

**GUARDIANSHIP IN KENTUCKY**  
**A Guide for**  
**Citizens with Disabilities**

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## INTRODUCTION

This brochure has been written for persons with disabilities and their parents, family members, and friends. It explains what a guardian is and why it may be important for a person who is unable to care for personal and financial affairs to have a guardian. The brochure tells about some alternatives to guardianship. The steps to follow to get a guardian are outlined; however, you should consult a lawyer before taking any of these steps.

The 1982 General Assembly passed a law effective July 1, 1982 that made major changes in Kentucky's old guardianship law (KRS 387.500). Various changes to the law were made by the 1984, 1986, 1990, and 1994 General Assemblies. The brochure explains the law and the amendments and in some cases points out how it is different from the old law. Real-life examples have been included to make the law less technical and more easily understood. Names included in the examples are fictitious.

## WHAT ARE GUARDIANSHIP AND CONSERVATORSHIP?

Guardianship is a legal relationship between a capable adult (the guardian) and a ward, either a minor (a person under eighteen years old) or a legally disabled person. A legally disabled person is a person who has been found by a court to be unable to care for personal needs and/or unable to manage financial resources. At the same time a person is declared disabled by the court, another person--a guardian or conservator--is appointed to care for personal or financial needs in those areas the disabled person cannot manage alone.

1. A guardian may be given complete responsibility for the ward if the disabled person is unable to take care of personal needs.
2. A limited guardian may be appointed if the disabled person is declared partially disabled and can care for some personal needs but may need help in other areas.
3. A conservator may be appointed if a disabled person only needs help managing financial affairs.
4. A conservator may be appointed alone or in combination with a guardian to handle a disabled person's financial affairs.

Until 1982, legally disabled persons in Kentucky were called "incompetent." The persons appointed to manage their affairs were called "committees." When individuals were declared incompetent, they lost all of their civil rights (including the right to marry, to have drivers' licenses, to buy or sell property, or to make wills) regardless of their abilities to manage some of their own affairs. On July 1, 1982, a new law went into effect which provides that persons whose functional abilities are impaired will be declared disabled only in those areas in which they are actually unable to care for themselves or manage their finances. This means that they retain all rights which they are able to exercise. Under the new law, the term "committee" was replaced by the terms "guardian" and "conservator," and the term "disabled" replaced "incompetent." The procedure by which a person is determined disabled was changed to provide more safeguards for the disabled person. Here are some examples of when guardianship and conservatorship might be considered:

Mr. and Mrs. Jones, in their seventies with failing health, have petitioned the district court to have their son, John, declared disabled. John is forty years old with severe cerebral palsy and severe mental retardation. His sister, Jane, has submitted an application to be his guardian. John's primary income is a monthly Supplemental Security Income (SSI) check; his parents have a small insurance policy with John named as beneficiary. The court reviewed John's functioning abilities and appointed Jane guardian to care for all of John's personal needs and financial affairs.

David Brown's parents have just died and left David a large inheritance valued at \$500,000. David, twenty-seven, has autism and is unable to talk; during his school years, he tested in the profound mental retardation range. His sister, Joan, has petitioned the court to have David declared disabled. Joan Brown also applied to be David's guardian. As the court reviewed David's abilities and his needs, it determined that David needed a guardian and appointed Joan to care for David's personal affairs. At the same time, it appointed the bank in his home town to be conservator because of the large amount and complexity of his financial resources. The bank will distribute a monthly allotment to Joan to spend for David's needs but will invest the rest of David's holdings in his behalf.

Sarah Jane Brody, thirty-five, works in a sheltered workshop and lives in her own apartment. Until recently, Sarah Jane lived in an institution. She is said to have moderate mental retardation, and she has not yet developed basic mathematical skills. Her mother, Mrs. Roberta Brody, has filed a petition with the court to have Sarah Jane declared disabled. Mrs. Brody has also applied to be Sarah Jane's guardian. The court listened to friends and professionals who knew Sarah Jane and determined she was able to conduct her own daily affairs but needed assistance in major medical decisions and managing her money. The court declared Sarah Jane partially disabled and appointed Mrs. Roberta Brody limited guardian with specific areas of authority.

