GUARDIANSHIP:

A Solution for (and Source of) Elder Abuse

Susan Dawson-Tibbits, Attorney at Law
JOHNSON, BUNCE & NOBLE, P.C.
7800 N. Sommer Street
Peoria, IL 61615
Phone: (309) 691-9650
E-mail:susan@peorialawyers.com

By law, when a person reaches the age of majority, he or she is presumed to be competent to handle his or her own affairs. Until that time, parents make decisions for their children as to where to live, where to go to school, and what to do concerning any necessary financial matters. For younger adults with developmental disabilities, such as mental retardation or autism, which significantly limit their ability to make appropriate decisions regarding their personal life and financial affairs, the appointment of a guardian to legally take over such decision-making when they reach the age of majority is often appropriate.

At any time in an adult's life, circumstances might arise that also make guardianship appropriate and necessary. Car accidents and medical problems incapacitate persons of all ages. For older adults, however, living longer than previous generations has its blessings and its burdens. Physical incapacities, such as sight, vision and mobility impairments and other functional limitations arising from the aging process may restrict an older person's ability to handle his or her day-to-day activities. Illnesses such as Alzheimer's disease, dementia, stroke or mental illnesses may cause sudden or gradual mental deterioration with loss of memory, loss of judgment, and even loss of personality.

The Illinois Probate Act governs the procedures and standards used in the adjudication of guardianship of the disabled person. 755 ILCS 5/11a-l *et seq*. As a creature of statute, a guardianship may only be granted when all such procedures and standards are complied with. A guardianship is an extraordinary interference in the life of the proposed ward. It should never be used as a routine remedy to solve problems, but should always be used with caution and restraint.

This presentation will focus on adult guardianships, particularly those involving elderly persons who may otherwise be subject to exploitation or emotional manipulation. Surprisingly, a guardianship may also be used for purposes of elder abuse, although the supervision of the court

and the guardianship statute with its remedies to remove guardians who act improperly to or on behalf of his/her ward, tend to cut back on these abuses.

The procedures involved in obtaining a guardianship will briefly be discussed, as well as some of the powers and limitations of a guardianship, as developed in Illinois case law. Various ethical issues will be highlighted along the way, and alternatives to guardianship, such as powers of attorney, will also be discussed. Since a guardianship proceeding may be cumbersome, time-consuming, expensive and public, an alternative may be a better choice in particular circumstances.

I. OBTAINING A GUARDIANSHIP FOR A DISABLED ADULT IN ILLINOIS

A. Preliminary Decisions to Be Made

After the decision is made to file a petition to appoint a guardian, the Illinois Probate Act should be examined carefully. 755 ILCS 5/11a-1 *et seq*. of that Act sets forth the specific requirements and procedures that must be met in order to successfully persuade a court to impose a guardianship on an alleged disabled adult. The following should be viewed as a summary of the law, but should not be solely relied on to ensure compliance with every section of the Act. Additionally, each circuit and each county (indeed, even some individual judges) have their own procedures to be followed. It is important to know and comply with any local practices that may be applicable.

The basic definition of who constitutes a "disabled person" under the statute is always the starting point for any analysis of whether guardianship is appropriate in any particular case. §11a-2 defines a Adisabled person@ as:

> . . . a person 18 years or older who (a) because of mental deterioration or physical incapacity is not fully able to manage his person or estate, or (b) is a person with mental illness or a person with a developmental disability and who because of his mental

> illness or developmental disability, is not fully able to manage his person or estate, or (c) because of gambling, idleness, debauchery or excessive use of intoxicants or drugs, so spends or waste his estate as to expose himself or his family to want or suffering. . .

755 ILCS 5/11a-2.

The Act limits the power of a court to appoint a guardian. It sets forth the standard that a guardianship may only be utilized for the best interests of the proposed ward, and that such a guardianship may only be ordered Ato the extent necessitated by the individual's actual mental, physical and adaptive limitations.@ 755 ILCS 5/11a-3(b). If a person has sufficient capacity to make and communicate responsible decisions concerning the care of his person, or is able to manage his estate or financial affairs, then a guardianship is not appropriate and should not be ordered by the court. 755 ILCS 5/11a-3(a). Lack of capacity must be shown by clear and convincing evidence. Ibid.

A guardianship may be of the person (authorizing the guardian to make decisions concerning the ward's personal care, residence, health, etc.), or of the estate (authorizing the guardian to make decisions concerning the assets, income and liabilities of the ward.) 755 ILCS 5/11a- 17 and 11a-18. In many situations, both a guardian of the person and estate is appointed. There may be situations involving an older adult where one adult child is better at handling health care and other personal matters, while another is good at handling his parent's financial affairs. If the two guardians can work together for the good of their parent, then this arrangement could work out well.

Of course, it is important that the proposed guardian or guardians be trustworthy and willing to accept the responsibility involved. A guardian must be 18 years of age or older, must be a resident of the United States, must Anot be of unsound mind,@ must not himself have been adjudicated disabled, and must not be a convicted felon. 755 ILCS 5/11a-5(a). In determining

who should be put forth as the proposed guardian, it is important to investigate that person's motives in being appointed. Having represented many older victims of financial exploitation and abuse, this author is suspicious when a family member seems too eager to gain control over his or her parent's money. Long-standing family feuds also tend to lead to disputes over who should be the one Ain charge@ of their parent's last-remaining days or years. There may also be a conflict of interest between what is in the best interest of the disabled person and the best interest of the potential guardian.

