

# WHAT IS A GUARDIAN?

---



**Brain Injury Association of New York State**

10 Colvin Avenue

Albany, NY 12206-1242

Telephone: (518) 459-7911 • Fax: (518) 482-5285

Family Help Line: (800) 228-8201

E-mail: [info@bianys.org](mailto:info@bianys.org) • Web Site: [www.bianys.org](http://www.bianys.org)

...and  
other  
frequently  
asked  
questions  
about  
guardianship.

## INTRODUCTION

The Brain Injury Association of New York State (BIANYS) receives many inquiries from individuals with brain injuries and families regarding guardianship - what it is, who it is, why, when or how to have a guardian appointed. This booklet contains brief answers to the most frequently asked questions. It is designed to provide basic general information. THE INFORMATION CONTAINED IN THIS BOOKLET IS NOT A SUBSTITUTE FOR PROFESSIONAL LEGAL ADVICE. SEEK PROFESSIONAL ADVICE BEFORE PURSUING ANY STEPS.

## WHAT IS A GUARDIAN AND WHY WOULD I NEED ONE?

The role of the guardian is to help you manage the areas of your life with which you might need assistance. A guardian is a person or an organization that is appointed by a court to make decisions on your behalf if you become unable to take care of yourself, your property, or your finances. When a guardian makes decisions for you, he or she must take into account your wishes and desires, and make a decision that is in your best interest. Basically, what happens is that someone asks the court to appoint a guardian for you, and the court will decide if you need one. Then, according to your needs, the guardian is granted specific powers by a judge. The guardian may only act on your behalf within those specifically designated areas. You will be able to contribute to all the decisions that affect your life, and you

will retain full freedom of choice in the areas of your life over which the guardian has not been granted power.

Some of the decisions that a guardian may make on your behalf include decisions regarding food, clothing, shelter, health care, safety, property, and/or finances. For example, a guardian may help you apply for medical benefits that you may be entitled to or help you choose a doctor. The guardian may also make sure that your payments on your house or apartment and other bills are paid on time.

Sometimes, the guardian may make decisions with which you do not agree. When this happens, you may go to court to disagree with the guardian's decision. You can always question your guardian's motives and decisions and make the guardian accountable for his or her decisions in front of a judge. You may always have a judge review your guardian's behavior, if you feel that your guardian is not acting in your best interest.

## WHO CAN BE A GUARDIAN?

Any person over age 18 can be a guardian. A guardian may also be a non-profit organization that has a concern for individuals with disabilities and whose training and services would make it a suitable choice to serve as a guardian. Often the guardian is a family member, but the guardian can also be a friend or social worker.

In choosing a guardian, the judge will look carefully at your relationship with the proposed guardian. The judge wants to see if your relationship is a good one and if the guardian will act in your best interest. For example, a judge is unlikely to choose a person to whom you owe money to be your guardian.

## HOW DO I GET A GUARDIAN?

You, your family or certain others may ask a judge to choose a guardian for you. The judge must hold a hearing where you and your lawyer are present to decide if you need a guardian. The judge will look at all the evidence presented on your behalf, as well as evidence presented from those people who are trying to have a guardian chosen for you. At the hearing, the main thing the judge will look for is whether or not you have any disability and if you do, whether or not you are aware of your physical and/or mental limitations. The judge will try to see if you understand what might happen to you if you do not take steps to account for your limitations. The judge is also looking to see if you are likely to suffer harm because you are not able to take care of yourself.

If the judge finds that you need a guardian because you are likely to suffer harm, he or she may choose a guardian for you even though you do not want one. However, the judge will give the guardian the authority to act for you only to the extent that you need help. You will keep all the rights that the guardian is not given. Take, for example, a person who needs help with her finances

and property but can make her own decisions about medical care. In this case, a guardian may be chosen with limited powers to make decisions for that person about her finances and property but nothing else.

## DO I HAVE A RIGHT TO A LAWYER?

Yes, you have a right to have a lawyer represent you in court throughout the guardianship process. A lawyer will help you fight a decision that your guardian has made that is not in line with your wishes. You can choose your own lawyer, or the court will choose one for you. If you cannot afford a lawyer, the judge may be able to find you a lawyer to work for free or the state may pay the costs of your lawyer. If your case is dismissed and the judge decides that you don't need a guardian, the other side may be expected to pay for your attorney fees.

Your lawyer is working for you. The lawyer should have a personal interview with you and ask you questions to see what you want. For example, do you want a guardian who will only help you make medical care decisions or property decisions or are you totally against having a guardian at all? Your lawyer will obtain evidence, call witnesses, and form arguments for you. Your lawyer will explain the guardianship process and keep you informed. The role of the lawyer is to give you the best legal representation according to your wishes and desires.

## WHAT ARE THE DUTIES OF THE GUARDIAN?

Generally, the guardian must preserve, protect, and account for all of your property and finances. The guardian must act in a way that he or she believes will be in your best interest. A guardian is required to create and file an initial and annual report with the judge. These reports describe what to do for you, and how he or she plans to do it.

For example, if the guardian has powers over your property, a report might include a complete list of your belongings. On the other hand, if the guardian is allowed to manage your finances, the guardian must state what finances or bank accounts he or she has control over and how he or she plans to manage them. In the annual report, the guardian will describe your state of well-being and create a plan that describes where you will live and what social and personal services you will receive.

