

QUESTIONS AND ANSWERS ON GUARDIANSHIP ISSUES

What is a Guardian?

A guardian is a person, institution, or agency appointed by a court to manage the affairs of another, called a ward. The guardian may manage person and/or the estate matters. Each state has specific laws, which govern guardianship proceedings and the guardian's activities. States also separate guardianship for minors and for adults with disabilities in the law. Your local court will be able to direct you to the divisions, which oversee adult guardianship and/or minor guardianships.

Who may have a guardian appointed to manage his/her affairs?

The law presumes that an adult 18 years of age or older is capable of managing his/her own affairs. In order to have a guardian appointed in most parts of the United States a person must be demonstrated to lack the capacity to make or communicate responsible decisions concerning personal or financial matters. In most states, the lack of capacity requires a cause with the decisional impairment being a result. Mental illness, developmental disability, physical incapacity, chronic intoxication, or even advanced age are identified by various states as the basis for the lack of decisional capacity. The laws of the state in which the ward resides must be reviewed to learn the specifics governing the definition of an incapacitated person.

How is it determined that a person may need a guardian?

The fact that someone has some sort of diagnosis, or disability does not automatically equate to the need for a guardian. The primary test for determining the need for guardianship focuses on the ability to make decisions, and to communicate the decisions once made. The essence of decisional capacity, which equates to the guardianship determination, may be encompassed in the following questions:

1. Does the individual understand that a decision needs to be made?
2. Does the individual understand the options available in making a decision?
3. Does the individual understand the potential consequences of the decision and options?
4. Can the individual direct the decision to appropriate parties?

The areas of decision making on which most guardianships are focused are living conditions, medical care, vocational and educational services, ancillary professional services, caring for dependents, and managing finances.

Who can act as a guardian?

The following qualifications for guardians are fairly universal:

- Individuals – 18 years of age, not convicted of a felony, and not adjudicated disabled.
- Non-related professional guardians, 18 years of age, not convicted of a felony, and not adjudicated disabled.
- A public or private institution, not supplying housing.
- Financial institutions (for estate matters only.)

In some states there is a statutory preference for family member as guardian, in others it is the discretion of the court. More states are requiring that individuals appointed as guardians have a minimum training experience, for example a video, a book to read, or even attendance at a course on guardianship which may last anywhere from two hours up to 40 hours. For specifics about who may be a guardian in various states review the individual state guardianship statutes.

How does a guardian get appointed?

A guardian gets appointed after a petition is filed, a court hearing is held, and the court determines based on the evidence presented that (1) the individual is incapacitated according to the law of that state and guardianship is appropriate; and (2) who or what entity will act as guardian; and (3) what the authority of the guardian will be.

What are the usual steps to appointing a guardian?

Before starting any legal proceedings a report must be obtained that certifies that the person has a disability and because of that disability needs a guardian. The requirements of the content of the report vary greatly. NGA advocates that the report focus on the functional abilities of the person. At a minimum the report should (1) provide a description of the nature and type of disability and an explanation of how that disability impacts the individual's decision making; (2) offer an analysis and results of evaluations of the individual's mental and physical condition, educational level, adaptive behavior and social skills as appropriate; (3) state an opinion about the need for guardianship, and provide supporting reasons for this opinion; and (4) recommend suitable living arrangements and treatment or habitation plans and again the supporting reasons for the recommendations. This report should accurately reflect the skills and abilities of the person as well as the deficits and problems. Finally, the report must be signed by all involved in the evaluation and in most states one of the signers must be a physician licensed to practice in that state. The report must be timely and meet a time frame that is usually stated in the statute.

A petition, which is the official request for the appointment of a guardian, will be prepared and signed by someone alleging incapacity, and the need for guardianship; it is then filed.

A hearing date will be set and usually a Summons is served. The summons is the official notice to the person with disabilities about guardianship proceedings, the time, and place.

Notice of the date, time and place of the guardianship proceedings is given to any interested parties, family members, proposed guardian, etc., in order that they can be present at the hearing if they choose.

A hearing will be held and evidence presented about the need for guardianship. The potential ward is usually represented by an attorney during the hearing process. Although, at times, the hearing may seem to be quite informal, this is an adversarial process and the petitioner must clearly demonstrate to the court that the individual needs a guardian of some sort.

The above includes very broad and general descriptions. During the appointment proceedings of a guardian the alleged disabled person has specific due process rights that are enumerated in the various state laws. Although an attorney may not be required to establish guardianship in some areas, this is a legal process. It may be best to consult an attorney familiar with guardianship proceedings and disability.

Can guardianship be used in an emergency?

In most states there is the mechanism for an emergency appointment of a guardian for a specific purpose. They are usually time-limited and not renewable without a full guardianship proceeding. There is usually a cursory hearing about the specific issue and a guardian's authority is only in the areas of the issue presented. Usually this is not a full finding of incapacity, and a full hearing on the guardianship must be scheduled or the emergency/temporary guardianship expires.

What are the different types of guardianship available?

This also varies from state to state but generally:

- Person – makes decisions about person, programs, medical care, residence, release of confidential information.
- Estate – manages and makes decisions about financial matters, benefits, real estate and other property often referred to as conservator.
- Plenary – means total and can be attached to guardianship of person or estate or both. In most states there are exclusions to plenary guardianship, which may be residential placement, certain medical procedures, and sale or transfer of property. The guidelines again are in the state laws regulating guardianship.
- Limited – means that the guardian has only the authority specifically given by court order. The ward keeps all other decision-making rights not specifically outlined by the court order. In most states the appointment of a limited guardian does not equal a finding of legal incompetence.
- Successor – the court appoints another guardian when the original guardian dies, resigns, or is removed. Usually the successor has the same powers as the original guardian.

Each state has chosen to address specific issues by defining various types of guardianships. Most fall within the above categories – this is one area which names or categories of guardians may differ greatly. Review your state laws for specifics.

How long does the guardianship process take?

Usually only temporary or emergency guardianships may be appointed quickly, meaning a few days. Generally most guardianship proceedings may take from an absolute minimum of two weeks to as long as two months.

Does guardianship ever end?

Guardianship is normally a long-term relationship. The court may modify, revoke, or terminate the guardianship if the ward's ability to make and communicate decisions is demonstrated to the court. The procedures governing the modification of guardianships again may vary but each state addresses the issue.

Are there alternatives to guardianship?

Guardianship is a highly intrusive form of advocacy and should be used only as a last resort when all other alternatives have been examined. Some of the alternatives to guardianship may be Powers of Attorney for health care or financial management, Living Wills, trust, case/care management services, Representative Payee and Health Care Surrogate acts. Individuals may get additional information from the local bar association, and local social service agencies.