

# OVERVIEW OF ADULT GUARDIANSHIPS IN MARYLAND

*Presented by:*

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# Adult Guardianships in Maryland



- ❖ Person
- ❖ Property

MD. CODE, ESTATES & TRUSTS, §13-701, *et seq.*  
MD. CODE, ESTATES & TRUSTS, §13-201, *et seq.*  
Maryland Rules 10-701, *et seq.*

# Legal Standard - Guardian of Person

- ❖ lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his or her person, including provisions for health care, food, clothing or shelter
- ❖ due to a physical or mental disability or disease, habitual drunkenness, or addiction to drugs and
- ❖ no less restrictive alternative is available that is consistent with the welfare and safety

MD. CODE, ESTATES & TRUSTS, §13-705(b)

# Legal Standard – Guardian of Property

- ❖ due to a physical or mental disability, disease, habitual drunkenness, addiction to drugs, imprisonment, compulsory hospitalization, confinement, detention by a foreign power, or disappearance
- ❖ unable to manage his or her property and affairs effectively and
- ❖ the alleged disabled person has or may be entitled to property or benefits that require proper management

Md. Code, Estates & Trusts, §13-201(c)

# Parties to a Guardianship



- ❖ Petitioner
- ❖ Alleged Disabled Person (“ADP”)
- ❖ Interested Persons

# Interested Persons

- ❖ Person or Health Care Agent Designated in Writing by Alleged Disabled Person
- ❖ Spouse
- ❖ Parents
- ❖ Adult Children
- ❖ Adult Grandchildren (only if there is no spouse and there are no parents or adult children)
- ❖ Siblings (only if there is no spouse and there are no parents or adult children)
- ❖ Any Other Heirs at Law
- ❖ Guardian (if appointed)
- ❖ Any Person Holding a Power of Attorney of the Alleged Disabled Person
- ❖ Any Other Person Having Assumed Responsibility for the Alleged Disabled Person
- ❖ Alleged Disabled Person's Attorney
- ❖ Any Government Agency Paying Benefits to or for the Alleged Disabled Person
- ❖ Any Person Having an Interest in the Property of the Alleged Disabled Person
- ❖ All Other Persons Exercising Control over the Alleged Disabled Person or the Person's Property
- ❖ A Person or Agency Eligible to Serve as Guardian of the Person of the Alleged Disabled Person

MD. CODE, ESTATES & TRUSTS, § 13-101(j)  
Maryland Rule 10-103(f)

# Role of Interested Persons

- ❖ object to the need for a guardian
- ❖ object to the appointment of the Petitioner as guardian
- ❖ allege that the disabled person may incur damages as a result of the appointment of a guardian
- ❖ present any material and/or relevant information which may affect the guardianship proceedings
- ❖ After the appointment of guardian, and for the duration of the guardianship, an interested person may invoke the jurisdiction of the court at any time to resolve questions related to the guardianship estate or its administration

# Contents of Guardianship Petition

- ❖ ADP's name, age, date of birth, gender and address (including a statement that the ADP resides or is currently located in the jurisdiction in which the petition is filed)
- ❖ Petitioner's name, age, address, telephone number, relationship to ADP
- ❖ Whether Petitioner has been convicted of a crime listed in Code, Estates and Trusts Article, §11-114 and, if so, a statement of the good cause exists for Petitioner to be appointed as guardian
- ❖ Prospective guardian's name, age, relationship to ADP (if not the petitioner)
- ❖ Whether prospective guardian has been convicted of a crime listed in Code, Estates and Trusts Article, §11-114 and, if so, a statement of the good cause exists for Petitioner to be appointed as guardian
- ❖ If the ADP resides with petitioner, name and address of an additional person on whom initial service shall be made
- ❖ Names, addresses, and telephone numbers of all interested persons
- ❖ Names and addresses of the persons with whom the ADP resides or has resided over the past five years (including the length of time of the ADP's residence with each person)
- ❖ Brief description of the alleged disability and how it affects the ADP's ability to function
- ❖ Statement of relevant facts relating to the legal standard for guardianship (of person and/or property)
- ❖ Description of the less restrictive alternatives that have been attempted and have failed
- ❖ List of all the property in which the ADP has any interest (guardianship of the property only), including the petitioner's interest in any of this property
- ❖ Name and address of a guardian, if one has been appointed, and the court that appointed the guardian
- ❖ All other proceedings regarding the alleged disabled person (including criminal)
- ❖ All exhibits required (copy of any power of attorney, copy of any instrument nominating a guardian, certificates of incapacity)

