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GUARDIANSHIP IN ILLINOIS

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What is Guardianship?

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

Guardianships are authorized and controlled exclusively by the Probate Act. 755 ILCS 5/Article 11a.

Adult guardians are appointed by court order:

- ▶ **Establishing a guardianship requires a party to engage in the legal system**
- ▶ **Duties are imposed upon the guardian**
- ▶ **Rights are retained by the ward**



Inability, 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 cable of intelligently directing others to perform tasks for him.”

Estate of Fallos, 386 Ill. App. 3d 831 (4th Dist. 2008).

Guardianship should be seen as a tool of last resort

▶ **Probate Act:**

- ▶ Guardianship is to be ordered only to the extent necessary to promote the well being of the person with a disability, protect from harm and to encourage development of maximum self-reliance and independence. Sec. 11a-3(b).

▶ **Effective remedies that may not require guardianship—Examples:**

- ▶ Legal civil remedies may be appropriate in some cases (i.e., eviction of “guest”, protective orders, trust for assets).
- ▶ Appointment of a responsible Representative Payee for pension or Social Security benefits.
- ▶ Advance Directives: Ex. If the adult has legal and decisional capacity they may be able to execute a Power of Attorney, naming an agent of their choice to assist with decision-making.

Alternatives to Guardianship

Substitute for Guardian of the Person

- ▶ Power of Attorney for Health Care
- ▶ Living Will or DNR
- ▶ Mental Health Treatment Preference Declaration

Substitute for Guardian of the Estate

- ▶ Durable Power of Attorney for Property
- ▶ Representative Payee
- ▶ Trust

NOTE: A guardian's authority is subordinate to a POA unless it has been suspended or terminated by court order.

Why Guardianship?



Assist in accessing services



Obtain confidential records



Manage finances; protection from fraud



In certain circumstances, make residential placement decisions.

Types of Guardianship



Temporary—may include
Person or Estate duties



Guardian of the
Person



Guardian of the
Estate

Types of Guardianship continued

Temporary Guardianship—emergency guardianship; the court determines that a person needs a guardian to be appointed immediately to take care of urgent decisions. This authority is in effect for 60 days and may be extended for one additional 60 day period. Temporary orders are often limited. May be for Person and/or Estate.

Limited Guardianship—the court determines that a person needs help with some but not all decisions. The court order will state the specific authority of the guardian and the person with disability retains all other rights. Often considered the least restrictive form of guardianship.

Plenary Guardianship—the court grants the guardian authority to make all personal decisions on behalf of the person with a disability; however, there are some decisions a guardian cannot make for the ward over his/her objection. Additionally, your actions as the legal guardian are accountable to the court.

NOTE: guardians do not incur personal or financial liability in their ordinary functions as guardian of a person with a disability.

Who may act as Guardian?

Any person who is:

- ▶ 18 years of age or older
- ▶ Resident of the U.S.
- ▶ Of sound mind and not adjudged disabled under the Probate Act
- ▶ Not convicted of a felony (with exceptions)

A guardian may live out of state:

-although the court may take issue with the person's ability to transact the duties of the guardian of the person or estate due to distance.

Size of Estate:

- ▶ Office of Public Guardian (generally involved in estates over \$25,000)
- ▶ Office of State Guardian (generally involved in estates under \$25,000)

What is the Office of State Guardian (OSG)?

The Illinois Guardianship and Advocacy Commission (IGAC) establishes the State Guardian. Now known as the Division of the Office of State Guardian (OSG). 20 ILCS 3955/5.

OSG acts as the guardian of last resort when **no other suitable and willing person is available to act.**

OSG has eight regional offices as well as centralized Intake.

