

Overview of Federal and State Laws

Ark. Code Ann. 28-65-101-28-65-109

940 of 1985 Guardianship Law

A guardian is a person appointed by a court to have the care and custody of the person or of the estate, or of both, of an incapacitated person. An incapacitated person is a person who is impaired by reason of disability such as mental illness, mental deficiency or physical illness to the extent of lacking sufficient understanding or capacity to make or communicate decisions to meet the essential requirements for his health or safety or to engage his estate. An incapacitated person for whom a guardian has been appointed is not presumed to be incompetent and retains all legal and civil rights except those which have been expressly limited by court order or have been specifically granted by order to the guardian by the court. It is the duty of the guardian of the person to care for and maintain the ward, and if he or she is a minor, to see that they are properly trained and educated and that opportunities are afforded to the individual. The guardian of the person may be required to report the condition of his or her ward to the court, at regular intervals or otherwise, as the court may direct. All guardians must file an annual report with the court. The report shall contain the person's current mental, physical and social condition; his present living arrangements; the need for continued guardianship services; and any other information requested by the court or necessary in the opinion of the guardian. A guardian is required to obtain court approval in order to make certain decisions. Among those are: consent on behalf of the incapacitated person to abortion, sterilization, psychosurgery or removal of bodily organs except when necessary in a situation threatening the life of the incapacitated person, and consent to withholding life-saving treatment. The qualifications of guardian are they must be a resident of This state, eighteen (18) or more years of age, of sound mind, and not a convicted and unpardoned felon. The Arkansas Department of human services or any charitable organization is qualified for appointment as guardian of the person and estate of a minor:

1. When the major portion of the support of the minor is being supplied or administered by the department or organization;
2. When the court finds that the minor has been abandoned by his parents;
3. When his or her parents are incapacitated or unfit for the duties of guardianship. A bank or similar institution with trust powers may be appointed guardian of the estate of an incapacitated person. The parents of an unmarried minor, if qualified, and in the opinion of the court, suitable, shall be preferred over all others for appointment as guardian of the person. In order to be appointed guardian of a person and his estate, it is necessary to file a petition with the probate court setting forth the grounds justifying the appointment. The cost associated with such petition will include a filing fee and attorney's fees. It is necessary for the court to hold a hearing before appointing a guardian. The type, scope and duration of the guardianship will be set forth in the petition. The determination of incapacity must be established by one or more qualified professionals. A professional evaluation shall be performed

prior to the court hearing. The evaluation shall include the mental and physical condition of the ward, his adaptive behavior and intellectual functioning. If no professional evaluation performed within the last six (6) months prior to petitioning the court is available, the court will order an independent evaluation. There are several less restrictive alternatives to guardianship which should be explored. Yet, alternatives will not always be preferable to guardianship. If impairments are severe, no advance planning has been done, and/or court supervision is clearly: needed, guardianship may be the best course of action. One alternative is the power of attorney in which individuals are allowed to name agents to act on their behalf if they become incapacitated. Conservatorship for the disabled and custodial trusts are typically used for people with disabilities. A conservatorship is, in effect, a voluntary form of guardianship of the estate. Since the person over whom the conservatorship is sought must consent, this procedure is not available to a mentally incapacitated person. A custodial trust is a method by which persons with few assets may make a trust for the benefit of an incapacitated person. There are some disadvantages of guardianship. The appointment of a guardian is predicated upon a judicial determination of capacity and therefore it results in a substantial loss. Establishing a guardianship can be expensive. Consideration must be given to court fees, lawyers, a doctor who are involved