Should no appropriate person be available to act as guardian, the Office of State Guardian (a division of the Guardianship and Advocacy Commission of the State of Illinois) may be appointed as guardian, if the alleged disabled person has few assets to manage. That agency will investigate the circumstances of the alleged disabled person, make their own decision as to whether a guardianship is needed, and further determine whether there are any other relatives, friends or other contacts of the disabled person who could act as guardian. OSG should be contacted in advance of filing the Petition to ascertain whether they are available to act in your situation. For more information, you can view their website at http://gac.state.il.us/osg. For those disabled persons with an estate exceeding $25,000.00, each Illinois county has a Public Guardian, appointed by the Governor, who may be appointed by the court where no other suitable person is available. *See* 755 ILCS 5/13-5 for provisions relating to the appointment of a Public Guardian. Neither the Office of State Guardian nor the Public Guardian may be appointed without their consent.

It is also important to determine whether the proposed ward has executed a Power of Attorney, either for Health Care or for Property. In those documents, the proposed ward may have nominated a specific individual as his or her guardian, if such becomes necessary. Such a

designation of the disabled adult's preference must be considered by the court, but the final selection of the guardian is in the discretion of the court. 755 ILCS 5/11a-6 and lla-12(d). In this author's geographic areas of practice, the court will give great deference to the principal's statement that he or she wishes to have their agent appointed as their guardian.

If either Power of Attorney has been executed, then a review of those documents will also reveal if a guardianship is actually necessary at this point. If an agent has been named under either Power of Attorney, then a guardian appointed by the court would have no Apower, duty or liability@ with respect to any power granted to the agent under the Power of Attorney. 755 ILCS 5/11a-17(c) and 11a-18(e). In other words, if a valid Power of Attorney exists, the agent under that document has the legal authority to exercise the powers granted in the document, and a court-appointed guardian would have no authority as to those powers.

In addition to the dichotomy of a guardianship of the person versus a guardian of the estate, the Probate Act also makes a distinction between a Aplenary@ guardianship versus a Alimited@ guardianship. A plenary guardianship is essentially a full guardianship, and the guardian, whether of the person or of the estate, has the authority to make all important decisions regarding the ward's personal and/or financial affairs, respectively. This is basically the easy case, where it is obvious that the disabled adult is totally without capacity to handle these matters.

There is a very strong preference in the statute for fashioning a guardianship *only* to the extent that it is warranted to protect the ward from harm, to promote his well-being, and to maximize his self-reliance and independence. 755 ILCS S/11a-3(b). Thus, the Act provides for a limited guardianship, in which the court can tailor the guardianship to cover only those matters or decisions that the ward is unable to handle on her own. In practice, most attorneys and courts

tend to ignore the limited guardianship. These are the more difficult cases, in that the ward's physician must clearly indicate in his or her report what capacities the proposed ward retains and what capacities are lacking. The court must then decide what legal rights are to be granted to the guardian, and which are to be retained by the ward. The limited guardianship order must then clearly spell out which rights are granted to the guardian. Only those rights spelled out in the order as granted to the limited guardian may be exercised by that guardian. 755 ILCS 5/11a-14(a). Furthermore, the appointment of a limited guardian does not constitute a finding of legal incompetency. 755 ILCS 5/11a-14(c).

Another factor to be analyzed prior to the filing of a petition is whether a temporary guardianship is needed. As will be reviewed below, the guardianship process may take several weeks to complete. In an emergency situation, the authority of a court order may be needed immediately. The court must look at the immediate welfare and protection of the alleged disabled person and his or her estate. 755 ILCS 5/11a-4. A temporary guardianship is valid for 60 days, and may only be extended under certain circumstances. §11a-4(b). The order granting such a temporary guardianship must spell out the actual harm that is identified by the court as likely to occur absent the granting of such an order. §11a-4(a). Any extension of the temporary guardianship may only be granted if in the best interest of the alleged disabled person, and the total period of the temporary guardianship with such an extension may not exceed 120 days from the date the temporary guardian was originally appointed. 755 ILCS 5/11a-4(b)(2).

Some of the questions that should be asked prior to filing a petition are:

1) Does the proposed ward meet the definition of a Adisabled person@?

2) Is a guardianship of the person needed? Of the estate? Both?

3) Who is an appropriate person to be proposed as guardian?

4) Has the alleged disabled adult already given powers over personal and financial decision-making to an agent under a Power of Attorney? If so, is a guardianship necessary?

5) Is the alleged disabled adult totally without capacity, or does he or she retain some capacity? Can a limited guardianship be fashioned to allow the proposed ward to retain legal competency and some independence?

6) Are there other services in the community that can be utilized to avoid the need for a guardianship?

7) Is there an immediate threat to the welfare of the alleged disabled adult, such that a temporary guardianship should be immediately sought?

B. <u>The Guardianship Process</u>

As with any other legal proceeding, a petition must be filed with the court alleging the need for the remedy sought. Section 11a-8 of the Act sets forth specific factual information that needs to be contained in the petition. 755 ILCS 5/11a-8.

At the time of filing the petition, a medical report should also be filed. The information required in this report is very specific:

> The petition for adjudication of disability and for appointment of a guardian should be accompanied by a report which contains (1) a description of the nature and type of the respondent's disability and an assessment of how the disability impacts on the ability of the respondent to make decisions or to function independently; (2) an analysis and results of evaluations of the respondent's mental and physical condition and, where appropriate, educational condition, adaptive behavior and social skills, which have been performed within three months of the date of the filing of the petition; (3) an opinion as to whether guardianship is needed, the type and scope of the guardianship needed, and the reasons therefor; (4) a recommendation as to the most suitable living arrangement and, where appropriate, treatment or habilitation planned for the respondent and the reasons therefor; (5) the signatures of all

> persons who performed the evaluations upon which the report is based, one of whom shall be a licensed physician and a statement of the certification, license, or other credentials that qualified the evaluators who prepared the report.

755 ILCS 5/11a-9. As a matter of practice, obtaining this medical report will often give the attorney the answers to several of the questions shown above. If the physician is not familiar with the guardianship process and the necessity for a detailed report, it is sometimes necessary to ask him or her to submit a more complete report that complies with the statute. Once filed, the report is sealed in the court file and is not part of the public record. 755 ILCS 5/11a-9(c).

