



DISABILITY LAW CENTER

Utah's Protection and Advocacy Agency

205 North 400 West
Salt Lake City, UT 84103

Voice: (801) 363-1347 • 1-800-662-9080
TTY: (801) 924-3185 • 1-800-550-4182
Fax: (801) 363-1437

www.disabilitylawcenter.org

Guardianship for adults in Utah

Guardianship is a legally authorized relationship between a competent adult (the guardian) and a minor child or an incapacitated adult (the ward). This fact sheet will discuss guardianships for incapacitated adults. In this relationship, the guardian is given the duty and right to act on behalf of the ward in making certain decisions affecting the ward's life. This fact sheet is informational only and is not intended to be legal advice. These are complex issues. If you need help to understand this information, the Disability Law Center can help you.

When a guardian is appointed, the court gives the guardian the authority to exercise certain legal rights of the ward in the ward's best interest. When a guardianship order gives certain rights to the guardian, it takes those rights away from the ward. This can limit the choices a person with a disability can make on their own. For this reason, guardianship is a very restrictive procedure and should only be used when necessary.

Types of guardianship

Guardianship - A guardianship may be created by a court for any individual 18 years of age or older who, by decision of a judge or a jury, is found to be incapacitated. This is the definition of an incapacitated person:

- any person whose decision making process is impaired by reason of mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, or the person who has unusually bad judgment, highly impaired memory, or severe loss of behavior control, to the extent that the person is unable to care for his or her personal safety or is unable to attend to and provide for such necessities as food, shelter, clothing and medical care, without which physical injury or illness may occur.

Regardless of an individual's disability or the severity of the disability, he or she is considered competent under the law when he or she turns 18 years of age. If a parent or other interested person wishes to become the guardian of the adult, an order by the court must be obtained.

Limited guardianship - Powers of guardianship can be limited to reflect the needs of the individual who is incapacitated. A limited guardianship may be appropriate for individuals whose conditions impair their ability to care for themselves in certain areas, but not to the extent that a full guardianship is required. Some areas where a limited guardian can make decisions on behalf of the ward include care provided by a health care professional (medical, habilitative, speech, physical or occupational therapy, mental health treatment and others), residential or educational guardianships. A limited guardianship allows the person with a disability to retain some independent decision making, while allowing the guardian control over some other things.

Conservatorship – A conservator is a person appointed by the court to manage and protect the estate (the money and property) of an incapacitated person. The definition of a person in need of protection (conservatee) for conservatorship purposes is slightly different than the definition of an incapacitated person. This is the definition of a person in need of protection:

- a person who, due to mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance is unable to manage their estate and affairs.

A court may prefer a conservator over a guardian to manage an estate. A conservator must report to the court about the estate in greater detail than a guardian. Sometimes the same individual is appointed to act as guardian *and* conservator. The court, however, may appoint one person to act as guardian and another person to serve as conservator.

Guardianship procedures

Appointment of a guardian or conservator – An adult will be made a ward or conservatee only if a petition is filed in a court and the judge finds guardianship or conservatorship necessary to protect the individual. If a judge determines that a person is incapacitated or in need of protection, the person may be placed under guardianship or conservatorship despite their objection or refusal.

A plenary (total) guardianship is very restrictive and may not be appropriate under certain circumstances. Therefore, the Utah statute states a preference for a limited guardianship and may only grant a plenary guardianship if no other alternative exists. If the judge grants a plenary guardianship it must be explained in the decision why nothing less than a plenary guardianship is adequate.

Right of the respondent – The appointment of a guardian limits the civil and legal rights of an incapacitated person. To ensure that rights are not limited unnecessarily, Utah law provides the following due process protections to the potential ward:

- to be notified of the time and place of a hearing in plain language in large type,
- to be represented by legal counsel. The cost of counsel will be borne by the alleged incapacitated person, unless the court determines that the petition is without merit, in which case, the person filing the petition may be ordered to pay the costs,

- to be present at all proceedings. If the potential ward cannot be present, a court visitor will do an assessment. There are certain medical exceptions when a court visitor or presence in court is not required. They are when the proposed ward has profound mental retardation, 4th stage Alzheimer's disease or extended comatosis which must be shown by clear and convincing evidence,
- to present evidence and to cross examine witnesses, and
- a trial by jury, if requested.