Jackie Graham has a job making salads in a restaurant and lives in her own apartment. She manages her personal affairs but has trouble budgeting her pay check to make it last until the next check. Her mother used to help Jackie budget her money, but it is more difficult now that Mrs. Graham is in a nursing home. Mrs. Graham has filed petition to have Jackie declared disabled, but there are no friends or relatives who can serve as guardian. The court agreed that Jackie was capable of caring for her personal needs, including decisions about where to live and work, but needed help with managing her money. For that reason, no guardian was appointed. However, the State Guardianship-Fiduciary Services Office was appointed conservator to help Jackie with her money since there was no one else able to provide this assistance.

Steve Thomas is twenty-seven and lives at home. He is said to be mildly retarded. He is learning job skills at a sheltered workshop. Steve's parents receive his SSI check as his "representative payee," and they assist him in budgeting his money. They also are teaching him to purchase clothes, food, etc.; and they help him get routine medical attention. Steve does not need a guardian at this time because his need for limited help is being adequately met by informal means.

The 1994 General Assembly created a new section of Kentucky's guardianship statute that allows an adult of sound mind to execute a verified petition for the voluntary appointment of a

guardian or conservator. The petition may name whom the person wishes to be appointed as the guardian or conservator in the future should the need arise for one.

Once such a petition is voluntarily filled out by a person, it may be filed with the court at the time a licensed physician swears in an affidavit that the person is no longer able to make informed decisions. After a petition for standby guardian or conservator is filed with an affidavit of a physician, the court may, without notice, appoint the person nominated in the petition to serve as guardian or conservator, or the court may hold a hearing on the matter.

The person executing a standby guardianship or conservatorship petition may revoke the petition at any time prior to being given a guardian or conservator as long as the person is still of sound mind. Revocation may be accomplished by actually destroying the petition or executing a proper document directing the revocation of the petition. If the petition was given to any person, firm, bank, trust company, or the circuit clerk to be held, a document of revocation should be given to that person.

### **WHAT IS THE HFSC STATE GUARDIANSHIP-FIDUCIARY SERVICES PROGRAM?**

The State Guardianship-Fiduciary Services Office (hereafter State Guardianship Office) was established over twenty years ago to implement KRS 210.290. The State Guardianship Program is administered under the Health and Family Services Cabinet, Department for Community Based Services. The State Guardianship Office was initially established to provide guardianship services to those disabled persons living in state institutions. In 1978, the General Assembly passed an amendment to KRS 210.290 to authorize the State Guardianship Office to become guardian for both institutionalized and "uninstitutionalized individuals" who have "no other suitable person or entity available and willing to be appointed."

The State Guardianship Office is mandated by law to perform those guardianship duties that are directed by the court at the time of the disability hearing. Therefore, the Guardianship Office can function as guardian, conservator, limited conservator, limited guardian, or any combination as assigned by the court.

The law states that the State Guardianship Office only be used when there is no other suitable person or entity who is willing or able to perform the duties as guardian. Most referrals to the State Guardianship Office are from local Community-Based Services agencies that are aware of a person who needs help in making sound decisions concerning his/her well-being.

### **WHEN SHOULD GUARDIANSHIP OR CONSERVATORSHIP BE CONSIDERED?**

Until a child reaches the age of majority, parents are considered the "natural" guardians. According to Kentucky law, the child is freed from parental control at the age of majority. Unless a court has determined that the individual is unable to care for personal or financial needs, the law presumes that the child is capable of exercising the rights of an adult. Many

disabled persons continue to live in their home communities with the assistance of family and friends and do not need formal legal intervention. However, when an individual is not capable of exercising all the rights of an adult and friends and relatives are not able to provide informal assistance, guardianship or conservatorship may become necessary to legally enable another person to make decisions for and act on behalf of the disabled individual.

### **QUESTIONS TO ASK TO DETERMINE IF GUARDIANSHIP AND CONSERVATORSHIP ARE NECESSARY**

The need for a guardian or conservator is dependent on the abilities and disabilities of each individual. The decision of whether to seek the appointment of a guardian or conservator should be made with assistance from a lawyer.

