

# GUARDIANSHIP LAW



# IN GEORGIA

### 1. What is Guardianship?

A guardianship is a probate court appointment of guardian to make decisions for an adult who has lost sufficient capacity to make or communicate significant responsible decisions concerning his or her health or safety. The power of a guardian over the person of his ward is like that of the parent over his child, but only to the extent necessary for the adult's actual limitations and in the least restrictive manner possible while observing that adult's individual rights and dignity.

### 2. What is Conservatorship?

It is a designation based upon the same principle as in #1 above except the adult has lost sufficient capacity to make or communicate significant responsible decisions concerning "the management of his or her property".

### 3. What is the difference between a Conservator, Guardian, Representative Payee, Power of Attorney, Responsible Party and Personal Representative?

- o **Conservator:** This is the person that was formerly known as the "guardian of property." The "Conservator" is appointed by the Probate Court for the **Ward** (*the adult for whom a guardian or conservator has been appointed*) when the Ward is not able to manage his or her property any longer. (O.C.G.A. 29-5-1)
- o **Guardian:** This is the person that the Probate Court appoints for the Ward when the Ward has lost the capacity or is not able to communicate significant responsible decisions concerning his or her personal health or safety.
- o **Guardian Ad Litem:** This is a specially appointed officer of the court whose job it is to review all parties, circumstances and make reports and recommendations to the court for the best interests of the Proposed Ward.
- o **Representative Payee:** This is a party appointed by the Social Security Administration to accept benefits on behalf of a beneficiary and ensure that those benefits are used to care for that beneficiary.
- o **Power of Attorney:** This is authority given by one individual, known as the Principal, to another, known as the Agent, to allow the Agent to act in the best interests of the Principal in business and/or financial matters. If the Power of Attorney is a Springing Power of Attorney, the agent is granted power to act when the Principal is absent, is unable to act or give consent, or some other contingency specified in the springing power has occurred. Powers can be general, specific or limited to a sole purpose.
- o **Responsible Party:** This is generally a term used in long-term care facilities to recognize the individual accepting responsibility for being the contact person for a resident who has been admitted to the facility.
- o **Personal Representative:** This term is generally reserved for those categories of persons with official responsibilities for estates of the deceased as they work to bring their affairs in order. These include:

- ❖ *Executor- person in charge of the Last Will and Testament*
- ❖ *Administrator- person in charge of the Estate when there is no Will*
- ❖ *Successor-person in charge when one of the named people above cannot serve*
- ❖ *Personal Representative-person appointed by the Court over the estate when none of the above is available*

#### **4. If I thought my loved one needed a guardian and/or conservator, where would I go to have the Court appoint me?**

A Petition would have to be filed in the Probate Court in the County where your loved one lives or is currently located.

First, however, you must ask whether or not this step is necessary. These are some points to consider:

- If you do not succeed in bringing this action, you can't try again for two years unless there is a significant change in your loved one's condition or circumstances;
- Even if you believe that you are doing this to "help" your loved one, once this process begins, you are taking your loved one's rights "**away**" from them. You become their adversary. Make sure that it is necessary.
- See if this is the least restrictive and least intrusive way to help your loved one with whatever problem(s) he or she might be experiencing.
- Seek advice from your local Area Agency on Aging, the Senior Legal Hotline, an Elder Law Attorney or other advisor before taking this step.

#### **5. Do I need an attorney to file this petition or can I file this petition on my own?**

The law does not require that you have an attorney to file a Petition in Probate Court, but in many Counties in the State, the Clerks will inform you that the Judge will not permit a Petition to be filed in their courts unless you are represented by an attorney. Guardianship is a legal proceeding that requires a hearing at which evidence is presented, testimony is taken and a lawyer will be appointed to represent the Proposed Ward. If you are not represented by an attorney, you will be expected to present the evidence to the court in the appropriate manner.

#### **6. What if I am unable to afford an attorney to file my petition for me?**

Generally, the legal services programs and legal aid programs provide assistance to the Proposed Ward in the defense of Guardianship matters and less often in seeking guardianship, unless it is to obtain Public Benefits for the Proposed Ward. For more information, contact your local Area Agency on Aging or the State Bar of Georgia (404) 527-8700/1-800-334-6865.

## **7. If I find that it is necessary to proceed with a Petition, who can qualify to become the guardian?**

There are some restrictions on who can be Guardians and, in #8 there is a list of Preferences in the Order in which the law selects those to become the guardian for a Ward. First, in order to qualify as a guardian, unless one is a “Public Guardian” or the Department of Human Services (both of these will be discussed later), only individuals can be guardians.

