



**RIDLC**

*Rhode Island Disability Law Center*

Your Protection and Advocacy System

Legal assistance for individuals with disabilities  
and their families

# Guardianship and Alternatives to Guardianship

Prepared by  
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# INTRODUCTION

This booklet has been drafted by the Rhode Island Disability Law Center, Inc. (RIDLC). It is intended as a guide for individuals with a disability as well as for parents and agencies to help better understand guardianship and the alternatives to guardianship.

Guardianship is the removal of the right to make important life decisions. It is one of several alternatives to providing decision-making support to individuals who lack the capacity to make decisions independently. Guardianship is the most serious and intrusive of all the options and should be used only when no other alternatives will adequately support the decision-making needs of the individual.

This booklet is also intended to help individuals with a disability advocate for themselves to suggest viable solutions for decision-making support, to strictly limit a guardianship order, or to contest or modify a guardianship order once it has been put in place.

## ABOUT RIDLC

RIDLC is the federally funded non-profit law office designated since 1977 as Rhode Island's protection and advocacy agency for persons with disabilities. We represent individuals with all kinds of physical, cognitive and mental disabilities on a wide variety of disability-related legal matters.

The mission of RIDLC is to assist Rhode Islanders with differing abilities in their efforts to achieve full inclusion in society and to exercise their civil and human rights through the provision of legal advocacy.

RIDLC believes that individuals with a disability should be entitled to personal control of their destiny with the natural supports that come from human interdependence. To this end, RIDLC represents individuals with a disability who seek to contest guardianship petitions filed against them, in order to preserve and maximize the autonomy of those individuals.

## LIMITED GUARDIANSHIP IN RHODE ISLAND

Guardianship is a court-ordered relationship between a competent adult (the guardian) and an adult with impaired decision-making capacity (the ward)<sup>1</sup>. In Rhode Island, city and town Probate Courts oversee the guardianship process and issue guardianship orders. The process of obtaining guardianship and the requirements for granting guardianship are established by state law. After a court appointment, the guardian becomes a substitute decision-maker for the ward. The court gives the guardian the authority to make specific decisions on behalf of the ward and at the same time takes away the ward's right to make those decisions. The guardian's authority may include the right to make health care decisions, the right to decide what relationships the ward may have and with whom, the right to decide where the ward will reside, and the right to control the ward's finances.

Recognizing that “adjudicating a person totally incapacitated and in need of a guardian deprives a person of all of his or her civil and legal rights and that this deprivation may be unnecessary,” Rhode Island modified its guardianship law in 1992 to create a “limited guardianship” process that “least interferes with the legal capacity of a person to act in his or her own behalf.”<sup>2</sup> In determining the scope of the guardianship, Probate Courts will focus on the individual's functional abilities in various decision-making areas and can appoint a guardian only in those areas where an individual lacks capacity. The court is required to “strike a delicate balance between providing

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<sup>1</sup> Rhode Island law also provides for a procedure for guardianship over children. *See* R.I.G.L. § 33-15.1-1 et seq., “Guardianship of Minors.” This booklet only reviews adult guardianships.

<sup>2</sup> R.I.G.L. § 33-15-1



the protection and support necessary to assist the individual and *preserving, to the largest degree possible*, the liberty, property and privacy interests of the individual.”<sup>3</sup>

The law also requires that those seeking guardianship show the steps which have been taken to utilize less restrictive alternatives to guardianship. These *less restrictive alternatives* are listed in the petition form used by the Probate Courts and range from informal options such as money management and social service or government benefit programs, to legal tools such as trusts and powers of attorney. These options are discussed in detail below.

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<sup>3</sup> R.I.G.L. § 33-15-4(a)(1)

## FREQUENTLY ASKED QUESTIONS

### *Does a parent automatically become the guardian of his or her adult child?*

Until a child reaches eighteen (18) years of age, the parent is considered the “natural guardian” of the child.<sup>4</sup> Once a child turns eighteen (18) years of age, he or she is presumed to be an adult capable of making decisions. For children with disabilities, the law is no different. A parent must petition the appropriate Probate Court if the parent opts to pursue guardianship of his or her adult child with a disability.