Some questions to consider in determining whether guardianship or conservatorship is necessary are:

1. Is the disabled person able to adequately provide for personal needs for physical health, food, clothing, or shelter?
2. Is the disabled person able to manage personal financial resources effectively?
3. Is the disabled person going to be taken advantage of if no one is appointed to act as guardian?
4. Is assistance available through means other than guardianship or conservatorship?

### **ALTERNATIVES TO GUARDIANSHIP AND CONSERVATORSHIP**

Many disabled people are able to manage their personal or financial affairs without intervention of a guardian or conservator and with appropriate services and support from family and friends. Some alternatives to guardianship and conservatorship are:

1. Skills Training: There are successful teaching tools available to allow handicapped persons to develop skills in areas where weaknesses are identified. This approach reinforces the concept that even the most severely handicapped person is capable of acquiring some independent living skills. If, after some time, it becomes apparent that a person is unable to acquire a needed skill, other alternatives should be considered. This training can be obtained with the assistance of appropriate service-providing agencies.
2. Citizen Advocacy: Citizen advocacy is a program in which mature, competent volunteers are matched with individuals who need assistance in caring for their personal or financial affairs. A citizen advocate may assume a wide variety of roles. Depending on the needs of the disabled individual, s/he may serve as a guide and advisor, assist with budgeting

and paying bills, help make purchases, and perform all the supportive activities that are usually provided by family and friends when they are present.

3. Bank Account Requiring Co-Signatures: These accounts allow for protection of a disabled person's finances, while ensuring that the disabled person is given the opportunity to develop skills in basic money management. Of course, an account should only be established with a trusted and responsible relative or friend.
4. Trust Fund: If parents' major concern is how a disabled person will manage an inheritance, they may choose to establish a trust fund rather than a guardianship. A trust is a legal device which permits one person to manage property and money for the benefit of another person in accordance with the directions of the person who set up the trust. The success of a trust depends on the selection of the trustee, the person or agency that will administer the trust. A trustee has no authority to make personal decisions for an individual for whom a trust is established. (See page 14.)
5. Power of Attorney: An individual may authorize someone else to make certain decisions on her/his behalf. The person appointed is called an attorney-in-fact. Power of Attorney may be used only if the person granting the power of attorney fully understands what s/he is authorizing another individual to do. However, it may be written so that it continues in the event that the person later becomes disabled. This type of document is called a Durable Power of Attorney. (See page 15.) A Power of Attorney allows a person control over the powers granted and may be revoked or modified as a person desires.
6. Representative Payee: A number of government benefit programs, such as Social Security, Supplemental Security Income (SSI), and the Veterans' Administration, permit a representative payee to receive and manage the funds from that agency for another person who is deemed by the agency as unable to manage personal funds. The representative payee is appointed through the government agency, for example, the Social Security Administration, and does not involve a court's determination of disability. The representative payee has no authority beyond managing income from a particular agency.
7. Curator: Kentucky law provides that aged or infirm persons who consider themselves unable to manage their own estate may voluntarily apply to the district court for another person to be appointed to manage their financial resources. Such a proceeding is done without notice to others or a hearing. There is no legal determination of disability.
8. Advance Directive: Kentucky law allows adults with the ability to make and communicate health care decisions to execute a document that provides directions relative to their health care to be followed in the event they are not able to make and communicate health care decisions. (See page 15.)

9. Adult Protective Services: The state provides protective services for persons needing assistance in managing their resources, carrying out the activities of daily living, or protecting themselves from neglect or hazardous or abusive situations. Unlike the other alternatives, adult protective services would not provide a continuous one-to-one relationship with the disabled person; instead, the caseworker, who will only visit periodically, may change from time to time.
10. Protection and Advocacy: The Protection and Advocacy Division (P & A) is available to protect and advocate for the human, civil, and legal rights of persons with disabilities. Some disabled persons may be able to handle their every day lives but may encounter special problems requiring the assistance of an agency like Protection and Advocacy. Families and friends should be sure disabled persons are aware of the services provided by P & A.

### **HOW IS A PERSON DECLARED DISABLED AND A GUARDIAN OR CONSERVATOR APPOINTED?**

Proceedings to determine disability and appoint a guardian or conservator take place in the district court where the person thought to be disabled--the "respondent"--lives or, if the person is a minor, where the will of the minor's last surviving parent was probated, if that will nominates a guardian or conservator. In all other cases, it is the county where the minor resides.

