

THE LAW OF GUARDIANSHIPS

by Richard V. MacKay

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THE LAW OF GUARDIANSHIPS

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*This legal almanac has been revised
by the Oceana Editorial Staff*

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Man individually and as a race is possible on earth only because, not for weeks or months but for years, love and the guardianship of the strong over the weak has existed. Oliverr Schreiner, *Man to Man*, Ch. 7.

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FOREWORD

The basis for the appointment of a guardian is the weakness, incompetence, youthfulness, or other legally recognized disability under which the ward (the "ward" being the person whose disability requires the need for a guardian) labors. The duties and responsibilities of guardians of these persons, both the very young and the very old whose incapacities set them at a disadvantage in society and therefore make them vulnerable for exploitation make up the subject matter of this almanac. The law seeks to protect such wards against their weaknesses by appointing a competent person to look after them and their property. The text also examines the law relating to incompetent veterans and beneficiaries of veterans who because of non-age or incompetence are considered unable to handle their own affairs. In this connection, a discussion of the Uniform Incompetent Veterans Act which is in force in many jurisdictions is included.

A major new feature in this volume, and one that is too infrequently included in the treatment of the subject of guardianship with but the most limited discussion, is the consideration of the needs of the aged in this area. Indeed, by way of demonstrating our belief that this is a compelling subject, we begin with this very topic.

Status of Ward

Preliminary to any appointment, there must be proof of status. Status, as the word implies, is the standing of an individual in the society of which he is a member. It is a legal concept of the individual's position, and, for most purposes, must be determined by law, and, more specifically, by the laws of the jurisdiction of which the ward is a resident. *That determination is, in most instances, binding upon all other states and for all other purposes.* There are exceptions to this basic rule but they are called into play only under special circumstances. Status may be determined in several ways, depending upon the nature of the disability. Proof of age is fairly simple today. Insanity or other weaknesses, is generally proved by an *inquisition*, which means an examination into the sanity or insanity of other frailty of the individual. Medical evidence must be produced to show that person to be incompetent. An impartial judge hears the evidence and determines the question.

Jurisdiction

The status of the individual must be proved in the courts having *jurisdiction*. In other words, application must be made to the courts having the authority to make such an adjudication, and conse-

quently, the appointment of the guardian. This authority must exist because the infant or incompetent person resides in or is domiciled in, or owns property located in the jurisdiction or simply because he is physically, though perhaps only temporarily, within the jurisdiction. The courts are vigilant in the protection of the rights of those suffering disabilities and where there is a doubt, as to whether there should or should not be a guardian, the courts will determine it to the best interests of the person involved.

The Guardian

Given *status* and *jurisdiction* (or to paraphrase, if the individual is determined to be a child or other incompetent person and the authority of court to act is established), the court then seeks a competent, disinterested person to act on his behalf. Preference is given to parents in the case of children or at least close relatives, and in the case of other incompetents kinship is also a strong consideration. But in either situation, the best interests of the child or other incompetent control the selection of such a person.

A legally appointed guardian has the duty to make an inventory of the property of his ward, to account for such property and increment or depreciation of such property periodically and to "settle" the account when the disability is removed. He has many other particular duties and responsibilities towards his ward which will be discussed in greater detail in this almanac. Indeed, some of the matters mentioned here already will be repeated in further detail in subsequent chapters.

Naturally, a guardian failing in these duties may be removed from office and may be held personally liable for any loss to his ward. The guardian is an officer of the court and is subject to its discipline. The guardian is not expected to perform these services without compensation and the laws of the various states make the provisions for his fees and disbursements.

The guardian's duties and responsibilities and rights over his ward cease when the disability is removed or terminated. Thus, when a child reaches his majority, when an older person for whatever reason resumes his ability to maintain himself, or an insane person is declared to be competent again, the guardianship terminates. The guardian ceases to have any official status when he himself becomes incompetent, or dies, or violates the trust placed in him by his appointment. At that point, the guardian, or someone acting in his behalf, must submit his account to the court which appointed him. If the court is satisfied that he performed his functions properly, the guardian and the surety which supplied the bond for his faithful performance, are released from any liability. If the court feels the guardian did not perform his duties faithfully, he may be surcharged

(i.e., forced to reimburse the ward). The bonding company may be required to make this payment, in his default. Furthermore, his obligations will continue, since the court will not judicially settle his accounts until he has performed the conditions specified by it.