- No minors
- No Wards
- No protected persons
- No one with a conflict of interest with the adult without the court’s approval
- No owner, operator, or employee of a long-term care or other caregiving institution or facility at which the adult receives care, unless the adult is related by blood, marriage or adoption

## **8. What is the Order of Preference for those persons who will be considered for guardian?**

The Court is required to appoint that person who will best serve the interests of the one in need of the guardian/conservator. As such, even though one person may be higher on the list of preferences, the Court may disregard that person’s position and appoint someone with a lower preference because it is in the best interest of the Proposed Ward. The list of those eligible persons is as follows:

- An individual/person previously nominated in writing by the Proposed Ward
- A spouse of the Proposed Ward or an individual/person nominated by the spouse
- An adult child or an individual/person nominated by the adult child
- A parent or someone nominated by a parent
- A guardian appointed while the Proposed Ward was a minor
- A guardian appointed previously in Georgia or appointed in another state
- A friend, relative or any other individual
- Any other person, including a volunteer to the court found suitable and appropriate who is willing to accept the appointment
- The County Guardian

## **9. (a) If no one in the Order of Preference is selected by the Court, what happens?**

- ✓ If no other person is available, the judge may appoint a Public Guardian; and
- ✓ If no Public Guardian is available, the Department of Human Resources will designate a representative to provide services. However should the Department find a Public Guardian later or another suitable person, the Department shall be allowed to resign and the other person appointed instead.

### **10. What is a County Guardian?**

This is an Official who represents the County and stands in as Guardian on behalf of the County in the event the Court needs to appoint a designated official. This individual represents the County in a guardianship or conservatorship but is subject to the same requirements and obligations as any other and is entitled to the same rights and privileges and is governed by the same law as any other guardian and conservator.

### **11. What is a Public Guardian?**

A “public guardian” is an individual or a private entity who has met certain qualifications and is registered with and approved by the Probate Court in that county to serve as Public Guardian of an adult who has no one else to serve as his or her guardian.

### **12. What kind of qualifications will the public guardian have met?**

These include the following: 1) public guardians must submit to a criminal records background check and a credit check; 2) public guardians may be individuals or entities that have been accepted by the probate court; 3) public guardians or employees of the entity, will have completed at least 20 hours of approved training and 4) private entity public guardians will have demonstrated that certain liability insurance is in place for all employees and agents having direct contact with the proposed ward.

### **13. Does DFCS no longer serve as guardian for people?**

DFCS will no longer serve as guardian. Formerly, when there was no one to serve as guardian for someone, the County Department of Family and Children Services Director was appointed as the Guardian and, then, delegated the duties of Guardian to an Adult Protective Services Caseworker. However, Adult Protective Services is primarily responsible for the investigation of abuse, neglect and exploitation of vulnerable adults eighteen (18) years of age and older who are imminently at-risk of harm and not in a protected environment.

On July 1, 2004, Adult Protective Services relocated to the Georgia Department of Human Resources (*Department of Human Services, effective 7/1/09*) Division of Aging Services and was no longer a part of the Department’s Division of Family and Children Services. Consequently, during the 2005 legislative session, the law was changed to reflect that the County DFCS Director would no longer serve as guardian of last resort. Now if the Probate Court cannot find a guardian from the order of preferences outlined in the law; nor any friend, relative or any other individual as provided, including a volunteer of the Court; if the County Guardian is not available; and there is no Public Guardian available, then as a last resort, the Department of Human Services may be appointed by the court as guardian.

**14. Who has the right to petition for guardianship or conservatorship?**

- Any interested person with a physician's, licensed clinical social worker's, or psychologist's affidavit stating that he or she had examined the Proposed Ward within 15 days prior to filing the petition
- Any two persons swearing to the facts in the petition
- The Proposed Ward

**15. Is there a specific form for the petition?**

Yes, there is a form available from the Probate Court. The form for Petition for the Appointment of Guardianship and/or Conservator is also available from the website of the Georgia Probate Courts at [www.gaprobate.org](http://www.gaprobate.org)

**16. What happens once the petition is filed?**

As with any Petition, in any Court, it is reviewed to see if it meets the appropriate criteria. If "probable cause" is present, the petition is accepted for filing; if not, the Petition is **dismissed**.

