



THE BASICS

Becoming a Legal Guardian
in New York State

WHAT IS A LEGAL GUARDIAN?

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

A Judge decides whether a child will have a legal guardian and which person will be the child's legal guardian.

A legal guardian is not the child's parent. But a legal guardian has the same powers as a parent to make official decisions about the child.

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 a parent is abroad in the armed forces and the child stays in the U.S.
- When the parent is deported back to the country s/he came from but the child stays in the U.S.
- 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 three basic kinds of legal guardians, each with a different set of decision-making powers:

- **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 lawsuit or court case involving the child.

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 lawsuit involving the child. Or a separate person may be named guardian ad litem to act for the child in the lawsuit.

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.

HOW DOES A PERSON BECOME A LEGAL GUARDIAN?

There are three 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.

OR

- A child can petition for a guardian for herself/himself if s/he is over the age of 14.

In all cases, 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 A PARENT DESIGNATE 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.

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 in Court for a legal guardian to be appointed. This written request is called a **petition for guardianship**. The Judge officially appoints the guardian by issuing a specific order called **letters of guardianship**. The letters of guardianship specify whether the guardian is a guardian of the person, a guardian of the property, a guardian ad litem, or a combination of the types of guardian.

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.

WHICH COURT – SURROGATE'S COURT OR FAMILY COURT?

Surrogate's Court and Family Court can both enter orders appointing a guardian of the person of a child. But only the Surrogate's Court can appoint a guardian of the property of the child. If a child needs a guardian of the property, you must go to Surrogate's Court.

“Probating the Will” is when a Will is approved and a judge makes sure that the instructions of the person who made the Will are carried out.

Probating the Will always happens in Surrogate's Court.

If a guardian of the person is named in a Will, most people go to Surrogate's Court to have the guardianship approved, even if there does not need to be a guardian of the property. This way, the same Judge who reviews the Will will also approve the guardians named by the person who has made the Will.

Whether you go to Surrogate's Court or Family Court, go the courthouse that is located in the county where the child (person needing a guardian) lives.

HOW DOES THE JUDGE DECIDE?

A Judge usually will not appoint any legal guardian for a child if the parent does not want one appointed. The only time the judge will overrule the wishes of the parent 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 that the Department of

Probation or New York City Administration for Children's Services 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.

WHAT HAS TO BE IN THE PETITION?

The petition for guardianship must include:

- The name and address of the person who is asking the Court to appointment 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.
- The estimated value of property and income of the child.
- Whether the petitioner has knowledge that the nominated guardian or person residing with the guardian has been the subject of a child protective proceeding.

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 both named on the birth certificate, bring either:
 - the written permission of the parents; OR
 - the address of the parents so they can be notified that someone is asking for a guardian to 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 one or both of the child's parents is dead.
- The written permission of the child, if the child is over 14 years old.

WHO MUST BE TOLD (NOTIFIED) WHEN SOMEONE ASKS A JUDGE 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).
 - BUT, the child's mother and/or father do not need to be notified if they have abandoned the child, or if a Judge has taken away their parental rights.
- The person the child lives with.
- If there are no parents, then all of the child's grandparents who live in the U.S.
- The child, if s/he is over the age of 14.
- 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 someone other than the parent(s) is asking the Judge to appoint a legal guardian, the parent(s) must be told in which court, on what date, and at what time the Judge will hear the request. Then the parent(s) 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 and able to give informed consent. **To give informed consent, a child must understand what will happen to him/her if a legal guardian is appointed.** If the child is over 14 but is mentally, physically or developmentally disabled, or not able to give informed consent for any other reason, the Judge will choose a guardian ad litem to act for the child.

Both parents, if they are married, or if they were married at the time the child was born, but later divorced each other.

- Only the mother, if she is not married and no father has come forward.
- The father, even if he was not married to the mother at the time the child was born, if at least one of the following is true:
 - there is an order of paternity (also called an order of filiation) naming him as the legal father, or an acknowledgment of paternity; OR
 - the father has his name on the child’s birth certificate; OR
 - 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.

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.

WHEN DOES THE GUARDIANSHIP BECOME EFFECTIVE?

When a parent names a legal guardian in a designation or deed of guardianship, that person becomes the legal guardian as soon as the Judge approves the parent's choice.

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 standby guardian is appointed by the Judge.** The standby 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. For more information about standby guardianship, please see below in this booklet.

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. If the child gets married before he or she turns 18, the guardianship ends.

When a child who has a guardian turns 18, he or she can ask the court to extend the guardianship until his or her 21st birthday. Having a guardian until age 21 can be helpful for young immigrants who want to apply to become permanent residents by obtaining special immigrant juvenile (“SIJ”) status.

To obtain SIJ status, the juvenile must meet 4 conditions. First, he or she must be under 21 years old. Second, he or she must be in foster care or already have a guardian when he or she applies for SIJ status. Third, he or she must have been placed in foster care under guardianship before his or her 18th birthday. Fourth, the reason for the foster care or guardianship must have been abuse, abandonment, or neglect.

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 that names 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 go to Court and petition the Judge for letters of guardianship.

WHAT IF AN APPROVED LEGAL GUARDIAN DIES OR CAN NO LONGER CARE FOR THE CHILD?

A **successor 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 successor guardian can take on the responsibilities and duties of the original legal guardian.

IF A PARENT IS SICK AND KNOWS THAT HIS OR HER CHILDREN WILL NEED A GUARDIAN IN THE FUTURE, CAN HE OR SHE MAKE GUARDIANSHIP ARRANGEMENTS AHEAD OF TIME?

Yes. A parent who is sick and worries that he or she might die or become unable to care for his or her children can designate someone as a **standby guardian**. In a standby guardianship, the parent gets to decide when the legal guardianship will start, and the parent keeps all of his or her parental rights even after the guardian's authority begins. The parent can specify that the standby guardian's authority begins when the parent becomes mentally incapacitated, when the parent becomes too physically ill to care for the children, when the parent dies, or whichever of these occurs first. A parent who has made a standby guardianship arrangement can also start the guardian's authority at any time.

Standby guardianship is a different process for creating a legal guardianship, but standby guardians have all of the same powers as a guardian appointed through the regular processes described above. A standby guardian can be a guardian of the person, a guardian of the property, or both.

A standby guardian can be appointed in two ways:

- **By petition to the court:** A parent can go to court, or have his or her lawyer go to court, and make a petition. This petition is similar to the regular petition for guardianship. It must also state the reasons that a standby guardian is needed, such as progressive or fatal illness. The petition for a standby guardian will also state whether the authority

of the standby guardian becomes effective upon the parent's incapacity, death, consent, or whichever comes first. The court will approve the guardianship if it is in the best interest of the child.

- **By written designation:** A parent can arrange a standby guardianship without having to go to court by making a **written designation**. The designation must name the intended standby guardian and the conditions that will start the guardian's authority. The parent must sign and date the designation in front of two witnesses. The two witnesses also must sign and date the designation.

If a doctor certifies that the parent has become mentally incapacitated, or if the parent has become physically debilitated and consents to starting the guardianship, the guardianship begins immediately. However, the standby guardian must go to court within 60 days and file a petition to have the guardianship approved and made permanent.

A parent might use a written designation to appoint a guardian if s/he is worried that s/he will die or get too sick before s/he is able to go to Court and make a petition.

DOES A PARENT NEED A LAWYER TO HAVE A STANDBY 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 legal organizations that can also help.

IF A PARENT WHO WANTS THE JUDGE TO APPOINT A STANDBY GUARDIAN IS TOO ILL, DOES S/HE STILL 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.

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