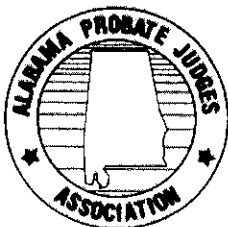


Guardianships: Adult & Minor

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GUARDIANSHIPS

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GUARDIANSHIPS PART ONE:

1. Who needs a guardian?

- Until individual is 19, his/her parents are recognized as *natural* guardians. No court involvement necessary.
- After individual is 19, he or she is presumed competent, able to make his/her own decisions about health, schooling, living arrangements, etc. Parent no longer has legal authority to make such decisions, absent appointment by Probate Court.

2. When is a guardian needed? *Ala. Code Section 26-2A-105(b) and 26-2A-20(8):*

Once the Court is satisfied that the person is incapacitated and needs guardian to provide continuing care and supervision.

Person is deemed to be incapacitated when he/she is impaired by mental illness, mental deficiency, physical illness or disability, physical or mental infirmities accompanying old age, chronic use of drugs, chronic intoxication or other cause except minority to the extent of lacking sufficient understanding OR capacity to make or communicate responsible decisions.

3. Who may be appointed guardian? *Ala. Code Section 26-2A-104, 26-2A-104.1*

1. person named in the ward's durable power of attorney
2. spouse of ward or nominee of ward's spouse
3. adult child of ward
4. parent of ward or nominee of ward's parent
5. relative with whom ward has lived the prior 6 months

6. nominee of ward's caretaker
7. private 501(c)(3) corporation if ward is developmentally disabled
8. any person the Court deems in the best interest to serve

4. **How is a guardian appointed?** *Ala. Code Section 26-2A-102*

1. Petition filed by someone interested in the person's welfare
2. Court sets hearing
3. Court gives notices
4. Court appoints guardian ad litem unless person already has attorney
5. Court orders examination of person by doctor/other qualified person and written report from the examiner
6. Court orders court representative to examine person at home + petitioner + proposed guardian + proposed new abode if any, and submit written report
7. Person may attend / participate in hearing

5. **How does the short track guardianship differ?** *Ala. Code Section 26-2A-102(e)*

1. Custodial parent(s) or adult custodial sibling files request to be appointed guardian
2. Court holds informal hearing with whoever made the request and the person involved
3. Still required: guardian ad litem
4. Still required: written report by doctor/other qualified person
5. Court may waive any notice, service, interview requirements. No lawyer, no court representative, no notices are mandatory

6. **Emergency guardianships.** *Ala. Code Section 26-2A-107*

In event of emergency. Cannot be renewed indefinitely.

7. **What is the guardian to do?** *Ala. Code Sections 26-2A-108--adult ward 26-2A-78--minor ward*

Guardian of adult has same duties, powers and responsibilities as does a guardian for a minor.

6 “shall” and 6 “may”:

1. must assume responsibilities for health, support, care and education
2. must become personally acquainted with ward
3. must take reasonable care of ward’s personal effects
4. must apply available money for current needs for health, support, education and maintenance
5. must conserve excess money, cooperating with conservator, if any
6. must report the condition of the ward to the court, as required by court
7. may receive limited funds for support of ward. (Section 26-2A-6*)
8. may take custody of ward and establish residence for ward
9. may compel payment for support of ward if there is no conservator
10. may consent to medical care as would a parent
11. may consent to marriage or adoption
12. may delegate certain decision making responsibilities to the ward
[court may limit powers of guardianship]

*Parent (as custodian) may receive property that would otherwise be distributed to minor without court involvement within certain limits: up to \$5,000 lump sum or \$25,000 total, paid in increments. *Ala. Code Section 26-2A-6*. Code says guardian for adult has same powers and duties as does a guardian for a minor. Therefore, appears this could also apply for adult ward.

8. May a guardian pull the plug? *Alabama Code Section 22-8A-11*

Suppose the ward develops serious medical issue/needs surgery. Who may consent? How far does the guardian’s authority extend?

Alabama’s Natural Death Act authorizes competent adults to make medical directives. Competent adults usually do this one of three ways: verbally, through an Advance Directive or through a Health Care Power of Attorney.

What about someone who is unable to do any of the three? Alabama recognizes **surrogate decision makers** in such a case. The rules for appointing surrogates when there is no Living Will, or other advanced medical directive are in Ala. Code Section 22-8A-11; they relate to decisions to be made when there is a terminal illness, injury or permanent unconsciousness.

Among the priorities as to who may serve as surrogate, the guardian is first on the list with this proviso: **“provided the appointment specifically authorizes the guardian to make decisions regarding the withholding of life-sustaining treatment or artificially provided nutrition and hydration.”**

Since so many Letters of Guardianship do not contain such special authority the following are listed as others who may serve as surrogate: under Alabama Code Section 22-8A-11:

- ward's spouse
- adult child
- parent
- adult sibling
- or other adult relatives, among others

9. What happens if the guardian dies?

Unless a guardian remains after one guardian dies, normally a successor has to be appointed. See if the court will appoint two guardians initially to postpone necessity to appoint new guardian.

