

GUARDIAN BOOKLET

Rules and statutes are subject to change. This information is intended as a guide only

A guardian is a person appointed by a court who is given specific powers and responsibilities to make decisions for the person under guardianship. Guardianship limits some of the personal and constitutional rights of the person under guardianship for whatever period of time the guardianship is in effect. The purpose of appointing a guardian is to provide protection while an individual cannot manage his or her personal care or financial matters, and to encourage the person under guardianship to develop or regain the ability to manage his or her personal affairs to the maximum extent possible. The powers conferred on the guardian can be total or limited to meet the specific needs of the individual.

Are there different kinds of guardianship in Vermont?

There are three kinds of guardianship in Vermont:

- Guardianship for Minors
- Voluntary Guardianship
- Adult Involuntary Guardianship

These three guardianships fall under the jurisdiction of the Probate Division of the Vermont Superior Court. In addition, for adults with an intellectual disability, there is a public guardianship under the jurisdiction of the Family Division of the Vermont Superior Court. In a public guardianship, the Commissioner of the Vermont Department of Disabilities, Aging and Independent Living (DAIL) is appointed to act as guardian. Guardianship responsibilities are carried out through the Office of Public Guardian (OPG). Public guardianship may also be ordered through the Probate Division for people over the age of 60.

MINOR GUARDIANSHIP

Parents are the natural guardians for their children until the age of 18. There are however, circumstances when a court-appointed guardian is needed to provide for the personal care or protection of the property of a child, or both. A guardianship ordered to provide for the personal care of a child is called a “custodial guardianship.” A guardianship ordered to care for the property of a child is called a “financial guardianship.”

When might a “custodial” minor guardianship be ordered?

A custodial guardianship might be ordered where:

- The child’s custodial parent has a serious or terminal illness;
- A custodial parent's physical or mental health prevents the parent from providing proper care and supervision for the child;

- The child's home is no longer habitable as the result of a natural disaster;
- A custodial parent of the child is incarcerated;
- A custodial parent of the child is on active military duty;
- The parties agree to another reason that guardianship is in the best interests of the child;
- The child has been abandoned or abused by the child's parent;
- The child is without proper parental care, subsistence, education, medical, or other care necessary for the child's well-being; or
- The child is beyond the control of the child's parent.

A significant number of the custodial guardianships established in Vermont Probate Courts are done so on the basis of consents filed by both biological parents. When both biological parents are willing and voluntarily consent to the creation of the custodial guardianship, and the guardian or co-guardians are suitable, creating a custodial guardianship can usually be done fairly quickly.

A custodial guardianship can only be established, however, with proper notice to, at least, both biological parents. All non-custodial parents must be served with the petition and the rest of the initial filing.

If a custodial guardianship is not established with the knowing and voluntary consent of all necessary parties, the person filing the petition takes on the burden of proving parental unfitness. The legal burden to be met to prove parental unfitness is significant. Contested petitions for custodial guardianship require evidentiary hearings and sometimes those evidentiary hearings are necessarily lengthy.

What are the duties and responsibilities of a custodial guardian?

A custodial guardian must:

- Take custody of the child and establish his or her place of residence;
- Make decisions related to the child's education;
- Make decisions related to the child's physical and mental health, including consent to medical treatment and medication;
- Make decisions concerning the child's contact with others;
- Receive funds paid for the support of the child, including child support and government benefits; and

- File an annual status report at the Probate Division, with a copy to each parent at his or her last known address.

What is a “financial guardian” for a minor?

If a child owns real or personal property, the court may appoint a financial guardian to manage the estate of the child. A financial guardian does not have custody of the child.

The typical financial guardian is holding monies for a child. The monies could have been received as an inheritance, or maybe the child was the recipient of a personal injury settlement. The financial guardian is a fiduciary – a role that with it brings significant responsibility.

