

GUARDIANSHIP

WHEN MAY A COURT APPOINT A GUARDIAN?

The court may appoint a guardian for a person if the court determines (1) that the appointment is necessary to provide for the personal needs or to manage the property and financial affairs of the person, or both, and (2) that the person agrees to the appointment or that the person is incapacitated. A determination of incapacity requires clear and convincing evidence that a person is likely to suffer harm because:

- the person is unable to provide for personal needs or unable to manage property and financial affairs; and
- the person cannot adequately understand and appreciate the nature and consequences of such inability.

The law requires the court to give primary consideration to the functional level and functional limitations of the person. This consideration includes an assessment of the person's:

- management of the activities of daily living, as defined in Section 81.03(h) of this article.
- understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living.
- preferences, wishes, and values regarding managing the activities of daily living; the nature and extent of the person's property and financial affairs and his or her ability to manage them.

It shall also include an assessment of (i) the extent of the demands placed on the person by that person's personal needs and property and financial affairs; (ii) any physical illness, mental disability, alcoholism or substance dependence and the prognosis of such illness, disability, or dependence; and (iii) any medications with which the person is being treated and their effect on the person's behavior, cognition, and judgment.

WHAT ARE THE BASIC DUTIES OF THE GUARDIAN?

This section provides that the guardian shall, among other things:

- exercise only the powers the guardian is authorized to exercise.
- exercise the utmost care and diligence when acting on behalf of the incapacitated person.
- exhibit the utmost degree of trust, loyalty, and fidelity in relation to the incapacitated person.
- file an initial and thereafter annual reports.
- visit the incapacitated person not less than four times a year or more frequently as specified in the court order.

WHAT ARE THE DUTIES OF THE GUARDIAN WHO IS GIVEN AUTHORITY WITH RESPECT TO PROPERTY MANAGEMENT?

The guardian with authority over property management must:

- afford the incapacitated person the greatest amount of independence and self-

determination with respect to property management considering that person's functional level, understanding and appreciation of his or her functional limitations, and personal wishes, preferences, and desires regarding managing the activities of daily living.

- preserve, protect, and account for such property and financial resources faithfully.
- determine whether the incapacitated person has executed a will, determine the location of any will, and the appropriate persons to be notified in the event of the death of the incapacitated person and, in the event of the death of the incapacitated person, notify those persons.
- use the property and financial resources and income available to maintain and support the incapacitated person, and to maintain and support those persons dependent upon the incapacitated person.
- at the termination of the appointment, deliver such property to the person legally entitled to it.
- file with the recording officer of the county wherein the incapacitated person is possessed of real property, an acknowledged statement to be recorded and indexed under the name of the incapacitated person identifying the real property possessed by the incapacitated person, and the tax map numbers of the property, and stating the date of adjudication of incapacity of the person regarding property management, and the name, address, and telephone number of the guardian and the guardian's surety; and
- perform all other duties required by law.

These powers are potentially very broad. Although Medicaid planning will not be part of a guardianship of a Commissioner of Social Services, it should be noted that Medicaid planning plays a significant role in many guardianships.

WHAT ARE THE DUTIES OF A GUARDIAN WHO IS GIVEN AUTHORITY RELATING TO PERSONAL NEEDS?

A guardian who is given authority relating to the personal needs of the incapacitated person shall afford the incapacitated person the greatest amount of independence and self-determination with respect to personal needs considering that person's functional level, understanding and appreciation of that person's functional limitations, and personal wishes, preferences, and desires regarding managing the activities of daily living.

WHAT EXTENT CAN THE GUARDIAN HAVE POWER OVER THE INCAPACITATED PERSON'S PROPERTY?

The guardian may be authorized to exercise those powers necessary and sufficient to manage the property and financial affairs of the incapacitated person; to provide for the maintenance and support of the incapacitated person, and those persons depending upon the incapacitated person.