Note

In the initial planning of this volume material in the last edition (1957) of the Legal Almanac volume, *The Law of Support*, was to appear here. But in view of the fact that the topics in the latter have been up-dated and strengthened in a number of recently revised editions in the Series. Thus, the Almanac volumes, *Law of Separation and Divorce*, *Law of Adoption*, and *Investment Planning*, among others, contain strong chapters dealing with the issues of support and we accordingly suggest that you turn to these titles for information on the topic of support.

TABLE OF CONTENTS

Foreword	iv
Chapter 1	
GUARDIANSHIP AND THE OLDER PERSON ..	1
Chapter 2	
GUARDIANSHIP OF MINORS	24
Chapter 3	
SPECIAL TOPICS IN THE GUARDIAN-MINOR RELATIONSHIP	54
Chapter 4	
GUARDIANS OF OTHER INCOMPETENTS	65
Chapter 5	
VETERAN'S GUARDIANSHIP	70
Glossary	92
Appendices	
A. Sample Guardian and Ward Forms	95
B. Termination of Guardianship	100
C. Courts, Accounts and Inventories	105
D. Nomination of Guardian by Infant	109
E. Foreign and Ancillary Guardians	110
F. Commissions	114
G. Gift of Securities To Minors - Uniform Law Adopted	118
Index	119

Chapter I

GUARDIANSHIP AND THE OLDER PERSON

Most, if not all treaties dealing with the subject of guardianship and ward, including the earlier editions of the Almanac volume on this topic, begin and indeed emphasize the infant ward. Indeed, the very title of the previous edition of this work was *Guardianship and the Protection of Infants*. As the original volume put it in its Introduction, "The main purpose of this almanac is to study the relationship of a child (i.e., the ward) to legally recognized custodian (the guardian)."

While the thrust and the bulk of the subject area even here remains the infant-ward, still we start this present volume with the older adult both for the reasons that we wish to acknowledge the growing importance of this figure in American society and because older persons are increasingly in need of protective services of which legal guardianship is but only one most appropriately treated in a legal work of this kind.

Many adults now survive through the upper age bracket. As individuals advance from one decade to the next, capacity, either physical or mental or both, tend to diminish. And more and more of these older people have some assets, be they only old age assistance. The assets are useless unless converted into goods and services that can be utilized by their owner. Better techniques both for finding those in need of help and for psycho-social-medical diagnoses have made it possible to identify more of the *incompetent* aging and at earlier stages. In the meantime, laws have been modified and the definition of the individuals for whom, a guardian may be appointed has been broadened. It is no longer restricted to those legally "insane."

Furthermore, those in the oldest age brackets are less likely to have family members or friends who might give enough informal help to avoid the necessity for legal procedures. Their natural protectors may have died, moved away or themselves reached an age where they cannot carry this kind of responsibility. Today one often finds both parent and child in older age brackets and both in need of assistance in managing their assets.

Increased mobility of the population has added to the problem in using guardianship proceedings. Many older persons travel extensively. Some spend part of the year in one state and part in another. Inability to manage for themselves may overtake them while away from their legal domiciles. The need for immediate care may arise in one jurisdiction while the assets may be in another. Or, if

these transients have assets with them, the legal right to appoint a guardian outside the state of their residence may be in question. Not infrequently an older individual may have two guardians, one in the jurisdiction of residence, another where he is for the moment. In such cases the two guardians, or the two courts which supervise them, may be at odds about plans for the care of the individual and about the ways in which his assets should be used or conserved.

Three major shifts have taken place concerning the assets to be administered by older persons. (1) Although ownership of real estate now plays a less important part in our economic life, it is significant that approximately two-thirds of those 65 or over own their homes. (2) An increasingly important role in the economy is played by income from annuities or pensions, social security benefits and public assistance payments as distinguished from increment from capital assets. (3) The distribution of wealth has shifted, so that more people have assets which need to be administered if they become incompetent. At the same time, however, the assets are often insufficient to pay for the labor involved in administering them, particularly through court proceedings.