1. A petition, a form available from the local district court, is completed and filed with the court. Any person concerned with the welfare of the respondent may file the petition. The form asks for information about where the respondent lives, who is next of kin, and why a guardian or conservator is necessary.
2. At the same time the petition for a disability determination is filed, an application for appointment must also be filed by the person intending to be guardian or conservator of the respondent. This application is also available from the district court. The district court will not begin the disability determination process until this application is filed.
3. If the respondent does not have a lawyer, the court will appoint an attorney to provide representation. The court will pay the lawyer's fees if the court determines the respondent is unable to do so. The county attorney will represent the state in the process. The person who filed the petition (the petitioner) is not required to have an attorney but may choose to do so.
4. The district court will schedule a hearing before a jury of six (6) individuals. The jury will decide whether the respondent is fully or partially disabled in personal and/or financial affairs. The judge will write a court order appointing a guardian or conservator as indicated by the jury findings and designating those areas in which the individual is authorized to act in behalf of the disabled person. The court order will be filed with the court but must also be indexed in the county clerk's office.



5. At least two (2) weeks before the hearing the district court will send notice of the hearing date to: the petitioner, the respondent, the person who has applied to be the guardian or conservator, the respondent's next of kin, and the person who has custody of the respondent.
6. Before the hearing, the respondent must be examined by at least three (3) people: a physician, a psychologist, and a social worker. If the respondent is thought to be disabled because of mental retardation or mental illness, at least one of the examiners must be a professional qualified in mental retardation or mental health, as appropriate. Those persons will give the court a very thorough evaluation of the respondent, including assessments of the respondent's mental, physical, social, and education abilities and needs; a recommendation as to the kind and amount of guardianship needed; and a recommendation as to the most appropriate living arrangement and treatment program. If these evaluation reports are not filed with the petition, the county where the proceedings are held will pay for the evaluations if the court determines the respondent cannot pay for them.

If the respondent lives in a licensed facility for persons with mental illness or mental retardation and the facility files the petition, the facility will provide the court the required evaluation of the respondent when the petition is filed. The respondent may request a second set of evaluations if it is believed that the initial evaluations are biased. These will be paid for by the county if the respondent is unable to afford them.

7. If the evaluation reports are filed with the petition, the district court will hold a hearing within thirty (30) days. Otherwise, the court will order the evaluations and schedule the hearing within sixty (60) days unless more time is needed.
8. The respondent must be present at the hearing unless the court determines that attendance would subject the person to serious risk of harm.
9. A person will NOT be declared disabled unless a guardian or conservator is appointed at the same time. This is one of the major changes under the new guardianship law.

Some examples of appointments of guardian and conservator follow:

John Barkley will be eighteen in two weeks. John's doctor has indicated John will need major surgery within a year. John has mental retardation and cannot fully understand the complications that may arise with the surgery. His social worker has advised his parents to petition the district court for a disability determination hearing, even though John will continue to live with his parents. Mr. and Mrs. Barkley talk with their lawyers and complete the petition and application for guardianship from the district court. The court orders the necessary evaluations completed and schedules a hearing in two months. At the hearing attended by all

the Barkleys, the jury finds John partially disabled. The judge appoints Mrs. Barkley limited guardian in those areas John cannot handle on his own.

Joan Parker has lived in a state-operated facility for persons with mental retardation for twenty years. After Joan's parents died in an accident, her social worker realized that Joan had no legal guardian. She files a petition with the local district court, and Joan's sister completes the application to be guardian. At the same time, the facility sends the court the necessary evaluations of Joan's abilities and needs. The district court sends Joan, her sister, the facility, and the social worker notice that the hearing will be in two weeks. Joan is declared fully disabled by the jury, and her sister is appointed guardian by the judge.

Sara Robinson is a seventy-eight-year-old woman who resides in a nursing home. Due to her medical condition, Sara's ability to make sound medical decisions has quickly deteriorated. Therefore, the Community Based Services Department at the nursing home has suggested the need for a limited guardian. Her only daughter agrees but doesn't feel that she can assume those responsibilities due to her current family responsibilities. The social worker then applied to the State Guardianship Office for services. At the disability hearing in the district court the State Guardianship Office was appointed conservator and limited guardian concerning medical decisions.

