

1



Things You Need to Know about Guardianship:

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Contact information:
<https://www2.illinois.gov/sites/gac/Pages/default.aspx>

2

What is Guardianship?

Guardianship is a legal relationship conferring one party (guardian) with the authority of substitute decision making for another party (ward).

It is established by court order after due process of right to notice and right to a hearing including by a 6 person jury. It is essentially a lawsuit to declare a person incompetent.

Duties are imposed upon the guardian and certain rights are retained by the ward.

The Guardian is not the parent of the ward, albeit the parent of the ward may be the guardian.

3

Inability to manage affairs, not disability, is the basis for guardianship.

Disability alone cannot be a basis for guardianship.
 "Plenary guardianship over a disabled adult is not appropriate where the adult is capable of intelligently directing others to perform tasks for him."
Estate of Fallos, 386 Ill. App. 3d 831 (4th Dist. 2008)

4

Guardianship should be seen as a tool of last resort.

- Establishing a guardianship requires a party to engage the legal system.
- The process also must be followed in order for the court to properly establish a guardian.
- Guardianship is to be ordered only to the extent necessary to promote the well being of the PWD, protect from harm and to encourage development of maximum self-reliance and independence. §11a-3(b)**

5

Categories of Guardianship

- Temporary (expire after 60 days—can be renewed for up to 120 days).
- Guardian of Person (Plenary or Limited).
- Guardian of Estate (Plenary or Limited).

Each category of guardianship has an advance directive counterpart:

- Durable Power of Attorney for Property
- Health Care Power of Attorney
- Mental Health Advance Directive

Guardianship: why?

Assist in accessing services.
 Obtain confidential records.
 Manage finances; protection from abuse, neglect, fraud.
 In certain circumstances, make residential placement decisions.

7

Who may act as Guardian?

Any person who is:

- 18 years of age
- of sound mind and not adjudged disabled under the Probate Act,
- Office of Public Guardian (generally involving estates over \$25,000.00)
- Office of State Guardian (generally involving estates under \$25,000.)

8

Out of State Residents

- Out of state residents can become guardians.
- The court may take issue with the person's ability to transact the duties of the guardian of person or estate due to distance.

9

Who may not act as guardian?

Felons convicted of offences involving harm or threats of harm to minors, elderly or persons with a disability;

Other felons, unless the court makes a finding the appointment of the felon is in the best interests of the PWD (but never sex offenders and abusers of elderly and disabled).

"The court shall not appoint an agency which is directly providing residential services to the ward." §11a-5(b).

10

Who may Petition for Guardianship?

Any "reputable person." (Includes individuals working for service providers).

The person with the disability.

The court on its own motion.

11

Physician's Report is Generally Required

The evaluation and examination of the ward must have been conducted within 3 months of the filing of the petition.

The report must be signed by all persons conducting the evaluation one of whom must be a physician.

12

Guardian ad litem

Section 11a-10 provides that the court shall appoint a GAL to report to the court concerning the ward's best interests.

The GAL is to personally observe the respondent, inform him/her of the contents of the petition, advise of rights and attempt to discern the respondent's position on the petition, proposed guardian, possible change of residence/services and any other areas the court has concerns.

The GAL is essentially the eyes and ears of the court.

The GAL is not the respondent's attorney

The GAL is not the ward's counsel, though this point is often confused. The fee of the GAL can be taxed as a cost to the estate and possibly the petitioner.

The court has the authority to appoint counsel for the respondent. The fee of the attorney is treated similarly as the GAL.

15

Hearing: Standard of Proof, ward's wishes for choice of guardian.

- Court must find by clear and convincing evidence that the Respondent is unable to fully manage affairs.
- Further, court must order guardianship only to extent necessary (from which is derived the concept of limited guardianship) and must consider the ward's preference for guardian.

Prior signed POAs.

Under Section 2-5 of the POA Act, if a POA was created prior to the establishment of guardianship the POA continues unless terminated by the order for guardianship.

Oath and Bond; guardian training.

The Petitioner, if appointed guardian, is required to sign an oath and bond form. If the bond is a surety (vs. no surety) the guardian must obtain a bond (insurance policy).

The practice varies by county.

No surety bonds present a risk of financial exploitation.

Once appointed guardian of the person the guardian has one year to complete on-line training and file the certificate.

The training can be found at the link on the 1st slide.

17

Temporary Guardian

Usually precipitated by an emergency, health/financial (abuse, neglect, self-neglect, incapacity).

Guardian is authorized to make only decisions as specifically enumerated by the court up to 60 days, but can be extended up to 120 days.

Again, Temporary guardians are by statute limited guardianships and the temporary guardian only has the powers specified in the court order. In Cook Co the order for temporary guardianship is CCPN 203.

18

Duties: Guardian of the Estate

Collect and preserve assets; prepare and file an inventory.

Frugal care, management and investment of the estate.

Provide for the comfort and suitable support and education of the ward's children/dependents.

Annually account to the court for income and expenses.

19

Duty to Account

A guardian of the estate is to file with the court proof of income and disbursements for the estate at least once per every three years (or more often if court requires it) and a copy is to be served on the ward. In Cook and collar counties the courts require the accounting be filed every year. Failure to do so can result in a Citation to Show Cause being issued against the guardian and/or his/her attorney.