**17. What is the next step if the Petition is accepted?**

- ❖ The court sends notice to the Proposed Ward of what has happened and sends copies of the papers that have been filed
- ❖ The Proposed Ward is informed that he or she must submit to an evaluation set up by the Court
- ❖ The Proposed Ward is informed that he or she has a right to an independent attorney and unless the Proposed Ward hires an attorney within two (2) days, the Court will appoint one to represent him/her in this action
- ❖ On either party's motion, or on the court's own motion, the court will decide whether to appoint a guardian ad litem

**18. Who conducts the evaluation?**

A physician, psychologist or a licensed clinical social worker.

**19. If the evaluator agrees that there needs to be a guardian/conservator, will there be a hearing?**

Yes, the court will then schedule a hearing. All parties will be notified by mail of the time and place. The hearing will not be scheduled less than ten (10) days after the notice is mailed.

**20. Will the “Proposed Ward” be at the hearing?**

The Proposed Ward and his/her attorney will confer and determine whether the Proposed Ward will attend. The Proposed Ward has a right to attend the hearing but this right to appear can be waived by the ward’s attorney.

**21. How long does it normally take to get the guardian/conservator in place?**

It could take more than a month to complete the entire process of filing, serving, evaluating and conducting the hearing to have a guardian/conservator appointed.

**22. What if I believe there is a possibility that the Proposed Ward may be in danger, may get hurt, become seriously ill or lose all of his/her money if something isn’t done sooner? Is there no way to speed up this process?**

There is another process called “an emergency guardianship/conservatorship.” .” If the facts indicate that there is an immediate and substantial risk of death or serious physical injury, illness or disease unless an emergency guardian is appointed or an immediate and substantial risk of irreparable waste or dissipation of the Proposed Ward’s property if an emergency conservator is not appointed.

**23. How soon could I be appointed if I filed an emergency petition?**

The Court may be able to appoint an emergency guardian/conservator immediately or at least within 3-5 days when the emergency hearing is required to be held. **The risk must be so great that it is certified by a physician, psychologist or licensed clinical social worker that it is necessary and cannot wait until after the hearing.**

**24. How long do guardianships/conservatorships last?**

- ❖ A guardianship/conservatorship lasts for as long a period of time as the Court has ordered (i.e., 3 months, 6 months, 12 months, or indefinitely)
- ❖ Emergency guardianship/conservatorships end on the earliest of
  - The court’s removal of the emergency guardian/conservator with or without cause
  - Effective date of appointment of a permanent guardian/conservator
  - Dismissal of petition for appointment of guardian/conservator
  - The date specified for termination by the order appointing the emergency guardian/conservator; or
  - 60 (sixty) days from the appointment of the guardian/conservator

**25. If I am appointed as guardian/conservator, is there training to assist me in carrying out my duties so that I know what I’m supposed to do?**

The Probate Court may have a handbook that will assist you once you are sworn into

your role as guardian/conservator. If this is not available to you in your county, call the Probate Court in Bibb County (478)621-6494 or Fulton County (404)730-4690 to inquire whether or not one is available. You might also go to the Probate Court website at [www.gaprobate.org](http://www.gaprobate.org) The only training program that is required by law is for the Public Guardians.

## **26. Is it always necessary to go through the Court to assist loved ones if they are no longer able to voluntarily sign a Financial Power of Attorney or Georgia Advance Directive for Health Care?**

That depends on what you're trying to do. There are some tools in the law that allow you to assist a spouse/relative or, in some cases, a friend in certain circumstances. See the descriptions below.

### **Health Care Tools:**

**Temporary Health Care Decision Maker for an Adult Act – (O.C.G.A. § 31-36A-1 et. seq.)** Allows a certain list of persons to consent to a transfer, admission or discharge of an incapacitated person from one health care setting to another and when no one on the list can be found, allows an affidavit to be filed in Probate Court by the physician and discharge planner indicating that no one else who is able to consent has been found, the person is ready to be discharged, and an appropriate placement has been located.

**Consent to Surgical and Medical Treatment – (O.C.G.A § 31-9-1 et. seq.)** Allows a certain list of persons to consent to surgical and/or medical treatment for another who is not able to communicate or understand the consequences of the decisions.

