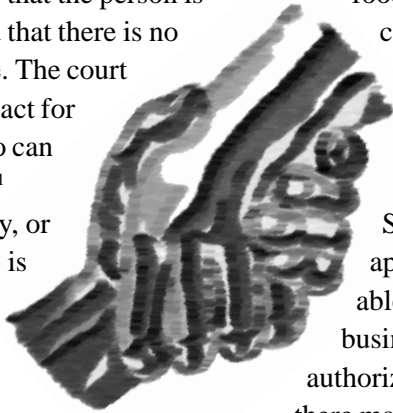

CHAPTER 1

GUARDIANSHIP

WHAT IS ADULT GUARDIANSHIP?

Adult guardianship is a legal procedure in which a court determines that a person has severe disabilities which impair the person's ability to make decisions, that the person is in need of protection, and that there is no less restrictive alternative. The court appoints someone else to act for that person, someone who can make decisions about her¹ person, about her property, or about both. Guardianship is a way for the state, in the form of the court, to enter into the life of an adult to ensure that the person's basic needs are met, and that her property is protected and used for her benefit.



WHY WOULD A PERSON NEED A GUARDIAN?

A person may need a guardian if she is not able to make every day decisions because of

¹The feminine pronouns “she” and “her” are used throughout this handbook in order to simplify the language. Both men and women are subject to guardianship, but because women are more often the subject of guardianship proceedings, the feminine pronoun is used.

the effects of a disease or other disabling condition. A person may become too mentally confused or forgetful to care for herself, or to make arrangements to meet her physical needs, such as providing food and shelter. This condition is called mental incompetency. *If there is no one else to step in and take charge, a **guardian of the person** may have to be appointed.*

Sometimes a guardian must be appointed because a person is not able to manage her own money or business affairs, and there is no one authorized to handle them for her. At times there may be a specific need for a legal signature, such as to sell property or to settle an insurance claim, and the person is not able to understand the matter. In this case a **guardian of the property** may have to be appointed.

WHAT ARE THE DIFFERENT KINDS OF GUARDIANSHIP?

The court may appoint either a guardian of the person, a guardian of the property, or both. One person can serve as both guardian of the person and guardian of the property, or different people can take each role.

A guardian of the person makes decisions only about the person's medical care,



Guardianship focuses on a person's ability to care for herself and manage her property.

residence, food, clothing, shelter, and other subjects which affect her person.

A guardian of the property makes decisions only about the person's money, income, property of any kind, stocks and bonds, and other financial matters.

ian, not to the person, for personal or financial decisions.

If a court appoints a guardian of someone's *person*, the guardian, not the person, will make decisions about where the person is to live, what medical treatment she is to receive, whom her doctors should be, with whom she associates or where she travels.

DOES EVERY INCOMPETENT PERSON NEED A GUARDIAN?

No, not everyone who is mentally incompetent needs a guardian. There are many ways to handle the affairs of a disabled person without resorting to guardianship.

- ✓ For example, there may be relatives and friends who can step in to take over the care of the disabled person without court intervention. The disabled person may have already planned for her incompetency by signing a durable power of attorney for her financial affairs. She may have executed an advance medical directive.

In Chapter 3 we discuss alternatives to guardianship in detail.

If a court appoints a guardian of someone's *property*, the guardian, not the person, will make decisions about how, where or when to spend the person's money or how to administer her property. All control over the person's finances and property is given to the guardian. The guardian typically collects all money due to the person and from that money, pays her bills and buys her necessities. The guardian of the property can sell the person's real estate and other assets and invest the proceeds as the guardian sees fit.

WHY AVOID GUARDIANSHIP?

There are several reasons to avoid guardianship.

One reason is that *guardianship is expensive*. The person requesting a guardianship, called the petitioner, must hire an attorney to draft the papers and file them in the court. Another attorney is appointed by the court for the alleged disabled person. The petitioner must pay a filing fee with the court, although this may be waived if the person is not able to pay. In addition, the guardian of the property may charge a yearly fee for handling the person's finances.

WHAT IS THE EFFECT OF A GUARDIANSHIP?

The appointment of a guardian removes some or all of a person's ability to make decisions about her life. The court takes away the authority and power that the person had as an adult and gives it to the guardian. The guardian stands in the shoes of the person, and others look to the guard-

Another reason to avoid guardianship is that it can be *time consuming*. The length of the process varies across the state, but it may take 2-6 months to appoint a guardian. This may be too long to resolve the immediate problem.

But the most important reason to avoid guardianship is that it is a legal measure which *deprives a person of control of her own life*. An adult under guardianship usually has no authority to make legally binding decisions. The guardianship order may be so broad that it deprives her of far more rights than are necessary to solve the problem at hand. Many people under guardianship have such limited understanding that this has no meaning for them, but for others, it can have a devastating effect, because they feel they have lost control over their lives.

The late United States Representative Claude Pepper, in considering the effects of the appointment of a guardian on the life of a disabled person (here called the ward), said this:

"The typical ward has fewer rights than the typical convicted felon—they no longer receive money or pay their bills. They cannot marry or divorce. By appointing a

guardian, the court entrusts to someone else the power to choose where they live, what medical treatment they will get and, in rare cases, when they will die. It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen, with the exception, of course, of the death penalty.²"

The law regarding guardianship of the person states that a guardian should be appointed only if there is no less restrictive alternative. Sometimes there *is* no alternative to guardianship. It may be the only way to protect someone who cannot protect herself. But it should be done as a last resort, after every other solution has been tried and has failed.



***Guardianship
should be used as a
last resort, when
alternatives are not
sufficient.***

²*Abuses in Guardianship of the Elderly and Infirm: A National Disgrace*, H.R.641, Subcommittee on Health and Long-Term Care, House Special Committee on Aging, 100th Cong., 1st Sess. (Sept. 25, 1987) (Comm. Pub. 100-641).