

# ADULT GUARDIANSHIP: To Help and To Protect

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**Advocates Society**

at the

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by

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# Outline

- Introduction
- How are guardianships established?
- How are guardianships administered?
- What is new in guardianship law?
- Scenarios.
- Questions and Comments.
- Adjournment.



# Introduction

Please pick one:

- A. Currently, I only handle guardianship matters.
- B. Currently, I periodically handle guardianship matters.
- C. Currently, I rarely, if ever, handle guardianships.

# Introduction (continued)

Please pick one:

- A. I have never handled a contested guardianship.
- B. I have handled a handful of contested guardianship.
- C. I have handled many contested guardianships.

# Introduction (continued)

Please pick one:

A. I work in Cook County.

B. I work outside Cook County.

# Introduction (continued)

- **The Probate Act of 1975, 755 ILCS 5/1-1 – 30-3.**
  - Article XI – Minors.
    - Covering those under 18.
    - Guardianships of the Person and Estate.
  - Article XIa – Disabled Adults
    - Covering those who are 18 and older.
    - Guardianships of the Person and Estate.

# Introduction (continued)

- **The Probate Act of 1975 (continued)**
  - Article XII - Bonds and Oaths
  - Article XIII – Public Guardians
  - Article XIV – Inventory
- **Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, 755 ILCS 8/101-505.**
- *Other bodies of law . . . .*

# Introduction (continued)

- *Here*, the focus will be on guardianship for **disabled adults**.
- No guardianship for the elderly, *per se* – just the disabled.
- Effects of aging can result in disability.
- Also, of course, guardianships can be established for minors.
  - Guardianships for minors are set up in similar fashion.
  - The main difference involves eligibility – age vs. disability.
  - The handling of minors is a bit more nebulous under the Act.
  - *All* guardianships for minors, however, *end* by age 18.



# How are guardianships established?

**First, a petition is filed** under § 11a-8 to include:

- a. Relationship and interest of the petitioner.
- b. Respondent's name, DOB, and residence.
- c. Reasons for the guardianship.
- d. Name and address of any guardian or POA.
- e. Name and address of *relatives*.
- f. Name of person/facility where respondent resides.
- g. Approximate value of personal and real estate.
- h. Anticipated annual gross income and receipts.

# How are guardianships established?

(continued)

- i. Name, address, etc., of proposed guardian.
- j. Details of any pervious standdy guardianship.
- k. Date of death of a previous guardian, or consent.

**The petition should also** be accompanied by an evaluation report from a licensed physician. *See* § 11a-9(a).



# How are guardianships established?

(continued)

*Second, before a hearing is set on the petition . . .*

“[T]he court **shall set a date and place for hearing** to take place **within 30 days.**” *See* § 11a-10(a) (**emphasis added**).

“The court **shall appoint a guardian ad litem** to report to the court concerning the respondent's best interests consistent with the provisions of this Section, **except** that the appointment of a guardian ad litem shall not be required when the court determines that such appointment is not necessary for the protection of the respondent or a reasonably informed decision on the petition.” *Id.*

# How are guardianships established?

(continued)

“[T]he guardian ad litem **shall personally observe** the respondent prior to the hearing and **shall inform** him **orally and in writing** of the contents of the petition and of his rights under Section 11a-11.” *Id.*

“At or before the hearing, the guardian ad litem shall file a **written report . . . .**” *Id.*

“The guardian ad litem shall appear at the hearing and **testify . . . .**” *Id.*

# How are guardianships established?

(continued)

The Court may, and in some cases, shall **appoint counsel** for the respondent. *See* § 11a-10(b).

Attorney fees can be assessed against the petitioner if the respondent cannot afford them. *See* § 11a-10(c).

“Unless he is the petitioner, the respondent shall be **personally served** with a copy of the petition and a summons **not less than 14 days before the hearing.**” § 11a-10(e) (**emphasis added**).

# How are guardianships established?

(continued)

*Third, at a hearing* on the petition . . .

“The respondent is entitled to be represented by counsel, to demand a jury of 6 persons, to present evidence, and to confront and cross-examine all witnesses. The hearing may be closed to the public on request of the respondent, the guardian ad litem, or appointed or other counsel for the respondent. Unless excused by the court upon a showing that the respondent refuses to be present or will suffer harm if required to attend, the respondent shall be present at the hearing.” § 11a-11(a).

# How are guardianships established?

(continued)

“At the hearing **the court shall 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;

# How are guardianships established?

(continued)

(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;



# How are guardianships established?

(continued)

(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.”

§ 11a-11(e).

# How are guardianships established?

(continued)

*Fourth*, to establish a guardianship, the Court must . . .

Find by **clear and convincing evidence** . . .

That a person is **disabled**.

*See* § 11a-3.



# How are guardianships established?

(continued)

"Disabled person" means 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 wastes his estate as to expose himself or his family to want or suffering, or (d) is diagnosed with fetal alcohol syndrome or fetal alcohol effects. "§ 11a-3.

