A PRACTITIONER'S GUIDE TO ADULT GUARDIANSHIP IN ILLINOIS

Illinois Guardianship and Advocacy Commission

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A PRACTITIONER'S GUIDE TO ADULT GUARDIANSHIP IN ILLINOIS is a collaborative effort of the staff of the Office of State Guardian of the Illinois Guardianship and Advocacy Commission, a state agency. As the largest public guardian in the United States, the Office of State Guardian handles personal or financial decisions for more than 5,000 disabled adults and manages nearly two million dollars in cash and personal property for persons with disability throughout Illinois.

This guide is intended to assist legal practitioners, social workers, medical practitioners, and the families of persons with disability. Assessing the need for adult guardianship and creating successful guardianship estates are difficult tasks. We have prepared these materials in an effort to assist those who must confront the need for adult guardianship. We stress that adult guardianship should be considered as a last resort, only after all other alternatives have been exhausted.

Citations to the Probate Act of 1975, 755 ILCS 5/1-1 et seq. are provided throughout this guide, and every effort has been made to check the accuracy of information. However, any views expressed in this work may be subject to contrary judicial interpretation. The Office of State Guardian recommends that questions concerning any legal or procedural aspect of adult guardianship be reviewed by an attorney familiar with guardianship practice in the jurisdiction in question.

 The Practitioner's Guide is also available on the Internet, at our World Wide Web Site. Visit the Commission's Web Site for helpful information about the Commission and its programs. Our Web address is *http://www.state.il.us/igac*.

We would appreciate your feedback. If you have any comments or suggestions, or if you require additional information, please feel free to contact:

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I. Statutory Basis

Procedures for petitioning for adult guardianship in Illinois are statutory and set out in Chapter 11a of the Probate Act of 1975, 755 ILCS 5/1-1 et seq., formerly cited as Ill. Rev. Stat., Ch. 110 2, par. 11a-1 et. seq. All citations in this guide are to the Probate Act of 1975, unless otherwise noted.

Although the Probate Act establishes a framework for guardianship, many areas of guardianship law in Illinois are unclear. The many Illinois probate courts interpret legal principles or procedures differently, or not at all. Consequently, certain procedures that may be taken for granted in a particular county may be unheard of in another. Accordingly, careful review of local practice rules and familiarity with local customs are vital.

This guide is intended to aid guardianship practitioners statewide, and will discuss things that are generally true everywhere. References to the protocol in Cook County are provided as examples. A private attorney or Office of State Guardian (OSG) attorney should be able to explain local practice considerations in most Illinois probate courts.

In addition, effort has been made to explain procedures pertinent to OSG, or positions adopted by OSG in handling guardianship matters. Some practitioners have requested clarification concerning legal positions adopted by the office, and we hope to clearly express our interpretations of Illinois law and procedures. We recognize that our interpretations are always subject to contrary opinions by the various probate courts.

II. Definitions

A. Person with Disability

Section 11a-2 defines a person with disability (or "a disabled person") as a person 18 years or older who 1) because of mental deterioration or physical incapacity is not fully able to manage his or her person or estate, or 2) is a person with mental illness or developmental disability and who because of mental illness or developmental disability is not fully able to manage his or her person or estate, or 3) because of gambling, idleness, debauchery or excessive use of intoxicants or drugs, so spends or wastes his or her estate as to expose the person with disability or dependents to want or suffering.

The demographics of the Office of State Guardian may reflect the make-up of persons with disability in Illinois. The vast majority of Office of State Guardian wards are persons with developmental disability or mental illness. Relatively few are physically incapacitated, without some accompanying mental deterioration. Virtually no OSG wards were adjudicated simply as a result of gambling, idleness, debauchery or excessive use of intoxicants or drugs. In cases where the use of intoxicants or drugs is at issue, the ward usually has a specific diagnosed mental illness as well.

Prior to 1979, persons with disability were legally referred to as "incompetents," and guardianship for adults with disability was known as conservatorship. Other archaic terms were also used. Case law references may reflect the terms in use at a particular time. For purposes of clarity, the statutory terms now in effect will be used in this guide.

B. Adjudication of disability

This phrase describes both the guardianship process and the end result. A person for whom a guardian has been appointed has been legally adjudicated disabled. The legal mechanism used to obtain guardianship is also called an adjudication of disability. The probate court may exercise discretion in making guardianship appointments but is required to consider the preference of the alleged person with disability. Section 11a-12(d).

C. Plenary guardianship

The most common form of guardianship involves a plenary, or complete, adjudication of disability as to a person, an estate, or both. Persons found to be totally without capacity or understanding to make or communicate personal decisions or manage financial affairs, are given plenary person or estate guardians. The duties of person and estate guardians are respectively set out in Sections 11a-17 and 18.

D. Person guardianship

In determining a need for person guardianship, two prominent issues are medical decision making and residential placement. If a person is unable to give informed medical consent or make appropriate decisions about living independently in a residence, person guardianship should be considered.

E. Estate guardianship

Estate guardianship is necessary where a person, due to some disability, cannot manage financial affairs. However, courts are generally reluctant to appoint plenary estate guardians where estate assets are minimal. Pensions, public benefits and similar entitlements can be handled with representative payeeships. Bill paying assistance and money management assistance programs should also be considered. Small estate amounts can be collected and disbursed, without resort to estate administration. Some courts encourage the use of small estate affidavits under Section 25-2, and court-supervised deposits of wards' funds under Section 24-21 as alternatives to estate guardianship. However, many downstate judges are not at all reluctant to appoint estate guardians in small or minimal estates.