Many circuits have a pre-printed or approved form for this report. The report can also be completed by a person other than a licensed physician, as long as a physician also signs it. If another professional is involved in the care or evaluation of the alleged disabled person, and is familiar with the impairments and functional limitations of that person, then that person may be more familiar and better able to submit the detailed report that is necessary.

You may face a situation where the older person refuses to be evaluated by a physician or other medical provider. In many cases involving abuse or self-neglect, the potential ward may not have seen a doctor for months or even years. 755 ILCS 5/11a-9(b) provides that the court can order appropriate evaluations to be performed by a qualified person, and a report then prepared and filed with the court. Despite a court order, it may still require much effort to persuade the older person to cooperate with the examination. Some family doctors are reluctant to supply a report documenting the need for a guardianship, on the theory that the older person will lose any trust they may have in that doctor for treating them.

On occasion, an emergency room visit for treatment for a UTI, a fall, or after a wandering episode can be utilized for an examination of the potential ward and the completion of a physician's report.

In a situation where the older person may pose a serious danger of physical harm to herself or others, involuntary admission to a mental health facility pursuant to the Mental Health Code, 405 ILCS 5/3-600 *et seq.*, may be considered. That statute sets forth procedures, subject to the due process rights of the older person, which require an evaluation of the person=s mental health status. This, obviously, is a very drastic step to take, and will only be successful in the event of threats or actions by the older person that may lead to physical harm.

Local practice dictates the procedure for obtaining a temporary guardianship. In some counties, this can be done on a walk-in basis at the time of filing the petition. A separate petition should be prepared, alleging the facts necessary for the court to find that immediate danger exists for the person or estate of the alleged disabled person, and seeking a temporary order of guardianship. A temporary guardianship, if granted, expires within 60 days of the appointment or when a permanent guardian is appointed, whichever comes first. 755 ILCS 5/11a-4. There are some circumstances in which a temporary guardianship may be extended, as explained above. §11a-4(b). The ward has the right to petition the court to revoke the temporary guardian's appointment at any time. *Ibid.*

Upon filing the petition for appointment of a plenary guardian, a court hearing must be set within 30 days. A guardian ad litem (GAL) may also be appointed to investigate and report the best interests of the alleged disabled person to the court. In the counties in which this author practices, a GAL is routinely appointed in every guardianship case. The GAL must meet face-to-face with the ward and advise him or her of the contents of the petition for guardianship and of his/her legal rights. The GAL may be a licensed attorney, or may be someone else who is qualified either by training or experience to work with or advocate for persons with various types of disabilities. 755 ILCS 5/11a-10(a).

The GAL must also file a report with the court which contains specific information elicited from the proposed ward, such as his position as to the proposed guardian, any change in residential placement or change in care, and any other factors that may be relevant to the determination of the issues. 755 ILCS 5/11a-10. If the alleged disabled person takes a position contrary to the recommendation of the GAL, then he or she is entitled to appointed counsel to advocate on his or her behalf. 755 ILCS 5/11 a-10(b). He or she may also request appointed counsel from the court. Independent counsel for the potential ward must advocate for whatever that ward wants, even though it may not be in his/her best interests. The GAL is charged with the responsibility of informing the court of what is in the ward's best interests.

Not less than 14 days prior to the hearing, the Respondent (the alleged disabled adult) must be served with summons and a copy of the petition, as well as a notice of his or her legal rights. 755 ILCS 5/11a-10(e). Because a guardianship can strip an alleged disabled adult of his or her basic right of legal independence, such a proceeding requires a high level of due process of law. The Respondent has the right to be present at the hearing, present evidence, cross-examine the witnesses against him, be represented by an attorney, ask for an independent evaluation of his competence, have a hearing closed to the public, and have a jury trial with six jurors. *lbid.* In the majority of cases, however, the proceedings are not contested.

The nearest relatives of the alleged disabled adult are also entitled to notice of the proceedings, and must be listed in the petition. 755 ILCS 5/11a-8 and 11a-10(f). The petition is **required** to include names and addresses of **all** living parents, siblings and children of the proposed ward, even if the relative has dementia or been estranged from the proposed ward.

At the hearing itself, the physician or other expert who prepared the medical report required under Section 11a-9 is only required to be present to testify if required by the court for

good cause shown. 755 ILCS 5/11a-11(d). The Respondent is required to be present, unless he or she refuses, or there is reason to believe he or she would suffer harm if required to attend. 755 ILCS 5/11a-11(a).

The court is required to inquire regarding:

> . . . (1) the nature and extent of respondent's general intellectual and physical functioning; (2) the extent of the impairment of his adaptive behavior if he is a person with a developmental disability, or the nature and severity of his mental illness if he is a person with mental illness; (3) the understanding and capacity of the respondent to make and communicate responsible decisions concerning his person; (4) the capacity of the respondent to manage his estate and his 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 area of inquiry deemed appropriate by the court.

755 ILCS 5/11a-11(e).

The court will then determine whether the alleged disabled adult is totally without capacity, or whether some capacity is retained. The appropriate order will then be entered. As stated above, any order granting only limited guardianship must spell out in detail which legal powers are being granted to the guardian. In both cases, the specific factual basis for the court's finding must be included. 755 ILCS 5/11a-12.

At the time a guardian is appointed, the ward must be informed of her right to petition the court for a termination or modification of the guardianship. 755 ILCS 5/11a-19. Assuming that the ward is present in court, this notice must be given orally and in writing. If the ward is not present, then the written notice typically is served on him or her with the order appointing the guardian.

The court may require the guardian to post a bond prior to appointment, unless the

guardianship is only of the person, or if the ward's estate is minimal. 755 ILCS 5/12-2. If the disabled person nominated a guardian and excused that nominee from having to post bond, then the court may also waive the bond. Upon filing an oath of office and the bond being approved by the court, if required, letters of office will be issued by the Clerk of the Court to the guardian. *Ibid.*

Depending again on local practice, the guardian will be required to report to the court on a regular basis as to the health and welfare of the ward. 755 ILCS 5/11a-17(b). The extent to which these reports are reviewed and any action taken also depends on the practices in different circuits.

