

Guardians & Guardianships: *A Primer*

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CITIZENS
LEGAL GUIDE

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Guardians and Guardianships: A Primer

Imagine what life would be like if you couldn't go to the doctor, pay your gas bill, or live in your home without another person's permission. Imagine if a stranger appointed by a court could move you into a nursing home against your will, sell your house, choose your doctor, spend your money and even rewrite your will. Imagine if that person were able to stop your family members from visiting you and could consent to or refuse medical procedures in your name.

As scary as this sounds, this is daily life for the hundreds of thousands of Americans who have been declared incapable of handling their own affairs and placed under the supervision of court-appointed guardians. Although guardianship is a valuable institution that can help protect those who are no longer able to protect themselves, it is also a system that is uniquely open to abuse. Guardianship places one adult's rights in another's hands, and most states do little to monitor these arrangements.

This *Citizens Legal Guide* offers basic facts about how the guardianship system works and provides information that can help you protect yourself and your loved ones. If you are involved in an unwanted guardianship, we recommend finding out what the guardianship laws are in your state either at your local law library or by visiting www.retirementnightmare.com which includes a summary of the state codes and statutes nationwide.

What Is a Guardian?

A guardian is a person appointed by a court to make important decisions on behalf of someone (called a ward) who is unable to make responsible decisions for him or herself.

With baby boomers aging and Alzheimer's cases increasing, a loss of capacity is a real prospect for many of us. If you are smart, you will plan ahead and create documents like a durable power of attorney that provide direction for the management of your money and your physical care. Even if you have a loving and supportive family that is ready to help, it is important to identify who exactly will be in charge of your affairs—and who will step in as a substitute if your original selection is

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no longer available. If you do not plan ahead in this way, a professional guardian could be appointed who views you as just one of many “cases” that need to be handled.

Once appointed, a guardian’s authority over you is similar to that of a parent over a minor child. Like a parent, a guardian normally has the last word and has the duty to act in your best interests, as the guardian understands it. A court may appoint a guardian to make financial decisions (sometimes known as “conservatorship”), to make intimate personal decisions (“guardianship of the person”) or both. In some states, the term conservatorship refers to all adult guardianship arrangements, whether establishing authority over financial or personal decisions.

The law allows a guardian to decide how your money will be spent, what doctors you will see, what medical treatments you will receive, and whether you will live in your own house or in a nursing home. In some states, a guardian can even modify your will or trust and must approve changes in your marital status.

How Is a Guardian Appointed?

Most guardianship cases begin with the filing of a “petition for guardianship.” This is a request in which the person seeking to be named guardian tells the court why it is necessary. If you do not believe that you need a guardian, or object to the person who is proposing to be your guardian, you can contest the petition for guardianship. A friend or family member can also file papers with the court to formally contest the guardianship petition.

Before a guardian is appointed, the court must hold a hearing to determine whether you are in fact unable to handle your own affairs. Guardianship cases are usually heard by judges in the probate division of state courts. According to the Uniform Guardianship and Protective Proceedings Act, a court can only declare a person incompetent if that person is “unable to receive and evaluate information or make or communicate decisions,” or unable to “meet essential requirements

for physical health, safety, or self-care, even with appropriate technological assistance.” As you can see, this language leaves a great deal of discretion and power in the hands of judges.

The law provides some safeguards against the court mistakenly declaring you incompetent or selecting an undesirable guardian. These are vital because the appointment of a guardian may extinguish all or many of your rights. In most states you have the right to:

- receive notice of a guardianship petition;
- be present at the hearing on your case before a judge;
- be represented by a lawyer (who may be appointed by the court); and
- present evidence of your ability to take care of yourself.

The principle of *limited guardianship*, which requires that a guardian “should be appointed only when necessary, only for as long as necessary, and with only those powers as are necessary,” has been adopted in many states.

While the law presumes that guardianships should only be used as a last resort, the sad truth is that courts can and do bypass almost all the usual procedural safeguards for appointing guardians. One particularly egregious example is the frequently-used “emergency guardianship,” which can be established without so much as notice to the proposed ward if the petitioner claims (and the court determines) that delay would be harmful to the ward’s health, safety or welfare. Courts usually make emergency appointments on the basis of statements and information provided by the person petitioning for guardianship. Although these emergency appointments are supposed to be temporary, they tend to become permanent.