F. Limited guardianship

Perhaps the least understood and least used form of guardianship applies where a person lacks some, but not all of the capacity to make personal decisions or handle an estate. Under Section 11a-14(c), the appointment of a limited guardian is not a finding of legal incompetence. Limited guardianship is intended to be less intrusive and more individualized than plenary guardianship. Although guardianship is supposed to be used only to the extent necessitated by a person's actual mental, physical and adaptive limitations (section 11a-3(b)), courts tend to create plenary guardianship rather than limited guardianship, even where limited guardianship may arguably be more appropriate.

One reason for the bias toward plenary guardianship is that the creation of an appropriate limited guardianship is complicated when compared to plenary guardianship. A physician must clearly differentiate between those things a person can and cannot do and must clearly describe these things to the court. The court must then determine which of these rights will be taken from the person with disability, considering the practical consequences for each. The limited guardianship must be understandable to the guardian, ward and third parties who may rely on the order. Not all guardianship practitioners, medical practitioners and courts are able to design an appropriate, useful limited guardianship order.

G. Petitioner, respondent, other parties

In any adjudication of disability, certain parties are always involved. The alleged person with disability is always known as the respondent. Section 11a-10 (e). The named petitioner is usually an individual or an individual acting in an authorized or official capacity who presents facts and circumstances which would lead a probate court to conclude that a named respondent requires some form of guardianship. For example "Joe Smith, a social worker at St. Joan of Arc Health Care Center" could be a named petitioner.

The Office of State Guardian is specifically authorized to petition for its own appointment as guardian under Section 30 of the Guardianship and Advocacy Act, ILCS 3955/30, but is not required to do so.

In many cases, a *guardian ad litem* is involved. The *guardian ad litem's* role is discussed in greater detail in Section V, D. Other parties may include parents, spouses, children or other family members who are legally entitled to notice of the guardianship proceedings. Finally, the prospective guardian will be involved.

H. Probate

As an adjective, probate refers to that having to do with probate law or the probate court. As a noun, probate refers to proving before a judge the authenticity of a document, usually a will, and distributing property within the purview of the court. Traditionally,

probate courts in Illinois have jurisdiction over the probating of wills, administration of decedents' estates, and cases involving minors and adults with disabilities.

III. Guardianship Principles and Guidelines

A. Section 11a-3(b): limited use of guardianship and consideration of appropriate guardianship alternatives

Guardianship is to be utilized only as is necessary to promote the well-being of a person with disability and to protect against neglect, exploitation, or abuse, and to encourage development of maximum self-reliance and independence. Guardianship shall be ordered only to the extent necessitated by the individual's actual mental, physical and adaptive limitations. Section 11a-3(b). Many statutory alternatives to guardianship exist. Where a person with disability has executed a proper Living Will or Power of Attorney for Health Care, or where a surrogate decision-maker under the Health Care Surrogate Act may be found, a personal guardian may not be needed. Similarly, where an adequate trust or representative payeeship is in place, estate guardianship may be unnecessary.

Guardianship should not be considered in a vacuum. Alternatives should be explored. A person may meet the clinical or legal definition of disability, but still not benefit from having a guardian, and thus render guardianship futile. Before petitioning for guardianship or accepting a guardianship case, one should determine how guardianship is intended to benefit an alleged person with disability. If no good reasons for guardianship are apparent, alternatives must be explored. The Guardianship and Advocacy Act, 20 ILCS 3955/33 indicates that the State Guardian may offer guidance and advice for the purpose of avoiding the need for appointment of a guardian. Courts also look for obvious signs of conflicts of interest by examining the relationships between the respondent, the petitioner, and the proposed guardian, if different from the petitioner.

B. Section 11a-5(a): active and suitable program of guardianship

The requirements for serving as guardian are minimal. Any U.S. resident who is of sound mind, has not been adjudicated disabled, is over age 18, and who has not been convicted of a felony is eligible to be a guardian.

In addition to the foregoing, a party must also be capable of providing an active and suitable program of guardianship for the person with disability. Although active and suitable programs of guardianship are not specifically defined in the Probate Act, courts tend to look for at least a basic plan of guardianship prior to appointing a prospective guardian.

C. Section 31 of Illinois Guardianship and Advocacy Commission Act: Office of State Guardian is guardian of last resort

Section 31 of the Guardianship and Advocacy Act, 20 ILCS 3955/31, provides that the Office of State Guardian will not be appointed guardian if another suitable person is available and willing to accept the guardianship appointment. In all cases where a court appoints the State Guardian, the court shall indicate in the order appointing guardian as a finding of fact that no other suitable and willing person could be found to accept the guardianship appointment. This requirement is waived where the Office of State Guardian petitions for its own appointment as guardian.

Petitioners must take great care in ensuring that every possible guardianship candidate is considered, and that a public guardian is not appointed merely for the convenience of a court or the petitioner. Office of State Guardian attorneys will contest or seek to vacate guardianship orders naming OSG as guardian where a suitable and willing alternative is available.

D. Section 11a-14.1 of the Probate Act: residential placement criteria

In August 1997, more detailed placement criteria were implemented. The new rules created criteria to determine residential placements for adult wards, including a requirement that the guardians consider the wishes of a ward unless harm to the ward or to the ward's estate ensues. When the preferences of the ward cannot be ascertained or where they will result in substantial harm to the ward or to the ward's estate, the guardian makes decisions that are in the best interests of the ward. The law also exempts state and public guardians from petitioning probate courts to change residential placement, but requires these guardians to follow all other new guidelines.