Vermont law presumes that parents assume the responsibility for the care and custody of their children. As indicated below, while it is possible to obtain court approval for expenditures of funds to meet extraordinary needs of the child which cannot be met with other family resources, ‘extraordinary needs’ is a high threshold. Vermont law presumes that these funds will grow over time without withdrawal until the child reaches the age of eighteen absent truly extraordinary circumstances.

What are the duties of a financial guardian?

The duties of a financial guardian include the duty to:

- Pursue, receive, and manage any property right of the child's. The financial guardian may not expend the child's benefits or property without prior court approval;
- Deposit any cash resources of the child in accounts established for the guardianship. The cash resources of the child may not be comingled with the guardian's assets;
- Responsibly invest and re-invest the cash resources of the child;
- Obtain court approval for expenditures of funds to meet extraordinary needs of the child which cannot be met with other family resources;
- Establish special needs trusts with court approval;
- File an annual financial accounting with the Probate Division stating the funds received, managed, and spent on behalf of the child.

Who can act as a guardian for a minor?

In appointing a guardian for a minor, the Probate Court gives primary consideration to selecting a person who will act in the best interests of the child. The court can appoint a family member or an individual who is not related to the child. Minors over the age of 14 may choose their guardians, subject to the approval of the Probate Division of the Superior

Court. The court may appoint two individuals to act as co-guardians. Vermont law also allows parents to name their choice for guardian in their will.

Becoming a financial guardian, if the guardian is the recipient of ANFC, Medicaid, or other type of means-tested public financial assistance, can create unintended consequences. It is possible that the money held for a child in such a financial guardianship can be considered available household income for benefit eligibility purposes – putting the financial guardian in the rock and hard place of being required to spend down money which is not theirs and which they are court ordered not to spend down or lose benefits.

Financial guardians must be bonded, and they must file detailed, annual reports. It is a sad reality that these monies can be and on occasion are expended by financial guardians, usually parents, improperly and without court approval. Probate courts accordingly take active roles in the supervision of these financial guardianships through the required, annual accounting process.

ADULT GUARDIANSHIP (INVOLUNTARY AND VOLUNTARY)

What do I do if I think an adult needs a guardian?

If you think an adult needs assistance in the management of their personal or financial affairs due to a mental disability you can file a petition with either the Probate Division or the Family Division of the Superior Court requesting that a guardian be appointed to assist them.

How do I know which court to file my request with?

Which court to file with is determined by the age of the person over whom guardianship is sought, whether there is an identified proposed guardian, and the nature of the alleged disability of the person over whom guardianship is sought.

- For individuals over 18 years old, where the individual is alleged to have an intellectual disability and a private individual is identified to act as guardian, the petition should be filed with the Probate Division;
- For individuals over 18 years old, where the individual is alleged to have an intellectual disability and a public guardianship is being requested (no private individual is identified to act as guardian), the petition should be filed with the Family Division;
- For individuals over 60 years old, regardless of whether a private individual is identified to act as guardian or whether a public guardianship is requested, the petition should be filed with the Probate Division.

Are there steps I need to take before requesting a guardianship for an adult?

Before filing the petition you should consider whether there are any alternatives to guardianship which might meet the individual's need for assistance, such as having a representative payee appointed through Social Security, executing a general power of

attorney or advance directive, or establishing some other form of Supported Decision Making.

If you believe a person needs a guardian because they are being abused, neglected or financially exploited, you should contact Vermont's Adult Protective Services division at 1-800-564-1612.

What will happen once the guardianship petition is filed?

A significant number of the involuntary guardianships established in Vermont Probate Courts are uncontested. Frequently, the court-ordered evaluation recommends establishment of a guardianship, and the alleged person in need of guardianship, or a *guardian ad litem* standing in the shoes of the alleged person in need of guardianship agrees with the guardianship. In these types of involuntary guardianships, and there are many of them, the involuntary guardianship can usually be done fairly quickly and after one hearing.

