



ALBANY LAW SCHOOL

GOVERNMENT LAW CENTER

EXPLAINER

Guardianship for Adults with Developmental Disabilities in New York

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The Government Law Center's explainers concisely map out the law that applies to important questions of public policy. July 21, 2020

Introduction

A guardian for an adult is appointed by a court to make decisions for an individual found by the court to be unable to make their own financial and personal care decisions. A guardian is often sought for a person who needs a surrogate to make personal care and financial decisions for them and has not executed a health care proxy or a power of attorney. New York has two guardianship statutes that are applicable to adults with developmental disabilities. They have starkly different perspectives and procedures. One form of guardianship, governed by the mental hygiene law (general guardianship), provides for the appointment of a guardian for any adult who may have a medical diagnosis that impairs their decision-making and is determined by a court to be unable to

appreciate the harmful consequences of their impairment.¹ The main focus of the law is the adult's understanding of their abilities rather than their diagnosis, whether it be dementia or a developmental disability. The law takes a nuanced approach under this type of guardianship, requiring that the guardian have decision-making authority "tailored to the individual needs" of the adult.² This type of guardianship is consistent with New York's public policy that recognizes that the "presence of a particular condition does not necessarily preclude a person from functioning effectively."³ It is also consistent with New York's public policy which supports helping individuals with developmental disabilities to advocate for themselves,⁴ and improving their opportunities in employment, integrated living, and self-direction.⁵ The other form of guardianship, governed by the surrogate's court procedure law (developmental disability guardianship), is limited to adults diagnosed in childhood with a developmental disability, and those who have suffered a traumatic brain injury at any time.⁶ An addendum to the guardianship

law for minors, this law is governed by principles of “in loco parentis,”⁷ preserving the idea that adults with developmental disabilities are perpetual children. This form of guardianship does not reflect the public policies described above. This explainer describes the two guardianship statutes and highlights their differences.

RESOURCES

For a more detailed discussion of alternatives to guardianship, see *BEYOND GUARDIANSHIP: TOWARD ALTERNATIVES THAT PROMOTE GREATER SELF-DETERMINATION FOR PEOPLE WITH DISABILITIES*, available at <https://ncd.gov/publications/2018/beyond-guardianship-toward-alternatives>.

General adult guardianship

a. Standard for appointment

The standard for appointment of a general guardian requires clear and convincing evidence that a guardian is necessary and the adult is likely to suffer harm because they are unable to provide for personal needs and/or property management, and cannot adequately understand and appreciate the nature and consequences of their inability.⁸ The standard emphasizes the functional abilities of the adult rather than a particular medical diagnosis.⁹ The petition to the court must describe the adult’s ability to manage the activities of daily living, their understanding and appreciation of the nature and consequences of their limitations, the powers sought for the guardian and their relation to the adult’s limitations, the anticipated duration of the

guardianship, and the less restrictive alternatives to guardianship which were considered and rejected.¹⁰ No medical diagnosis is required for the petition.¹¹ In fact, the court cannot require medical affidavits at the pleading stage of the proceeding.¹² The emphasis of the guardianship is on the person’s abilities; the court will, however, consider any medical diagnosis in light of information about the adult’s limitations in determining whether to appoint a guardian.¹³

b. The role of counsel and court evaluator

An adult alleged to need a guardian is entitled to be represented by an attorney of their choice.¹⁴ If it is not clear to the court that the attorney was chosen freely and independently,¹⁵ the court will disqualify the attorney and replace them.¹⁶ If the adult does not otherwise have an attorney, the appointment of counsel is required in certain statutorily defined situations.¹⁷ The attorney is expected to advocate for their client’s wishes.¹⁸ A court evaluator is appointed by the court at the beginning of every proceeding to assess the individual’s circumstances and recommend to the court whether appointing a guardian would be in the best interest of the adult.¹⁹ The court evaluator’s role is distinct from the advocacy role of counsel.²⁰

c. Hearing

The court must hold a hearing in every case before making a decision. The hearing must be held in the presence of the adult either in the courthouse or where the adult resides.²¹ The adult’s presence is excused only if the

adult is out of the state or unable to participate in a meaningful way.²² The courts have interpreted “unable to participate” very narrowly because they have found it important to have “the opportunity to observe, firsthand, the allegedly incapacitated person.”²³

d. Guardian’s powers and duration of authority

If the court determines that a guardian should be appointed, it decides both the duration of the appointment and the guardian’s decision-making powers, linking them to the adult’s limitations so as to preserve the adult’s independence as much as possible.²⁴ If the guardian is not authorized by the court to take certain actions, the guardian cannot take it upon themselves to act.²⁵

e. Guardian’s responsibilities

A guardian must exercise their authority with the “utmost care and diligence.”²⁶ They must visit the adult at least four times a year,²⁷ and file with the court annual reports describing the health of the adult and the financial and personal care decisions the guardian has made.²⁸

f. Guardian’s responsibilities

The guardianship ends at the time set by the court, or upon a successful application by the adult, the guardian, or a third party to terminate it.²⁹ If the guardian or someone else objects to the termination, they bear the burden of showing a continued need for the guardian.³⁰

