When and How to get Guardianship for a Disabled Adult



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Disclaimer — Please read

This packet of information was prepared to answer general questions and give general advice about the law in Illinois. This packet may or may not also include forms that you can use. When reading this packet or using the forms, keep in mind that the advice, information, and forms were created to assist readers with general issues, not specific situations, and as such does not replace the advice or representation of an attorney licensed to practice in the State of Illinois. Because of this and because of unanticipated changes in the law, the School of Law at Southern Illinois University and the person, institution, or agency who gave you this packet make no claim as to whether the use of this packet will acheive the result you desire and disclaim any responsibility for the consequences of any form prepared or action taken in reliance upon the information in this packet. If you are concerned or do not understand whether this packet will be of assistance to you or will apply to your specific situation, you should talk to an attorney who is licensed to practice in the State of Illinois. If you have any questions about this disclaimer, call the Self Help Legal Center.

WARNING!

Before you proceed with using this packet, you should ask yourself the following questions:

1. Have I tried to consult a private attorney?

No self-help publication, packet, or form can replace the advice and experience of a licensed attorney. An

attorney may not cost as much as you think, especially if you just need to ask questions. Before you

proceed on your own, call several local attorneys, compare prices, and find out whether you can pay an

attorney or not.

2. If I cannot afford an attorney, have I tried to find a free source of legal assistance?

There are several agencies which provide legal assistance for free to certain groups of individuals. Some

of these agencies are listed below. While they may not be able to help you with a particular problem, it

does not hurt to call them to find out before you proceed on your own. What follows is a list of legal

service agencies that may or may not be avaiable to help with your case:

Land Of Lincoln Legal Assistance

Serves the 65 southernmost counties in Illinois

Toll free: 877-342-7891

For additional information, you may visit their website at:

Http://www.lollaf.org

Prairie State Legal Services

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Serves most of northern and north central Illinois outside of Cook County

815-965-2134

800-331-0617

Coordinated Advice and Referral Program for Legal Service

serving Cook County, 312-738-9200

and Will County

815-727-5123

3. Is this something that I can do on my own?

If you have trouble following directions, or have difficulty reading, writing, or speaking in public, you may not be able to follow the directions and advice in this packet. If this is the case, find a friend or someone who can help you before you proceed on your own.*

*Obtaining a guardianship is a difficult procedure, and if at all possible, a lay person should seek out legal assistance when attempting to do so. If legal assistance is not an option, it is very important that you read each section of this packet completely before you take any action in regard to a legal problem including using any forms that supplement this packet.

Because this packet discusses terms and actions you are likely not familiar with, you will

need to refer back to the following sections from time to time when reading this packet:

Who are these people

This section describes people that you may come into contact with in regard to a particular legal problem. It is important that you understand who these people are and what they do and don't do.

What these legal terms mean

This section defines commonly used legal terms in words that you can understand. To use the rest of this packet and any supplemental forms, you need to understand exactly what these terms mean.

Summary of the law in this area

This section contains summaries of important areas of the law that you need to know.

Guardianship Time Table

This section list the standard deadlines for filing guardianship documents.

Popular filing questions

This section answers commonly asked questions about filing documents.

Who these people are



Judge:

The judge is the person who presides over the courtroom. In most cases, including divorce cases, the judge makes all of the final decisions and approves all agreements. When a judge makes a decision or a finding, it has the force of law. The judge also sets and enforces court rules (like dress codes) and in some courthouses, the judge decides when cases are scheduled.



Circuit Clerk:

The Circuit Clerk is responsible for creating, managing, and updating court files. When you want to put something in a court file, see a court file, or make a copy of something in a court file, you talk to the Circuit Clerk's staff. In some courthouses, the Circuit Clerk also decides when cases are scheduled.



Sheriff:

The Sheriff's main duty is to keep the peace and to enforce the law. His/her role in the legal system, however, is usually to "serve" (give notice) to people that they are being sued. The sheriff does this by giving the person a notice called a "summons". The sheriff also enforces the judge's orders.