# How are guardianships established?

(continued)

*Fifth*, the Court must appoint a **qualified** guardian:

A person **who** is “capable of providing an active and suitable program of guardianship “ **and who**

- (1) has attained the age of 18 years;
- (2) is a resident of the United States;
- (3) is not of unsound mind;
- (4) is not an adjudged disabled person as defined in this Act;  
and
- (5) has not been convicted of a felony, unless . . . .”

# How are guardianships established?

(continued)

*Or,*

a **public agency** or **not-for-profit corporation** found capable, providing it does not directly provide residential services to the ward.

*Or,*

a corporation qualified to accept and execute trusts (in the case of guardianships of the estate).

§ 11a-5.

# How are guardianships established?

(continued)

*Sixth*, following a hearing, an **Order** should enter . . .

*Dismissing*

*or*

*Adjudicating* a disability and *Appointing* a guardian.

See § 11a-12.

# How are guardianships established?

(continued)

*As well*, please consider . . .

**Venue** under § 11a-7.

**Standby guardians** under § 11a-3.1.

**Short-term guardians** under § 11a-3.2.

**Temporary guardians** under § 11a-4.

**Limited guardians** under § 11a-12.

# How are guardianships administered?

**LIMITED**



vs.

**PLENARY**





# How are guardianships administered? (continued)

## Limited Guardianships

**Duties** and **powers** must be *specified* in the Order.

§ 11a-12(a).

“[D]o not constitute a finding of legal incompetence.”

§ 11a-12(c).

Duties for Guardians of the Person . . . .

§ 11a-17.

Duties for Guardians of the Estate . . . .

§ 11a-18.

# How are guardianships administered? (continued)

## Residential Placements (§ 11a-14)

“No guardian appointed under this Article, *except for duly appointed Public Guardians and the Office of State Guardian*, shall have the power, *unless specified by court order*, to place his ward in a residential facility.

**Preferences of the ward** should be considered.

Placements should be in the **best interest** of the ward.

Wards *should not be removed their homes or families* unless necessary to prevent to prevent substantial harm.

Guardians have duty to **investigate** and **monitor**.

# How are guardianships administered? (continued)

## Deceased Guardians

When a guardian dies, a successor should be appointed or the guardianship should be terminated.

§ 11a-15.



# How are guardianships administered? (continued)

## Testamentary Guardians

“A parent of a disabled person may designate by will . . . If the court finds that the appointment of the one so designated will serve the best interests and welfare of the ward, it shall appoint the one so designated. The selection of a guardian shall be in the discretion of the court, whether or not a designation is made.”

§ 11a-16.



# How are guardianships administered? (continued)

## Duties of Guardians of the Person (§ 11a-17, *emphasis added*)

**Custody** of the *ward* and his/her *children*....

**Development** of “maximum self-reliance and independence”....

May maintain (continue with) an action for **dissolution** of marriage....



# How are guardianships established?

(continued)

*“If the court directs, the guardian of the person shall file with the court at intervals indicated by the court, a **report** that shall state briefly:*

(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;

# How are guardianships administered? (continued)

(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;

# How are guardianships administered? (continued)

(6) any **other information** requested by the court or useful in the opinion of the guardian.

The *Office of the State Guardian shall assist* the guardian in filing the report when requested by the guardian.

*The court may take such action as it deems appropriate pursuant to the report.”*



# How are guardianships administered? (continued)

“**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.



# How are guardianships administered? (continued)

“If the ward's wishes are unknown and remain unknown after reasonable efforts to discern them, the decision shall be made on the basis of the ward's **best interests** as determined by the guardian. . . .

“[The guardian] shall take into account any other information, including the views of family and friends, that the guardian believes the ward would have considered if able to act for herself or himself.”

# How are guardianships administered? (continued)

## Sterilization (§ 11a-17.1, *emphasis* added)

Requires an **Order** of the Court, following

A **verified motion** by the guardian, and

A report and testimony from a GAL.

# How are guardianships administered? (continued)

## Duties of Guardians of the Estate (§ 11a-18, *emphasis added*)

“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 [dependents].”



# How are guardianships administered? (continued)

The **Veterans Administration** must be given at least 7 days notice of any application to use estate assets derived from the VA.

“The probate court, upon petition of a guardian, other than the guardian of a minor, and after notice to all other persons interested as the court directs, may authorize the guardian to exercise **any or all powers** over the estate and business affairs of the ward that the ward could exercise if present and not under disability.”

# How are guardianships administered? (continued)

## *Guardians of estates can deal with:*

Personal Property

Real Property

Gifts

Contracts

Trusts

Options

Claims

Residences / Domiciles

Codicils to Wills / Amendments to Trusts

# How are guardianships administered? (continued)

*Guardians of estates need to:*

Ascertain ward's **intentions**, if possible.

**Reduce tax consequences.**

**Pursue government benefits.**

**Appear for/represent the ward** in legal proceedings.

# How are guardianships administered? (continued)

## Notice of Right to Seek Modification (§ 11a-19)

The Court *shall provide* upon appointment of guardians.

