



## **Guardianship Should Be a Last Resort**

This post was written by former Special Needs Alliance president [Katherine N. Barr, Esq.](#), a member of [Sirote & Permutt's](#) Private Clients, Trusts and Estates Practice Group, Birmingham, Alabama. Much of her practice involves special needs planning, through which she assists clients in providing for a family member in a way that does not jeopardize government benefits. She is a fellow of the American College of Trust and Estate Counsel (ACTEC) and has been cited in *The Best Lawyers in America*®.

## **Guardianship Should Be a Last Resort**

In the past, family members have often turned to guardianship as a means of protecting loved ones with special needs who may be unable to handle medical, financial and other decisions on their own. (In some states, including Alabama, where I practice, conservators are appointed to manage financial matters.) In my own practice, I find that HIPAA restrictions have made health-related decisions the number one reason for seeking guardianship of an adult with an intellectual disability. But full guardianship is an extreme measure, a court-ordered process that places an individual who has been determined to “lack capacity” under the complete control of someone else. However, reports of abuse and a growing self-advocacy movement are changing attitudes.

## **Defining Capacity**

“Capacity” is an ill-defined term. Someone may be able to handle most daily tasks, but be unable to understand a doctor’s directions. Mental illness, often characterized by on-and-off periods of instability, is particularly problematic. Achieving the right balance between independence and safety differs according to individual circumstances.

In addition, guardianship law is fragmented—varying not only between states, but across local jurisdictions, as well. Even within the same court, different judges may have contrasting philosophies. There are procedural gaps and inconsistent oversight.

Healthcare advances have increased life spans, so growing numbers of individuals will eventually need decision-making assistance. Yet many states haven’t seriously reviewed their guardianship laws for decades. The American Bar Association, the Uniform Law Commission and others have been pressing for much needed reform.

## **Least Restrictive Alternative**

There's widespread agreement that before guardianship is considered, less restrictive arrangements should be considered.

In some instances, the adult with an intellectual disability may be capable of authorizing decision-making assistance through a power of attorney or healthcare proxy. In such cases, the individual's ability to make his or her own choices is not limited in any way, the individual simply has one or more authorized agents who can act on his or her behalf, and who may be removed at any time.

An evolving alternative is referred to as "supported decision-making," which involves an individual's making their own choices after consulting family, friends or other trusted persons. To date, only Maine has adopted the Uniform Guardianship, Conservatorship and Other Protected Proceedings Act published by the Uniform Law Commission several years ago. The Real Property, Trust and Estate Section of the American Bar Association recommends that states consider supported decision-making in their guardianship statutes. Texas has added supported decision-making provisions to its guardianship act, although it has not adopted the new Uniform Act. Alabama and several other states are studying the act for potential adoption.

Furthermore, if guardianship is determined to be in an individual's best interest, it's possible in many states to limit the scope of a guardian's authority, based on highly specific needs.

### **Selection and Accountability**

Parents and siblings are sometimes surprised to learn that the court may not choose a relative to act as guardian, preferring an individual who is more in tune with abilities of the person under guardianship. Recognizing that this may be due to family dysfunction, advocates propose that courts give priority consideration to family members or others preferred by the respondent. There are also calls for performing criminal background checks and, when appropriate, requiring that guardians of property be bonded.

Many individuals do not fully understand the responsibilities they are undertaking with guardianship, and to provide more consistency, reformers want training to be required. It has also been suggested that guardians develop an annually updated plan for the care of the respondent and file it with a party to be determined by the court. The plan should cover details such as frequency of the guardian's interaction with the respondent, living arrangements, services, education and social activities. Advocates stress that guardians should make every effort to make choices that they believe the individual would make for themselves—unless that would pose a risk to their welfare or financial interests. Visitation rights and communication with family members are especially important, since there have

been many reports of families being unable to meet with or communicate about the well-being of someone under guardianship.

While periodic court review of guardianships is standard in some states, there's pressure to make this practice more widespread. In particular, individuals who have regained capacity should be able to terminate the guardianship.

### **Slow Going**

Despite changing attitudes, it will unfortunately take time for these improvements to gain traction. Some of them will need changes to state law, while others will require courts to adopt new procedures. All of which takes time.

The biggest obstacle though, is the need for education—of families, as well as legal, medical and financial service professionals. Stereotypes abound with regard to individuals with special needs. Families that are rightfully concerned about a loved one's security need to realize that there are alternatives to full guardianship. The concept of supported decision-making needs to be further explored and explained. And individuals with disabilities must be encouraged and supported in their efforts to become self-advocates.

**About this Article:** We hope you find this article useful and informative, but it is not the same as legal counsel. A free article is ultimately worth everything it costs you; you rely on it at your own risk. Good legal advice includes a review of all of the facts of your situation, including many that may at first blush seem to you not to matter. The plan it generates is sensitive to your goals and wishes while taking into account a whole panoply of laws, rules and practices, many not published. That is what SNA is all about. Contact information for a member in your state may be obtained by calling toll-free (877) 572-8472, or by visiting [Find an Attorney](#).

**Requirements for Reprinting this Article:** The above article may be reprinted only if it appears unmodified, including both the author description above the title and the "About this Article" paragraph immediately following the article, accompanied by the following statement: "Reprinted with permission of the Special Needs Alliance – [www.specialneedsalliance.org](http://www.specialneedsalliance.org)."

---

**About this Article:** *We hope you find this article informative, but it is not legal advice. You should consult your own attorney, who can review your specific situation and account for variations in state law and local practices. Laws and regulations are constantly changing, so the longer it has been since an article was written, the greater the likelihood that the*

article might be out of date. SNA members focus on this complex, evolving area of law. To locate a member in your state, visit [Find an Attorney](#).

**Requirements for Reproducing this Article:** The above article may be reprinted only if it appears unmodified, including both the author description above the title and the “About this Article” paragraph immediately following the article, accompanied by the following statement: “Reprinted with permission of the Special Needs Alliance – [www.specialneedsalliance.org](http://www.specialneedsalliance.org).” The article may not be reproduced online. Instead, references to it should link to it on the SNA website.