### **HOW IS A HFSC STATE GUARDIAN APPOINTED?**

Once it has been determined that there is no suitable family member or interested person who is willing or able to become guardian or conservator for a disabled person, the petitioner can ask the Health and Family Services Cabinet, State Guardianship Office, to apply to become guardian.

1. The petitioner calls one of the six regional offices, depending on the county of residence of the respondent, to initiate the referral process for state guardianship. In order to determine which office to make the referral to, call the office located nearest to you:

Prestonsburg (606) 886-9423  
Lexington (859) 245-5748  
Somerset (606) 677-4210  
Louisville (502) 595-4052  
Elizabethtown (270) 766-5099  
Hopkinsville (502) 886-4431 X 387  
Frankfort (502) 564-2474

2. At that time, a telephone referral will be taken. This will be followed by a packet of information to be sent to the petitioner to be completed and returned to the local State

Guardianship Office. The packet will include "A Petition to Determine if Disabled," Guardianship Information Questionnaire, and a letter of instruction.

3. Once the material is returned, the State Guardianship Office will complete the "Appointment for Fiduciary" form and return the court forms to the petitioner, who will immediately file it with the district court clerk.
4. The procedure at this point follows that mandated by law and described earlier in the pamphlet on page 6.
5. If the petitioner has difficulty with this procedure, the State Guardianship Office at (502) 564-2474 or the Protection and Advocacy Division at 1-800-372-2988 should be contacted.

Some examples of appointments of a state guardian and state conservator are as follows:

Diane Roberts participates in a community-based program and works in a sheltered workshop. The Interdisciplinary Team that works with Diane daily has determined that she needs assistance to make decisions in all phases of her life. Since the state had earlier removed her from her home due to physical and sexual abuse, it has been determined that her parents are not candidates to become her guardian. Her sister lives in another state and doesn't want the responsibility. Therefore, her social worker has called the local State Guardianship Office and referred her case for a state guardian.

James Wells works full-time as janitor and has recently gotten a raise to \$5.00 an hour. He could make ends meet if he could budget his money, but his "friends" tend to bully him out of a good portion of his weekly check. A concerned neighbor called the local State Guardianship Office to refer his need for assistance with managing his money. There are no trusted friends willing to provide informal assistance nor any person willing to serve as conservator for Mr. Wells. DCBS agreed to petition the court to secure a conservator for James. The referral packet has been completed by both DCBS and the local HFSC State Guardianship Office and filed in district court. The hearing has been set for some time within the next sixty days.

### **WHAT ARE THE COSTS INVOLVED IN A DISABILITY PROCEEDING?**

There is no fee for filing a petition for a determination of disability. There may be a small fee for the application for appointment as guardian or conservator. The county will pay for the evaluation reports and legal representation if the respondent is unable to pay for an attorney or evaluation reports.

### **WHO MAY ACT AS GUARDIAN OR CONSERVATOR?**

The court may appoint any person or any public or private agency that is capable of acting as guardian or conservator. The law used to provide that family members be given preference for appointment. That has been changed so that, although kinship is one of several factors to be considered, the court will appoint the person best qualified and willing to serve. The court must consider any preference stated by the disabled person.

### **WHAT IS A SUCCESSOR GUARDIAN OR CONSERVATOR?**

At the time that a guardian or conservator is appointed or at any later time, the court may appoint another person--a "successor"--to succeed the initially appointed guardian or conservator upon death, resignation, or inability to serve. The successor may also act in the case of an emergency if the appointed guardian or conservator is unavailable. To be appointed, the successor must fill out an application which is provided by the district.

### **WHAT IS A TESTAMENTARY GUARDIAN OR CONSERVATOR?**

If a family member of a disabled person is a guardian or conservator, the family member may, in a will, nominate someone to serve as the successor guardian or conservator. While the nomination is not legally binding, courts will generally honor the nomination unless there is clear evidence that it would not be in the best interest of the ward to do so. Having such a nomination by will may make the transition period between guardians and conservators easier.

