

Guardianship to the rescue:



When Everything Else Has Failed

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Many seniors can no longer properly handle their personal and/or financial affairs. Nonetheless, they are extraordinarily angry and combative even when honest, reliable, and loving family members try to intercede on their behalf. These seniors are vulnerable to not only financial abuse, but physical harm as well. Our attorneys work tirelessly alongside of family members, police departments, and the courts to find the least burdensome way to respect a senior's dignity but still attain authority for an honest and reliable person to make the decisions that need to be made.

In a hurry?

Call Law ElderLaw at 800-810-3100 or 630-585-5200
or email rick@lawelderlaw.com.

If you find yourself looking on helplessly as someone you love is being destroyed by dementia, mental health problems, addictions, or other powerful demons, this report will tell you what to do if your loved one is desperate need of rescue.

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In an ideal world, I always try to emphasize the importance of planning ahead. Unfortunately, what happens that causes a guardianship is the failure to plan ahead.

Frankly, most people don't plan ahead.

When many crises happen, no one is prepared and no one has been authorized to come to the rescue of a loved one who is suddenly crushed by forces beyond their control.

A guardianship is one tool that is used to put someone in a decision-making role under the authority of a court.

Guardianship is a legal relationship whereby a *court* gives a person (the guardian)

the power to make personal decisions for another (the ward). This could be because of dementia, drug use, or a host of other reasons, but essentially it is caused by an individual's lack of ability to make important decision for themselves.

A family member or friend initiates the proceedings by filing a petition in the circuit court in the county where the individual lives. A medical examination by a licensed physician is needed to establish the individual's condition.

The court—usually a judge—then determines whether the individual is unable to meet the essential requirements for his or her health and safety. If so, the court appoints a guardian to make personal decisions for the individual. Unless limited by the court, the guardian has the same rights, powers and duties over his ward as parents have over their minor children. The guardian is required to report to the court annually.

Amazingly, many guardianships could have been avoided by a document as simple as a valid Power of Attorney. It's a legal document where one person (the principal) authorizes another person (the agent) to act on his or her behalf, either for health care decisions or for financial decisions.

When someone does not have power of attorney, or if the powers of attorney are not drafted properly and something happens that results in the inability to make decisions, a loved one may later face costly court proceedings and court-supervised guardianship.

What's more, a court proceeding is not only expensive, but the person appointed as the guardian may not be the person whom the loved one would have chosen.

Sometimes those decisions are what the person would have wanted, and other times, though the guardian tries, decisions are made that are completely the opposite.

Our guardianship legal team is headed by Attorney Diana Law, Kane County Public Guardian.

Diana has substantial experience with private guardianships. A private guardianship is when we are hired by a family member to represent them in establishing a guardianship to protect a loved one.

In addition to private guardianships, Diana also serves as the Kane County Public Guardian. In her role as the Public Guardian, she is appointed by the courts to serve those who do not have anyone to act as their protector.

To reach Diana and her guardianship legal team,
call Law ElderLaw at 800-810-3100 or 630-585-5200
or email rick@lawelderlaw.com.

So what's the next step?

You may be asking yourself what to do in the case that your loved one does need a guardian.

First, when does a person need a guardianship? The answer is: only when they are not capable of making and communicating responsible decisions.

This could be caused by mental deterioration, physical incapacity, mental illness, developmental disability, or because of gambling, idleness, debauchery, or excessive use of intoxicants or drugs, meaning that the person spends or wastes his estate as to expose himself or his family to want or suffering.

What is the process for obtaining a guardianship?

The process for obtaining a guardianship begins when someone – it can be anyone who has an interest in making sure that the alleged disabled person is protected – files a petition saying that they believe the person needs a guardian and ask for someone to be appointed.

For example, if Jane thinks her husband Jack needs a guardian, Jane would petition for him to have a guardian. She would likely say that, as a spouse, Jane herself should be the guardian.

