



THE BASICS

Becoming a Legal Guardian
in New York State

This is one of 11 booklets in *The Basics Series*. The booklets in this series are designed as basic self-help guides for individuals who need access to legal information and the courts in order to address family law and related issues.

All booklets in *The Basics Series*, in English and Spanish, can be downloaded using either of the following two web site links:

- www.lawhelp.org
- www.brooklynbar.org/vlp

Here is current contact information for the two organizations that produced *The Basics Series* in 2002:

Brooklyn Bar Association Volunteer Lawyers Project
718-624-3894
www.brooklynbar.org/vlp

inMotion
718-562-8181 (Bronx)
or 212-695-3800
www.inmotiononline.org

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WHAT IS A LEGAL GUARDIAN?

A legal guardian is a person who has legal power to take care of a child.

A Judge decides who that person is. A Judge decides who can make decisions for the child.

A legal guardian is not the child's parent. But a legal guardian has the same power as a parent.

WHY WOULD A PARENT CHOOSE, OR ASK A COURT TO CHOOSE, A LEGAL GUARDIAN FOR HIS OR HER CHILD?

A parent may need a legal guardian for his/her child:

- When the parent dies.
- When the parent may be in prison for a long time.
- When the parent is deported back to the country s/he came from.
- When the parent is too sick or disabled to take care of the child and cannot make decisions for the child anymore.

WHO CAN BE A LEGAL GUARDIAN?

A legal guardian must be over the age of 18 and a legal resident or a citizen of the United States.

A legal guardian can be a relative or a good friend who knows and loves the child. This person must be able to make good decisions and take very good care of the child.

CAN A PERSON BE A LEGAL GUARDIAN IF THAT PERSON HAS A CRIMINAL RECORD?

Maybe. It depends on the type of criminal record. The more serious the crime, the less possible it is that a person will be able to serve as legal guardian. If a proposed legal guardian has a record of child abuse, that person probably will not be able to serve as legal guardian. Anyone who wants to be a legal guardian will have to complete a form which lists all his/her addresses since 1973. Then the Judge will check the State Central Registry of Child Abuse and Maltreatment.

IS ANYONE EVER TOO OLD TO BE APPOINTED A LEGAL GUARDIAN?

No, but age and health are important things to think about when choosing a legal guardian.

WHAT KINDS OF LEGAL GUARDIANS ARE THERE?

There are four kinds of legal guardians:

- **Guardian of the Person:** This kind of legal guardian decides everything about the child's health, education and welfare. This means that the guardian of the person makes decisions about where the child lives and goes to school, what health care the child needs and gets, and other important things in the child's life.
- **Guardian of the Property:** This kind of legal guardian handles the child's money, investments and savings, as directed by the Judge for the child's benefit. The Judge may require a guardian of the property to post a bond to ensure that s/he follows the Court's rules and laws about investment of a child's assets.
- **Guardian ad litem:** This is a legal guardian who acts for the child if there is a law suit or court case involving the child.

- **Stand-by Guardian:** This legal guardian will be able to make decisions for the child at some time in the future when the parent no longer can do so. A parent with an illness that will get worse may know that at some point s/he will not be able to make important decisions for the child or be able to take care of the child. A parent in this situation would want to have a stand-by guardian.

Often, the same person can be more than one kind of legal guardian for the child. For example, the same person who is guardian of the person also may be guardian of the property. When the child has a lot of money, however, there can be two different people as legal guardians: one person as guardian of the person and another person as guardian of the property. A guardian of the person also may be the guardian ad litem in connection with a law suit involving the child. Or a separate person may be named guardian ad litem to act for the child in the law suit.

WHAT IS A BACK-UP GUARDIAN?

A **Back-up Guardian** is someone chosen by a parent or the Judge to be the legal guardian if the original legal guardian cannot continue. The original legal guardian might quit, become incompetent or disabled, or die. If that happens, the back-up guardian can take on the responsibilities and duties of the original legal guardian.

HOW DOES A PERSON BECOME A LEGAL GUARDIAN?

There are two ways a person can become a legal guardian:

- A parent can choose the person s/he wants as legal guardian for a child.

OR

- Any person or agency (for example, a social services agency) can ask the Judge to appoint a legal guardian for a child. This person can ask the Judge

to appoint himself/herself as legal guardian, or to appoint someone else. It is not necessary for a parent to have selected a person as legal guardian beforehand.

In either case, the **Judge has the final say** as to whether a legal guardian will be appointed and, if so, who that person will be.

HOW DOES THE JUDGE DECIDE?