Guardians are prohibited from removing the ward from his or her home or separating the ward from family and friends unless such removal is necessary to prevent substantial harm to the ward or to the ward's estate. Guardians have a duty to investigate reasonable residential alternatives. Placements are to be monitored on an ongoing basis to ensure continued appropriateness and pursue alternatives as needed.

IV. Powers and Duties of Guardians

A. Person guardians

A list of some of the practical issues that are often addressed by guardians of the person is included in Section VIII, below. The duties of a personal guardian, as described in Section 11a-17, are summarized as follows:

> Section 11a-17. Duties of personal guardian. (a) To the extent ordered by the court and under the direction of the court, the guardian of the person shall have custody of the ward and the ward's minor and adult dependent children; shall procure for them and shall make provision for their support, care, comfort, health, education and maintenance and such professional services as are appropriate.... The guardian shall assist the ward in the development of maximum self-reliance and independence. The guardian of the person may petition the court for an order directing the guardian of the estate to pay an amount periodically for the provision of the services specified by the court order....

The Office of State Guardian supports mandatory filing of annual reports by all guardians. Under Section 11a-17(b), OSG will assist private guardians in the filing of reports, where requested by the guardian. Where directed to do so by a probate court, a person guardian is required under Section 11a-17(b) to file periodic reports discussing the following:

> (1) the current mental, physical, and social condition of the ward and the ward's minor and adult dependent children; (2) their present living arrangement, and a description and the address of every residence where they lived during the reporting period and the length of stay at each place; (3) a summary of the medical, educational, vocational, and other professional services given to them; (4) a resume of the guardian's visits with and activities on behalf of the ward and the ward's minor and adult dependent children; (5) a recommendation as to the need for continued guardianship; (6) any other information requested by the court or useful in the opinion of the guardian.

B. Estate guardians

A list of some of the practical issues that are often addressed by estate guardians is included in Section VIII, below. The duties of an estate guardian, as described in Section 11a-18, are summarized as follows:

> (a) To the extent specified in the order establishing the guardianship, the guardian of the estate shall have the care, management and investment of the estate, shall manage the estate frugally and shall apply the income and principal of the estate so far as necessary for the comfort and suitable support and education of the ward, his minor and adult dependent children, and persons related by blood or marriage who are dependent upon or entitled to support from him, or

> for any other purpose which the court deems to be for the best interests of the ward, and the court may approve the making on behalf of the ward of such agreements as the court determines to be for the ward's best interests. The guardian may make disbursement of his ward's funds and estate directly to the ward or their distributee or in such other manner and in such amounts as the court directs.
>
> (b) Upon the direction of the court which issued his letters, a guardian may perform the contracts of his ward which were legally subsisting at the time of the commencement of the ward's disability. The court may authorize the guardian to execute and deliver any bill of sale, deed or other instrument.
>
> (c) The guardian of the estate of a ward shall appear for and represent the ward in all legal proceedings unless another person is appointed for that purpose as guardian or next friend.

C. Temporary guardians.

A temporary guardianship appointment may be made by a court prior to the appointment of a plenary or limited guardian or pending an appeal in relation to such an appointment, upon a showing of necessity. Temporary guardianship is supposed to be linked to the welfare and protection of the person with disability or the person's estate. Section 11a-4. In determining the necessity for temporary guardianship, the immediate welfare and protection of the alleged disabled person and his estate shall be of paramount concern, and the interests of the petitioner, any care provider, or any other party shall not outweigh the interests of the alleged disabled person. The court order creating the temporary guardianship shall state the actual harm identified by the court which necessitates temporary guardianship.

Cook County courts will not allow the filing of temporary guardianship petitions without the contemporaneous filing of a plenary or limited petition. However, some downstate courts routinely grant relief on temporary petitions, with no further action by guardianship petitioners.

Under Section 11a-4, a temporary guardian shall have all of the powers and duties of a guardian of the person or of the estate which are specifically delineated by court order. Consequently, orders appointing a temporary guardian must describe the specific power or duty conferred by the court. By operation of law, temporary guardianships expire within 60 days after the court appointment or whenever a plenary or limited guardian is appointed, whichever comes first. The Probate Act specifies that temporary guardianships may not be renewed for additional 60 day periods.

Temporary guardianship petitions are generally seen as emergency procedures invoked prior to a full adjudication of disability. In temporary guardianship cases, Probate courts have greater procedural latitude with respect to notice and other procedural safeguards. Accordingly, the Office of State Guardian takes the position that the use of temporary guardianship, without the procedural and evidentiary safeguards associated with a plenary or limited adjudication, is inappropriate if no true emergency exists. Where a true emergency exists, the Office of State Guardian argues in favor of as much notice to the respondent and other procedural due process as possible.

D. Standby and Short-term Guardianship

Standby Guardianship is used to provide continuity in the guardianship case if the primary guardian dies, becomes incapacitated or is no longer acting. The court creates the standby guardian upon the filing of a petition for the appointment, when a plenary or limited guardian is appointed. The court applies the same standards used in determining the suitability of a plenary or limited guardian in determining the suitability of a standby guardian. A court may not appoint the Office of State Guardian or a public guardian as a short-term guardian, without the written consent of the state or public guardian or an authorized representative.

Short-term Guardianship is used to enable a guardian to appoint an acting guardian for short periods. The guardian of a disabled person may appoint in writing, without court approval, a short-term guardian of the disabled person. The written instrument shall be signed by, or at the direction of, the appointing guardian in the presence of at least two credible witnesses at least 18 years of age, neither of whom is the person appointed as the short-term guardian. The person appointed as the short-term guardian shall also sign the written instrument, but need not sign at the same time as the appointing guardian. A guardian may not appoint the Office of State Guardian or a public guardian as a short-term guardian, without the written consent of the state or public guardian or an authorized representative.