Maryland Rule 10-111



# Certificates of Incapacity

- ❖ two physicians licensed to practice medicine in the United States  
OR one licensed physician and either one licensed psychologist  
or one certified clinical social worker (LCSW-C)
- ❖ at least one examination or evaluation must occur within 21 days  
before the date the petition is filed
- ❖ admissible as evidence of disability at a guardianship hearing,  
without presence of certifying health care professional

Maryland Rule 10-202(a)(1)

# Certificates of Incapacity - Contents

- ❖ name, address, and qualifications of the person who performed the examination or evaluation
- ❖ a brief history of that person's involvement with the ADP
- ❖ the date of the last examination or evaluation of the ADP
- ❖ the person's opinion as to:
  - (A) the cause, nature, extent, and probable duration of the disability;
  - (B) whether institutional care is required; and
  - (C) whether the disabled person has sufficient mental capacity to understand the nature of and consent to the appointment of a guardian

Maryland Rule 10-202(a)(3)

# Certificates of Incapacity

- ❖ If certificates cannot be provided, the Petitioner may request that the court appoint two appropriate health care providers to evaluate the ADP and file their reports with the court
- ❖ Petitioner must not be able to produce certificates because the ADP:
  - (1) is under the control of a person who has refused to permit examination and
  - (2) may be at risk unless a guardian is appointed

Maryland Rule 10-202(a)(3)

# After filing of petition

- ❖ Order to Show Cause issued by Court  
(Maryland Rule 10-104)
- ❖ Court appoints counsel to represent ADP (if the ADP is not already represented by an attorney of his own choosing)  
(Maryland Rule 10-106; MD. CODE, ESTATES & Trusts, 13-211(b) and 13-705(d)(1))

# Court-Appointed Counsel



- ❖ Maryland Rule Professional Conduct 1.14
- ❖ In re: Sonny E. Lee, 132 Md. App. 696 (2000)

# MRPC 1.14



When representing a client under a disability, an attorney is required, as far as reasonably possible, to maintain a normal client-lawyer relationship with the ADP

# *In re: Sonny E. Lee*



## Court-appointed counsel must:

- ❖ Explain the proceedings to his client (the ADP)
- ❖ Advise him of his rights
- ❖ Keep his confidences
- ❖ Advocate his position
- ❖ Protect his interests

# *In re: Sonny E. Lee*

“In guardianship proceedings, effective representation by counsel ensures that the proper procedures are followed by the court, that the guardianship is imposed only if the petitioner proves by ‘clear and convincing evidence’ that such a measure is necessary and there is no reasonable alternative, that the guardianship remains no more restrictive than is warranted, that no collusion exists between the court appointed investigator and petitioner, and that the client's right to appeal is exercised, if appropriate.”



# Court-Appointed Counsel

Court-appointed counsel may also decide whether to:

- ❖ request the presence of the physicians who prepared physician certificates
- ❖ request the appointment of an independent investigator
- ❖ request a closed hearing
- ❖ assert or waive his client (the ADP's) right to be present at the hearing
- ❖ assert or waive a jury trial

# Issues for trial



- ❖ Is appointment of a guardian is necessary?
- ❖ Who should be appointed guardian?

