



GUARDIANSHIP OF A DEVELOPMENTALLY DISABLED ADULT: PROS AND CONS

Nature, Purpose, and Necessity of Guardianship

Guardianship is an ancient form of protection for a disabled adult or minor child. In Oklahoma, guardianship law has become legislatively enacted, resulting in a statutory procedure addressing the majority of issues relating to guardianship. The purpose of this article is not to address the issue of guardianship for a minor, since most individuals are aware of the need for a guardian of a minor's property if a minor child were to be entitled to property as a result of an inheritance, or an award in a personal injury case, or something of that nature.

However, guardianship of a disabled adult is a challenging, sometimes troubling issue that arises both with families that have disabled children who reach the age of majority, which is currently eighteen in Oklahoma, as well as persons who may develop dementia in their older years. Sometimes, also, guardianship is necessary for adults who may be injured by means of an accident or some form of disease, mental illness, or substance abuse in which event guardianship may be sought or believed to be needed to provide the care, management of assets, and oversight of overall health care in order to provide for and take care of the disabled person.

When a child is born with a developmental disability, or perhaps if they are disabled while they are a child through some injury, when the child arrives at the age of eighteen, the

question is then faced by the parents, “Should we seek guardianship at this time?” There is no hard and clear answer one way or the other to this question. It entails an exploration of the facts of the specific case, the goals to be sought, what aspects of the disabled person’s life require protection, and whether or not there are other less expensive or less cumbersome alternatives to a guardianship.

Guardianship Procedure

Sometimes an understanding of the procedure associated with guardianship will help a person decide whether or not they should seek it on behalf of a disabled adult. Guardianship in Oklahoma requires the filing of a verified (sworn to) petition alleging that a person is of adult age, but is incapacitated by reason of a developmental disability, or mental incapacity of one kind or another. Often the person petitioning is the parent or parents, sibling, adult child, or a near relative who has an interest in the welfare of a disabled person. A hearing is set before the guardianship judge, and notice is given to certain relatives as set out by statute—typically close family members—and notice must be given to the disabled person. At the hearing, if possible, the disabled person must be present so that the judge can inquire and ask questions about his or her condition and observe the responses of the disabled person. Usually a doctor’s report or that of a psychometrist, psychiatrist, or other professional is provided to the court at the time of the hearing, or attached to the petition when it is filed. At the hearing, witnesses are sworn and testimony taken by the court to determine if the disabled person is in need of a guardian, which usually results in some deprivation of personal rights, which is what happens when a guardian is appointed. A general guardian, if appointed, has overall control over the person and, if guardianship over the estate is also granted, then the guardian will also manage the assets of the disabled person. Guardianship can be general or limited, depending on whether or not the court

believes it would be best to not grant full guardianship to the petitioner. If the incapacitated adult is relatively severely handicapped, the hearing is usually rather perfunctory and brief, and the hearings can be held privately with a “cleared” courtroom, or in chambers, as requested by the petitioner and determined by the judge. Nevertheless, these types of hearings may be somewhat disturbing to the disabled person if he/she has enough understanding as to why he/she is in court, although they may be somewhat confused by the proceedings. It is typically best to make sure that the disabled person (“Ward”) was been advised as carefully as possible prior to the hearing so that he/she does not feel excessively intimidated or disturbed by the procedure.

Assuming that the court agrees with the need for the appointment of a guardian, the petitioner then takes an oath as guardian or co-guardian to handle the affairs and person of the Ward under the laws of the state. In addition, if the guardian is also appointed over the property of the Ward, it is necessary that they file an inventory setting forth the assets of the Ward, and a “Plan” for the management of the Ward’s property, as well as a Plan for the care of the person of the Ward. Often, the court requires, pursuant to statute, that the guardian file an Annual Report setting forth the receipts and disbursements of the Ward that the guardian has managed over the course of the prior year. Notice is given of this report to other family members, as required by statute, to allow any objections to the services provided by the guardian. These reports can be handled by the guardian themselves, or sometimes legal counsel is obtained to prepare and file these documents and obtain approval by the court. Rarely is a hearing conducted on the Annual Report.