Adult developmental disability guardianship

A person seeking guardianship for an adult with a developmental disability that originated in childhood or a traumatic injury can use the adult developmental disability guardianship instead of the general guardianship described above.

a. Standard for appointment

The standard for the appointment of a developmental disability guardian requires a diagnosis of a permanent intellectual or developmental disability,³¹ or a traumatic brain injury, that results in the adult being incapable of managing their affairs.³² A petitioner seeking a guardianship under this statute must support their application with affidavits of medical professionals attesting to the diagnosis.³³ Unlike the petition for the appointment of a general guardian, there is no requirement that the petition describe any available resources which were rejected as alternatives to the guardianship.³⁴

The court appoints a guardian if it is in the “best interest” of the adult.³⁵ Unlike the procedure for the appointment of a general guardian which requires clear and convincing evidence of the adult’s lack of appreciation of the harm they may suffer because of their limitations, there is no similar requirement in this law. Rather, the applicable standard of best interest “is subject to the discretion and judgment of the presiding [judge].”³⁶

b. Appointment of a guardian *ad litem*

The statute does not mention the adult's right to counsel of their choice and does not provide for the appointment of counsel. Rather, the court has the discretion to appoint a guardian *ad litem*.³⁷ The guardian *ad litem* must be an attorney;³⁸ however, their role is not to advocate on behalf of the adult but to recommend whether the appointment of a guardian is in the best interest of the adult, like that of the court evaluator in a general guardianship proceeding.³⁹ In some cases, the court will appoint Mental Hygiene Legal Service to represent the adult.⁴⁰ This appointment will occur when the adult is receiving services from a program licensed or operated by the Office for People with Developmental Disabilities.⁴¹

c. Hearing

Unlike the procedure for the appointment of a general guardian, a hearing is not required in every case. The court may dispense with a hearing if the petitioners for the guardianship are the adult's parents, which is frequently the case, or if the parents consent to the proceeding.⁴² If the court does hold a hearing, it can excuse the presence of the adult if a physician certifies that the adult is "medically incapable" of attending the hearing.⁴³ There is no requirement that a court conduct the hearing where the adult resides.

d. Guardian's powers and duration of authority

The guardianship lasts for the duration of the adult's life unless the court terminates it sooner.⁴⁴ Unlike the general guardianship law which requires tailoring the guardian's

authority to the adult's limitations, this appointment is "plenary," granting the guardian authority to make all decisions for the adult.⁴⁵ The law provides two limited exceptions. The court can appoint a limited guardian of the property which allows an employed adult to keep their wages, and to enter into contracts in an amount "not exceeding one month's wages or earnings from such employment or three hundred dollars, whichever is greater, or as otherwise authorized by the court."⁴⁶ The court can also limit the guardian's authority to make health care decisions.⁴⁷ However, the court typically grants the guardian "liberal powers over the [adult's] medical decisions, including end-of-life decisions."⁴⁸

Unlike the general guardianship law, this law does not describe the responsibilities of the guardian. Likewise, the guardian is not required to file with the court annual reports regarding the health of the adult and the guardian's actions regarding their care. If the guardian is managing the adult's property, the guardian is required to follow the reporting requirements for guardians of property for minors.⁴⁹ In fact, the statute provides that "to the extent the context admits," the law governing guardianship of a minor "shall apply to all proceedings under this [statute] with the same force and effect as if an 'infant' were a 'person who is intellectually disabled' or 'person who is developmentally disabled.'"⁵⁰ This statement leaves no doubt that this "guardianship is very much like the guardianship of a child."⁵¹

e. Termination of the guardianship

The guardianship may be terminated by the court on the application of the adult, or any person on their behalf.⁵² Unlike the procedure for terminating a general guardianship, the adult has the burden of establishing that continuing the guardianship is not in their best interest, and the determination of adult’s “best interest [is] committed to the court’s discretion.”⁵³

Conclusion

New York’s two guardianship statutes for adults with developmental disabilities present a stark difference in perspective and procedure. Legislative efforts to make the developmental disabilities law more similar to the general guardianship law have been unsuccessful.⁵⁴ Several courts have applied elements of the general guardianship law when considering a guardianship application under the developmental disability statute;⁵⁵ however, these efforts are not uniform throughout New York and the applicability

of these elements is not apparent from reading the developmental disability statute. Consequently, uncertainty about the law creates a confusing choice in guardianship for adults with developmental disabilities.