### *When will a guardian be appointed for an adult person?*

An adult person may need a guardian if a disabling condition renders him or her incapable of making some or all decisions about health care, finances, residence or relationships. The fact that a person is making decisions that others disagree with does not necessarily mean the person lacks the capacity to make decisions. The more relevant inquiry is whether the person can appreciate the risks and benefits of making particular decisions. Even when a person lacks the capacity to make decisions, a guardian should not be appointed unless *there are no less restrictive alternatives*.

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<sup>4</sup> R.I.G.L. § 33-15.1-1

## *Are there different kinds of guardianship?*

Unlike other states, Rhode Island law does not differentiate between guardianship over the person and guardianship over the estate. As noted above, Rhode Island has a limited guardianship law, which generally focuses on four areas of decision-making capacity: finances, health care, relationships, and residence. Guardianship can be tailored to take into account a ward's ability to make decisions in some but not all of these four areas. Even within one functional area, it may be possible for a ward to make some but not all decisions. For example, it may be possible for a ward to consent to routine medical care, and this right could be specifically reserved in a guardianship order. The same ward may need the guardian to make decisions with respect to more invasive or risky medical procedures, and this could be spelled out in the guardianship order as well.

## *What is temporary guardianship?*

Temporary guardianship<sup>5</sup> is meant to be utilized when there is a perceived emergency and a substitute decision-maker is needed right away. The temporary guardian is only meant to serve until the court can decide whether a permanent guardian is needed. However, temporary guardianship should be avoided if at all possible. Unlike the limited guardianship described above where the responsibilities of the guardian are strictly defined, temporary guardianship may grant broad decision-making authority to the temporary guardian. Moreover, the tenure of the temporary guardian can be determined at the discretion of the Probate Court and there generally is no appeal from the appointment of a temporary guardian.<sup>6</sup> When

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<sup>5</sup> R.I.G.L. § 33-15-10

<sup>6</sup> R.I.G.L. § 33-15-11

a temporary guardianship is used, every effort should be made to limit its scope and duration.

Rhode Island law also authorizes the appointment of a “temporary guardianship for a specific purpose.” In this process, the Probate Court may appoint a temporary limited guardian for the “specific purpose of authorizing, directing, or ratifying any transaction necessary or desirable for admission to a nursing facility.” The tenure of this appointment is limited to the time necessary to admit the person into the nursing facility.<sup>7</sup>

### *Who can become a guardian?*

Both individuals and public or private agencies may become guardians. Agencies that financially benefit from providing housing, medical or social services to an individual cannot become the person’s guardian. The Probate Court will conduct an inquiry into the qualifications of a proposed guardian, generally asking about any criminal history, the ability to manage finances, the ability to meet the unique needs of the proposed ward, and the ability to meet the requirements of the law.

Relatives and friends are most often appointed guardians. However, the wishes and preferences of the proposed ward as to who should be guardian must be considered by the Probate Court.<sup>8</sup>

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<sup>7</sup> R.I.G.L. § 33-15-8.1

<sup>8</sup> R.I.G.L. § 33-15-6(e)

## *What are the duties and responsibilities of a guardian?*

A guardian owes a duty to act in the best interests of the ward. In order to do that, a guardian should see the ward often and ask the ward what he or she wants in a given situation. Furthermore, if a guardian is managing a ward's finances, the guardian must manage the financial affairs frugally and without waste. Lastly, a guardian must not exceed the bounds of authority as set forth in the guardianship order.

The authority of the guardian may extend to making *some or all* decisions regarding:

the ward's residence;

the kind of medical care to be provided to the ward;

the management of the ward's financial affairs including expenditures to be made on behalf of the ward; and

the relationships that a ward may have.

