

Alternatives to Guardianship (Part 1): Introduction

Welcome to the Maryland Judiciary's video series on alternatives to guardianship. Sometimes alternatives to guardianship are called less restrictive options. Exploring alternatives is important because guardianship significantly interferes with a person's independence, and legal and human rights. This series is for anyone considering guardianship or who wants to avoid it.

Let's start with some basics. First, let's talk about adult guardianship.

CHAPTER HEADING: ADULT GUARDIANSHIP

The term refers to a legal process in which the court appoints a person, known as a guardian, to make personal or financial decisions for an adult who is not able to because of illness or disability. The court can appoint a guardian of the person, a guardian of the property, or both.

So, what is a guardian of the person?

CHAPTER HEADING: GUARDIAN OF THE PERSON

A guardian of the person makes non-financial decisions for things like housing, medical care, clothing, food, education, and everyday needs.

The other type of guardianship is guardian of the property.

CHAPTER HEADING: GUARDIAN OF THE PROPERTY

A Guardian of the property handles financial affairs such as paying bills, filing taxes, and applying for benefits or services.

While guardianship may be needed to protect someone, it must be treated as a last resort.

Why? Because guardianship limits, and in some cases takes away, a person's basic rights. It removes their ability to make decisions about what they eat, where they live, when they see family and friends, and how their money is spent. Because these fundamental rights are at stake, the guardianship court process is protective, complex, lengthy, and expensive. To get out of a guardianship, you'll have to return to court and request that it be terminated. It might not be easy. You may be up against people who want you to stay under guardianship.

There is another downside. If there is no appropriate family member or friend who can serve as your guardian, the court may appoint a stranger who knows nothing about your values, preferences, or beliefs.

Another thing to consider - the responsibility of serving as a guardian.

CHAPTER HEADING: THE RESPONSIBILITY OF SERVING AS A GUARDIAN

Before you sign up to serve as someone's guardian, know that it can be challenging. You have responsibilities to the person as well as to the court. Your responsibilities to the person are to protect and advocate for their care and well-being and put their interests first. Your responsibilities to the court include:

- Filing regular reports
- Getting the court's permission to make certain decisions on behalf of the person under guardianship.
- And notifying the court of significant changes in their situation.

It is also important to know that guardianship does not entitle you or the person under guardianship to any benefits, financial or otherwise. Given all these downsides, explore all alternatives to guardianship.

CHAPTER HEADING: ALTERNATIVES TO GUARDIANSHIP

The term "alternatives to guardianship" refers to options that allow a person to function and have their needs met without a guardian. These options must be explored and exhausted before the court will appoint a guardian for an adult. This series covers alternatives that alone or together can help a person avoid guardianship of the person, guardianship of the property, or both. Alternatives can also be used to limit, modify, or terminate a guardianship.

Some of the options we talk about can be part of your estate plan.

CHAPTER HEADING: ESTATE PLAN

An estate plan is a collection of documents that explains how you want your personal or financial affairs to be handled in the event you die or later become incapacitated and are unable to make decisions. Your plan can include a will that lays out what will happen to your belongings after you die and can direct who will take care of your minor children.

Your estate plan can also include an advance directive or power of attorney. Advance directives are discussed in part 2 of this series, and power of attorney in part 5. Having a plan in place can help ensure that your wishes are honored. Your loved ones will also find comfort knowing that you have planned for the future. Talk to a lawyer to develop an estate plan that's right for you.

The last two terms, Competence and Capacity, are used interchangeably.

Alternatives to Guardianship (Part 1): Introduction

CHAPTER HEADING: COMPETENCE AND CAPACITY

When you hear the terms “competence,” “capacity,” “incompetence,” or “incapacity,” we’re talking about a person’s ability or inability to understand the nature and consequences of an action or decision. When we talk about guardianship and its alternatives, whether someone is “competent” or has “legal capacity” depends on the type of decision or action that needs to be made. For example, the capacity to execute a power of attorney is different from that needed to create an advance directive.

Keep in mind that there are also different levels of capacity and incapacity. A person may be able to make some decisions but not others. It all depends on the individual and their circumstances. Capacity can also be lost and regained. For example, a person may not be able to make certain decisions if they have severe depression. But, with effective treatment, they can. Over time or with support, a person can gain or regain the ability to make decisions.

It is important to know that just because someone has been diagnosed with a disability or is an older adult, it does not mean they lack capacity or that they need a guardian. Everyone is presumed to have capacity until proven otherwise. The court will only appoint a guardian for a person who has a disease or disability that affects their ability to make or communicate responsible decisions.

Another thing to keep in mind, we all make and communicate decisions in different ways. Some of us can make decisions right away, others need more time to digest information. Sometimes we need to do research or consult with experts or people we trust. Others, might process information better if it’s in writing. Just because someone’s decision-making process looks different than your own, that doesn’t mean that they lack capacity.

When considering guardianship and its alternatives remember people with disabilities are entitled to accommodations. These can be in the form of a support person, extra time, assistive technology, or a communication device. To learn more about assistance available to people with disabilities, visit disabilityrightsmd.org

We covered a lot of information here, but I encourage you to watch the rest of this series. The more you understand about guardianship and its alternatives the better for everyone.

Thanks for watching.