

Anatomy of a Guardianship: Case Study and Red Flags for Abuse

About Guardianship

What is guardianship?

In a guardianship, the court appoints a person or entity to make personal and/or property decisions for someone whom the court finds cannot make decisions for themselves. Guardianship laws, terms, practices, and procedures vary by state.¹

Who can be a guardian?

Guardians can be family, friends, professionals, public agencies, or private for-profit or non-profit agencies.

Why is guardianship a remedy of last resort?

Guardianship may protect a vulnerable person from harm but also results in the removal of their fundamental legal rights. It should be ordered only after *less restrictive options* such as informal or formal supports have been tried and exhausted.

Is a guardian a fiduciary?

As a fiduciary in a trust relationship, a guardian owes a person under guardianship a duty of trust, care, and confidentiality, and must put the person's interests above their own.

Key Elements of a Case

- 1 Petition
- 2 Notice
- 3 Counsel
- 4 Court Investigator
- 5 Capacity Assessment
- 6 Court Hearing
- 7 Court Order
- 8 Guardian's Responsibility to the Person
- 9 Guardian's Responsibility to the Court
- 10 Court Monitoring of the Guardian
- 11 Restoration of Rights

CASE STUDY

Gloria, an 86-year-old widow with heart failure and dementia, lives at home with her son, Felipe, 50, unemployed and a heavy drinker. She relies on Felipe to shop for food, clean the home, and drive her to the doctor. Gloria's daughter, Sonia, who lives in another state, recently visited and found her mother malnourished, disheveled, and confused. The home was messy, the bills hadn't been paid, and Gloria's ATM card was missing. Felipe denied any problems. Enraged, Sonia filed a petition for guardianship of Gloria.

Key Elements of a Guardianship Case

1. Petition

A petition is a legal form requesting the court to appoint a guardian. A petitioner might be a family member, friend, adult protective services, a hospital, or anyone concerned about the person's welfare. Most petitioners have an attorney draft and submit the petition, but some file it themselves.

What information is included in the petition?

- The petitioner's name and contact information
- The need for a guardian to manage personal or financial affairs or both
- Supporting evidence showing the need for guardianship
- The proposed guardian
- In some cases, a medical evaluation letter or report must be filed with the petition

What is required before a petition is granted?

Before granting a petitioner's request, the court must consider whether "less restrictive options" to guardianship could protect the adult and preserve rights.



Red Flags of Abuse

- The petition itself could be considered abusive if it is unnecessary or overbroad, and if less restrictive options have not been considered or attempted.
- The filing may be prompted by family dynamics rather than an adult's need.



Case Application

Does Gloria need food or medication to regain strength? Can she make some decisions on her own? If Sonia filed the petition in anger, she may not have considered less restrictive options or her mother's wishes. If Sonia is Gloria's agent under a health care and/or financial power of attorney, she may be able to assist her mother and prevent exploitation by Felipe without the need for filing a guardianship petition.

2. Notice

To preserve due process rights, the person named in the petition must get written notice of the proceedings. They must be informed that their decision-making authority is challenged, and that they may lose rights. Formal notice gives time to prepare for the court hearing, get an attorney, attend the hearing, and present evidence.

When must notice be delivered to the person?

State laws vary but typically specify that notice must be received 14 days before the court hearing on the petition.

Are there other notice requirements? Notice must be meaningful. Some states specify:

- The *format* of the written notice, such as bold, large type
- That the petition must be in “*plain language*” – easy to read and understand
- That notice must be in the person’s *preferred language*
- That notice include *rights that could be lost*, and *rights during the hearing*



Red Flags of Abuse

Failing to provide meaningful advance notice could signal possible abuse.



Case Application

Gloria needs to know that her self-determination is at stake, and be provided the opportunity to respond to the petition. Even if Felipe’s apparent mistreatment triggered the filing, failing to give Gloria notice compromises her due process rights.

3. Counsel

Why does the person named in the petition need legal representation?

An adult named in a guardianship petition is in a very precarious position, at risk of losing their rights. A court hearing will be held, and a judge will decide the outcome. They need an attorney to represent their wishes in court and advocate for their rights.

What does the “right to an attorney” mean?

Many state laws give the adult “*a right to an attorney*” – that is, the person can retain an attorney for the proceeding. In some states, the court must appoint an attorney in selected cases. Several states provide for counsel in every case. Attorney fees may come out of the person’s funds. If there are no funds the state may pay the fees.

What is the role of an attorney representing the adult?

The attorney should vigorously represent the adult’s wishes. In some states, an attorney may serve as a “guardian ad litem” – charged by the court with investigating the case – which is very different from an attorney who advocates for the person’s wishes and rights.



Red Flags of Abuse

- Without a qualified attorney, an adult’s rights may be compromised.
- If the attorney fails to vigorously advocate or has a conflict of interest, ethical representation may be jeopardized.