E. Powers of attorney compared with guardianship.

A power of attorney is a signed written instrument governing the relationship between a principal, the one creating the power of attorney, and an agent, a person designated by the principal to act on the principal's behalf. Powers of attorney may be written to cover personal needs, financial needs, or both. The principal has the ability to tailor the document to include as many or as few areas of need as desired. Only the specific powers listed in the powers of attorney may be exercised by an agent.

Where a conflict exists between the powers listed in a power of attorney and a guardian, the power of attorney controls. The guardian will have no power, duty or liability

with respect to any personal or financial powers or duties given an agent under a power of attorney. Sections 11a-17 (c) and 11a-18 (e).

In addition, Section 2-7 of the Illinois Power of Attorney Act provides that an adjudication of disability of the person who created a power of attorney should not affect the ability of an agent to exercise authority under the power of attorney. However, where a power of attorney is ambiguous or where the agent fails to act under the terms of the written power of attorney, a court may direct a guardian to exercise powers included in the power of attorney. 755 ILCS 45/2-10.

F. Health Care Surrogate Act powers

The Health Care Surrogate Act, 755 ILCS 40/1, et seq. provides an additional means of making health care determinations on behalf of an incapacitated person. Under this law, a parent, spouse, child, sibling, relative, or friend of a person who lacks capacity to consent or refuse medical decisions, can act as a substitute decision maker. No guardianship appointment is required.

The surrogate decision maker may act without court appointment, and is legally authorized to make decisions to forego life sustaining treatment, where a doctor finds that a patient lacks decisional capacity and a qualifying medical condition is present. This law may be invoked where no guardian has been appointed, and no power of attorney or living will have been executed.

Similarly, a guardian may act as a surrogate decision maker without court order, to forego life-sustaining treatment for the ward. Section 11a-17(d). Consequently, guardianship may be a means of invoking the numerous benefits of the Health Care Surrogate Act where no family or friends are available to render a health care decision.

V. The Guardianship Process

A. Use of forms

In most counties, necessary forms used in the guardianship petitioning process are available from the probate court clerk. All probate courts prefer that their own forms be used.

The following is a list of forms typically used in a guardianship case (Cook County form designations are noted):

Report CCP-211

Petition CCP-200
Order Appointing Guardian ad Litem CCP-209
Guardianship Summons CCP-201
Notice of Rights
*Notice of Motion CCG-3A
Order Appointing Plenary Guardian CCP-204, or
*Order Appointing Limited Guardian CCP-207
Statement of Right to Discharge or Modify Guardianship CCP-214
Oath and Bond-No Surety CCP-313, or
*Oath and Bond-Surety CCP-312
*Petition for Temporary Guardian CCP-202
*Order Appointing Temporary Guardian CCP-203
*Petition to Waive Fees - Indigent and Order (no preprinted form)

***these forms are used only where necessary.**

B. Use of attorneys by petitioners

Although an individual seeking guardianship for another may do so without the use of an attorney, the advice of legal counsel may be beneficial. The involvement of an attorney can be helpful where the alleged person with disability objects to guardianship or where complicated personal or financial issues are presented to the court. In addition, an experienced attorney may be valuable in weighing the sufficiency of legal evidence necessary for guardianship adjudication, and in preparing a guardianship case in a way that conforms to local standards of practice.

Where a person opts to petition for guardianship without representation by legal counsel, a regional Office of State Guardian attorney or a legal assistance agency may be consulted, in order to learn about specific practices or requirements in a particular court. Local court rules and procedures should be available at the office of the Presiding Judge of any jurisdiction. In addition, the clerk of the court should be consulted to obtain copies of local court forms, and to learn about the scheduling of guardianship cases.

The Office of State Guardian will provide callers with referrals for attorneys in a number of jurisdictions who practice in the adult guardianship area. In addition, the Illinois State Bar Association and the Chicago Bar Association, as well as many local bar associations, provide lawyer referral services.

A respondent facing guardianship adjudication has the right to a court appointed attorney. See Section V I, below.

C. Costs

1. Office of State Guardian petitions

Section 11a-13(b) of the Probate Act provides that no costs shall be assessed or charged against the Office of State Guardian by any public officer in any proceeding for the appointment of a guardian.

2. All other petitions

Fees in adult guardianship cases are generally paid by the petitioning party, or, subject to court approval, from the estate of the person with disability. Petitioning costs in Cook County are $50.00 for filing for person only guardianship, $70.00 for estates up to $15,000.00 and $105.00 for estates in excess of $15,000.00. Sheriff's fees are $23.00 plus $.40 per mile for service of the petition and guardianship summons on the respondent. Surety bonds for estate assets (required only in estate guardianships) start out at $50.00 per year for $8,000.00 of coverage. Surety bonds must be obtained from authorized writers.

In addition, the expense of a guardian ad litem typically runs in the $-200-400.00 dollar range for routine cases. However, not all guardianship cases require a guardian ad litem. Fees may also be incurred for expert witnesses or appraisals of property, but usually only in contested cases. Attorney and guardian ad litem fees are typically approved by the court, and may be paid from the estate of the person with disability. In cases of indigence, attorney and guardian ad litem fees may be assessed against the petitioner, if the court approves. Section 11a-108 of the Probate Act details the court's role in considering fee issues.

