

thinking about Guardianship?

Your loved one is unique.

There are many options to think about.

Each individual's circumstances must be carefully considered when deciding what is right for him or her.

People with disabilities should live in the least restrictive, most inclusive environment possible. Likewise, any legal measures should be the least restrictive needed, designed to protect individuals when necessary, and give them independence and autonomy when possible.

This guide is designed to help you think about other, less restrictive measures, and to fully inform you of the consequences of seeking guardianship.



A guide produced by
the Georgia Council
on Developmental
Disabilities

Find an electronic version of this guide at GCDD.org

Reference Guide

Where to go for more, expanded, and different information

- Georgia Council on Developmental Disabilities, GCCD.org, for a PDF of this guide or for more information about advocacy, policy and statewide initiatives.
- The Official Code of Georgia Annotated (O.C.G.A.) is Georgia's list of laws and statutes. Reference this for finite detail about the laws referenced in this guide.
- GeorgiaLegalAid.org for help finding an attorney, useful forms and tool kits, or expanded information about the legal rights of people with disabilities.
- Georgia Advocacy Office, thegao.org, for legal assistance, help drafting wills or trusts, or further information about guardianship.
- gaprobate.org for more information on trusts and estates, and how the probate process works; this website also contains a handbook for personal representatives in Georgia.
- www.socialsecurity.gov/payee for information about becoming a representative payee
- For state-by-state information about voting rights among people with disabilities, including those under guardianship or conservatorship, visit the Bazelon Center's website: bazelon.org/Where-We-Stand/Self-Determination/Voting/Voting-Policy-Documents.aspx

about the Georgia Council on Developmental Disabilities

The Georgia Council on Developmental Disabilities is a federally funded, independent state agency that serves as a leading catalyst for systems change for individuals and families living with developmental disabilities. Through public policy initiatives, advocacy programs and community building, GCDD promotes and creates opportunities to enable persons with disabilities to live, work, play and worship as an integral part of society.

Visit us on the web at GCDD.org; in person at 2 Peachtree St. NW, Suite 26-246, Atlanta, GA 30303; or by calling 404-657-2126 or toll free 888-275-4233.

Getting Started

Full, legal guardianship is the most restrictive option. In Georgia, it is expensive, requiring the use of attorneys and the payment of probate court hearing fees. It requires petitioning a court to declare that an individual lacks sufficient capacity to make his or her own decisions. Capacity is defined as the ability to: (1) take in information, (2) make an informed decision and (3) communicate that decision.

Not only does it carry a serious stigma to determine someone lacks capacity, but it also revokes that person's ability to make decisions about medical treatment and where to live, as well as the right to marry, divorce, or enter contracts. There are many alternatives you should consider. These alternatives are less expensive, can typically be done without an attorney, are easier to revoke or adjust, and they are person-centered. In other words, many of these alternatives can be tailored to give individuals as much independence as possible in their unique situation.



Options to consider before full legal guardianship:

- Financial
 - Limited or joint accounts
 - Representative payee
 - Financial power of attorney
 - Trusts and estates
 - Conservatorship
- Medical
 - Release of information
 - Advance directives for health care
 - Alternative decision-maker status

Financial Measures

Limited or joint accounts

Want to ensure your loved one can manage his or her own finances with a little (or a lot of) help? Talk to your bank about setting up limited or joint checking/savings accounts. They could be a way for you to restrict spending, monitor saving and spending, or perform any of the vital account management functions you would use for yourself, such as ordering checks, depositing and transferring funds, replacing a lost card or disputing charges. Together, talk to your bank about the options that would provide your loved one with independence, and allow you to best assist him or her with good financial decisions.

Representative payee

A representative payee is someone approved to receive and manage funds distributed by the Social Security Administration or the Veterans Administration on behalf of a beneficiary. Children, legally incompetent adults or people temporarily or permanently incapable of managing their own benefits are required to have a representative payee. Beneficiaries may also voluntarily appoint a representative to act on their behalf.

Representative payees can be parents, spouses, guardians, friends, institutions

(like nursing facilities), public or nonprofit agencies, or providers at homeless shelters. When you become a representative payee through a federal agency, it applies only to the benefits received from that agency. It does not give the representative any authority to execute binding contracts on behalf of the individual. Also, power of attorney does not automatically equal representative payee status.

