

Guardianship

Understanding who may make legal, medical and financial decisions for others

The medical and financial decisions that need to be made after someone suffers a traumatic brain injury can be daunting. If the injured person has been determined to be “legally incapacitated,” that can bring a host of legal issues for which the family must make decisions.

What does it mean to be legally incapacitated and who has the authority to make decisions for such individuals? What are the responsibilities and limits of the various authorities? A clear set of guidelines exists within our legal system to help answer these questions when they arise.

Who is “legally incapacitated”?

Though individual states may differ, Michigan laws state that a legally incapacitated person is an individual who is “impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, not including minority (a person under the age of 18), that results in the individual lacking sufficient understanding or capacity to make or communicate informed decisions.” (Michigan Revised Probate Code)

What is Guardianship?

When an adult becomes temporarily or permanently incapacitated, the probate court may appoint a guardian — a person charged with responsibility over the care, custody and control of the individual. A guardian is required to act in the individual’s best interests.

When appointing a guardian, the court must find clear evidence that an individual is legally incapacitated and that guardianship is necessary as a means of providing continuing care and supervision of the incapacitated individual. Before granting the broad control and responsibilities associated with guardianship, the court will ask that the petitioner to consider other available options first. These options include Durable Power of Attorney, Patient Advocate and Conservator.

Durable Power of Attorney

In order for a durable power of attorney document to be valid, an individual must be mentally competent when they sign it. Unlike a power of attorney, which terminates when the principal dies or becomes incompetent, the durable power

of attorney is “durable” beyond incompetence. The authority granted can be broad or limited, but it should be specific. For instance, an individual might designate a durable power of attorney to have the authority to access bank accounts, pay bills or file taxes on their behalf.

A durable power of attorney may have an expiration date, or in the case of incompetence, expires when the principal is again declared competent or dies.

Patient Advocate

A person may designate a patient advocate to make medical treatment decisions on their behalf in the event that they become unable to make decisions for themselves. This document must be written, dated, signed, and witnessed by at least two people who are not legally disqualified. A disqualified person might be a family member, lawyers, caregivers or anyone with a financial interest. A patient advocate may have the power to withhold or withdraw treatment if the patient gives the authority to the advocate in the patient advocate designation.

Conservator

A conservator has the court-appointed responsibility for the management of financial affairs for an incapacitated individual. The legal “letters of authority” allow the conservator to manage property and funds in the best interest of the incapacitated person.

A conservator is generally responsible to the court to account for expenditures made on behalf of the incapacitated person.

Who can be designated as a guardian?

Any person interested in the welfare of an incapacitated individual may petition the probate court for guardianship. In Michigan, certain people are given priority as petitioners for guardianship, though the individual’s expressed wishes are given strong consideration. In order of priority, they are: a spouse, an adult child, a parent, a relative with whom the individual has resided, a person nominated by a caregiver, and a professional guardian.

The law states that guardians must make an initial visit



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within three months of their appointment and at least every three months thereafter. The probate court will maintain ongoing supervision of the guardianship and they also may appoint a *guardian ad litem*, a person hired by the court to investigate the mental capacity of an individual and the appropriateness of a particular guardian. All of the authorities will be designated in the official Letters of Guardianship.

What are a guardian's responsibilities?

Guardianship may be broad and include control of financial affairs and medical decisions or they may be limited if the incapacitated individual can handle some responsibilities on their own. The court "letters of authority" define the limitations and powers in each case of guardianship. When meaningful communication is possible, the guardian must consider the individual's wishes while still deciding in their best interests.

Only the probate court may remove a guardian. Reasons for termination include death of the incapacitated individual, resignation or death of the guardian, a petition to the court by the individual or an interested person, caregiver or agency. The determination of removal is based on an independent court investigation.

Remember that guardianship law is designed to protect the rights and interests of the individual. Consider seeking the help of a family law or probate attorney with specific questions regarding your potential role of guardian. ❖

(Michigan Revised Probate Code) Section 8(2) of the Revised Probate Code, M.C.L. § 700.8(2); M.S.A. § 27.5008(2)

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