Hearing. The alleged protected person is required to be present in court unless the court finds:

- it is impossible or impractical for the alleged incapacitated person to be present due to the disappearance, absence from the state or similar circumstances;
- it is not in the alleged incapacitated person's best interest to be present because of a threat to the health or safety of the alleged incapacitated person;
- the incapacitated person has knowingly and voluntarily consented to the appointment of the guardian or the issuance of a protective order and at the time of such consent the incapacitated person was not incapacitated as a result of a mental condition that would prevent that person from knowingly and voluntarily consenting; or
- the alleged incapacitated person has knowingly and voluntarily waived notice of the hearing and at the time of the waiver was not incapacitated as a result of a mental condition.

Prior to the hearing, the court may appoint an attorney for the alleged protected person and shall appoint a guardian ad litem. The attorney and guardian ad litem shall be paid from the estate if a guardian is appointed.

At the hearing, the court will hear evidence regarding the disability of the alleged protected person. Once the court determines that a guardian is necessary, the court must determine whether the proposed guardian in the petition is qualified. The court will also consider certain preferences in selecting a guardian.

Guardian qualifications. Any guardian must be at least 18 years of age, of sound mind, not a convicted felon and a person whom the court finds suitable. A corporation may be guardian if authorized to act as a fiduciary in Indiana. The guardian must accept the appointment and file a bond in an amount equal to the value of the personal property plus one year's income from all property. Individual surety on the bond is acceptable under certain guidelines. The court may reduce the bond if limitations are placed on the guardian's use of the property.

Guardian preferences. In selecting a guardian, the court is required to give preference as follows:

- a person designated in a durable power of attorney executed by the protected person;
- a spouse of the incapacitated person;
- an adult child of the incapacitated person;
- a parent of the incapacitated person or a person nominated by will of deceased parent of the incapacitated person or by any writing signed by a parent of the incapacitated person and attested to by at least two witnesses;
- any person related to the incapacitated person by blood or marriage with whom the incapacitated person has resided for more than six months before the filing of the petition;
- a person nominated by the incapacitated person who is caring for or paying for the care of the incapacitated person.

Types of Guardianships

There are different types of guardianships.

Regular. The guardian is required to care for and maintain the ward. A person under age 19 does not need a guardian if a parent of the person is properly performing parental duties. The guardian is to see that the protected person is properly trained and educated and has the opportunity to learn a trade, occupation or profession. The guardian is required to report the condition of the protected person to the court at regular intervals.

The guardian is charged with protecting, preserving, investing, and accounting for the protected person's estate. If the assets of the protected person are extensive, a separate guardian for estate management may be desirable. The guardian must file an accounting every two years and seek approval from the court for extraordinary expenditures or transfers. The guardian also files income tax returns and pays taxes for the ward.

Limited. The court may, upon request or upon its own decision, limit the power of any guardian to act on behalf of the protected person. If there is no limitation, the protected person has no legal capacity to act and can only legally act through the guardian. The court may limit the authority of the guardian to act in only those situations where a guardian is necessary, thereby reserving to the protected person many of the protected person's rights and privileges.

Temporary. In emergency situations, the court can, without hearing, appoint a temporary guardian for a specified period not to exceed 60 days if the court finds that the welfare of the alleged protected person requires the immediate appointment of a guardian. This is an extraordinary procedure and is limited to emergency situations.

Liability of Guardian

Generally, a guardian is not legally responsible for the actions of the protected person. This applies to legal liability as well as financial liability. If, for example, a protected person runs away, steals a car and wrecks it, the guardian cannot be charged with the crime of theft nor will the guardian be required to use his personal funds to pay for the damages. If the guardian acts in good faith in carrying out his duties to protect the ward's interest and in faithfully reporting to the court, the guardian will not be held liable for his actions. The guardian will be liable for any breaches of the duties which he owes to the protected person.

Removal as Guardian

If the guardian is not doing the job properly, the guardian may be removed by the court. When this happens, a successor guardian will be appointed. A successor guardian may also be appointed if the first guardian resigns or dies.

