

Guardianship Overview

WHAT IS GUARDIANSHIP?

Generally, guardianship is where one person makes personal and financial decisions for another. When a person needs assistance in making decisions about finances and/or property and/or medical treatment, guardianship is used. A guardianship is a legal proceeding in the Probate courts of Massachusetts in which a guardian exercises the legal rights of an incapacitated person. Guardians have the same powers, rights, and duties as a parent. A guardian can be either an individual or institution such as a bank trust department appointed by the court to care for an incapacitated person called a "ward" or for the ward's assets. Guardians must be represented by an attorney who will serve as "attorney of record." Guardians are usually required to furnish a bond and may be required to complete a court-approved training program. The Clerk of the Court reviews all annual reports of guardians of the person and property and presents them to the court for approval. ***A guardian who does not properly carry out his or her responsibilities may be removed.***

HOW IS A PERSON DETERMINED TO BE INCAPACITATED?

Any adult may file with the court a petition to determine another person's incapacity setting forth the factual information upon which they base their belief that the person is incapacitated. The court then appoints a committee of two professionals, usually physicians, and a lay person to examine the person and report its findings to the court. The court also appoints an attorney to represent the person alleged to be incapacitated. If the examining committee concludes that the alleged incapacitated person is not incapacitated in any way, the court will dismiss the petition. If the examining committee finds the person to be incapable of exercising certain rights, however, the court schedules a hearing to determine whether the person is totally or partially incapacitated. A guardian is usually appointed at the end of the incapacity hearing.

IS A CONSERVATORSHIP THE SAME AS A GUARDIANSHIP?

No. A conservatorship is created when an individual consents to allowing a person to handle his estate without being declared incapacitated. The person giving up his rights must fully understand the process and its ramifications.

HOW DO YOU BECOME A GUARDIAN?

1. Hire a lawyer and file a petition with the court.
2. The person to be placed under guardianship (ward) must be evaluated. The cost of the evaluation is determined by who prevails.
3. There must be a notice of hearing and the proposed ward must be told of his rights in court. An important right is to be represented by a lawyer.
4. Hold a public hearing to determine if the proposed ward needs a guardian.
5. A Judge appoints a guardian if one is needed.

WHO IS GOING TO BE APPOINTED GUARDIAN?

The court should give preference to a person nominated by the proposed ward or the ward's spouse. However, the judge can choose anyone over 18 who is a Massachusetts resident and is not a convicted felon. Any adult resident of Massachusetts can serve as a guardian. A close

relative of the ward who does not live in Massachusetts can also serve as a guardian. Persons who have been convicted of a felony or who are incapable of carrying out the duties of a guardian cannot be appointed. Institutions such as a bank trust department, a nonprofit religious or charitable corporation, or a public guardian, can be appointed guardian, but a bank trust department may only act as guardian of the property. The court gives consideration to the wishes expressed by the incapacitated person in a written declaration or at the hearing.

IS THE GUARDIAN FREE TO DO WHAT HE WISHES AFTER HE HAS BEEN APPOINTED?

No. He must make an accounting each year. In addition, other reports regarding the health and well being of the ward must be made. A guardian who is given authority over any property of the ward shall inventory the property, invest it prudently, use it for the ward's support, and account for it by filing detailed annual reports with the court. In addition, the guardian must obtain court approval for certain financial transactions. The guardian of the ward's person may exercise those rights that have been removed from the ward and delegated to the guardian, such as providing medical, mental and personal care services and determining the place and kind of residential setting best suited for the ward. The guardian of the person must also present to the court every year a detailed plan for the ward's care.

In addition, the guardian must obtain court approval for certain financial transactions.

IS GUARDIANSHIP PERMANENT?

No. If a person recovers in whole or part from the condition that caused him or her to be incapacitated, the court will have the ward reexamined and can restore some or all of the person's rights.

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