D. *Guardians ad Litem*

Guardians ad litem are expected to scrutinize the guardianship petition and Doctor's report and gauge the appropriateness of an adjudication of disability. In that sense they act in the best interest of the alleged person with disability rather than as an advocate. Section 11a-10 indicates that a *guardian ad litem* is supposed to report to the court concerning the respondent's best interests. Attorneys for petitioners in adjudication proceedings should understand the different roles of guardians ad litem, and expect the guardian ad litem to adopt the role outlined in Section 11a-10.

In Cook County, protocol requires the appointment of a *guardian ad litem* in all estate guardianships, and in person guardianships which might result in a physical intrusion (surgery or forced medication) or a denial of rights (involuntary placement or objection to

guardianship by the respondent). Most downstate courts require the appointment of *guardians ad litem* in all cases except temporary guardianships (see Section VI, "Emergency Situations,≅ below), regardless of whether estate guardianship is at issue. The Probate Act does not require the appointment of a *guardian ad litem* where, in the discretion of the court, it is determined that an appointment is not necessary for the protection of the respondent or for a reasonably informed decision on the guardianship petition. Section 11a-10(a).

If the guardian ad litem is not a licensed attorney, he shall be qualified, by training or experience, to work with or advocate for the developmentally disabled, mentally ill, physically disabled, the elderly, or persons disabled because of mental deterioration, depending on the type of disability that is alleged in the petition. Section 11a-10(a).

Guardians ad litem typically visit the respondent, review available medical evidence (including the physician's report), inform the respondent of statutory rights, and form an opinion as to the need for and extent of guardianship. *Guardians ad litem* may consult with experts qualified to work with persons with developmental disability, mental illness, physical disability or mental deterioration. Section 11a-10.

The guardian ad litem is required to attempt to elicit the respondent's position concerning the adjudication of disability, the proposed guardian, any proposed change in residential placement, any changes in care that might result from the guardianship, and any other area of inquiry deemed appropriate by the court. At or before the hearing, the guardian ad litem must file a written report detailing his or her observations of the respondent, the responses of the respondent to any of the inquiries detailed herein, the opinion of the guardian ad litem or other professionals with whom the guardian ad litem consulted concerning the appropriateness of guardianship, and any other material issue discovered by the guardian ad litem. The guardian ad litem shall appear at the hearing and testify as to any issues presented in his report.

E. Petitions for guardianship

The guardianship petition is a statement, sworn to by the petitioner, that alleges a need for the appointment of a guardian for an alleged person with disability. The reason for guardianship, as stated in the petition, should conform to the actual diagnosis given in the physician's report, and should also conform to the basic statutory criteria.

Acceptable statutory criteria include mental deterioration, physical incapacity, developmental disability or mental illness and an inability to manage personal or financial affairs due to such deterioration, incapacity, disability, or illness. Section 11a-2. A person's status as elderly, frail, developmentally disabled or mentally ill, without proof of an inability to manage affairs, does not meet the statutory test.

Known relatives of the respondent should be listed as an Exhibit A to the petition, along with the names and addresses of any previously appointed guardians or agents acting under powers of attorney. Section 11a-8. Although friends of the respondent have no statutory right to notice, they should be afforded an opportunity to be heard, to demonstrate fairness and thoroughness to the court, if for no other reason.

Once filed, guardianship petitions may not be dismissed or withdrawn without leave of court. Section 11a-8. The allegations stated on the face of the petition necessarily suggest that a person is disabled and needs the assistance of a guardian. Courts are often reluctant to let a case be withdrawn without a showing of a change in circumstances or a written statement from a doctor explaining why guardianship is no longer needed. Before a guardianship petition is filed, care must be taken to ensure that a respondent meets the legal standard for guardianship and would benefit from guardianship.

F. Doctor's Report

As medical reports are the foundation of guardianship petitions, careful scrutiny of the report is essential. In uncontested matters, the person who prepared the report is routinely excused from testifying. Section 11a-11(d). Accordingly, a report is often the major evidence considered by the court.

1. Content

Section 11a-9, requires four main criteria to be discussed by the physician:

a) the nature and type of disability, and an assessment of how such disability impacts on the ability of the respondent to make decisions or to function independently;

b) an analysis and results of the respondent's mental and physical condition, including educational condition, adaptive behavior and social skills;

c) an opinion regarding the need for, type, and scope of guardianship recommended; and

d) a recommendation regarding the most suitable living arrangement.

2. Signatures and dates

Reports must bear the name of at least <u>one</u> physician (an M.D. or D.O. licensed to practice in Illinois), but may be prepared by nurses, social workers or other persons, so long as they also sign. In addition, the report should include a short

statement of the certification, license or other credentials which qualify any evaluators who prepared the report. Any report dated three months prior to the date of filing the petition is inadmissible and must be updated or redone. Section 11a-9(a)(2). After adjudication, the report is held by the clerk, but separated from the rest of the court file unless released by the court. Section 11a-9(c).

3. Scrutinizing reports

In reviewing a physician's report, consider the following:

a) Does the report correctly state the respondent's name in the caption and elsewhere on the form?

b) Is the physician's name clearly legible?

c) Is the date of examination over three months old as of the date the petition will be filed?

d) Is the disability of the alleged person with disability described, rather than a mere statement of diagnosis of medical problems? For example, "Down's Syndrome, resulting in moderate developmental disability," is an appropriate diagnosis for the purposes of an adjudication of disability. An inappropriate diagnosis would be "acute asthma," or "insanity."

e) Is the functioning level of the person adequately described? This statement should be descriptive of the person, rather than a bare statement that the person is incapable. One should be able to tell whether the person is comatose, conscious but nonverbal, able to participate in recreational or job programs, or able to live independently with support services.

f) Does the statement both state a conclusion, and give facts or observations upon which the conclusion is based? It should state the physician's opinion about the person's decision making capacity and the extent of the respondent's impairment. A statement that guardianship is necessary, without indicating why, may be inadequate.

g) Is the report signed by the physician?

h) Is the physician's address and telephone number clearly stated?

