
CHAPTER 4

APPOINTMENT OF A GUARDIAN



To start a guardianship case, a petition is filed in the local circuit court.

Often there is no way to avoid a guardianship action. Perhaps all other alternatives have been tried and have failed, or perhaps the situation is one for which there is simply no other solution, such as when an incompetent person owns property that must be sold. This chapter describes how to file for guardianship in court.

HOW IS A GUARDIAN APPOINTED?

In Maryland, a guardian must be appointed by a circuit court judge. The process is started when a person files a **petition** with the circuit court, asking that the court appoint a guardian of the person, of the property, or both. The person who is the subject of the case is called the **alleged disabled person**. (After a guardian is appointed, that person is called the **disabled person**.) A lawyer usually writes and files the petition in court. It contains the basic facts of the case and states what the court is being asked to do.

WHO FILES THE PETITION?

The petition can be filed by any **interested person**. An interested person is a spouse or close family member, a close friend, or a public agency such as the Department of Social Services. Sometimes hospitals file the petition, as when an incompetent patient

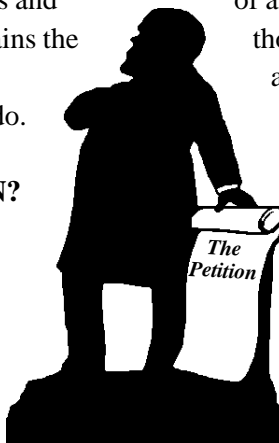
cannot be discharged to another care facility because the patient has no one who can sign the necessary discharge and admission papers and take care of financial arrangements. The hospital asks that a public guardian or someone else be appointed guardian.

WHAT DOES THE PETITION CONTAIN?

The petition contains all of the basic facts about the situation. The petition lists the name, address, age and Social Security number of the alleged disabled person. It states the relationship of the petitioner to the alleged disabled person. It states why the petition is being filed, and why the petitioner is asking that a guardian be appointed. It lists the names and addresses of all other interested persons, that is, those who are the closest relatives of the alleged disabled person, as well as any agency that is paying money to her, and anyone else whom the petitioner thinks should be notified about the guardianship petition.

WHAT ELSE IS FILED WITH THE PETITION?

Two certificates signed by doctors must be filed with the petition. Both doctors must have examined the alleged disabled person and both must



certify that the person is incompetent. One of the doctors must have examined the person within 21 days before the petition is filed.

Often the first step in obtaining guardianship is having two doctors examine the person, make a medical judgment about the person's mental capacity, and fill out the certificates. These may become evidence in the case, or the doctors may be witnesses who testify in the case.

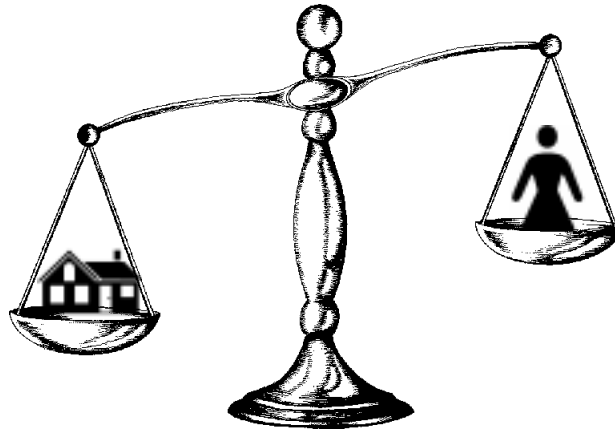
ARE THERE DIFFERENT KINDS OF GUARDIANS?

Yes, a **guardian of the property** takes care of the disabled person's financial and business affairs and her property, including monthly income, bank accounts, real estate, stocks and bonds, valuable personal items and other assets. A **guardian of the person** takes care of all affairs that concern the disabled individual personally, such as living arrangements and medical care. One person can serve as both guardian of the person and guardian of the property, or different people may serve in each role. The petition must state which kind of guardian is being requested: guardian of the person, guardian of the property or both.