Case Application

Gloria’s ability to retain an attorney to advocate for her rights is critical to the preservation of her independence and decision-making.

4. Court Investigator

How do judges get the case information they need?

Court investigators, court visitors, or “guardians ad litem” are neutral agents of the court.

- They interview the adult named in the petition about their abilities, limitations, needs, and wishes
- They assess the safety of the adult’s setting
- They also may interview the proposed guardian, family, or friends and review legal documents such as a power of attorney

A court investigator’s report may address whether:

- There are alternatives to guardianship
- A full or limited guardianship is needed
- The proposed guardian is suitable
- The person can and wants to attend the hearing



Red Flags of Abuse

Court investigators or guardians ad litem may uncover abuse, but in some cases they may prompt abuse by failing to conduct a thorough examination, impeding a fair and just process, or by being biased if selected by the petitioner’s attorney.



Case Application

For Gloria, the court investigator might find facts relevant to the appointment process – for instance, that Felipe has mental health problems or a criminal record; that Sonia has Gloria’s power of attorney; or that Gloria wants to live at home but needs care to do so.

5. Capacity Assessment

How do courts determine an adult's capacity?

A court must assess whether the adult meets the state law definition of incapacity based on medical, psychological, functional, and other factors, as well as the risk of harm.

- Conditions that may impair decision-making ability include dementia, mental illness, intellectual disability, substance use disorder, or head injury
- A diagnosis alone doesn't mean a guardian is needed
- Capacity is task- and decision-specific. An adult may be able to decide some things and not others
- Context matters. An adult in a protected environment with strong support is more likely to have the capacity needed for the decisions at hand

Courts may order a clinical evaluation to be by a professional such as a physician, clinical psychologist, psychiatrist, or neuropsychologist.

- Evaluations generally include interviews with the adult, tests, and sometimes interviews with others who know or care for the person
- Professionals may testify in court and/or prepare a report



Red Flags of Abuse

- Failure to sufficiently consider clinical and functional evidence about the person's capacity is an abuse of the guardianship process.
- Reliance on a brief, conclusory report does not support a meaningful determination of the person's capabilities, resulting in an overbroad order and deprivation of rights.



Case Application

Even if Gloria has mild dementia, she may still have the ability to meet her basic personal and financial needs, especially with Sonia's support, and technology aids such as direct deposit, and medication reminders.

6. Court Hearing

The court must conduct a hearing with due process of law, at which each party has the right to present evidence.

- Uncontested hearings may be brief, with few if any witnesses
- Contested hearings could last days, involving many witnesses and expert testimony
- The hearing may be open to the public or closed to preserve privacy
- The case may be heard by a judge with expertise in guardianship/probate, a general jurisdiction judge with less frequent exposure to guardianship cases, or by a jury.



Red Flags of Abuse

- The adult might have no attorney at the hearing. The adult might not be present. There might be few or no witnesses and little evidence presented.
- The judge might lack training in guardianship or might have a backlog of cases and be pressed for time.
- The case could be one in an ongoing hospital to guardianship pipeline,² with an assessment that does not fully examine the facts.



Case Application

The decision in Gloria's case may be dependent upon a number of factors, including whether she contests the petition, whether Felipe contests the petition or the choice of guardian, the sufficiency of evidence presented by each party, and the relevant state laws.

7. Court Order

In most states, the finding in a court order must be based on clear and convincing evidence. Requirements for court orders vary, but they often:

- Include a statement that the needs cannot be met by a less restrictive option, and that proper notice has been given
- Give the guardian access to medical records and other protected information
- Grant the guardian powers under state law. “*Limited orders*” restrict the guardian’s powers, such as the power to manage certain funds or make certain decisions
- Limited orders also may specify rights retained by the adult, such as right to vote

Can guardianship be ordered if there is an existing financial power of attorney or advance health care directive?

- Yes. The court specifies the extent to which the agent can still exercise authority
- There may be a need for decision-making beyond the scope of planning documents
- The agent under the power of attorney may be committing abuse or exploitation, and the judge may revoke the agent’s authority



Red Flags of Abuse

A full or “plenary” order transferring maximum authority to the guardian might be considered abusive because it fails to allow the adult any degree of self-determination.



Case Application

If the judge finds that less restrictive alternatives are unavailable, and a guardianship is necessary, the court order should specify the rights that Gloria retains and those given to the guardian. If possible, Gloria should retain rights in areas important to her – for example, visiting with friends or participating in a faith community.

8. Guardian's Responsibility to the Person

- Provide for the adult's safety, while respecting their self-determination. *Being a guardian is one of society's most difficult roles in balancing these two principles.*
- Know the adult's individual abilities, needs, limitations, and wishes, and seek their input. This requires frequent in-person and virtual communication. A supportive family member or friend, basic communication techniques, and communication technology can help.
- Make decisions based on the person's values and wishes. Only if this is not possible, may the guardian make a more objective decision based on the person's best interests.³
- Monitor the adult for potential of harm by a third party such as a visitor or scammer.
- If health conditions, living arrangements, and/or financial circumstances have changed, a guardian may need to intervene to best support the individual.