In other cases, it might be an agency like Senior Services that petitions for someone

to have a guardian. If one of their seniors needs a guardian, and they might recommend the person they think is best for the job. For example, they might be the caregiving granddaughter, or the Kane County Public Guardian. The first step is filing a petition with the court.

The second thing that needs to be filed with that petition is a physician's report. The physician's report has to be created by a medical doctor. It should show the diagnosis, how that diagnosis impairs the alleged disabled person's ability to make decisions for their estate or their health, and what's a suitable living arrangement for them.

Upon filing the petition, the court will appoint a "guardian ad litem". The guardian ad litem is someone who doesn't represent the family or the alleged disabled person, and they are simply there to be the eyes and ears of the court. The guardian ad litem should go out and meet with the alleged disabled person, the family, the caregivers, and friends of the alleged disabled person. They will make a recommendation to the court as to whether or not this person does need a guardian; and second, if they need a guardian, who that person should be.

Finally, there's a hearing in court. The disabled person then has a right to obtain counsel, demand a jury trial, and to be independently evaluated by a different doctor.

What is a guardian?

A guardian is a surrogate decision maker.

This is a person who weighs the burdens & benefits of treatment for you if you become incapacitated—and that's a heavy responsibility!

A guardian takes into account more information than just what course of treatment is most medically sound. They also include the views of what family and friends believe the patient would have considered if able to act for herself or himself.

A guardian will do the best they can for their ward, but they may not know your personal, philosophical, religious, or moral beliefs. This can make things difficult, especially when it comes to your healthcare decisions.

Diana Law, guardianship attorney, says, "A big challenge guardians face is that they

are not supposed to make decisions based on what they personally think is in the ward's best interest. Instead, the guardian is supposed to exercise *substituted judgment*. That means that even if the guardian thinks that this person needs dialysis, but religiously they are opposed to that treatment, the guardian is not supposed to order dialysis."

When a guardian is appointed, the ward loses his/her freedom of choice.

What someone gets a guardianship, the freedom of choice that we enjoy every day is taken away because the person is a danger to themselves and/or others. They do lose the right to vote, the right to marry, the right to drive. Because someone is taking away these civil liberties, they need to get due process.

In Illinois, the law says they need to be given notice at least 14 days before the hearing. If they don't contest it, then the judge will usually approve it. If they do contest it, the judge can appoint counsel for them. They have the right to their own attorney. Many times a guardianship is contested, the guardian ad litem will be appointed as their attorney.

As you can imagine, a contested guardianship can get very expensive, complicated, and time-consuming.

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What does a guardian do?

A guardian of the person:

- Makes medical decisions
- Conducts the residential placement of ward, with court approval
- Ensures that ward receives proper professional services
- Releases medical records and information
- Has limited powers for mental health decisions (but cannot admit a ward to a mental facility)

A guardian of the estate:

- Makes financial decisions
- Enters into contracts

- Helps with estate planning
- Files lawsuits
- Sells real estate
- Applies for government benefits (guardian has a fiduciary duty to investigate and pursue eligibility for government benefits to conserve estate assets)

It's important to note that most of these actions require court approval.

Some planning tools are only available to people who have a guardian.

"One of the things that's interesting in Illinois is that some estate planning tools to help people save some of their assets, such as pooled trusts for people over the age of 65, are no longer available for people as a Medicaid planning technique unless they have a public or state guardian," says Diana Law.

"That's why sometimes, when a child could be the guardian, they may instead choose to work with me as guardian... simply because they want their parent to have that tool available to them."

This is why it's so important to work with a guardianship attorney who knows the rules. As we say here in the Law ElderLaw offices, "There's one law for the informed and another law for the uninformed." In the same way that you might have an expert work on your taxes to help you get the best result from your tax return, working with an elder law attorney who knows all the ins and outs of the laws surrounding seniors can often lead to a better solution for families.

If you find yourself facing the prospect of a guardianship for a loved one, Law ElderLaw has vast experience in working with families like yours, and we have become a trusted guide for hundreds of families like yours. You don't have to walk this path alone.

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