



Role of a Guardian
By Attorney Sarah Peterson

1. What is Guardianship?

Guardianship is a court process through which a concerned individual or entity can request to have someone appointed to make medical (and other personal decisions) for someone who lacks capacity to make reasoned decisions for himself. Typically it is considered when a family member, loved one, or treatment provider becomes concerned that necessary medical care will not be provided absent appointment of a guardian, or has some other concern (safety or otherwise).

2. What does a Guardian do?

Generally, a guardian is required to maintain reasonable contact with the individual and his treatment providers and to make decisions in the best interest of the individual. They must file an initial 60 day report with the court and annually thereafter to report on how the individual's treatment, placement, and progress has been over the course of the year and whether there are any concerns. If the individual is prescribed an antipsychotic medication then the guardian often also serves as the Rogers monitor and is required to follow changes (or proposed changes) to the medication and dosages, and any side effects and to report back to the court annually (or sooner if changes to the treatment plan are required). A guardian is often also in the role of discussing issues regarding treatment and placement with the individual's family (if involved).

3. Who chooses a Guardian?

While an individual can nominate a guardian in a power of attorney or health care proxy, the court ultimately chooses the guardian. Sometimes it is someone who the petitioner recommends, sometimes a family member. Who is chosen depends on who is available and how contentious the matter is. For example if there are two children who are fighting over who should serve as guardian, a judge may choose to nominate some third-party neutral (often an attorney) to serve in the role, notwithstanding the choice of the individual when competent.

4. Who can be a Guardian?

Any competent individual over the age of 18 (or in some cases even an entity) can serve as guardian. In order to serve, the guardian must file a bond (the court will determine whether sureties are required and how much) and the court will conduct a criminal background check on the proposed guardian. If the proposed guardian's background check comes back with any record of abuse (particularly against the individual for whom guardianship is sought) the court will conduct further inquiry into whether or not it is in the best interest of the respondent for this person to serve as guardian.

5. How is a Guardian different than a Health Care Agent?

A guardian is different than a health care agent in that they are appointed by the court, as opposed to appointed by the individual. A guardian is sometimes a person who is injected into the individual's life by virtue of the court order, whereas a health care agent is typically someone who has been involved all along and the authority arises by virtue of the individual losing the ability to make reasoned medical decisions. A health care agent is limited to making health care decisions, however, while a guardian can make non-medical decisions as well (such as decisions about placement in housing, including an assisted living). A health care agent can make all medical decisions, including treatment with antipsychotics and placement in a nursing facility, while a guardian requires specific court authority (after appointment of counsel and certain findings) to make those decisions. Interestingly, if there is a guardian serving alongside a health care agent, the decision of the health care agent wins if there is a difference of opinion.

6. What is a Guardian's decision making powers?

In general a guardian makes usual and customary medical and personal decisions for the individual. The authority can be as broad or as limited as the court sees fit. The new law (established in 2009) encourages limiting the guardianship to whatever extent possible. To whatever extent possible, an individual should retain certain basic rights, such as the right to vote or determine his level of involvement in religious activities, if any. The scope of authority is beyond medical decisions, and can include authority to select housing, apply for public benefits, and contact with visitors.

7. What are the limits to a Guardian's decision making powers?

Although one typically would need a conservator to be appointed for financial matters, a guardian does have an obligation to conserve any excess funds for the individual's future care needs unless a conservator has been appointed. Specific court authority is required for nursing home placement (over 60 days), for treatment with antipsychotics, ECT treatment, and end of life decision-making. If no authority was granted for extraordinary treatment at the outset, then a guardian will need to petition the court to expand his powers in order to make those decisions.



8. What duties does a Guardian have to the Court?

At the outset of the matter, the guardian will have to file a bond (promising to do a good job) and have a background check completed. They must file an initial 60 day report with the court and annually thereafter to report on how the individual's treatment, placement, and progress has been over the course of the year and whether there are any concerns. If the individual is prescribed an antipsychotic medication then the guardian often also serves as the Rogers monitor and is required to follow changes (or proposed changes) to the medication and dosages, and any side effects and to report back to the court annually (or sooner if changes to the treatment plan are required). A guardian is often also in the role of discussing issues regarding treatment and placement with the individual's family (if involved).

9. How do I become a Guardian?

One can become a guardian for a specific individual by filing a petition (along with a medical certificate) with the appropriate probate court to initiate the guardianship process.

For more information visit Massachusetts Guardianship Association website,
<http://www.massguardianshipassociation.org/>

Biography

Attorney Sarah Peterson practices elder law, mental health law, estate planning and probate and trust administration with Zalkin Law Firm, PC in Wellesley, Massachusetts. She has many years of experience advocating for seniors and their families.

She is currently serving as President of the Massachusetts Guardianship Association and as a member of the Advisory Board of the Money Management program at HESSCO Elder Services. She is a member of the National Academy of Elder Law Attorneys (and its Massachusetts Chapter), Women's Bar Association, and Neponset Valley Alzheimer's Partnership.