These changes also affect the availability of persons to act as guardians. Relatives or close friends may have died or become unable to assume the responsibility. Since many of those who may need a guardian do not have assets beyond their living requirements, they cannot pay the costs of guardianship services. Furthermore, persons who might normally act as guardians may not have sufficient knowledge or experience to carry out the duties. These "natural" guardians may not have sufficient assets of their own to guarantee faithful performance.

Attempts have been made to adapt the probate law and its administration to the social changes which have taken place in recent years. One of the most important changes has been in the destination of the group for whom a fiduciary may be appointed. Many states have enlarged the definition to include psychotics among those needing assistance in financial management. In some states the enlarged definition has been incorporated in the basic guardianship statute. In other states, a separate but similar procedure has been set up for those who have been so diagnosed. In such instances, different terminology is used. In some states, not all of the consequences which flow from a traditional guardianship follow from the appointment of a fiduciary under the newer procedures.

Appointment of a Conservator

The California statute establishing the institution of conservatorship as distinguished from guardianship should be noted. It is designed to reach those older persons requiring assistance in

financial management as well as those who need planning for personal care and supervision. The law defines the group as "Any adult person who by reason of advanced age, illness, injury, mental weakness, intemperance, addiction to drugs or other disability, or other cause is unable to properly care for himself or for his property, or who for said causes or any other cause is likely to be deceived or imposed upon by artful or designing persons, or for whom a guardian could be appointed (under Division 4 of the code) or who voluntarily requests the same and to the satisfaction of the court establishes good cause therefore."

In appointing a conservator, the court is guided by what appears to be the best interest of the person placed under the conservatorship. The California law provides for flexibility in the extent to which a conservator shall take over financial management and in extending or limiting the authority as circumstances change. Provision is also made for the appointment of a temporary conservator to act in emergencies.

It should be pointed out, however, that the law governing conservatorships is substantially similar to that governing guardianship. That is, conservatorship proceedings are no less formal or expensive than guardianship proceedings. Flexibility remains limited.

Appointment of a "Legal Representative" for Public Assistance Recipients

Another recent adaptation of traditional guardianship has developed in response to the special needs of incompetents entitled to public assistance. In order to protect the rights of individuals receiving or entitled to public assistance, the Bureau of Family Services of the Department of Health, Education, and Welfare requires the appointment of a legal guardian for any recipient unable to manage his own affairs. This requirement further protected beneficiaries from pressure by the assistance-giving agency with respect to how they expend the benefits. Under this provision, federal funds could not be allocated to the states for any public assistance grant not paid directly to the recipient or a court-appointed guardian. Because of the many difficulties encountered in working within such a legal structure, a simpler procedure has been devised. An amendment to the Social Security Act now provides that federal funds may be used for matching state funds if the grant is paid to a legal representative appointed for an incompetent recipient. Several states have enacted such laws.

The essential difference between a legal representative and a legal guardian is that the former is responsible neither for the person of the incompetent nor for assets other than the public assistance grant. This fact makes it easier to find persons willing to assume the responsibility. This fact makes it easier to find person willing to assume the fiduciary responsibility. It has the disadvantage of leading the individual without the protection of someone responsible for him as a person and for his other assets. While these are necessarily minimal in value they may be very important to him. Under the

Under the personal representative provisions certain designated public employees are empowered to sign a petition for the appointment of a legal representative. Although in about half the states "any persons," including a public employee, may sign such a petition, social workers have hesitated to assume this burden as individuals rather than in an official capacity.

Administrative Procedures

A. Accounting Procedures

Some probate courts have developed a ticker system to remind the court when a current accounting is due. Without such a system, an estate might go on indefinitely without an accounting, with no awareness of the fact by the judge.

B. Reducing Expenses for Small Estates

Some probate courts provide for waiver of court costs in estates that do not exceed a certain total value. Arrangements of this sort are frequently made on behalf of veterans and their dependents, either by state law or by court rule. A more detailed discussion of veteran's guardianships is presented in chapter 5.

