



Guardianship: Questions and Answers

Guardianship procedures and the most commonly asked questions by family members and healthcare providers are discussed below.

What is Guardianship?

Guardianship is a legal relationship between one individual (the guardian) and an incapacitated individual (the ill or injured individual) which gives the guardian the right and duty to act on behalf of the incapacitated party in making decisions which affect that person's life. Unless the guardianship is limited by the court in some way, the guardian will manage all of the incapacitated party's personal, legal, medical, and financial affairs.

When does someone need a Guardian?

A guardian is necessary when an individual suffers a catastrophic injury, illness, or is otherwise so disabled that the individual is unable to manage responsible decisions concerning his medical, financial, and legal needs and manage his daily affairs.

My 18-year-old son was in a serious accident and he is in a coma. I am the natural parent. Do I need to be appointed as his legal guardian in order to make medical, financial, and legal decisions on his behalf?

Yes, you need to file for guardianship. Parental authority to make legal decisions **ends** when a child reaches the age of 18. The laws of every state require that a guardian is appointed for an incapacitated individual who is over 18 years of age.

Do the parents have to petition the court for their minor child?

No. It is not necessary for a parent to petition the court to be a guardian if their child is under 18 years of age. Parents are the natural guardians of their minor children and it only becomes necessary to file for guardianship if their child becomes "incapacitated" and reaches the age of 18.

Why is a Guardian necessary?

The guardian is empowered with the authority to:

- Consult with treating doctors;
- Approve medical treatment and placement, if necessary;
- Give authorization for the release of medical records under HIPPA;
- Apply for governmental benefits, Social Security Disability, Supplemental Security Income, and state medical benefits;
- Open bank accounts;
- Safeguard the incapacitated party's assets.

Can a Guardian negotiate with a health insurance company, worker's compensation carrier, Medicaid, and Medicare for an extension of acute care, rehabilitation, equipment, therapies, nursing, and coma awareness programs?

In the absence of a guardianship decree, private health insurers, managed care insurers, Medicare, Medicaid, and Worker's Compensation carriers have no legal obligation to follow the directives or requests of spouses, parents, children, or other family members.

A court appointed guardian is empowered with the authority to:

- Negotiate for additional managed care health insurance benefits.
- Approve discharge planning.
- File an appeal due to the denial of medical benefits.
- File a claim for Bad Faith against the health insurer for unfairly denying the requested treatment, equipment, or services.
- Negotiate with the adjuster, case manager, or rehabilitation nurse, assigned by the health insurance carrier.

Often an experienced attorney can aid the court-appointed guardian to navigate these complex issues.

Who should be appointed Guardian?

Usually, a husband, wife, parent, or next of kin is appointed the guardian by the court. The court will not appoint a guardian unless that person is over 18 years of age and the court feels that the person is capable of acting in the best interest of the incapacitated individual.

Who is appointed Guardian if no family members or friends are qualified to serve as a Guardian?

The court has the power to appoint anyone as guardian in this case. Often the court will appoint an attorney, bank, accountant, or case manager to serve as guardian when there are no qualified relatives or friends.

What is the procedure for appointing a Guardian?

A petition must be filed in the Orphans Court in the county in which the disabled individual resides. After receiving a petition for the appointment of a guardian, the Orphans Court will hold a hearing to determine if there is sufficient medical documentation to appoint a guardian. Most courts will require that the treating doctor testifies in person concerning medical aspects of the case, however, some courts will not require the doctor to testify and will appoint a guardian if the doctor files a notarized medical report or deposition with the court.

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Is it necessary for the incapacitated individual to appear in court?

Generally, if the treating doctor states that it would be against the best interest of the incapacitated individual to appear in court, the court will not require his or her appearance.

What is the legal test to determine if a person is incapacitated?

The legal test to determine if a person is incapacitated is whether the adult has the ability to receive and evaluate information effectively and communicate decisions. An individual is considered incapacitated if their impairment is so significant that he or she is partially or totally unable to manage their financial resources or meet essential requirements for their physical health and safety.

Is it difficult to have a person declared incapacitated?

Courts are reluctant to declare a person incapacitated unless it is *absolutely* necessary and is based upon proper medical documentation.

