

Overview - Video 4

The Guardianship Process

(Introductory music and images)

Speaker appears in comfortable, neutral “home” setting. At times words and pictures will appear next to them or in place of them to support the dialogue.

In order to discuss the guardianship process, we must first understand the legal terms used in guardianships. The guardianship process begins when a person, called the petitioner, files a document with the court called a Petition for Adjudication of Incapacity. When a Petition for Adjudication of Incapacity is filed, the person claimed to be in need of a guardian is called the alleged incapacitated person. If the petition is granted, the person is referred to as the incapacitated person. After a petition is filed, a judge determines if the person is legally incapacitated, meaning they are at least 18 years old and unable to understand and evaluate information and make and communicate decisions. The court can declare a person totally incapacitated or incapacitated in limited areas, such as making decisions about their property, finances or personal care. The court's determination is based on a medical, psychological, or other expert evaluation, as well as other evidence of the individual's alleged inability to make decisions.

Anyone who is concerned with the alleged incapacitated person's wellbeing may petition the court for guardianship. The petitioner must provide information required by law, including what type of guardianship is sought, personal information about the alleged incapacitated person such as their date of birth and address, any proposed guardians, and all interested parties such as family members that may be interested in the guardianship proceedings and the well-being of their loved one. The petitioner must notify all interested parties, which can be difficult if their location is not known. The petition must also contain the reason the petitioner is seeking guardianship for the alleged incapacitated person, information about any existing advance planning documents like a power of attorney, what interventions and alternatives to guardianship have been considered or tried prior to filing the petition, and why these interventions and alternatives did not work. Petitioners are encouraged to get help from a lawyer as this process can be complex.

When a guardianship petition is filed, the alleged incapacitated person has certain rights and protections under the law. These include the right to receive notice of the proceeding, be represented by a lawyer separate from any lawyer representing the petitioner or others, have a hearing on the need for guardianship, present evidence and witnesses, cross-examine witnesses, have guardianship ordered only based on clear and convincing evidence, receive notice of guardianship orders, and appeal the court's decision. If the alleged incapacitated person cannot afford a lawyer, the court will appoint one to represent the wishes and interests of the alleged incapacitated person and to identify any less restrictive alternatives available to meet their needs.

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The length and format (such as availability of remote participation) of the hearing will vary based on the complexity of the case. Whenever possible, the alleged incapacitated person should be present and participate in the hearing. At the hearing, the judge will consider the evidence and testimony presented and determine the alleged incapacitated person's level of capacity.

Once the judge determines the alleged incapacitated person's level of capacity a decision will be made on whether to appoint a guardian. The court must consider whether there are any alternatives to guardianship that will meet the needs of the person while being less burdensome than guardianship. If the alleged incapacitated person is determined to need a guardian, a Final Decree is created by the court to appoint a guardian or guardians and to list the guardian's powers and responsibilities. This includes if the guardian will be appointed as the guardian of the person, to oversee the alleged incapacitated person's well-being, as the guardian of the estate, to oversee the alleged incapacitated person's finances, or both. If the judge finds that the alleged incapacitated person is capable of making their own decisions, or that a less restrictive alternative is appropriate, guardianship will not be granted.

Once a guardian has been appointed, the guardian is required to notify the incapacitated person and all interested parties. Some others who may need to be notified include family members, the incapacitated person's employer, anyone named in the incapacitated person's existing written powers of attorney, their doctors and other health care providers, other service providers, government agencies, the post office if the incapacitated person will be moving, and anyone involved in a lawsuit, contract, or financial agreement with the incapacitated person. The guardian of the estate will also need to contact the incapacitated person's bank and other financial institutions, insurance companies, retirement plans, and Social Security or any other government agency from which the incapacitated person receives benefits.

If the court determines that the alleged incapacitated person needs a guardian immediately and that without one, the person or their estate is at imminent risk of irreparable harm, the judge may appoint an emergency guardian without a typical hearing. An initial appointment of an emergency guardian of the person can last no more than seventy-two (72) hours but may be extended by up to twenty (20) days by the court. Emergency guardian of the estate appointments can last no longer than thirty (30) days. If the alleged incapacitated person will need a guardian over a longer period, a hearing will be held to determine if a plenary, also known as a full, guardianship, or limited guardianship should be granted.

While there are specific powers and responsibilities given to each guardian, in general, guardians must protect the incapacitated person, help to maintain their quality of life, advocate for the incapacitated person, and make decisions for the incapacitated person while involving them in the decision-making process as much as possible. For more information on the general responsibilities of the guardian, watch the other three videos

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in this guardianship overview series. In order to be the best advocate possible for the incapacitated person, guardians must be informed, be involved, and be heard.

For more information about the specific duties of a guardian, please watch the video series for guardians of the person and the series for guardians of the estate.

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