

The Purpose and Process of Guardianships

Under New York State law a court may appoint a guardian for a person whenever it finds by "clear and convincing evidence" that an alleged incapacitated person, the "AIP," cannot adequately understand and appreciate the nature and consequences of his/her particular inabilities; and that person is likely to suffer harm because of these limitations and the inability to appreciate the consequences of the limitations.

The statute provides that the guardian's authority should be tailored to satisfy specific personal and/or property management needs of the AIP, making available the least restrictive form of intervention. In contrast to the old guardianship law, the new law permits the AIP as much latitude as possible under the circumstances for the exercise of independence and self-determination.

The guardianship proceeding may be initiated by the AIP, or a person with whom that person resides, relatives, a trustee of a trust established by and/or for the benefit of the person, and, in fact, any individual who is concerned about the welfare of the person alleged to be incapacitated.

The hearing must be conducted in the presence of the person alleged to be incapacitated, either at the courthouse or where the person resides, so as to permit the court to obtain its own impression of the person's capacity. Only in rare and exceptional circumstances may this requirement be bypassed.

NOTE: Medicaid planning, that is the management of assets and income for individuals in need of home care or nursing-home care, is often available for an incapacitated person. There is no hard and fast requirement that a guardian "spend-down" the incapacitated person's assets to meet Medicaid eligibility requirements. The court may authorize transfers for sheltering assets upon "clear and convincing evidence" that (1) that the person does not have the capacity to make such transfers; (2) that a competent, reasonable person in that individual's place would be likely to make the transfers; (3) that the transfers are not inconsistent with that individual's intentions.

What is a Guardian? A guardian is a person appointed by the court who receives authority from the court to make certain personal care decision and/or property and financial management decisions for the AIP for the period of time found by the court to be necessary to meet the person's needs.

The powers of the guardian are specifically limited to those necessary to meet the needs of the AIP. A guardian must be eighteen years of age or a parent under eighteen years of age. Certain public agencies and not-for-profit corporations may also qualify as guardians.

How the Process Begins: The guardianship proceeding may be commenced by the AIP or a person with whom that person resides, relatives, a trustee of a trust established by and/or for the benefit of the person, and, in fact, any individual who is concerned about the welfare of the person alleged to be incapacitated. Public agencies such as the department of social services, hospitals, schools and alcoholism facilities and other such entities may also initiate the proceeding.

In New York City, the Supreme Court is empowered to hear guardianship proceedings; outside the City, the county courts. The statute provides that a guardianship proceeding is entitled to preference over all other cases in the court and there are specific rules for a prompt resolution of the matter; ideally, a decision must be rendered within forty-five days of the signing of the initial papers. However, the court has discretion to extend this period.

Significantly, the statute requires that the hearing must be conducted in the presence of the person alleged to be incapacitated, either at the courthouse or where the person resides, so as to

permit the court to obtain its own impression of the person's capacity. Only in rare and exceptional circumstances may this requirement be dispensed with. The AIP's right to counsel is carefully delineated in the law and the official Comments that accompany the section of the law underscore this right.

Agreement and Incapacity: The legislation gave considerable consideration to the issues of "agreement" and "incapacity," as well as "least restrictive form of intervention." The provision for an appointment of a guardian, where the person agrees to it, permits the court to fashion relief for individuals who are unable to meet personal or property management needs because of a physical disability and welcome the appointment of someone to act on his/her behalf. In all other situations, that is, when the appointment is not voluntary, the court must find that the person is incapacitated.

There are two components to a determination of incapacity: (1) the person cannot adequately understand and appreciate the nature and consequences of his/her particular inabilities; and (2) the person is likely to suffer harm because of these limitations and his/her inability to appreciate the consequences of the limitation. The court is required to give primary consideration to the functional level and limitations of the person. Such assessment is required to go beyond the usual medical workup and specifically test the physical function, cognition and social support system of the alleged incompetent.

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