

Chapter 5: Guardianship Law and Procedures

1. What is a guardian?

A **guardian** is appointed by the **Probate Court** to manage the affairs of a **ward**, that is, a person who is, by reason of mental illness or other physical or mental disability, unable to take care of him- or herself or his or her affairs, and who is at risk of serious harm as a result of such incapacity. Our society values the autonomy of an individual and the right to control our own lives and destinies, and the court recognizes this reality.

Guardianships are not taken or appointed lightly, so that a ward is not placed under a guardianship for bad judgment or eccentric behavior, but solely on the legal basis described above. The guardianship statutory law is found at G.L. c. 201.

Under Massachusetts law, all adult persons 18 years of age or older are presumed to be competent and capable of caring for themselves and managing their affairs. The power to make decisions for one's self, one's autonomy, may be taken away only by a court and only when a judge decides that, for the person's safety and well being, another person should be appointed as guardian.

A person who has been found to be unable to manage his or her affairs is termed "**incompetent**" under our current system. The term "**incapacitated**" is gaining ground as a more respectful and accurate expression to describe the person over whom a guardian is appointed. To make a determination of incompetence or incapacity, a judge will consider all the ways in which the person may need help as well as the ways in which she or he is able to maintain his or her independence. A decree of guardianship should limit the authority of the guardian only to those areas where a judge has found the person to be unable to manage his or her affairs and where assistance is needed to keep the person safe. For example, if the proposed ward's incapacities are found by the court to relate only to financial matters, the court will appoint a **conservator**, or guardian of the estate of the ward, and not a guardian of the person.

A guardian appointed to manage the medical treatment of the ward has authority to manage the usual and customary medical needs and should seek specific authority from the court for any unusual or extraordinary treatments, such as the administration of **anti-psychotic medications**, amputations, life supports, abortion, or sterilization. Where **extraordinary medical treatment** is being proposed, the guardian is required to seek authority under the "**substituted judgement**" concept, where the court must determine that the patient, if competent, would consent to such proposed treatment.

A guardian is appointed to a fiduciary position, that is, one requiring a very high degree of trust, honesty, responsibility, loyalty, and care for the ward's well being. It is a role not to be taken lightly; the demands on a guardian come from society as well as from the needs of the ward.

2. Who decides whether or not a person needs a **guardian**?

In the case of a disabled nursing home resident or a frail elder in need of such a placement, a judge of the **Probate Court** makes the decision that an individual must have a guardian.

There is a procedure available in the District Court where an individual, elderly or otherwise, who is a danger to himself or to others may require involuntary commitment to a mental health facility. A long-term guardianship, however, is in the province of the Probate Court for the county in which the individual resides. The Resources section has a listing of all Probate Courts.

3. How does a **guardian** get appointed?

The first step in the process of having a guardian appointed is the filing of a petition for the appointment of a guardian over a **ward** who is alleged to be in need of such protection. The petition identifies (1) the allegedly **incapacitated** person, (2) the persons who are the petitioners (asking the court to act), (3) all interested parties, and (4) the person(s) whom the petitioners would like to see the court appoint as guardian(s).

The petition must be accompanied by a number of other documents: a medical certification from the treating physician of the proposed ward, a bond form, and a filing fee.

Filing the petition begins the procedure that is described in full detail in Chapter 6 and that may result in the appointment of a guardian.

4. Who can petition for the appointment of a **guardian**?

A parent, two or more relatives or friends, or certain non-profit corporations or state agencies whose functions include public protection may petition for the appointment of a guardian.

5. Who must be given notice that a petition has been filed?

When a petition is properly filed and reviewed by court personnel, the court will issue a "citation," which will instruct the petitioners about how to give notice of their petition to all interested parties (see Chapter 6 Appendix J for a sample citation). A copy of the

citation and petition must be given to (served on) the proposed **ward** by a disinterested party, such as a constable, and a copy must be served on all of the heirs of the proposed ward. The heirs are those persons who would share in the estate of the proposed ward if he or she were to die without a will. A person who dies without a will is described as having died “**intestate**,” and there is a statute that prescribes how the estate will be distributed to the decedent’s next of kin. (G.L. c. 190 § 1: law of intestate succession: (see Chapter 6 Appendix A-1) The court may require that the citation be published in a newspaper, all of which is designed to protect the integrity of the court’s ultimate ruling: The judge will want to hear testimony from any person interested in the well being of the proposed ward, whether in support of, or opposed to, the petition.

