

GENERAL INFORMATION

• **WHAT IS A GUARDIANSHIP?**

A guardianship is an involuntary trust relationship in which one party, called a guardian, acts for an individual called the ward. The law regards the ward as incapable of managing his or her own person and/or affairs.

• **WHAT IS A GUARDIAN?**

A guardian is any adult person, association, or corporation appointed by the Probate Court to assume responsibility for the care and management of the person, the estate, or both, of an incompetent person or minor child. A corporation can only be guardian of the estate and not of the person.

• **WHO NEEDS A GUARDIAN?**

A guardian may be appointed for either an incompetent or minor, which are defined by statute as:

Incompetent: Any person who is so mentally impaired as a result of a mental or physical illness or disability, or mental retardation, or as a result of chronic substance abuse, that he is incapable of taking proper care of himself or his property or fails to provide for his family or other persons for whom he is charged by law to provide, or any person confined to a penal institution within this state.

Minor: Any person under 18 years of age who has neither father nor mother or whose parents are unsuitable to have custody and tuition of such minor, or whose interests, in the opinion of the Court, will be promoted.

Minor Settlement: Natural parents do not have an inherent right to settle personal injury claims on behalf of a minor child. The Probate Court must authorize approval of such settlements. If the settlement exceeds \$10,000, the Court will require the appointment of a

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guardian of an estate.

- **WHO CHOOSES THE GUARDIAN?**

The Court appoints the guardian. However, a minor over 14, or the parents by will, may suggest a guardian for a minor. In addition, an adult, while competent, may nominate a guardian to serve in the event of incapacity.

- **APPOINTMENT PROCEDURE**

(1) Application for guardianship is filed in the Probate Court of the County of the ward's residence by an interested party, or on the Court's own motion.

(2) Application must include a statement of the guardian's willingness to perform as guardian, a bond as required by law, and, in the case of a prospective incompetent ward, a statement of the ward's mental and physical condition from a treating physician, psychiatrist, or licensed psychologist.

(3) The prospective ward, as well as the adult next of kin, are notified of the impending guardianship and date and time of hearing as prescribed by law. In the case of an incompetent proceeding, the notice and a statement of rights will be served on the prospective ward by Court Investigator.

(4) An investigation is conducted, in the case of a prospective incompetent ward, by a Court Investigator, which includes an interview with the prospective ward in order to assist the Court in determining the advisability of guardianship.

(5) Formal hearing is conducted by the Judge or Magistrate to determine if a guardianship is necessary, the guardian is suitable, and the guardian understands his duties.

- **RIGHTS OF THE WARD**

The prospective ward has the right to be present at the hearing, to contest any application for guardianship, to have a record of the hearing taken, to have a friend or family member present at the

hearing, and to be represented by an attorney. A prospective incompetent ward has the additional right to present evidence of a less restrictive alternative, and, if indigent and requested, to have an attorney and independent expert appointed at Court expense.

- **COURT SUPERVISION**

The Probate Court is the superior guardian, and all guardians must obey all orders of the Court. The Court exerts its supervisory authority through the following:

Accountings: A guardian of the estate must file a written account with the Court annually or biennially as to the income and expenses of the ward's estate.

Reports: A guardian of an incompetent ward must file a written report annually or biennially. The report concerns the status of, and continued need for, the guardianship.

Citations: If a guardian fails to timely file a report, inventory, or accounting, the Court may cite a guardian to appear, and may fine, reduce the guardian's fee, or remove, the guardian.

Investigations: To determine if a guardianship is functioning properly, the Court may order an investigation by a Court Investigator, Law Enforcement Agency, Adult Protective Service, or other County Agency.

Prior Approval: The guardian must first obtain approval of the Probate Court before entering into contracts or leases, making improvements to real estate or mortgage real estate, selling assets of the ward, or settling any personal injury claim for the ward.

Removal: The Court may, at any time, in the best interest of the ward, remove the guardian.

- **TYPES OF GUARDIANSHIPS**

Person and/or Estate: A guardian may be appointed either a guardian of the person, a guardian of the estate, or both. A guardian of the person has custody of, controls, and protects, the person of the

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ward. A guardian of the estate controls and protects the assets or property of the ward.

Limited: A guardian may be appointed with limited powers to make restricted or specific decisions of the ward. The ward retains all powers not granted to the guardian.

Emergency: In an emergency in which significant injury to a prospective ward may occur unless immediate action is taken, the Court may appoint an emergency guardian for 72 hours.

- **FEES**

A guardian's compensation and attorney's fees are set by Court rule, and must be approved prior to fees being paid.

- **TERMINATION**

A Court order will terminate a guardianship upon the death of a ward, upon the ward being adjudged competent, or, in the case of a minor, upon reaching the age of majority (18). A Motion for termination of a guardianship of an incompetent may be filed 120 days after an appointment of a guardian, and once every year thereafter.

