

RIGHTS OF AN INDIVIDUAL UNDER GUARDIANSHIP

Guardianship is the legal process by which a court determines that a person is incapable of making decision about some or all areas of life. Because of certain medical conditions, a developmental disability, mental retardation, dementia, mental illness, or the inability to communicate, a person may not be able to take care of his or her own finances, make medical decisions, or understand the need for assistance with the activities of daily living.

After the court has heard medical testimony and other reliable evidence, it may declare a person to be “**incapacitated**” and appoint a **guardian** to make decisions on the person’s behalf. This determination of incapacity and the appointment of a guardian may take specific rights from the person. Once under guardianship, the court might refer to this person as the “**ward,**” the “**incapacitated person**” or the “**protected person.**”

The court should specifically state which rights it is taking from the ward. The ward keeps all rights that the court has not specifically given to the guardian. State laws may also restrict the ward’s rights. The state Constitution, for example, may deny the ward the right to vote. The ward, however, has the right to the **least restrictive** guardianship suitable to his or her needs and conditions. The guardian also has the affirmative duty to advise the ward of his or her rights and to attempt to maximize the ward’s self reliance and independence.

Rights of the Ward

In general, the ward keeps all legal and civil rights guaranteed to all residents under the states’ and the United States’ Constitution, **except those rights which the court grants to the guardian.**

These rights include, but are not limited to:

1. The right to be treated with dignity and respect.
2. The right to privacy, which includes the right to privacy of the body, and the right to private, and uncensored communication with others by mail, telephone, or personal visits.
3. The right to exercise control over all aspects of life that the court has not delegated to the guardian.
4. The right to appropriate services suited to the ward’s needs and conditions, including mental health services.
5. The right to have the guardian consider the ward’s personal desires, preferences, and opinions.
6. The right to safe, sanitary, and humane living conditions within the least restrictive environment that meets the ward’s needs.
7. The right to procreate.
8. The right to marry.
9. The right to equal treatment under the law, regardless of race, religion, creed, sex, age, marital status, sexual orientation, or political affiliations.
10. The right to have explanations of any medical procedures or treatment. This includes information about the benefits, risks, and side effects of the treatment, and any alternative procedures or medications available.
11. The right to have personal information kept confidential. This may include withholding certain information the ward may not want his or her family to know. The guardian may have to provide personal information to apply for benefits, or in emergency situations where the ward or others may be in danger, or if the information is required by law to be shared with agencies or health departments. Personal information may also be contained in the reports the guardian makes to the court, and which may be available for others to see.
12. The right to review personal records, including medical, financial, and treatment records.
13. The right to speak privately with an attorney, ombudsman, or other advocate.
14. The right to petition the court to modify or terminate the guardianship. This includes the right to meet privately with an attorney or other advocate to assist with this legal procedure.

15. The right to bring a grievance against the guardian, request the court to review the guardian's actions, request removal and replacement of the guardian, or request that the court restore rights if it can be shown that the ward has regained capacity to make some or all decisions. The guardian also has a responsibility to request that the ward's rights be restored when there is evidence that the ward has regained capacity.

Removal and Replacement of a Guardian

A **petition** asking the court to review the guardianship can be filed in the clerk of court's office by the ward, the ward's attorney, the ward's family, or any concerned party. This petition should simply state the reasons a review is being requested. It is strongly recommended that the petitioner seek **legal assistance** when considering whether to file such a petition. There may be quicker, more effective, and/or less costly remedies available, such as **writing a letter** to the guardian or asking an **ombudsman or other advocate** to intervene with the guardian.

The court may order a **hearing** at which the party bringing the petition presents evidence. At the conclusion of the evidence, the court may order the guardian to consider or pursue a different course of action, be more responsive to the needs of the ward, file timely reports or accountings, or the court may **remove and replace** the guardian. Where it can be shown that the ward has regained the capacity to make decisions in some or all areas, the court may **dismiss or modify** the guardianship.