

# Guardianship of Mentally Ill Adults in Illinois: Statutory Guidelines and Practical Applications

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## **I. Guardianship**

A. process provided for by state law under which a court may make a determination that a **guardian** be appointed to manage the affairs of, and protect, a disabled person, called a **ward**.

### **B. Determining the need for Guardianship**

1. Children are considered to lack legal capacity until age 18. Parents' natural guardianship over a child automatically stops when the child turns 18.

2. Statute provides for appointment of guardian when a person is adjudicated by the court to be "disabled," that is, unable to make and communicate decisions regarding personal care or finances due to

a. Physical disability

- i. Coma
- ii. Stroke patient
- iii. Accident patient

b. Developmental disability

- i. Downs Syndrome
- ii. Cerebral Palsy
- iii. Diminished mental capacity since birth

c. Mental disability

- i. mentally ill
- ii. Alzheimer's patient
- iii. age-related dementia

d. Gambling or other substance abuse that causes a person to spend or waste his/her finances so as to expose him/her or family to want or suffering

- i. new to Illinois law
- ii. not many cases brought under this
- iii. usually addiction is a symptom of another underlying condition

3. Applying the statute

a. Guardianship decisions are based on the factual set of circumstances before the court and subject to constant review

b. Making incorrect or ill-advised decisions, or choices different from what family members would have done is not enough.

- c. Being elderly, mentally ill, mentally, physically, or developmentally disabled is not *alone* a sufficient reason to appoint a guardian.
- d. Burden of proof is on the person seeking guardianship to demonstrate that *because* of the disability person cannot make or communicate responsible decisions about his/her person or finances. Clear and convincing evidence is needed.
- e. Does the person understand when particular decisions need to be made, what options exist, what the consequences of each option may be?
- f. Can the person make sound decisions about
  - where to live, work
  - when/how to seek medical, other professional services
  - how to purchase food, clothing, care for dependents?

**C. Guardians are substitute decision makers for their wards.**

1. Must be appointed by, and act only on authority of, the court.
2. Any person 18 or older who is not a convicted felon may serve
3. May be an institution (bank) or agency (state guardian)
4. Need not be a family member and relatives are not given preference
5. Disabled person may express a preference which court is to consider

**D. Type of guardianship established is based on Court's flexibility to tailor guardianship to meet the needs and capabilities of the ward.**

1. Guardian of the Person makes decisions for housing, daily living needs, medical or rehabilitative care, educational or vocational needs of the ward
2. Guardian of the Estate makes decisions for the management, investment and disbursement of finances, including properties and income of the ward
3. Temporary guardian can be appointed for no more than 60 days during which a hearing will be held to determine the need for ongoing

guardianship. This is used in an emergency situation where immediate protection or intervention is needed. A temporary guardian for person and/or estate can be appointed.

4. Plenary guardian is appointed to make all decisions for the ward. Plenary denotes the guardian's powers are without limitation, subject to court approval. A plenary guardian for person and/or estate can be appointed.

5. Limited Guardian is appointed when court believes a disabled person needs some, but not complete, assistance. The order appointing the limited guardian specifically will state what authority the guardian has to act on the ward's behalf. Courts favor this type of guardianship so as to promote independence and self reliance where suitable. A limited guardian for person and/or estate can be appointed.

6. Short term guardian may be appointed in writing by a guardian, without court approval, to act for the guardian for short periods of time.

7. Stand-by guardian is a person named to act as guardian if the appointed guardian dies, becomes incapacitated or no longer can act. Must be appointed and approved by the court.

#### **E. Procedure**

1. Set forth by state law and administered by each circuit court
  - a. Varies from county to county
  - a. Forms are basically the same
2. Required Doctor's (M.D. or D.O.) report
  - a. this is the first step in determining whether to file for guardianship and should be discussed thoroughly with disabled person's physician.
  - b. Doctor must have examined the disabled person no earlier than three months prior to a petition being filed.
  - c. Doctor must list his/her credentials and the names of any other persons who performed evaluations upon which the doctor's report is based
  - d. Report must respond to four questions:
    - i. nature and type of disability  
-underlying diagnosis and manifestations

- ability to make decisions or function independently
- ii. analysis and results of evaluations for person's
  - mental, physical, educational condition
  - adaptive behavior and social skills
- iii. opinion, with reasons, as to whether person is
  - totally or partially incapable of making decisions
  - the kind of personal and financial decisions that can/cannot be made if only partially incapable
- iv. opinion, with reasons, as to
  - appropriate living, treatment, rehab plan
  - restrictions that are reasonably necessary to protect assets and safety of person

### 3. Starting the legal process

#### a. Petition

- i. Filing fee
- ii. Cannot be withdrawn once filed
- iii. Hearing date will be set at that time and cannot be later than 60 days after filing date