OSG continued

▶ Services Offered by OSG:

- ▶ <https://www2.illinois.gov/sites/gac/OSG/Pages/default.aspx>
- ▶ Adult guardianship services
- ▶ Guardianship Training – required for new guardians
- ▶ Education and outreach about guardianship

▶ Contacting OSG:

- ▶ OSG's Intake line: **866-274-8023** or Regional Office
 - ▶ Determine when OSG may and may not serve as guardian
 - ▶ When guardianship alternatives may be helpful (e.g., Rep Payee or POA)
 - ▶ Placement issues
 - ▶ Restoring a person's legal rights

OSG and Public Guardian

▶ OSG:

- ▶ State Guardian
- ▶ Generally accept cases where the estate is less than \$25k

▶ Public Guardian:

- ▶ Most Illinois counties have a Public Guardian appointed by the Governor except Cook
- ▶ PG must be certified as a National Certified Guardian
- ▶ Estates over \$25k

OSG and Public Guardian continued

- OSG and the Public Guardian serve when no other person is willing and able to be a guardian
 - Cases may be transferred between the two
- Both OSG and PG have statutory authority to assess fees for services
 - Probate Act for PG (755 ILCS 5/13.3.1)
 - Guardianship and Advocacy Act (20 ILCS 3955/5(i) and 59 Ill. Admin. Code Part 301 for OSG fee schedule)
- The PG is often the Public Administrator
 - When a person dies owing any real or personal estate and no one else has a prior right to administer the estate the Public Administrator may assist

Is there overlap between OSG and the Illinois Department on Aging?

IDoA Programs:

- ▶ **Senior Help Line: 866-800-1409**
- ▶ Adult Protective Services (APS)
 - ▶ Investigate abuse, neglect, self-neglect and financial exploitation of individuals over 60 or 18 and over with a disability
 - ▶ APS may refer cases to OSG and OSG may report suspected abuse
- ▶ Long-Term Care Ombudsman Program (LTCOP)
 - ▶ Resident-directed advocacy in long-term care settings
 - ▶ Most referrals to OSG will come from the long-term care facility and not LTCOP
- ▶ Community Care Program (CCP)
 - ▶ Medicaid Waiver program—In-home services for individuals over 60
 - ▶ OSG may be guardian for individuals enrolled in CCP
- ▶ SHIP
 - ▶ Senior Health Insurance Program – through different service sites
 - ▶ Health insurance counseling for Medicare beneficiaries and their caregivers
- ▶ Benefits Access Program [e.g., Free Ride Transit Benefit; reduced License Plate fees]
 - ▶ Secretary of State for applications

Duties of the Guardian of the Estate

- ▶ Duty to collect, preserve and inventory assets (755 ILCS 5/14-1).
- ▶ Duty to manage, frugally invest, and apply the estate for the ward's (and any dependents) care and comfort (Sec. 11a-18).
- ▶ Duty to account (Sec. 24-11).

Guardian of the Estate continued

Limitations on Authority

- ▶ Guardian cannot sell/mortgage real estate absent a court order. Sec. 19-1
- ▶ Cannot sell, lease, pledge or mortgage ward's chattel (personal property) absent a court order. Sec. 20-3

Standard for estate decision-making

- ▶ Disbursements generally are made using the best interests standard, however:
 - ▶ “The ward’s wishes as best they can be ascertained **shall** be carried out, whether or not tax savings are involved.” Sec. 11a-18(a-5)

Duties of the Guardian of the Person

- ▶ Has custody of the ward and the ward's minor children and adult dependent children.
 - ▶ Custody is legal responsibility, not residential placement.
- ▶ Shall make provision for their support, care, comfort, health, education, professional services, etc.
 - ▶ This may include provisions/consent for participation in community services, Special Olympics, classes, etc.
 - ▶ Consent for medical services has some limitations.
 - ▶ Apply or assist with Public Aid benefits.

Guardianship and Advocacy Act also imposes duties (20 ILCS 3955)

The GAC Act requires that:

- ▶ The State Guardian shall **visit and consult with the wards at least four times per year.**

Accordingly, OSG is subject to the same court oversight as any other guardian.

- ▶ The State Guardian shall have the same powers and duties as a private guardian.

Decision-making Standards

The Probate Act establishes a three-tiered decision-making standard. Sec. 11a-17(e).

