

Stepping into Guardianship: A Review of the Process

A guardianship can be a very good thing. If you've heard talk about guardianships being too restrictive regarding an individual's independence and rights, don't let that sway you from considering one. There are valid reasons for having one, such as preserving funds for the person's use during their lifetime or ensuring he or she receives proper medical care.

"Guardianships can be structured to authorize one or more persons to have the level of responsibility needed to best serve another person," says James (Jamie) Bush who has earned the Chartered Special Needs Consultant (ChSNC)¹ designation. He's a Special Care Planner with Commonwealth Financial Group² in Boston, Massachusetts, a general agency of Massachusetts Mutual Life Insurance Company (MassMutual). "You can specify which rights a person retains regarding self care, medical decision making, and home or community life. The important thing is to ask if a guardianship will make life better."

"Ordinarily, petitioning for a guardianship takes only a couple months," says Frederick M. Misilo, Jr.³, an officer of the law firm Fletcher Tilton PC⁴, which has offices in Worcester, Framingham, and Hyannis, Massachusetts. "However, it's advantageous to plan ahead. Learn about your state's process by checking your state's website or visiting your county's probate court."

The process

Described here are the steps for obtaining a guardianship. Other articles⁵ about guardianships published in this section of this magazine provide additional information, such as the role of a guardian and why you might want to have one.

Preparing a teen – If you're considering a guardianship for when your teen becomes a legal adult (age 18 in most states), begin planning when he or she is between age 16 and 17 as part of the transition into adulthood. Misilo recommends talking with your child about why the action needs to be taken. "It helps to review the decisions of the last six months and ask: 'What were these decisions? Who made them? Could these have been made by my son or daughter with or without me? For what types of decisions is my involvement essential? Which ones can my son or daughter make without me having to veto?'"

Groundwork – "It's also a good time to obtain a preliminary assessment so you can plan the steps to take before he or she turns 18," suggests Misilo. An assessment may come from a psychologist, physician or social worker who is capable of ascertaining your son's or daughter's capacity to make informed decisions.

Misilo notes, "This preliminary assessment helps determine whether guardianship is appropriate and, if it is, how broad or limited the guardian's authority should be. Alternatively, you may find that a durable power of attorney, a health care proxy, or appointment of advocate designation, rather than a court appointed guardian, may be a more suitable avenue to pursue."

Documentation – You must use court-approved forms to report results of an evaluation of the person who's the subject of the guardianship. Get them from your probate court or your attorney. "In Massachusetts, the type of form used is based on the nature of the person's underlying disability, a Clinical Team Report for an intellectual disability and a Medical Certificate for a psychiatric or other type of disability. Also, since these forms contain the result of a recent evaluation, they're admissible for a limited time only, the CTR for no more than 180 days from date of evaluation and the MC for no more than 30 days," explains Misilo. When you schedule evaluations to complete the court forms, make sure your professionals know the reason for appointment and understand guardianship proceedings as it applies to their role. (The forms and their time limits may vary by state.)

Selecting the guardian(s) – Guardians may be family members, friends, or others who can be counted on to act in the best interest of the person subject to the guardianship. Normally, if the guardianship is for a child, one or both parents are appointed. Some states prohibit a family care provider who's paid with Medicaid funds to also be named as guardian for the person under his or her care. If the person subject to the guardianship petition has assets in his or her name, a conservator may also need to be appointed. The same person may serve as guardian and conservator. (The terms guardian and conservator, and their defined responsibilities, may vary by state.)

Petitioning the court and notifying others – Once your petition with clinical evidence is filed with the court, the clerk or judge will review the case file to ensure the proper forms are used, the evaluations meet the applicable timeframes, and all necessary information is included for the case to be filed. If it meets requirements, the court will order that notice of the request for guardianship be provided to the person who is subject to the guardianship, all heirs at law, biological parents, and any relevant state agencies.

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Those who are notified are given the opportunity to file an objection within a specified timeframe. Common objections include the need for a guardianship, the scope of the guardian's authority, and the suitability of the guardian.

The court hearing – It's up to the court to determine whether the person who's subject to the guardianship should attend the hearing. At the hearing, the judge will review all evidence to determine whether it's sufficient to warrant guardianship and will either issue the decree as requested or modify it. Likely, a guardianship that's the least restrictive yet provides the best personal and financial protection is what the judge will approve.

Appointed! – Once your petition is granted, the guardian is required, in most states, to complete a report for the court on at least an annual basis. In the case of a conservator, an initial inventory and annual accountings must be filed.

"If assets are minimal, it may be advisable to spend them down rather than incur expense and take time to complete annual accounts," says Misilo.

"Or the assets might be transferred to a Special Needs Trust (SNT)," suggests Bush, "which would be especially beneficial if the person is receiving government benefits. It would help keep personal assets beneath the \$2,000 limit to maintain benefit eligibility, since the trust funds aren't counted by Social Security."