Social Security, Supplemental Security Income, and special veterans benefits representative payees must use benefits first for the basic needs of the beneficiary, such as food, clothing, housing and medical care, with the remainder placed in savings. Each year, the representative payee must complete a simple accounting report showing how the money was spent and saved. Either the individual receiving benefits or the representative payee can terminate the arrangement at any time, following an investigation by the Social Security Administration.

Visit socialsecurity.gov/payee for more information. To become a payee, contact your nearest Social Security Administration office to submit an application, known as form SSA-11, and any other required documentation. In most cases, a face-to-face interview is also required.

(References: socialsecurity.gov, ssab.gov, va.gov)

Financial power of attorney

Power of attorney is a legal process in which the individual grants a third party the authority to take care of financial or property matters for him or her. It does not remove any of the individual's rights, and it does not extend to management of Social Security or veterans' benefits. As a spouse or as the parent of a minor, you automatically have power of attorney. Divorce automatically severs power of attorney, and when a child turns 18, parents no longer hold power of attorney (unless they have secured guardianship).

Power of attorney should be granted only to someone in whom the individual has complete trust, and who does not have a conflict of interest when taking on the responsibility. The person given power of attorney, referred to as an "agent," could be given authority to do anything that the person delegating the authority would be able to do on his or her own.

Power of attorney can be granted in writing, with two witnesses. You do not need an attorney or notary to execute a power of attorney



agreement in Georgia, but both are strongly recommended. Give copies to people who might be affected: family members, family attorneys, etc. Also, remember who you gave copies to! It will be important if power of attorney needs to be cancelled, revoked or amended – which can be done at any time. Power of attorney can cover very broad or very limited actions, depending upon what you and your loved one decide. It is important to specify those actions – and limitations – in writing.

Visit GeorgiaLegalAid.org for help finding an attorney to execute a power of attorney document, as well as other legal matters referenced in this guide.

(Reference: O.C.G.A. § 10-6-140; Family Support Technical Assistance Institute)

Personal representative for trusts and estates

It is possible to designate one or more people as personal representatives to oversee estates or trusts. This would apply in a case where an individual's parents or other relatives have passed away, leaving property, a trust fund, or other assets, or in the case that someone is the recipient of a personal injury settlement. This is similar to power of attorney, but applies in the specific situation of administering or managing assets that have been left to an individual with disabilities. If a qualified executor has not been identified – and the beneficiary,



or person at the receiving end of the trust/estate, is not qualified – Georgia probate court will appoint an administrator.

While this may not apply to you and your family now, it may be important to think about what plans are in place to administer your assets when you pass away, as they could be an important piece of your loved one's ongoing support structure. According to state law, no formal words are necessary to nominate the executor of an estate – all it takes is an expression of desire for a particular person to act in that capacity. Of course, putting this in writing – and taking the same steps identified to execute power of attorney – is recommended.

When it comes to administering complex estates, hiring an attorney is strongly recommended. Executors

are expected to take an oath of office and abide by state laws for proper administration of the estate. This includes following requirements such as getting the court's permission in order to sell a piece of property, which may be necessary in some cases. Visit gprobate.org for more information, including a handbook for personal representatives in Georgia.

A living trust, on the other hand, is a way for a competent adult to designate someone to handle financial affairs related to property placed in a trust. The trust can specify exactly how the trustee should manage the property, including what steps the trustee may take in the event the individual becomes incapacitated, and it can also designate beneficiaries. Trust documents should be as detailed as possible on the specifications, and should be signed in front of a notary.

Any property – such as a house or car – should be transferred to the trust. Like power of attorney, a trust can be cancelled or revoked at any time without needing to go to court or any other complex legal process.

In some cases, there are specific kinds of trusts that may be helpful or necessary depending on your loved one's particular situation. One such example is a Miller trust. This type of trust is useful in a case where, because an individual's income exceeds state-mandated caps, he or she is not eligible for long-term care from Medicaid. A Miller trust can be established as the recipient of the individual's income, whether from a pension plan, Social Security, or another source.

Again, using an attorney's expertise to set up a trust is recommended, though it is not strictly necessary. Visit GeorgiaLegalAid.org to find an attorney.

(Reference: *O.C.G.A. § 53-6-1; gaprobate.org*)

Conservatorship

Does your loved one own his or her own property, but cannot manage it? Conservatorship may be the right move in this case – however, it is one of the most drastic steps possible with regard to property. It goes a step or two beyond creation of a living trust. Georgia courts will appoint a conservator for an adult if they find the adult lacks sufficient capacity to make or communicate

significant responsible decisions about management of that property. State law also says conservatorships should be designed to “encourage the development of maximum self-reliance and independence in the adult” and will be used only once the court decides “that less restrictive alternatives to the conservatorship are not available or appropriate.” This step should be taken only in the absence of a power of attorney, trust, or other measure that identifies a plan for management of that property.