Attempts have been made to meet the urgency of the need for an attorney and for a fiduciary where there is no one close to an incompetent to perform this function. In several cities, legal aid societies furnish free service to small estates. In some countries, the state's attorneys will do the necessary legal work, especially in cases where the estate includes public assistance. In many instances attorneys on boards of private social agencies do yeoman service. The Veterans Administration also provides free legal services in small estates consisting wholly, or primarily, of veteran's benefits.

C. Provisions of a Fiduciary Service

The need for someone to act as fiduciary is met in different ways. One device is appointed in each county of an official, known as the public guardian. In some states, notably Illinois, this is a fee office; that is, the public guardian does not receive a salary but depends upon fees collected from the estates he handles. This does not solve

the problem of providing service for those who need their total assets for support. It does, however, make it possible to find a fiduciary for incompetents without relatives or friends to act, if their assets are sufficient to pay for the service.

In other states, such as California, the services of the public-salaried guardians are free of charge to the incompetent. The service is limited, however, to those who are patients in certain public institutions or who are recipients of public assistance. California also has an effective guardianship service for patients in or on the rolls of state mental hospitals. This service too is free to incompetents whose assets are limited; usual guardianship fees are collected if the estates are large enough to warrant this action. California also provides for a fiduciary without court appointment for mental hospital patients when circumstances do not require court proceedings.

Fiduciaries Without Legal Guardian Appointment For Older Persons

When the total assets of the older person are minimal or when the chief purpose is to collect and disburse a small periodic income, calling into play the full gamut of probate proceedings seems inappropriate. For this reason various ways have been devised to allow someone to act as fiduciary for an incompetent without appointment as guardian.

One such device is the Small Estates Affidavit statute. Under such a law, if the total assets of an incompetent do not exceed a certain amount, the spouse or other person designated by law may make an affidavit describing the essential facts. On the basis of the facts he is authorized to collect assets belonging to the incompetent. Even the title to an automobile may be transferred.

Similarly, many states have statutes which allow a public official or the superintendent of a state mental hospital to collect and disburse assets belonging to patients up to a given amount

Insurance companies often incorporate in policies a Facility of Payment clause. Under this clause the company may pay the insurance benefits to someone other than the insured incompetent.

These devices are useful. They avoid delay and expense, and allow for maximum flexibility. They do not, however, provide controls. If the person who has taken over the assets of an incompetent does not use them for the latter's benefit, the only recourse is to bring suit. Such a remedy is hardly practical.

Administrative Fiduciary Relationships

Under federal law, an administrative agency which provides

benefits for its clients may pay a fiduciary who is not under court control. This procedure is used by the Railroad Retirement Board and the Veterans Administration.

It is used most extensively, however, by the Bureau of Old-Age, Survivors, and Disability Insurance. The Bureau's procedure will serve as the prototype of a fiduciaryship structured through an administrative agency rather than through the courts.

Section 205 (j) of the Social Security Act provides that when the interest of an entitled individual is served thereby, and regardless of his legal competency or incompetency, The Secretary of Health, Education and Welfare may either make direct payment to the beneficiary or certify the payment for his "use and benefit to a relative or some other person."

Adult beneficiaries are paid directly unless there is convincing evidence that they are incapable of managing their benefits funds or of protecting their own interests because of a disabling mental or physical impairment. Beneficiaries under 18 years of age are ordinarily not paid directly.

The "relative" or "other person" who is selected to represent the beneficiary is called a representative payee. The authority to designate a representative payee on behalf of a beneficiary has been delegated to the Bureau of Old-Age, Survivors, and Disability Insurance by the Secretary of Health, Education, and Welfare

Only three conditions are generally considered satisfactory proofs that an adult beneficiary requires a representative payee to receive and disburse Old-Age, Survivors, and Disability Insurance benefits. These are: a court finding of incompetency, appointment of a fiduciary under state law, or medical evidence of the beneficiary's incapacity to manage benefit funds or protect his own interest.