20

Probate Code limitations on Guardian of Estate's authority.

Guardian cannot sell/mortgage real estate absent court order. 755 ILCS 5/19-1.

Cannot sell, lease, pledge or mortgage ward's chattel (personal property) absent court order. 755 ILCS 5/20-3.

21

Duties of the Personal Guardian

- Has custody of the Ward **and the Ward's minor children and adult dependent children.**
- Shall make provision for their support, care, comfort, health, education, professional services, etc. However the right to consent to medical procedures has its limits.....

22

Standard for decision making by Guardian of the Person

Decisions are to conform to what the ward would have done if competent, guided by stated preferences of ward and ward's moral, religious, philosophical and personal beliefs.

Where possible, guardian is to involve the ward in the decision-making process to the extent they are able and is to act in conformity with those wishes unless they could cause substantial harm to the ward's estate/person. 755 ILCS 5/11a-17(e).

23

If Ward's wishes are not known or knowable...

If ward's wishes remain unknown after reasonable efforts to discern them, decisions are to be made in the best interests of the ward weighing risks and benefits of the proposed action. 755 ILCS 5/11a-17(e).

24

25

Duty to maximize independence

"The guardian (of the person) **shall** assist the ward in development of maximum self-reliance and independence." 755 ILCS 11a-17(a).

Applicable to community integration, skills development, work, residential placement, etc.

Supportive Decision Making

Out of the duty to maximize self-reliance comes the concept of supportive decision making. This places the person at the center of the decision and starts the conversation by asking "what does the PWD want?" "What is important to PWD" rather than what I, as guardian, think is best for the person. It creates a balancing act of weighing the risk of a possible negative outcome with the reward of personal achievement/satisfaction. The balance of liberty vs. safety requires the exercise of the guardian's judgment informed by legal requirements and the PWD's wishes.

27

Guardians making health care decisions

A guardian acting as a surrogate health care decision maker acts under the authority of the Illinois Health Care Surrogate Act, 755 ILCS 40/5, not the Probate Code. End of life decisions require two doctors to make written findings after exam showing that ward lacks decisional capacity and has a qualifying condition.

Non-life threatening conditions are made "in consultation with the attending physician" and do not require a qualifying condition.

28

Decisional Capacity vs. Legal Competency

- Does a person retain the right to make own medical/other decisions even when he/she has a plenary guardian?
- When it comes to medical decisions, including a DNR, the answer is yes if the person has **decisional capacity**. In Re Estate of Austwick.

29

No more forced sterilization

A guardian has no authority to consent to the medical procedure of sterilization without court authority after a hearing to determine the ward's decisional capacity. (5/11a-17.1). If the court finds the ward has capacity and states a preference the court ends the hearing going with the ward's wishes.

30

Does the nature of the facility matter for residential placement?

Yes! If the facility is a Mental Health Facility as that term is defined under the Mental Health and Developmental Disabilities Code (MHDDC) a guardian has NO authority to make a "voluntary" placement. *In Re Estate of Mueller*.

31

Residential placement of PWDs with MI.

- "A guardian of the person may not admit a ward to a mental health facility except at the ward's request who has the capacity to consent to the admission." §11a-17(a).
- MHDDC defines MH facility as any private or state operated hospital, institutions, clinics, evaluation facilities, mental health centers or facility, or section thereof, for the treatment of persons with mental illness.

Guardians do have legal authority to admit wards with DD into residential placements.

MHDDC §3-200(b) similarly applies to DD wards into Department DD facilities; however §4-302 provides that **a guardian may administratively admit a ward into a DD facility** if there is a court order authorizing it (residential placement authority).

33

Residential placements....

"The guardian shall not remove the ward from his or her home or separate the ward from family and friends unless such removal is necessary to prevent substantial harm to the ward or ward's estate." 755 ILCS 5/11a-14.1.

Limited Guardianships

Guardianships for either person or estate can be limited. If limited only the specific authority conferred may be acted upon and the ward retains all other rights. It can be narrow or expansive.

"The appointment of a limited guardian shall not constitute a finding of legal incompetence."

MARRIAGE

A ward has the right to marry so long as he/she has the mental capacity to understand the nature of marriage. *Larson v. Larson*, 1963, *Pape v. Byrd*, 1991.

A guardian may petition the court for leave to consent to marriage.

A guardian can go to court and attempt to prevent the marriage.

35

36

Divorce

- A guardian may seek to bring a divorce action for the ward but must go to court and show by clear and convincing evidence that the divorce is in the ward's best interests.

Revocation and Modification.

The ward has the right to go back to court and request that another person become guardian, that the guardian's power be limited or that guardianship be terminated.

A ward or any interested party may petition to remove a guardian for various reasons including for "good cause."

37

Restoration/Modification proceedings.

- When the court receives communication from the ward or somebody acting on his/her behalf, the court may appoint a GAL and may direct the GAL to prepare the relevant petition.
- The ward has a right to an attorney.
- Standard of proof is clear and convincing.

38