psychoactive medication, electroconvulsive therapy and emergency mental health. The instructions will be followed if a court believes an individual will be able to give or withhold consent. Once executed it continues in effect for 3 years. It can be revoked at any time except during periods of incapacity.
- Representative Payee
 - For Supplemental Security Income (SSI) and Social Security Disability Income (SSDI) a representative payee may be appointed to help manage the individual's benefits. A payee's main duties are to use the benefits to pay for the current and future needs of the beneficiary and properly save any benefits not needed to meet current needs. A payee must also keep records of expenses and provide an accounting to the Social Security Authority of how they were used or saved when asked.
- Trusts and Savings Accounts
 - This is a legal alternative that helps to plan for the long-term financial needs of a person with a disability. A trust creates a legal relationship where a person or an entity can take care of the individual's money and property.
- Special Needs Trusts
 - Allows for a person with a disability to receive money without losing benefits such as Medicaid or SSI. Funds from the special needs trust cannot be used to pay for items that Medicaid and SSI cover. This includes housing and medical care. It can be used for furniture, education, transportation, entertainment, travel and personal care expenses.
 - [The Arc of Texas Master Pooled Trust](#) provides an affordable alternative to a private trust.
- ABLÉ Account (Achieving a Better Life Experience)
 - A tax-advantaged savings account available to individuals diagnosed with significant disability before age 26. Contributions can be made by the beneficiary, friends or

family members, but the total annual contribution must not exceed a certain amount. (In 2018 this limit was set at \$15,000). The account can save as much as \$100,000 before SSI benefits are suspended.

- Supported Decision Making
 - Does not require an attorney and offers an opportunity for adults with disabilities to make their own decisions. The individual enters into a voluntary agreement with a person of their choosing who assists them with making decisions such as where they want to live, who they want to live with, where they want to work and whether to consent to a medical procedure. Essentially it formalizes the process most adults go through when they make decisions. [Disability Rights Texas provides a sample form.](#)