

THE NUTS AND BOLTS OF GUARDIANSHIP PROCEEDINGS

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Sometimes because of a catastrophic illness or accident or a progressive disease, such as Alzheimer's, a person loses the ability to make rational decisions about his or her property or person. In these situations the Supreme Court of New York has the power to appoint an article 81 guardian for a person unable to manage his or her financial affairs and/or personal matters. In most cases an Article 81 guardianship proceeding takes several months to accomplish although the proceeding can be expedited in special circumstances.

To get the ball rolling, a person with an interest in the incapacitated person petitions the Court to seek the appointment of a guardian. Generally, the petitioner requests that he or she be appointed in this role. In response to the petition, the court appoints a court evaluator to investigate the facts presented in the petition and to advise the court. Sometimes the court also appoints an attorney to represent the alleged incapacitated person. Following a review of the court evaluator's report and testimony in open court by various persons, the Court decides who will be the guardian and what authority the guardian will have.

After appointment as guardian, the guardian must take a course which provides instruction to the guardian about his or her duties as guardian. The Court monitors the guardian's performance and requires the guardian to submit yearly accountings.

A guardianship proceeding is costly. The attorney for the petitioner and the court evaluator are each paid for their time. There are court costs and if an attorney is appointed to represent the person in need he will also be awarded a fee. Occasionally interested parties who don't agree with the requests in the petition contest the proceeding. The attorney representing the contesting party is often awarded a fee.

In most cases, guardianship proceedings should be avoided if there is any other method of managing the incapacitated person's finances and/or person. It is for this reason we usually recommend to our clients that they create a plan in case of incapacity. Often this plan involves creating powers of attorney and/or preparing revocable trusts which name trustees with the ability to act in the case of incapacity. A consultation with a knowledgeable Elder Law attorney will help you determine what plan will most efficiently help you avoid the expense, uncertainty and emotional toll of a guardianship proceeding.