Anyone, including the individual with the disability, can petition for the appointment of a conservator. That petition must be filed in the county where the individual with the disability lives. Georgia Code 29-5-10 provides a detailed list of requirements for the petition, including the requirement that two or more people swear to the petition. Alternatively, a sole petitioner can submit an affidavit from a medical professional verifying that the individual lacks capacity. It is possible to do this with or without seeking guardianship; it is also possible to appoint two different people as guardian and as conservator.

When considering conservatorship, it is important to tread carefully. Not only does this step require lawyers and probate court hearings (plus the associated costs), but it takes an equal amount of effort to undo conservatorship.

(Reference: *O.C.G.A. § 29-5-1 et seq.*)

Medical Measures

Release of information

Want to make sure you stay in the loop about your loved one's medical conditions and treatment? Making sure you are included on medical release of information forms can be a simple step to ensure that you will be allowed access to medical records and to discuss conditions or concerns with medical providers. When your



children are minors, you have a right to access such information. Without guardianship, filling out a release of information form will ensure you continue to have that ability even after your child turns 18.

A release of information form can be filled out at any time – as a blanket authorization, or to access specific medical records – but it must be done

with each medical provider, and it must be signed by the patient. Once a child or another loved one turns 18, you cannot fill out a release of information form for him or her. It is also important to note that many medical providers require patients to fill out a new release of information form annually. A release of information form signed two or three or five years ago may no longer be valid.

In cases where you and your loved one may be traveling or seeking medical attention away from their usual medical provider, having a notarized, signed medical release form may be a good idea. It should be signed by your loved one, in the presence of a notary, giving you permission to seek and be informed of medical treatment on his or her behalf. If your loved one is frequently in the care or company of someone else – a friend, relative or caretaker – who is trusted to help secure medical treatment, ensure that they also have a medical release form authorizing them to seek treatment for your loved one. A medical release form does not authorize anyone to act on behalf of the individual with the disability, though – only to access information about a patient and visit that person in the hospital or other facility. For information on how you might act on behalf of an adult with a disability, read about advance directives for health care and alternative decision-maker status.

Advance Directives for Health Care

In 2007, Georgia's Durable Power of Attorney for Health Care law was repealed and replaced by the Georgia Advance Directive for Health Care Act (O.C.G.A. § 31-32-1). Living wills and powers of attorney put in place before July 1, 2007, still apply. The new law allows an individual to appoint someone to make decisions on their behalf if they become unable to. It is particularly important in cases that don't classify as emergency, but there is an important medical decision to be made. This person, referred to as an "agent," can be appointed to make decisions about treatment, as well as autopsy, organ donation, and burial specifications. Different people can be appointed to make different types of decisions – for example, medical treatment versus what to do with burial remains.

Filling out an advance directive for health care goes several steps beyond release of information. It gives individuals with and without disabilities a vehicle to indicate who

can act on their behalves, and what decisions they would make if they had the ability in a given situation: Should they be intubated? Do they want to remain on life support if declared brain dead? What measures should or should not be taken in the case of an emergency?

A form included in the law gives examples of what information should be included, such as treatment preferences, as well as nomination of a person to become the individual's guardian if one should be needed. Filling out and executing an advance directive form requires the signature of the individual, plus the signatures of two witnesses. It may be revoked at any time.



For individuals with family, determining who can act on an individual's behalf may be simple and straightforward. For people without family, or for whom family either cannot or should not act on their behalves, it may be more complicated. If you or someone you care about is considering this question, this guide cannot answer it for you. However, there are a few places you can start: does the

individual interact with a particular segment of the community such as a church or synagogue? Are there civic organizations or volunteer activities where the individual may have made connections? Anyone chosen to play this role in your life, or in the life of a loved one, should be trusted and should know the individual and his or her wishes. One note of caution: this person should not be someone currently providing paid support to the individual, or anyone with another conflict of interest relating to the individual's care.

Have these discussions early and often, build support networks in the community and don't be afraid to have conversations with friends, neighbors or advocates about whether they would be willing to fill this role.