6. Why is a bond necessary and what are “**sureties**”?

Anyone appointed as a **guardian** will have access to and control over the **assets** and income of the **ward**. Consequently, the guardian must be shown to be a person who can be trusted to see to the well being of the ward. Even the most talented judge cannot look at a person or examine a signature and tell whether that person has the reputation and wherewithal to serve as a guardian. The guardian must sign a bond in the amount equal to 150% of the estimated value of the proposed ward’s estate (not including the value of any real estate). If the guardian, once appointed, is guilty of some wrongdoing and causes a financial loss to the ward’s estate, the guardian can be sued on the bond and will be required to reimburse the ward’s estate from his or her own resources. Sureties are persons who express confidence in the integrity of the guardian by, in essence, guaranteeing to the court that the guardian will be an honest steward. A surety can be sued on the bond if the guardian absconds or is otherwise unable to reimburse the ward’s estate if ordered to do so by the court. The court may also order corporate sureties, that is, a bond issued or endorsed by an insurance company; the guardian must obtain a corporate bond by demonstrating to the insurance company the honesty and financial capacity to abide by the **fiduciary responsibilities** of a guardian, since the insurance company would be liable on the bond for any financial wrongdoing of the guardian.

7. What happens if the **ward** does not have the funds even to pay the filing fee?

There is no filing fee when the ward has assets of less than \$100. Massachusetts has a statute that permits indigents access to the courts by requiring that courts waive any filing fees or court costs when the party can show an inability to pay such fees or costs (see Chapter 6 Appendix B for information and a sample affidavit of indigence).

8. What is a **guardian ad litem**?

A guardian *ad litem* is *not* a guardian, but rather a person, usually an attorney, whom the court appoints to investigate the facts of a case where there is an alleged need for speedy action by the court because a delay may harm any party to the proceedings, and/or where

there is some conflict among the parties. Suppose Becky files a petition for appointment of herself as Agatha Adam's guardian, and another nephew appears and alleges that Becky is unsuitable because she has stolen Agatha's funds in the past. Few **Probate Court** judges can promptly schedule a hearing to listen to the evidence from both sides, so the court may appoint a guardian *ad litem* to investigate the facts surrounding the allegations and determine whether the nephew's allegations are sufficient or delusional or somewhere in between. The guardian *ad litem* prepares a report of his or her findings, which is filed with the court and distributed to the parties. If the matter is unresolved, that issue is heard by the court. Ultimately, the judge will decide what is to be done.

9. Does the court appoint an attorney for the proposed **ward**?

Although there is a Massachusetts Supreme Judicial Court rule¹ that says that in every **guardianship** petition, the **Probate Court** must appoint counsel for any proposed ward, such appointments are not made in every case. Whether to avoid unnecessary spending of either the proposed ward's funds or the public funds of the state, or for other considerations, the Probate Courts will appoint counsel for the ward only if there is a reason for doing so, for example, if any interested party requested such an appointment, if the proposed ward objects to the petition, or if the nature of the proceedings require it. In a **Rogers guardianship** proceeding, the court will always appoint counsel for the proposed ward.

10. What happens if the proposed **ward**, or anyone else, objects to the petition?

The purpose of the rule that requires that the citation be served on all interested parties, and perhaps even published in a newspaper, is to ensure that anyone knowing of any valid reason why the petition should not be allowed by the court will learn that the petition has been filed. The citation informs all parties served, and the world in a newspaper legal notice publication, that a petition has been filed by Becky Thatcher in the Norfolk County Probate Court Docket No. such- and-such, for the appointment of a guardian for Agatha Adams and says that anyone objecting must file his or her appearance by a date certain, called the "return day." If any person files an objection or even an appearance on or before the return day, nothing will happen; no guardian will be appointed until there has been a hearing on the substance of the objection. After the return day has passed, any interested party may file a motion to bring the case before the court for an order giving relief to the moving party. For example, Becky may file a motion that says, in essence, that she needs emergency authority as temporary guardian to admit Agatha to a nursing home, and her cousin's allegations of larceny are bogus. The court will hear from all sides, including any guardian *ad litem* report, and decide whether the temporary relief should be granted or denied.

