

Guardianship by Country:  
Resource for Second World Congress on Adult Guardianship

 <p><b>Country:</b> United States of America <b>Population:</b> 314 million <b>Number of people under Adult Guardianship:</b> Unknown</p>
<p><b>Relevant legislation</b></p> <p>Art. V of the Uniform Probate Code and Uniform Guardianship and Protective Proceedings Act. Each of the 50 states, the District of Columbia, and the U.S.'s several territories (e.g. Puerto Rico, Guam, etc.) has its own guardianship statutes or codes.</p>
<p><b>Key terminology</b></p> <p>Guardian, advance directive, alleged incapacitated person or person at risk, substituted judgement</p>
<p><b>What types of guardianship exist? (personal welfare/financial affairs)</b></p> <p><i>Guardianship, Guardianship of the person:</i> personal affairs</p> <p><i>Conservatorship, Guardianship of the estate:</i> property-related/financial affairs</p>
<p><b>Aside from personal appointments, who has the power to appoint an adult guardian?</b></p> <p>Only a court of competent jurisdiction may appoint a guardian.</p>
<p><b>What criteria do the court need to consider when deciding the need for a guardian?</b></p> <p>The court must find the alleged incapacitated person to be unable to manage some or all aspects of his/her personal or financial affairs. All states employ a functional rather than status based approach to defining incapacity, and in theory must choose the least restrictive limited guardianship/ conservatorship that is necessary to protect the person.</p> <p>Incapacity must be established by clear and convincing evidence. Some jurisdictions require a medical or multidisciplinary evaluation. In most states, courts rely on reports by visitors or guardians ad litem regarding incapacity and the need for guardianship.</p>
<p><b>What is the potential duration of an order?</b></p> <p>Indefinite. A guardianship/conservatorship may be terminated by the court on motion of the protected person or another person (including the guardian/conservator), via a restoration proceeding. A guardianship/conservatorship terminates at the death of the protected person.</p>
<p><b>Can a person under guardianship seek review of a guardian's appointment and/or a guardian's decisions?</b></p> <p>Yes. Depending on the circumstances and the jurisdiction, counsel may be appointed to represent the person under guardianship to appoint a different guardian or revoke the guardianship.</p>
<p><b>Who can be appointed as guardian? (e.g., family members, private guardian, private body, public body)</b></p> <p>In almost all states, any adult who has an interest in the person's welfare may file a petition</p>

for guardianship/conservatorship. Almost all statutes contain a priority listing among potential guardians, usually beginning with the spouse and proceeding through other family members (parent, sibling, other relatives), a person with whom the alleged incapacitated person has resided, etc. Some states have a Public Guardian that has limited authority and capacity to serve as guardian for indigent individuals.

Professional guardians may be individuals, limited liability companies, or other entities. Most states do not have any credentialing, licensing, or registration requirements to hold oneself out as a “professional” guardian.

**What are the responsibilities of an adult guardian? (e.g., what principles or guidelines must they comply with)**

Guardians are usually required to utilize a substituted judgment and/or best interest standard, although not all state statutes are explicit in articulating these standards.

**How are adult guardians monitored and/or supported? (e.g., overseeing body, support for volunteer guardians)**

State law pertaining to monitoring and accountability is variable. Most state laws require annual or less frequent, but regular, accountings of the guardian’s activities and conservator’s expenditures of the protected person’s assets, but these accountability provisions are not always enforced.

**Does an existing enduring Power of Attorney (personal welfare/financial) remove the need for guardianship when capacity is lost?**

A durable power of attorney for property obviates, at least in theory, the need for a conservatorship unless the scope of the power granted to the agent does not cover necessary transactions.

Durable powers of attorney and health care directives are intended to eliminate the need for guardianship. If these documents are abused, or if the named agent is unable or unwilling to act in accordance with her fiduciary obligations, a guardian and/or conservator will likely be appointed.

**What costs are associated with guardianship and who pays? (e.g., application costs, court costs, yearly service fees)**

Costs of guardianship include filing fees, litigation costs, attorneys’ fees, and fees paid to professional guardians. The costs of such a proceeding are usually imposed on the alleged incapacitated person, to be paid from his or her assets. If the person is indigent, the state bears the costs of the proceeding, including attorneys’ fees for appointed counsel, and any costs associated with the guardianship, such as fees paid to the guardian.

**Additional comments (Interesting elements of your country’s system than are not covered above)**

Guardianship proceedings in the U.S. are civil judicial proceedings subject to the rules of procedure and to a lesser extent the rules of evidence. Both petitioner and respondent (the alleged incapacitated person) are entitled to present evidence, cross-examine witnesses, and make arguments to the court in a formal hearing.