### **HOW LONG IS THE PERIOD OF APPOINTMENT FOR A GUARDIAN OR CONSERVATOR?**

A guardian or conservator of a person who is totally disabled may be appointed for a period of "unlimited duration." The guardian or conservator may be appointed with no limit as to how long the individual may serve, although the court may choose to limit the period of appointment. A limited guardian or a limited conservator may be appointed for no more than five (5) years and may be appointed for less than that period of time.

If, near the end of this period of appointment, a limited guardian or conservator thinks the ward continues to need services, the individual may ask the court to extend the appointment for another five (5) years.

### **WHAT ARE THE DUTIES OF A GUARDIAN?**

A guardian has responsibility for the care and custody of the ward. Depending upon the specific rights taken away from the respondent, the guardian's duties may include:

1. Arranging for a place for the ward to live.

Parents and guardians may admit their minor family members and wards to state mental retardation treatment centers without additional court hearings if treatment personnel at

the centers approve the placement. This statute also allows a mildly or moderately mentally retarded adult to be voluntarily admitted upon approval of the treatment personnel, but persons voluntarily admitted must be allowed to be discharged upon written request unless involuntary civil commitment is pursued through court.

2. Arranging for educational, social, vocational, and rehabilitation services, as well as other services necessary to meet the ward's needs.
3. Providing necessary consent or approval to enable the ward to receive medical or other professional services (except that a guardian may not consent to abortion, sterilization, psycho-surgery, removal of a bodily organ, or amputation of a limb without approval of the court except in the event of an emergency requiring such action).
4. Managing the financial resources of the ward, unless a separate conservator has been appointed, and carrying out only those duties specifically granted by the court.
5. Reporting as required by law. A guardian must report to the court every year as to the personal status of the ward and, if responsible for the ward's finances, must make a financial report to the court every two (2) years. Forms for these reports are available from the district court. The reports are intended to give the court an update on the welfare of the disabled person. The report includes information on where the ward is living, in what programs the ward is involved, and whether guardianship continues to be needed. The financial report is a simple accounting of what money was received by the ward (for instance, the SSI check) and how it was distributed.
6. In addition to performing the specific duties assigned by the court, the HFSC State Guardianship Office should advocate for each of its clients:
  - (a) Services that will meet all the needs of the ward,
  - (b) The least restrictive environment for each individual ward, and
  - (c) Protection of the ward's rights.

### **WHAT ARE THE DUTIES OF A CONSERVATOR?**

A conservator is responsible for managing the financial resources of the ward. Within sixty (60) days after appointment, the conservator must file with the court a list of the property of the ward. The conservator must then report every two (2) years as to the money and property which has been received as conservator and how it has been used. A limited conservator manages only some of the financial resources of the ward according to the authority specifically granted by the court.

The HFSC state conservator is also responsible for managing the financial resources of the ward. Again, their duties are the same as for anyone else who assumes the role as conservator.

In addition, the State Guardianship Office is responsible for:

- applying for client benefits;
- receiving and disbursing client funds;
- establishing and maintaining accurate accounting procedures and records;
- ensuring payment for client care to appropriate facilities;
- paying expenses incurred by client;
- maintaining client eligibility to receive benefits;
- receiving and monitoring quarterly reports of client escrow accounts held by care facilities;
- determining and securing appropriate refunds;
- exploring proper investment of client funds;
- preparing biennial financial reports to the courts.

### **HOW TO CHANGE OR END GUARDIANSHIP OR CONSERVATORSHIP**

At any time, a ward, the ward's guardian or conservator, or any person interested on behalf of the ward may ask the court to:

1. terminate an order of disability,
2. change an order of disability,
3. remove or replace a guardian or conservator, or
4. renew the appointment of a guardian or conservator.

A proceeding for any of the actions listed above is generally begun by filing a petition with the district court where the ward is residing. However, if the request is made by the disabled person, it may be by such informal means as a verbal request to the court or by letter, in which case the court will appoint someone to help fill out the petition.

The court will hold a hearing within thirty (30) days after the petition is filed (unless more time is needed) to decide whether to do what was asked in the petition.

