

## **Guardianship:**

Ideally, everyone would make advance arrangements for implementation of a care plan for themselves if they became unable to take care of themselves. Powers of Attorney for Health Care and for Property (POA's For Health &/or Property) afford a method for each of us to make such arrangements. Unfortunately many people do not avail themselves of the opportunity POA's for Health &/or Property provide. Other individuals, due to chronic conditions, may have never had the ability to create Health &/or Property POA's. When a disabling condition occurs, and no plan for personal or financial decision making has been made, then a Guardianship proceeding may be the only alternative.

In Illinois Guardianship matters are governed by the provisions of 755 ILCS 5/11a-1 through 5/11a-23 of the Illinois Probate Act.

Generally, persons who have reached their eighteenth birthday are presumed to be capable of making their own decisions, and accepting responsibility for the outcome of their decisions. Not everyone has the ability to make their own decisions.

The Probate Act of 1975 defines a "disabled person" as follows:

"Disabled person" means a person 18 years or older who (a) because of mental deterioration or physical incapacity is not fully able to manage his person or estate, or (b) is a person with mental illness or a person with a developmental disability and who because of his mental illness or developmental disability is not fully able to manage his person or estate, or (c) because of gambling, idleness, debauchery or excessive use of intoxicants or drugs, so spends or wastes his estate as to expose himself or his family to want or suffering. 755 ILCS 5/11a-2.

The process of having a guardian appointed for a disabled person begins with the filing of a petition asking that the Court find that an individual is disabled; stating the underlying reason for the disability, whether illness, injury, or other; stating if the individual requires a guardian for making personal decisions, managing his or her assets and estate, or both; and the nature of the relationship between the person filing the petition and/or the person who is nominated to act as guardian and the alleged disabled person.

A Report of Physician (referred to in Cook County as a form "CCP 211") must be obtained. The CCP 211 is to be completed by a licensed physician, must state the underlying diagnosis of the individual's disabling condition, and must state the effect that the disabling condition has on the person's ability to make personal or financial decisions. The examination must have been done not more than three months prior to the date that the Petition was filed.

The Petition is filed with the Clerk of Court, and in Cook County assigned to one of the judge's assigned to her guardianship matters. A hearing date is assigned by the judge's clerk. A summons stating the hearing date, and a copy of the Petition, must be served to the alleged disabled person by the sheriff not less than fourteen days prior to the hearing. Since a guardianship proceeding may

result in the alleged disabled persons civil rights being restricted the nature of the proceeding is adversarial, and the Court must have proper jurisdiction over the alleged disabled before it can proceed.

In certain circumstances an person referred to as a “guardian ad litem” (“GAL”) may be appointed. The role of the guardian ad litem is to meet with the alleged disabled person prior to the hearing date; advise the alleged disabled person of his/her rights in the proceeding; ascertain if the alleged disabled is in agreement with or opposed to having a guardian appointed; if the alleged disabled has no objection to a guardian, ascertain if the individual has an opinion as to whom should be appointed as guardian. The GAL will thereafter prepare a written report for the judge.

What might occur at the initial hearing date depends, in part, on whether the alleged disabled person has a position with respect to having a guardian appointed, or the person asking to be appointed as his/her guardian. If there is no opposition, and the Physician’s Report indicates the need for a guardian, then it is possible that the Court will enter an order finding the individual to be “disabled” within the context of the Probate Act, and appoint a guardian. If there is opposition to either the finding of disability, or the person asking to be appointed as guardian, the Court may appoint an attorney for the alleged disabled or allow the alleged disabled to obtain counsel of his/her choice, and continue the matter for further proceedings. Remember, a guardianship proceeding is “adversarial” in nature, which means that the alleged disabled person has a right to oppose the petition, and present evidence that he/she does not require appointment of a guardian. At some point in time there could be a trial on the issue of whether the alleged disabled requires a guardian, the extent of the guardianship required to meet the individuals needs, and who is the most appropriate person to be appointed as guardian.

The Probate Act provides that the least intrusive level of guardianship that meets the individuals needs is to be ordered. A “Limited” guardianship may be ordered, with the duties assigned to the guardian, and the rights reserved to the alleged disabled, clearly and specifically stated in the order appointing a guardian. In a Limited Guardianship, to the extent that a guardian is not authorized to act on behalf of the individual, the individual retains the right to exercise his or her own independent judgment on such matters.

An alleged disabled may have a “Guardian of the Person” appointed. A guardian of the person will be responsible for making all decisions for the disabled individual concerning where the disabled person will live, the type of medical treatment the disabled will receive, who may visit with the disabled person, and so forth. A “Non-Surety” bond will be required from the person appointed as guardian of the person to ensure that the individual will properly and fully execute his or her duties.

There may also be a “Guardian of the Estate” appointed. The duties of the Guardian of the Estate are to compile an Inventory of all assets owned by the disabled, or in which the disabled person has an interest and to file the Inventory with the Court; to present a proposed Budget to the Court for its review and approval; to collect all income and assets of the disabled person, to invest and manage the assets, and to expend the disabled persons assets in accordance with the Budget; and to prepare and file all tax returns for the disabled person . An individual acting as Guardian of the Estate will be required to post a “Surety” bond, the amount of which is determined by statute. The expense of

the bond is the responsibility of the disabled persons estate. An alternative to an individual acting as Guardian of the Estate is for a corporate fiduciary - a trust department of a bank, or a trust company, for instance - to act as Guardian of the Estate. If a corporate fiduciary acts then a surety bond may not be required.

A guardian of the person is required to file an annual report with the Court on the condition of the disabled person (also now referred to as the "Ward"). The contents of the report are set out in the Probate Act, and include information such as where the Ward currently resides, what the care plan for the Ward is, what medical and dental treatment the Ward has received over the past year, and similar information. In Cook County, the report of the Guardian of the Person can be filed by mail, in other Counties an appearance may be required.

The Guardian of the Estate, in addition filing a report on the condition of the Ward (if the Guardian of the Estate is also acting as Guardian of the Person) is required to file an annual accounting of all assets, receipts and distributions received and expended over the prior year. The contents of the Accounting are set out in the Probate Act. Failure to file the Accounting, or to file a proper accounting, may result in removal of the Guardian of the Person as well as other action being taken to protect the Ward's estate.

If the Ward's condition improves to a point where either a lesser level of guardianship becomes appropriate, or termination of the guardianship overall is appropriate, then either a petition to modify or a petition for restoration may be filed.

Guardianship is a complex proceeding which requires a thorough understanding of the rights of an individual alleged to be disabled and in need of a guardian, and also a complete understanding of the duties of a guardian of the person and/or estate to provide for a successful implementation and administration of a guardianship estate. If there are no Powers of Attorney for Health Care or Property, a guardianship may be the only and best alternative to ensure that someone who requires assistance is properly cared for. We are available to assist you in understanding the options available and the actions required.

The Clerk of the Circuit Court of Cook County has the forms required for starting a guardianship proceeding available on its website: <http://www.cookcountyclerkofcourt.org>.