Let’s talk: Alternatives to Guardianship

Just because someone has been diagnosed with a disability or an illness does not mean they need a guardian. Because guardianship significantly interferes with a person’s independence and rights, it is treated as a last resort.

What is adult guardianship?

The term refers to a legal process in which the court appoints a person, known as a guardian, to make personal or financial decisions for an adult who is not able to because of illness or disability. The court can appoint a guardian of the person, a guardian of the property, or both.

- A **guardian of the person** makes non-financial decisions for things like housing, medical care, clothing, food, education, and everyday needs.
- A **guardian of the property** handles financial affairs such as paying bills, filing taxes, and applying for benefits or services.

Why are alternatives to guardianship important?

Guardianship limits, and in some cases takes away, a person's basic rights and it removes their ability to make decisions about what they eat, where they live, when they see family and friends, and how their money is spent. Since this is all at stake, the guardianship court process is protective and complex and can be lengthy and expensive. If the court decides you need a guardian, it may appoint a stranger who knows nothing about your values, preferences, or beliefs.

What are alternatives to guardianship?

They are formal and informal options that allow a person to have their personal or financial needs met without a guardian. They are sometimes called less restrictive options. Alone or together, these options can help a person avoid guardianship or be used to limit, modify, or terminate a guardianship.

Alternatives to guardianship include:

- Advance directives
- Surrogate decision-making
- Assistance with personal needs
- Powers of attorney
- Representative payees
- Supported decision-making
- Banking services, ABLE accounts, trusts, and specific transactions

Some of these options can be part of your estate/financial plan. An estate plan is a collection of documents that explains how you want your personal or financial affairs to be handled in the event you die or later become incapacitated and are unable to make decisions. Having a plan in place can help ensure that your wishes are honored and help you avoid needing a guardian one day.

For more information on estate and financial planning, see our guide, "Let's talk: Financial Planning".

Advance Health Care Directives

- An advance directive is a statement of a person's wishes about future health care. The advance directive may:
  - Appoint another person to make decisions for the person
  - State what type of care the person would want in certain situations
  - Do both

Surrogate Decision-Making

- If a person does not have an advance directive, and is unable to consent to treatment, a surrogate decision maker can make health care decisions for her. A surrogate is a person who makes a decision for the incapacitated patient based on what that person would have wanted. If a surrogate decision maker is available, it may not be necessary to appoint a guardian of the person. The use of a surrogate most often happens in emergency medical situations.
- Surrogate decision makers. The law lists these individuals as surrogate decision makers, in the following order of priority:
  - A guardian previously appointed by the court
  - A spouse
  - An adult child
  - A parent
  - An adult brother or sister
  - A competent friend or other relative who can demonstrate he or she has maintained regular contact with the patient sufficient to be familiar with the patient's activities, health, and personal beliefs
- Assistance with Personal Needs
  - Provides assistance with dressing, bathing, transferring, grooming, eating, cooking, laundry, light cleaning and shopping.
  - In general, it allows a person with a disability to remain living at home and to avoid unnecessary or premature moves to a nursing home or other out-of-home placement.

Power of Attorney

- A power of attorney must be written when a person is mentally competent. For some people with decreased mental capacity, it may be too late to write a power of attorney; however, others affected by confusion or an intellectual disability may be able to adequately express what they want.
- Even individuals who have been diagnosed with an early stage of Alzheimer's disease, a mental illness, or other disability may possess the necessary competency to execute a power of attorney.
- The person must be able to understand what property they have, the consequences of appointing an agent, and be able to clearly communicate their wishes, stating that they want a certain person to handle their financial affairs.

Representative Payees

- Representative payees are usually family members or friends, but service providers, public agencies and volunteer organizations can also serve as representative payees. Federal law limits those who may collect a fee for serving as payee to community-based, non-profit social services agencies, licensed and bonded in the state.
- To be named a representative payee:
    - A person must apply to the agency paying the benefits.
    - A physician must sign a medical form that certifies that the individual receiving the benefit check is not able to handle her own money.
    - The form must be filed with the agency.
    - The agency will determine if it is in the best interest of the beneficiary for a representative payee to be appointed.
    - The agency will notify the beneficiary that someone has applied to be her representative payee. If the beneficiary does not object, the agency will send the monthly check to the representative payee, for the use of the beneficiary.
    - The representative payee can open a bank account in both names and can pay the beneficiary's bills and buy necessities for her from the monthly income.
    - The representative payee must always act in the best interest of the beneficiary.

Banking services, ABLE accounts, trusts, and specific transactions

- Banks often provide some money management services for their banking clients. It may be possible to arrange for the following services:
  - Direct Deposit: A person's regular income, such as pension or Social Security checks, can be automatically deposited into the individual's account.
  - Direct Payment: The bank can make direct payments from the individual's account for routine bills such as rent, mortgage payments, nursing home payments, and monthly utility bills. With the bank automatically paying these bills, the individual is relieved of having to remember to write checks for them each month.
  - Personal Money Managers: If an individual has substantial funds, she can hire a personal money manager to receive funds and pay bills on her behalf.
  - Power of Attorney Accounts: Banks will establish accounts that allow an agent to act for the owner of the account only in matters at that bank.
  - Joint Bank Accounts: If two or more people own a checking or savings account, all owners can usually deposit and withdraw money from that account.
  - ABLE Accounts: With Maryland ABLE, you can contribute up to $19,000 per year (or more if the beneficiary is working) for a wide range of qualified disability expenses. The account's growth is tax-free and your contributions could qualify for an income deduction on your Maryland State taxes. You can save and invest up to $100,000 before impacting SSI cash benefits.
  - Trusts: A trust may be used to avoid guardianship of the property. A trust is a legal arrangement by which one person (the grantor) transfers assets to a trustee to be held and managed for the benefit of one or more beneficiaries of the trust.
  - Court Authorization of a Specific Transaction: Maryland law provides for court authorization of a one-time transaction to transfer a specific piece of property without the appointment of a guardian of the property.

Let's Recap: What are reasons to seek alternatives to guardianship?

- First, the appointment of a guardian is a serious measure. Guardianship has the potential to deprive a person of the right to make virtually all personal and financial decisions.
- Second, the law requires that a guardian of the person be appointed only when no less restrictive form of intervention is available which is consistent with the person's welfare and safety. The petition requesting guardianship must contain information about what other alternatives have been tried and failed.
- Third, filing for guardianship is costly and time consuming. Two attorneys (one representing the petitioner and one representing the alleged disabled person) must be paid. There may also be expert witness fees for the testimony of physicians, psychologists, or social workers. In some parts of Maryland, it will take several months for a guardian to be appointed unless it is an emergency. Once appointed, the guardian will have an obligation to file annual reports with the court. At the end of the guardianship, a guardian must return to court and petition to terminate the guardianship.
- Fourth, a guardian of the person may have less authority to make decisions about life-threatening medical treatment than does a close relative who is not a guardian. A guardian may have to return to court for approval to withhold medical treatment if appropriate. A close relative or friend could make the same decision without court involvement after consulting with the person's physicians.

We'd love to talk to you about the services we provide and how our wide range of programs and services honor personal choices and goals while providing children and adults with the support needed to lead self-directed and fulfilling lives. If you have any questions about guardianship or how The Arc Southern Chesapeake can help your loved one safely maintain independence, please reach out to us 410-535-2413
or via email at admissions@arcsoch.org