I) Have all others who contributed to the report signed it? Often, exceptional reports are prepared by nurses, social workers, or other care providers. If the doctor relies upon the written statements of others, the names of those persons should appear on the face of the form.

j) If the answer to any of the above questions is "no," confer with the physician or facility staff or referral source to gather necessary information and revise the report accordingly.

G. Summons

A guardianship summons is the legal notice physically served upon the respondent which advises of the time, date, and place of the guardianship hearing, the right to appointed counsel, the right to a jury trial, the right to request the appointment of an expert witness and other legal rights. The form of the notice is mandated by Sections 11a-10(e). The summons and a copy of the guardianship petition must be served not less than 14 days before the guardianship hearing. 11a-10(e).

An adjudication of disability cannot occur without proof of personal service on the respondent. Substitute service of a summons is not acceptable, despite its practicality. For example, the sheriff cannot leave a copy of the petition and summons with a nurse, social worker, or family member when the respondent is in a coma. A summons is usually served by the office of the sheriff of the county in which the respondent lives, but may be served by any individual over age 18 who is not a party to the guardianship proceeding.

H. Notice

A legal notice of motion and a copy of the petition must be sent by the petitioner to all persons whose names and addresses appear on the petition, at least 14 days before the hearing date. Section 11a-10(f). Notice need not be sent to the respondent (summons and a petition will be served) but the proposed guardian should get notice. The notice simply explains that a guardianship proceeding has been scheduled for a particular time and place, and advises that parties may appear and participate in the adjudication of disability.

I. Due process

Certain procedural safeguards are included in the adjudication process. The appointment of a *guardian ad litem* may provide the best oversight of guardianship

proceedings. The *guardian ad litem* is required to perform certain statutory functions intended to protect the rights and interests of the respondent (see Section V D, above).

The Guardianship and Advocacy Commission favors the appointment of a *guardian ad litem* in all cases where OSG is appointed guardian or where OSG petitions for guardianship. However, in cases where a *guardian ad litem* is waived or refused by the court, other protections remain. Any or all of the following should be considered.

1. Appointment of counsel

A court may appoint an attorney to represent the respondent, if the court finds that the interests of the respondent will be best served by the appointment. A court must appoint counsel when the respondent requests representation or when the respondent takes a position averse to that of the *guardian ad litem*.

Requests for counsel by a respondent may be made by any oral or written means, either before or at the guardianship hearing. Section 11a-10(b), 11a-11(a)

2. Jury trial

A respondent is entitled to a 6-person jury. The jury will determine the issue of disability after hearing evidence. 11a-11(a)

3. Independent experts

A respondent may request that the court appoint independent medical, psychiatric or other evaluations to attempt to refute allegations made by the experts retained by the petitioner. 11a-118

4. Other rights

Respondents are absolutely entitled to appear at guardianship hearings, cross examine witnesses, and present evidence. Guardianship hearings may be closed to the public at the request of the respondent, *guardian ad litem*, or appointed counsel. 11a-11(a)

5. Quantum of Proof

The quantum of proof in contested guardianship proceedings is sometimes hard to determine. The Commission believes that most courts would follow a clear and convincing standard, although no particular standard is articulated in the law.

J. Uncontested cases

In an uncontested case, the court will focus on the physician's report, and may even read the report into the court record. In many courts, the testimony of a witness familiar with the respondent, usually a person from the respondent's residence or care facility, will testify concerning the need for guardianship.

If a *guardian ad litem* is appointed, a brief oral report discussing issues of importance may be made. The court will then rule, after considering the factors set out in Section 11a-11(e):

1. the nature and extent of the respondent's general intellectual and physical functioning,

2. the extent of the impairment of the respondent's adaptive behavior if the person is developmentally disabled, or the nature and severity of the person's mental illness in the case of a person with mental illness,

3. the understanding and capacity of the respondent to make and communicate responsible personal decisions,

4. the capacity of the respondent to manage an estate and financial affairs,

5. the appropriateness of proposed and alternate living arrangements,

6. the impact of the disability upon the respondent's functioning in the basic activities of daily living and the important decisions faced by the respondent or normally faced by adult members of the respondent's community, and

7. any other appropriate area of inquiry.

K. Contested cases

If the respondent appears and objects or if another objector steps forward, the court may set the case over to a future date for a contested hearing or appoint counsel for the respondent. Section 11a-10(b). The respondent is entitled to legal representation, a 6-person jury and other due process, and is required to be present at the guardianship hearing absent a showing that the respondent refuses to be present or will suffer harm if required to attend. Section 11a-11(a). In practice, the respondent often does not appear at the guardianship hearing.

L. Orders of appointment

Illinois law creates no preferences or priorities as to whom is appointed guardian for a person with disability, other than the requirement that the court give due consideration to any preference of the respondent. Section 11a-12(d). Rather than affinity or the degree of relationship to the ward, the criterion used in selecting a guardian is the prospective guardian's capability of providing an active and suitable program of guardianship for the ward. Section 11a-5(a).