The specific duties of a guardian of the person and a guardian of the estate are spelled out in the statute in 755 ILCS 5/11a-17 and 11a-18. These responsibilities should be reviewed with the guardian, especially any requirements for reporting to the court and any required format for doing so. Some counties and judges have prepared a form that can easily be filled in by the guardian and mailed to the court, which will only schedule a review hearing if it sees something amiss. In addition, the Elder Law Section of the Illinois State Bar Association has published a pamphlet entitled ABeing a Guardian@, which is available from the ISBA Publications Department.

II. SOME POWERS AND LIMITATIONS OF GUARDIANSHIP

Even the powers of a guardian with a plenary guardianship are not unlimited. There are certain circumstances in which the approval of a court is necessary. First of all, it is necessary to examine the standards by which a guardian must make decisions for the ward.

Many guardians believe that they know what is in the best interests of the older adult who has been adjudicated a disabled adult. They are sometimes surprised to learn that they must first

put themselves in the shoes of the disabled adult, and try to determine what he or she would have done under the circumstances. Specifically, the Probate Act requires a guardian of the person to ascertain, as well as he or she can, what the ward would have done, Ataking into account. . . the ward's personal, philosophical, religious and moral beliefs, and ethical values relative to the decision to be made by the guardian.@ 755 ILCS 5/11a-17(e). Only if the ward's wishes are unknown and remain unknown Aafter reasonable efforts to discern them@, can the guardian make the decision on the basis of what is in the ward's best interests. *Ibid.*

A guardian of the person other than the Public Guardian or the Office of State Guardian has no authority to place a ward in a residential facility without the specific approval and order of the court. 755 ILCS 5/11a-14.1. The guardian must make decisions in this regard according to the wishes of the ward, unless substantial harm to the disabled person or his or her estate would occur. The Act places several very specific responsibilities on the guardian in this respect:

> [T]he guardian shall not remove the ward from his or her home or separate the ward from family and friends unless such removal is necessary to prevent substantial harm to the ward or to the ward's estate. The guardian shall have a duty to investigate the availability of reasonable residential alternatives. The guardian shall monitor the placement of the ward of an ongoing basis to ensure its continued appropriateness, and shall pursue appropriate alternatives as needed.

755 ILCS 5/11a-14.1.

A guardian of the person has no right to consent to involuntary admission of a ward to a psychiatric facility. The only means of involuntary admission to such a facility is through an involuntary civil commitment proceeding. In re Gardner, 459 N.E.2d 17, 121 Ill.App.3d 7, 76 Ill.Dec. 608 (1984).

Similarly, a guardian of the person must have court approval to authorize ECT therapy or the use of psychotropic drugs, and must prove, by clear and convincing evidence, that the ward

lacks the capacity to make a reasoned decision about such treatments. In re Estate of Austwick, 656 N.E.2d 779, 275 Ill.App.3d 769, 212 Ill.Dec. 182 (1995). Where a ward had previously executed a Power of Attorney that specifically excluded the power to consent to ECT treatments, a court had no jurisdiction to authorize the guardian to consent to such treatments. In re Hatsuve T., 689 N.E.2d 248, 293 Ill.App.3d, 228 Ill.Dec. 376 (1997) .

A guardian of the person must obtain court approval to forego or withdraw life-sustaining treatment that is not authorized under the Health Care Surrogate Act. 755 ILCS 5/11a-17(d). An agent duly appointed under a Health Care Power of Attorney, however, does have the right to exercise this power without a court order. *Ibid.*

Interestingly, merely because a person has been determined to be disabled under the Probate Act, and a guardian for that person has been appointed, this does not automatically mean that the ward does not have Adecisional capacity@ for making medical decisions under the Health Care Surrogate Act, 755 ILCS 40/1 *et seq.* The Illinois Appellate Court, First District, held that it is presumed that a person has decisional capacity under that statute, and that the requirements of that statute, including the requirement that the ward has a qualifying condition, must be met in order for a guardian to make end-of-life decisions for the ward. In re Austwick, 656 N.E.2d 773, 275 Ill.App.3d 665, 212 Ill.Dec. 176 (1995); *see* 755 ILCS 40/20(b) and (b-5). ADecisional capacity@ must be determined under that statute by the attending physician. 755 ILCS 40/10.

A guardian of the person does have the right to authorize an abortion for a ward. In re D.W. , 481 N .E.2d 355, 134 Ill.App.3d 788, 89 Ill.Dec. 804 (1985). A guardian of the person also has the right to continue an action for dissolution of marriage which was filed by the ward before the adjudication of incompetency . 755 ILCS 5/11a-17 (a-5); In re Marriage of Burgess,

725 N.E.2d 1266, 189 Ill.2d 270, 244 Ill.Dec. 379 (2000).

As of August, 2014, §11a-17(a-5) has been amended to allow a guardian to file for a dissolution of marriage for the ward under certain circumstances:

> Upon petition by the guardian of the ward's person or estate, the court may authorize and direct a guardian of the ward's person or estate to file a petition for dissolution of marriage or to file a petition for legal separation or declaration of invalidity of marriage under the Illinois Marriage and Dissolution of Marriage Act on behalf of the ward if the court finds by clear and convincing evidence that the relief sought is in the ward's best interests. In making its determination, the court shall consider the standards set forth in subsection (e) of this Section.

This section was codified following the ruling in Karbin v. Karbin, 2012 IL 112815, 977 N.E.2d 154, 364 Ill.Dec. 665, wherein a guardian of the person was allowed to petition the court to allow the guardian to file a petition for dissolution on behalf of the ward. The petitioner/guardian must show clear and convincing evidence that a dissolution is in the ward's best interest. This case is very interesting for its discussion of the policy issues involved in such a determination.

