

## **Questions and Answers about New Hampshire Guardianship**

### **1. Where can information be found about guardianships?**

RSA 464-A is the New Hampshire Statute that covers guardianship procedures and RSA 547-B is the New Hampshire statute that describes public guardianship programs. If you have questions about guardianship you can contact either public guardianship agencies, Tri-County CAP Inc. Guardianship Services or Office of Public Guardian. You may also be able to obtain information from a mental health center, area agency, attorney, nursing home, or hospital.

### **2. How many people are currently under guardianship in New Hampshire?**

Approximately 6,000 persons (2013). 1,450 of those persons have a public guardian. The other 4,550 persons have either a family member or attorneys who serve as guardian. The guardianship can be person only, person & estate, or estate only.

### **3. When is it appropriate to petition for guardianship?**

It is appropriate if the person petitioning for guardianship can prove "beyond a reasonable doubt" that the proposed ward is unable to provide for basic needs of food, shelter, clothing, health care, safety, and/or is unable to manage financial affairs. The petitioner must be able to prove that the proposed ward is incapable of making an informed choice not to provide for these needs, and must also prove that the proposed ward will or has come to substantial harm as a result of the incapacity. Finally, the petitioner must be able to prove that there are no other available solutions that would impose fewer restrictions on the proposed ward.

### **4. What is "beyond a reasonable doubt?"**

"Beyond a reasonable doubt" is the highest burden of proof that the law requires. According to Black's Law Dictionary, it requires the judge to be "...fully satisfied, entirely convinced, satisfied to a moral certainty..." of the proof that is offered.

### **5. How can you tell if someone is making an informed decision or choice?**

A proposed ward is making an informed decision or choice if (a) he/she can demonstrate an understanding of the issues and the consequences of a particular decision, and (b) the decision or choice is made freely.

**6. What is involved in petitioning for guardianship?**

The first step is to complete the form, "petition for guardian of incapacitated person". The petition includes questions pertaining to the proposed ward, the petitioner, whether the proposed ward has nominated a guardian, the proposed guardian, the name of any attorney the proposed ward has retained, the proposed ward's relatives, whether the proposed ward has durable power of attorney and/or a living will, the type of guardianship requested, the length of time for which guardianship is sought, and a statement of the facts showing the need for guardianship.

**7. How does the petitioner show the need for guardianship?**

The petitioner must provide specific examples of the proposed ward's inability to provide for food, shelter, health care, safety, or an inability to manage his/her financial affairs. These examples must have occurred within the last six months and one of the incidents must have occurred within 20 days of the filing of the petition. For each example the petitioner must prove that the proposed ward will or has come to substantial harm as a result of the inability, that the inability is not the result of informed judgment, and that no less restrictive alternatives are available.

**8. What is the next step after the petition for guardian of incapacitated person is completed?**

Once the petition is complete the petitioner must have it notarized and then file the petition in the county probate court in which the proposed ward resides. If the proposed ward is in an institution the petition may need to be filed in the county in which the institution is located.

**9. After the petition is notarized and filed, what happens?**

All parties, including the proposed ward, the petitioner, family of the proposed ward, and attorney for the proposed ward, will receive notice of the date of the guardianship hearing. Notice will be at least 14 days in advance of the actual date of hearing.

**10. What if the proposed ward does not have an attorney?**

Under the guardianship statute the proposed ward is entitled to counsel. Therefore, if the proposed ward does not have an attorney the court will appoint one.

**11. What if the proposed ward cannot afford to pay for the attorney?**

If the proposed ward does not have an attorney a form must be completed which determines the ward's ability to pay. This form must be approved by the Court.

## **12. What is the attorney's role in the guardianship hearing?**

As mentioned, the guardianship statute indicates that every proposed ward has an "absolute and unconditional" right to be represented by an attorney, and as such, has the right to expect the attorney to act as an advocate and not a guardian ad litem. The petition lays out the claims made by the petitioner of the need for guardianship. The attorney should meet with the proposed ward as soon as possible, and prepare to represent the proposed ward and the proposed ward's wishes at the hearing. If the attorney can show, for any claim of incapacity presented by the petitioner, that no substantial harm will or has resulted, the proposed ward is making informed judgment, and/or that a less restrictive alternative to guardianship is available, then the petition may be denied.

## **13. How does the petitioner prepare for the hearing?**

The petitioner, with or without the assistance of an attorney, should prepare for the hearing by gathering facts, which will be introduced as evidence showing beyond a reasonable doubt that a guardianship is needed. The petitioner must show that the proposed ward has or will come to substantial harm as a result of the incapacity, that the incapacity is not the result of informed judgment on the part of the proposed ward, and that no less restrictive alternatives to guardianship are available as a remedy to the situation. The petitioner should use witnesses such as family, friends, and/or the petitioner who have observed the proposed ward and can support the petitioner's claims. It should be noted, therefore, that since the focus of the hearing is on functional limitations, generally there is no need for the witnesses to be experts such as medical doctors or psychiatrists.

## **14. What are functional limitations?**

"Functional limitations" means behavior or conditions in an individual, which impair his or her ability to participate in and perform (either directly or indirectly) minimal activities of daily living that secure and maintain proper food, clothing, shelter, health care, or safety.

## **15. Is guardianship permanent?**

It can be. The petitioner is required to indicate on the petition how long guardianship is required. For example, if the petition for guardian is required because the petitioner feels the proposed ward is unable to provide for needs due to severe dementia and that the dementia is getting progressively worse, it is more than likely that permanent guardianship will be needed.

