

Do-Not-Resuscitate Declaration (DNR)

A competent³ adult – or the patient advocate of an incompetent⁴ adult – may execute a DNR declaration that if breathing and heartbeat stop, the patient will not be resuscitated (revived). This applies only in a non-hospital setting. Therefore, it does not apply in a hospital, nursing home, or mental health facility owned or operated by the Department of Community Health. Forms are available from the State Bar of Michigan at <http://www.michbar.org>.

Drawbacks to Guardianship

Guardianship is a serious step. Keep in mind:

- It removes all or some of the rights of the individual it is intended to protect. This can be difficult for the protected person.
- It may be expensive. Both the person or institution seeking to be guardians – and the protected individual – may need a lawyer, especially if the protected individual does not want a guardian.
- It is a time-consuming process. Putting a guardianship in place can take 2 to 6 months.

More Information

Guardianship is a complicated issue. It is important to learn all you can.

The State Bar of Michigan has many resources available to the public on the Elder Law section of its web site, <http://www.michbar.org/elderlaw>. The site includes answers to common questions, alternatives to guardianship, and forms.

Additional Resources

Michigan Guardianship Association, <http://www.michiganguardianship.org>
National Guardianship Association, <http://www.guardianship.org>

¹ See page 3 for the definition of “incapacitated”.

² A developmental disability is a mental or physical disability (such as mental retardation or Fetal Alcohol Spectrum Disorder) arising before adulthood and usually lasting throughout life.

³ “Competence” refers to the right to manage personal, financial, or legal affairs.

⁴ An “incompetent” person is someone who is unable or legally unqualified to perform certain acts or to be held legally responsible for such acts (for instance, signing contracts).



GUARDIANSHIP

Occasionally, an individual is too young, too physically or mentally impaired, or too disabled to make his or her own decisions. Guardianship is a legal procedure in which a court appoints someone else to act for an individual, making decisions about the individual person and/or the person’s property. Guardianship is a way for the state, in the form of the court, to make sure that a person’s basic needs are being met, and that the person’s property is protected and used for the person’s benefit.

In this booklet, we look at the topic of guardianship as it may relate to people with serious health care issues.

What is a guardian?

A guardian is a person, or institution, chosen by probate court to make decisions about the care and custody of a person who needs to be protected. This person is referred to as a “protected person”.

A guardianship may be temporary, permanent, full, or limited, depending on the needs of the protected person.

Who might need a guardian?

A person who needs help making – or who cannot make – decisions about his or her own welfare *may* need a guardian. This booklet discusses the guardianship of three different kinds of protected people:

- Guardianship of an adult who cannot respond for himself (an “incapacitated”¹ adult),
- Guardianship of an adult who is mentally impaired (a “developmentally disabled”² adult), or
- Guardianship of a minor (a person under 18 years of age).

What can a guardian do?

A guardian can make decisions about medical care, living arrangements, and other quality-of-life issues. The court decides which kinds of decisions a guardian can make; the court describes the guardian’s powers and duties in a document called the Letters of Guardianship.

If you are chosen as a guardian, keep a copy of the Letters of Guardianship with you whenever you need to seek medical care for the protected person.

Health care providers should make a copy of the Letters of Guardianship for the patient’s medical record.

Other Kinds of Assistance for a Protected Person

Conservator: A person chosen by probate court to manage a protected person’s estate. Conservators make decisions about money and guard what a protected person owns. Conservators do not make medical decisions unless there is some other document that says they should, such as a durable power of attorney for health care.

Guardian Ad Litem (GAL): A person, often a lawyer, chosen to be the “eyes and ears” of the court. When the court is asked to choose a guardian, the GAL will talk with the protected person, the family, and the caretakers. The GAL will then tell the court what the protected person wants to happen, and whether there are any alternatives to guardianship. The GAL does not make decisions for the protected person. The GAL only gathers information and then gives that information to the probate court.

How is a guardian appointed?

A petition must be filed with the probate court, along with necessary documentation. Documentation may include:

- A description of the disability, incapacitation (inability to care for oneself) or need for guardianship.
- A professional evaluation of the protected person's needs and skills.
- A recommendation for appropriate rehabilitation plans and living arrangements.
- The signatures of the individuals who performed the evaluations.
- A list of all medications the protected person receives on an ongoing basis.

When can a guardian be removed?

If a guardian does not perform the guardianship duties capably and the well-being of the protected person requires immediate action, the court may choose a temporary guardian for up to 6 months. The permanent guardian may not make decisions for the protected person as long as the temporary guardian is in place.

Who can be protected by guardianship?