Additionally, a new section has been added allowing the guardian to consent to a ward's marriage, in certain circumstances:

> (a-10) Upon petition by the guardian of the ward's person or estate, the court may authorize and direct a guardian of the ward's person or estate to consent, on behalf of the ward, to the ward's marriage pursuant to Part II of the Illinois Marriage and Dissolution of Marriage Act if the court finds by clear and convincing evidence that the marriage is in the ward's best interests. In making its determination, the court shall consider the standards set forth in subsection (e) of this Section. Upon presentation of a court order authorizing and directing a guardian of the ward's person and estate to consent to the ward's marriage, the county clerk shall accept the guardian's application, appearance, and signature on behalf of the ward for purposes of issuing a license to marry under Section 203 of the Illinois Marriage and Dissolution of Marriage Act.

Until very recently, the court lacked authority to compel a guardian of the person to allow visitation between the ward and his or her relatives. Struck v. Cook County Public Guardian, 901 N.E.2d 946, 387 All.App.3d 867 (Ill.App. 2008). However, P.A. 99-0821, effective 1/1/2017, added two additional sub-sections to 755 ILCS 5/11a-17:

> (g)(1) Unless there is a court order to the contrary, the guardian, consistent with the standards set forth in subsection (e) of this Section, shall use reasonable efforts to notify the ward's known adult children, who have requested notification and provided contact information, of the ward's admission to a hospital or hospice program, the ward's death, and the arrangements for the disposition of the ward's remains.
>
> (2) If a guardian unreasonably prevents an adult child of the ward from visiting the ward, the court, upon a verified petition by an adult child, may order the guardian to permit visitation between the ward and the adult child if the court finds that the visitation is in the ward's best interests. In making its determination, the court shall consider the standards set forth in subsection (e) of this Section. This subsection (g) does not apply to duly appointed public guardians or the Office of State Guardian.

Thus, if visitation with an adult child is denied, that child has the right to petition the court for such visitation.

With respect to financial matters, the guardian of the estate is more limited in what he can do without court approval. For example, the guardian of the estate needs to obtain court approval in order to perform existing contracts of the ward, sell or mortgage the wards' personal property or real estate, operate the ward's business, or make conditional gifts. 755 ILCS 5/11a-18(a-5) and 11s-18.1. As a fiduciary, the guardian of the estate owes the highest ethical obligation to the ward in the management of his income and property.

III. ALTERNATIVES TO GUARDIANSHIP

Guardianship should be viewed as the last resort, and other alternatives may be less restrictive and allow the disabled adult to retain their dignity and their status as adults in our

society. As the saying goes, an ounce of prevention is worth a pound of cure, and therefore a Health Care Power of Attorney and/or a Property Power of Attorney allows the principal to designate an agent of his or her own choosing to handle medical and personal decisions.

The following are some alternatives to a plenary guardianship:

- a limited guardianship;
- a health care power of attorney;
- a health care surrogate decision-maker;
- a declaration for mental health treatment;
- a Physician's Order for Life-Sustaining Treatment (POLST);
- a power of attorney for property;
- joint ownership of property;
- representative payeeships (typically used in government benefits programs);
- trusts; or
- adult guardianship mediation.

Adult guardianship mediation is becoming more common in situations that may otherwise lead to guardianship. Such mediation may also be useful after the guardianship is granted, when family members, medical providers, social workers, and other involved persons clash over the action or inaction of the named guardian. Family dynamics, differences in proximity to the aging parent, gender differences and the emotional fall-out after one family member is named by the court as the "chosen" guardian often lead to such disputes, with resulting feelings of being overworked by the guardian, or alternatively, left out of decisions about the aging parent for other family members. Potential points of contention include often include concerns over a potential inheritance, differing moral beliefs (particularly concerning

end-of-life issues), unresolved childhood rivalries and disputes over contact and visitation with the parent who is the subject of the guardianship.

Mediation is a voluntary process in which the parties communicate concerns and explore options, and it may be a good alternative for those willing and able to put aside their emotions and work toward a common goal. A good mediator can assist family members learn to communicate better and keep the focus on the best interests of the aging parent. The elderly person must be an integral part of the discussion if able and willing to participate.

A mediator of such disputes must have a thorough knowledge of community resources, Medicaid and Medicare policies and procedures, long-term care options, legal remedies, end-of-life issues, and other services and issues affecting the elderly. The mediator must be cognizant of confidentiality requirements, as more people are typically involved in this type of mediation. He or she must be able to explain his or her role, be skilled in facilitating discussion among disputing and often highly emotional parties, and maintain absolute neutrality. The mediator is neither an advocate nor a therapist, but an impartial outsider with a unique set of skills.

As with other alternatives, mediation may not be the right option in every case. Abusive behavior, psychological problems, or extreme resistance on the part of the disputants may make mediation inadvisable. If the attorneys representing the guardian and the other family members see mediation as a good alternative and recommend it to their clients, then a successful outcome is more likely. In the right case, a properly trained mediator can be a great help to the family as they come to terms with the changes that come with a guardianship and the aging of the parent.

. Of course, by the time that family members realize that such documents are needed or may be useful, the disabled person may no longer be mentally competent to execute them. Other alternatives may exist, although they may take more time and effort to seek out and implement.

These alternatives may not exist in every community, especially rural communities. It is important for the attorney who practices in the area to be aware of the services that are offered to seniors in their community. With respect to health care and personal matters, many communities offer in-home support services, such as homemakers, home health providers, and companions. In the property and financial arena, there are other options, such as bill-paying services, representative payeeships, and direct deposit of pension or Social Security checks. The local Area Agency on Aging, funded through the Illinois Department on Aging, is a valuable resource to use to find these types of services. The Department on Aging also has a website at http://www.state.il.us/aging, which links to various types of services available.