Attorney:

An attorney is someone who can help you with your legal problem by providing you with advice about the law, the legal system, and the merits of your case. An attorney can act as your advocate and can represent you in court and in negotiation settlements.



Mediator:

A mediator is someone who can meet with you and the person with whom you have a dispute and help you both come to a resolution you can both agree on. A mediator is not a judge and does not make decisions, but rather helps you make a decision. In some counties, mediation is required in certain types of cases, including child custody.

WHAT THESE LEGAL TERMS MEAN

Disabled adult- A disabled adult is 18 years or older and because of mental illness, mental deterioration, or physical incapacity is unable to care for their person or estate or because of idleness, gambling, debauchery or drugs, wastes his estate thereby exposing himself or his family to want or suffering (755 ILCS 5/11a-2). Before a person is found to be disabled, they should be referred to as **alleged disabled person** or **respondent**. The term ward is also used to describe a person with a court appointed guardian.

Guardian- Illinois statutes defines who can serve as guardian as a person 18 years or older, who is a resident of the United States, not of unsound mind or a disabled person, and in some instances, not convicted of a felony (755 ILCS 5/11a-5).

Guardian ad litem (GAL)- A independent professional appointed by the court to express whether or not a guardianship is in the best interest of the respondent. In a case where the guardian ad litem disagrees with the respondent, the respondent should be appointed a separate attorney that will advocate on behalf of the respondent.

Petition- A formal document requesting the court to make a finding or adjudication.

Petitioner-Person who brought the matter (or petition) to court.

Respondent-The person who is the subject of the petition.

Short-term guardian- A person appointed by the guardian (and not the court) to take the place of the guardian when the guardian is unavailable and with consideration of the ward's preference. The paper making the assignment must be signed by two other credible witnesses and the short-term guardian (although the guardian can sign at a different time). A short-term guardian can only serve for a maximum period of 60 days in a given year, and there can not be more than one instrument in force at any given time (755 ILCS 5/11a-3.2).

Standby guardian- A person appointed by the court to act as guardian when the guardian dies or is no longer able or willing to act as guardian (See 755 ILCS 5/11a-3.1 or supplement for petition outline)

Surety-A person or corporation that is bound in writing for the debt of another (i.e. guaranteeing the payment). See 740 ILCS 155/1

Temporary guardian- The court may appoint a temporary guardian where there is a showing of necessity for the immediate welfare of the alleged disabled person. In determining the need for a temporary guardianship the court will consider the immediate welfare and protection of the alleged disabled person and his or her estate as the major concern. The temporary guardian powers are determined by the court and its order. The guardian's authority will terminate no later than 60 days or upon the appointment of a regular guardian, which ever is sooner (755 ILCS 5/11a-4).

"ILCS"- is the acronym for the Illinois Compiled Statues. The Illinois Compiled Statutes are the laws that govern the people in Illinois. The numbers that flank ILCS will refer to the chapter and section where the specific law can be found.

Before deciding to bring a guardianship action you should investigate whether other options (such as representative payee, or powers of attorney for healthcare and property) could be utilized rather than a guardianship or have already been put in place. At the Self Help Legal Center website and under the Health and Aging icon there is a packet entitled:

How to protect your assets and your wishes for medical treatment by having a durable power of attorney for health care and property in Illinois

The above packet will describe advance directives that can be made by the individual themself. Just as the court will look to see if there is a less intrusive manner in which to protect an alleged disabled adult, you as the prospective agent should also look into other means of achieving this goal. Before granting a guardianship, the court should consider whether any advance directives already executed would satisfy the purpose of the proposed guardianship. A guardianship does not over turn a power of attorney already in place.

Summary of law GUARDIANSHIP FOR DISABLED ADULTS

Sometimes, for various reasons, adults can not handle their own affairs. Under Illinois law (755 ILCS 5/11a-3), if a petition is filed by a reputable person or the disabled person themself, a court may find by clear and convincing evidence that an adult is disabled (see definition page) and appoint a guardian to represent the disabled adult's person and or their estate.