A Judge will not appoint any legal guardian for a child if the parent does not want one appointed. The only time this happens is if the parent is mentally incompetent or unable to make decisions and to care for the child.

The Judge will pay a lot of attention to the parent's choice in deciding who will be the legal guardian. The Judge may request the Department of Probation or the Administration for Children's Services (ACS) to investigate and make a report. The Judge will want to know that the person to be appointed legal guardian has no history of child abuse or neglect. The person who is chosen to be legal guardian has to be cleared by the State Central Registry of Child Abuse and Maltreatment. The Judge will act in the best interests of the child.

HOW DOES A PARENT NAME A LEGAL GUARDIAN?

A parent can choose who will be the legal guardian by writing the name of that person in a document called a **designation**, a **deed of guardianship** or a **will**.

A person named as legal guardian in one of these documents must be approved by a Family Court or Surrogate's Court Judge.

WHEN DOES THE GUARDIANSHIP BECOME EFFECTIVE?

The person a parent names as legal guardian in a designation or deed of guardianship becomes the legal guardian as soon as that person is approved by the Judge.

The person a parent names as legal guardian in a will becomes the legal guardian only after the parent dies and that person is approved by the Judge. Naming a legal guardian in a Will does not change a parent's rights and responsibilities while the parent is still alive. A parent can change the legal guardian named in his/her will at any time.

IMPORTANT: There are formal rules for writing and signing a will. **To write a will, ask an attorney for help**

A parent may suffer from a chronic or progressive illness and expect not to be able to care for or make decisions for a child in the future. This parent may name, and have appointed by the Judge, a person to be stand-by guardian while the parent is still well enough to make decisions for the child.

The parent still has custody and control of the child. **The parent does not lose any rights when the stand-by guardian is appointed by the Judge.** The stand-by guardian's authority usually starts only when the parent becomes too sick to care for the child, or dies, but can start at any other time the parent wants this to happen.

HOW LONG DOES A GUARDIANSHIP LAST?

Normally until the child is 18 years old. However, if the child is mentally, physically or developmentally disabled, the guardianship may last as long as the child needs to be cared for.

WHICH COURT - SURROGATE'S COURT OR FAMILY COURT?

It is possible to seek an order appointing a guardian of the person or a stand-

by guardian in either Surrogate's Court or Family Court. However, the only court that can appoint a guardian of the property is Surrogate's Court. So, if a guardian of property is needed, you must go to Surrogate's Court.

When a will is approved and a judge makes sure that the instructions of the person who made the will are carried out, this is called probating the will.

Also, if a legal guardian or stand-by guardian is named in a will, even if this person is not also being named a guardian of the property, most people go to Surrogate's Court because that is where wills are probated. Then the same Judge will review the will and the appointment of any guardian by the person who has made the will.

Whichever Court is selected, the Court should be located in the county where the child (person needing a guardian) lives.

HOW DOES A PERSON GET A JUDGE TO APPOINT A LEGAL GUARDIAN?

The child's parents, another adult or a social services agency must file a written request for a legal guardian to be appointed (a **petition for guardianship**) with the Court. A person becomes an official legal guardian when the Judge issues a specific order (**letters of guardianship**) naming him/her as a guardian of the person, a guardian of the property or a guardian ad litem.

A legal guardian named in a will must ask the Judge for an **order of guardianship** after the death of the parent. The order of guardianship makes the deceased parent's choice official. The legal guardian chosen by the deceased parent has to be approved by the Judge before s/he has any legal right to act as a guardian.

A stand-by guardian can be appointed in two ways:

- A parent can request that a stand-by guardian be **appointed by written**

designation. The parent must sign and date the designation naming a stand-by guardian in front of two witnesses. The two witnesses also must sign and date the designation. Then the stand-by guardian has to sign the designation. Within 60 days after receiving proof of the death or incapacity of the parent, the stand-by guardian must go to court and ask the Judge to approve his/her appointment as stand-by guardian.

OR

- When there is no prior written designation naming a stand-by guardian, a parent who wants to appoint a stand-by guardian, or a person who wants to be a stand-by guardian, can go directly to court to ask the Judge for an order naming someone as stand-by guardian.

WHAT HAS TO BE IN THE PETITION?

The petition for guardianship must include:

- The name and address of the person asking for the appointment of a legal guardian.
- The name, address and date of birth of the child.
- The name and address of the child's parent(s) or other person(s) who are taking care of the child.
- The reason(s) why the Judge should appoint a legal guardian for the child.

WHO MUST BE TOLD THAT THE JUDGE IS BEING ASKED TO APPOINT A LEGAL GUARDIAN?