Termination

Several conditions terminate the guardianship:

- if the guardianship was established solely because the protected person was under 18 years of age, it may be terminated when the protected person becomes 18 years of age or, in the court's discretion, if the protected person is married before age 18;
- if the court determines the protected person is no longer incapacitated;
- if the protected person dies;
- at the court's discretion if the estate is exhausted or the estate is less than $3,500;
- at the court's discretion if the protected person's residence is changed to another state and a guardian has been appointed for the protected person in that state; or
- if the court determines that the guardianship is no longer necessary for any other reason.

On termination, the guardian is required to file with the court an account and report of all activities. If the court accepts the report, the guardian will be discharged from all obligations after final distribution is made.

All inquiries regarding the reprinting or distribution of this brochure should be addressed to the Indiana State Bar Association, 230 East Ohio St., Indianapolis, IN 46204, (317) 639-5465. 1/2001

Guardian Laws

Guardianship Types and Requirements

Provided in the Public Interest by the Probate, Trust & Real Property Section of the Indiana State Bar Association

Introduction

It has long been recognized that because of age or incapacity certain individuals are not legally able to handle their own affairs. In response to this problem, the law allows guardianships to be established by the courts. Upon petition by an interested person, a court may appoint a qualified individual or institution to handle the affairs of an incapacitated individual. An individual for whom a guardianship is requested is referred to as the *protected person.* The person appointed by the court to handle the protected person's affairs is referred to as the *guardian,* though another familiar term is *conservator*.

The purpose of this pamphlet is to provide general information about the guardianship laws in the state of Indiana. This pamphlet is issued to inform, not to advise. No one should try to interpret the law without the aid of a lawyer who knows the facts, since the facts may change the application of the law.

Minor and Disabled Person

The court may appoint a guardian for an individual who is a minor or an incapacitated person. A *minor* is a person who is under the age of 18 years and not emancipated. An *incapacitated person* is an individual who: (1) cannot be located upon reasonable inquiry; (2) is unable to manage in whole or in part the individual's property or to provide self care because of insanity, mental illness, mental deficiency, physical illness, infirmity, habitual drunkenness, excessive use of drugs, incarceration, confinement, detention, duress, fraud, undue influence of others on the individual, or any other disability; or (3) has a developmental disability as the result of a mental or physical impairment suffered before the age of 22 that is likely to continue indefinitely and results in functional limitations in several areas reflecting the incapacitated person's need for a combination of special treatment. An individual 18 years of age or older is presumed to be competent. Before a guardian can be appointed for an adult individual, the court must be presented with proof by a preponderance of the evidence that the individual is incapacitated.

Not every minor or incapacitated person needs a guardian. A guardianship is only one possible solution to the many problems that may confront the minor or incapacitated person. Because a guardianship requires a petition to the court and a court hearing, it can be time consuming and expensive. Moreover, the guardianship may not be the best way to handle the individual's personal and financial affairs. Other alternatives should be kept in mind.

Alternatives

A guardianship is usually considered in response to a specific problem. For example, the incapacitated person may own real estate that needs to be sold or bills that need to be paid. Less restrictive alternatives might be more appropriate than a guardianship. A lawyer should be consulted to determine and pursue the most appropriate approach.

Representative payee. If the only income of a person is SSI, Social Security, or some other federal supplement, a representative payee may be an appropriate alternative to a guardianship. A *representative payee* is a person authorized by the Social Security office to receive and manage federal funds for another person who is unable to manage his own funds. The representative payee will be required to periodically account to the Social Security office about how the funds were used for the other person. Separate records must be maintained and the representative payee must not mix those funds with his own.

Specific powers of attorney. If the problem involves an account or deposit in a bank or similar institution, the owner of the account or deposit, while competent, may execute forms provided by the institution which creates a *specific power of attorney* giving a trusted individual power to manage that specific asset for the owner. This is preferable to a joint account which would create an ownership interest on behalf of the individual being asked to manage the account. The creation of an ownership interest in the joint account may be contrary to the desires of the original owner because all of the account passes to the surviving joint owner at the death of the original owner and no provision is made for other unnamed beneficiaries. Moreover, the added joint owner or his creditors can remove all of the account monies even while the original joint owner is alive.