Not all involuntary guardianships are so clear cut. The alleged person in need of guardianship may object to the guardianship, or the proposed guardian may be objected to by other family members or interested persons. The court may also on its own find the proposed guardian to be unsuitable. In contested cases, the person filing the petition takes on the burden of proving the need for involuntary guardianship and the suitability of the proposed guardian to act as guardian. The legal burden to be met to prove that a person is in need of involuntary guardianship is again significant. Contested petitions for involuntary guardianship require evidentiary hearings and sometimes those evidentiary hearings are necessarily lengthy. Moreover, an involuntary guardianship can only be established with proper notice to, at least, a spouse, parents and adult siblings.

Once a guardianship petition has been filed, the court will appoint an attorney to represent the person who is the subject of the petition (the "respondent"), schedule the case for hearing, and order an evaluation to help determine the need for guardianship. If the respondent has assets you should provide the court with the name of a professional who can perform the evaluation. The cost of the evaluation will be borne by the respondent. If the respondent has limited assets, the court will send the order for evaluation to the Department of Disabilities, Aging and Independent Living and it will arrange for the evaluation.

If the respondent is unable to understand the nature of the proceedings, or is unable to communicate with their attorney, the court may appoint a *guardian ad litem* (GAL) to "stand in the shoes" of the respondent and direct the attorney in the proceeding. The GAL has no actual guardianship powers and is only appointed for the duration of the guardianship proceeding.

Are there any alternatives to guardianship?

Vermont's guardianship law requires that guardianship only be ordered when there are no less restrictive alternatives to assist an individual manage his or her personal and financial affairs. Some less restrictive alternatives include:

- **General power of attorney** for individuals who need assistance managing their financial affairs;
- An **advance directive** or **durable medical power of attorney** for individuals who need assistance in making medical decisions;
- Appointment of a **representative payee** for individuals whose only source of income is Social Security benefits (Supplemental Security Income or Social Security Disability Income) and need assistance with managing their money;
- **Supported decision making** for individuals who have a circle of family or friends who can assist them in making decisions about their personal and financial affairs;
- **Case management services** through a developmental services provider agency or local Area Agency on Aging;
- Establishing a **trust**;
- **Partial guardianship** tailored only to the specific areas where the individual needs assistance;
- **Voluntary** guardianship.

Can a guardian be appointed more quickly if the person in need of guardianship is at risk of harm?

In certain limited circumstances it is possible for the court to order an emergency temporary guardianship before the evaluation is completed. An emergency temporary guardianship may be ordered only where following the normal court procedures relating to providing notice to the person who is the subject of the guardianship petition and allowing time for completion of the evaluation would cause *serious and irreparable harm to the physical health or financial interests of the person who is the subject of the guardianship petition*.

An emergency temporary guardianship order may be issued in one of two ways:

- It may be issued before the evaluation is completed and following a hearing where the person who is the subject of the guardianship is represented by an attorney, or;
- It may be issued before the evaluation is completed and without a hearing.

In order to obtain a temporary emergency guardianship order the person filing the petition for guardianship must also file a Motion for Emergency Temporary Guardian.

If requesting an *emergency temporary order with notice and hearing*, a sworn statement that notice of the petition cannot be served as required by the Rules of Probate Procedure due to the emergency need for guardianship must be filed along with the Motion. The court will appoint an attorney for the person who is the subject of the guardianship and set a hearing for the earliest possible date.

If requesting an *emergency temporary order without notice and hearing*, a sworn statement with specific facts showing that immediate, serious, and irreparable harm will result to the respondent before a hearing on the appointment of an emergency temporary guardian can be held must be filed along with the Motion.

An emergency temporary guardianship order expires when the court makes a final decision on the guardianship petition. If the court has not issued a decision within 90 days of the filing of the petition, the court must hold a hearing to review the need for continuing the temporary guardianship order.

What powers may a guardian have?