The duties of the guardian include the following:

If the guardian has any authority over the ward's finances or personal property, the guardian has a duty to submit an *accounting* to the Probate Court every year, which describes the assets and income of the ward, and accounts for all expenditures on behalf of the ward.

- The guardian must assure at a minimum that the person's basic needs for food, clothing and shelter are met; and

- The guardian must keep the ward's assets separate from his or her own assets. Generally guardianship accounts are set up to do this.

If the guardian has any authority over the ward's personal life, such as decision-making capacity over residence, relationships, or medical treatment, the guardian must file an *annual status report* with the Probate Court outlining the ward's condition, summarizing decisions that were made on the ward's behalf, and any changes in the ward's decision-making capacity.

### ***What are the costs of guardianship?***

In addition to a filing fee that must accompany a petition for guardianship, advertising fees may be required for newspaper notice to interested parties. Payment for the services of a guardian ad litem (see below) will also be required.

If a guardianship is granted, the Probate Court may require surety, with or without bond from the guardian. The court may also approve payment from the ward's estate of some fees associated with the cost of obtaining the guardianship and maintaining the guardianship.

### ***Why avoid guardianship?***

In addition to having an impact on the autonomy and liberty of the ward, guardianship can be an expensive and time-consuming process. Furthermore, if an inappropriate and uncaring guardian is appointed, tremendous hardship can result.

Advocacy organizations and disability organizations recognize that guardianship may be overused to unnecessarily deprive persons of

fundamental rights, or misused with resulting abuse, neglect or exploitation by an unsuitable guardian.

- The Arc of the United States and the American Association on Intellectual and Developmental Disabilities issued a joint statement on guardianship in 2002, noting that “[g]uardianship has been over-used by those who were unaware of less intrusive alternatives or who simply wanted to have their views prevail over the wishes of the individual. Frequently, lesser forms of intervention ... have been either overlooked, intentionally avoided, or unavailable.”<sup>9</sup>
- A 2006 Guardianship Monitoring Report issued by the AARP and written with the American Bar Association (ABA) Commission on Law and Aging, noted the need for more court monitoring of guardian activities: “Guardianship is a powerful legal tool that can bring good or ill for an increasing number of vulnerable people incapable of making their own decisions. While it often brings needed protections, it also removes fundamental rights. Incapacitated elders are at risk of abuse, neglect, and exploitation by guardians with the authority to make surrogate personal and financial decisions.”<sup>10</sup>

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<sup>9</sup> See [http://www.aamr.org/content\\_159.cfm?navID=31](http://www.aamr.org/content_159.cfm?navID=31).

<sup>10</sup> See [http://www.aarp.org/money/estate-planning/info-2006/2006\\_14\\_guardianship.html](http://www.aarp.org/money/estate-planning/info-2006/2006_14_guardianship.html).

## ALTERNATIVES TO GUARDIANSHIP

As reviewed above, alternatives to guardianship should be explored before guardianship is utilized. Rhode Island law requires this approach, as does our understanding of human and disability rights. Some common examples of alternatives to guardianship, based on the kinds of decision-making support a person needs, are listed below. Other creative solutions also can be explored.

### HEALTH CARE ALTERNATIVES

#### DURABLE POWER OF ATTORNEY FOR HEALTH CARE

Individuals can draft a written declaration granting another person (their “agent”) the power to make health care decisions for them when they are no longer able. There is a specific form that must be used in Rhode Island to create the Durable Power of Attorney for Health Care.<sup>11</sup> The person creating the power of attorney must sign the form in the presence of two qualified witnesses, or in the presence of a notary public.

The person need not necessarily understand the risks and benefits of all the health care decisions that could be made for them by the health care agent. The individual must understand that he or she is giving the agent the right to make such decisions.