When the guardian has authority → apply the decision-making standards.

- ▶ **First**—make a reasonable effort to determine ward's wishes and make decisions in conformity so long as they do not result in substantial harm.
- ▶ **Second**—if ward's wishes are unknown, make decisions conforming as closely as what the ward, if competent, would have done taking evidence into account (Substituted Judgement).
- ▶ **Third**—if the above are absent, then make decisions in the ward's best interest (Best Interest).

Decision-making standards continued

First, check the court order regarding the types of decisions the guardian is permitted to make, for example:

- ▶ A limited guardianship may only grant the authority for the guardian to make certain decisions.
- ▶ Generally, a plenary guardian of the person may not make financial decisions. These decisions may be under the authority of a guardian of the estate or an agent under a Power of Attorney for Property.
- ▶ If a situation arises that is not covered by the guardianship order, you may need to return to court for further guidance.



Decision-making standards continued

Substituted Judgement

Decisions are made by conforming as closely to what the would have done if competent under the circumstances taking into account evidence that includes, but is not limited to:

- The ward's personal, philosophical, religious, and moral beliefs;
- Ethical values relative to the decision to be made by the guardian;
- The ward's previously expressed preferences.

Decision-making standards continued

Best Interests Standard

When the ward's wishes cannot be ascertained, the guardian is to make the decision using the best interests standard. This is essentially a totality of the circumstances analysis that weighs the risks and the benefits of a proposed decision that looks at:

- What is the reason for the decision?
- How is it of benefit to the ward or necessary?
- What are the risks and consequences of the proposed decision?
- Are there any alternatives and what are the risks and consequences of those?
- What other evidence is available, including views of family and friends?

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).

This duty is applicable to community integration, skills development, work, residential placement, etc.

Duty to Maximize Independence

continued

The ability to make decisions is a part of the ability to function. If guardianship is viewed as a means of supporting and developing the ability of the person to function that leads naturally to involving the person at his or her level to the greatest extent possible. Some wards will be more involved in directing their affairs, whereas others will be able to offer little involvement.

Self-determination is a fundamental right that gives the individual the right to make decisions about medical care, where to live/work, who to associate with, what to eat, recreation.

For persons under guardianship, this fundamental right is supported through person-centered decision-making with the guardian focusing on what the individual wants, values, and deems important rather than what is best for the person or good for the person.

But this always involves balancing the risk of harm with the liberty interest.

Convenience to the guardian is NOT a factor in this analysis.

Presumption of Decisional Capacity

- ▶ Individuals are presumed to have decisional capacity even at an advanced age.
- ▶ A diagnosis of mental illness or intellectual disability alone, is not a bar to a determination of decisional capacity.
- ▶ The determination that an individual lacks decisional capacity must be made by the attending physician to a reasonable degree of medical certainty *in writing* in the patient's records.

Decisional Capacity vs. Legal Competency

Decisional capacity is distinct from legal incompetency.

- The determination of lack of decisional capacity is made by a physician.
- The determination of legal incompetency is made by a judge. An adult person is adjudicated a person with a disability when a plenary guardian is appointed. Sec. 11a-2.

Does a person retain the right to make his/her own medical decisions even when he/she has a plenary guardian?

Decisional
Capacity vs.
Legal
Competency
continued

Does a person retain the right to make his/her own medical 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

Informed Consent, Health Care Surrogate Act, and End of Life Decisions

- ▶ **Informed consent** is required prior to a health care provider providing treatment except in true emergency situations. This is true for persons under guardianship as well as those not under guardianship.
- ▶ **Health Care Surrogate Act (HCSA)** provides the surrogate decision maker's (including, a guardian) authority to make medical decisions for a ward. A guardian may only make decisions on behalf of wards who lack "decisional capacity."
- ▶ For **end of life decisions** the HCSA requires that the ward lacks decisional capacity AND has a qualifying condition (terminal, permanent unconsciousness, incurable or irreversible condition).
 - ▶ The essence of a qualifying condition is that treatment only prolongs the dying process and that treatment will only provide minimal medical benefit.