## **16. When is guardianship not permanent?**

Guardianship may be needed for a relatively short time if the purpose of the petition is to be able to, for example, consent to a specific medical procedure. In that case, the petitioner could request a temporary guardianship. Temporary guardianships expire 60 days from the date the guardianship order is signed (RSA 464-A:12). Also, the guardianship statute indicates that guardianship should be lifted in favor of any less restrictive alternatives that become available. This means that if a less restrictive alternative to guardianship does become available, it is up to the guardian to utilize that option. It can also mean that if the ward regains any or all capabilities, guardianship should be terminated or altered accordingly. The rule is simple: always utilize the alternatives that will impose the least restrictions on the (proposed) ward.

## **17. What is required to become a guardian?**

Under the guardianship statute RSA 464-A anyone may be appointed guardian who is competent, willing, and whose appointment would cause no conflict of interest. The statute also allows for the proposed ward to indicate those persons he/she does not want to be appointed guardian, although the court is not bound by the proposed ward's request.

## **18. What happens if the proposed ward has no friends or family members, or does but they all refuse to be guardian?**

In either case the petitioner can request the appointment of a public guardian.

## **19. Do guardians have any guiding principles for making decisions?**

Yes. The National Guardianship Association (NGA) has established a code of ethics for guardians and has identified two important decision making standards: substituted judgment and best interest. The NGA address is 1604 N. Country Club Road, Tucson, AZ 85716-3102 and the telephone number is 502-881-6561. The website is [www.guardianship.org](http://www.guardianship.org)

## **20. Why does the petitioner have to show that the incapacity has resulted or will result in substantial harm?**

Isn't it enough to be able to show that a person is unable to provide for one or more of his/her basic needs? Substantial harm must be shown because the inability to provide for a basic need is not a problem otherwise. For example, suppose a person is unable to provide for his/her need for food but has several friends who are well aware of the issue and who always make sure that the person is well fed. In this case, although it

is true that the person is not directly providing for a basic need that need is nonetheless being met, making a guardianship inappropriate.

**21. Why is it important to be sure that no less restrictive alternatives to guardianship are available?**

Under guardianship the ward is denied the right to make certain important decisions and that right is transferred to the guardian. Although the guardian must safeguard the ward's civil liberties to the greatest extent possible, the guardian must sometimes make decisions that are very much at odds with the ward's wishes. Since we all value the right to make our own decisions it is always best to find an alternative to guardianship that safeguards the right.

**22. What does it mean to say that a person has an inability to provide for the basic need for food?**

Very broadly, it means that a person is either not eating at all or not eating enough. Examples could include a 92 year old person who can prepare meals but who is unable to get to the store to shop and has no one who can do the shopping; a 32 year old person who has food available in the apartment but who has refused most food for the past two weeks; a 23 year old person who is unable to move about or to speak or communicate in even the most basic ways; and a 66 year old person in a nursing home who must be spoon fed all meals.

**23. Wouldn't all of the examples mentioned above justify a guardian?**

Not necessarily. It is not enough just to show an inability to provide for basic needs for food. As mentioned, the petitioner must show that in each case the proposed ward has or will come to substantial harm as a result of the incapacity, that the inability to provide for basic needs is not the result of an informed decision on the part of the proposed ward, and that no other less restrictive alternatives to guardianship are available to address the problem.

**24. What about the example of the person who can't shop and has no one to do the shopping?**

Wouldn't that person need a guardian? Not necessarily. The petitioner can only petition for guardianship if there is absolutely no way of assisting the person with food shopping. This would mean that there were no available case management services, no Visiting Nurse Association (VNA) services available, no neighbors or family available, no Meals on Wheels available, and/or no other religious or other community organizations available to assist with the shopping. If none of those less restrictive services were available then it would be appropriate to petition for guardianship.

**25. What about the example of the 32 year old person who is refusing most food?**

Wouldn't a guardian be needed for this person? Again, it depends. If this person can show that an informed choice is being made not to eat then there is no need for guardianship. For example, the individual is fasting for two weeks for religious purposes or following a doctor-prescribed diet and the individual is fully aware of the risks involved, there would be no need for guardianship.

**26. What about the 23 year old person who can't move, speak or communicate?**

Is guardianship appropriate? Again, it depends on the situation. If the person is currently being treated respectfully and his/her needs appear to be well met a guardian may not be necessary. Similarly, suppose the person's inability to communicate was a result of a recent injury and prior to the injury the person had made arrangement for a durable power of attorney for health care and finances. In that case these arrangements provide for a less restrictive alternative to guardianship, possibly making guardianship unnecessary.

**27. What about the 66 year old person in a nursing home who has to be spoon fed all meals?**

Wouldn't guardianship be appropriate in this case? Not necessarily. Just because a person requires assistance to provide for a basic need doesn't mean that the person needs a guardian. If the person has the ability to arrange for his/her needs to be provided through the assistance of others then the person is effectively providing for those needs. So, if the 66 year old person is only being fed because she is physically unable to do so (say, because of a stroke), then there may not be a need for a guardian. It should be noted that even though this person is incapable of arranging for the assistance of eating, the nursing home is providing regular meals, so if no other issues arise a guardian may not be needed.

**28. Under what circumstances might guardianship become appropriate for this person?**

Suppose the person developed diabetes and it was determined that the person could control his/her condition by either insulin injections or a special diet. If the person was unable or unwilling to make that choice, and has no durable power of attorney for health care, no surrogate decision maker, nor advance directives, then guardianship might be the least restrictive solution.