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<sup>11</sup> That form is created by statute. *See* R.I.G.L. § 23-4.10-2.



## LIVING WILL

Individuals can draft a “living will,” which is a written declaration instructing a physician to withhold or withdraw life sustaining procedures in the event of a terminal condition. A living will must be executed by a competent person who is at least 18 years old and witnessed by two people.<sup>12</sup>

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<sup>12</sup> R.I.G.L. § 23-4.11-3

# FINANCIAL MANAGEMENT ALTERNATIVES

## REPRESENTATIVE PAYEE OR FIDUCIARY

When a person who receives Social Security disability benefits or Veteran's Administration benefits cannot manage those benefits, the federal agency will appoint a person or entity to manage the benefits for the person. Social Security calls the manager a Representative Payee. The Veterans Administration calls the manager a Fiduciary. The appointed manager will receive the benefit checks and must use the income to meet the person's basic needs. Generally, accounts must be made and reports kept detailing how the benefit income was used for the person. In order to become a representative payee or a fiduciary, the interested individual or agency must file an application with the appropriate government agency.

## TRUSTS

Trusts are a legal plan for placing funds in the control of a trustee for the benefit of a person. The individual placing the funds, or grantor, may direct the trustee as to how the money is to be spent. For example, the grantor may direct that funds be used only for the individual's housing or schooling, etc. Trustees can be institutions such as banks, or individuals who know and care for the person.

## POWER OF ATTORNEY

A power of attorney gives one person the power to act for another person. A person with a disability can give another person the power to handle his or her financial affairs through a power of attorney.

Other, more informal options include:

Joint ownership of bank accounts;

Money management training through a social service agency or school; or

A friend or family member to help with bill payment and/or budgeting.

## PERSONAL CARE ALTERNATIVES

When a person has difficulty managing personal care, such as eating regularly, taking medications, cleaning, or bathing they may need some sort of personal assistance, rather than guardianship. Some options for care support are:

Home health services;

Case management;

Meals on Wheels;

Adult day care; or

Housing options such as assisted living, group homes, and adult foster care.

## SAFETY ALTERNATIVES

If a person is being abused or neglected, the person or any concerned individual can report this to the appropriate state agency (e.g., the Department of Behavioral Healthcare, Developmental Disabilities and Hospitals, or the Department of Elderly Affairs). The individual can also seek a court protective order, preventing the abuser from having any contact with him or her.

## PROCEDURES FOR OBTAINING GUARDIANSHIP

### FILING THE PETITION FOR LIMITED GUARDIANSHIP

#### *Forms*

Probate Courts utilize state-wide forms for guardianship. Copies of the forms can be obtained from the clerk of each Probate Court, or they may be obtained online from the Secretary of State's Office.<sup>13</sup>

The individual or agency seeking to become guardian must file a Petition for Appointment of Limited Guardian.

With the petition, the individual or agency seeking guardianship must also file a Decision-Making Assessment Tool (or DMAT)<sup>14</sup>, completed by the proposed ward's primary care physician. The DMAT analyzes the individual's decision-making capacity in

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<sup>13</sup> Forms are made available through the Secretary of State's web site: <http://www.sec.state.ri.us/library/probateforms/probate-index.html>.

<sup>14</sup> The forms for the Petition, the DMAT, Notice, GAL Report and Annual Status Report are established by statute. See R.I.G.L. § 33-15-47.

various areas. Other individuals who know the proposed ward personally or professionally may also submit a DMAT.