M. Oaths and Bonds

Guardians are required to file an oath or a bond. Section 12-2. Where a guardian of the person only is appointed, many courts routinely waive the filing of a bond, and a simple oath signifying the guardian's acceptance of the office will suffice. Estate guardians are generally required to file either surety or non-surety bonds, and the courts have very little discretion in waiving or reducing bonds. Section 12-6.

For example, many courts will generally require a bond even where the parent of an adult person with developmental disability is serving as guardian to oversee the investment of an inheritance. The bond amount is set by Section 12-5 at one and one-half times the value of the personal estate if a surety company acts as a surety.

N. Statement of rights

After an adjudication of disability, the person with disability receives a statement which advises of statutory rights to modify or revoke the adjudication of disability. Section 11a-19. In Cook County, the statement is mailed by the court after the adjudication of disability.

O. Letters of office

Letters of office, which are certified proof of the guardian's appointment, are usually issued by the Probate clerk within a day or two of the appointment and are mailed to the petitioner's attorney or to the appointed guardian.

P. Termination/restoration of rights

Guardianship may be modified or terminated at any time under Section 11a-20,21, and guardians may be removed for the causes stated in Section 23-2. Unless revoked by the court, guardianship is a lifetime proposition, and survives the death of a guardian. Section 11a-15.

VI. Emergency Situations

A. Temporary Guardianship

As an emergency procedure for use before a full adjudication on the merits, temporary guardianship is available to protect the person or estate of an alleged person with disability. Section 11a-4. Temporary guardianship may also be used to protect a ward when proceedings have been brought to remove a guardian who is acting against the best interests of the ward or the ward's estate. Although orders may be entered *ex parte*, or without notice to the alleged person with disability, Cook County judges tend to insist on the appointment of a *guardian ad litem*. Cook County courts also prefer to have service of notice on the respondent by the petitioner. However, other courts may be less stringent. A condition to filing for temporary guardianship is the simultaneous or prior filing of a petition for adjudication of disability - either plenary or limited. Consequently, in most cases the temporary appointment is followed or replaced by a permanent one. Temporary guardianship should not be used to circumvent plenary or limited guardianship procedures, although many downstate jurisdictions do so.

Temporary guardianships are typically entered for 30 day periods or until the hearing for plenary of limited guardianship. Orders may be extended, but are statutorily limited to 60 days. The only duties of a temporary guardian are ones specifically described on the face of the temporary order. Courts should be reluctant to enter temporary guardianship orders absent true emergencies, but are generally accommodating if a real danger exists. A typical time frame for obtaining an order is two or three days from the filing of a petition, although other arrangements may be made in dire cases.

B. Orders of Protection

Orders of protection are defined under the Illinois Domestic Violence Act of 1986 (IDVA), 750 ILCS 60/101, et seq. Section 11a-10.1 of the Probate Act incorporates the provisions of the IDVA by reference. The Probate Act provides that all IDVA procedures for the issuance, enforcement and recording of orders of protection will also be available in guardianship cases. Consequently, an order of protection may be joined together with a plenary or temporary petition for adjudication of disability, and a court may enter both orders of protection and orders appointing guardians in the same proceeding.

Under the IDVA, any person abused by a family or household member or any high-risk adult with disabilities who is abused, neglected, or exploited by a family or household member, among others, are subject to court ordered protection. The IDVA defines high-risk adult with disabilities to mean a person age 18 or over whose physical or mental disability impairs his or her ability to seek or obtain protection from abuse, neglect, or exploitation. The IDVA defines adults with disabilities to mean either an elder adult with disabilities or a high-risk adult with disabilities. Elder adults with disabilities include adults

prevented by advanced age from taking appropriate action to seek protection from abuse by a family or household member.

The IDVA also provides that a person may be considered to be an adult with disabilities for the purposes of the Act even though he or she has never been adjudicated an incompetent adult (or adjudicated disabled within the meaning of the Probate Act).

The Probate Act supplements the IDVA in two basic ways. First, section 11a-10.1 provides that an order of protection may be used in concert with a proceeding for an adjudication of disability and appointment of guardian if a petition for an order of protection alleges that a person who is party to or the subject of the proceeding has been abused by or has abused a family or household member or has been neglected or exploited as defined in the IDVA.

Second, section 11a-10.1 provides that if the subject of the order of protection is a high-risk adult with disabilities for whom a guardian has been appointed, the court may appoint a temporary substitute guardian. In addition, the court is actually required to appoint a temporary substitute guardian if the appointed guardian is named as a respondent in a petition for an order of protection under the IDVA.

C. Guardianship Alternatives

Problems that in the past may have been attacked with the filing of a temporary guardianship petition may now, in some cases, be handled without resort to guardianship. Before racing into court to obtain temporary guardianship, practitioners should thoroughly investigate the existence of a Living Will, Power of Attorney, or similar advance directive. In addition, in many cases the Health Care Surrogate Act may provide an adequate legal means to address important medical issues for the terminally ill.

However, practitioners should also be cautioned against creating advance Living Wills, Powers of Attorney, or advance directives for persons of limited capacity. The ethical considerations of urging a client or a client's relative to sign such a document in an effort to solve a problem that might more properly require the attention of a probate court should be considered.

VII. Ethical and Practice Considerations for Guardians

A. The National Guardianship Association

The National Guardianship Association (NGA) provides for the exchange of ideas, education, and communication between groups and individuals interested in providing or furthering guardianship services or alternative protective services to individuals in need of such services.

In 2000, the NGA prepared a thoughtful and comprehensive *Standards of Practice*, that includes a list of guardianship standards covering a wide variety of practical issues. The issues covered in these materials are extremely helpful and are available from the NGA's web site at www.guardianship.org. NGA correspondence may be addressed to their offices at 526 Brittany Drive, State College, PA 16803. Their phone number is 877-326-5992.