Developmentally Disabled People

Developmental disability, when applied to anyone over 5 years of age, is a severe, chronic condition that meets **all** of the following requirements:

- It is related to a mental or physical impairment or combination of mental and physical impairments.
- It occurred before the person was 22 years old and will likely continue forever.
- It severely limits function in three or more areas of major life activity (self-care, language, mobility, self-direction, ability to live independently, and economic self-sufficiency).

Guardianship for developmentally disabled adults should encourage the development of maximum self-reliance and independence, and is to be used only when needed to promote and protect the well-being of the person.

A parent may be the legal guardian. But often, when a child with a developmental disability reaches the age of 18 years, parents may want to appoint a different legal guardian.

Guardian of the Person

A guardian of the person for a developmentally disabled adult may be “plenary” or partial.

- **Plenary Guardian:** Appointed when the individual is developmentally disabled and is *totally without the capacity to care for himself*. All the legal rights that formerly belonged to the developmentally disabled individual now belong to the plenary guardian.
- **Partial Guardian:** Appointed when the individual is developmentally disabled and *lacks the capacity to do some of the tasks necessary to care for himself*. The protected person keeps all legal and civil rights except those that have, by court order, been granted to the partial guardian. If medical care is a responsibility of the partial guardian, this would have to be stated in the Letter of Guardianship.

Guardian of the Estate

Guardianship of the estate for a developmentally disabled adult is similar to a conservatorship for an incapacitated adult.

Medical Treatments and Surgery

It is very important for health care providers to obtain a copy of the Letters of Guardianship to know what powers the court has given to the guardian.

A guardian can okay routine or emergency medical treatment or surgery. A guardian for a developmentally disabled adult **cannot** okay extraordinary procedures such as sterilization, abortion, experimental treatment, and organ transplants from the developmentally disabled adult to another person. These procedures require a court order.

Incapacitated Adults

An adult may receive – or refuse – medical treatment unless he or she is an incapacitated person. “Incapacitated” means a person is unable to understand and make informed decisions because he is impaired in some way: a mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic drunkenness, or other cause.

Anyone interested in an adult's well-being may ask the probate court to declare the person incapacitated and choose a guardian. The adult may make this request himself.

The court can require a doctor to examine the adult and report to the court on whether the person is incapacitated. If the court finds the person is incapacitated, then the court will choose a guardian.

- **Full Guardianship:** All of the rights of the incapacitated person that can legally be removed, are removed and given to the full guardian. This could include both medical and health care decisions as well as decisions concerning the persons property or assets.
- **Limited Guardianship:** When a protected person is largely capable of caring for himself but needs help in some areas, the court gives those specific rights to the limited guardian. This could include bill-paying, for instance.
- **Temporary Guardianship:** In an emergency situation, a court may choose a temporary guardian for the incapacitated person. The temporary guardian will have only the powers ordered by the court and will serve only for the period of time ordered by the court.

Minors

A minor is defined as a person under the age of 18. A parent (biological or adoptive) is automatically a minor child's guardian unless the parental rights have been restricted or ended by court order, or the minor is emancipated (free from the control of parents or a guardian).

A guardian may need to be appointed for a minor if the minor's parents are dead, incapacitated, or in jail or prison.

There are two kinds of guardianships for minors:

- **Full Guardianship:** Empowered to make all decisions a parent can make for a child.
- **Limited Guardianship:** Appointed only when the custodial parent, court and proposed guardian agree to the appointment. The guardian typically has full powers but cannot consent to the minor's marriage or adoption.

Alternatives to Guardianship

Courts view guardianships as a last resort because the ability of the person to make basic decisions about his or her care, treatment, or living arrangements is being taken away. Courts will always look for a less restrictive or alternative means before appointing a guardianship. Here are a few alternatives:

Patient Advocate Designation - Durable Power of Attorney for Health Care

An adult who is of sound mind can name another person as his or her patient advocate and can allow that person to make decisions for him about medical and mental health treatment.

A patient advocate can make decisions only when the patient is unable to participate in treatment decisions. The patient's main doctor and another doctor or psychologist decide whether the patient is unable to participate in decisions.

A person who wishes to draft a durable power of attorney for health care can talk with a lawyer or can use one of many forms available for free from many sources. The State Bar of Michigan offers forms on the Elder Law section of its web site: <http://www.michbar.org>.

Durable Power of Attorney (DPOA)

This is different from the durable power of attorney for health care. A DPOA generally gives the named person the authority to act as an agent for the protected person and to do business on that person's behalf. A DPOA may allow the named person to make health care decisions as well as financial decisions. DPOAs are usually drafted by lawyers.