### *Where to file*

The guardianship petition is filed with the Probate Court clerk in the city or town where the proposed ward lives or where an out-of-state proposed ward has property.<sup>15</sup>

### *Notice*

The proposed ward has a right to be notified of the guardianship hearing.<sup>16</sup> The Notice form sets forth the time and date of the hearing as well as the proposed ward's rights during the hearing process. Furthermore, a guardian ad litem is appointed to provide in-person notice to the proposed ward about the guardianship petition.<sup>17</sup>

Probate Courts also generally will require newspaper publication of the hearing scheduled on the guardianship petition.<sup>18</sup>

### *Guardian ad Litem (GAL) responsibilities*

The GAL, who need not be an attorney, must:

personally visit the prospective ward;

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<sup>15</sup> R.I.G.L. § 33-15-2

<sup>16</sup> R.I.G.L. § 33-15-17.1

<sup>17</sup> R.I.G.L. § 33-15-7

<sup>18</sup> R.I.G.L. § 33-22-11

explain the nature, purpose and legal effect of the appointment of a guardian;

explain the hearing procedure (including the rights listed on page 18);

inform the respondent of the name of the person known to be seeking the appointment;

review the DMAT, petition and notice;

interview the prospective guardian; and

determine whether the respondent wants to exercise any of the rights described below.

The GAL must file a report with the court outlining the GAL's actions and informing the court as to whether the prospective ward

- wants to be present at the hearing;
- wishes to contest the petition;
- wishes to place limits on the prospective guardian's powers;
- objects to a particular person being appointed guardian; and
- wishes to be represented by counsel.

When the proposed ward obtains legal counsel, the appointment of the GAL terminates.<sup>19</sup>

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<sup>19</sup> R.I.G.L. § 33-15-7(f)

# HEARING PROCEDURES

## RIGHTS OF THE PROPOSED WARD

The proposed ward has the right to:

attend the hearing;

contest the petition;

request that the powers of the guardian be limited;

object to the appointment of a particular individual as guardian; and

be represented by an attorney.

If contesting the petition the proposed ward can:

compel the attendance of witnesses;

present evidence; and

cross-examine witnesses.<sup>20</sup>

## DETERMINATIONS TO BE MADE

As discussed above, the proposed ward can object to the need for a guardian or to the specific powers to be granted to the guardian. To support this objection, the proposed ward should present evidence

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<sup>20</sup> R.I.G.L. § 33-15-5

contesting the DMAT. Generally, this is done through another expert who can attest to the individual's decision-making capacity. The proposed ward's own testimony may also be very persuasive.

The judge will listen to the testimony of the witnesses and then determine:

- whether the individual does, in fact, lack decision-making capacity in the areas outlined in the petition;
- if the individual does lack decision-making capacity, whether there are least restrictive alternatives that can be used as an alternative to guardianship; and
- if no lesser restrictive alternatives are available and limited guardianship is necessary, whether the person or agency seeking to become guardian is appropriate for the job.

## CHANGING GUARDIANSHIP ORDERS

Like many court orders, an order appointing a guardian may be appealed. It may also be changed over time, as the needs of the ward or the ability of the guardian changes. The terms of the order may be modified by the Probate Court. The court may also remove a particular guardian, or the court may remove the guardianship entirely.



## APPEALS

An order granting a guardianship may be appealed to the Superior Court for the county in which the Probate Court is established. Appeals are heard “de novo,” which means that the case will essentially be heard again from the beginning.<sup>21</sup>

## MODIFICATIONS

Probate Courts can also modify a guardianship order, and must do so, “when the scope and duties of the limited guardianship order no longer meet the needs of the individual, or fail to afford the individual as much autonomy as possible.”<sup>22</sup> This modification can be achieved by agreement of the ward and the guardian, or when no agreement can be reached, a hearing can be requested.

## REMOVALS OF GUARDIANS

A guardian can be removed by the Probate Court when:

- the guardian wishes to resign;
- the guardian is no longer able to fulfill, or is not fulfilling his or her responsibilities; or
- the ward can demonstrate that he or she now has the capacity to make decisions.<sup>23</sup>

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<sup>21</sup> R.I.G.L. § 33-23-1

<sup>22</sup> R.I.G.L. § 33-15-4(a)(4)

<sup>23</sup> R.I.G.L. § 33-15-18

