



Guardianship

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Background

A [GUARDIAN](#) is someone who is chosen, either by a court or by being named in a will, to make decisions for someone else when that person—generally referred to as the ward—cannot do the same for him or herself. These types of decisions include: giving consent to medical care or treatment; purchasing or arranging for purchase of such necessities as food, clothes, cars, household items, and other personal items; arranging for education; and managing finances and bank accounts.

A guardianship requires that someone act on behalf of and protect the ward during the period of time when the ward is incapable of doing so. When asking the court appoints a guardian in a particular situation, the court must be sure that the potential ward is incapacitated and cannot make decisions for him or herself because of a mental or physical [DISABILITY](#), disease, or addiction to alcohol or other drugs. The fact that potential wards are minors who lack someone to make certain decisions on their behalf until they reach the [AGE OF MAJORITY](#) is also sufficient reason to ask the court to appoint a guardian.

The selection of a guardian is an extremely important task. Certain people, with ties to the ward, are preferred by courts as possible guardians. These include the person designated by the ward, before the period of incapacity occurred, by legal document or otherwise to handle his or her affairs; the spouse; parents; or another relative; or a state employee or private person familiar with the ward and the incapacity at issue. Whoever is chosen by the court must be willing and able to perform the duties at hand and to represent the best interests of the ward. In selecting the guardian, the court considers the prospective guardian's character, history, physical capacity, and other relevant attributes. A potential guardian's limited education or financial resources are not disqualifying conditions in and of themselves.

The guardianship statutes of each state detail the specific duties, responsibilities, and powers of the guardian. They should be examined in order to determine the regulations that apply to each situation.

Guardianship of Minors

The guardianship of a minor can be over the actual minor (or what is commonly referred to as the minor's person), the property (or estate) of the minor, or both. Preferred guardians for a minor are parents and then

other relatives. However, the primary consideration in selecting a guardian is the best interests of the minor. If the parents are still alive, before a nonparent is chosen as a guardian, the parents must be determined to be unable or unfit to look after the best interests of the minor. When minors are removed from the care and supervision of their parents, and [ADOPTION](#) is either not forthcoming or not a viable option, guardianship is considered a reasonable alternative.

Even after a guardian is chosen for a minor, most state statutes allow that at age fourteen (or other reasonable age), the minor may select or at least voice a preference, concerning who will be selected to serve a guardian.

The guardian of a minor looks after the direct physical well-being of the minor and the assets of the minor's estate. A guardian is also necessary to provide a [LEGAL RESIDENCE](#) in order for the ward to attend a public school; to apply for public assistance benefits for a minor if needed; to apply for public housing on behalf of a minor where necessary; and to bring a lawsuit on behalf of the minor. The guardian also receives and maintains any money due the minor for his or her care or support. The guardian is required to maintain, account for, and preserve any excess funds beyond what is necessary to support the minor. The guardian has a duty to look after the minor's [PERSONAL PROPERTY](#) and assure the proper education of the ward. The guardian is also required to authorize any necessary medical or other care for the well-being and health of the ward. Generally, the guardian provides whatever care would be given to a child by its parents.

When a guardianship of a minor is instituted because of the age of the ward, the guardianship may be terminated when the minor reaches the age of majority. The guardianship may be reinstated by the court after the ward reaches the age of majority where it can be shown that the ward still requires supervision. Guardianship may be terminated if the ward marries. Guardianship is automatically terminated at the death of the ward. In addition, the guardianship may be terminated, and a new guardian appointed, when it can be shown that the guardian did not adequately perform his or her duties to the ward.

Testamentary Guardianship

Generally, parents may, in a properly drafted will, appoint or indicate their preference for a guardian for a minor child or an adult child with a disability who requires supervision over his or her person or estate. Courts will then make a determination as to the availability or appropriateness of the parents' selection.

Temporary Guardianship

Some state statutes provide for temporary or limited guardianships. These guardianships are generally granted by the courts to achieve a specific purpose for a certain amount of time. Once the purpose is accomplished, the guardianship is terminated.

Also, emergency guardianships have been granted. In these situations, an emergency situation exists and someone is needed to give approval in order for the person to receive emergency services. A temporary guardian is appointed by the court to serve during the existence of the emergency situation. Generally, the person being served by the temporary guardian is disabled or incapacitated in some way. The court must determine that the person being served by the guardian is unable to make the emergency decision because of mental disability, addiction, debilitating disease, or some other similar limitation. The court must also determine that if a guardian is not appointed, the person is at risk of serious harm or even death. Finally, the court must determine that there is no other person available who can make the emergency determination for the incapacitated person.

The order for emergency guardianship is generally granted for a short period of time which is sufficient to allow the situation to be handled properly. After the emergency situation has ended or subsided, the temporary guardian must file a report with the court detailing the nature of the services rendered by the guardian and describing the outcome of the situation.

Guardianship of Persons who are Mentally or Physically Incapacitated or Disabled

State statutes define mental and physical disability. However, generally, such disability or incapacity involves severe and long-term conditions that impose great limitations upon individuals' ability to take care of themselves, express themselves verbally, earn a living, and live independently of the care of others. Such a disability also reflects the necessity for a combination of treatments and services.