# Trial – Guardian of Person



- ❖ Hearing is required
- ❖ Burden of proof – “clear and convincing evidence”
- ❖ If contested, jury trial is scheduled unless waived

# Trial – Guardian of Property



- ❖ Hearing not required
- ❖ Burden of proof – “preponderance of the evidence”
- ❖ If no objection filed, court may rule summarily

# Who should be appointed guardian?

## Priorities for appointment in statute:

- ❖ *A conservator, committee, guardian of property, or other like fiduciary appointed by any appropriate court of any foreign jurisdiction in which the minor or disabled person resides*
- ❖ *A person, agency, or corporation nominated by the disabled person if the disabled person was 16 years old or older when the disabled person signed the designation and, in the opinion of the court, the disabled person had sufficient mental capacity to make an intelligent choice at the time the disabled person executed the designation*
- ❖ *A health care agent appointed by the disabled person in accordance with Title 5, Subtitle 6 of the Health - General Article*
- ❖ *The disabled person's spouse*
- ❖ *The disabled person's parents*
- ❖ *A person, agency, or corporation nominated by the will of a deceased parent*
- ❖ *The disabled person's children*
- ❖ *Adult persons who would be the disabled person's heirs if the disabled person were dead*
- ❖ *A person, agency, or corporation nominated by a person caring for the disabled person*
- ❖ *Any other person, agency, or corporation considered appropriate by the court*
- ❖ *Director of the local department of social services (for adults less than 65 years old) or Secretary of Aging or the director of the area agency on aging (for adults 65 years old or older) (person only)*

## Priorities overcome by a showing of “good cause”

MD. CODE, ESTATES & Trusts, § 13-207 (property)  
MD. CODE, ESTATES & Trusts, § 13-707 (person)

# “Good Cause” to overcome statutory priority

- ❖ nature of and length of relationship between the interested person and the alleged disabled person
- ❖ frequency of contact between the interested person and the alleged disabled person
- ❖ why the interested person wants to be guardian
- ❖ what is the interested person’s plan for the alleged disabled person if he is appointed guardian
- ❖ how close does the interested person live to the alleged disabled person and how often will the interested person be able to visit the alleged disabled person
- ❖ whether the interested person is reasonably available to make decisions for the alleged disabled person
- ❖ whether the interested person is in good health and able to take on the duties of a guardian
- ❖ what other responsibilities the interested person has (e.g., young children, demanding job)
- ❖ whether the interested person is willing to confer with the alleged disabled person and/or other family members regarding decisions

# Guardian of Person

Court SHALL appoint a guardian if:

- ❖ ADP lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his or her person, including provisions for health care, food, clothing or shelter (due to a physical or mental disability or disease, habitual drunkenness, or addiction to drugs) and
- ❖ no less restrictive alternative is available that is consistent with the welfare and safety

# Guardian of the Person



The court may grant to a guardian of a person only those powers necessary to provide for the demonstrated need of the disabled person.

MD. CODE, ESTATES & TRUSTS, § 13-708(a)(1)



# Possible Rights, Duties and Powers

## Rights:

- ❖ Same as parent has with respect to an un-emancipated minor
- ❖ Right to custody
- ❖ Right to establish place of abode (within and without the State)

## Duties:

- ❖ Provide care, comfort and maintenance (including social, recreational and friendship requirements)
- ❖ To take reasonable care of clothing, furniture, vehicles, and other personal effects
- ❖ File an annual report

# Guardian of the Person - Powers

The power to give necessary consent or approval for:

- ❖ Medical or other professional care, counsel, treatment, or service, including admission to a hospital or nursing home or transfer from one medical facility to another;
- ❖ Withholding medical or other professional care, counsel, treatment, or service; and
- ❖ Withdrawing medical or other professional care, counsel, treatment, or service.

MD. CODE, ESTATES & TRUSTS, § 13-708(b)(8)

# Substantial Risk to Life

Even if guardian is conferred any of the express powers contemplated in MD. CODE, ESTATES & TRUSTS, § 13-708(b)(8), the court must still authorize a guardian's consent or approval if the medical procedure, or its withholding or withdrawal, would involve a substantial risk to the life of the disabled person.