As discussed above, in cases of terminal illness or other qualifying conditions, Illinois law provides for the use of a surrogate decision-maker under the Health Care Surrogate Act, where a person who lacks decisional capacity has not previously executed a Living Will, a Power of Attorney for Health Care, or a Declaration for Mental Health Treatment. 755 ILCS 40/1 *et seq.* This Act was amended to provide for surrogate decision-making for medical decisions even in cases not involving life-sustaining treatment. If the conditions in the Act are met, then a guardianship of the person may not even be necessary.

Limited guardianship can be a way to handle specific problems and needs of the disabled person without stripping him or her of legal competency. Very often, there is a tendency on the part of adult children to jump in and take over their parent=s life, in an effort to Ado what=s in mom=s or dad=s best interests.@ They may be uncomfortable with Abad@ decisions made by their parent, such as spending their money in ways the children deem inappropriate, or forming a relationship with someone deemed unsuitable. If the attorney is sensitive to these kind of issues, then a frank discussion with the potential guardian and other family members may lead to a

realization that while a parent may need help balancing a checkbook and making sure the bills get paid, there is no need to totally take all financial decision-making from him or her. If the older person retains the capacity to handle some decisions, whether personal or financial, then he or she should be left the legal ability to do so.

Merely because there are alternatives to either type of guardianship does not always make the guardianship inappropriate or unnecessary. Occasionally, family members will contact an attorney requesting assistance with a Power of Attorney or other legal document. It is essential for the attorney to make a determination of the older person=s capacity to execute such a document. Capacity may be intermittent or variable, depending on the time of day, the medications taken by the older person, his or her physical health, and other factors. Should there be any question as to capacity, a referral to a doctor or psychologist for evaluation may be helpful. Such documentation of the person=s mental capacity may be critical in case a challenge to the document arises later on.

III. POSSIBLE SIGNS OF ABUSE BY A GUARDIAN

Some signs of potential abuse have already been noted in these materials, such as the potential guardian who denigrates their siblings or seems all too concerned with the parent's money. Along with signs of obvious physical abuse (bruises, unexplained injuries), here are some other red flags of potential abuse, whether by a family member, friend, professional, guardian or agent under a power of attorney:

- secrecy concerning the existence of the transaction or legal changes, or the events occurring in haste
- lack of independent advice related to that transaction or new legal document
- changes in the identified victim's attitude toward others

- discrepancies between the identified victim's behavior and previously expressed intentions
- the unjust or unnatural nature of the terms of the transaction or new legal instrument
- anonymous criticism of other potential beneficiaries made to the identified victim
- suggestion, without proof, to the identified victim that other potential beneficiaries had attempted to physically harm him or her
- withholding mail, limiting telephone access or visitation, or limiting privacy when victim is with others
- discussion or consummation of transaction at an unusual or inappropriate time
- demand the business be finished at once, or an extreme emphasis on the consequences of delay
- the use of an attorney chosen by the perpetrator
- the perpetrator using victim's assets (property, money, credit cards, etc.) or obtaining access to bank accounts or safe deposit boxes
- becoming conservator, trustee, beneficiary, executor, etc.
- an unusual degree of submissiveness or even fear of a caregiver
- lack of knowledge as to personal finances
- missing belongings or property
- significant changes in spending patterns
- the new “best friend”
- the caregiver who exhibits excessive control over the older person
- the caregiver or family member who insists that other family members, relatives or friends are taking advantage of the older person
- the guardian who keeps “forgetting” to do the periodic report or accounting for the court

Fortunately, in a guardianship where the guardian can be shown to have acted improperly, the Probate Act includes a section that provides for removal of the guardian “on the

petition of any interested person or on the court's own motion". 755 ILCS 5/23-2. This can happen on proof that the guardian acted in any of nine different ways, or "upon good cause." Ibid. A citation to show cause must be served upon the representative at least ten days prior to hearing. 755 ILCS 5/23-3. If the guardian is no longer in the state, or is evading service of the citation, the clerk of the court must send a copy of the notice and petition by registered mail to the respondent to various addresses, including that of his or her attorney.

IV. CONCLUSION

Guardianship is a legal remedy that should never be considered lightly or as a routine matter. Even an elderly or disabled individual may retain the capacity to handle some or all of her day-to-day activities. Any petition that states being "aged and infirm" as a reason for a guardianship should be vigorously challenged. As counsel for a petitioner, you should due your due diligence prior to filing an action for guardianship, to ensure that it is a necessary decision. As counsel for an interested person alleging malfeasance by the guardian, you should be aware that some guardians are capable of acting just as badly as any other person. The goal of each individual in the guardianship courtroom should be the same: to protect the legal rights of those persons who are potential wards, to protect their best interests, and to protect their particular vulnerabilities, even against those who allege their sole interest is in "helping" the ward.

Consumer Legal Guide

Serving as a Guardian for an Adult with Disabilities

ILLINOIS STATE BAR ASSOCIATION

ASK A LAWYER

SERVING AS A GUARDIAN FOR AN ADULT WITH DISABILITIES

Serving as a guardian for a disabled adult age 18 and older is a serious responsibility. As guardian, you have been given control over certain or all aspects of the person's life.

At all times, you must follow the law, the guardianship order, and any other specific court orders pertaining to your guardianship. You must act in the ward's best interests and avoid any conflict of interest or appearance of impropriety when handling the ward's affairs. You are also expected to seek out and rely upon professional financial and legal assistance, when appropriate.

GUARDIANSHIP TERMINOLOGY

Certain terms have specific meanings when used in relation to guardians and guardianships:

- A "disabled person" is a person 18 years or older who is not fully able to manage his or her person or estate because of mental deterioration, physical incapacity, a mental illness, a developmental disability, a gambling or drug addiction, or fetal alcohol syndrome.