WHAT IS DONE WITH THE PETITION?

The petition is filed in the circuit court in the county in which the alleged disabled person lives. The filing fee will be about \$100. This fee can be waived if the peti-

tioner is not able to pay it. If the alleged disabled person does not have her own attorney, the court appoints one to represent her. The petition, the doctors' certificates, and other court papers are served on the alleged disabled person and her attorney. This means that the papers must be officially delivered to those persons. All of the interested persons (close family members and agencies paying benefits to the alleged disabled person) listed in the petition are sent a copy of the papers also. The court



gives these people a certain amount of time to object to the guardianship, or to otherwise communicate with the court.

CAN THE ALLEGED DISABLED PERSON OBJECT TO THE APPOINTMENT OF A GUARDIAN?

Yes. The alleged disabled person is entitled to defend herself against the appointment of a guardian. Sometimes she may be so confused or sick that this is not possible. However, many who are the subjects of guardianship cases *can* communicate with their lawyers to express their feelings about it or to protest the appointment of a guardian.



Two doctors must certify that the person is incompetent.

ROLE OF THE ATTORNEY

There are many things a lawyer for the alleged disabled person can do. The attorney can—

- ◆ investigate to try to find less restrictive alternatives to guardianship, such as home health care and other supportive services which will enable the person to remain at home;
- ◆ ask for a social work assessment of the situation to identify care options for the person;
- ◆ get another, more favorable medical examination to counter the physicians' certificates filed by the petitioner;
- ◆ contact potential witnesses who will support the person's position;
- ◆ find a person more acceptable as a guardian, if the person objects to the person nominated; and
- ◆ argue for a limited or temporary guardianship order, so that even if a guardian is appointed, the person is left with as much control over her life as possible.



argue that she can care for herself adequately and present a plan which will ensure her safety.

Whatever her objection, the alleged disabled person has the right to try to prove in court that she does not need a guardian. Her lawyer is appointed to help her do this. The lawyer's role is to be the voice of the person in the guardianship proceeding, to help the person make the best case possible, and to be sure that she has her "day in court."

WILL THERE BE A COURT HEARING?

In most cases there will be a hearing before a judge on the facts presented in the petition. The judge must make three decisions:

- ◆ Is the person incompetent according to the legal definition?
- ◆ Are there less restrictive alternatives?
- ◆ Is the proposed guardian a fit and proper person to be guardian?

✓ For example, the alleged disabled person may not like or trust the person who is asking to be named guardian. She may think the person simply wants control of her money. Or, if the petitioner is alleging that she cannot maintain herself in her home, she may

The judge will take testimony or ask for other evidence to prove these questions. Usually the petitioner testifies, as well as others who know about the case, such as social service workers. Often a doctor testifies. The alleged disabled person may testify as well, in order to tell the judge what she wants and what she thinks should be done.

WHO CAN BE A GUARDIAN?

A family member or friend of the disabled person can serve as guardian, as well as an attorney, a public agency, a trust company, or a corporation. The court always decides who is the best person to serve as a disabled person's guardian. A guardian must be willing to serve, must demonstrate that he or she is familiar with the disabled person and her needs, and that the guardian is able to meet those needs. The guardian must be willing to keep records of all the financial matters handled for the disabled person, and be able to file timely reports to the court about the person's well being and property.

