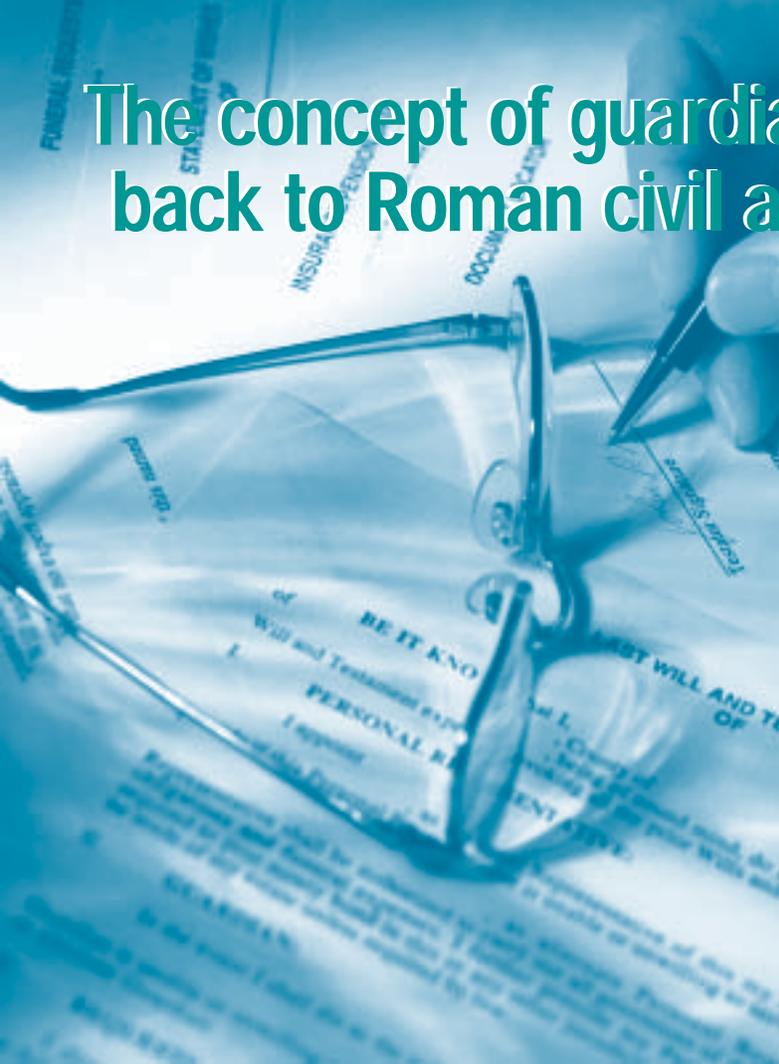




Guardianship

**A guide for the families,
advocates and friends of
people with disabilities**



The concept of guardianship is very old, dating back to Roman civil and English common law

Questions about guardianship often arise when a person with a disability reaches the age of majority. Parents, spouses, relatives, friends, advocates, providers, as well as the individual him or her self, want to know what guardianship entails, including how it impacts both the guardian and the ward. While this booklet neither advocates for nor opposes guardianship, it does, in comprehensive, non-legalistic language, answer many of these questions.

About the author – Little Rock attorney Raymon B. Harvey practices in the area of Elder Law. His principal areas of focus are Disability Planning, Guardianship, Conservatorships, Long Term Care Planning, Medicaid Planning, Estate Planning and Probate. Mr. Harvey has written sections of the Arkansas Elder Law Desk Manual, authored “Planning for Your Aging Parents,” and is a member of the National Academy of Elder Law Attorneys, the Arkansas Bar Association, the Special Needs Alliance and the Arkansas Gerontological Society.

I. What is guardianship and why is it needed?

A Guardianship is a “legal relationship” where a person (the Guardian) is given the legal right to care for another person (the Ward) and/or the Ward’s property.