My husband was hit by a tractor trailer and sustained a traumatic brain injury and a spinal cord injury.

Can a Guardian be appointed in emergency situations?

If there is a *medical or legal emergency*, the court will appoint a temporary guardian pending a hearing to determine whether or not a permanent guardianship is necessary. Usually, courts will appoint a temporary guardianship in an emergency within 24-48 hours after the petition is filed. Often, a temporary guardian is necessary to assist/expedite discharge planning.

Is Guardianship revokable?

Yes, a guardianship is revocable. The incapacitated individual, or anyone acting on his or her behalf, may ask the court at any time to remove the guardian or revoke the guardianship. Medical documentation of the treating doctor is necessary to revoke a guardianship.

Can the assets of an incapacitated person be protected in any way by the court?

The court can require a guardian to post a bond, ensuring that the assets will be protected in the event that they are lost, misappropriated, or improperly handled.

How can I be sure if a Guardian is necessary?

Each case must be judged on its own facts. I recommend that the treating doctor meets with the case manager/social worker, interested family members, and the proposed guardian to discuss whether or not everyone agrees that a guardian is necessary. This approach alleviates court battles and enables a unanimous opinion that a guardian is needed in a particular case.

What happens if a court appointed Guardian dies, becomes ill, or changes his or her mind concerning serving as Guardian?

In all these cases, the court will appoint another guardian. This is a simple procedure and it can be accomplished by requesting that the court appoint a substitute guardian. There does not have to be additional medical evidence presented, only a new list of persons that want to serve as the guardian.

Is a Guardianship necessary if someone already has a Power of Attorney or Durable Power of Attorney and that person becomes incapacitated?

Power of Attorney

In this situation you would have to file for guardianship. A Power of Attorney is a right which is given by one *competent* individual to another granting that person the right to do a specific act for the competent individual, such as open bank accounts, write checks, sign legal documents, etc. A Power of Attorney ceases if the *competent* individual revokes the Power of Attorney, or becomes incapacitated. In this situation, you would have to file for guardianship.

Durable Power of Attorney

In this situation you would not have to file for Guardianship. A Durable Power of Attorney is a specific document which a competent individual, prior to his/her incapacitation, names another person to act on his/her behalf if that individual becomes unable to manage his/her own affairs. The person named in the Durable Power of Attorney, unlike a Power of Attorney, will serve as the guardian of the individual *without* the necessity of petitioning the court to have the individual declared incapacitated.

Is a Guardian Ad Litem the same as a court appointed Guardian?

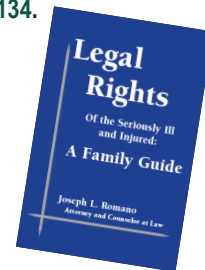
No. A guardian is appointed by the court when an individual meets the legal test to be declared an incapacitated person. A guardian ad litem is a relationship created by a court order only for the duration of a legal action to protect the rights of infants, minors, and adults who are impaired but do not require a court appointed guardian.

Conclusion

Guardianship is sometimes avoided because it is an emotional issue, but it is crucial that family members and healthcare professionals discuss this topic as soon as possible after a catastrophic injury or illness. If you have any questions about **guardianship issues** or any funding questions for the seriously ill and injured, please contact me at **800-331-4134 for a FREE consultation.**

Reprints of this newsletter are available upon request. If you would like Joseph L. Romano to give an in-service presentation on Guardianship, call 800-331-4134.

To receive a **free** copy of Joseph Romano's book: **Legal Rights of the Seriously Ill and Injured: A Family Guide**, in English or Spanish, please call **800-331-4134.**



This comprehensive resource guide was written to help families and medical professionals advocate for benefits and services for the seriously ill and injured.



JOSEPH L. ROMANO, ESQUIRE

583 Skippack Pike • Suite 500
Blue Bell, PA 19422

One Oxford Centre • 301 Grant Street
Suite 4300 • Pittsburgh, PA 15219

800-331-4134 • info@josephromanolaw.com
www.josephromanolaw.com

Mr. Romano, along with qualified co-counsel, represents clients throughout the United States.