

# Problems With Guardianship System Is Focus of John Oliver Show

John Oliver recently highlighted problems with the guardianship system on his HBO show, [Last Week Tonight with John Oliver](#). The comedian provided a scary and funny explanation of how guardianship works, ending with a public service announcement by William Shatner, Lily Tomlin and others explaining steps you can take to avoid the guardianship.

The show focuses on the abuses of a [professional guardian in Las Vegas](#), April Parks. She is clearly at the far end of guardianship exploitation and is currently facing prosecution on more than 200 charges. But Oliver does a good job of explaining how guardianship takes away rights without providing oversight of the people appointed to handle personal and financial decisions for people who can no longer make decisions for themselves.

He explains how courts do not have the resources necessary to provide proper oversight, reporting that only 12 states certify professional guardians. In addition, according to an investigation by the [Government Accountability Office](#), states don't even do credit or criminal background checks on candidates for guardianship.

Nevertheless, the reality is that guardianship and conservatorship actually work in most cases. Family members seek the legal authority they need to make personal, financial and legal decisions for loved ones who have lost the capacity to do so for themselves. In many cases, these non-professional guardians don't follow through with the court reporting required by law, not because they have anything to hide but

because they don't know that they have the obligation or don't know how to provide the reporting. More robust follow up by the probate court could seek to enforce the reporting rules, but also could result in much more red tape without much more protection for the people under guardianship or conservatorship.

In any event, the best approach is to avoid the need for guardianship and conservatorship by putting durable powers of attorney and health care proxies in place ahead of time when you can choose who you would like to make decisions for you when necessary. Even if you're not at risk of exploitation because your children or grandchildren would step in, the need for court intervention causes otherwise unnecessary expense and delay.

This is what estate planners counsel their clients all the time. But William Shatner, Lily Tomlin, Rita Moreno, Fred Willard, and Cloris Leachman do it so much better. With some side discussions about hippos, they recommend executing a durable power of attorney and health care proxy naming someone you trust to make decisions for you if you can't for yourself. They all agree that the person they most trust for this role is Tom Hanks.

To watch the clip from the show, [click here](#). (Warning: The clip contains occasional profanity.)

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## **When Can an Adult Child Be**

# Liable for a Parent's Nursing Home Bill?

Although a nursing home cannot require a child to be personally liable for their parent's nursing home bill, there are circumstances in which children can end up having to pay. This is a major reason why it is important to read any admission agreements carefully before signing.

Federal regulations prevent a nursing home from requiring a third party to be personally liable as a condition of admission. However, children of nursing home residents often sign the nursing home admission agreement as the "responsible party." This is a confusing term and it isn't always clear from the contract what it means.

Typically, the responsible party is agreeing to do everything in his or her power to make sure that the resident pays the nursing home from the resident's funds. If the resident runs out of funds, the responsible party may be required to apply for Medicaid on the resident's behalf. If the responsible party doesn't follow through on applying for Medicaid or provide the state with all the information needed to determine Medicaid eligibility, the nursing home may sue the responsible party for breach of contract. In addition, if a responsible party misuses a resident's funds instead of paying the resident's bill, the nursing home may also sue the responsible party. In both these circumstances, the responsible party may end up having to pay the nursing home out of his or her own funds.

In a case in New York, a son signed an admission agreement for his mother as the responsible party. After the mother died, the nursing home sued the son for breach of contract, arguing that he failed to apply for Medicaid or use his mother's money to pay the nursing home and that he fraudulently transferred

her money to himself. The court ruled that the son could be liable for breach of contract even though the admission agreement did not require the son to use his own funds to pay the nursing home. (Jewish Home Lifecare v. Ast, N.Y. Sup. Ct., New York Cty., No. 161001/14, July 17, 2015).

Although it is against the law to require a child to sign an admission agreement as the person who guarantees payment, it is important to read the contract carefully because some nursing homes still have language in their contracts that violates the regulations. If possible, consult with your attorney before signing an admission agreement.