The Messy Reality. Courts often fall short of their own standards for appointing guardians. Three common reasons are:

- *Judges' attitudes*—Daily exposure to the woes of the elderly and the handicapped leads many judges to presume that all individuals who are the subject of a petition for guardianship are unable to take care of themselves. The judge may view you as incompetent until you are proven competent, even though the law requires the opposite. Similarly, a judge may find it easier to give a guardian complete powers over you despite the principle of limited guardianship which encourages tailoring a guardian's authority to your specific needs and capabilities.
- *Heavy caseloads*—Judges who preside over guardianship appointments are often responsible for hundreds of cases at a time. Many cut corners and take a relaxed attitude toward procedure in order to move cases along. They may justify doing so because guardianship proceedings are supposed to be “non-adversarial,” meaning that the court assumes that both sides have fundamentally the same interests at heart—your protection and wellbeing.
- *Difficulties of finding an advocate*—When faced with an unnecessary guardianship petition you may experience feelings of shock, fear and betrayal. It can be difficult to hire a lawyer and prepare for a court hearing under such circumstances. Moreover, if the court appoints a lawyer, he may not be obligated to follow your instructions. A court-appointed attorney's obligation is often to your “best interests,” not your personal wishes. As over-burdened as judges, court-appointed attorneys may consent to a guardianship and waive the protective procedures that would otherwise apply. One study found that court-appointed attorneys in Florida waived their clients' right to a hearing in 90 percent of cases.

To be wrongfully subjected to guardianship may be the greatest loss of rights a person can experience short of being sent to prison. Although you can usually respond to a guardianship petition or challenge an existing guardianship informally, professional representation increases your chances of being taken seriously by the court.

Who Can Be a Guardian?

Any adult can petition to become a ward's guardian. While guardians tend to be family members or trusted friends, attorneys, government officials and even for-profit entrepreneurs may be appointed. Family members usually have priority for appointment as guardians, but judges are free to appoint whomever they believe is best, regardless of family ties.

Because there are more elderly and incapacitated members of society than there are family members to care for them, courts sometimes have to rely on government-run guardianship programs. The problem is, these programs usually lack the funds to care for more than the most desperate cases. In Florida, for example, a 2003 study found that even though more than 22,500 residents needed a guardian; the statewide public guardianship office could care for no more than 1,750. Large caseloads and insufficient funds frequently compromise the quality of care and attention provided by public guardians.

Stepping up to fill the void is an industry of professional, or “for-profit,” guardians. Professional guardians profit because they are allowed, under the law, to be compensated for their services out of their ward’s account. Many professional guardians reap huge sums by managing the lives of hundreds of sick and handicapped adults at once.

Although many are lawyers, almost anyone can become a professional guardian. The industry is poorly regulated, and few states require licensing or training. For-profit guardians drum up business by cultivating relationships with doctors, hospitals, lawyers, courts and government agencies responsible for the elderly or the handicapped. There are few hard numbers, but the guardianship industry is growing.

A for-profit guardian acts principally out of economic motives, not from affection or family obligation, and an unscrupulous for-profit guardian is uniquely positioned to exploit you and your assets given the scope of a guardian’s powers.

What Powers Does a Guardian Have?

A guardian’s precise powers vary from state to state. The chart compares powers typically granted to a guardian with parallel restrictions typically imposed on you.

A guardian can...	You cannot...
Spend your money	Make bank withdrawals or sell stock without a guardian’s approval
Be compensated from your assets	Refuse to pay a for-profit guardian
Decide where you will live	Decide where to move without a guardian’s permission
Bring lawsuits on your behalf	Bring lawsuits without a guardian’s permission
Buy and sell property in your name	Buy and sell a house or car without a guardian’s permission
Enter into contracts on your behalf	Hire or fire a cleaning person or others without a guardian’s permission
Consent to your medical care	Choose doctors without a guardian’s approval, or reject or consent to medical treatment without a guardian’s permission
Consent to your marriage	Divorce without a guardian’s permission
Consent to changes in your will	Write a new will without a guardian’s permission

How Can These Powers Be Abused?

A responsible guardian needs these powers to effectively manage your affairs. If you were suffering from dementia and asked to enter into a contract (say, for example, to sell a car you no longer use) you could easily be cheated without a guardian to supervise. Similarly, a guardian needs to be able to protect you from being coerced into making changes to your will when you are very ill.

Unfortunately, guardianship abuse, often but by no means exclusively by for-profit guardians, has become alarmingly common.

The most common kind of guardianship abuse is simple theft. A guardian's authority to be compensated

out of your accounts may become an invitation to embezzlement. In a recent California case, a for-profit conservator whose clients were primarily disabled veterans fleeced more than one million dollars from her wards' bank accounts. Other guardians may not steal outright, but will charge exorbitant fees for mundane tasks. A professional guardian may charge you hundreds of dollars in hourly fees for having a bag of groceries delivered, or for making brief visits.