#### b. Service of Process

- i. respondent (disabled person) is served by county sheriff
  - processing fee
  - can make arrangements for special process server if seeing a sheriff in uniform would upset the person
- ii. person is notified of petition filing and summoned to appear at hearing
- iii. person is given a written list of rights
- iv. must occur no later than 14 days before hearing

#### c. Notice of hearing date (no less than 14 days) also must be given to any adult family members of person

- i. spouse or children
- ii. parents or siblings

#### 4. Preliminary Hearing

a. In most counties, court will appoint the petitioner temporary guardian after

i. reviewing the physician's report

ii. receiving Oath of Office

iii. Bond

-surety bond if there are financial assets of person

-no-surety bond if

guardian of the estate is not being sought or  
only assets are social security payments

b. Appointment of Guardian ad Litem

i. an independent, objective attorney court selects to be eyes and ears of court

ii. will meet with person, family, petitioner, others

iii. will review doctor's report and possibly consult with him/her

c. Order appointing temporary guardians and setting date of full hearing is entered

#### 5. Full Hearing

a. Must be within 60 days of filing of petition

b. Report of Guardian ad Litem is received and a written report is entered into the file stating

i. finding as to disability of ward

ii. recommendations as to scope of guardianship needed

c. Guardian ad litem may waive the disabled person's

i. right to be present

ii. right to jury

- iii. right to counsel
    - iv. right to have doctor present
  - d. If person is challenging need for guardianship consider having others willing to testify
    - i. doctor
    - ii. other healthcare professionals
    - ii. other family, friends or employers who know person well
  - e. Order denying guardianship or appointing plenary or limited guardians is entered
- 6. After adjudication of disabled person and appointing of guardians
  - a. Statement of right to discharge guardian or modify guardianship must be mailed to ward by Circuit Court Clerk.
  - b. Letters of Office are issued to the guardian which serve as certified proof that the guardian has court authority to act on behalf of the ward
  - c. Inventory of ward's assets must be filed with court in 60 days if guardian of the estate was appointed
  - d. Annual Report must be submitted to the court detailing the ward's current condition and financial records along with a request that the guardianship continue.
  - e. Burden of proof is on ward to demonstrate a change of circumstances if he/she wishes to have guardianship terminated or modified.

F. Cost of guardianship

- 1. Petition filing fees
- 2. Service of Process
- 3. Surety on Bond fees
  - a. Surety must be 1.5 times the value of assets
  - b. Bond costs usually 1-2 % of surety needed

4. Guardian ad Litem fees about 3 hours of legal time, more if contested

5. Attorney fees about 3-6 hours of legal time, more if contested

G. Guardianship Limitations

1. Guardian acts as “hands of the court” and needs court authority to act on ward’s behalf; court retains discretion over the manner in which the guardian provides for the ward

a. Residential placement

b. Marriage and divorce

c. Contracts

2. Health care - Illinois courts have held that guardians do not have authority, absent court approval, to force these types of medical treatment for a ward

a. Pyschotropic medication

b. Electric Convulsive Therapy

c. Mental Health Hospitalization

3. A guardian may not consent to involuntary admission of a ward to a psychiatric facility. Mental Health Code, which covers both voluntary and involuntary commitment to a mental health facility, is the exclusive governing law.



## **II. Alternatives to Guardianship**

### **A. Guardianship should be used as a last resort .**

1. Guardianship is considered an extreme measure and should be used only when all other less restrictive means to protect a person have been considered and/or tried.
2. Guardianship is costly and can be a complicated process.
3. Once a petition has been filed, it can be withdrawn only with court approval. Court must assure itself the allegation that a person is disabled and needs assistance is false.
4. Should never be used as a convenience to a health care provider or family member.
5. Care should be taken to ensure that a person meets the legal standard for guardianship and would benefit from it *before* filing a petition.
6. Right to privacy and independence in managing oneself should be limited and removed only for the gravest need.

### **B. Powers of Attorney**

1. Power of Attorney is a signed written form governing the relationship between the principal, the person creating the power, and an agent, the person designated by the principal to act on the principal's behalf.
2. Principal can tailor the power form to add or delete certain powers but the agent only may exercise the specific powers listed.
3. Principal must be competent at time power is given, but power can be written to endure through any disability. Principal does not need to be incompetent for agent to act.
4. Health Care Power of Attorney - agent can
  - a. consent to or withdraw any type of personal care or medical treatment
  - b. admit or discharge you from a hospital, nursing care facility or other institutional care
  - c. statutory form contains provisions for choosing a type of life sustaining treatment - like a living will

5. Property Power of Attorney - agent can
  - a. handle all financial transactions, including buying, selling, real or personal property, paying bills
  - b. access to safe deposit box
  - c. prepare, file and sign tax returns and pay taxes
6. Conflicts between powers granted an agent and guardian
  - a. Power of attorney controls
  - b. If power of attorney is unclear or agent refuses to act, court may authorize the guardian to act

