



Office of the Public Guardian

*Providing guardianship  
and advocacy to the  
citizens of Delaware  
appointed to our care.*

# Adult Guardianships

A nuts & bolts summary created by the Office of the Public Guardian & the Guardianship Monitoring Program

# Adult Guardianships

- ▶ In the State of Delaware, adult guardianships are filed in the Court of Chancery.
- ▶ The Court of Chancery has offices in all three counties.
- ▶ The Court of Chancery consists of two Masters, four Vice Chancellors and one Chancellor.



# Adult Guardianships

- ▶ Taking the step to obtain a guardianship over an adult should be a last resort and should only be considered when other alternatives to guardianship have failed or are no longer appropriate.
- ▶ Guardianships can be adversarial and disempowering, and are less convenient than POA's or AHCD's.

# Adult Guardianships

- ▶ Guardianships can provide extra protections for an alleged disabled person since they require the Court to review evidence before they are approved and the Court continues to monitor them until they are terminated.
- ▶ Potential guardians may find it easier to speak to medical providers, apply for public benefits (example-Medicaid planning), and handle financial matters on behalf of the alleged disabled person once they are appointed guardian by the court.

# The authority of the Court of Chancery

In the State of Delaware, the Court of Chancery has the authority (12 *Del. C.* Ch. 39) to appoint a guardian of the person and/or property of a disabled person.

As a result of their disability the alleged disabled person may be in danger of:  
Being taken advantage of; Suffering property loss; Being abused/neglected or substantially endangering their own health.

“**Disabled person**” means an individual 18 years of age or older who is unable to care for their person and/or property by reason of physical and/or mental impairment.

A “**guardian**” is a person, or persons (co-guardians), appointed by the Court to make medical and/or financial decisions for a disabled person.

# Technical Details

- ▶ The Court, upon request or petition, can appoint different types of guardians.
- ▶ Guardianships do **not** have to be permanent or plenary.
- ▶ Based upon the evidence presented to the court in the petition for guardianship and the Attorney ad Litem report, the Court may appoint an **interim/emergency guardian**, a **temporary guardian** (rare), a **limited guardian** (with only selected powers under 12 Del.C. 3921 et seq.), or a **plenary guardian** (with all powers).

# Technical Details

- ▶ In certain instances, a Fee-For-Service (private neutral paid guardian) guardianship agency may be appointed as a guardian. Currently, there are two companies operating in Delaware.
- ▶ The Office of the Public Guardian may be appointed to serve as someone's guardian if no alternatives to guardianship are available and if there is no other individual willing or able to serve.

# The two types of guardians (You could be either one or both)

## ▶ **Guardian of the Person**

This guardian makes decisions about the personal and medical care of the disabled person.

### **Responsibilities may include:**

- Deciding where the disabled person will reside
- Resolving medical issues and providing consent for medical treatment(s) as needed
- Advocating on behalf of the disabled person
- Attending care plan meetings, if applicable, and making medical/dental appointments

## ▶ **Guardian of the Property**

This guardian makes decisions about the financial welfare of the disabled Person.

### **Responsibilities may include:**

- Handling the disabled person's bank accounts, investments, personal property and real estate
- Applying for social security benefits for the disabled person
- Filing taxes on behalf of the disabled person if applicable
- Filing an inventory 30 days after your appointment and yearly accountings with the Court if applicable



# Substituted Judgment & Best Interest

As a guardian, you are in a position to make decisions for the disabled person in one of two ways; using either substituted judgment or the best interest standard.

Substituted judgment should be your first choice unless following the disabled person's wishes would cause them substantial harm or when you cannot establish the disabled person's preferences or goals.

**Substituted Judgment:** Making the same decision the disabled person would make if they had the mental capacity to do so.

**How would you know what decision the disabled person would have made? Do the research and find out. Your job is to figure out what the disabled person's preferences were (if they made them known) when they had capacity to decide for themselves.**

- ▶ Discuss each decision with the disabled person and listen to their preferences (Try to put it in a way they can understand) and allow them to give you their reasons behind their preference. (e.g. religious, cultural, etc.)
- ▶ Speak with the disabled person's family and friends and ask them if they ever heard, or know, the disabled person's preferences to medical treatments, burial methods, etc.

# Substituted Judgment & Best Interest

Making decisions using substitute judgment may be easier for those of you who are guardians of an elderly disabled person because they were capable, at one point, of understanding how their decisions (and preferences) would impact their lives. Most likely, they discussed their wishes with others which makes it easier for you, as their guardian, to use substituted judgment on their behalf.

When an individual has been disabled since birth, it may be more difficult to know their wishes as they may not have ever clearly expressed them. In this situation, or in situations where the disabled person's preferences may cause them serious harm or injury, you would be making your decision based upon what you believe to be in the disabled person's best interest.

**Best Interest:** When making a decision you are to consider the least intrusive, most normalizing, and least restrictive course of action possible to provide for the needs of the disabled person. You must also consider past practices and evaluate reliable evidence of all likely choices.

*\*Sometimes a decision made in a disabled person's best interest differs from their wishes*

# Obligations of a Guardian

- ▶ All guardians must file an Annual Update and Medical Statement (AUMS) with the Court each year. The AUMS reports the current geographical information of the guardian and the person subject to guardianship as well as includes a physician's affidavit noting the necessity (or not) of continuing the guardianship.
- ▶ Guardians of the property may have to file periodic accountings with the Court. (You should check with the Court regarding accounting requirements for your specific case)

# Actions requiring prior Court approval

Although guardians have the ability to make many decisions without court involvement, there are still several instances where a guardian is required to make application (file a petition) to the Court for prior approval.

## EXAMPLES:

- ▶ You cannot buy real estate with the disabled person's funds without first obtaining Court approval.
- ▶ You cannot sell a disabled person's interest in real estate without first obtaining Court approval.
- ▶ A guardian cannot withdraw funds in excess of the monthly allotment without first obtaining Court approval.
- ▶ A guardian cannot give monetary gifts to others or borrow money from the disabled person's funds without first obtaining Court approval.

The above are only a few examples, **ALWAYS** contact the Court and speak with staff in the Register in Chancery if you have questions regarding your authority as guardian.

# Requirements, Responsibilities & Duties of a guardian

If the disabled person passes away, you must notify the Court within 10 days.

If the disabled person happens to improve and/or recover sufficiently from his or her disability to where they can once again handle their own affairs, you can file a petition to terminate due to recovery with the Court.

If you would like to make something (e.g. important information) part of the official record, you must put it in writing and file it with the Court.

# Requirements, Responsibilities & Duties of a guardian

If you are unable to continue serving in your role as guardian or you would like to add a co-guardian to assist you in your role as guardian, you must contact the Court's staff at the Register in Chancery and discuss your situation with them.

If you have someone (e.g. a family member or close friend) in mind that you would like to serve as a successor (replacement) guardian in case you are unable to do so one day, please discuss your case with them often and remind them to contact the Court, if you have not already done so, when the time comes for them to serve\*.

*\*All individuals applying to become a guardian must meet the Court's requirements before they can be appointed.*

# Length of the Guardianship

- ▶ A guardianship continues until it is terminated by the Court due to death, recovery of capacity, or other reason as determined by the Court of Chancery.
- ▶ In order for the Court to consider terminating a guardianship, a guardian must notify the Court and file the appropriate petition to terminate.
- ▶ A petition requesting the removal of a guardian must establish good cause for the removal.

# Additional Resources

For more information regarding Adult Guardianship, please visit the Court of Chancery's website:

[www.courts.delaware.gov/chancery/guardianship](http://www.courts.delaware.gov/chancery/guardianship)