Guardianship abuse can be much more extreme, however. An abuser may confine you to a nursing home while pillaging your life savings. He may withhold your food, bar you from leaving your home or block contact with loved ones, sometimes as a punishment. In one case, a for-profit guardianship firm committed felonies against more than 600 of its incapacitated wards, selling at least one person's home to an employee's relative for just \$500.

Warning Signs of Guardianship Abuse

- The guardian "forgets" to file regular reports with the supervising court, or submits dubious ones.
- The guardian fails to file prompt and accurate tax returns.
- The guardian becomes the ward's sole trustee or attorney-in-fact, thus avoiding court supervision.
- The guardian bills at professional rates for performing ordinary tasks, or seems to look for excuses to generate fees.
- The guardian deposits money from the ward's funds into his own account.
- The ward seems to have lost a lot of money since the guardianship began.
- The guardian hires cronies, perhaps as attorneys and money-managers, on the ward's behalf.
- The guardian sells real estate or other property at unusually low prices.
- The ward receives an eviction or foreclosure notice even though the ward owned the house.
- The guardian refuses to keep the ward's family informed of the ward's condition or attempts to stop them from visiting the ward.
- The guardian cannot explain why the ward has signed legal documents.
- The guardian seems to spend very little time with the ward.

How Are Guardians Supervised?

When the system is working properly, a guardian makes regular reports to the court about your current status, including an accounting of your assets. These reports give judges the information they need to decide whether to continue or modify the scope of a guardianship, or to replace a guardian for mismanagement or misconduct. In most states, a guardian's failure to report to the court justifies removal.

Matters rarely work so well in practice. Despite mounting public concern about guardianship abuse, court oversight of guardians is often very poor. A national survey of court practices found that:

- more than 25 percent do not require guardians to file annual reports on a ward's personal status
- nearly 20 percent do not require annual accountings of a ward's finances
- less than 50 percent have an official whose job it is to verify the information contained in guardians' reports and to understand the accounting
- 75 percent lack a computerized system to track guardianship cases
- 43 percent admit they lack sufficient funds for guardianship oversight

Judges responsible for hundreds of cases may fail to notice that a guardian has not reported on a ward. They may be too busy to spot signs of abuse, mismanagement or fraud. Worse yet, where a tight-knit network of judges, lawyers and professional guardians routinely interact with one another, some judges may be more concerned with protecting guardians than wards.

A few states have begun to improve their guardianship monitoring systems. Some of the most promising strategies include:

- *Regulating the professional guardianship industry.* A handful of states, including Alaska, Arizona, California, Florida, Texas and Washington, have established procedures for licensing for-profit guardians by state authorities. These states require guardians to undergo mandatory training and testing.
- *Harnessing the power of computer technology.* In a few exemplary jurisdictions—such as Rockingham County, New Hampshire, computer systems automatically notify court officials and guardians when status reports on the care of wards are due, and also alert officials that action is needed if the required report is not received.
- *Organizing visits from “friends of the court.”* A number of states, including California, Florida and Texas, use investigators, either professional or volunteer, to periodically visit wards and their guardians. These investigators report suspected abuse or neglect and recommend follow up actions to the court.
- *Establishing disciplinary bodies.* Arizona and Washington have created special offices that are responsible for following up on complaints of abuse and initiating appropriate disciplinary action against the guardian.

How Does a Guardianship End?

The most common way a guardianship ends is when a ward dies. The next most common way is when a guardian petitions the court to terminate a guardianship if he has spent most of your money and there is little left to pay bills, including the guardian's fee. Shockingly, guardians can deplete a ward's assets to between \$3,000 and \$10,000 before asking the court to terminate the guardianship. Otherwise, it is extremely difficult to end a guardianship. The court that appointed your guardian has the sole authority to end or otherwise alter the guardianship arrangement. The court, for example, must terminate the

guardianship if you regain competency (for example, if you recover from a long illness). The court should also reduce your guardian's powers if you regain partial capacity to make some decisions. In practice, a busy court is unlikely to bother with cases that are not brought to its attention. A responsible guardian should advise the court whenever it becomes possible to restore some or all of your personal autonomy. Family members, or any other third party concerned with your welfare, may also ask the court to reexamine a guardianship appointment.

Courts may remove a guardian for:

- Incapacity or illness
- Substance abuse
- Conviction of a crime
- Waste or mismanagement of your assets
- Neglecting your care and custody
- Conflicts of interest
- Failure to file required reports in a timely manner

To contest an existing guardianship arrangement, your relatives or loved one may file a formal legal petition asking that the guardian be removed or replaced by the local court that established the guardianship.