C. Health Care Surrogate

1. Effective since 1991
2. Applies when a doctor determines that a patient lacks capacity to consent to or refuse medical treatment.
3. Law may be invoked where no guardian has been appointed, no power of attorney or living will has been executed.
4. Surrogate decision maker can be from the following classes of people in this order
  - a. spouse
  - b. child
  - c. parent
  - d. sibling
  - e. grandchild
  - f. friend
5. Surrogate acts without written or court authority

D. Mental Health Advance Directive

1. New to Illinois law in 1998
2. Limited to mental health treatment decisions regarding
  - a. psychotropic medications
  - b. electroconvulsive therapy
  - c. in-patient hospitalizations
3. Must be signed while you are mentally competent
4. Must be witnessed by two unrelated persons who are not your health care providers, or involved in your healthcare plan, who attest that you appear to be of sound mind.
5. Only becomes effective after two doctors or a judge determine you are unable to make or communicate reasonable decisions regarding your mental health care. Until that time, you continue to make decisions.
6. Must be followed by your mental health care providers unless
  - a. a court order contradicts your wishes
  - b. there is an emergency
  - c. an involuntary commitment occurs under Mental Health Code
7. You may designate a person to act for you under the terms you set forth in the Mental Health Advance Directive, but do not need to do so.
8. Can change or cancel directive if
  - a. doctor states in writing you are capable of doing so
  - b. must be in writing
9. Directive is valid for three years; at end of that time
  - a. directive expires unless you re-execute it
  - b. remains in effect if you are unable to make decisions for yourself

### **III. Resources available**

#### **A. Private Attorney**

1. Contact county bar association
2. Ask health care providers

#### **B. Contractual Services**

1. Surrogate Guardian Services, Inc.  
1S450 Summitt Ave, Suite 375  
Oak Brook Terrace, IL 60181  
630-761-3201

private non-profit company that assists persons

- i. with assets over \$25,000
- ii. to determine what services would be of benefit to them
- iii. can act as guardian where no family or friend is able to

2. National Guardianship Association  
1604 North Country Club Road, Tuscon, AZ 85716  
520-881-6561

can be a resource for other services in your geographical area

#### **C. Illinois Guardianship and Advocacy Commission [www.state.il.us/igac/](http://www.state.il.us/igac/)**

is an executive state agency charge with safeguarding the rights of persons with disabilities.

1. Three divisions each in nine regional offices:
  - a. Office of the State Guardian can serve as guardian of last resort for disabled adults where no family or friends are available.
  - b. Legal Advocacy provides legal advice and representation to disabled persons in civil commitment matters under the mental health code
  - c. Human Rights Division investigates allegations that the legal rights of persons with disabilities have been violated and recommends remedial action
2. Will assist person/family with initial review to determine
  - a. what resources are available
  - b. financial eligibility
    - i. must have assets under \$25,000

ii. otherwise will refer you to private attorneys.

## ILLINOIS GUARDIANSHIP AND ADVOCACY COMMISSION REGIONAL OFFICES

Chicago Regional Office  
160 N La Salle Street  
Suite S500  
Chicago Illinois 60601  
(312) 793-5900  
Fax (312) 793-4311

Springfield Regional Office  
421 East Capitol Ave  
Springfield, Illinois 62701  
(217) 785-1540  
Fax (217) 524-0088  
East Central Regional Office  
423 South Murray Road  
Rantoul, Illinois 61866-2125  
(217) 892-4611  
Fax (217) 892-4598

Peoria Regional Office  
5407 North University, Suite 7  
Peoria Illinois 61614  
(309) 693-5001  
Fax (309) 693-5050  
Egyptian Regional Office  
#7 Cottage Drive  
Anna, Illinois 62906-1669  
(618) 833-4897  
Fax (618) 833-5219

Rockford Regional Office  
4302 North Main Street  
Rockford, Illinois 61103-5202  
(815) 987-7657  
Fax (815) 987-7227  
Metro East Regional Office  
4500 College Avenue Suite 100  
Alton, Illinois 62002-5051  
(618) 474-5503  
Fax (618) 474-5517

West Suburban Regional Office  
Post Office Box 7009  
Hines, Illinois 60141-7009  
(708) 338-7500  
Fax (708)338-7505

North Suburban Regional Office  
9511 Harrison Avenue W-300  
Des Plaines Illinois 60016-1565  
(847) 294-4264  
Fax (847) 294-4263

## Metropolitan Area Counties Guardianship and Service of Process Fees

	<u>Person Only</u>	<u>Under/Over \$15,000</u>	<u>Sheriff's Fee*</u>
<u>COOK</u>	\$94	\$119/164	\$23-\$50
<u>DUPAGE</u>	\$180	\$140/205	\$36-\$56
<u>KANE</u>	\$136	\$136/136	\$33-\$59
<u>LAKE</u>	\$131	\$96/131	\$24-\$55
<u>WILL</u>	\$123	\$123/158	\$40-\$79

\*Fee based on mileage from Sheriff's office to location of service