The court can appoint a guardian of an adult only after finding by clear and convincing evidence that the proposed ward is incapacitated. This is a higher standard of proof than is required in most civil proceedings.

Legal effects of guardianship

When the court grants a guardianship, the powers and duties of the guardian may include the following, but they must be specified:

- authority to determine where the ward will live and what training, health care and education they receive,
- responsibility to make sure the basic needs of the ward for food, clothing and shelter are met,
- authority to consent to medical and other professional care needed by the ward, and
- responsibility to keep the ward's financial affairs in order.

There is no complete list of areas where the guardian can make decision. The letters of guardianship must identify the areas of decision making that are given to the guardian. Under a plenary guardianship, the guardian still can make decisions *only* on matters directly impacting the ward's health and safety.

Custody of the ward

The guardian is responsible for the debts of the ward only to the extent of the ward's resources. The guardian accepts no personal liability for debts incurred by the ward.

A plenary guardian has custody of the ward. This means the guardian is responsible for the care, safekeeping and supervision of the ward.

Discharge from guardianship or conservatorship

The court may remove a guardian and appoint a successor if it is in the best interest of the ward. On petition of the guardian, the court may accept the guardian's resignation and make any other order that may be appropriate. Before removing a guardian, the court shall follow the same procedures to safeguard the rights of

the ward that apply to a petition for appointment of a guardian. Restoration to capacity constitutes a finding by the court that the person is not incapacitated and is able to exercise full civil rights.

Any interested person, or the ward, may request that the court find that the ward is no longer incapacitated and in need of a guardian.

Alternatives to guardianship

In certain circumstances, there are alternatives to guardianship. Some of the alternatives allow the individual to retain more control of his or her life.

Trusts – A trust is a legal device often used to manage the financial affairs of an incapacitated person. To create a trust, the trustor (incapacitated person) transfers legal title of property to the trustee (person who is managing the finances). Express trusts are created by a document such as a deed or will. Trusts are more flexible than guardianships because the trustor keeps control of his or her life and is only restricted by conditions of the trust.

Representative payee – This is a program where the United States Social Security Administration determines that an incapacitated person (beneficiary) needs help to manage their Social Security benefits. When a person needs this kind of help, the Social Security Administration, after a careful investigation, appoints a relative, friend or another interested party to serve as the beneficiary's representative payee. The beneficiary's Social Security of SSI benefits are then paid in the representative payee's name. A representative payee controls only Social Security benefits. An allegedly incapacitated person may demand a hearing to challenge the appointment of a representative payee. When appointed, Social Security payments will be made to the representative payee on condition that the funds are used only for the use and benefit of the beneficiary.

Estate planning – Individuals doing estate planning where the beneficiary is a person with a disability should consider certain factors. If the intended beneficiary utilizes public services on a regular basis (e.g. training, educational, medical, or psychiatric facilities) the benefactor should determine if there are income eligibility requirements for those services. The estate plan should be set up either to provide the benefit of the estate without making the beneficiary ineligible for the needed public services or to provide sufficient capital to purchase those services privately.

For more information

If you have questions about this information, you may contact the Disability Law Center (DLC). The DLC is a private non-profit organization designated by the governor to protect the rights of people with disabilities in Utah. The mission of the DLC is to enforce and strengthen laws that protect the opportunities, choices and legal rights of people with disabilities in Utah. We envision a just society where all people are treated with equity, dignity, and respect.

Contact the DLC toll-free at 1-800-662-9080 (voice) or 1-800-550-4182 (TTY), or visit the DLC at www.disabilitylawcenter.org. DLC offices are located at 205 North 400 West, Salt Lake City, Utah 84103. DLC services are state-wide and provided free of charge. DLC materials are available on tape, in large print, Braille and in Spanish. Other alternative formats can be made available upon request.