Finally, a friend or family member may contest the appointment of a professional guardian, if he believes he would be better able to assume responsibility for your care. This often happens following the appointment of an emergency guardian, which may have occurred without notice to your family.

To contest an existing guardianship arrangement, your relatives or loved one may file a formal legal petition asking that the guardian be removed or replaced by the local court that established the guardianship. Once the petition is filed, the court will schedule a hearing. At

this hearing you will have many of the same rights as in the original proceedings when the guardian was appointed.

In some states, a relative can also request the removal of a guardian by providing a written request either to the clerk of the court or to the judge who made the initial appointment directly. This written request should include background information about the guardianship arrangement and the reasons that you think it should be modified or terminated. The presiding judge will review the request, and may order a hearing directly, instruct a court investigator to look into your situation and determine if a hearing would be in your best interest, or deny the request as being without a good reason. If the judge does deny an informal request, your relative may still be able to file a formal motion with the court to modify the guardianship arrangement.

Two states, Arizona and Washington, have established regulatory bodies with authority to discipline abusive guardians. Ohio is considering setting up a similar agency. Your relatives should report any concerns about your guardian's conduct to these programs if your state has one.

Fighting an unwanted guardianship is not easy. To begin with, your loved ones will be petitioning the same court that originally declared you incompetent. Unless presented with strong evidence, courts tend to uphold their initial decisions. The judge may not take their claims of your competency seriously or may ascribe their complaints of your mistreatment to your senility. The process of contesting a guardianship can be confusing and upsetting, and the judge may trust the honed explanations of a professional guardian (often a lawyer) who is familiar to the court over the emotional protests of you and your loved ones.

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In addition, a guardian who has been mistreating or defrauding you will fight ruthlessly to keep control. Losing can mean exposure, lawsuits, criminal charges and, for lawyers, possible disbarment. Your guardian may punish you for encouraging your relatives to petition the court to end the arrangement. The guardian may bar you from seeing your loved ones.

It may be difficult for you to hire a lawyer to help challenge an unwanted guardianship because your guardian controls your purse strings and your ability to enter into contracts, including those for legal services. Adding insult to injury, you may be responsible for your guardian's legal fees in any contest because it is presumed that the guardian is acting in your interests when he fights to retain authority.

Removing or replacing a guardian can be risky, expensive and emotionally grueling. Citizens concerned about the possibility of being placed under the supervision of a court-appointed guardian can avoid these problems by planning in advance.

How Can I Protect Myself or My Family?

No one wants to think about growing old or becoming physically or mentally incapacitated. However, statistics show that if you make it to age 65, you are more likely to die of a chronic disease or debilitating condition—such as cancer, stroke or Alzheimer's—than as a result of accidental death.

The fundamental goal of advance planning is to avoid forcing a judge to appoint someone, often a stranger, to manage your affairs if you fall ill or become disabled. The simplest way to do this is to select someone you know and trust to handle your affairs such as a family member or close friend, while you are still competent to do so.

The Durable Power Of Attorney. A durable power of attorney is a legal document that allows you to

appoint someone (called your “agent” or “attorney in fact”—although the person need not be a lawyer), to manage your financial affairs and/or make health-care decisions as you have directed. The power is “durable” because it continues in effect after you become incompetent. A durable power of attorney usually prevents appointments of a guardian, but sometimes judges will still appoint a guardian. All 50 states recognize durable powers of attorney over property and recognize similar powers over healthcare and personal matters.

One of the great advantages of this type of legal document is that it is flexible—you can adapt it to your needs. You can specify precisely which powers are to be entrusted to your agent, rather than hoping an overworked court will take the trouble to carefully tailor a guardian's authority to your situation. You may select one or more agents, and draw up a list of alternatives in case your first choices are unable to assume the responsibility. You can also allocate authority over different kinds of decisions to different agents. For example, you may grant your niece power of attorney to deal with your real estate because she lives nearby and a friend's son power of attorney over your retirement assets because he is an accountant.

You decide whether a power of attorney takes effect upon signing (which is useful if you are undergoing some sort of major surgery or are in failing health) or only when you become incapacitated. You can also specify a method by which your incapacity will be formally determined; for example, by examination of a family doctor.

Creating a power of attorney has its risks. Unlike guardians, agents operate outside the court's supervision and do not have to file regular reports. It is therefore imperative that you select someone you trust completely. In addition, a narrowly-drawn power of attorney may fail to prevent the appointment of a guardian, if the agent's authority does not extend to your actual circumstances when you become incapacitated. Problems may also arise if a third party questions the actions of an agent or if multiple agents are unable to agree on how your care should be managed.