The powers a court may grant to a guardian are:

- The power to exercise general supervision over the person under guardianship. This includes making decisions about habilitation, education, employment and the residence of the person under guardianship;
- The power to make medical/dental decisions for the person under guardianship;
- The power to exercise financial supervision over the income and resources of the person under guardianship;
- The power to approve or withhold approval of any contract which the person under guardianship wishes to make;
- The power to obtain legal representation for the person under guardianship.

A guardian may be given full powers or limited powers. Guardianship powers should be ordered only to the extent required by the actual mental and adaptive limitations of the person over whom guardianship is being sought. If a person only needs assistance with making medical decisions, the court will give the guardian power only in this area.

In making decisions on behalf of the individual under guardianship, the guardian's role is to support the wishes, values, beliefs and preferences of the individual and to decide, as much as possible, as the individual would decide if they were able. Whenever possible the individual under guardianship should be consulted and included in making decisions. The

personal preferences of the individual must be followed unless the preferences would result in harm or the individual does not understand the consequences.

What are the duties and responsibilities of a guardian?

A guardian must exercise guardianship powers in a manner that is least restrictive of the personal freedom of the person under guardianship. The guardian should encourage the person under guardianship to participate in decisions, to act on his or her own behalf when practicable, and to develop or regain the ability to manage his or her personal affairs to the maximum extent possible. The guardian must, to the greatest extent possible, respect the wishes, values beliefs and preferences of the person under guardianship in the exercise of guardianship powers.

A guardian must maintain close contact with the person under guardianship.

A guardian should assure that the person under guardianship receives all benefits and services to which he or she is entitled including public benefits, medical and dental services, therapeutic and habilitation services, adult education, vocational rehabilitation and other appropriate services. Habilitation services are services that enable the person under guardianship to achieve maximum levels of independence.

A guardian must keep the court informed of significant changes in the circumstances of the person under guardianship (such as a major change in the living situation or health status of the person under guardianship or a change in the need for guardianship), and must file annual personal and financial (for a guardian holding financial powers) reports with the court. The guardian must also file a final report with the court when the guardianship is terminated.

Are there any limitations on a guardian's powers?

There are certain actions a guardian may not take on behalf of the person under guardianship. These include:

- If the person under guardianship has an advance medical directive, the authority of the agent and the instructions in the directive remain in effect. If a guardian questions the decisions of the agent or the instructions contained in the advance directive, he or she may file a petition with the court asking for review of the advance directive;
- A guardian who has been granted the power to make medical decisions on behalf of the person under guardianship must get permission from the court before withholding or withdrawing life-sustaining treatment, unless obtaining a court order would not be practical due to the need for a decision before court approval could be obtained;

- A guardian who has been granted the power to make medical decisions on behalf of the person under guardianship must get permission from the court before consenting to a do-not-resuscitate order;
- A guardian who has been granted the power to choose or change the residence of the person under guardianship must get permission from the probate court to admit the person to a nursing home or to move the person from a private home to a boarding home, residential care home, assisted living residence, group home, or other similar facility. In an emergency, the guardian may change the residential placement of the person under guardianship without permission of the court, but immediately after the change of placement must request the court's permission to continue the placement;
- A guardian may not have a person committed to the state hospital. Any petition for commitment must be filed by the Department of Mental Health in the Family Division of Superior Court;
- A guardian may not consent to involuntary treatment or medication for a person under guardianship;
- A guardian may not consent to sterilization.

What rights does a person under guardianship have?

The guardian has only the specific powers granted by the court order. A person under guardianship retains all other legal and civil rights guaranteed under the Vermont and United States constitutions and all the laws and regulations of Vermont and the United States. Some of these rights include:

- The right to control over all aspects of life not specifically delegated to the guardian by the court;
- The right to be treated with dignity and respect;
- The right to participate in all decisions made by the guardian;
- The right to vote;
- The right to consult with and hire a lawyer;
- The right to speak with an ombudsman or other advocate;
- The right to freedom of religion;
- The right to have friends of choice;

- The rights of expression and free speech;
- The right to be free from discrimination;
- The right to petition the court on matters concerning the guardianship, including asking that the guardianship be terminated;
- The right to refuse medical treatment;
- The right to have children;
- The right to privacy;
- The right to be safe from harm;
- The right to access personal records and information such as medical, financial and treatment records;
- The right to make a will if legally competent to do so.

