
Guide to Guardianships

Pursuing guardianship process can be stressful for those with mental illness and their family. This guide has been written to provide information about the Guardianship process and the different options available.

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GUARDIANSHIP OVERVIEW

A guardian may be appointed for an adult if a probate court judge concludes that one of the following situations exists:

The individual is incapable of taking care of him or herself by reason of mental illness;

Failure to appoint a guardian would create an unreasonable risk to the health, welfare and property of the individual by virtue of mental retardation; or

The individual is unable to make or communicate informed decisions due to physical incapacity.

The text below focuses on the procedure for pursuing guardianship for adults with mental illness. The procedure is somewhat similar for individuals with mental retardation or physical incapacity.

STARTING THE PROCESS

To begin the Guardianship process, one parent or two "friends" can file a Guardianship Petition with the Probate Court in the county in which the individual lives. The Petition must state that the individual, otherwise known as the proposed Ward, is incapable of taking care of him or herself because of mental illness.

It usually takes a minimum of about four to six weeks for the court to hear the matter, barring an emergency, because of notice requirements. However, if the matter is contested it may take longer to schedule a court date.

PHYSICIAN PARTICIPATION

Depending upon the type of guardianship sought, the court requires one or more documents from a physician who has met with and is knowledgeable about the proposed Ward. The documents must describe the clinical reasons that make guardianship necessary.

If the Guardianship Petition is uncontested, the authority can usually be granted without the physician appearing in court. The physician, however, is required to have met with the proposed Ward within 30 days of the court date. If the proposed Ward decides to contest the Petition the physician must usually appear in court to testify.

Typically, an uncontested hearing can be scheduled sooner, takes less time and is less costly than a contested hearing.

If the individual has not met with a physician in some time, the Petitioners can ask the court to order the individual to meet with an Independent Medical Examiner.

TYPES OF GUARDIANSHIPS

There are four main types of Guardianships, each of which is described below. There are also additional authorities described that may be pursued by a proposed Guardian of the Person.

Temporary Guardianship

One can request that the Probate Court appoint a Temporary Guardian if an emergency exists, and the court will hear the matter sooner than it would hear a request for Permanent Guardianship. A Temporary Guardian's appointment only lasts for 90 days. However, the appointment may be extended for an additional 90 days. A separate court hearing is required to request that a Temporary Guardianship be made Permanent.

Permanent Guardianship

As opposed to Temporary Guardianships, Permanent Guardianships do not automatically extinguish. They continue as long as the Ward is alive unless the court otherwise orders that they end. However, as noted below there is one type of guardianship, a "Rogers" Guardianship, that must be reviewed regularly by the court, usually on an annual basis.

Guardianship of the Estate

This type of Guardian has responsibility for safeguarding the Ward's assets and making expenditures on the Ward's behalf. All Guardians must file a Bond stating that they will faithfully serve in their position before the court will grant them authority. However, a proposed Guardian of the Estate must also either purchase a corporate Bond for a fraction of the value of the Ward's estate or have two Massachusetts residents sign the Bond agreeing that they will pay the Ward's damages if the Guardian acts inappropriately.

After being appointed, a Guardian of the Ward's Estate is required to submit an Inventory listing the Ward's assets. In addition, each year the Guardian must submit an Account listing all expenditures made and funds collected on the Ward's behalf.

Although a Guardian of the Estate has authority to manage the individual's assets, the Guardian must first get specific court approval before selling any of the individual's real estate or performing estate planning.

Notably, if an individual does not have access to funds, such as funds held by a trust which the individual cannot revoke and from which the individual may not demand funds, a Guardian of the Estate will not have access either.

Guardianship of the Person

A Guardian of the Person is authorized to make ordinary medical decisions for the individual, and so has access to the individual's medical records and is able to speak with the individual's physicians. Concerns hospitals or doctors traditionally have about confidentiality do not traditionally apply to a Guardian because he or she acts in the individual's shoes.

ROGERS AUTHORITY

In order for a physician to prescribe antipsychotic medication to an individual who has been found incompetent, the Guardianship must include the authority to monitor the administration of antipsychotic medication, known in Massachusetts as "Rogers" authority. Rogers authority is not required if the individual is only prescribed other psychiatric medication such as anti-depressants, mood stabilizers or anti-anxiety medication.

When a Guardianship Petition seeking Rogers authority is filed, the court will automatically appoint an attorney to represent the individual.

The Petitioners must provide the court with several documents from the individual's physician, including a treatment plan listing the proposed types and dosages of antipsychotic medication and an affidavit providing additional information regarding the need for antipsychotic medication. The treatment plan must be reviewed by the court on a regular basis, usually annually.

EXTRAORDINARY MEDICAL AUTHORITY

Similar to the administration of antipsychotic medication, a Guardian must receive the court's permission before consenting to extraordinary medical treatment. What constitutes extraordinary, as opposed to usual and customary medical treatment is open to some debate. There has been clear precedent, however, that classifies ECT as extraordinary treatment.

AUTHORITY TO ADMIT OR COMMIT TO A MENTAL HEALTH FACILITY

A third type of added authority that a court can grant a Guardian of the Person is the authority to admit or commit an individual to a mental health facility. If a Guardian has this authority, the Guardian can sign the individual out of a mental health facility but the individual may not sign him or herself out. Of course, the facility always has the right to discharge the individual. In addition, a Guardian can sign an individual into a psychiatric facility if the individual is at an emergency room as long as the facility believes that the individual can benefit from inpatient treatment.

Different counties respond to this authority differently, with the hospitals in some counties not respecting the authority unless it was granted very recently. Courts are sometimes particularly reluctant to grant this authority because of the extent of the rights that are taken away from the individual. The court will automatically appoint an attorney to represent the proposed Ward if this authority is requested.

GUARDIANSHIP OF THE PERSON AND ESTATE

One can certainly be appointed Guardian of the Person and of the Estate. This type of Guardian has authority to consent to ordinary medical treatment as well as make decisions about the individual's finances.