### **WHAT ABOUT COMMITTEES WHO WERE APPOINTED PRIOR TO JULY 1, 1982?**

Any person who was appointed committee for a disabled person before July 1, 1982 will assume all the duties of a guardian. If a limited guardianship or conservatorship would be more appropriate for the ward than a full guardianship, the committee should have petitioned the court for changes in the original order within one year from July 1, 1982. The disabled person or any other person interested in the disabled person's welfare may also petition for the district court for changes in the original court order. For example:

Paula Gibbons' committee was appointed ten years ago immediately after her parents died. Paula's sister is her committee. Paula lives in an apartment with a friend and works in a local cafeteria. When Paula saw her social worker last month, she suggested Paula petition the court to modify the original order. Paula agreed that she needed help with her finances but not her personal affairs and asked the social worker to help her file the petition.

### **WILLS AND TRUSTS**

A will is a legal document by which a person declares what is to be done with the person's money and property after death. By will, a person may dispose of property, name a guardian to care for minor children or a family member for whom the person has been appointed as guardian or conservator, or create a trust for the care and benefit of a loved one.

Any person over the age of eighteen (18) who has not been declared legally disabled has the right to make a will. If a person dies without a will, state law determines how the property is distributed. If you are planning for the future needs of a disabled person, a will becomes especially important. Parents of a disabled child may want to leave a greater portion of their estate to that child than to others less in need of support and services. In addition, the way that property is distributed to the disabled person may have an impact on government services and benefits to which the disabled person might otherwise be entitled.

A trust is an arrangement by which one person (the trustee) manages money and property (the trust) for the benefit of another (the beneficiary). The trustee manages the trust according to the directions of the person who establishes it. One advantage of a trust, if the trust is properly established, is that any funds held for an individual are not counted as a resource to the beneficiary and therefore are not included in any accounting of the income for different income eligible programs. The beneficiary must not be able to terminate the trust or to control the amount or frequency of distributions from the trust. The trustee must have great discretion as to when the trust benefits are distributed and whether the principal of the trust estate can be used.

The trustee is the person who manages the money of the trust: investing funds, writing checks, doing the accounting, and filing tax returns. You may discuss who should be the trustee with the trust officer of your bank. You may want to have the trust department of your bank as trustee, because: (1) the staff is trained in investment and money management; (2) the bank would be a permanent trustee, with no interruptions due to moving away, illness, or death; and (3) the responsibility might be more than a family member can manage. If a bank or other corporation is established as trustee, you may appoint an advisory committee to help the trustee decide how the trust estate should be spent. The advisory committee would be made up of family and friends or other persons familiar with the needs of the disabled person.

A major source of public support for persons unable to support themselves financially through employment is Supplemental Security Income (SSI). Regulations prohibit an SSI recipient from having resources above a certain amount. Other state and federal programs may have similar limitations on an individual's resources in order to qualify for assistance. Trustees should carefully review all rules governing eligibility for services before making any distribution of money to the disabled person.

It is not necessary to have a great deal of money before establishing a trust. A lawyer can advise you if it will be to the benefit of the disabled person. Upon death of the beneficiary, the trust may continue for the benefit of another person or it may be terminated and the funds distributed as established at the time the trust was first set up. A bank may be made trustee, and an advisory committee may be appointed to make decisions about use of the trust.

### **ADVANCE DIRECTIVES**

The Kentucky Living Will Act of 1990 and the Kentucky Health Care Surrogate Act of 1990 were repealed by the 1994 General Assembly, and in their place, the Kentucky Living Will Directive Act was created. This Act's Living Will Directive form combines into one document such decisions as whether or not to authorize life-prolonging treatment, the withholding or withdrawal of artificially provided food or water, and the designation of a health care surrogate to make health care decisions on a person's behalf. This form may be expanded upon to include other health care decisions made in advance by a person at a time when s/he is able to make informed decisions. The Kentucky Living Will Directive Act mandates the proper execution of a Living Will Directive, including who can and cannot be a witness to its signing. It is up to the person who executes a Living Will Directive or Advance Directive in some other form, or that person's responsible party, to notify the person's attending physician and any health care facility where that person is a patient of the Advance Directive. A Living Will Directive may be revoked while a person still has decisional capacity by a signed writing declaring an intention to revoke it, destruction of the document by or at the direction of the person whose Living Will Directive it is, or orally by that person in front of a health care provider and one other person.