There are three possible relationships:

1. Guardianship of the Person
2. Guardianship of the Estate
3. Guardianship of both the Person and the Estate.

The need for a Guardian arises when the person (the Ward) is incapacitated to the extent that he or she is not capable of making decisions about their care and/or managing their assets. Incapacity is a result of the person’s medical condition, adaptive behavior and intellectual functioning. It can also be because of the person being a minor. A court proceeding is required before a Guardian can be appointed.

Basic terms you need to know.

1. Guardian – The court appointed Guardian has the legal right to make decisions about the Ward’s care and/or property. Some decisions, such as consent to abortion, sterilization, psychosurgery, or removal of

bodily organs, require court approval.

In addition, the Guardian must exercise due care to protect, preserve, invest, and account for the Ward’s assets.

Generally, a Guardian must be 18 years or older, be of sound mind, not be a convicted or unpardoned felon and be an Arkansas resident. The court will give preference to the parents of an unmarried minor, to a Will or other written document of the parent, to the request of the Ward (if 14 or older), a spouse, or a blood relation.

2. Ward – The Ward is the person who requires a Guardian. The need for a Guardian arises because the Ward is a minor and/or because the Ward is not capable of making decisions about their care and/or managing their assets. This lack of capacity must be proven to the court.

3. Court – The court that decides the need for a Guardian is the Circuit Court in the county where the person (the Ward) resides. A Petition for a Guardian must be filed and medical evidence and testimony must be presented to the Circuit Court Judge. That court, thereafter, retains jurisdiction and all future reporting is made to that court.

II. Who can be a guardian?

Almost anyone can be appointed as a Guardian. Arkansas law sets out the minimum qualifications as being eighteen (18) or older, of sound mind, and not a convicted or unpardoned felon.

The law sets out a preference for the parents of an unmarried minor, if qualified, over all others. Otherwise, the law requires the appointment of the one most suitable, giving regard to:

- (1) A request in writing, such as a Will;
- (2) A request by a minor, fourteen (14) years or older;
- (3) A request made by the spouse;
- (4) The proposed guardian's relationship by blood or marriage, and
- (5) A request made to the court by the incapacitated person.

III. Who needs a guardian?

The actual need to pursue Guardianship generally arises when the person is incapacitated and no one has the legal authority under a durable power of attorney to act on the person's behalf.

Any "incapacitated person" may need a Guardian. Incapacitated means the person is so impaired that he or she is unable to make or communicate decisions essential to the person's health or safety or to manage his or her estate.

By definition, the impairment is the result of a disability such as mental illness, mental deficiency, physical illness, chronic use of drugs, or chronic intoxication. The impairment can also be because the person is a minor.

IV. What are the types of guardianship?

A. Guardianship of the Person – Guardianship of the Person is necessary if the person is unable to give informed consent for medical treatment or to make appropriate decisions about where to live.

B. Guardianship of the Estate – A Guardianship of the Estate is necessary when the person cannot manage his or her financial affairs. The Guardianship of the Estate is responsible for the management of all the Ward's assets, including asset preservation, investment, distribution, and maintenance.

A Guardian can be appointed for both the person and the estate.

V. How is a guardian appointed?

You must go to the Circuit Court for the Ward's county in order to be appointed a Guardian. There is a set procedure that must be followed. Additionally, there are filing fees and costs involved in the process.

a. A petition must be filed at the Probate Clerk's office requesting a guardian be appointed

This is filed in the Probate Clerk's office of the county where the proposed Ward lives. The Petition is generally filed by the person seeking to be appointed Guardian, with the aid of an attorney. A statement by a physician is usually filed along with the Petition unless the reason is because the person is a minor.

Once the Petition is filed, the proposed Ward must be notified along with all members of the immediate family. Generally, there is a requirement that twenty (20) days must pass between this notice and the hearing before the Judge.

b. A Hearing is required before a Judge.

A hearing is required before a Circuit Court Judge. The Judge decides if the proposed Ward needs a Guardian and who the Guardian will be.

The Judge is presented with evidence that shows

the need for a Guardian. Generally this evidence consists of written statements from a physician and oral statements from individuals who have firsthand knowledge of the proposed Ward.