When there is an objection, the court will order a full hearing on the merits of the petition and will hear evidence from the proponents and the opponents of the petitioner's request.

If no objections or appearances are filed by the return day and the proceedings do not require that an attorney be appointed for the proposed ward, the court will automatically appoint the guardian nominated in the petition, after having approved the bond.

11. What happens if no one is available to serve as **guardian**?

This is a frequent scenario and one of the reasons for preparing this Handbook. Many situations arise in the community and in the long-term care system where an individual clearly needs a guardian, but no one is willing or available to serve.

Suppose Becky were unwilling to get involved and Agatha had no other living relatives or friends. Since the hospital needs to move her out of their care and into a more appropriate care setting, the burden falls on the hospital staff to arrange for a lawful discharge. Only a guardian can lawfully authorize medical care and sign the documents associated with Agatha's placement in the nursing home. The hospital discharge planners can contact their legal department for help. Their lawyer can draft the guardianship petition and list no relatives, but then must nominate someone to serve as guardian. The attorney can take a chance and leave that part of the petition blank, hoping that the court can find some attorney willing to serve *pro bono publico*, that is, in the public interest without charging fees or costs, but many **Probate Courts** have no capacity to draft attorneys involuntarily for such responsibilities. When the proposed **ward** is indigent and there are no **assets** to compensate those willing to help, there is a significant dilemma for the courts: How can a guardianship system work for low-income **incapacitated** persons if there are only unpaid volunteers? Some courts succeed in persuading attorneys to take cases involving indigent wards *pro bono* as a recognition of the obligation to provide free service to indigents and as a kind of payback for the compensation they receive in representing wards who are better off financially. In some instances, frail elders go without proper care and without adequate supports.

In the case of an indigent nursing home resident who needs a guardian, at least there is a mechanism for paying the costs of needed guardianship services if a guardian can be found.

12. How are **guardians** paid for their services?

If the **ward** has significant **assets** or income, the court will order that reasonable costs of establishing the guardianship and of providing the needed ongoing services of the guardian to the ward may be paid for out of the ward's income or assets. A guardian must file an inventory of the ward's assets within 90 days of appointment and must file annual accounts with the court that detail the ward's income and expenses. The court must approve the accounts. When a ward has assets, the account will reflect payment to the guardian, and the court will approve reasonable expenditures.

When there are no assets in the ward's estate, there is no mechanism for payment unless the Court is mandated to pay for such costs, as in the case of **Roger's guardians** who monitor care plans involving the administration of **anti-psychotic medications**.

While there is no mechanism for paying for guardianship costs for indigent elders in the community, the *Rudow* decision has resulted in a way for some guardians of nursing home residents to be compensated for their services.

13. How is a **Rudow guardian** paid?

A **Rudow guardianship** refers simply to a case where the ward is a nursing home resident who is or will be eligible for **Medicaid** coverage, and the costs of providing guardianship service may be paid from the ward's monthly income.

Prior to the *Rudow* decision, Medicaid took the position that guardianship costs were neither medical nor remedial expenses and therefore could not be allowed as a deduction from income in computing the resident's **Patient Paid Amount (PPA)** under the allowance for "Health Care Coverage and Other Incurred Expenses" found at 130 C.M.R. 520.126 (E). The *Rudow* court ruled that a medical guardian was an essential pre-requisite for providing any medical care to a resident unable to give **informed consent** to treatment, and therefore, Medicaid must allow a medical or remedial deduction for such care. The court left it to Medicaid to develop the regulations to implement the decision. Those regulations are found at 130 C.M.R. 520.026(E)(3), and they permit a deduction where a medical guardianship is established and a Medicaid application filed on behalf of a nursing home resident (see Chapter 6, Appendix O).