What is the difference between a voluntary guardianship and an involuntary guardianship?

When an adult wants and needs the assistance of a voluntary guardian, not because of incompetency but for any number or other valid reasons, and when that adult has the ability to understand both the nature of voluntary guardianship generally and the procedure for terminating a voluntary guardianship once formed specifically, that adult can enter into a voluntary guardianship.

In a voluntary guardianship an individual voluntarily requests that a guardian be appointed to assist them in the management of their personal and/or financial affairs. Unlike an involuntary guardianship, where the request for guardianship is made by a third person, an attorney is appointed to represent the person over whom guardianship is sought, and the court will order an evaluation to determine the need for guardianship, a voluntary guardianship is formed without an evaluation or the appointment of counsel. While the statute allows the submission of a doctor's letter of capacity in lieu of appearance when a person is truly not able to appear at a hearing, because the determination of the capacity of the person entering into a voluntary guardianship is so important, personal appearance for the hearing whenever possible is both helpful and preferred. The powers a guardian may hold are the same in both forms of guardianship.

It is not unusual for a petition to be filed requesting a voluntary guardianship to be converted to an involuntary petition for guardianship. People often think that the guardianship must be voluntary because the whole family agrees to it. Other times, the

family understandably doesn't realize the applicable test for capacity, and/or have simply overestimated an elderly parents' ability to both understand the guardianship and subsequently verbalize that understanding. In such cases, the court converts the petition with no further filing, counsel is appointed, the evaluation is ordered and the petition proceeds as an involuntary petition.

One of the most significant differences between the two kinds of guardianship relates to how the guardianship may be terminated. In a voluntary guardianship the person under guardianship need only write to the court requesting the guardianship be terminated. If the individual's guardian does not file a written objection to the termination of the guardianship with the court within 10 days, the guardianship terminates automatically, and no hearing is required. If the guardian does file a written objection to the termination of the guardianship with the court within 10 days, the proceeding is converted into an application for involuntary guardianship and the court will schedule a hearing. In an involuntary guardianship, someone must file a petition with the court to terminate the guardianship and the court will schedule a hearing on the petition.

Who may act as a guardian?

In order to act as a guardian a person must be at least 18 years old and must be competent.

A guardian cannot be a person who operates a boarding home, residential care home, assisted living residence, nursing home, group home, developmental home, correctional facility, psychiatric unit at a designated hospital, or other similar facility in which the person under guardianship lives.

A proposed guardian is usually required to undergo a background check.

When appointing a guardian, the court will consider the following factors:

- The preferences of the person under guardianship;
- The geographic location of the proposed guardian;
- The relationship between the proposed guardian and the person under guardianship;
- The ability of the proposed guardian to carry out the powers and duties of the guardianship;
- The willingness of the guardian to communicate with and respect the wishes of the person under guardianship;
- Any potential financial conflicts of interest between the guardian and the person under guardianship.

Does a guardian need to be bonded?

A guardian holding financial powers over the income and resources of the person under guardianship may be required to file a bond with the court. The bond stands as an assurance that the guardian will perform his or her duties according to the law and will protect the income and assets of the person under guardianship. While the bond may not require the actual deposit of funds, it may be necessary to have an insurance company act as a guarantor for the guardian's obligations. This service can be arranged through a local insurance company for a fee. The need for a bond depends on the size and nature of the assets and income of the person under guardianship.

