Overview of Guardianship

Each state has developed its own legal criteria and process for determining when an individual is legally incapacitated and, as a result of this incapacity, is unable to make decisions to care for his or her personal matters or property. Depending on state terminology, the court appoints an individual or entity to serve as guardian or conservator. For clarity, because of the various terms used in the states, the term “guardianship” throughout this book includes the appointment of a surrogate decision maker for either personal or financial matters. A reference to a guardian includes a conservator and all other types of guardians, except where indicated.

It is important to note that the terms “disability,” “incapacity,” and “incompetence” are not intended to be attached to any particular category of people. However, the three major categories of adults who often need to have a guardian appointed are those who lack decision-making capacity due to dementia, those who have an intellectual disability, and those who have a mental illness. Others who may require a guardian are individuals who have a brain injury or physical trauma that causes the individual to have diminished capacity to make decisions or communicate them in a clear manner.

Another note on terminology: the current trend is moving away from using the term “ward” to refer to a person for whom the court has appointed a guardian. While it is has been used historically, the term has derogatory connotations and to many individuals it is truly an unfavorable four-letter word. In keeping with the current usage, the authors use “person,” “client,” “adult,” or “individual.”

In all cases, guardians should keep in mind the following points:

- All adults are presumed to be competent until a court proceeding determines otherwise.
- Guardianships are established only through a legal process and are subject to court supervision (Standard 2).
- Incapacity is a legal definition, which must be based upon a mental or medical assessment along with other evidence of the individual’s lack of decision-making abilities.
- All guardianships should be based on the actual decision-making ability of the individual without regard to the mental or medical diagnosis.
Because guardianship removes many of the individual’s civil rights, ways to avoid removing those rights must be explored before a guardian is appointed.

Every guardianship should be designed and limited to meet the individual’s needs.

The guardian must at all times treat the individual with dignity (Standard 3.I).

Types of Guardianship

In general, states authorize the courts to appoint a guardian of the person, a guardian of the estate (which in some states is called a conservator), or a plenary guardian with full authority to make all decisions for both the person and the estate. Other types of guardianship are limited guardianships or emergency (or temporary) guardianships.

State statutes specify the types of guardianship that a court may order. It is the guardian’s responsibility to know the types of guardianship available and the specific authority that can be granted to guardians under each type of guardianship in their state (Standard 2.I).

A guardian of the person has the authority only to make decisions relating to the personal, nonfinancial affairs of the person under guardianship. These decisions may include where the person resides and what types of medical, psychological, and psychiatric treatment the person is to receive. Many states require specific court approval for intrusive treatments such as electroconvulsive therapy (ECT) and prohibit treatment that violates the person’s known objections. The guardian of the person is responsible for knowing the applicable state statutes and limitations on his or her authority (Standard 2.I).

A guardian of the estate is granted the authority only to make decisions relating to the property and finances of the person. These decisions may concern debt payments, asset liquidation, investment management, real estate transactions, and personal finances. Many states require specific court approval for the guardian to engage in certain financial transactions, such as the sale of the home. The guardian of the estate is responsible for knowing the applicable statutory criteria for conducting all financial transactions on behalf of the person (Standard 2.I).

Although it may be necessary to remove all of an individual’s rights and grant total responsibility to a guardian, guardianships should be limited to the needs of the person. Courts should allow the person to keep decision-making responsibility in areas where he or she has the ability to make and communicate informed decisions. An individual, for example, may not be able to understand the need to see a doctor or take medicines, but he or she may be able to safely remain at home and carefully manage personal finances. In such cases, the court may find it appropriate to grant only medical decision-making authority to the guardian. As another example, the court may order a medical guardianship, giving the guardian the authority to make only medical decisions for the person. These are often granted for a very specific
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purpose and limited time, such as 30 or 60 days. Thus, a **limited guardian** receives only those powers specifically designated by the court when it finds that the person remains able to perform some, but not all, of the tasks necessary to care for person or property. Limited guardians possess fewer powers than plenary guardians. Limited guardians are responsible for knowing the limitations of their authority and act consistently with the order (Standard 2.I).

In addition, most states allow for **emergency** or **temporary guardianships**. These time-limited guardianships are intended to provide only the protection needed to respond to an immediate crisis. Again, guardians should be familiar with state statutes that limit the time in which they may make decisions. They should also be familiar with and have a copy of the court’s written order. The order will specify the limited decision areas and timeframe in which the temporary guardian may act.

Courts have the responsibility to determine who will be appointed as guardian. Generally, courts prefer to appoint a **family member** as a guardian, but if no family member is available or suitable, courts may look to **professional**, **corporate**, or **public guardians**. Many statutes set forth a list of who should be given priority when selecting among possible guardians, including the person the individual nominated in another document, the agent named in a power of attorney or health care declaration, the guardian appointed in another state, as well as the spouse, adult child, or relative with whom he or she resides. Using the priority list as a guide, judges have the discretion to pick the guardian they believe will best be able to meet the person’s needs.

In many cases, the issue is not who to select among several possible candidates, but rather who to appoint when there is no capable or suitable person. Most states have some type of office of public guardian or nonprofit agency that the court appoints as a last resort when there is no other person to serve. The public guardian is an officer of the court or a state employee whose primary function is to provide guardianship services.

### Alternatives to Guardianship

Guardianship should be initiated as a last resort. It should be used only when it can be effective and there are no suitable, **less restrictive alternatives**. Serious consideration should be given to ways to avoid guardianship because guardianship results in the removal of the individual’s legal rights and restricts the individual’s rights to autonomy and self-determination. Developing supportive relationships or finding alternative treatments or an alternative residence can often avoid guardianship (Standard 8.I).

Some alternatives may provide simpler forms of assistance that allow the individual to retain more rights and decision-making responsibilities. These alternatives include obtaining case management services, an **advance directive**, or representative payeeship for Social Security, Supplemental Security Income, Veteran’s Administration, or other public benefits.