- A "ward" is the person who has been declared by the court to be disabled and the person for whom you have been appointed as guardian.

- A "Guardian ad Litem" is a person, typically an attorney, who has been appointed by the court to look out for the ward's best interests.

- A "guardianship order" means the court order setting forth your powers and duties as the guardian.

- "Letters of Office" are court documents which confirm your appointment as guardian; you should retain the originals in a safe place.

TYPES OF GUARDIANSHIP

Different types of guardianships have different types of duties and duration. Your powers as guardian will depend on the kind of guardianship which the court has established for your ward.

- "Guardianship of the estate" means that the guardian will be responsible for all financial and legal matters of the ward.

- "Guardianship of the person" means that the guardian will be responsible for all of the ward's personal care matters, including healthcare and residential placement.

- "Plenary guardianship," which can apply to a guardianship of the estate, of the person, or both, means that the guardian will have all of the powers and duties which are customarily granted to a guardian under Illinois law.

- "Limited guardianship," which can apply to both a guardianship of the estate, of the person, or both, means the guardian will have only certain limited powers determined in the Court Order appointing the guardian.

- "Temporary guardianship," which can apply to both a guardianship of the estate, of the person, or both, means that the guardian will be appointed in an emergency situation, such as the death of an existing guardian or before a permanent guardian can be appointed by the court, where a temporary guardianship is necessary for the immediate welfare and protection of the ward; a temporary guardianship only lasts for up to 60 days, although it can be extended by the court under certain circumstances.

- "Successor guardianship," which can apply to both a guardianship of the estate, of the person, or both, means that a replacement guardian will be appointed upon the death, incapacity, resignation, or removal of the existing guardian of a living ward.

- "Testamentary guardianship," which can apply to both a guardianship of the estate, of the person, or both, means that the guardian will be designated by a parent of a disabled person in his or her will to be appointed as guardian upon the parent's death.

BASIC DUTIES OF A GUARDIAN OF THE PERSON

As guardian of the person, you will have certain basic duties under the law:

- You will be responsible for the personal and medical care of the ward and may have the actual physical custody of the ward, the ward's minor children, and any adult children who are dependent on the ward for support and care.

- You will need to make decisions for the ward relating to personal care, healthcare, and living arrangements to the extent specified in the guardianship order.

- You may need to file written reports to the court describing the ward's current condition, living arrangements, typical activities, and a summary of your contact with the ward. You should check with the probate judge or an attorney to determine how frequently your court requires you to report.

LIMITATIONS ON THE GUARDIAN OF THE PERSON

There are certain things that the guardian cannot do without specific permission from the court. A specific court order is required before you can place the ward in a residential facility such as a nursing home and be-

fore you consent to a sterilization procedure. A court may authorize the guardian to petition for divorce on behalf of his or her ward if the court finds it is in the ward's best interest; it may also authorize the guardian to consent to the ward's marriage if it finds it is in the ward's best interest. A guardian cannot admit a ward to a mental health facility unless the ward requests the guardian do so and has the required capacity to make such a decision.

BASIC DUTIES OF A GUARDIAN OF THE ESTATE

As guardian of the ward's estate, you will need to manage the property, finances, and legal affairs of the ward. At a minimum, you will be required to:

- file an inventory of the ward's assets and income with the court within 60 days of the issuance of your Letters of Office;
- keep the ward's assets and income totally separate from your own assets and property;
- open an estate checking account, with your name as guardian, for the receipt of the ward's regular income and for you to use for payment of the ward's bills;
- arrange to have the ward's bills, bank statements, and other important mail sent directly to you; however, the ward should continue to receive his or her own personal mail;
- pay the ward's bills in a timely manner, using the ward's funds and income;
- contact all sources of the ward's income, such as the Social Security Administration, Department of Veterans Affairs and/or any pensions or employers and request that the ward's checks be sent to you or the estate checking account;

- be sure that the ward's real estate and other assets are securely protected and maintained, and restrict access to the property and accounts as determined to be in the ward's best interests;

- prudently manage and invest the ward's financial resources;

- prudently maintain the ward's real estate, which includes keeping it safe and insured;

- safeguard the ward's personal property and maintain insurance coverage if appropriate;

- apply the ward's assets to the comfort, care and education of the ward and any of his or her dependents;

- respond to any legal matters concerning the ward and be sure that he or she is represented in any court proceedings;

- pay the ward's taxes;

- apply for available public benefits and resources for the ward;

- file a written account of all financial transactions which you make on behalf of the ward setting forth all income received and expenditures made on behalf of the ward.

Illinois law provides that an accounting must be provided to the court one year after your appointment as guardian and every three years thereafter. Some courts require the account to be filed on an annual basis; you should check with an attorney to see how frequently accounts are required in your area. You also should find out whether it is necessary to schedule a court hearing for approval of the account. In counties where the "guardian ad litem" remains involved in the

case, you should provide him or her with a copy of the accounting.

LIMITATIONS ON THE GUARDIAN OF THE ESTATE

As guardian of the estate, there are certain things that you cannot do without specific permission from the court. You will need to file a petition with the court, and probably notify the "guardian ad litem" before doing any of the following:

- transfer or sell any of the ward's personal property or real estate;
- mortgage the ward's real estate or take out any other loans on the ward's behalf;
- make any gifts from the ward's estate, even if the ward gives you permission;
- expend any large sums of the ward's money for unusual or extraordinary expenses, such as the purchase of a new home or automobile; or
- distribute any money to yourself or anyone else for guardian fees.

TERMINATING THE RESPONSIBILITIES OF THE GUARDIAN

Once a guardian is appointed, only the court can terminate or modify the terms of the guardianship. These circumstances may include the death of the ward or guardian, resignation of the guardian, and restoration of the ward's rights (terminating the adjudication of disability).