The impairment which justifies designation of a representative payee to receive a beneficiary's check need not, however, be so severe as to warrant a judicial finding of incompetency, commitment to a mental hospital or appointment of a fiduciary under state law. The decision that a representative payee is needed relates solely to his benefits fund. It does not affect other resources the beneficiary may have, and it does not affect his civil rights.

In selecting a representative payee, the Bureau gives a preference to a spouse or other relative who has custody of the beneficiary or who demonstrates a strong and responsible interest in his personal welfare. Non-profit public or private institutions are usually selected as payees only when no relative or legal guardian meets the requisite qualifications. Although the decision that a beneficiary is incapable

of managing his benefits and needs a representative payee is reviewable at several levels within the administrative organization, and it is not subject to formal appeal. The Bureau, however, has an appeals procedure for review of its determination as to entitlement and other matters. Courts are the final recourse under the federal law which provides for judicial review of administrative decisions.

In many respects the duties and responsibilities of the representative payee toward the beneficiary are similar to those of a court-appointed fiduciary and include a concern for the personal welfare of the client.

Under applicable regulations (20 CFR, Subpart Q, Section 404, 1609), a representative payee is required to submit annually a written report accounting for the use and disposition of the benefits certified to him. Currently, natural or adoptive parents having physical custody of a minor or a person disabled since childhood are excused from the periodic accounting. A husband or wife payee with whom an incapable adult beneficiary is living is also excused. If the representative payee is court-appointed fiduciary required to render an annual accounting to the court, he may submit a true copy of such accounts in lieu of the form prescribed by the Social Security Administration.

Willful conversion to benefit payments received by a payee constitutes a misdemeanor punishable under law. Other appropriate remedies, including civil suit, for the recovery of misused funds are also available.

The use of benefits in the hands of a representative payee is covered by the statutes. Since Old-Age, Survivors, and Disability Insurance benefits are intended to replace current income lost because of the disability, retirement or death of the insured individual, benefits are usually used for current maintenance. Benefit payments not needed for such maintenance must be conserved or invested. If current maintenance needs of beneficiary are being reasonably met, a portion of the benefit funds may be used to support his dependent spouse or children.

Where a beneficiary is confined in an institution because of mental or physical incapacity, the representative payee must give highest priority to the expenditure of the benefits funds for current maintenance needs, including the institution's customary charges.

In order to insure a continuing income for current maintenance, Section 207 of the Social Security Act exempts Old-Age Survivors, or Disability Insurance benefits from execution, levy, attachment, garnishment or other seizure.

Guardianship Proceedings for Older Persons

For the most part, the description of a guardianship proceeding which will be presented in this section is close to whatever we will say subsequently in one of the chapters dealing with the infant-ward. Nevertheless, it seems useful to detail this proceeding here where we are focusing on the older person as the ward.

1. Filing the Petition

Some person, usually a close family member, who is concerned about the situation consults a lawyer. He prepares a petition outlining the facts as presented to him, including the proposed guardian it names. The petition is signed and sworn to by the person who consulted the attorney. The original petition is filed with the clerk of the court and the case is given an identifying number which is used on all pertinent documents. The clerk then sets the time and date for the hearing.

A copy of the petition together with a summons or written notice is served on the person alleged to be incompetent. In this way, he is advised of the petition, what the allegations are and when the case would be heard. These documents are handed to the alleged incompetent personally, usually by the sheriff of the country or a deputy.

2. The Court Hearing

The case is heard by the judge in the public court room at the stated time and place. The alleged incompetent is required to be present so that the judge can be satisfied by personal observation about his condition. This further assures the person in question could contest the allegations of the petition if he so desires. The judge hears relevant oral testimony from the petitioner and others usually including the alleged incompetent's doctor. If the alleged incompetent wishes to contest the case, he can testify for himself and call other witnesses. He can contest either the need for or the selection of a guardian.

3. The Determination

Following the hearing, the judge determines whether the person is in fact incompetent and, if so, who the guardian should be, and sets the amount of the fiduciary bond the guardian must then file in court. The determination is incorporated into a written order signed by the judge.

After the written order has been entered and the guardian has filed the required bond and an oath of office in which he swears to perform his duties faithfully, the clerk of the court issues what is known as Letters of Guardianship. The original document is filed in

court, and one or more certified copies are delivered to the guardian. The letters are proof of the guardian's authority to act on behalf of the incompetent. He exhibits his certified copy to persons with whom he dealt in relation to the incompetent's assets.