Terminating a guardianship – Typically, a guardianship ends when the person under guardianship or the guardian dies. "Very often," says Misilo, "the court is petitioned to add a co-guardian when a guardian is advancing in age. For example, a brother or a sister of the person under guardianship might be co-guardian with an elderly parent. This prevents a decision-making vacuum if a parent dies or becomes incapacitated."

Guardianship may also be revoked if the person who is subject to the guardianship believes and can show there's no longer a need for the guardianship.



Costs

"There are fees for filing a petition," Bush explains, "as well as for filing annual reports and conducting the initial and annual inventories, which the court may require be done by a hired professional. It's important to be sure you complete paperwork and request the right type of guardianship in your first attempt. It saves money and time, and working with your financial and legal experts will help, too."

Misilo adds, "Don't be shy in asking an attorney for a written fee agreement that outlines what the attorney will do, what you will be handling, and how the attorney's fee will be billed – hourly or flat fee." The degree of complexity determines your cost. You should have clear expectations about what you will be paying so you can best manage the overall expense of a guardianship petition.

Tips

- Begin the process early. Give yourself time to research and consider all options.
- Use your team of financial experts – a special care planner and attorney who know the ins and outs of finance and legalities related to individuals with special needs. They'll help you understand the role of guardians, whom to choose, how many guardians to have, naming subsequent guardians and when to do so, how to best manage financial issues, and more.
- If legal fees are a concern, visit your local bar association or probate court and ask about reduced-fee or pro bono lawyer services, but choose an attorney with special needs experience.

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- Ask an experienced court clerk to offer practical assistance, such as how to complete forms.
- Be aware that you may have delays in the process or may have to begin anew if certain things occur, which may include the following:
- someone challenges your petition,
- appointments for signatures from the required experts are cancelled/rescheduled,
- you miss court dates,
- documentation is missing, completed incorrectly, or dates are too old,
- you use documents that aren't court-approved,
- the person for whom a guardian is sought, who is mandated to be present at the petition, is absent,
- the prospective guardian has a change of heart (be sure he or she is fully informed and committed).

Some financial considerations

Can someone be unprepared financially and still be a guardian? “Yes, but resolving the financial dilemma would be advantageous,” says Bush. “A guardian may need to spend unplanned time assisting the person who is subject to the guardianship, which may affect their work schedule and income. Or the guardian may have limited income and personal financial struggles. In these cases, thorough financial reviews are recommended to see what strategies need to be changed or created. We want to minimize the guardian’s financial challenges to reduce the potential of making bad decisions simply because of financial insecurity. We also want to ensure the person under guardianship has financial resources to cover his or her needs.”

One solution may be to create a financial nest egg to help the guardian cover some expenses associated with guardianship. Another may be to establish a special needs trust to provide financial support for the person under guardianship. Bonus: the SNT trustee and guardian can work in unison to provide care.

Is guardianship the right choice for you? Or might a durable power of attorney, a health care proxy, or appointment of advocate designation suit the purpose? Talk with your team of experts who’ll help you make the right choice.

1. *Chartered Special Needs Consultant – a professional designation awarded to those individuals who’ve completed 120 hours of academic classes in addition to previously completing the Special Care Planner certification program and has also earned at least one other advanced financial services designation (such as ChFC, Chartered Financial Consultant). The ChSNC designation was developed by The American College in Bryn Mawr, Pennsylvania. The certification program and the professional designation evolved from MassMutual’s SpecialCareSM Program.*
2. www.commonwealthfinancialgroup.com
3. *Attorney Misilo’s practice includes elder law, special needs planning, estate planning, estate and trust administration, guardianship, and DDS (Department of Developmental Services) advocacy.*
4. www.fletcherilton.com
5. *Other articles, which may be available in the magazine archives at www.eparent.com, include: “Conservatorship: A Safety Net for the Special Needs Child and Adult,” June 2007; “Choice of Guardian and Trustee Crucial to Success of Special Needs Trusts,” July 2007; and “Becoming Your Sibling’s Future Guardian,” July 2009.*

* The Special Care Planner received advanced training and information in estate and tax planning concepts, special needs trusts, government programs, and the emotional dynamics of working with people with disabilities and other special needs and their families. The certificate program was offered by The American College in Bryn Mawr, PA, exclusively for MassMutual financial professionals. State insurance departments recognize that the Special Care Planner certificate program provides essential information on the profession of special care by granting continuing education (CE) credits (varies by state).

A Special Care Planner through MassMutual’s SpecialCareSM program can assist parents in drafting Letters of Intent and can help make a difference in the quality of life for an individual with special needs, their caregiver and other family members. Through SpecialCare you will learn valuable financial strategies, identify financial strategy solutions, access vital information, and meet certified specialists who will work with you and your professional advisors – your banker, accountant or financial planner, lawyer, social workers and health care providers – to review your financial picture and offer options to fit the needs of each situation. For more details, visit MassMutual’s website at <http://www.MassMutual.com/specialcare>, or call 1-(800)-272-2216.

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