(reference: O.C.G.A. § 31-32-1)

Alternative Decision-maker status

Georgia law clearly states who may make decisions about medical treatment for an adult who becomes incapacitated, and the list of people who qualify to make those decisions was expanded in 2010. Consent starts, of course, with that person, until they become unable to give consent. It passes next to any person authorized to give consent on their behalf, either through an advance directive for health care or a durable power of attorney for health care signed before July 1, 2007. In the absence of an advance directive

– or unavailability of the person identified in an advance directive – the hierarchy goes as follows: spouse; adult child on behalf of his or her parents; parent on behalf of an adult child; adult sibling; grandparent on behalf a grandchild; adult grandchild on behalf of a grandparent; or any adult niece, nephew, aunt or uncle of a patient.

Without any of those people available to give consent on the individual's behalf, the law allows one last option: an adult friend. "Adult friend" is defined as someone who has exhibited special care and concern for the person, who is generally familiar with the person's health care views and desires, who is willing and able to get involved in their health care decisions, and who will act in their best interest. That person will be asked to sign an acknowledgement form provided by the medical provider.

If all of those options fail, it will be left for the hospital or health-care facility to approach the courts in order to appoint a "temporary medical consent guardian."

Many of the considerations noted above about appointing someone in an advance directive also apply here. While an advance directive is just that – something done in advance – it is critical to have conversations before a crisis about who should have alternative decision-maker status.

(Reference: O.C.G.A. § 31-9-2)

Consequences to seeking guardianship

A guardian is not the same thing as a guardian ad litem, someone appointed to represent the interests of a person with respect to a single action in litigation. A guardian is someone appointed by probate court, after a petition, to care for and oversee the affairs of an adult found to lack “sufficient capacity to make or communicate significant responsible decisions concerning his or her health or safety.”

This is an all-encompassing designation, removing many rights

that the individual would have had otherwise: to decide where to live, decide what medical treatment to seek, to enter into contracts like marriage or divorce – unless otherwise preserved by the court order.

As mentioned, this process is a legal one requiring attorneys and court hearings. It can also become an adversarial process. If you petition for guardianship, the court is required to notify the proposed ward (the loved one over whom you are seeking guardianship) of the petition, and



the individual is given the option to seek representation from his or her own attorney. By law, the court will not appoint a guardian who has a conflict of interest in being the adult’s guardian, nor can institutions (such as group homes or nursing facilities) be given guardianship over someone where the individual is receiving care.

The courts are tasked with appointing someone as guardian who will act in the individual’s best interests, and there

are some guidelines as to who gets preference. This would be important in a case where two different people are seeking guardianship at the same time, for example. The order is: anyone nominated by the proposed ward to act as their guardian; a spouse or person nominated by the individual’s spouse; an adult child or someone nominated by the individual’s adult child; a parent or someone nominated by a parent of the individual; a guardian appointed when the individual was a minor; a guardian previously appointed in Georgia or another state; a friend, relative, or other individual; another person, including a volunteer to the court, found suitable and appropriate; or a county guardian.

In addition to this process potentially being lengthy and expensive – you must pay an attorney, as well as pay the costs of the probate hearings – it takes as much effort, time and cost to reverse guardianship.

(Reference: O.C.G.A. § 29-4-1, Family Support Technical Assistance Institute)

If your family decides to pursue guardianship, some things to remember:

- Make every effort to ensure that guardianship is limited and specific in scope.
- Review guardianship at least annually and request that guardianship be relinquished as soon as other supports are in place.
- Support staff in understanding that even when someone has a guardian, a person’s wishes and desires should be considered first.
- Educate and encourage guardians to actively solicit information from the person to determine what he or she wants, and to honor those wishes.
- Encourage and support guardians to be actively involved in peoples’ lives to foster their knowledge about peoples’ desired outcomes.
- Organizations providing services should maintain their focus on the person receiving supports – even when that person has a guardian or even a vocal family member.
- If you believe a guardian is acting against the wishes and/or desires of a ward, take action to assist the person to petition the court to remove the guardian, restrict the guardian’s scope, or to appoint another guardian if necessary.

(Reference: Family Support Technical Assistance Institute)

Terminating guardianship

To reverse guardianship, you must file a Petition for Restoration of Rights with the probate court in the county where the guardianship was enacted. This petition may be filed by any interested person, including the person under guardianship. It must also be supported by affidavits from two people who know the person under guardianship or from a physician,

psychologist or licensed clinical social worker. This will be followed by a court-ordered evaluation and a hearing to determine whether guardianship should be terminated. To undertake this process, you should seek the help of an attorney. For help finding an attorney, visit GeorgiaLegalAid.org or contact the Georgia Advocacy Office.