The Living Trust. While most people establish trusts to transfer property to loved ones after they die, another popular reason for setting one up is to

provide for the continual management of your financial affairs if you become disabled or incapacitated. In the trust you would name someone (a reliable relative, friend or institution, such as a bank) to take over management responsibilities (writing checks, making deposits, paying bills, etc.) if you cannot. The person you name must manage your assets for your benefit under terms specified in your trust.

A court will not need to appoint a guardian to manage assets that are already managed by a trustee—but it may disregard your careful plans and do so. Placing assets in a trust may also dampen the enthusiasm of predatory would-be guardians. It will be much harder to profit from abusing authority over you when your assets are legally owned and managed by your trust.

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The Living Will. A living will allows you to state ahead of time, in writing, what treatments you will or won't allow for yourself and what measures you will or won't permit healthcare professionals to take in preserving your life, if you become terminally ill. Though important, a living will alone will not be a sufficient tool in planning for incapacity because it applies only to future medical conditions and depends for its relevance on your ability to anticipate future problems. Nevertheless, a living will may be usefully combined with a power of attorney.

Glossary of Terms

Guardian Person appointed by a court to make important decisions on behalf of someone who is unable to make responsible decisions for himself or herself.

Conservator In many states, person specifically appointed to manage the financial affairs of an incapacitated adult.

Ward Person who is not able to make responsible decisions for himself or herself due to illness or injury.

Guardianship The legal relationship created between the guardian and the ward.

Incapacitated/Incompetent Lacking the physical or mental abilities to manage one's personal care, property or finances.

Guardianship Petition A formal written request made to a court to be named as the guardian of another person.

Emergency Guardianship Temporary appointment of a guardian if delay would likely result in substantial harm to the ward's health, safety or welfare.

For-Profit Guardian (or Professional Guardian) Person not related or familiar to the ward who receives financial compensation for carrying out the responsibilities assigned to the guardian by the court

Durable Power of Attorney Document that gives another person legal authority to act on someone's behalf and that remains in effect if the creator becomes incapacitated.

Living Trust Trust established and in operation during the creator's life.

Living Will Document in which a person state's wished about certain types of medical treatments and life-prolonging procedures.

Where to Find More Information

Regulatory Bodies:

Arizona Supreme Court

Fiduciary Certification Program

1501 W. Washington, Ste. 104

Phoenix, AZ 85007-3231

Phone: (602) 452-3987

Fax: (602) 452-3958

www.supreme.state.az.us/fiduc

The Fiduciary Certification Program exercises jurisdiction over certification, auditing and discipline of guardians in Arizona.

Washington State

Certified Professional Guardian Board

Administrative Office of the Courts

P.O. Box 41170

Olympia WA 98504-1170

Phone: (360) 705-5302

Fax: (360) 586-8869

www.courts.wa.gov/programs_orgs/guardian/

The Certified Professional Guardian Board adopts and implements regulations governing certification, minimum standards of practice, training, and discipline of professional guardians.

Organizations:

National Center on Elder Abuse

c/o Center for Community Research and Services

University of Delaware

297 Graham Hall

Newark, DE 19716

Phone: (302) 831-3525

Fax: (302) 831-4225

www.ncea.aoa.gov

The National Center on Elder Abuse serves as the nation's clearinghouse of information and materials on elder abuse and neglect.

Publications and Web sites:

The Retirement Nightmare: How to Save Yourself from Your Heirs and Protectors, by Diane G.

Armstrong, Ph.D., provides seniors and their loved ones with the tools to protect against a predatory guardianship. This book summarizes every state's guardianship statutes and provides contact information

for national services, legal organizations, state offices of aging, and other resources for the elderly. Additional useful information can be found on the author's Web site, www.retirementnightmare.com.

National Association to Stop Guardian Abuse

www.stopguardianabuse.org

This is a civil rights organization composed of victims and other concerned people who seek to eliminate the abuses of court appointed guardians/conservators of incapacitated seniors nationwide. Its Web site includes actual accounts of guardian abuse.

More information about common options for advance planning for future incapacity is available from HALT's Web site at www.halt.org, in HALT's **Citizens Legal Guides** *Durable Power of Attorney: Do You Need One?* and *Living Trusts: A Primer* and in HALT's *Everyday Law Series* article "What is a Living Will?"

Join Our Fight For Reform

Since 1978, HALT has provided a powerful voice—working on your behalf in Washington and across the nation—to help Americans navigate the legal system with or without a lawyer. We need your help. Join HALT and help us to allow more people to take charge of their own legal affairs.

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