Public and private agencies that assist with guardianships and conservatorships

The Disability Law Center is providing you the names of these attorneys and agencies as a courtesy. We do not know if any of these attorneys or agencies will accept your case and we cannot guarantee the quality of their work.

Age Connections, Inc.

13997 S. Minuteman Drive, Suite 210

Draper, Utah 84020

801-231-2081

Fax 801-523-9339

Email: marygy@ageconnections.com

Services: Consultation, private care management, in-residence non-medical care providers, court visitor and expert witness services, mediation for the elderly and individuals with disabilities

Eligibility: Adults living along the Wasatch Front of Utah

Fee: Call for more information.

Brian G. Cannell

Hillyard, Anderson & Olsen, P.C.

175 East 100 North

Logan, Utah 84321

435-752-2601

Eldercare Consult, Inc.

545 East 4500 South, Ste E155

Salt Lake City, Utah 84107

801-288-4004

www.eldercareconsult.com

Services: Private guardianships and conservatorships, private consultation and care management, capacity evaluation

Eligibility: Incapacitated adults and older adults

Fee: Fee for services

Guardian & Conservator Services, LLC

13997 S. Minuteman Drive, Suite 210

Draper, Utah 84020

801-523-0060

Fax: 801-523-9339

Email: rhuntercpa@attglobal.net

Services: Private guardian, conservator and trust services; VA fiduciary, Social Security payee, personal representative, estate management and liquidation; mediation for the elderly and individuals with disabilities

Eligibility: Individuals with disabilities living in Utah

Fee: Call for more information.

Guardianship Associates of Utah, Inc.

320 West 200 S., #140B

Salt Lake City, Utah 84101

801-533-0203

Fax: 801-533-0206

Services: Case management of guardianship cases, information, presentations, Assisted Family Guardianship Program that assists family members in gaining guardianship of adult children with disabilities.

Legal Aid Society of Salt Lake

205 North 400 West

Salt Lake City, Utah 84103

801-328-8849

The Legal Aid Society of Salt Lake provides legal services to low-income persons in family law, including guardianship.

Services: Representation of proposed wards wanting to contest proposed guardianships.

Representation of wards wanting to contest existing guardianships

Eligibility: Statewide but primarily limited to persons living in Salt Lake County and persons whom the Office of Public Guardian is seeking to establish or maintain guardianship or conservatorship

Fee: There is no fee, however, individual must meet income eligibility standards in order to qualify for services.

Holly J. Mahoney, LLC

8232 South Kirkwood Place

Sandy, Utah 84094

801-205-0969

Office of Public Guardian (OPG)

120 North 200 West

Salt Lake City, Utah 84103

801-538-8255

The Office of Public Guardian is the state agency responsible for public guardianship and conservatorship services in Utah.

Services: Information, referral and education, guardianship and conservatorship assessment, limited and full guardianships and conservatorships, alternatives to guardianship and conservatorship

Eligibility: Direct services are limited to incapacitated persons who have no one else to serve as their guardians or conservators. Priority is given to persons who are in life-threatening situations, or who are experiencing abuse, neglect, self-neglect or exploitation, or who are at significant risk of experiencing such problems.

Fee: Fees may be assessed for services. However, fees may be waived for persons of limited income.

Other Information: Eligibility for OPG's services are limited by law and OPG's limited staff and resources. OPG guardians are certified as registered guardians by the National Guardianship Association or are working to obtain NGA certification.

Maria Cristina Santana

44 West Broadway, Suite 304
Salt Lake City, Utah 84101
801-363-5803

Utah SNAP Fund

13997 S. Minuteman Drive, suite 210
Draper, Utah 84020
801-231-2018
Fax: 801-523-9339

Email: margy@ageconnections.com

Services: Utah special needs assistance program fund providing a pooled income alternative for individuals with disabilities living in Utah.

Eligibility: Individuals with disabilities living in Utah

Fee: Call for more information.

Stagg ElderCare Services

A Division of KHSA & Co.
111 East Broadway, Suite 250
Salt Lake City, Utah 84111
801-322-2113

www.khsa.biz

Services: Private guardianships and conservatorships

Eligibility: Incapacitated and older adults

Fee: Fee for services. Call for more information.