The guardian is required, if handling the assets of the Ward, to invest those assets according to statutory procedures. These investment options are very strict, and they are limited for the purpose of avoiding the loss of value of the assets of the Ward.

Alternatives to Guardianship

Many families have adult disabled children living at home with them or in other care facilities, a companion program, or group homes, etc., for which no guardian is in place. Sometimes people take the position that “If it ain’t broke, don’t fix it,” and, therefore, do not seek guardianship, since nothing has occurred that appears to necessitate the creation of the guardianship. Unfortunately, sometimes events occur that are medical emergencies that require that someone makes a decision regarding the Ward’s care if the Ward is not able to communicate well or lacks the mental competency to make important health care or financial decisions. In addition, lacking guardianship over a disabled person often excludes the parent or other interested family member from receiving important information, such as health care information, psychological reports, or even having private discussions with care givers or other important persons overseeing the care of a disabled person. Guardianship would allow the guardian to obtain and have access to health care information and other important documents that may be needed to make wise decisions on behalf of the Ward.

If a person became disabled later in life and was not developmentally disabled and, thus, possessed capacity to execute powers of attorney then, typically, the wise course of action would be for a competent adult person to sign a durable power of attorney for health care and a durable power of attorney for financial matters, in the event that they later became disabled from an accident, disease, or other form of dementia that may affect their mental functioning. Thus, having a power of attorney in place would avoid, typically, the need for a guardian for a person who became disabled later in life. Powers of attorney are not, typically, judicially overseen and allow the person named (“attorney-in-fact” meaning “agent”) to handle the affairs for the principal (the principal being the person signing the power of attorney) and to act on behalf of

the now disabled adult person. Unfortunately, many individuals fail to execute powers of attorney while mentally competent and, thus, when later afflicted by means of injury, accident, stroke, or slowly developing dementia, they fail to have the documents in place to provide for their care and for control of their assets in the event of a decline in their mental capacity.

Conclusion

As to competent adults, a wise course of action is to execute, while competent, a durable power of attorney for health care and financial matters. These will assist the family member named as the attorney in fact/agent to make health care and financial decisions in the event of one's incapacity.

The issue of seeking guardianship for a developmentally disabled child, however, is more complex since, typically, that person may not be able to sign a power of attorney due to their lack of capacity. Many take the position that they will not seek guardianship unless it is forced upon them, due to the annual reporting requirements, costs of maintenance of the guardianship, and the intrusiveness of the court into the guardian's life, or at least the perception thereof. However, experience has shown that possessing guardianship will enable the guardian to have the "horsepower" to deal with medical providers, social workers, the state, or other caregivers without having to simply have a voice but with no real power to act.

Guardianship, therefore, is a mixed bag when it comes to its utility. Durable powers of attorney are certainly preferable, generally speaking, for use in handling a normal adult's estate planning affairs so as to avoid a guardianship, due to its cost, maintenance expense, etc., in the event that the adult would later become incapacitated. However, a developmentally disabled person may not be able to execute a durable power of attorney due to their incapacity and, thus, guardianship should be considered as a means of protecting that person's welfare. Experience

has shown that seeking guardianship for a disabled child is wisest promptly upon their turning age eighteen, to avoid the child later becoming more resistant, over time, to the appointment of a parent as a guardian. Many times children reaching the age of eighteen may still view their parents as “parents,” but even as a disabled child ages, they might grow weary of a parent still trying to “parent” them, even though they may still need such oversight and care. It is possible for one to pursue guardianship as a lay person, without seeking the assistance of legal counsel. As I often say, a person could set their own broken arm if they have the gumption to do so. However, professional advice and counsel normally achieves the desired results more effectively and efficiently and without serious errors than when a person tries to do it on their own.

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