- The child's mother (if she is alive).
- The child's father (if he is alive and if he was married to the mother when the child was born, or if paternity has been established).

- The person the child lives with.

- The social services agency (if the child is in foster care).
- The foster parents (if the child has been with them for over one year).

If it is not the parent asking the Judge to appoint a legal guardian, the parent must be told in which court, on what date, and at what time the Judge will hear the request. Then the parent can go to court on the day and time to speak in court about whether a guardian should be appointed and about the person the Judge is being asked to appoint.

WHO MUST CONSENT TO HAVE A LEGAL GUARDIAN APPOINTED?

- The child, if the child is over 14 years old. If the child is over 14 but is mentally, physically or developmentally disabled, and/or not able to give informed consent, the Judge will choose a guardian ad litem to act for the child. **To give informed consent, a child must understand what will happen to him/her if a legal guardian is appointed.**
 - Both parents, if they are married, or if they were married at the time the child was born, but later divorced each other.
 - The father, even if he was not married to the mother at the time the child was born, when:
 - there is an order of paternity (also called an order of filiation) naming him as the legal father, or an acknowledgment of paternity;
 - the father has his name on the child's birth certificate;
 - the father has listed himself with the Putative Father Registry
- OR
- the father has been involved in the child's life, for example, by paying child support and visiting with the child.

- Only the mother, if she is not married and no father has come forward.

The putative father is someone everyone thinks is the father, and he thinks he is the father, but it is not official.

But, in some limited situations, a Judge can appoint a legal guardian without the parent's or child's consent, even if the parent or child objects.

WHAT DOCUMENTS MUST A PERSON OR AGENCY BRING TO COURT?

- The child's birth certificate (or a copy of it). The parent can get a birth certificate from the Department of Health where the child was born.
- The address where the child lives now, the name of the person(s) the child lives with, and the name(s) and address of the person(s) the parent or other person or agency seeking a guardianship wants the child to live with.
- If the child has two parents who are alive and were married when the child was born, or who were named on the birth certificate, either:
 - the written permission of the parents; or
 - the address of the parents so they can be notified that someone is asking that a guardian be appointed for their child.
- Proof of where the parent or other person seeking guardianship lives, such as an ID card, utility bill or official letter with that person's name and address on it.
- A death certificate, if the parent is dead.
- The written permission of the child, if over 14 years old.

IS THE PROCEDURE THE SAME FOR THE APPOINTMENT OF A STAND-BY GUARDIAN?

Yes. Except that a Judge must have the parent's permission to appoint a stand-by guardian.

DOES A PARENT NEED A LAWYER TO HAVE A STAND-BY GUARDIAN APPOINTED FOR THE CHILD?

Maybe not. The clerks in Family Court can help with the paperwork needed to name and appoint a stand-by guardian for a child. There are private legal organizations that can also help.

IF A PARENT WHO WANTS THE JUDGE TO APPOINT A STAND-BY GUARDIAN IS TOO ILL, DOES S/HE HAVE TO GO TO COURT?

No. You can ask the Judge if you can speak about your wishes by telephone, if you are well enough to do that. You can also have a lawyer go to court and speak for you, if the Judge permits this.

WHAT HAPPENS IF THERE IS A MEDICAL OR OTHER EMERGENCY AND A LEGAL GUARDIAN HAS TO BE APPOINTED QUICKLY?

- The Judge can appoint a **temporary guardian**. Then after the emergency, the parent or other person seeking a legal guardianship can choose a permanent legal guardian.
- The parent can sign a document naming a specific person as legal guardian. This is sometimes called a **grant of temporary care and custody**. This document may not be accepted by all authorities, though. If it is not accepted, then the parent or person seeking to be legal guardian must petition the Judge for letters of guardianship.

HOW IS GUARDIANSHIP DIFFERENT FROM ADOPTION?

In adoption, the legal relationship between the birth parents and the child ends. This means, among other things, that the child will receive no benefits that a child of the birth parent(s) is entitled to, such as social security benefits or child support payments. After the adoption is complete, the birth parent(s) has no right to the child or the child's property. The child's name is changed on the birth certificate to the name of the adopting parent(s) and the adopting parent(s) becomes the child's legal parent(s).

In legal guardianship, the legal relationship between parent and child continues. The parent is still the child's parent. The legal guardian is not the child's parent, but only substitutes for the parent when the parent is absent, dies or becomes unable to act as the child's parent. The child keeps his/her own name. The child will receive any benefits connected to his/her parent(s) to which s/he is entitled. The child is not entitled to benefits to which children of the legal guardian are entitled. Likewise, the legal guardian has no right to the child's property, except property that will be used for the benefit of the child.

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