

**Guardianship
and
Alternatives to Guardianship
for Adults with Disabilities**

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This handout is not a substitute for legal advice and is meant for informational purposes only.

WHAT IS A GUARDIAN?

A guardian is a person who makes decisions for someone who cannot make decisions for themselves.

WHAT ARE THE DIFFERENT TYPES OF GUARDIANS?

There are two different types of guardianships for adults with disabilities.

A **guardian of property** has the authority to make decisions involving financial or property matters. These guardians control property interests, including essentially anything that can be the subject of ownership. The court has the same powers over the estate as the individual with a disability did before the onset of the incapacity, except for the power to make a will. The court may limit which rights to allow the guardian to exercise. A guardian of the property may be able to do such things as invest or reinvest personal property, sell stocks, and pay taxes.

A **guardian of the person** can make decisions controlling the care of the individual with a disability. A guardianship of the person is one affecting personal interests, custody and care, such as where the individual with a disability lives, the ability to consent to services, education, medical treatment, and the release of confidential information. The court/guardian has the same control over the person with a disability under this type of guardianship as a parent would.

A separate guardian may be appointed for an individual with a disability's person and for the property, or one may be appointed for both. It is important to note that both types of guardians are explicitly protected by statute from spending their own money for the support or

care of the disabled person.¹

WHEN SHOULD ADULTS HAVE A GUARDIAN APPOINTED FOR THEM?

Adults with mental or physical disabilities can have guardians appointed if due to a mental or physical disability they cannot manage or care for themselves or their property, and as a result, are in danger of:

- suffering property loss; or
- being taken advantage of by someone else; or
- being abused by someone else; or
- substantially endangering their own health.²

WHAT ARE THE OBLIGATIONS ON THE GUARDIAN?

- Guardians of the property must file an accounting at a duration ordered by the court.

WHAT MUST BE INCLUDED IN A PETITION FOR GUARDIANSHIP?

Petitions must detail:

- name and address of both the person with a disability and the proposed guardian, and the relationship between them, or if there is no relationship, the interest of the proposed guardian.
- age, marital status, domicile and place of residence of the proposed person with a disability, and if that is in a hospital or institution, the circumstances of the admission;
- name and address of the spouse or next of kin of the person with the alleged disability, and whether they were a member of the armed services of the United States;
- information about whether a will, power of attorney, or attorney in fact exists for the person with an alleged disability, or whether they have been represented by a

¹12 Del. C. § 3922 and 3923.

²12 Del C. § 3901 contains the standard and explains the process for appointment of guardians for adults in Delaware.

Delaware attorney in any matter in the last two years;

- the ward's assets and liabilities, including real estate, and their estimated value;
- that the standard for establishing guardianship is met;
- that no guardian currently exists
- that notice should or should not be provided to the person with the alleged disability;
- a medical report documenting the disability causing the incapacity.⁴

WHAT PROTECTIONS ARE PROVIDED BY THE COURT TO THE PERSON WITH AN ALLEGED DISABILITY?

There are numerous protections provided by the Chancery Court to the person with an alleged disability about whom a guardianship petition has been filed. These include:

- appointing an attorney for the person with a disability during the guardianship proceeding;
- notifying the individual of all proceedings;
- having the individual attend the hearings and proceedings so long as the evaluating doctor does not believe it is detrimental to the ward's interests;
- allowing the individual through their attorney to present evidence, and call and question witnesses at hearings;
- having a trial and the right to appeal the court's decision to the Supreme Court.

The court will hold a hearing and listen to all of the evidence. It will only appoint a guardian if it finds that the person is "disabled" as described on page 1, and thus in need of a guardian.

GIVEN THAT APPOINTMENT OF A GUARDIAN TAKES TIME, WHAT IF THERE IS AN EMERGENCY?

When requested in the petition, the court may appoint a temporary or emergency guardian when a person is in danger of suffering imminent serious physical harm or substantial property loss. The court may appoint an interim guardian immediately upon the filing of a petition, without notifying the individual or first providing them with a hearing. A hearing will

⁴Chancery Court Rule 175 details the required elements of guardianship petitions.

then be held within 30 days.

WHAT IF A GUARDIAN IS NEEDED FOR SOMEONE BUT NO ONE IS AVAILABLE TO SERVE?

