

ADULT GUARDIANSHIP

Presented by:

Hon. Michael G. Hayes

Dutchess County Surrogate

TYPES OF GUARDIANSHIP

Adult (MHL Article 81)

Developmental and Intellectual
Disability (SCPA Article 17-A)

Infant (SCPA Article 17)

GUARDIAN
POWERS

Property
Management

Personal
Needs

PROPERTY MANAGEMENT

Real Property

Personal Property

Business

Benefits

Income

Bank Accounts

Investments

PERSONAL NEEDS

Food

Clothing

Shelter

Healthcare

Hygiene

Safety

COURT PROCEEDINGS

Players

Pleadings

Legal Standard

Hearing

Findings

PLAYERS

Petitioner

Alleged Incapacitated Person(AIP)

Court Evaluator

Attorney for AIP

Family/Necessary Parties

PETITIONER

Family

Person who lives with AIP

Executor/Trustee

Adult Protective Services

Hospital/Nursing Home

AIP

Anyone concerned with AIP's welfare

COURT EVALUATOR

Court-Appointed Neutral

Independent Assessment

“Eyes and ears of the court”

MHLS/Part 36

Minimum Training Requirements

Compensation limits

COURT EVALUATOR DUTIES

Meet/Interview/Consult with AIP

Attorney for AIP?

Interview Petitioner

Conduct Investigation

Attend Court Proceedings

Preserve property/Avoid waste

Inspect medical records (if Court OKs)

ATTORNEY
FOR AIP
PRIVATELY RETAINED

Statutory Right to Counsel

AIP can choose/engage counsel

Caveat: private counsel must be

- Freely and independently chosen
- No interference/undue influence

ATTORNEY
FOR AIP

WHEN WILL COURT
APPOINT

AIP requests counsel

AIP opposes petition

AIP does not consent to nursing home

AIP does not consent to medical treatment

Petition seeks a Temporary Guardian

Court's discretion

PAYING THE COURT
EVALUATOR AND
ATTORNEY
FOR AIP

Petition granted

- AIP

Petition denied/withdrawn

- AIP, or

- Petitioner, or

- Both (shares determined by Court)

FAMILY AND NECESSARY PARTIES

Spouse

Parents

Adult Children

Adult Siblings

Any Adult Living with AIP

Power of Attorney

Nursing Home/Hospital

DSS (if AIP receives public assistance)

MHLS (if AIP in mental health facility)

Third Party Seeking Relief Against

Demonstrated/Genuine Interest in AIP's Welfare

PLEADINGS

Petition

Order to Show Cause

Notice of Proceeding

PETITION

Filed where AIP is physically present

Describe AIP's functional level (ability)

Describe AIP's functional limitations

List powers sought

AIP finances

Other available resources

Necessary Parties and Contact Info

Temporary/Emergency Relief (if any)

ORDER TO SHOW CAUSE

Signed by Court

Sets Hearing Date (28 days or less)

Large Type

Statutory Plain Language

- Explaining Proceeding

- Summarizing AIP's Rights

ORDER TO SHOW
CAUSE

AIP'S RIGHTS AT
HEARING

Present evidence

Call witnesses

Cross-examine witnesses

Right to Counsel

Request jury trial

Attend hearing

AIP'S RIGHT TO ATTEND HEARING

Potential hearing locations

- Courtroom
- AIP's home/bedside
- Virtual

Hearing in AIP's absence

- AIP completely unable to participate
- AIP unable to meaningfully participate

OTSC AND PETITION SERVICE

AIP

- Personal delivery

- At least 14 days before hearing

Court Evaluator and Attorney for AIP

- Fax or overnight delivery

- Within 3 days of OTSC signed by Court

NOTICE OF
PROCEEDING
CONTENTS

Important names/addresses

Time/place of hearing

Object of proceeding

Relief sought in petition

NOTICE OF
PROCEEDING
SERVICE

Family/Necessary Parties

By Regular Mail

At least 14 days prior to
hearing

HEARING

Rules of Evidence Apply

AIP cannot be forced to testify

Confidentiality

- Courtroom: rarely closed

- Records: routinely sealed

LEGAL
STANDARDS

Need

Consent/Incapacity

Least Restrictive
Form of Intervention

NEED
CONSIDERATIONS

Court Evaluator's
Report

Sufficiency/Reliability
Available Resources

COURT EVALUATOR'S REPORT

Does AIP consent to guardian?

Does AIP request counsel?

Can AIP appear at hearing?

Sufficiency/reliability of available resources

AIP Function/Activities of Daily Living

AIP understand functional limitations?

