

# Guardianship - Conservatorship

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[www.idahoguardianship.org](http://www.idahoguardianship.org)

# Guardianship

- Is a legal process utilized when a person can no longer make or communicate safe or sound decisions about his/her person and/or property or has become susceptible to fraud or undue influence
  - a competent suitable person or entity is appointed by the Court to make legal decisions for another person
- Because establishing a guardianship may remove considerable rights from an individual, it should only be considered after alternatives to guardianship have proven ineffective or are unavailable.

# Alternatives to Guardianship

- Advanced directives – Living Will and Durable Power of Attorney for Health Care
  - Once court orders Guardianship – POA is null and void in Idaho
- Durable Power of Attorney for Finances
  - Once court orders Conservatorship – POA null and void in Idaho
- Supportive Decision Making
  - Varies based upon type of decision being made
  - Identified team to assist/support in decision making process
- Limited Guardianship
  - Need to read the Court Order/Letters to understand the scope

# Supportive Decision Making

- About self determination and self advocacy
- People with greater self determination are:
  - Healthier, more independent, more well-adjusted, have greater quality of life, better able to recognize and resist abuse
- A recognized alternative to guardianship through which people with disabilities/impairments use friends, family members, and professionals to help them understand the situations and choices they face, so they may make their own decisions without the “need” for a guardian.

# GUARDIANSHIP – A LAST RESORT

# Types of Guardianship

- Guardian of the person - responsible for the safety and wellbeing of the person under protection
- Guardian of the estate - responsible for the effective management and utilization of the resources/assets of the person
  - In Idaho, they are called Conservators
- Emergency or temporary – may be obtain usually within one week; valid for 90 days.
- Limited – in scope to specific areas determined by the court

# GUARDIANSHIP

- Three major groups of people are frequently protected under guardianship
  - Older adults with decisional capacity issues, i.e., dementia
  - Person who have a developmental or intellectual disability
  - Those who have a mental illness that affects daily decision making
- Others include:
  - People who have challenges that cause the individual to be unable to make or communicate decisions, i.e., head injuries

# Guardianship

**“The typical ward has fewer rights than the typical convicted felon...By appointing a guardian, the court entrusts to someone else the power to choose where they will live, what medical treatment they will get and, in rare cases, when they will die. It is, in one short sentence the most punitive civil penalty that can be levied against an American citizen.”**

-House Select Committee on Aging, H.R. Rpt. 100-641 (opening statement of Chairman Claude Pepper)



# Guardianship MAY be needed . . .

- In emergency situations when:
  - The person is incapacitated and cannot give consent
  - The person did not previously identify how decisions should be made in that situation
  - There is no one else available in the person's life to provide consent through a Power of Attorney, Advanced Directive, or other means
- To support people:
  - Who face critical decisions and have no interest in or ability to make decisions
  - Who need immediate protection from exploitation or abuse

# GUARDIANSHIP PROCESS

- Each state has developed its own criteria and process for determining when an individual is legally incapacitated and as a result of this incapacity, may bring harm to him/herself, to the estate or to others.
- Everyone is presumed to be competent
- Incapacity is a legal definition, not a medical definition
- All guardianships are based on the decisional capacity without regard to the diagnostic reason
- Established through a court order and subject to the supervision of the court
- Based on individual needs and strengths and as limited in scope as possible

# GUARDIANSHIP PROCESS, con't

- An interested party raises concerns for the welfare of another person
- A petition is prepared by an attorney and filed with the court to request the appointment of a guardian &/or conservator
  - Usually takes up to 90 days for needed investigation and reports before final hearing is held
  - Emergency appointment may be made with limited authority during 90 days
- Court may appoint a Guardian ad Litem (GAL), Court Visitor, and Physician to investigate and provide a summary of findings and recommendations to the court

# GUARDIANSHIP PROCESS, con't

- Roles in Idaho:
  - Guardian Ad Litem (GAL) – attorney representing the person of concern and ensures due process rights are protected
  - Petitioner - person(s) petitioning for guardianship
  - Attorney representing the persons petitioning for guardianship
  - Court Visitor – interviews all interested and related parties, including friends and other family members; provides report to the courts with recommendations regarding need for guardianship and persons to serve in this role
  - Physician – provides medical report with recommendations
  - Guardian/Conservator – may be someone other than the person initiating petition

# Diminished Capacity

- Not a have or does not have across the board standard
  - Must consider the nature of the decision (consistency with long-term values, fairness, and irreversibility)
  - The functioning of the individual (ability to articulate reasoning, variability of the state of mind, and appreciation of the consequences)
- The more serious the concerns about the decision and the risks involved, the higher the functioning needed.