Red Flags of Abuse

A guardian may need to intervene if the adult's living arrangement is no longer safe, if they become isolated, or if someone is exercising undue influence. However, the guardian may commit the abuse, especially when they have limited contact with the adult, and make inappropriate decisions, or are untrained, poorly intentioned, over-committed, or have conflicts of interest.



Case Application

If Sonia is appointed guardian and suspects that Felipe is harming their mother, she may ask him to move and may restrict his visitation. On the other hand, if Sonia as guardian neglects Gloria, the court should intervene.

9. Guardian's Responsibility to the Court

- If managing a person's money and property, the guardian must file an inventory of what the person owns and owes. The inventory is a baseline for later financial report filings.
- The court may require a bond, which functions like insurance. If the guardian fails to act properly and money is lost or stolen, the bonding company will pay the money back.
- The court could order a "restricted account" to limit the funds a guardian can use without court approval.
- The guardian must file reports with the court, generally annually.
- A guardian of property must file accountings, showing a beginning balance, income during the year, expenses, and a final balance
- A guardian of the person must file reports of a person's welfare, and in some cases a plan of care



Red Flags of Abuse

- Failure to file, or timely file, a required inventory, plan, report, or accounting
- Filing an inventory that does not include all of the assets the person owns
- Filings that don't add up, or are unclear, incomplete or inconsistent



Case Application

If Sonia is named guardian for Gloria and files an accounting that is inconsistent with a prior year's balance, this may suggest that she or someone else stole money.

10. Court Monitoring of the Guardian

How do courts monitor guardianships?

Monitoring varies by state law and court resources, but best practices may include:

- Ensuring that guardians file plans, reports, inventories, and accountings on time
- Promptly reviewing the filings
- Independently investigating the person's well-being and finances
- Responding to complaints about a guardian's behavior or neglect

If monitoring uncovers abuse, courts can:

- Limit the guardian's access to accounts
- Appoint an investigator or co-guardian
- Fine or remove the guardian
- Modify the court order or terminate an unnecessary guardianship.



Red Flags of Abuse

Courts are more likely to miss or overlook abuse by the guardian if:

- No one at the court is assigned to review the guardian's filings
- There is no mechanism for court response to complaints about a guardian
- Judges or court staff have conflicts of interest in a specific case or certain case types



Case Application

Monitoring may reveal that Sonia does not understand the court order or is overwhelmed by her responsibilities. The court could explain the order and refer her to supportive community resources. But if the court fails to review Sonia's reports or follow up on late or missed filings, Gloria may not receive the attention and care she needs.

11. Restoration of Rights

Can a guardianship be terminated?

If an adult's condition improves or their supports increase so that they do not need the protection of a guardian, they may be "*restored to capacity*" and regain their rights – or at least their rights may be partially restored. Every state has a process for restoration.

What are the challenges to gaining restoration of rights?

- The adult may be unaware of the process or unable to get an attorney to help
- A formal petition may be required, which may be difficult without an attorney
- Some attorneys are unwilling to represent a person with a guardian if they believe the individual lacks capacity to retain them or the funds to pay them
- Some guardians may actively oppose the adult's restoration



Red Flags of Abuse

- Challenges to seeking restoration may delay or defeat a person's ability to regain rights.
- Cases ripe for restoration may languish in court files because there is no review.



Case Application

With a condition like dementia, Gloria may be subject to guardianship for the rest of her life. If her condition, functionality, and supports improve, restoration may be possible.

CONCLUSION

What will happen to Gloria after Sonia files for guardianship? There are many factors to consider: Does Gloria have capacity to make health care and financial decisions – or at least some of the decisions? Are less restrictive options available to support her? Is there an investigator and/or a medical expert to assess Gloria's case? If Felipe is abusing and neglecting his mother, what role is Sonia able or willing to undertake, and what rights can Gloria retain?



Each case is different and must be evaluated independently. The more we understand about the elements of a guardianship case, the more we can improve outcomes for adults like Gloria.

Endnotes

- 1 Frequently, “guardian” refers to someone appointed to make personal decisions, and “conservator” refers to someone appointed to make financial decisions, but definitions vary from state to state. Here, “guardian” will be used to describe both appointments.
- 2 In a completely different scenario, a hospital might file a petition just so a guardian can discharge the person from the hospital and move them to a nursing home. If this is for the convenience or financial benefit of the hospital, not the person, the petition may be unnecessary, especially if hospital failed to search for family members with existing power of attorney documents. This common scenario is called the “hospital to guardianship pipeline.”
- 3 See the *Standards of Practice* of the National Guardianship Association, <https://www.guardianship.org/wp-content/uploads/NGA-Standards-2022.pdf>