The bond is at essence a promise to do two things: Follow the laws of Vermont supervising guardians generally and follow the orders of the court supervising the guardianship specifically. In the somewhat typical family guardianship -- where the person under guardianship is of modest means, the family is acting on consensus and the guardian and others are taking on hard and important work at significant personal sacrifice out of love and duty to an elderly parent and without compensation or expectation of compensation -- the need for an insurance company to act as a guarantor for the guardian's obligations is almost never required.

What kind of reporting does a guardian need to provide to the Court?

- 1) Guardians who have been granted power over the assets of the person under guardianship must file an Inventory with the court within 30 days of the guardianship appointment.
- 2) All guardians are required to file an annual Personal Status Report with the court on the progress and condition of the person under guardianship. The report should describe the general health, medical and dental care, current address and living situation, employment and habilitation of the person under guardianship. It should describe any significant changes in the condition or circumstances of the person under guardianship. It should also describe what actions the guardian has taken on behalf of the person under guardianship over the course of the year, and make recommendations for any needed changes in the guardianship.
- 3) Guardians who have been granted financial powers are, in addition, required to file a financial accounting with the court each year, "Summary of Account."

Does a guardian need to keep the court informed of changes in the condition of the person under guardianship?

The court has an on-going interest in the person under guardianship and relies on the guardian to keep it informed as to his or her circumstances. In addition to the filing of annual reports, the guardian should keep the court informed of any significant changes in the life of the person under guardianship as they occur, such as a major change in the living situation or health status of the person under guardianship or a change in the need for

guardianship. The guardian should report such changes by writing a letter to the court describing the change.

Can a guardian be held liable for the actions of the person under guardianship?

No, a guardian cannot be held liable for the actions of the person under guardianship. The guardian can be held liable if the guardian mishandles the financial affairs of the person under guardianship or otherwise causes harm to the person under guardianship.

Can a guardianship be modified or terminated?

Yes. The person under guardianship or any person interested in the welfare of the person under guardianship may request modification or termination of the guardianship. Some reasons for termination or modification of the guardianship may include:

- The death of the guardian;
- The failure of the guardian to carry out his or her responsibilities including the failure to file the annual report and accounting;
- The failure of the guardian to obey an order of the court;
- A change in the ability of the person under guardianship to manage his or her personal or financial affairs;
- A change in the capacity or suitability of the guardian for carrying out his or her responsibilities;
- The expressed preference of the person under guardianship to have an alternative guardian appointed.

Individuals requesting modification or termination of an existing guardianship should file a “Motion to Terminate or Modify Adult Guardianship” with the court. The court will schedule a hearing on the Motion. The court may order an evaluation of the person under guardianship if the modification involves adding additional guardianship powers.

What can I do if I am worried that a guardian is not properly performing their duties?

If you believe a guardian is not properly performing their duties you should write a letter to the court describing your concerns. The court may hold a hearing to determine whether the guardian is acting properly or whether there should be some change in the guardianship. If you think the guardian’s actions are such that a new guardian should be appointed, you should file a “Motion to Terminate or Modify Adult Guardianship” with the probate court.

If you believe the guardian is abusing, neglecting, or financially exploiting the person under guardianship, or allowing the person under guardianship to be abused, neglected or

financially exploited, you should report your concerns to Vermont's Adult Protective Services division at 1-800-564-1612.

Can a guardian be paid for acting as a guardian?

Depending on the extent and nature of the work involved in acting as guardian, and on the assets of the person under guardianship, a guardian may be paid a reasonable fee. What is reasonable depends on such factors as the time expended on guardianship responsibilities, the results achieved, the experience of the guardian, and the complexity of the guardianship. Most guardians serve without charging a fee. Any fee is paid from the estate of the person under guardianship.

A guardian may request payment of a fee by filing a motion with the probate court with copies to all interested persons. The motion should describe the nature and extent of the work for which the guardian is requesting the fee and provide supporting documentation. A guardian may not be paid any fees until all annual personal and financial annual reports have been filed with the court. A guardian should never pay him or herself a fee without the permission of the probate court.