B. Substituted judgment and best interest standards of decision making

Decisions made by a guardian on behalf of a ward may be made by conforming as closely as possible to what the ward, if competent, would have done or intended under the circumstances, taking into account evidence that includes, but is not limited to, the ward's personal, philosophical, religious and moral beliefs and ethical values relative to the decision to be made by the guardian.

If the ward's wishes are unknown and remain unknown after reasonable efforts to discern them, the decision would then be made on the basis of the ward's best interests as determined by the guardian. In determining the ward's best interests, the guardian would weigh the reason for and nature of the proposed action, the benefit of the action, the possible risks and other consequences of the proposed action, and any available alternatives and their risks, consequences and benefits, and take into account any other information, including the views of family and friends, that the ward would have considered.

C. Personal Accountability for Guardians

Although Illinois law has no mandatory training or certification requirements for guardians, case law has held that guardians owe a fiduciary duty to a ward's estate. In addition, case law has discussed the obligations of personal guardians in a number of situations. Finally, other jurisdictions have held guardians responsible for particular actions or failures to act.

The National Guardianship Association provides a training and certification program to guardians and others interested in learning about the ethics of the guardianship profession. The Commission believes that the NGA certification program advances guardianship as a profession, and in so doing, strengthens protections for persons with disabilities. For further information about the National Guardianship Association, please visit the NGA's web site at www.guardianship.org. NGA correspondence may be addressed to their offices at 526 Brittany Drive, State College, PA 16803. Their phone number is 877-326-5992.

A guardian should consult with a skilled attorney to consider issues of personal accountability and liability. Although it is generally the case that a guardian may not be held

personally accountable for claims properly brought against the estate of a ward, responsible practice dictates that a guardian seek professional legal or financial advice before undertaking serious decisions on behalf of a ward or a ward's estate.

VIII. Using Guardianship for Specific Problems

The following issues often arise in guardianship cases. We list them only to alert the practitioner, with no specific comments. Many of these issues are the subject of current litigation or of proposals before the Illinois General Assembly.

A. Personal Issues

1. Provision of "informed consent" to health care providers; 11a-17(a)

2. Residential placement issues, care and custody of a ward; 11a-10, 11a-14.1, 11a-17(a)

3. Consent to the release of information; 740 ILCS 110/1

4. Withdrawing & withholding life-supporting equipment, including food and hydration (right to die issues), and Do Not Resuscitate (DNR) orders; 11a-17(d); Section 20 (b) (1) of the Health Care Surrogate Act, 755 ILCS 40/20(b)(1);

5. Medical decision making; Section (b-5) of the Health Care Surrogate Act, 755 ILCS 40;

6. Mental Health issues

   a. Psychiatric hospitalization of wards on voluntary and involuntary basis; People v. Gardner, 121 Ill. App. 3d 7 (4th Dist. 1984)
   b. Forced psychotropic medication; 405 ILCS 5/2-107.1; In re Austin, 245 Ill. App. 3d 1042, (4th Dist. 1993)
   c. Use of electro-convulsive therapy (ECT) or experimental drugs or therapy; 405 ILCS 5/2-110

7. Abortion for a ward; Jolivet v. Chuhak, also known as In Re D. W. 137 Ill.2d 1, 1990

8. Dissolution of marriage: the legal standing of a guardian to represent the ward in legal proceedings is not unlimited, as with an action for dissolution, which is a personal legal proceeding; In re Drews, 139 Ill.App. 3d 763 (1st Dist. 1985), aff'd, 115 Ill.2d 201 (Ill. Sup. Ct. 1985), cert. denied, 483 U.S. 1001 (1987).

9. Orders of protection to stop or prevent abuse; 11a-10.1

B. Financial issues, where no preplanning occurred

1. Applications for public and private benefits, pensions, insurance

2. Citations to discover and recover estate assets

3. Basic estate management, bill paying, filing income tax returns; 11a-18 (a)

4. Collect wards' assets, prepare and file inventory and accounting with the probate court; 755 ILCS 5/24-11

5. Execute contracts for residential and health care services, or for other contracts necessary to administer the guardianship estate, or void such contracts; 11a-18(b), 11a-22

6. Orders of protection to stop or prevent financial exploitation; 11a-10.1

7. Appear for and represent the ward in all legal proceedings; 11a-188 however, the legal standing of a guardian to represent the ward in legal proceedings is not unlimited, as with an action for dissolution, which is a personal legal proceeding; In re Drews, 139 Ill.App. 3d 763 (1st Dist. 1985), aff'd, 115 Ill.2d 201 (Ill. Sup. Ct. 1985), cert. denied, 483 U.S. 1001 (1987); an estate guardian may maintain an action in order to protect the estate interests; In re Kutchins, 136 Ill. App. 3d 45 (2d Dist. 1985)

8. Make conditional gifts on behalf of the ward's estate; 11a-18.1

IX. Alternatives to Guardianship

A. Personal Decision Making

1. Powers of Attorney for Health Care

2. Living Will Act

3. Health Care Surrogate Act

4. Civil Commitment and Forced Psychiatric Treatment Under the Mental Health and Developmental Disabilities Code, Without Resort to Guardianship

5. Mental Health Treatment Preference Declaration Act Declarations

B. Financial Decision Making

1. Trusts

2. Powers of Attorney for Financial Decisions

3. Representative and Protective Payeeships, Bill Paying Assistance, and Related Programs