In the event that a petition is filed and no guardian is available for an adult, there is a Public Guardian who may be appointed. There are also organizations who will manage funds or serve as guardians for individuals for a fee (see the Resource section, page 5).

IS THERE ANYTHING THE GUARDIAN CANNOT DO WITHOUT COURT APPROVAL?

A guardian cannot make a will, release claims, settle tort claims, or convey title to real property without court approval. Similarly, the guardian cannot consent to the involuntary sterilization of an individual with a disability, nor involuntarily commit them to an institution, without court approval. The guardian must file an annual update and medical status report each year by the anniversary date of their appointment as guardian. A guardian may want to confer with an attorney to consider liability questions.

DOES GUARDIANSHIP AFFECT THE RIGHT TO VOTE?

No, just because someone has a guardian, does not mean she is ineligible to vote. The only time a person with a disability will be ineligible to vote is if there is a court order which specifically restricts her right to vote.

HOW LONG DOES THE GUARDIANSHIP ORDER LAST?

Until the death of the person with the disability, or until the court terminates it upon request of any party.

CAN A GUARDIANSHIP BE CHALLENGED OR CHANGED?

The court may terminate or make changes to a guardianship, or replace a guardian for any reason. However, the court cannot do so without someone filing a petition to review the guardianship. This can be done by filing an objection at the time that the guardianship is requested, or by filing a petition requesting that the court review an already existing guardianship. The court may then order a hearing where the party challenging the guardianship presents evidence, and it will make its decision based on the evidence.

ARE THERE LESS DRASTIC ALTERNATIVES TO GUARDIANSHIP?

There are a number of alternatives to guardianship. Because guardianship involves such a severe restraint on an individual's rights, it should only be considered after all other options have been shown to be ineffective or unavailable. The individual's needs may be able to be met without placing such severe restrictions on their freedom. Possible alternatives (each has advantages and disadvantages that should be discussed with an attorney) include:

- supported decision-making
- having a representative or substitute payee;
- using case/care management/community advocacy systems;
- establishing a health care surrogate (See 16 Del. C. §2507);
- creating a trust;
- drafting a durable power of attorney (See 12 Del. C. §49A-101 *et seq.*)
- developing a living will;
- opening joint checking accounts.

WHAT IS THE DELAWARE CAREPLAN TRUST ACT?

It was established to encourage the establishment of a non governmental non-profit entity to administer trust funds and provide care planning for individuals with disabilities, and to provide advice and counsel to guardians. In Delaware that entity is now the **Delaware CarePlan, Inc.** which can be contacted at (302) 633-4000.

RESOURCES

1. **Private Organizations.** A number of private organizations will serve as guardians, or representative payees, or assist with the establishment of trusts and plans, for people who need assistance with money management or other care issues. These organizations include:

- **Senior Partner, Inc.** (302) 764-7880;
- **Life Solutions, Inc.** (302) 622- 8292;

2. **Government Agencies.** A few government agencies may be able to offer resources or support:

- **Register in Chancery**– NCC- 255-0544, KC- 736-2242, SC- 856-5415
Offers a guide to the guardianship process and has forms and information available:
<http://courts.delaware.gov/chancery/guardianship/HandbookforGuardians.pdf>
- **Delaware Money Management Program**- 1-800-223-9074.
The Delaware Money Management Program is cosponsored by the Division of Services for the Aging and Adults with Physical Disabilities and AARP. This program offers money management service to help low-income seniors and adults with physical disabilities that have difficulty budgeting, paying routine bills and keeping track of financial matters.
- **Office of the Public Guardian**– (302) 577-8990.
The OPG is a statewide program which serves as guardian for adults when there is no one else willing or able to do so.

3. **Private Attorneys.** The Disabilities Law Program maintains a list of private attorneys who handle guardianship cases for a fee.

4. **Disabilities Law Program.** The Disabilities Law Program can offer advice, referral, and in some cases, direct assistance with establishing alternatives to guardianship.

PROS AND CONS OF GUARDIANSHIP

Pros: Protection, convenience (applying for public benefits, handling financial matters, dealing with health care providers), protection from liability.

Cons: Can be expensive, disempowering, adversarial, onerous bureaucratically, unnecessary, can be instrument of abuse.