If the alleged disabled person (from now on referred to as the "respondent") has no person available to serve as guardian and all other possible solutions have been exhausted, the respondent adult may be referred to the Illinois Guardianship and Advocacy Commission. The Illinois Guardianship and Advocacy Commission has a very helpful website and guide in English and in Spanish found at htp://gac.state.il.us/. Remember that the Illinois Guardianship and Advocacy Commission cannot act as an attorney or petitioner to seek guardianship and they can only act as guardian for an individual with an estate valued at less than \$25,000. When the alleged disabled person has no person available to serve as guardian, and their estate is valued over \$25,000, then the petitioner can ask the court to appoint the county's public guardian. The circuit clerk's office should have the name or names of the person(s) acting as public guardian in the county the petitioner is seeking guardianship. If the respondent is elderly, you may try to contact local agencies that assist senior citizens to see if they can point you to some assistance in seeking guardianship.

There are five different types of guardianships: temporary, plenary, limited, short-term,

and stand-by guardian. This packet is designed to assist those persons seeking a plenary guardianship, but regardless of the type of guardianship sought the following materials should be prepared for court:

- 1) Petition for Appointment of a Guardian;
- 2) Physician's Report
- 3) Motion for Guardian Ad Litem;
- 4) Order for Guardian Ad Litem;
- 5) Notice;
- 6) Certificate of Mailing;
- 7) Notice of Filing;
- 8) Certificate of Service:
- 9) Findings of Fact, Conclusions of Law and Order Appointing Guardian;
- 10) Oath of Guardian;
- 11) Letters of Office-Guardian of the ...;
- 12) Summons for Appointment of Guardian/Notice of Rights of Respondent;
- 13) Bond of Legal Representative-No Surety;
- 14) Bond of Legal Representative- Surety;
- 15) Notice of Right to Seek Modification;
- 16) Verification by Certification.

A guardianship proceeding generally starts with a petition filled he circuit

clerk's office in the county which the disabled person resides. If the disabled per son lives outside of Illinois the petition should be filed in the county in which they own land. You should check to see if the county in which you are filing has their own rules, practices, or forms regarding seeking guardianship (e.g., Cook County).

There is usually a filing fee that must be paid to file a petition seeking guardianship. You

should contact the Circuit Clerk's Office in which the petition will be filed to find out how much the fee will be. If the person that you are seeking guardianship for is indigent, or poor, you may be able to file a Motion to File Guardianship Petition Without Payment of Fees (Form in Supplement).

Under 755 ILCS 5/11a-8 the petition seeking guardianship should set out:

- the relationship/interest of the petitioner to the respondent;
- the name, date of birth, and address of the alleged disabled person;
- the basis for the guardianship;
- and the name, age, and address of proposed guardian;
- the name and address of any previously named agents under powers of attorneys;
- the names and address of the nearest relatives in the following order—
 - 1) spouse and adult children, parents, and adult brothers and sisters, if any, if none then
 - 2) nearest adult relative;
- the approximate value of the estate at issue; and
- the amount of anticipated annual gross income.

No guardian will have the power to place their ward in a residential facility unless it has been specifically provided for by the court (755 ILCS 5/11a-14.1). Therefore, if the petitioner

needs the authority to place the respondent in a residential facility, then the petitioner should request permission to do so in the petition and order for guardianship.

In drafting the petition for guardianship keep in mind that the court is having to make a decision about a person's rights, so the judge will want to know as much as possible about why the guardianship is necessary. The court will also examine the evidence to determine how broad to make the guardianship, and whether all the appropriate parties have been notified of the guardianship.