The Notice must be in writing and explain the procedure.

The Notice must in large, bold type.



# How are guardianships administered? (continued)

## Termination / Revocation / Modification (§ 11a-20)

A *petition* or *request* is required.

*Clear and convincing* evidence is required.

“Notice of the hearing on a petition under this Section, together with a copy of the petition, shall be given to the ward, unless he is the petitioner, and to each and every guardian to whom letters of guardianship have been issued and not revoked, not less than 14 days before the hearing.”

# How are guardianships administered? (continued)

At a *hearing on a petition* for modification . . .

“The ward is entitled to be represented by counsel, to demand a jury of 6 persons, to present evidence and to confront and cross-examine all witnesses. “

“If the ward is unable to pay the fee of the guardian ad litem or appointed counsel, or both, the court shall enter an *order upon the State to pay*, from funds appropriated by the General Assembly for that purpose, all such fees or such amounts as the ward is unable to pay. “

# How are guardianships administered? (continued)

Upon conclusion of the hearing, the court ***shall enter an order setting forth the factual basis for its findings and may:*** (1) dismiss the petition; (2) terminate the adjudication of disability; (3) revoke the letters of guardianship of the estate or person, or both; (4) modify the duties of the guardian; and (5) make any other order which the court deems appropriate and in the interests of the ward.

# What is new in guardianship law?

**755 ILCS 5/11a-24** (Public Act 98-63) (with **emphasis** added)

“When a court adjudges a respondent to be a disabled person under this Article, **the court shall direct** the circuit court clerk to notify the Department of State Police, Firearm Owner's Identification (FOID) Office, in a form and manner prescribed by the Department of State Police, **and shall forward a copy of the court order to** the Department no later than 7 days after the entry of the order. Upon receipt of the order, the Department of State Police shall provide notification to the National Instant Criminal Background Check System.”

# What is new in guardianship law?

*Also, please consider ...*

**Public Act 98-49** (effective 7-1-13) – 11a-10 – “APSA”.

“Statewide Centralized Abuse, Neglect, Financial  
Exploitation and Self-Neglect Hotline Act”

*Involves:*

Adult Protective Services Act ~~Elder Abuse and Neglect  
Act~~ (320 ILCS 20/1)

Department on Aging coordinating with the AOIC

Health Care Work Registry

Investigation and reporting

Etc.

# What is new in guardianship law? (continued)

**Public Act 98-89** (effective 7-15-13) – 11a-10.

Statute on preliminary procedures replaced.

“Provides that no guardian ad litem or legal fees shall be assessed against the Department of Children and Family Services in cases where the Department is the petitioner under certain provisions of the Juvenile Court Act of 1987.” [www.ilga.gov](http://www.ilga.gov)

# What is new in guardianship law? (continued)

**Public Act 98-120** (effective 1-1-14) – 11a-5.

Statute on qualifications for guardians replaced.

**Adds to the list of felons barred** from being appointed, a *person convicted of a felony involving harm or threat to a minor*, including a felony sexual offense.

# What is new in guardianship law? (continued)

**Public Act 97-1093** (effective 1-1-13) – 11a-12, 20.

Involves changes pertaining to the State Guardian.

“[T]he **court shall also indicate** in the order, *as a finding of fact*, the reasons that the State Guardian appointment, rather than the appointment of another interested party, is required.”

Imposes guardianship and advocacy operations fee.

Alters detail required in orders of appointment.



# Scenarios

## Scenario 1

FACTS: Petitioner = Spouse of Alleged Disabled Person.

Counter-Petitioner = sole adult child of ADP.

Each desire guardianship of the person and estate.

Each is qualified to serve as guardian.

Stipulated: ADP = Disabled.

Petitioner and ADO have joint liquid assets of \$100K.

Petitioner and ADO have joint real property of \$300K.

Counter-Petitioner has personal net worth > \$1M.

# Scenarios (continued)

Please pick one:

- A. Petitioner (spouse) should be appointed Guardian.
- B. Counter-Petitioner (child) should be appointed Guardian.

# Scenarios

## Scenario 2

FACTS: A Ward (Disabled Person) has an estate  $>$  \$2M.

Guardian of Estate = Adult Child of Ward.

Guardian of Person = Adult Child of Ward.

Ward has two other adult children as well.

Estate plan is proposed to place estate in trust.

Under plan, each gets  $\frac{1}{4}$ .

Under plan, G of E will be the trustee w/ *sole discretion* to invest in USA-based companies, etc.

Plan serves provides no tax benefits, will likely cost \$100K to effectuate, but will meet ward's desire to invest in the USA.

# Scenarios (continued)

Please pick one:

- A. The plan should be approved.
- B. The plan should not be approved.
- C. The plan should be approved with edits.

# Questions (and Comments)



# Adjournment

*Thank you!*

(please sign in / evaluate)