The proposed Ward has the opportunity to contest the Guardianship at the hearing. He or she can be represented by counsel and can present evidence. Ultimately, the Judge decides if there is a need for a Guardian and who that will be.

c. The Guardian may be required to post bond.

The Letters of Guardianship is issued by the Probate Clerk's office and authorizes the Guardian to take custody of the Ward and/or possession of the Ward's assets.

d. Once the Guardian has posted a bond (or if no bond is required, has filed an Acceptance of Appointment with the Probate Clerk), the Letters of Guardianship are issued. The Acceptance of Appointment as Guardian is simply a signed statement that the Guardian does accept the appointment.

The Letters of Guardianship is issued by the Probate Clerk's office and authorizes the Guardian to take custody of the Ward and/or possession of the Ward's assets.

VI. What reports and accounting are required?

The Guardian of the Estate is required to file an inventory of the Ward's property. This inventory is generally expected to be filed with the Circuit Clerk's probate section within ninety (90) days of the original appointment as Guardian of the Estate.

Annual Accounting

Every year thereafter, the Guardian of the Estate is required to file an annual accounting. This is filed with the Circuit Clerk's probate section within sixty (60) days of the anniversary date of appointment.

The annual accounting generally includes the assets of the Ward at the last accounting, the total income received during the year, any additions to the Ward's property and/or assets, and what was paid out for the Ward.

Annual Report

The Guardian is also required to file an annual report with the Circuit Clerk's probate section. The report generally contains the current condition of the Ward, where the Ward lives and if the Guardianship is still necessary.

VII. What decisions require the court's approval?

The Guardian is appointed to make decisions regarding the Ward's property and the Ward's well being. All decisions are made with the best interests of the Ward in mind. There are, however, certain decisions that *require* the Court's approval.

1. To consent to abortion, sterilization, psychosurgery, or removal of bodily organs, except in a life-threatening situation.
2. To consent to withhold lifesaving treatment.
3. To authorize experimental medical procedures.
4. To authorize termination of parental rights.
5. To authorize the Ward to vote.
6. To stop the Ward from obtaining a driver's license.
7. To consent to a settlement or compromise of any claim by or against the Ward.
8. To hospitalize the Ward at the State Hospital or like institution.
9. To execute a contract, entered into by the Ward before the need for a guardianship.

10. To continue a business on behalf of the Ward.
11. To borrow money, make gifts or disclaim property for the Ward.
12. To pay for the care, maintenance, and education of the Ward and his or her dependents.
13. To purchase a home for the Ward or the Ward's dependents.
14. To sell real estate.

Parents are responsible for the support of their unmarried, minor children.

VIII. How does a guardianship end?

A guardianship ends when the reason for incapacity, that prompted the appointment of a Guardian, ends. Unless the reason is minority, the Court must determine that the Ward has capacity. A statement must be submitted, to the Court that the Ward is no longer incapacitated.

Once the Court finds that capacity has been restored, the Guardian is discharged. The Guardian immediately settles his or her accounts and returns all property to the Ward. A guardianship also ends by the death of the Ward.

IX. How is guardian substituted or removed?

The substitution or removal of a Guardian requires the Court's approval. Generally the Guardian will not change unless the Court is satisfied that the new Guardian is for the best interest of the Ward.

If a Guardian resigns, he or she must notify the Court and request to be removed. A suitable, qualified and competent individual must be available to take over. A Guardian can be removed by the Court for various reasons. These include:

1. Becoming mentally incompetent;
2. Mismanaging the estate;
3. Failing to perform any duty imposed by law, or
4. Has moved out of the State of Arkansas.

Resource Guide

Anyone seeking assistance in establishing or contesting a guardianship or, in the case of an individual who wants information about his or her legal rights, can contact the Disabilities Rights Center at 1-800-482-1174, the Center for Arkansas Legal Services at 1-800-950-5817, or Arkansas Elder Law at 1-501-221-3416



5800 West 12th Street, Suite 805, Little Rock, AR 72204

1-501-661-2589 ♦ 1-800-482-54,ext 2589 (V/TDD)

Web Site – www.ddcouncil.org

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