



**By Sara Wilson**  
763-225-6000  
swilson@gislason.com

## GUARDIANSHIP

There is often confusion regarding what a guardianship is and whether it may be necessary for a friend or loved one. This article is meant to provide a general overview of guardianships in Minnesota.

A guardianship is a relationship between a guardian, who is appointed and supervised by the Court to make personal decisions for an individual incapable of making such personal decisions, and a ward who is found by the Court to be unable to make personal decisions on his or her own behalf due to age, mental or physical incapacity. In the case of a guardianship, incapacity means an individual who is impaired and lacking sufficient understanding or capacity to make or communicate responsible personal decisions. They must have demonstrated deficits in behavior which evidence an inability to meet personal needs for medical care, nutrition, clothing, shelter, or safety. Any competent person or agency may be appointed as the guardian, but the proposed ward's wishes and the prior relationship of the parties will be taken into consideration in any appointment.

To establish a guardianship, the following steps must be taken. A guardianship is initiated when a proposed guardian files a petition with the court in the county in which the proposed ward resides. Thereafter the court will schedule a hearing to determine if the conditions for a guardianship exist. Prior to the hearing the proposed guardian must undertake a background investigation conducted by the court. The court will also appoint a visitor to meet with the proposed ward to give notice of hearing rights and make an independent assessment of whether a guardianship is necessary (or which powers should be granted) to submit to the court. An attorney will be appointed by the court to represent the proposed ward and ensure their interests are being protected. Those persons interested in the proposed ward have the right to attend the hearing and object to the need for a guardianship for the proposed ward. The proposed ward must attend the hearing unless they have waived their right to attend or they are unable to attend by reason of a medical condition as evidence by a written statement

continued on pg 10

## GUARDIANSHIP continued from pg 9

from a licensed physician. If after the hearing the court finds that a guardian is needed, and no less restrictive alternative is appropriate, then an order and letters of guardianship will be issued by the court. Letters of guardianship are evidence of the guardian's authority to act on behalf of the ward. After their appointment, a guardian must file with the court and provide the ward with an annual report of personal well-being. The ward must also be provided with a notice of rights on an annual basis that informs the ward that he or she has a right to end or modify the guardianship.

In the appointment of a guardian, they may be granted some or all of the following powers to act on behalf of the ward:

- the right to determine where the ward will live;
- to provide general cares and needs;
- to provide care, comfort and maintenance (such as food, clothing, shelter, health care, social and recreational, training and education);
- to consent to medical treatment on the ward's behalf;
- to supervise the ward's daily activities; and
- if no conservator is appointed, the guardian may prevent the ward from entering into any contract except for basic needs, and may apply for public assistance on the ward's behalf.

The court may restrict the guardian's powers based on the needs of the ward, and certain decisions undertaken by a guardian must have prior approval by the court. Importantly, a guardian does not have unlimited authority to act on behalf of a ward. Rather, the guardian has the responsibility to make decisions in the best interest of the ward and to take into consideration the ward's preferences and needs. The guardian must use their authority only as necessary to provide needed care and services. It cannot be used in a manner that limits the ward's rights or restricts his or her personal freedoms.

Importantly, a guardian is appointed to make some or all of the personal decisions for the ward as listed herein, but is not authorized to handle the ward's financial affairs. A conservator must be appointed to make financial decisions for the protected person. A conservatorship establishes the power of a conservator to contract, pay bills, invest assets, and perform other financial functions for the protected person. A guardianship may be established whether or not a conservatorship is also established.

Guardianship should only be sought if the proposed ward's judgment or decision making is a major threat to the individual's welfare. A court may deny a petition for guardianship if it finds there are less restrictive alternatives. Courts have established that the right to autonomy and self-determination should allow every person to make their own decisions. A least restrictive alternative is an option which allows a person to keep as much autonomy and self-determination as possible while still protecting the person. An example of a less restrictive alternative is the execution of an advance directive for health care when the proposed ward has capacity. This underscores the importance of any person planning for incapacity, no matter how young or healthy they may be. Likewise, a plan established by an individual when they have capacity that allows for formal or informal supports, a family plan for care that is agreed to by the incapacitated individual, or a plan established by a case manager or health care facility that implements and coordinates ongoing personal care needs, would all allow for the avoidance of a guardianship as being less restrictive alternatives.

The decision regarding whether a guardianship may be necessary for a friend or loved one, or establishing an estate plan that would avoid the need for a guardianship in the event of incapacity should be weighed and considered with an attorney. Our attorneys are available to work with you to help make the best decision relating to a proposed or ongoing guardianship, or to provide estate planning needs. ■