RESOURCES

The Arc is a national community-based organization advocating for and with people with intellectual and developmental disabilities (I/DD) and serving them and their families.

Find resources and state and local chapters at: <http://thearc.org>.

RESOURCES

A collection of reported decisions under both statutes can be found at the Office of Court Administration Guardianship and Fiduciary Services, <https://www.nycourts.gov/ip/gfs/>.

Endnotes

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¹ N.Y. Men. Hyg. Law, Article 81.

² N.Y. Men. Hyg. Law § 81.01.

³ Comments of the Law Revision Commission to N.Y. Men. Hyg. Law § 81.02 (citing *Matter of Grinker (Rose)*, 77 N.Y.2d 703, 570 N.Y.S.2d 448, 573 N.E.2d 536 [1991]; *Rivers v. Katz*, 67 N.Y.2d 485, 504 N.Y.S.2d 74, 495 N.E.2d 337 [1986]).

⁴ *Be Your Own Advocate*, https://opwdd.ny.gov/opwdd_services_supports/beyourownadvocate.

⁵ Office of People with Developmental Disabilities *Mission, Vision & Values*, <https://opwdd.ny.gov/about-us/mission-vision-values>.

⁶ N.Y. Surr. Ct. Proc. Act. Article 17A. New York also has a guardianship statute for veterans, Article 79 of the Mental Hygiene Law, titled “Proceedings Relative to Incompetent Veterans and Infant Wards of the United States Veterans’ Administration.” See N.Y. Men. Hyg. Law §§ 79.01–79.43. The provisions of that statute are beyond the scope of this discussion.

⁷ *In re Cruz*, No. 500001/01, 2001 WL 940206, at *4 (Sup. Ct. N.Y. County July 16, 2001); Radigan & Kelly, *Article 17-A Guardianship Statute: Still Alive and Well*, N.Y.L.J., Mar. 14, 2016.

⁸ N.Y. Men. Hyg. Law § 81.02(b). An adult may consent to the appointment of a guardian, N.Y. Men. Hyg. Law § 81.02(a)(2); a discussion of a consensual guardian is beyond the scope of this explainer.

⁹ N.Y. Men. Hyg. Law § 81.02(c).

¹⁰ N.Y. Men. Hyg. Law § 81.08.

¹¹ N.Y. Men. Hyg. Law § 81.08.

¹² N.Y. Men. Hyg. Law § 81.07(b)(3).

¹³ N.Y. Men. Hyg. Law § 81.08 (Comments of the New York State Law Revision Commission).

¹⁴ N.Y. Men. Hyg. Law § 81.10(a).

¹⁵ *Matter of Application of S.B.*, 66 Misc.3d 452, 117 N.Y.S.3d 814 (Sup. Ct. Chemung Co. 2019)(citing N.Y. Men. Hyg. Law § 81.10(a)).

¹⁶ *Caryl S.S. v. Valerie L.S.*, 45 Misc.3d 1223(A), 5 N.Y.S.3d 327 (Table)(Sup. Ct. Bronx Co. 2014).

¹⁷ N.Y. Men. Hyg. Law § 81.10(c)(1)-(7).

¹⁸ N.Y. Men. Hyg. Law § 81.10 (Comments of the New York State Law Revision Commission).

¹⁹ N.Y. Men. Hyg. Law § 81.09.

²⁰ N.Y. Men. Hyg. Law § 81.09 (Comments of the New York State Law Revision Commission).

²¹ N.Y. Men. Hyg. Law § 81.11(c).

²² N.Y. Men. Hyg. Law § 81.11(c)(2).

²³ See, e.g., *In re Banks*, 138 A.D.3d 519, 28 N.Y.S.3d 321 (1st Dept. 2016); *Matter of Lillian U.*, 66 A.D.3d 1219, 887 N.Y.S.2d 321 (3d Dept. 2009)).

²⁴ N.Y. Men. Hyg. Law § 81.15.

²⁵ N.Y. Men. Hyg. Law § 81.20(a)(1).

²⁶ N.Y. Men. Hyg. Law § 81.20(a)(2)-(3).

²⁷ N.Y. Men. Hyg. Law § 81.20(a)(4). It is anticipated that the number of visits and communications will far exceed the statutory minimum. “Decision making is a fundamental part of the guardian’s role. In order to carry out this responsibility in the most careful and diligent manner, the guardian should develop a personal relationship to the ward, in the event one does not exist, so that the guardian can understand the decision’s impact from the incapacitated person’s perspective and involve the incapacitated person in the decisions to the greatest extent possible.” *Id.* (Comments of the New York State Law Revision Commission).

²⁸ N.Y. Men. Hyg. Law § 81.20(a)(5); N.Y. Men. Hyg. Law § 81.31.