After filing the petition for guardianship, the court should set the matter for a hearing within 30 days. The petitioner will have the obligation to send the petition and notice to **all** of the individuals named in the petition, and to have the respondent served personally by the appropriate sheriff's department. Details on serving a summons is covered in the Self Help Legal Center's packet "How to Serve Someone By Sheriff" ttp://www.law.siu.edu/selfhelp/info/serve/servei.pdf), but the summons for guardianship is included in the supplemental packet. All the notices should include the date, time, and location of

included in the supplemental packet. All the notices should include the date, time, and location of the hearing. The respondent should also be given the "**Notice of Rights of Respondent**" (see 755 ILCS 5/11a-9 or the supplement to this packet). The respondent needs to be personally served at least 14 days before the hearing date. The Court may waive the 14 day requirement in certain cases where only *temporary* guardianship is requested.

To help the Court determine the necessity of a guardianship it will need to see a report from a physician that has examined the respondent within the previous 90 days. The probate clerk in the your county may be able to give you a form to use for the physician's report. (The

supplement to this packet has a form for the physician's report and a cover letter to send with it.)

The doctor's report should be filed with the circuit clerk's office at the same time as the petition to determine guardianship, or at least 10 days before the scheduled hearing.

According to 755 ILCS 5/11a-9 the physician's report should contain a description of the respondent's disability and include an evaluation of how their condition impacts their ability to care for themself. It is important that the physician's report be given to the circuit clerk's office in a sealed envelope, because it contains information that should not be made available to the general public.

As it states in the notice of rights (see 755 ILCS 5/11a-10), the respondent has a right to an attorney and a jury trial. In most cases, the court will start by appointing a guardian ad litem (GAL) to determine the best interest of the respondent: therefore, it is important that the petition and order for the GAL be submitted at the same time as the petition for guardianship. After the appointment by the court, the petitioner will need to make sure a copy of the order of appointment, the petition for guardianship and the notice of hearing are all sent to the GAL.

The GAL is responsible for submitting a report based on their own independent review of the physician's report and personal examination of the respondent. The GAL should also attempt to discover the respondent's position regarding the petition for guardianship. If the GAL's position is contrary to that of the respondent's, or if the respondent requests a lawyer, the Court shall appoint an attorney to represent the respondent's position. When the guardianship goes to hearing, or shortly thereafter, the GAL will generally submit a bill for his or her services. The court may order the respondent to pay for the GAL's fees, or if the respondent is unable to do so, may order the petitioner to pay the costs.

At the hearing the attorney for the petitioner, or if there is no attorney, the petitioner themself, will bear the burden of going first in the hearing and demonstrating to the court by "clear and convincing" evidence that a guardianship is necessary. The Court will want to determine the nature of the respondent's disability and how it impacts the respondent's ability to handle his or her affairs. The Court will also need to know the living arrangements proposed by the possible guardian and the respondent's ability to communicate "responsible decisions" for him or herself (755 ILCS 5/11a-11). Generally, the evidence is presented by the petitioner through the testimony of his or her witnesses after they take the witness stand. It is advisable for the petitioner to go through and review the paperwork that has been filed in court, and write down questions for your witness that would elicit the information contained in the paperwork, and any new information obtained about the respondent since the filing of the paperwork.

Under 755 ILCS 5/11a-12, if the court finds no basis for a guardianship, the petition will be dismissed. If the Court finds that the respondent lacks some, but not all capacity, the court will enter a limited guardianship. But, if the court finds that the respondent is without the ability to care for themself and or their estate, and that a limited guardianship is not sufficient, the court will enter an order for a plenary guardianship over the respondent's person and or estate.

Before a guardian can begin his or her duties as guardian they will have to file an oath with the court that they will "...faithfully discharge the duties..." involved in being a guardian (form in supplement). In addition, the court can require the guardian to post a bond to ensure the faithful performance of his or her duties (see 755 ILCS 5/12-2). The amount of bond shall be 2 times the amount of the disabled person's estate if a) a person acts as surety, or b) if the bond is

excused; or 1 ½ times the amount if a corporation acts as surety. The bond or security can be excused by a will, by the disabled adult, or if the guardian is the Office of State Guardian. (see 755 ILCS 5/12-5)

If the court finds the respondent is disabled, and if the court orders a guardianship for the respondent, then the guardian will be given letters of office. The letters of office should be sufficient to notify the parties, that interact with the disabled adult, that the guardian is to make all further decisions regarding the respondent's health and or property (depending on the court's order).