DEATH OF THE WARD

Guardianship generally terminates when the ward dies. Upon the death of the ward, the guardian should:

- not make any further expenditures from the ward's assets;

- preserve and protect the ward's assets until the court directs a final distribution; and

- notify the court and the guardian ad litem immediately of the ward's death.

In addition, a guardian of the estate should prepare a final accounting and request the court to approve a final distribution of the ward's assets from the guardianship account(s).

RESIGNATION OF THE GUARDIAN

To resign as guardian, you will need to file a petition with the court requesting permission. As part of the petition, you may be asked to prepare a final accounting as to the ward's estate. The court also may ask you to suggest a successor guardian; however, the choice of a successor guardian is totally up to the court.

REMOVAL OF THE GUARDIAN

The court has the power to remove you as guardian, if it is determined that you failed to file a required inventory or accounting; failed to post the required bond; are adjudicated to be a disabled person; are convicted of a felony; or did not properly perform your duties.

Before being removed as a guardian, you have a right to appear in court and explain your actions. If you are accused of any inappropriate action, you should contact an attorney.

TERMINATING THE GUARDIANSHIP

If there is a change in the ward's ability to manage his or her own affairs, the court can modify or terminate the terms of the guardianship. Regardless of his or her disability, the ward always retains the right to request that the guardianship be modified or terminated. A petition to modify or terminate the guardian can be brought at any time by the guardian, the ward, or any other person on the ward's behalf.

As guardian, you will need to participate in any hearings regarding the modification or termination of the guardianship, and take further actions as the court may direct.

STANDBY AND SHORT-TERM GUARDIANS

As guardian, you may designate in writing a qualified person to be a standby guardian, who will act as guardian of the ward if you die or are no longer willing or able to serve the ward appropriately. Once a person who has been appointed as a standby guardian learns that you are no longer able to serve as guardian for whatever reason, he or she will immediately assume all duties as guardian that were given to you in your guardianship order.

Similarly, you may also designate in writing a short-term guardian for your ward to take over your duties in the event that you are unavailable or unable to fulfill those duties. Unlike a standby guardian, the designation of a short-term guardian does not need the court's approval. A short-term guardian may act as guardian in place of you for up to 60 days during any 12-month period.

SEEKING LEGAL ADVICE

This pamphlet discusses the general duties and responsibilities of a guardian of the person or estate; it is not a substitute for obtaining professional legal advice. You should consult with a licensed attorney for a full explanation of the court process and duties involved in being a guardian.

This pamphlet is prepared and published by the Illinois State Bar Association as a public service. Every effort has been made to provide accurate information at the time of publication.

For the most current information, please consult your lawyer. If you need a lawyer and do not have one, call Illinois Lawyer Finder at (800) 922-8757 or online **www.IllinoisLawyerFinder.com**

Pamphlets Available

Adoption
Advice to Newly Marrieds
Alternative Dispute Resolution
Auto Accidents
Auto Insurance
Bankruptcy
Being a Guardian
Buying a Car
Buying a Home
Buying on Time
Divorce
Estate Planning
Gender Transitioning
General Practitioner
Health Privacy
Healthcare Decisions
Hiring a Lawyer
Illinois Traffic Courts
Jury Duty
Landlord-Tennant
Law-related Careers
Limited Scope Representation
Living Trusts
Patients' Rights
Rights of LGBT
Selling a Home
Serving as a Guardian for a Disabled Adult
Starting a Business
Your Rights if Arrested

For more information on legal issues or to obtain single copies of each of the pamphlets listed above (free to individuals), please visit **www.ISBAlawyers.com**

ILLINOIS BAR CENTER
424 S. Second Street
Springfield, IL 62701-1779
www.isba.org

1/16

ILLINOIS STATE
BAR ASSOCIATION

ISBA Informational Brochures

HOW TO ORDER

ISBA accepts Visa, MasterCard, American Express and Discover, and checks (by mail only).

- **Online:** Go to www.isba.org and click on "Bookstore" under "Publications."
- **E-mail:** Contact Janet at Jlyman@isba.org • **Phone:** Call Janet at 217-525-1760 or 800-252-8908.
- **Fax:** To Janet at 217-525-0712 • **Mail:** To Janet Lyman at ISBA, 424 S. 2nd St., Springfield, IL 62701

PUBLIC INFORMATION PAMPHLETS & BOOKLETS

Provide basic information to your clients. Pamphlets and booklets are **pre-packaged in lots of 100**. Single copies free on request. No bulk discounts.

Pamphlets ($15 mbr./$30 nonmbr./per 100)

Packages

_____ Adoption
_____ ADR: Methods for Settling Legal Disputes Without Going to Court
_____ Advice to Newly Marrieds
_____ Auto Accidents
_____ Bankruptcy for Individuals
_____ Buying a Car
_____ Buying on Time
_____ General Practitioner
_____ Getting a Divorce in Illinois
_____ Health Care Privacy
_____ Landlord/Tenant
_____ Selling a Home
_____ Starting a Business
_____ Your Health Care
_____ Your Rights if Arrested

Booklets ($25 mbr./$50 nonmbr./per 100)

Packages

_____ A New Way to Get Legal Help: Limited Scope Representation
_____ Automobile Insurance & Accidents
_____ Being a Guardian
_____ Buying a Home
_____ Estate Planning
_____ Hiring a Lawyer
_____ Law-Related Careers
_____ Live Safe: Your ID Documentation and Records After Gender Transitioning
_____ Rights of Gays, Lesbians, Bisexual and Transgender Persons
_____ Serving as a Guardian for a Disabled Adult
_____ What Is a Living Trust?
_____ Your Guide to Illinois Traffic Courts

TOTAL ORDER (before tax & shipping) . . . . . **$**_____

Name_____ **Membership #** _____

Address_____

City/State/Zip _____

Phone _____

Type of Payment: ❑ check ❑ Visa ❑ Mastercard ❑ American Express ❑ Discover

Credit Card #:_____ Exp. Date _____

_____

Signature (required if using credit card)