### **Financial Tools:**

**O.C.G.A. § 29-5-4 provides a process for obtaining personal property due an incapacitated adult.** For spouses and relatives providing care for persons who are currently in possession of less than \$2,500 in personal property (cash, savings, clothing, cars, artwork, anything other than land), they need only present an affidavit to the Probate Court, indicating their relationship and the value of personal property owned by the incapacitated adult. The Probate Court can issue authorization for whatever stocks, bonds, dividends, notes or debts owed the incapacitated adult be paid or transferred (as appropriate) to the affiant. The affiant is then authorized to spend these assets in their best judgment in a manner that is just and proper for the benefit of the incapacitated adult. ***There is no formal accounting required for these assets.***



**NOTE: WHILE THERE IS NO ACCOUNTING REQUIRED BY THE COURT, THIS IS A FIDUCIARY ROLE. THERE IS LEGAL ACCOUNTABILITY FOR BREACHING A FIDUCIARY DUTY.**

**27. Once the guardianship/conservatorship is ordered, what is the Ward allowed to do?**

The Ward has certain rights that are protected. These include:

- A qualified guardian /conservator who acts in the best interests of the Ward
- A guardian/conservator reasonably accessible to the Ward
- To have the Ward's property used to provide adequately for the Ward's support, care, education, health and welfare
- To communicate freely and privately with person other than the guardian except as otherwise ordered by the court
- The right to bring an action against the guardian/conservator, relating to the guardianship/conservatorship
- The least restrictive form of guardianship/conservatorship assistance considering the Ward's function limitations, personal needs, preferences; and
- The removal of the guardianship/conservatorship at the earliest possible time if the Proposed Ward regains capacity

**28. What kinds of things can the Ward not do any more?**

Unless the Court specifically says differently, these rights are taken away from the Ward:

- × to marry
- × to make, modify or terminate other contracts
- × to consent to medical treatments
- × to establish a residence or dwelling place
- × to change domiciles
- × to revoke a revocable trust established by the Ward; and
- × to bring or defend any action at law or equity, except an action relating to the guardianship/conservatorship

**29. I didn't see anything about the right to vote or make a Will; does the Ward lose those rights as well?**

No, not necessarily. The law states that the appointment of a guardian is not in and of itself a determination regarding the right of the Ward to vote or make a Will. These must be separately removed from the Ward by the Court.

**30. Is the guardian required to meet the Ward's expenses out of his or her own pocket?**

No, the Ward's expenses are paid for from the Ward's estate: the Ward's income and assets.

**31. Once the Ward has a guardian/conservator, is he/she allowed to make any decision?**

The guardian/conservator is supposed to encourage the Ward to participate in decisions, act on the Ward's own behalf and develop or regain the capacity to manage the Ward's personal affairs.

**32. Are there certain things that guardians/conservators cannot do?**

Yes, such as:

-the guardian cannot initiate divorce proceedings for the Ward on the grounds that the marriage is irretrievably broken; as long as the court does not order otherwise, the guardian may bring an action for divorce limited to reasons listed in O.C.G.A. §19-5-3.

-the guardian/conservator cannot mix the Ward's funds with his or her own to be used indiscriminately; and,

-the guardian/conservator cannot dispose of the Ward's assets without court's knowledge and approval;

**33. What responsibilities does the guardian/conservator owe to the Ward?**

The guardian/conservator must do what is reasonably necessary to provide adequately for the support, care, education, and health and welfare of the Ward and that includes:

- ✗ Respect and maintain rights and dignity;
- ✗ Become or remain personally acquainted with the Ward and maintain contact with the Ward to know of the Ward's capacities, limitations, needs, sufficient opportunities and physical and mental health;
- ✗ Arrange for the support, care, education, health and welfare of the Ward, considering the Ward's needs and available resources
- ✗ Take reasonable care of the Ward's personal effects
- ✗ Cooperate with the conservator
- ✗ Use money of the Ward that has been received for the Ward's current use
- ✗ Conserve for future needs any excess money of the Ward the guardian receives; if a conservator, the guardian shall pay to the conservator at least quarterly any money the guardian has received to be conserved for the Ward's future needs

**34. How are the guardian/conservator held accountable?**

Within 60 days after the appointment as guardian, the guardian must file a personal status report which contains (a) a specific description by the guardian of the Ward's general condition, living situation progress, development and needs; and

(b) recommendations for any changes needed in the guardianship Order. Within 2 months after every anniversary of the appointment as guardian, a personal status report must be filed with the court.

Within 2 months after appointment as conservator, the conservator must file an inventory of the Ward's property and a plan for administering the property.

*Inventory* – has to describe all the assets and liabilities of the Ward and must include a list of all the personal and real property owned by the Ward and describe how the property is titled.