After being appointed guardian, the person (or agency) shall act as closely as they can to follow the wishes of ward, if they were competent, considering any evidence of their moral beliefs. If ordered by the court, a personal guardian shall have custody of the ward and the ward's minor children, but cannot deprive the ward's spouse of custody of the children without the spouse's permission. A guardian of a person will have to give a regular current report of the ward's physical condition and living arrangements (see separate report packet).

The guardian of an estate may make frugal investment decisions, with the permission of the court, that are in the best interest of and for the comfort of the ward and his or her dependents. Within 60 days of being appointed guardian of an estate, the guardian will need to prepare an inventory of the estate (see separate report packet). In addition, a guardian of an estate will be required to provide a verified accounting of the status of the ward's estate (see separate report packet). The accounting is usually required annually, but the guardian should check the docket entries to make sure when the court asked for an accounting. Keeping detailed records

throughout the year of expenditures and income makes the guardian's reporting easier.

TIME TABLE FOR EVENTS

- 1. **Physician's Report.** A physician's report must be filed **at least 10 days prior to the hearing**. The report must be **based upon an examination** that was **performed within 3 months from the date of filing the petition**. 755 ILCS 11a-9. Normally, the physician's report is obtained prior to filing the petition and is filed when the petition is filed.
- 2. **Hearing** must be scheduled within 30 days from the date the petition is filed. 755 ILCS 11a-10.
- 3. **Temporary Hearing**. Can be scheduled any time the court will allow. The maximum period for a temporary guardianship is **60 days**.
- 4. **Notice of Hearing.** The petitioner must give notice of the time and place of the hearing to those persons named in the petition, including the proposed guardian, **not less than 14 days prior to the hearing.** 755 ILCS 5/11a-10.
- 5. **Summons.** The respondent, must be served with a copy of the petition and summons not less than 14 days before the hearing. 755 ILCS 5/11a-10 (e).
- 6. **Notice of Right to Seek Modification**. At the time of the appointment of a guardian the court shall inform the ward of his right to petition for termination of adjudication of disability, revocation of the guardianship or to modify the guardianship. 755 ILCS 5/11a-19.
- 7. **Inventory.** Within **60 days** from being appointed guardian of the estate, the guardian must file an inventory of the real and personal property of the ward. 755 ILCS 5/14-1.
- 8. **Reports.** The guardian of the person has a responsibility to file a report with the court, at intervals indicated by the court, stating the ward's current status. 755 ILCS 5/11a-17.
- 9. **Accounts.** A guardian of the estate must file an account of all transactions made on behalf of the ward **as directed by the court**, and if no time is set by the court, then once **every 3 years** from the date letters of office were issued. 755 ILCS 5/24-11.

Popular filing questions

Q: What is a court file?

A: The file is the way that the courthouse keeps track of a lawsuit.

The file includes all of the documents that were filed, notices of hearings, notes by the judge and clerk, and letters to and from the judge and clerk.

Q: When do you need to file a document in a court file?

A: Generally, you will file a document when you want to: have evidence that a task was completed, record an event or a statement, or give notice to someone about something.

Q: What does it mean to file a document in a court file?

A: Generally, filing a document means giving the Circuit Clerk a copy of a document so that he/she can place it in the court file you want it to go in. When the Clerk files the document, he/she will stamp it with a stamp that says the date (and sometimes the time) the document was filed.

Q: Does filing a document make it legal?

A: No. The Clerk will not check to make sure that your document is in compliance with the law. Most of the time you can file anything you want as long as you are willing to pay for the filing costs. It does not mean, however, that what you have filed is correct.

Q: Why is filing so important?

A: Most of the time, filing is the primary way to show that you have met the deadline for something — either to initiate a lawsuit or to notify someone of a lawsuit or a hearing. Filing is also the way that you notify the court of your answer (response) to lawsuit started against you.

Please note that failure to file something on time can cause you to lose your right to proceed with your claim or you may be forced to start over.