# Who pays the cost of all of this?

- The Estate of the person to be placed under protection pays the cost of the entire process and professionals involved
- If the individual does not have the assets to cover these expenses, it is very unlikely there will be a professional guardian involved and a conservator is not needed

# Effect on Individual Rights

- What rights may be removed
  - Choose where to live
  - Consent to medical treatment
  - Have a drivers license
  - Manage property/assets
  - Contract or file law suits
  - Marry
  - Vote
- May be temporary and/or permanent



# Who typically serves as Guardian/Conservator

- 80% -85% of the time, a family member or close associate serves in this capacity
- 10%-15% of the time, a professional guardian and/or conservator is appointed
- 5%-10% of the time, a public guardian is appointed
  - County “Board of Community Guardians” is the only public guardianship option currently in Idaho
    - Only active in Idaho’s more populated counties



# Guardian's Authority to Act

- Spelled out in the “Letters of Office” – orders signed by the court
- In Idaho, guardians and conservators are given broad authority to act without specific court approval
- Primary objectives are
  - Safety and wellbeing of the person
  - Appropriate utilization of assets for the benefit of the person
- Court Monitoring and Reporting requirements

# Fundamental Rights

- Protection against abuse/neglect
- Treat with dignity/respect
- Safe and least restrictive environment
- Privacy
- Confidentiality
- Religious expression
- Interpersonal relationships
- Sexual expression
- Option to procreate
- Exercise control over decisions retain by person and not delegate to guardian
- Receive appropriate services
- Have consideration given to personal desires, preference and opinions

# Fundamental Rights con't

- Receive information for medical procedures or treatment
- Access to medical, financial and treatment records
- Not to be involved in research projects
- Equal treatment under the law
- Prudent financial management of property
- Receive information regarding financial management
- Notice of all guardianship proceedings
- Participation in guardianship proceedings
- Representation by attorney, ombudsman or another advocate
- Modification of guardianship or restoration
- Bring a grievance against guardian
- Request removal or replacement of a guardian

# Restoration of Rights

The goal of effective guardianship is to be able to restore the rights of the individual who, for whatever reason, has had some of them removed by a court after due process. It is true that in many instances once a guardianship has been initiated by a court, it is in place until the incapacitated person dies.

However, an annual review and assessment will monitor the need for maintaining or terminating a guardianship, and alert the court to a potential need for restoration of some or all of the incapacitated person's rights.

# Role of the Guardian

# Surrogate Decision Making

- **Substituted Judgement** – determining what the person would have done or chosen on a particular issue
  - Unless there is a substantial risk of harm in doing so
- **Best Interest** – when the guardian is not able to determine what the person would have done or chosen on a particular issue.
  - Must make decision base on the best interest of the person
- **Informed Consent** – based upon full disclosure of the facts needed to make an intelligent decision
- **Least Restrictive Alternatives** – evaluates available options and chooses the one that most fully meets the needs of the person while placing the least restrictions on his/her freedom, rights, and ability to control his/her environment

# Role of Guardian

- Advocate
  - Medical provider selection, attend appointments, communication, Emergency Department visits & hospital admissions, etc.
- Surrogate decision-maker
  - Living environment, medical decisions, visitation & outings, etc.
- Coordinator and monitor of services
  - Regular check ins, problem prevention and resolution
- Ensure no undue harm befalls the person

# Advocate – Visitation of family & friends

- The guardian shall encourage and support the person in maintaining contact with family and friends unless it will substantially harm the person.
- Per Idaho Code 15-5-312 “The guardian shall take reasonable measures to ensure that a convicted felon does not reside with, care for or visit the ward without court approval.”
- Circumstances deemed by the guardian as disruptive or controversial may cause restrictions of family and/or friends
  - Specific individuals can visit only with appropriate supervision
  - Specific individuals may be allowed to visit, but not take the resident from their home



# Guardian vs. Family Members

- When there is a disagreement by family with the decisions made by the guardian
  - Communication, communication, communication
- Formal complaint process against the guardian/conservator is outlined on the Idaho Supreme Court website

# Role of the Conservator

# Role of Conservator

- Financial Planner and Estate Manager:
  - Maximize the person's use of benefits
  - Well-reasoned long-term financial planning decisions
  - Provide oversight of person's finances
  - Act with the greatest degree of care and diligence
  - Represents only the interest of the person
  - Avoid any potential conflicts of interest
  - Maintain the confidential nature of the person's affairs

# Conservator Involvement

- Financial authorizations
  - Review and sign financial related documents
  - Review and approve/deny payment for expenses
- Monitors expenses
  - Reviews medical bills, EOB's to ensure proper processing

# National Guardianship Association

## [www.guardianship.org](http://www.guardianship.org)

- NGA set the standard for quality in guardianship by establishing national practice standards for individuals in 2000 and have been updated periodically.
  - <https://www.guardianship.org/wp-content/uploads/2017/07/Ethical-Principles-2017.pdf>
  - <https://www.guardianship.org/wp-content/uploads/2017/08/Standards of Practice 2017.pdf>

# Idaho Guardian and Fiduciary Association (IGFA)

- Established to support family and professionals serving in these roles
- Professionals attend to provide non-professionals with assistance, training, and guidance
- Monthly meetings to learn about local resources and services
- Quarterly case presentations for group brainstorming
- Periodical training specific to roles of guardian and conservator
- Annual or semi-annual conference with great speakers, resources, and networking opportunities

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# Idaho Guardian and Fiduciary Association

- Meet monthly, 3<sup>rd</sup> Wednesday of the month, 12 to 1:15pm
  - Resources for Guardians & Conservators
  - Case presentations
  - Training for Guardians
  - Conferences and seminars for professionals and family guardians
- See website for details; [www.idahoguardianship.org](http://www.idahoguardianship.org)

# What can you do?

- Join IGFA and become a part of our advocacy efforts
- Share relevant information about how the lack of guardianship resources impacts you and your organization
  - City Council members
  - County Commissioners
  - State legislators
- Join grassroots Advocacy program through NGA by texting the word “Guardians” to 52886; no membership required.
  - You will get a text back with a link to sign-up



**QUESTIONS?**