The procedure to be followed is for the guardian, once appointed, to obtain the **Probate Court** judge's approval of the expenses associated with securing the guardianship and of the anticipated costs of the guardians in providing services over the next year, then submitting the court's approved expenses to the Medicaid office. Medicaid will then approve the amount to be recovered by the guardian and reduce the PPA for the resident for each month over the next 12-month period by one-twelfth of the amount approved. The guardian will then be able to use the income saved by the deduction, rather than pay the nursing home, to apply it to guardianship-related costs.

Suppose Becky went to the Probate Court and obtained a guardianship for Agatha, and incurred costs of \$1,440.00, which were approved by the Probate Court for submission to Medicaid. The Probate Court will approve out-of-pocket expenses and reasonable compensation for the guardian in prosecuting the petition. (Medicaid will also allow a PPA deduction for up to 24 hours per year at up to \$50.00 per hour for payment for the guardian, upon an affidavit from the guardian.) Medicaid will issue a decision that reduces Agatha's PPA by one-twelfth of the amount approved or \$120.00. For the next 12 months, then, Becky will be able to retain \$120.00 each month to recoup the

guardianship expenses. Since guardians have a duty to file an annual account, Becky can use that occasion every year to renew her request for payment of costs associated with functions as her aunt's guardian.

Critics point to a number of drawbacks in the Medicaid regulations implementing the Rudow decision:

- The guardian has no recourse if he or she pays the expenses “up front” and the ward dies before the funds are recouped via the PPA deduction;
- The limits that Medicaid placed on the amount of reimbursement is unrealistically low: \$500.00 for a guardianship petition and \$750.00 for “more complex” cases. The limits are a disincentive to lawyers to accept such cases; there is a provision for hardship, which may allow larger expenses;
- There is no allowance for travel or transportation costs;
- No guardianship costs deduction is permitted when the guardian is the spouse, parent, sibling, or child of the ward; and
- For a nursing home resident whose income consists entirely of an SSI personal needs allowance of \$60.00 per month, there is no Patient Paid Amount and, therefore, no way to reimburse a guardian for services or out-of-pocket expenses.

14. How does a **guardian** make medical decisions?

Once appointed, the guardian should base all medical decisions on the wishes of the **ward** if the ward were able to state those wishes. A guardian who has known the ward is better equipped to have knowledge of what the ward would want in terms of medical care, but even a guardian who is a virtual stranger to the ward has the duty to learn from any and all available sources what the ward's wishes are or would be relative to medical care. Due diligence must be given to the input of medical providers, and attendance at the quarterly care plan meetings is essential and is even mandated under the **Medicaid** regulations (130 C.M.R. 520.026(3)(d)(iii)); see Chapter 6, Appendix O.

15. What behavior would cause a **guardian** to be removed?

Any omission committed or action taken by a guardian that is not in the best interests of the **ward** is grounds for the removal of the guardian. A guardian is held to a very high standard of honesty and loyalty to the ward and, as a fiduciary, must be attentive to the ward and to the ward's affairs.

16. Can the court appoint co-guardians?

Yes, the **Probate Court** has authority to appoint co-guardians, although, like having two captains of a ship, it may not always be a good idea, unless the individuals involved are able to work cooperatively.

17. What can an interested person do who suspects that a **guardian** is acting improperly?

Any interested person can bring a guardian's suspected misconduct to the court's attention by submitting a statement of facts relative to the alleged misconduct and a statement of the evidence to support the allegation. If the ward has an attorney or if a **guardian ad litem** has been appointed by the court, complaints can be addressed to them.

18. What is the remedy of a family member who disagrees with the actions of a **guardian**?

Unless the disagreement involves a breach of the guardian's duties, a family member can only try to persuade the guardian to his or her point of view. A good guardian should welcome the advice of any person concerned about the welfare of the **ward**.

19. Does a **guardian** need special knowledge or training?

There are currently no training programs for guardians in Massachusetts, although other jurisdictions offer various training books, pamphlets, or videos. Knowledge of the ward and his or her wishes, respect for those wishes, common sense, and honesty will take a guardian far as the lessons of the tasks at hand are learned.

1. Supreme Judicial Court Rule 3:10 (5)