MD. CODE, ESTATES & TRUSTS, § 13-708(c)(1)

# Substantial Risk to Life

The court may authorize a guardian to make a decision regarding medical procedures that involve a substantial risk to life without further court authorization, if:

- (i) The disabled person has executed an advance directive in accordance with Title 5, Subtitle 6 of the Health--General Article that authorizes the guardian to consent to the provision, withholding or withdrawal of a medical procedure that involves a substantial risk to life but does not appoint a health care agent; or
- (ii) The guardian is:
  1. Within a class of individuals specified in § 5-605(a)(2) of the Health--General Article as authorized to make health care decisions for the disabled person; and
  2. Determined by the court to be familiar with the personal beliefs, values, and medical situation of the disabled person.

MD. CODE, ESTATES & TRUSTS, § 13-708(c)(2)

# Guardian of Person – Annual Reports

- ❖ Annual report required
- ❖ Anniversary of the date the court assumed jurisdiction over the person
- ❖ Copies to interested persons on request
- ❖ Court shall review the report and either enter an order accepting the report and continuing the guardianship or take other appropriate action

Maryland Rule 10-206  
MD CODE, ESTATES AND TRUSTS, § 13-708 (b)(7)

# “Temporary” Guardianship of Person

- ❖ “Emergency protective services”
- ❖ the person alleged to be in need of emergency protective services is living in conditions presenting a substantial risk of death or immediate and serious physical harm to that person or others
- ❖ the person alleged to be in need of emergency protective services lacks the capacity to make or communicate responsible decisions and
- ❖ no person authorized by law or court order to give consent is available to consent to emergency services
- ❖ explanation of steps taken by the petitioner to obtain the consent of the person alleged to be in need of emergency protective services to the proposed services and the response of the person.

Maryland Rule 10-210  
MD. CODE, ESTATES AND TRUSTS, § 13-709

# Emergency Protective Services

- ❖ Notice, in writing, at least 24 hours before the hearing to: (1) the person alleged to be in need of emergency protective services; (2) the person with whom the person is residing; (3) the attorney for the person; (4) the director of the local department of social services; and (5) those other interested persons as the court may direct
- ❖ Hearing required
- ❖ Person alleged to be in need of emergency protective services is entitled to be present at the hearing unless the person has knowingly and voluntarily waived the right to be present
- ❖ If the person alleged to be in need of emergency protective services that, because of his or her disability, the person cannot attend a hearing at the courthouse, the court may hold the hearing at a place to which the person has reasonable access
- ❖ person has a right to counsel and to present evidence and cross-examine witnesses

Maryland Rule 10-211 and 10-212

# Order for Emergency Protective Services

- ❖ Burden of Proof – “clear and convincing evidence”
- ❖ Order expires 144 hours after it is issued (unless extended based upon a showing that the situation will probably continue or recur if the emergency order is not further extended and filed before the expiration of the emergency order, accompanied by a petition for the appointment of a guardian of the person)
- ❖ Report of temporary guardian – describe services provided, outcome and any forcible entry used to obtain custody of the person

Maryland Rule 10-213



# Guardian of Property



Court SHALL appoint a guardian if:

- ❖ a person is unable to manage his/her property and affairs effectively; and
- ❖ the alleged disabled person has or may be entitled to property or benefits that require proper management

MD. CODE, ESTATES & TRUSTS, §13-201(c)

# Guardian of Property - Powers

A guardian of the property MAY (*without court authorization*):

- ❖ pay or apply income and principal from the guardianship estate as needed for the clothing, support, care, protection, welfare, and rehabilitation of the ward
- ❖ Exercise all of the powers of a fiduciary recognized by MD. CODE, ESTATES & TRUSTS, § 15-102