A guardian also must complete a training program that teaches the guardian about his or her legal duties and helps the guardian to understand what kinds of services are available to you.

If the guardian is chosen to help you make health decisions, the guardian must account for his or her personal visits with you and describe how he or she plans to provide for your personal needs. The guardian must describe what medical, dental, mental health, or related services will be provided for you. The guardian also must look into insurance and other benefits to which you are entitled.

## WHAT ARE THE POWERS OF THE GUARDIAN OVER MY PROPERTY?

The judge is the only person who determines what rights a guardian may have. Therefore, the guardian may make decisions about your property only if the judge determines that you need help managing your property. For example the judge may allow the guardian to sell your personal items in order to cover the costs of your care. Or, the guardian may be allowed to keep money generated from your property as payment for serving as your guardian.

Guardians also may be given the power to enter into contracts for you, create or close your bank accounts, purchase or sell your stocks, change beneficiaries under your insurance plans, and cash in policies to receive money to pay for your bills. A guardian may be allowed to release confidential records, and apply for and receive governmental benefits in your name.

## WHAT ARE THE POWERS OF THE GUARDIAN OVER MY PERSONAL NEEDS?

The judge may allow the guardian to make decisions for you regarding your personal care. As with all other decisions, the guardian must act in a way that takes into account your needs and desires and is in your best interest. A judge may allow a guardian to decide with whom you may socialize, where you should live, whether or not you should travel and drive, and where you should attend

school. The guardian may even be authorized to make health care decisions for you, although the guardian may not decide that life sustaining treatment be withdrawn or withheld. While a guardian is granted permission to make lots of decisions for you, a guardian may not revoke a power of attorney or health care proxy that you had previously signed before you became disabled. In addition, the guardian may not revoke your living will, if it was made at a time before you became incapacitated. In the event that the guardian does these prohibited things, the judge may step in and take away the guardian's power and make the guardian's decisions invalid.

## WHAT CAN I DO IF I AM UNHAPPY WITH MY GUARDIAN?

If you find that you are unhappy with your guardian, you may go to court to have the guardian removed. In fact, any person concerned with your welfare may bring an action to have a guardian removed.

The judge can take away, suspend, or limit the powers granted to the guardian if, at any time, the judge finds that the guardian did not act in your best interest, or that you are able to exercise some or all of the powers you did not have before. The court can also remove a guardian if the guardian fails to comply with the court's order granting the specific powers and duties of the guardian.

Source: NY Mental Hygiene Law Article 81. (McKinney 1997)

## WHO CAN I CONTACT FOR FURTHER INFORMATION?

### ✓ **Guardianship Association of New York State**

c/o Joyce Stratton, MSW, DSW, President  
200 East 27th Street, Suite 7R  
New York, NY 10016  
(212) 679-7791  
(212) 679-8914 Fax

### ✓ **National Guardianship Association**

Laury Adsit, Executive Director  
1604 North Country Club Road  
Tuscon, AZ 85716-3102  
(520) 881-6561

### ✓ **Office of Court Administration**

25 Beaver Street  
New York, NY 10004  
(212) 428-2700

### ✓ **Brookdale Center on Aging of Hunter College**

425 East 25th Street  
New York, NY 11010  
(212) 481-4433

### ✓ **Mental Hygiene Legal Service**

First Judicial Department  
60 Madison Avenue,  
2nd Floor  
New York, NY 10010  
(212) 779-1734

*Counties Covered:* Bronx and Manhattan

✓ **Mental Hygiene Legal Service**

Second Judicial Department  
170 Old Country Road  
Mineola, NY 11501  
(516) 746-4545

*Counties Covered:* Dutchess, Kings, Nassau, Orange,  
Putnam, Queens, Richmond, Rockland, Suffolk, Westchester

✓ **Mental Hygiene Legal Service**

Third Judicial Department  
P.O. Box 7028  
Capital Station Annex  
Albany, NY 12225  
(518) 474-4453

*Counties Covered:* Albany, Broome, Chemung, Chenango,  
Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton,  
Greene, Hamilton, Madison, Montgomery, Otsego, Rensselaer,  
St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler,  
Sullivan, Tioga, Tompkins, Ulster, Warren, Washington

✓ **Mental Hygiene Legal Service**

Fourth Judicial Department  
42 East Avenue  
Rochester, NY 14604  
(716) 454-1898

*Counties Covered:* Allegany, Cattaraugus, Cayuga, Chautauqua,  
Erie, Genesee, Herkimer, Jefferson, Lewis, Livingston, Monroe,  
Niagara, Oneida, Onondaga, Ontario, Orleans, Oswego, Seneca,  
Steuben, Wayne, Wyoming, Yates

✓ **N.Y.S. Office of Mental Retardation and  
Developmental Disabilities**

44 Holland Avenue  
Albany, NY 12229-0001  
(518) 473-1997



**About the Brain Injury Association  
of N.Y.S.**

The Brain Injury Association of New York State (BIANYS) is a state-wide non-profit membership organization that advocates on behalf of individuals with brain injury and their families, and promotes prevention. Established in 1982, BIANYS provides education, advocacy, and community support services that lead to improved outcomes for children and adults with brain injuries and their families. BIANYS also offers a toll free Family Help Line, chapters and support groups throughout the state, prevention programs, mentoring programs, speakers bureau, a video library and a publications library. BIANYS plays a central role in the development of public policy on the state and local level.