RIGHTS RETAINED BY THE WARD

A ward retains certain fundamental rights even when under plenary guardian of the person.

Rights Retained:

*A person with a disability who has a guardian,
has rights to make certain decisions*

Right	to refuse mental health treatment;
Right	to engage in sexual activity;
Right	to vote;
Right	to marriage;
Right	to get counseling and psychotherapy;
Right	to get medical records;
Right	to have input into decision-making;
Right	to have services that are: (1) least restrictive, (2) person-centered, and (3) maximize independence.

Mental Health Services

Right to refuse treatment, medication, ECT

The Mental Health and Developmental Disabilities Code (405 ILCS 5) grants all recipients of mental health and developmental disability services the right to refuse treatment, including psychotropic medication and ECT, regardless of a guardianship and absent an emergency (imminent threat of physical harm) or a court order (the facility can file a petition and obtaining a court order).



Mental Health Services continued

Guardians for persons with mental illness can:

- ▶ Seek a court order with the assistance of their State's Attorney to have their ward hospitalized or treated for their mental illness.
- ▶ Call an ambulance or the police to have their ward taken to the hospital if they believe it is necessary.
- ▶ Fill out a petition for involuntary admission at the hospital.
- ▶ Consent to psychiatric medications if their ward is clearly not objecting to the medication and the guardian is able to give informed consent after consulting with the prescribing physician.

Restoration, Modification, Revocation, Resignation

A person under guardianship has a right to seek to be restored to his/her rights if they are able to demonstrate clearly that they have the capacity to take care of his/her self.

A physician's statement is not required under the Probate Act; however, some judges may order a physician examination and report before allowing the matter to proceed to hearing.

In addition, there are advantages to guardianship having a CCP-211 on file before proceeding (Cook Co.).

Modification of Guardianship

In addition to the right to be restored, the individual, or other interested person acting on behalf of the individual, has the right to seek to modify the guardianship.



Example: Individual wants to live in a particular setting, such as with a partner, but the guardian is preventing it.

The individual, or the individual's partner as an "interested person" could write the judge and seek to modify the guardian's authority by having the authority to make residential placement decisions removed from the guardian and restored to the individual.

This modification would take place after a hearing that would take into consideration the nature of the relationship, the safety of the individual's living environment and the need for any services balanced against the individual's stated residential preference.

Periodic Court Reports



When appointed guardian of the person, OSG will annually file a report with the court which provides a status of the condition of the ward's health, residence, need for continuing guardianship, and any other information as the court directs.



A guardian of the estate will file an annual accounting that shows credits, debits and balances on hand.



Filing Documents with the Court

- ▶ Illinois courts require all paperwork to be electronically filed through an e-filing system.
- ▶ The Illinois Supreme Court website has an e-filing guide: http://illinoiscourts.gov/CivilJustice/Resources/Self-Represented_Litigants/self-represented.asp
- ▶ Waivers may be granted by the court that allow paper filing. You may get a waiver form from the circuit clerk.

Order for Discharge

The final step in closing a case with the court is obtaining an order of discharge.

Key Points to Remember about Guardianship:

Guardianship is a legal relationship. Guardians, including OSG and PGs, are accountable to the court and guardians are required to comply with the Illinois Probate Act.

The guardianship court order defines the guardian's authority.

The Probate Act guides a guardian's decision-making. It requires guardians to use Substituted Judgement decision-making when possible, and Best Interest decision-making when Substituted Judgement cannot be applied.

The Probate Act requires person-centered decisions which are the least restrictive alternative. Your decisions must maximize your ward's independence and self-reliance.

Guardians have rights and responsibilities.

Persons with disabilities have rights, even when they are under guardianship.

Questions?

ILLINOIS GUARDIANSHIP AND ADVOCACY COMMISSION

[HTTPS://WWW2.ILLINOIS.GOV/SITES/GAC/PAGES/DEFAULT.ASPX](https://www2.illinois.gov/sites/gac/pages/default.aspx)

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