MD. CODE, ESTATES & TRUSTS, § 13-214

MD. CODE, ESTATES & TRUSTS, § 13-214

MD. CODE, ESTATES & TRUSTS, § 15-102

# Guardian of Property - Powers

- ❖ Retain /receive assets
- ❖ Perform contracts
- ❖ Compromise debt
- ❖ Borrow money
- ❖ Satisfy pledges
- ❖ Deposit funds
- ❖ Vote stocks
- ❖ Real or personal property
- ❖ Pay/release mortgage
- ❖ Pay taxes
- ❖ Employ agents
- ❖ Engage in partnership
- ❖ Incorporate
- ❖ Exercise options
- ❖ Pay claims
- ❖ *Inter vivos* powers
- ❖ Hold securities
- ❖ Environmental compliance

# Guardian of Property - Powers

A guardian of the property MAY NOT (*without prior court authorization*):

- (1) Anything the court, common law, statute or the governing instrument does not authorize
- (2) Pay an attorney > \$50

MD. CODE, ESTATES & TRUSTS, § 15-102(b)(2)  
MD. CODE, ESTATES & TRUSTS, § 15-102(o)



**When in doubt? FILE A MOTION!!!!**

# Guardian of Property - Bond

- ❖ Court may require bond if, in its discretion, it finds it “necessary for the safety of those interested in the administration of the estate”
- ❖ amount of shall not be greater than:
  - ❖ aggregate value of the property of the estate in the fiduciary's control
  - ❖ (less the value of (A) securities, (B) money deposited in a financial institution under arrangements requiring an order of court for their removal, and (C) real property which the fiduciary, by express limitation of power, lacks power to sell or convey without court authorization)
- ❖ bond premium may be paid out of the income of the estate

Maryland Rule 10-702  
MD. CODE, ESTATES & TRUSTS, § 13-208

# Guardian of the Property - Inventory/Information Report

- ❖ Must file with the court within 60 days of appointment as guardian
- ❖ Detail all assets in ward's name (“guardianship estate”)
- ❖ Inventory is baseline against which future accountings will be compared
- ❖ Must be filed under oath

Maryland Rule 10-708

# Guardian of the Property - Annual Fiduciary Accounts

- ❖ Annual report required
- ❖ Exception: fiduciary estate consisting entirely of cash in a restricted account [under Rule 10-705] need not file an annual account
- ❖ Anniversary of the date the court assumed jurisdiction over the person
- ❖ Copies to interested persons on request
- ❖ Trust clerk shall examine each annual account, report to the court any irregularity in it, raise any other matters deemed appropriate, and make recommendations. The trust clerk may require the fiduciary to furnish proof of any transactions shown in the account
- ❖ Court shall review the report and either enter an order accepting the report and continuing the guardianship or take other appropriate action

Maryland Rule 10-708



# If you are a Guardian of the Property...

- ❖ You must keep accurate records!  
(at a minimum - bank statements and receipts for purchases)
- ❖ All purchases should be done by check, to assist in record keeping
- ❖ If you expend any cash, be prepared to support those expenditures with receipts
- ❖ If you fail to account properly for fiduciary funds you may be personally responsible

# I've been appointed guardian of the property - what now?

- ❖ Make contact with the disabled person (“ward”)
- ❖ Contact guardian of person, if any
- ❖ Talk to ward’s relatives, friends, social workers
- ❖ Change address with USPS
- ❖ Retitle assets (“...as Guardian for...”)
- ❖ Register with governmental agencies (SSA, IRS, Comptroller)
- ❖ Identify all other income and assets in ward’s name

# Titling of assets

- ❖ Any account in any bank, savings and loan association, securities (?), and all other intangible assets and all tangible personal assets: “Angela B. Grau, Guardian of the Property for \_\_\_\_\_”
- ❖ Real estate need not be titled in the name of the fiduciary if (1) the real property lies in the county in which the court has assumed jurisdiction or (2) a copy of the court order or instrument naming the fiduciary has been filed in the land records in the Maryland county where the property is located or in the land records of another state where the property is located