Health care representative. If there are concerns that an individual may, at some time, lack the ability to make decisions regarding the individual's health care, the individual may appoint a *health care representative* with the power under Indiana law to make decisions on behalf of the individual if the individual is unable to do so. The appointment of a health care representative must be done when the individual is competent.

Durable power of attorney. An individual can give someone else the power to make decisions for him by using a *durable power of attorney*. The durable power may include powers to receive federal checks, handle bank accounts, buy and sell property and make health care decisions along with many other powers. The individual must be competent at the time the power of attorney is executed and delivered to the agent. The selection of the agent is very important because the agent can do anything authorized in the power until the power is revoked or the individual dies.

Trust. A competent individual can enter into a contract with a *trustee* transferring management of certain assets to the trustee. The trustee would be required to manage the assets according to the desires of the individual as expressed in the trust contract.

Claims under $3,500. When the estate of a minor or incapacitated person does not exceed the value of $3,500, the court, without the appointment of a guardian, may, in the case of an incapacitated person, authorize deposit of the money in a protected account or delivery to a suitable person or, in the case of a minor, delivery to the parent or similar individual.

Protective proceedings. The court, on request and without the appointment of a guardian, may issue a protective order for a minor or incapacitated person protecting the person or the person's business affairs and property. Included in these powers is the right to establish a trust for the protected person.

Parental powers. The parents of a minor, jointly or the survivor if one is deceased, may execute on behalf of the minor consents, waivers or powers of attorney under the Internal Revenue Code and Indiana tax, probate and health care law.

Establishing a Guardianship

There is a specific procedure to follow in establishing a guardianship.

Location. All counties in Indiana have a court which has jurisdiction over "probate" matters. Any action to establish a guardianship must be filed in that court. For a protected person who is a resident of Indiana, the proper county for filing the petition is the county where the alleged protected person lives. If the alleged protected person does not reside in Indiana, then any county where there is property of the protected person would be appropriate. If a temporary guardian is requested for medical care, the proceeding can be filed in the county where the medical care facility is located. Proceedings may only be held in one court; therefore, the court where proceedings are first properly started will determine whether a guardianship is necessary.

Petition. Any interested person may file a written petition to the court asking that a guardian be appointed for the alleged protected person. The petition must provide the court with information about the alleged protected person, including address, next of kin, the nature of the disability, value of assets, and name and address of institution or persons with custody of the protected person. Information must also be given about the proposed guardian, including name, address, lawyer's name and address, whether the proposed guardian serves as a guardian for anyone else and whether the proposed guardian is guardian for the protected person in any other state.

Notice. When a petition is filed, the court will set a date for a hearing to receive evidence. A copy of the petition for the appointment of a guardian for the minor and notice in the form provided in the statute must be given to:

- the minor if at least 14 years of age unless the minor signed the petition;
- any living parent of the minor unless parental rights have been terminated by court order;
- a person alleged to have had the principal care and custody of the minor during the 60 days preceding the filing of the petition; and
- any other person that a court directs.

Upon the filing of a petition for the appointment of a guardian for an incapacitated person, notice in the form provided in the statute along with a copy of the petition must be served on:

- the alleged incapacitated person, the incapacitated person's spouse, the alleged incapacitated person's adult children, or if none, the alleged incapacitated person's parents.
- any person that is serving as guardian for or has the care and custody of alleged incapacitated person;
- at least one person most closely related by blood or marriage to the alleged incapacitated person if notice cannot be given above;
- any person known to the petitioner to be serving as the alleged incapacitated person's attorney-in-fact under a durable power of attorney; and
- any other person that the court directs.

Notice is not required on the petition for the appointment of a guardian for a disabled person if the person to be notified waives notice or appears at the hearing on the petition.