*The Plan*– has to be based on the actual needs of the Ward and must take into consideration the best interests of the Ward. It must include a strategy for managing expenses and budgeting the assets and resources for the Ward.

***A copy must be shared with the guardian.***

Accurate records, supporting data and annual returns must be filed by the conservator within 60 days of the anniversary date with the Court.

### **35. Is the guardian/conservator legally responsible for the things done by the Ward?**

Not necessarily and not just because of the guardian/conservator-Ward relationship.

The guardian/conservator does not assume personal liability for

- × Contracts entered into by the Ward
- × Contracts entered into as a guardian/conservator
- × Acts or omissions of the Ward
- × Obligations arising from ownership or control of property of the Ward
- × Other acts or omissions occurring in the course of the guardianship/conservatorship

### **36. Will a guardian/conservator have anything in writing to prove he or she is that person's guardian/conservator?**

Yes, once the Oath has been taken and the Order is issued from the Probate Court appointing the guardian and/or conservator, the court also provides the guardian/conservator with a document called "Letters of Guardianship or Letters of Conservatorship." This names the appointed person and briefly describes the appointment. If you do not receive a copy of the Letters of Guardianship or Letters of Conservatorship when you are appointed, you may obtain a blank copy from the Probate Court website [www.gaprobate.org](http://www.gaprobate.org) and submit it to the court with a request that the

Judge sign it for you. Copies of this can be provided to anyone and any agency needing proof of your authority.

**37. Is the Ward basically captive and at the whim of the guardian as far as his or her friends are concerned?**

NO. Each Ward has the right to communicate freely and privately with persons other than the guardian unless otherwise ordered by the court.

**38. Since the Ward cannot bring any suits, what happens if the Ward has a complaint against the guardian?**

The Ward, his representative, or his attorney may always file a petition in the probate court alleging that the Ward is being unjustly denied a right or a privilege granted by law. The court has the authority to conduct a judicial inquiry and to issue appropriate orders to correct any abuse of the guardianship law.

**39. What if I am not the guardian/conservator but I see that the person who is the guardian conservator is not taking care of the Ward properly. Is there any way that I can lodge a formal complaint?**

Effective July 1, 2005, O.C. G.A. §29-4-40 allows any person, including the Ward, to petition the court, and report that the Ward is being denied a right or privilege, or the court on its own may recognize this by a motion. The court can conduct a judicial inquiry into the matter.

**40. Once a guardianship/conservatorship is finalized, how do you go about getting the court to change it?**

Any interested person, including the Ward, can petition the court for a modification of a guardianship/conservatorship, or the court on its own can modify a guardianship/conservatorship by a motion and adjust the duties and/or powers of the guardian/conservator or powers of the Ward. The adjustment can be made to reflect the current capacity of the Ward.

***Standard to be met:*** *If the evaluation determines there has not been a significant change in the capacity of the Ward, the petition will be dismissed. Another attempt to modify cannot be made for another 2 years; if the petition proceeds but after a hearing the request is denied, another attempt is barred for 2 years.*

**41. What happens if the guardian/conservator no longer wants to serve, becomes ill and can no longer serve or worse still – dies?** There are a number of reasons that can arise that could prevent the guardian/conservator from being able to serve in the capacity for which he/she was appointed. Should this occur, the guardian conservator can always resign. Once the court accepts the resignation, the court will appoint a successor to continue the work of the guardian/successor.

If the guardian/conservator dies or if the court suspends or revokes the Letters of Guardianship/Conservatorship, the court will appoint a successor to serve and continue the duties and obligations on behalf of the Ward.

**42. What happens if a guardian/conservator does not take care of his/her Ward properly or uses the Ward's money for his/her own personal use instead of taking care of the Ward?**

The guardian/conservator will be said to have “breached a fiduciary duty” owed to the Ward. For that, the Ward or an interested person on behalf of the Ward can bring a cause of action (a suit) to:

- ☞ Recover damages
- ☞ Compel performance of the guardianship/conservatorship duties
- ☞ Enjoin (stop) the breach of fiduciary duty (wrong doing) by the guardian/conservator
- ☞ Compel (force) the redress (correction) of the breach of fiduciary duty by payment of money or otherwise

If the Ward's money is misapplied or misappropriated and this can be traced into the hands of a person with notice of the misapplication, a trust will attach to these funds/assets.

**All other remedies at law, including the provisions of the Criminal Code are also available to address the actions of the guardian/conservator and to bring remedies, relief and justice on behalf of the Ward.**

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