Designation in a Living Will Directive of a health care surrogate who will make decisions that have not already been made in the Living Will Directive is preferable over designating a person



to make these decisions through a Durable Power of Attorney. This is because a guardian may be appointed to replace an attorney-in-fact, but a health care surrogate appointed in a Living Will Directive, in general, is not overridden by a guardian.

A properly executed Living Will or Health Care Surrogate designation prior to July 15, 1994 will still be honored as they were under the previous law.

## DEFINITIONS

The following terms are used in Kentucky's guardianship law (KRS 387.500 to 387.770 and 387.990) and will be used by lawyers, the court, and judges during the guardianship proceeding:

1. Committee: A person appointed by the court before July 1, 1982 to have full care, custody, and control of a disabled person and the disabled person's estate. Committees are now called "guardians."
2. Conservator: An individual, agency, or corporation appointed by the court to manage the financial resources of a disabled person.
3. Disabled Person: One declared by a court to be unable to provide for physical health and safety (health care, food, shelter, clothing, hygiene, etc.) or to manage property effectively.
4. Emergency Guardian or Conservator: One appointed after a petition for a determination of disability is filed but before the proceedings are completed and before a guardian or conservator has been appointed.
5. Guardian: An individual, agency, or corporation appointed by the court to have full care, custody, and control of a disabled person and to manage the financial resources of that person.
6. Limited Conservator: One appointed by the court to assist in managing the financial resources of a partially disabled person and one whose powers and duties have been specifically listed by court order.
7. Limited Guardian: A guardian with fewer than all the powers and duties of a full guardian and whose powers and duties have been specifically listed by court order.
8. Partially Disabled Person: One who is unable to provide for some needs and/or manage financial resources but who is not fully disabled.
9. Petitioner: The person who files the petition for a determination of disability.
10. Respondent: A person who is thought to be disabled and on whose behalf a petition for a determination of disability has been filed.
11. Standby Guardian or Conservator: A person nominated in a verified petition for voluntary appointment of a guardian or a conservator to serve as guardian or conservator upon future appointment by the court.

12. Successor Guardian or Conservator: A person appointed by the court to succeed a guardian or conservator upon death, resignation, removal, or incapacity. A successor guardian or conservator may also act in the case of an emergency if the acting guardian or conservator is unavailable.
13. Testamentary Guardian or Conservator: A person named in the will of one who has been appointed by the court as guardian or conservator to succeed the guardian or conservator upon death. A testamentary nomination may be made only by a parent, spouse, or child of a disabled person.
14. Ward: A disabled person for whom a guardian or conservator has been appointed.

Office of Public Advocacy  
Protection and Advocacy Division  
100 Fair Oaks Lane, Third Floor  
Frankfort, Kentucky 40601  
(502) 564-2967  
Toll Free & TTY: 1-800-372-2988

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The Protection and Advocacy Division (P & A) is established by federal and state laws to protect and advocate for the human, legal, and civil rights of Kentuckians who have disabilities. P & A is completely independent of any agency providing treatment, services, or habilitation to persons with disabilities. It is P & A's policy to try to resolve client complaints through negotiation and other informal means. P & A has the authority to pursue remedies administratively and through the courts, if necessary. Anyone may call P & A for assistance. There is no cost.

For more information, contact:

Protection and Advocacy Division  
100 Fair Oaks Lane, Third Floor  
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The Health and Family Services Cabinet, State Guardianship-Fiduciary Services Office, is established by state law to provide guardianship services to disabled persons for whom no other suitable person or entity is available and willing to be appointed. The State Guardianship Office is designed to encourage the development of maximum self-reliance and independence in each client as well as to protect the clients from neglect, abuse, and exploitation. The law recognizes "that disabled persons have varying degrees of disability," therefore requiring varying degrees of guardianship involvement. The State Guardianship-Fiduciary Services Office is able, by law, to provide all degrees of protection as directed by the court. Anyone may apply for appointment of state guardianship if there is no responsible person able and willing to assume those duties. For more information, contact:

State Guardianship-Fiduciary Services Office  
Department for Community Based Services  
Health and Family Services Cabinet  
275 East Main Street  
Frankfort, Kentucky 40621  
(502) 564-2474