



Guardianship: Rights, Responsibilities, Limitations, and Alternatives

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Guardianship in Illinois

- Review of Illinois Guardianship Law
 - ❖ What is Guardianship?
 - ❖ Alternatives to Guardianship
 - ❖ Process of Obtaining Guardianship
 - ❖ Rights of Wards and Guardian's Responsibilities

What is Guardianship?

Guardianship is a legal status that can only be established by court order.



When is Guardianship Appropriate: Inability NOT Disability

- Disability alone is **NOT** a basis.
- Lack of understanding or capacity to make or communicate responsible decisions about personal or financial matters.
- “[O]nly as is necessary to promote the well-being of the person with a disability, protect him from neglect, exploitation, or abuse, and to encourage development of his maximum self-reliance and independence.”
- “Ordered only to the extent necessitated by the individual’s actual . . . limitations.” 775 ILCS 5/11a-3(b)

Alternatives to Guardianship

- Power of Attorney for Property
(Substitute for Guardianship of Estate).
- Power of Attorney for Health Care
(Substitute for Guardianship of the Person).
- Mental Health Advance Directive
(Mental Health Treatment Preference Declaration).

Representative Payee

- Established by the Social Security Administration if it determines that a person is unable to manage his/her Social Security benefits.
- Rep payee required to spend money first on individual's food, clothing, shelter, then other expenses.
- Rep payee can never spend other's benefits on himself.

Supported Decision-Making

- People with disabilities keep their rights and their decision-making capacity.
- “Guardianship shall be utilized only as is necessary to promote the well-being of the person with a disability, to protect him from neglect, exploitation, or abuse, and to encourage development of his maximum self-reliance and independence.” 755 ILCS 5/11a-3(b)

Types of Guardianship

- Temporary Guardian: Expires after 60 days and cannot be renewed
- Guardian of Person: Limited or Plenary
- Guardian of Estate: Limited or Plenary

Guardianship Proceedings

- Court process must be followed in order for the court to properly establish a guardian.
- **Who can file?** An individual or organization.
- **Who may act as guardian?**
 - ❖ 18 years of age, of sound mind, not adjudged disabled, not convicted of felony, unless judge finds in best interest.
 - ❖ Any public agency court finds capable. Cannot be agency directly providing residential services to ward.

Guardianship Process: Rights of Respondent

- Right to be represented by a lawyer
- Right to be present at the court hearing
- Right to ask to appoint an independent expert to examine & give an opinion about need for a guardian
- Right to ask for a jury
- Right to present evidence and ask questions of witnesses

Guardianship Process: Rights of Respondent

- Right to ask that the court hearing be closed to the public
- Right to tell the court choice of guardian, if guardianship determined to be appropriate
- Right to be free from overbroad guardianships
 - ❖ **Limited guardianship** should be favored over plenary guardianship

Guardian of the Person: Standard for Decision Making

- Guardian must make reasonable efforts to discern the ward's wishes
- Decisions must be made in accordance with the ward's expressed preferences
- Decisions should conform with what the ward would have done if competent under the circumstances
 - ❖ Take Into Account: ward's personal, philosophical, religious, ethical, and moral beliefs

If ward's wishes are not known and remain after reasonable effort

- Then, the guardian shall make the decision in the ward's **best interest** as guardian determines by weighing:
 - ❖ Reason for proposed action
 - ❖ Benefit or necessity
 - ❖ Possible risks & other consequences
 - ❖ Alternatives, risks, consequences, & benefits
 - ❖ Shall take into account views of family & friends that ward would have considered

Duties of the Guardian of the Person

- Custody of the ward and ward's minor children and adult dependent children
- Maximize independence and self reliance
 - ❖ Community integration, skill development, work, residential placement

Guardian of the Person: Residential Placement

- Court order appointing guardian will specifically state guardian's responsibilities & powers
- Right to live where ward wants
- Right not to be separated from family & friends
 - ❖ Exception: necessary to prevent substantial harm to ward or ward's estate
- Right to live as fully and independently as possible
- Guardian has ongoing duty to monitor

Does the nature of the facility placement matter?

- Yes!
- Ward has the right to be free from forced admission to psychiatric facilities.
- Guardian can only assist a ward with admission to a psychiatric facility with the ward's consent.

Guardianship of Person: Rights of Ward

- Guardian does not have the authority to interfere with ward's constitutionally-protected rights.
- Right to be free from forced sterilization without due process.
- Right to marry where there is the ability to understand nature of marriage.

Guardianship of Person: Health Care Decisions

- Wards with decisional capacity retain the right to make medical decisions, including decisions regarding life sustaining treatment
 - ❖ Decisional capacity: able to understand the nature of the treatment and the possible benefits and risks.
 - ❖ ID & MI alone do not overcome presumption that the ward has decisional capacity
 - ❖ If no capacity, decisions must conform as closely as possible to what ward would want

Guardian of Person: Specific Involuntary Treatments

- Mental Health and Developmental Disabilities Code prohibits a guardian from consenting to administration of psychotropic medication and/or electroconvulsive therapy when the individual objects.
- Guardian has to petition the circuit court for these involuntary procedures and meet the statutory standard.

Guardian of Person: Health Care Records

- HIPPA allows disclosure of confidential information to “personal representatives,” including guardians, POAHC, and lawful surrogate decision makers.
- MH & DD Confidentiality Act allows guardians access to MH records of adult wards.
- Guardians cannot prevent wards from accessing their own records.

Duties of the Guardian of the Estate

- Frugal care, management, and investment of the estate
- Provide for the comfort and suitable support and education of the ward and ward's dependents
- Account for income and expenses

Duties of the Guardian of the Estate: Standard for Decision Making

- Disbursements are made using the best interest standards, however: “ward’s wishes as best they can be ascertained shall be carried out, whether or not tax savings are involved.”
- “Guardian may make disbursements of the ward’s funds and estate directly to the ward...”
755 ILCS 11a-18(a-5)

Guardian of the Estate: Limitation on Authority

- Guardian cannot sell/mortgage real estate without a court order. 755 ILCS 5/19-1
- Cannot sell, lease, pledge or mortgage ward's personal property without a court order.

Guardian of the Estate: Loss of Rights

- Wards under plenary guardianship of the estate lose right to contract.
- Contracts entered into by “innocent” third parties with wards are voidable by ward’s guardian but not the innocent party.

Revocation and Modification

- Ward has the right to request that court terminate or modify guardianship.
- Ward or any person acting on ward's behalf can communicate to the judge by any means, including an informal telephone call or visit to seek modification/termination of guardianship or notify of a problem.
 - ❖ Letters often result in a GAL being appointed
 - ❖ Ward has right to an attorney in proceeding

Guardian Removal For Cause

- A guardian may also be removed, where inappropriately exercising his/her duties
 - ❖ Mismanagement or waste, fails to file accounting after being ordered, incapable/unsuitable for discharge of duties, convicted of a felony, or other good cause.
- If petition for removal filed, the court requires the guardian to file a response explaining why he/she should not be removed.

Successor Guardian

- If guardian dies, resigns, becomes incapacitated, or is removed, the court shall appoint a successor guardian or terminate the adjudication of disability.
- No one automatically becomes the successor, so the court must be notified.
- Powers and duties remain the same as predecessor unless the court modifies the guardianship.

EFE Representation

- EFE does not represent individual to become someone's guardian but does represent individuals who have a guardian and seek restoration or modification or oppose someone becoming their guardian.
- Call EFE for case consideration at 800-537-2632

Informational Purposes Only

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