Another way to avoid a repeat guardianship hearing is with appointment of successor guardian in the Will of the last parent and assuming the named successor guardian agrees to serve. *Ala. Code Section 26-2A-100*

10. When does the guardianship end? *Ala. Code Sections 26-2A-109, 26-2A-79*

1. death of ward
2. resignation of the guardian
3. adoption of the minor ward
4. marriage of the minor ward
5. minor becoming an adult
6. when ward's incapacity is terminated

GUARDIANSHIPS PART TWO:

I. Disputes and other legal issues generally:

A. Disputes

1. Arises prior to the appointment of a guardian and/or conservator and frequently involves:
 - a. Determining whether an alleged incapacitated person is actually incapacitated
 - b. Determining whether an alleged incapacitated person needs a guardian and/or conservator
 - c. Determining which person or institution is most appropriate to serve as the ward's guardian and/or conservator
2. Frequently involves:
 - a. Alleged incapacitated person arguing that he/she is not incapacitated
 - b. Interested party arguing about who should serve as guardian, or that there is no need for a guardian because there is a proper power of attorney

B. Definitions §26-2A-20

1. Guardian. A person appointed by the court to be responsible for the personal care of an individual
2. Conservator. A person appointed by the court to manage the property or "estate" of an individual
3. Incapacitated person. Any individual who is impaired by reason of:
 - a. mental illness or deficiency
 - b. physical illness or disability
 - c. physical or mental infirmities accompanying advanced age
 - d. chronic use of drugs or chronic intoxication
 - e. other cause (except minority) to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions
4. Protected person. Any individual for whom a conservator has been appointed or other protective order has been made as provided in §26-2A-136 and §26-2A-137

C. Lawyer as Witness

1. Ala. Rules of Prof. Conduct Rule 3.7

a. An attorney cannot act as an advocate at a trial in which the attorney is likely to be a necessary witness unless

i. The testimony relates to an uncontested issue

ii. The testimony relates to the nature and value of legal services rendered in the case

iii. Disqualification of the lawyer would work substantial hardship on the client

b. A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness, unless precluded from doing so by Rule 1.7 or Rule 1.9.

D. Jurisdiction §26-2A-31

1. The probate court has original and general jurisdiction over guardianship and conservatorship proceedings (see also §12-13-1(b) for jurisdiction of probate courts)

2. If both guardianship and conservatorship are filed for the same person, or are pending in the same court, the proceedings may be consolidated

E. Removal §26-2-2

1. A guardianship or conservatorship may be removed from the probate court to the circuit court at any time before the final settlement

2. Standard is that the guardianship or conservatorship "can be better administered in the circuit court than in the probate court"

3. Petition, which must be verified, is filed in circuit court, and if properly requested, the guardianship or conservatorship must be removed

F. Procedure §26-2A-33

1. The Alabama Rules of Civil Procedure apply in guardianship and conservatorship proceedings

2. Ala. R. Civ. P. Rule 1 (2014) states that the Alabama Rules of Civil Procedure apply in probates courts

G. Jury Trial §26-2A-35

1. Except for proceedings in a court having general equity jurisdiction, a party is entitled to a 6-person jury trial to determine the incapacity of the individual
2. If there is no right to a jury trial, then the court may, in its discretion, call a jury to decide any issue of fact, in which case the verdict is advisory only

H. Compensation §26-2A-142

1. Any attorney whose services resulted in a protective order, or in an order that was beneficial to a protected person's estate, is entitled to reasonable compensation from the estate
2. Any attorney whose services resulted in a guardianship order or in an order that was beneficial to a ward is entitled to reasonable compensation from the estate

II. Guardianship

A. Venue §26-2A-101

1. Venue is appropriate in the county where the incapacitated person resides or where the person is present at the time the guardianship proceedings are commenced

B. Petition for Appointment of Guardian §26-2A-102

1. The incapacitated person, or any person interested in the welfare of the incapacitated person, can file a petition for guardianship
2. After the petition for guardianship is filed, court must set a date for hearing
3. The incapacitated person can be represented by their own legal counsel, but a guardian ad litem is usually appointed regardless of whether the incapacitated person has their own legal counsel
4. A physician or other "qualified person appointed by the court" must examine the incapacitated person and submit a report in writing to the court
5. In addition to interviewing the incapacitated person, the court representative must also

- a. Interview the petitioner and any person who is nominated to serve as guardian
 - b. Visit the residence of the incapacitated person
 - c. Submit their findings to the court
6. The incapacitated person is entitled
- a. To be present at the hearing
 - b. To be represented by legal counsel
 - c. To present evidence, cross-examine witnesses, including the court-appointed physician or other “qualified person appointed by the court”, and the court representative

C. Notice of Hearing §26-2A-103

1. Notice of hearing for appointment of guardian must be given to the following:
 - a. Incapacitated person
 - b. Spouse
 - c. Adult children, or if none, parent(s)
 - d. Any person serving as guardian, conservator, or who has care and custody of incapacitated person
2. Notice must be personally served on incapacitated person, any person serving as guardian, conservator, or who has care and custody of incapacitated person, and all other persons if they can be found in the state

D. Priority of Candidates §26-2A-104

1. Any qualified person can be appointed guardian, but unless the person is unfit, the court shall appoint the incapacitated person’s most recent nomination in a durable power of attorney
2. If no durable power of attorney, or if the person is unfit, then the following is the order of priority
 - a. Spouse
 - b. Adult child
 - c. Parent(s) or person nominated in will by parent
 - d. Relative the incapacitated person has lived with for more than six (6) months
 - e. Person nominated by person who is caring for or paying for the care of incapacitated person
3. With respect to persons having equal priority, the court has authority to select the person it deems best to serve

4. The court can ignore priority and pass over persons in selecting the person it deems best to serve

E. Temporary Guardians §26-2A-107 (i.e. Emergency Guardians)

1. If no guardian for incapacitated person, and an emergency exists, then, without notice, a temporary guardian may be appointed
2. A temporary guardian's authority may not be extended beyond thirty (30) days, but it can be renewed