



UNDERSTANDING GUARDIANSHIP FOR ADULTS WITH DISABILITIES

By Damon W. Doucet, Esq.

Guardianship is a valuable tool which can be used to protect individuals who no longer possess the ability to make appropriate personal or financial decisions for themselves. The guardian assumes the duty of caring for the person with disabilities and/or their assets, and the court maintains oversight to reduce the risk of exploitation or abuse by the guardian.

Below you will find answers to some of the most frequently asked questions concerning guardianship. It is important to note that the information provided herein is intended for general informational purposes only. If specific legal advice is required, please consult with an attorney in your jurisdiction.

WHAT IS ADULT GUARDIANSHIP?

Adult guardianship is the legal process by which an individual assumes the role of decision-maker for an adult who becomes unable to make such decisions for himself/herself.

Guardianship can take several forms:

- **Guardianship of the Person**, wherein decisions are limited to those affecting the person of the individual with disabilities, such as medical treatment decisions;
- **Guardianship of the Estate**, wherein the guardian is responsible for managing the estate of the individual with disabilities. Guardianship of the Estate is required where a person with disabilities has significant assets, or in cases where an inheritance or other monetary windfall is anticipated;
- **Guardianship of the Person and Estate**; or,
- **Limited Guardian of the Person, Estate or both**, in cases where the individual with disabilities is determined by the court to retain some capacity for rational decision-making.

WHO MAY SERVE AS GUARDIAN?

Any person may serve as guardian who:

- Has attained the age of 18;
- Is a resident of the United States;
- Is not of unsound mind;
- Is not under a finding of disability; and
- Has not been convicted of a felony involving harm or threat to an elderly person or person with a disability, including a felony sexual offense. The court may appoint an individual who has been convicted of a felony other than those noted above, so long as the court finds it to be in the best interest of the ward and there is evidence of rehabilitation. In some jurisdictions conviction for any felony is disqualifying.
- Entities may also serve as guardian, including:
- Any public agency or not-for-profit corporation found capable by the court of providing the care and/or support the ward requires.
- Any corporation qualified to accept and execute trusts may serve as guardian of the estate.

103 Schelter Road, Lincolnshire, IL 60069 | 847.522.8086 | Fax 847.522.8081

www.protectedtomorrows.com | info@protectedtomorrows.com

® & © 2003-2010 Protected Tomorrows, Inc. All rights reserved. Reprinted with permission by Protected Tomorrows, Inc.



HOW IS GUARDIANSHIP DETERMINED?

The process of obtaining guardianship is governed by the laws of each state. Generally, the individual seeking guardianship must:

- File a petition for guardianship of the alleged person with disabilities (the "Respondent"), nominating either themselves or another qualified person or entity to act as guardian;
- Arrange for personal service of the petition, the Rights of the Respondent and a summons on the Respondent. Service is usually performed either by the sheriff of the county in which the petition is filed, or by private service (in some jurisdictions private service requires court approval) and must be accomplished within a specified number of days prior to the hearing date;
- Provide notice by mail to the respondent's nearest relatives; and
- Obtain a medical report from a licensed physician detailing the reason guardianship is necessary.

A *Guardian ad Litem* may be appointed by the court in cases where the respondent cannot, or will not, appear for personal examination by the court. The *Guardian ad Litem* performs an independent investigation of the facts in the case and reports to the court. After the requirements listed above have been satisfied, a hearing is then held, the evidence is presented, and the court issues a ruling.

DOES THE RESPONDENT HAVE ANY PROTECTION UNDER THE LAW?

The law takes the revocation of a citizen's rights very seriously and provides the respondent with legal protection in guardianship cases, which are spelled out in the governing statute.

These rights are as follows:

- The right to object to guardianship;
- The right to counsel, either chosen by the Respondent or appointed by the court;
- The right to a jury of six persons;
- The right to present evidence and confront and cross-examine witnesses;
- The right to a second independent medical opinion;
- The right to a closed hearing; and
- The right not to attend the hearing

WHAT HAPPENS IF GUARDIANSHIP IS DETERMINED TO BE NECESSARY?

When guardianship is ordered by the court, the named guardian becomes an officer of the court and is subject to the oversight of the court.

If guardianship is of the person only, the guardian is required to:

- Execute a no surety bond or an Oath of Office; and
- Report annually on the mental and physical condition of the ward.



If guardianship includes the ward's estate, the guardian is required to:

- **Execute a surety bond in an amount determined by statute;**
- **Present an annual budget and an initial inventory of the estate's assets; and**
- **Present an annual accounting of the ward's assets to the court.**

WHO PAYS FOR THE GUARDIANSHIP?

Generally, if guardianship is of the person only, and the ward has no assets, the petitioner usually bears the cost burden. If the ward has an estate, the costs of gaining and maintaining the guardianship are borne by the ward's estate.

WHAT ARE THE LIMITATIONS OF GUARDIANSHIP?

Examples of the limitations of guardianship include, but are not limited to:

- **No authority for permanent placement in a care facility without court approval;**
- **Ward cannot be forcibly medicated, except by order of the court;**
- **Ward cannot be kept isolated from any person, except at their request, or by order of the court for the ward's safety;**
- **Ward cannot be prevented from requesting a hearing to seek restoration of rights.**

Guardianship is a deprivation of individual rights and should be sought only as a last resort. If an individual has a disability, yet still maintains the capacity to execute powers of attorney, guardianship is not necessary. When appropriate, however, guardianship provides two important layers of protection (the guardian and the court), for those who have lost the ability to protect themselves.

Damon Doucet is a Louisiana native, a former non-commissioned officer in the United States Marine Corps and a long time Chicago area resident. Damon is a summa cum laude graduate of Columbia College, Columbia, Missouri, and a graduate of the Loyola University Chicago School of Law, where he was a Dean's List student and a recipient of the law school's Leadership and Service Award. He is a former legal intern at the Office of the Cook County Public Guardian and a former judicial intern in the Probate Division of the Circuit Court of Cook County. Damon spent many years in corporate management and served as a staff attorney at an estate planning and probate firm on the North Shore prior to entering private practice. He is a Master Mason and a member of the Illinois State Bar Association, the Lake County, Illinois Bar Association, the National Academy of Elder Law Attorneys and the America Legion.