- **ALTERNATIVES TO GUARDIANSHIP**

NOTE: Except for Representative-Custodial Payee, all alternatives involve a person who has capacity, or is competent, to grant powers. If the person does not have capacity when the powers are granted, they are subject to challenge, and may be void.

- **CONSERVATORSHIP**

- **WHAT IS A CONSERVATORSHIP?**

A conservatorship is a voluntary trust relationship using guardianship laws and procedures as its basis, in which one party, known as a conservator, acts with Court supervision for a competent, physically

infirm adult, who is called the conservatee.

- **WHO CHOOSES THE CONSERVATOR?**

A conservatorship is based on the consent of the person for whom the conservatorship is to benefit. Thus, the conservatee decides who will serve as conservator, and what property and powers of the conservatee will be included in the conservatorship. In addition, the conservatee decides which of the guardianship duties and procedures and conservator follows and the Court enforces.

- **WHAT IS THE COURT'S ROLE?**

After a petition is filed, and the matter heard, the Court will determine if the petitioner is infirmed, the petition is voluntary and the conservator is suitable. If the petition is granted, the Court, while the conservatorship exists, will apply the laws and procedures of Ohio pertaining to guardianship, except those excluded by the conservatee.

A Conservatorship is terminated by judicial determination of incompetency, the death of the conservatee, the Order of the Probate Court, or the execution of a written termination notice by the conservatee.

- **POWER OF ATTORNEY**

- **WHAT IS A POWER OF ATTORNEY?**

A Power of Attorney is a written authorization for an agent to perform specified acts, either personal (health care) or estate (property) on behalf of a principal.

- **TYPES OF POWERS OF ATTORNEY**

Durable: A Power of Attorney in which the powers granted remain in effect in the event of the grantor's incapacity or on being adjudged incompetent.

Springing: A Power of Attorney in which the powers granted become

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effective when the grantor becomes incapacitated or is adjudged incompetent.

Health Care: A durable Power of Attorney that may be used to authorize health care decisions in the event of incapacity.

- **EXECUTION OF POWERS OF ATTORNEY**

Certain Powers of Attorney, such as those involving transfer of real property, require recording, and must be executed in a specific manner. It is recommended that legal advice be obtained before executing Powers of Attorney as an alternative to guardianship. In addition, there are few safeguards or protections from abuse or misuse of Powers of Attorney. For that reason, before execution, the agent of the Power of Attorney should be of good character, and be very carefully chosen.

- **INTERVIVOS TRUST**

An intervivos trust is a confidential relationship involving a trustee, usually a bank, who manages only the property of a living person for the benefit of that person or someone else. Banks often require a minimum trust amount.

- **REPRESENTATIVE-CUSTODIAL PAYEE**

A Representative-Custodial Payee is an individual authorized to receive and expend Social Security, Supplemental Security Income, or Veteran's benefits, on behalf of the recipient, based upon a Court finding of mental incompetence or on submission of evidence to the Social Security or Veterans Administrations of mental or physical incapacity which impairs management of the funds.

- **KNOW YOUR PROBATE COURT**

The Probate Court of Ohio is a State Court with extensive duties and powers. The following facts may help when you have dealings with the Court.

WHERE? Located in each of Ohio's 88 counties is a Probate Division

of the Court of Common Pleas, or Probate Court. For a Court's hours, address, and telephone number, check the local telephone directory.

DUTIES: Major duties of the Court are Guardianships and Conservatorships, Estate Administration, Issuance of Marriage Licenses, Civil Commitments, Adoptions, Legitimations, Name Changes, Trusts, and Land Appropriations.

RECORDS: The Judge of the Probate Court is the ex officio clerk of the Court, and maintains all files, journals, and dockets. To examine Probate records, contact the appropriate Probate Court.

OFFICERS: The Probate Court in each county is presided over by a Judge elected on a non-partisan ballot for a six-year period. To assist in carrying out the extensive duties of the Probate Court, the Judge may appoint referees, deputy clerks, and investigators.

LEGAL PRACTICE is restricted, by law, to attorneys who are licensed by the Supreme Court of Ohio. If an individual wishes to handle his or her own case, he or she may do so, but may not represent others. Deputy Clerks are prevented, by law, from practicing law, and therefore, are limited in the amount of advice they are permitted to give.

ABOUT THIS PAMPHLET

Prepared by the Ohio Association of Probate Judges

This publication is designed as a service to the public in order to provide a general understanding of the duties and procedures of the Probate Court in reference to guardianships. This pamphlet should not be considered as a legal reference. If you have a legal question dealing with guardianship, an attorney should be consulted. Additional copies of this pamphlet are available on request by writing to the Ohio Judicial Conference Ohio Judicial Conference, 10 West Broad Street, Columbus, Ohio 43215. Cost of preparing and printing this pamphlet was paid for by grants from the Administration of Aging, Ohio Department of Aging; Ohio Association of Probate Judges; Calhoun Foundation, Trumbull County Probate Court; and Summit County Probate Court.