Maryland Rule 10-704

# Restricted Accounts

- ❖ Fiduciary estate consists entirely of cash in an amount not exceeding \$ 200,000
- ❖ Deposit of cash in a federally insured financial institution in a single restricted account
- ❖ titled substantially in the following form: “Angela B. Grau, Guardian of the Property for \_\_\_\_\_, withdrawals subject to the order of the Circuit Court for Howard County”
- ❖ Court may require a separate order prior to each withdrawal or may enter a continuing order authorizing withdrawals up to a specified amount
- ❖ Continuing order may be for a definite period of time, not to exceed one year, and may on petition be renewed annually
- ❖ Fiduciary shall promptly provide proof of the opening of a restricted account to the trust clerk, who shall make note of it in the file
- ❖ When accounting not required. If all of the assets of a fiduciary estate are deposited in a single restricted account in an amount not exceeding \$ 10,000, no annual accounting is required unless the court orders otherwise

Maryland Rule 10-705

# Termination of a Guardianship

- ❖ Grounds for the termination of a fiduciary estate include:
  - the occurrence of the event specified in the instrument creating the estate;
  - the distribution by the fiduciary of all remaining assets of the estate in a manner authorized by the instrument creating the estate;
  - the attainment by a minor of the age of majority;
  - the emancipation of a minor who has not attained the age of majority;
  - the cessation of a disability;
  - the death of the minor or disabled person; or
  - any other good cause for termination
- ❖ Time for filing -- 45 days after the fiduciary discovers grounds for termination exist, the fiduciary shall file a petition requesting the court to terminate the estate
- ❖ Final accounting must be filed with petition to terminate covering any period not covered by annual accountings previously filed

Maryland Rule 10-710

# Resignation of Guardian

- ❖ A fiduciary may file a petition to resign, and may request the appointment of a substituted or successor fiduciary
- ❖ When a fiduciary resigns, dies, is removed, or becomes otherwise incapable of filling the position, and there is no substituted or successor fiduciary already named, the court may, on its own initiative or on petition filed by any interested person, appoint a substituted or successor fiduciary
- ❖ Petition shall be filed in the court that has assumed jurisdiction over the fiduciary estate, or if jurisdiction has not been assumed, in the county in which the property is situated, or where the fiduciary resides, is regularly employed, or maintains a place of business
- ❖ Resigning fiduciary shall file with the petition an accounting for any period not covered in any annual accountings previously filed
- ❖ Resignation of a fiduciary does not terminate the appointment of the fiduciary until the court enters an order accepting the resignation

Maryland Rule 10-711

# Removal of Guardian

- ❖ On court's initiative or on petition of interested persons
- ❖ Notice and hearing required
- ❖ Upon the appointment of a substituted or successor fiduciary, the removed fiduciary shall file an accounting and deliver any property of the fiduciary estate to the substituted or successor fiduciary, within the time period specified by the Court
- ❖ In addition to or in lieu of removal, the court may disallow any commissions from the time the court finds that the default began, require the fiduciary to perform the neglected duties, and impose any other appropriate sanctions

Maryland Rule 10-712

# Alternatives to Guardianship



- ❖ **Petition for Specific Transaction**

(MD. CODE, ESTATES & TRUSTS, § 13-204)

- ❖ **Maryland General and Limited Power of Attorney Act**

(MD. CODE, ESTATES & TRUSTS, § 17-100, *et seq.*)

- ❖ **Health Care Decisions Act**

(MD. CODE, HEALTH GENERAL, § 5-601, *et seq.*)