4. Procedures of the Guardian in Managing Assets

The guardian's first job is to determine what the incompetent's assets are, to take physical possession of them, and to file a formal notice with the proper persons to show that further transactions in regard to the assets must be conducted with the guardian. This also involves filing applications for any benefits to which the incompetent might be entitled.

Once the assets are determined, the guardian lists them, showing their exact cash value, in a document called an inventory, which he signs and swears to. The inventory is then presented to the judge for his examination. On the basis of the value of the assets, the judge decides whether the original amount of the fiduciary bond is proper. If not, he enters an order cancelling the original bond and requiring a new one for the appropriate amount. From then until the case is closed, the guardian is responsible for accounting for each item listed in the inventory.

The fiduciary bond is a document signed by the guardian guaranteeing that his maximum liability up to the amount of the bond would be paid out of pocket for losses resulting from his failure to perform his duties faithfully. The bond is also signed by two or more persons who own real estate in the country, guaranteeing that they would pay out of their own resources up to the amount of the bond if required and should the guardian fail to do so. The guardian is liable even beyond the amount of the bond, but the liability of the bondsmen is limited to the amount of their bond.

As an additional protection, the court appoints one or more appraisers, experienced in knowing the money value of different kinds of assets, to appraise the items listed in the inventory. They, like the guardian, file an oath to perform their duties properly. They report the results of their evaluation in a document called the appraisal which they sign and swear to. In this way the interests of the incompetent person are protected against mistakes in judgment (or willfully-given misinformation) on the part of the guardian.

The estate is now a "going concern" and follows a more or less set pattern until closed. The guardian manages, invests, conserves and expends the assets of the incompetent in the manner of a prudent man managing his own affairs but with the added responsibility for doing so according to certain restriction in the law. He cannot take risks which he might normally assume in his own behalf.

In order that the court can exercise its supervision over the guardian's management, the latter is required to present a petition to

the judge describing any action he proposed to take. This applies to disposal or investment of assets and to expenditures for care of the assets or for support of the incompetent and his legal dependents. The petition further indicates why the proposed action is necessary or advisable. If the judge finds the proposal acceptable, he signs a written order authorizing it. In matters pertaining to real estate, the procedural requirements are usually more detailed and incorporates more safeguards than those pertaining to personal property. In some states, the guardians act at their own discretion without court authorization, but justify their actions at the time of filing their accounts.

At the end of the first year of guardianship, the guardian prepares in writing an account referring back to the inventory to reflect his transactions. This contains a statement of receipts, including income and proceeds from any sale of disbursements made, supported by vouchers, and of the balance of cash and other assets on hand. This account is signed and sworn to by the guardian and presented to the judge for inspection and approval. It is then filed with the clerk of the court. Similar accounts are filed at the end of each succeeding year; each annual account referred back to the preceding one.

Little was spelled out in the law concerning the guardian's duties toward the incompetent as a person. Apparently it was assumed the guardian had the personal welfare of the incompetent at heart and would see that he was properly cared for. Furthermore, at the time the law of guardianship developed, little could be done for an incompetent beyond seeing that he was fed and clothed and kept from harming himself or others.

Historically, it was assumed that the assets of the incompetent would not be exhausted during his lifetime and that he would not recover from his disability. Normally the estate continued until such time as the incompetent died, at which point an executor or administrator was appointed to dispose of the decedent's assets according to law. The guardian then prepared a final account and turned over the remaining assets to the executor or administrator, or to the heir or devisees, as the law indicated.

If the guardian failed to perform his duties properly, several remedies would be available:

(a) *He could be removed as guardian and another appointed in his place, in which event the original guardian prepared a final account and turned over the assets to the successor guardian. This remedy was available for failure to care for the incompetent properly as well as for mismanagement of assets.*

(b) *The guardian could be sued for the full amount of money which he misappropriated or caused the estate to lose through mismanagement.*

(c) *If the guardian's own assets were insufficient to pay the judgment*