The guardianship law lists potential guardians in order of preference. The court usually makes appointments according to that list. The judge may name someone lower on the list, however, if there is good reason to do so. The court will appoint a guardian in this order of preference:

- 1) A person, agency or corporation the disabled person named to be her guardian when she was competent;
- 2) A health care agent the disabled person named under the Health Care Decisions Act (see page 16);
- 3) The spouse of the disabled person;
- 4) The parent of the disabled person;
- 5) A person, agency, or corporation named by the will of a deceased parent;
- 6) The children of the disabled person;
- 7) Someone who would inherit from the alleged disabled person if she died;
- 8) Any other person, agency or corporation nominated by the person caring for the disabled person;

RIGHTS OF THE ALLEGED DISABLED PERSON

The alleged disabled person has these legal rights—

- ◆ to be advised about her rights and the effect of a guardianship;
- ◆ to be represented by an attorney;
- ◆ to have a jury trial;
- ◆ to be present in court when her case is heard if she so chooses;
- ◆ if the person has a disability and cannot attend a hearing at the courthouse, the person may ask the court to hold the hearing at a place to which she has access;
- ◆ to present evidence and witnesses;
- ◆ to testify in court;
- ◆ to ask the judge to seal or close the courtroom so that she is not embarrassed by public testimony about her mental competence; and
- ◆ to appeal to a higher court if the court issues an unfavorable decision.



- 9) Any other person, agency or corporation considered appropriate by the court;
- 10) For those less than age 65, the director of the local Department of Social Services; for those 65 or older, the director of the local agency on aging.



*A guardianship order
may be appealed.*

WHAT IS A GUARDIANSHIP ORDER?

After both sides have presented their cases, the judge will make a decision. The judgment of the court must be based on “clear and convincing evidence.” This is legal term which means that the petitioner must prove his or her case with substantial evidence. If the petitioner does not present substantial evidence that the person needs a guardian, or if there are less restrictive alternatives, the guardianship suit should be dismissed.

The judge will issue an order which states whether or not the person meets the legal definition of a person who needs a guardian, and if so, the name of the person or agency the court appoints. The court will also state in the order exactly what it is the guardian can do.

The law states that the court can give to the guardian of the person only those powers which the petitioner has proven are necessary. This is called a **limited guardianship order**. The attorney for the alleged disabled person can argue for an order which is very limited and which will have the least impact on the life of the alleged disabled person.

CAN A GUARDIANSHIP APPOINTMENT BE APPEALED?

Yes, a disabled person may appeal the appointment of a guardian to a higher court. She must file an appeal within thirty days of the court’s order granting guardianship. See Chapter 8 for a list of free or reduced cost attorneys.

WHAT RIGHTS DOES A PERSON HAVE AFTER A GUARDIAN HAS BEEN APPOINTED?

Maryland law requires that the court issue an order tailored to the needs of the person. This means that a person may retain some individual rights after a guardian has been appointed. Further, there is a provision in the guardianship law which states that a person under guardianship still retains her civil rights.

But by its very nature, a guardianship limits an individual’s rights. Often, after the court finds an individual is incompetent, it may be very difficult for the person to find anyone who will honor her wishes. Her personal freedoms may be very limited, so that it is difficult for her to find someone to help her.

WHAT DECISIONS CAN A GUARDIAN MAKE?

The decisions a guardian is entitled to make should be stated explicitly in the court order granting guardianship. A guardian can make only those decisions authorized in the court order. The court should limit the powers a guardian has, but this is not always the case. Many guardianship orders give the guardian very broad authority over the person and her property. See Chapters 5 and 6 for more detail about a guardian’s duties.

CAN A GUARDIANSHIP BE REVOKED?

Yes, a court may order that a guardian is no longer needed or that the powers of the guardian should be modified or reduced because the person has recovered from the disabling condition which caused in the appointment of a guardian. To revoke a guardianship, the disabled person or someone else can file a request with the court, stating why a guardian is no longer needed. If the person is claiming that her disability has ceased, she must file one physician's certificate verifying this with the petition.



CAN A COURT REMOVE A GUARDIAN?

Yes, a court can remove a guardian who cannot perform the duties ordered by the court, or who has acted improperly as a guardian.

WHEN DOES A GUARDIANSHIP END?

The guardianship does not end automatically when the person dies. A guardian must file a petition asking the court to terminate the guardianship. A guardian of property must file a final accounting with the court, as well.



Funeral arrangements may be made by a guardian if there is no close relative to do so.