Another way children may be liable for a nursing home bill is through filial responsibility laws. These laws obligate adult children to provide necessities like food, clothing, housing, and medical attention for their indigent parents. Filial responsibility laws have been rarely enforced, but as it has become more difficult to qualify for Medicaid, states are more likely to use them. Pennsylvania is one state that has used filial responsibility laws aggressively.

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## **6 Things to Ask Before Agreeing to Be a Trustee**

Being asked to serve as the trustee of the trust of a family member is a great honor. It means that the family member trusts your judgment and is willing to put the welfare of the beneficiary or beneficiaries in your hands. But being a trustee is also a great responsibility. You need to go into it with your eyes wide open. Here are six questions to ask before saying “yes”:

1. **May I read the trust?** The trust document is your instruction manual. It tells you what you should do with the funds or other property you will be entrusted to manage. Make sure you read it and understand it. Ask the drafting attorney any questions you may have.
2. **What are the goals of the grantor (the person creating the trust)?** Unfortunately, most trusts say little or nothing about their purpose. They give the trustee considerable discretion about how to spend trust funds with little or no guidance. Often the trusts say that the trustee may distribute principal for the benefit of the surviving spouse or children for their "health, education, maintenance and support." Is this a limitation, meaning you can't pay for a yacht (despite arguments from the son that he needs it for his mental health)? Or is it a mandate that you pay to support the surviving spouse even if he could work and it means depleting the funds before they pass to the next generation? How are you to balance the needs of current and future beneficiaries? It is important that you ask the grantor while you can. It may even be useful if the trust's creator can put her intentions in writing in the form of a letter or memorandum addressed to you.
3. **How much help will I receive?** As trustee, will you be on your own or working with a co-trustee? If working with one or more co-trustees, how will you divvy up the duties? If the co-trustee is a professional or an institution, such as a bank or trust company, will it take charge of investments, accounting and tax issues, and simply consult with you on questions about distributions? If you do not have a professional co-trustee, can you hire attorneys, accountants and investment advisors as needed to make sure you operate the trust properly?
4. **How long will my responsibilities last?** Are you being asked to take this duty on until the youngest minor child reaches age 25, in other words for a clearly

limited amount of time, or for an indefinite period that could last the rest of your life? In either case, under what terms can you resign? Do you name your successor or does someone else?

5. **What is my liability?** Generally trustees are relieved of liability in the trust document unless they are grossly negligent or intentionally violate their responsibilities. In addition, professional trustees are generally held to a higher standard than family members or friends. What this means is that you won't be held liable if for instance you get professional help with the trust investments and the investments happen to drop in value. However, if you use your neighbor who is a financial planner as your adviser without checking to see if he has run afoul of the applicable licensing agencies, and he pockets the trust funds, you may be held liable. A well-respected Massachusetts attorney who served as trustee on many trusts used a friend as an investment adviser who put the trust funds in risky investments just before the 2008-2009 stock market crash. The attorney was held personally liable and suspended from the practice of law. So, be careful and read what the trust says in terms of relieving you of personal liability.
6. **Will I be compensated?** Often family members and friends serve as trustees without compensation. However, if the duties are especially demanding, it is not inappropriate for trustees to be paid something. The question then is how much. Professionals generally charge an annual fee of 1 percent of assets in the trust. So, the annual fee for a trust holding \$1 million would be \$10,000. Often, professionals charge a higher percentage of smaller trusts and a lower percentage of larger trusts. If you are doing all of the work for a trust, including investments, distributions and accounting, it would not be inappropriate to charge a similar fee. However, if you are paying others to perform these functions or are

acting as co-trustee with a professional trustee, charging this much may be seen as inappropriate. A typical fee in such a case is a quarter of what the professional trustee charges, or .25 percent (often referred to by financial professionals as 25 basis points). In any case, it's important for you to read what the trust says about trustee compensation and discuss the issue with the grantor.

If after getting answers to all these questions you feel comfortable serving as trustee, then by all means accept the role. It is an honor to be asked and you will provide a great service to the grantor and beneficiaries.

For more on the different kinds of trusts, [click here](#).

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