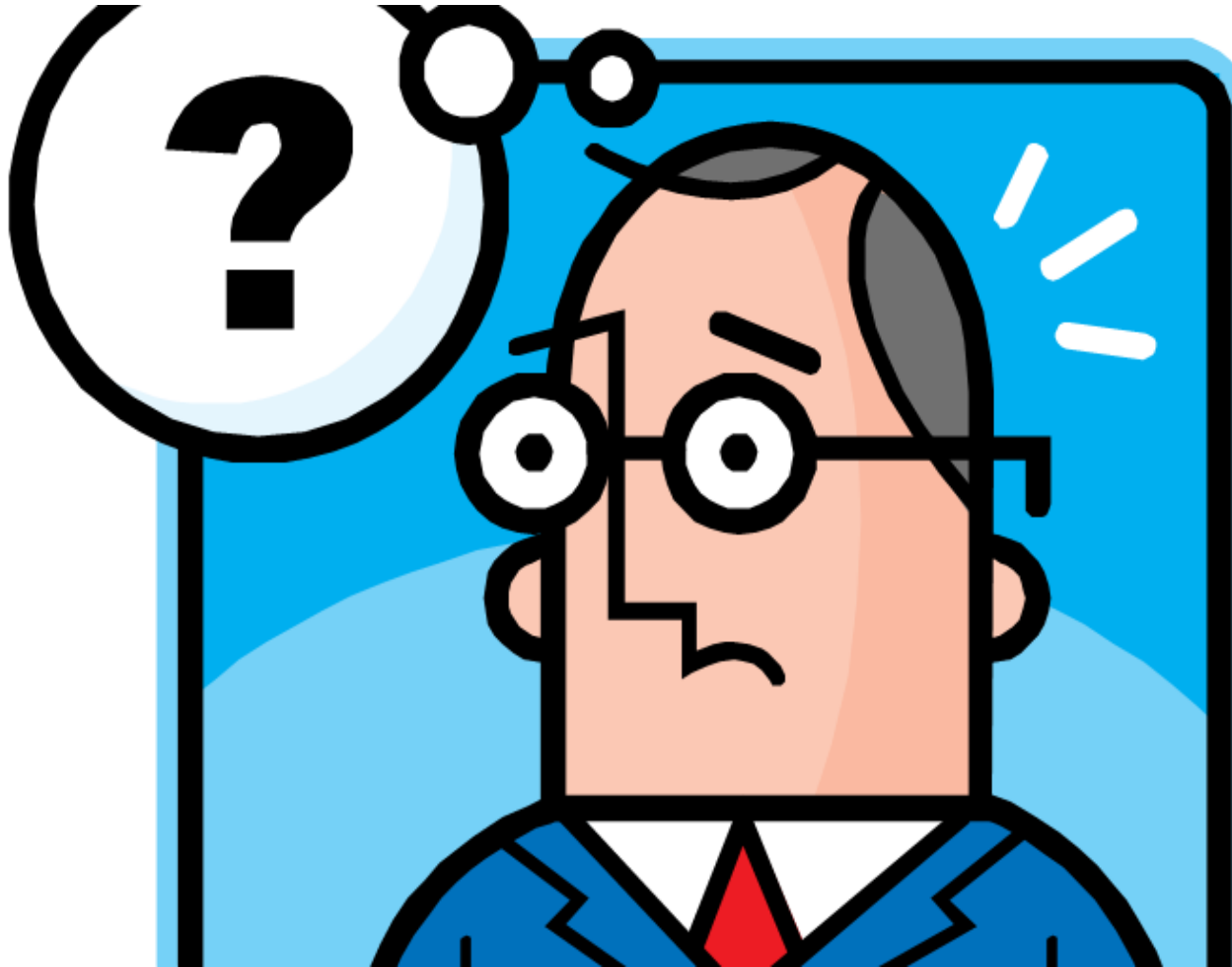




# THE COURT IS THE GUARDIAN

**A GUARDIAN IS AGENT FOR THE COURT**

# Questions?



# Disclaimer



The foregoing information is not intended to provide specific legal advice for any specific situation. It is intended as general information only. Legal advice can be provided only in the course of an attorney-client relationship with reference to all the facts of a specific situation. The information, therefore, must not be relied on as a substitute for obtaining legal advice from a licensed attorney.