²⁹ N.Y. Men. Hyg. Law § 81.36. Such applicants include those who are entitled to commence a guardianship proceeding. See N.Y. Men. Hyg. Law § 81.06(a)(1–7).

³⁰ N.Y. Men. Hyg. Law § 81.36(d).

³¹ “Developmental disability” is defined in subdivision twenty-two of section 1.03 of the mental hygiene law.

³² N.Y. Surr. Ct. Proc. Act §§ 1750, 1750-a.

³³ N.Y. Surr. Ct. Proc. Act §§ 1750, 1750-a.

³⁴ There are such alternatives. They include existing statutes and regulations that govern health care and other surrogate decision making, joint bank accounts, special needs trusts, health care surrogate decision making committees, case management services, day services, in-home care services, money management programs, social support services and networks, supported decision making, and available opportunities for shared decision making.

³⁵ N.Y. Surr. Ct. Proc. Act §§ 1750, 1750-a.

³⁶ *Matter of Robert C.B.*, — N.Y.S.3d — 2020 WL 2567063 (N.Y. Surr. Ct. Dutchess Co. 2020).

³⁷ N.Y. Surr. Ct. Proc. Act § 175.

³⁸ N.Y. Surr. Ct. Proc. Act § 403.

³⁹ N.Y. Surr. Ct. Proc. Act § 1754.

⁴⁰ Mental Hygiene Legal Service “provides legal services, advice and assistance to persons receiving care or alleged to be in need of care at inpatient and community-based facilities for individuals with mental disabilities. Created in 1964 and organized under Mental Hygiene Law article 47, MHLS represents such persons in judicial and administrative proceedings concerning admission, retention, transfer, treatment and guardianship. In addition to handling judicial proceedings, MHLS provides advice and representation regarding standards of care and other matters affecting the civil liberties of persons receiving care at facilities for individuals with mental disabilities.” <http://www.courts.state.ny.us/ad3/mhls/index.html>.

⁴¹ *Id.*

⁴² N.Y. Surr. Ct. Proc. Act § 1754.

⁴³ N.Y. Surr. Ct. Proc. Act § 1754.

⁴⁴ N.Y. Surr. Ct. Proc. Act § 1759.

⁴⁵ *Matter of Guardianship of Capurso*, 63 Misc.3d 725, 727 (Surr. Ct. Westchester Co. 2019).

⁴⁶ N.Y. Surr. Ct. Proc. Act § 1756. The amount of \$300 was added in 1989, and not increased since then. *See* L.1989, c. 675, § 2.

⁴⁷ N.Y. Surr. Ct. Proc. Act § 1750-B.

⁴⁸ N.Y. Surr. Ct. Proc. Act § 1750-B (Margaret V. Turano, Practice Commentaries).

⁴⁹ N.Y. Surr. Ct. Proc. Act § 1761.

⁵⁰ N.Y. Surr. Ct. Proc. Act § 1761. *See Matter of Boni P.G.*, 2006 N.Y. Misc. LEXIS 4699; 236 N.Y.L.J. 96 (Surr. Ct., Bronx Co. 2006).

⁵¹ N.Y. Surr. Ct. Proc. Act § 1761 (Margaret V. Turano, Practice Commentaries).

⁵² N.Y. Surr. Ct. Proc. Act § 1755.

⁵³ *Matter of Guardianship of Capurso*, 63 Misc.3d 725, 728 (Surr. Ct. Westchester Co. 2019). *See also Matter of Robert C.B.*, 2020 WL 2567063 (Surr. Ct. Dutchess Co. 2020).

⁵⁴ *See Matter of Robert C.B.*, 2020 WL 2567063 (Surr. Ct. Dutchess Co. 2020).

⁵⁵ See *Matter of Robert C.B.*, 2020 WL 2567063 (Surr. Ct. Dutchess Co. 2020) (citing *Matter of K.L.*, N.Y.L.J., July 3, 2017 at 25, col. 3 (Surr. Ct. Richmond Co.); *Matter of Zachary W.*, N.Y.L.J., Apr. 28, 2017 at 45 (Surr. Ct. Suffolk Co.); *Matter of Michelle M.*, 52 Misc. 3d 1211(A), 2016 WL 3981204 (Surr. Ct. Kings Co. 2016); *Matter of Hytham M.G.*, 52 Misc. 3d 1211(A), 2016 WL 3981192 (Surr. Ct. Kings Co. 2016); *Matter of D.D.*, 50 Misc. 3d 666, 19 N.Y.S.3d 867 (Surr. Ct. Kings Co. 2015); *Matter of Chaim A.K.*, 26 Misc. 3d 837, 844–45, 885 N.Y.S.2d 582 (Surr. Ct. N.Y. Co. 2009); *Matter of John J.H.*, 27 Misc. 3d 705, 896 N.Y.S.2d 662 (Surr. Ct. N.Y. Co. 2010).