

decision for any other adult unless that individual has executed a document such as a DPOA or unless that person has been declared to be disabled and has a guardian appointed or when the Health Care Surrogate Act (HCSA) is used. See section 8, page 20, for the law governing the HCSA.

2. Procedural Aspects of Guardianship

If you are a guardian and have gone through the process you have an idea of the procedure. There are a number of resources that provide a review of the legal process. For our purposes here, it will require a brief overview as you may not have been appointed yet but expect to be named soon.

To continue with Professor Howard Eisenberg's "Legal Aspects of Guardianship" the process of guardianship means a person must lack the mental ability to make decisions because of intellectual and developmental disabilities, substance abuse, mental illness, or organic brain disorders which may occur in older persons. It may mean that the person is physically unable to take care of him or herself but mentally competent so a power of attorney could be signed delegating decisions to some individual.

Guardianships are legal actions filed in court. A petition will have to be filed in the circuit court alleging that the named person (18 years or older) needs a guardian and that a named individual or agency be appointed. A signed report by a physician (within 90 days of filing) is required along with the petition. The report must specify the diagnosis and prognosis of the patient as well as a recommendation whether a guardian is necessary, and if so, the extent and scope of guardianship. There are court costs and it is recommended contacting an attorney for assistance.

Who may act as a guardian is a person over the age of 18 and has not been convicted of a serious crime nor adjudicated mentally incompetent or disabled. A guardian of estate must meet the same qualifications. (Note: being an Illinois resident is not required anymore) Frequently a close relative of a disabled person is appointed. Sometimes, a commercial bank or a public agency (public guardian) may be appointed. Usually, only one person can act as guardian. Although ultimately the judge in court will decide who the guardian is, it is always best for family and friends of the disabled person to

agree on a guardian before the legal process is filed. Otherwise, there may be a conflict and the judge will be required to resolve the matter.

Once a guardianship is filed a hearing date is set no sooner than 14 days from the date the petition is served on the alleged disabled person and no later than 30 days after that date. It is required that the alleged disabled person be personally handed copies of the petition and summons by the sheriff's office or private processor. If the legal process is not properly served, the guardianship will not be valid.

The judge will appoint an attorney to represent the legal interest of the alleged disabled person. The attorney is known as a guardian *ad litem* (GAL). The role of the GAL is to interview the alleged disabled person, inform the person of his or her rights, and submit a report to the court regarding need for a guardian. An important thing to remember is that the GAL attends the hearing and remains the disabled person's representative until the court removes the person and appoints another if needed.

The alleged disabled person has rights. Under Illinois law the alleged disabled person has very substantial rights in the guardianship proceedings. The person may demand a jury trial, can request the court to appoint experts to prepare medical reports, and can even request the appointment of a second attorney, if the GAL makes recommendations that are contrary to the articulated wishes of the person alleged to be disabled.

At the guardianship hearing the person who has filed the petition will testify as will the proposed guardian. Frequently, the petitioner and the proposed guardian are the same person. If there is no question regarding the medical evidence, the physician will not testify and the adjudication will be based on the medical report attached to the petition. In the majority of cases there is no conflict over the medical evidence. The GAL may recommend to the court that the presence of the alleged disabled person be waived. However, some judges are insistent that the individual appear unless too infirm, confused, or disabled to appear in court. At the hearing the alleged disabled person has the right to testify and call witnesses. The attorney for the alleged disabled person can cross examine the witnesses called by the petitioner. The judge also might ask questions of any of the witnesses.

Once the judge decides that a guardianship is necessary and that the individual proposed as guardian is appropriate the court will order that the person be appointed guardian. It is at this time the scope of guardianship is also ordered depending on the petition and the witnesses' testimony. Limits of authority will be determined by the judge. The court may at that time set a **bond** which will have to be posted by the guardian. The bond is a legal promise that the guardian will properly perform their duties as guardian. If an estate guardian is established the bond is simply a written promise by the guardian to safeguard the funds and other property. In the case of a large estate, however, the court may require that a commercial bond be posted. Such a bond is similar to an insurance policy in which the surety company promises to reimburse the estate of the disabled person if the guardian improperly uses the funds and/or property of the disabled person.

The judge will enter a written order appointing a guardian. However, the legal document which is the "badge" of guardianship is entitled **letters of office**. This is a one page legal paper informing everyone that the guardian has been appointed and has continuing legal authority. Presentation of the letters of office is the way the guardian proves he or she has proper legal authority. See Section 13 Guardianship Checklist for steps involved.

3. Manner in Which a Guardian Exercises Authority

Substituted judgment by a guardian for a client can be exercised in two very different ways. One, the guardian can act as a "reasonably prudent person" without reference to the manner in which the ward may have made those decisions in the past. When operating in this manner the guardian will act more conservatively regarding safeguarding the assets of the ward and in making decisions regarding the personal care of the individual.

The second way a guardian may make decisions is to determine how the client would have made the decision based on that individual's life history and past conduct. A guardian must have evidence of the way in which the ward made decisions previously. The guardian cannot speculate about how the client would have made the decision. It should be understood that the action of the guardian may have an impact on persons other than the client. For example, how the guardian of estate spends money for the benefit of the