AIP financial resources

Least restrictive form intervention

Proposed guardian appropriate?

Anyone else entitled to Notice of Proceeding?

ACTIVITIES OF DAILY LIVING

Mobility

Eating

Toileting

Dressing

Grooming

Housekeeping

Cooking

Shopping

Money Management

Driving

OTHER
AVAILABLE
RESOURCES

Power of Attorney

Health Care Proxy

Trust

Home Health Aide

Visiting Nurse

Residential Care Facility

Representative Payee

Joint/Convenience Accounts

Family Healthcare Decisions Act

CONSENT/ INCAPACITY

If AIP consents to guardian, then no finding of incapacity is required

Person in Need of Guardianship (PING)

Court Inquiry into Consent (Knowing/Voluntary)

Scope of Guardian's Powers =
Scope of Consent

AIP Can Revoke Consent

INCAPACITY

Burden of Proof = Clear and Convincing Evidence

Two-prong test

- AIP is unable to provide for personal needs and/or property management

- AIP cannot adequately understand/appreciate the nature and consequences of such inability

If Court finds lack of capacity, AIP becomes an IP (Incapacitated Person)

INCAPACITY PRIMARY CONSIDERATIONS

Functional Level

- Ability

Functional Limitations

- Behavior or Conditions that Impair Ability

Capacity is NOT diagnosis-driven

Medical Records/Testimony RARELY placed in evidence

INCAPACITY
COMMON FACTORS

Activities of Daily Living (ADL)

AIP understanding/appreciation of
ADL functional limitations

AIP preferences, wishes and
values

AIP resources and ability to
manage them

LEAST RESTRICTIVE
FORM OF
INTERVENTION

Scope of Guardian's Powers

Least Restrictive Form of Intervention

Limited to only those powers absolutely
necessary

Preserve IP's independence and self-
determination to greatest extent feasible

INCAPACITY
ADDITIONAL
REMEDIES

Revoke/Modify Power of Attorney

Revoke/Modify Health Care Proxy

Revoke/Modify Prior Contracts and Gifts
- but only if third party was served
with Notice of Proceeding

FINDINGS AND ORDER

Statutory Findings

- Usually in court at end of hearing

Order and Judgment

- Formal written document, usually within 30 days of hearing

PETER FALK'S LAW

Court shall identify persons entitled to notice of:

- IP's death

- IP's funeral

- Intended disposition of IP's remains

- IP's final resting place

PETER FALK'S LAW

Court MAY identify persons entitled to:

- Notice of IP's transfer to medical facility
- Visit the IP

List of visitors is NOT an exclusive list

But list does guarantee named persons the right to visit

GUARDIAN
WHO CAN SERVE?

Any suitable person over age of
18

Not-for-Profit or Public Agency

Department Social Services

Community Guardian Program

GUARDIAN
WHO IS PROHIBITED
FROM SERVING?

AIP's creditors

Health Care/Home Care provider

- Family members exempt

- Court can waive if no other option

GUARDIAN AIP NOMINATION

AIP can nominate Guardian

When nomination made in writing prior to hearing

- Court must appoint unless UNFIT

When nomination made orally during hearing

- Court must appoint unless
NOT APPROPRIATE

GUARDIAN
BACKGROUND
CHECKS

Criminal history

Sex offender registry

Child abuse registry

NYS Order of Protection registry

Family Court child protective proceeding records

GUARDIAN DUTIES

Exercise only those powers listed in the Order and Judgment

Utmost care and diligence

Utmost degree of trust, loyalty, fidelity

Visit IP at least 4 times/year

Afford IP as much independence and self-determination as possible

GUARDIAN REPORTING OBLIGATIONS

Initial Report – 90 days after commission

Annual Report – May of each year

Final Report

- 150 days after AIP's death, or

- Upon removal or discharge of guardian

GUARDIAN COMPENSATION

Compensation set by Court

- Hourly rate

- Annual flat fee

- Percentage

Paid by IP

TEMPORARY GUARDIAN

Emergency basis

No formal evidentiary hearing

AIP must have attorney

Court will grant application if:

- Imminent danger to AIP's health or well-being

- Imminent danger of waste, loss or misappropriation of AIP's property

COURT EXAMINER

Appointed by Court

Reviews Guardian reports

Reports non-compliance to Court

- Failure to file report

- Incomplete report

COURT EXAMINER COMPENSATION

Flat Fee (based on size of estate)

Fee paid by

- IP (if estate worth \$5,000 or more)

- County (if IP's estate is worth less than \$5,000)