Guardianships for physically or mentally disabled or incapacitated persons have, in recent decades, been understood to facilitate the independence and self-reliance of the ward. They are limited as much [AS IS](#) reasonable in order to allow wards to exercise as much control over their lives as possible while maintaining as much dignity and self-reliance as possible. The desires of the wards are given primary consideration. Also, wards are allowed to do as much of their own care giving as is physically and mentally possible.

The guardian will be granted only those powers necessary to accomplish for the ward what the ward cannot accomplish independently. These powers may include assuring the availability and maintenance of care for the ward, making sure that educational and medical services are maintained and adequate, and submitting updates to the court of the ward's condition. These court updates describe the ward's living situation, status of mental and physical health based upon medical examinations and official records, provide a list of services being received by the ward, describe services rendered by the guardian, account for the ward's monetary assets, and any other information necessary to submit to the court in order for it to assess the status of the ward and the guardian's duties.

Removal of Guardian

A guardian may be removed if a court determines that the ward no longer needs the services of the guardian. Also, a guardian may be removed when he or she has not provided adequate care for the ward or when it is determined that the guardian is guilty of neglect. Neglect can include using the ward's money or property for the guardian's own benefit and not obeying court orders. Upon court order, the guardian will be removed and a new guardian (or temporary guardian) will be substituted in place of the original guardian.

Examination of Certain State Provisions on Guardianship

FLORIDA: The [STATUTE](#) on guardianships for incapacitated persons requires that the court find the "least restrictive form of guardianship to assist persons who are only partially incapable of caring for their needs." The statute also confirms the legislative intent that incapacitated persons function and live as independently as possible, managing their finances and developing their potential for self-sufficiency. To that end, they will be encouraged to develop their living skills to the extent that they may, for example, be able to marry, vote, travel, sign contracts, complete their educational objectives, and apply for a driver's license.

MASSACHUSETTS: Regarding the guardian of a minor, the statute states that the court will choose the guardian for any minor under the age of fourteen. A minor over the age of fourteen may suggest his or her

own guardian and the court will try to honor that request. If the court does not find the guardian desired by the minor to be appropriate, then the court will appoint another guardian. Regarding the care of a mentally ill person by a guardian, the statute declares that a guardian will not have the authority to commit the ward to a mental institution or agree to the administering of "antipsychotic medication" unless the court first finds that such an action is in the "best interests" of the ward and then authorizes such a commitment or treatment. Regarding testamentary guardians, the statute allows parents to appoint such a guardian on behalf of a minor child, even if the child is not born at the time the testamentary instrument is drafted. Such a testamentary guardian will have the same powers and duties as one appointed by the court.

NEW HAMPSHIRE: Regarding the duties of a guardian for a minor, the guardian will "protect and preserve" the personal and real property assets of the minor and any income the comes from rents, income, or the sale of such property. The guardian is also given the authority, with the courts approval, to open a trust to which the minor's assets can be transferred. This trust would end no later than the ward's twenty-fifth birthday.

SOUTH CAROLINA: Regarding persons with disabilities, the spouse (if the incapacitated person is married) or parents of an incapacitated person may make a testamentary appointment of a guardian for the incapacitated person in their will. Such an appointment by a spouse or parent becomes effective if, after the incapacitated person and the person giving him or her care or the "nearest adult relative" has received twenty days written notice and "the guardian files acceptance of appointment in the court." When both a spouse and a parent appoint guardians in their wills, the appointment of the spouse has priority.

Additional Resources

Corpus Juris Secundum. Volume 39, West Publishing, 1976.

Guardianship Manual. (Chapter Five) The Maryland Institute for Continuing Professional Education of Lawyers, Inc., 1999.

Michigan Guardianship and Conservatorship Handbook. Institute of Continuing Legal Education, 2000.

"Permanency Outcomes in Legal Guardianships of Abused/Neglected Children." Henry, Jim "Families in Society: The Journal of Contemporary Human Services" 80 (1999): 561.

Representing the Child Client. New York: Lexis Publishing, 2001.

Organizations

California Coalition for Youth (CCY)

1220 H Street, Ste, 103
Sacramento, CA 95814 USA
Phone: (916) 340-0505
URL: <http://www.ccyfc.org/>
Primary Contact: Cheryl Zando, Board Chair (Youth)

Citizens for Better Care (CBC)

4750 Woodward Aveneu, Ste., 410
Detroit, MI 48201 USA
Phone: (800) 833-9548

Encyclopedia of Everyday Law: Guardianship

Fax: (313) 832-7407

URL: <http://www.cbcmi.org>

Primary Contact: Nida Donar, Executive Director

National Guardianship Association (NGA)

1604 North Country Club Road

Tucson, AZ 85716 USA

Phone: (520) 881-6561

Fax: (520) 325-7925

URL: <http://www.guardianship.org/>

Primary Contact: Terry W. Hammond, Board Member

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