

Model Public Guardianship Act

Section 1. Title

This Act shall be known as the Public Guardianship Act.

Section 2. Declaration of Policy and Legislative Intent

The legislature of the state of _____ recognizes that some persons in the state, because of incapacity, are unable to meet varying essential requirements for their health or personal care or to manage varying essential aspects of their financial resources. The legislature finds that private guardianship is inadequate where there are no willing and responsible family members or friends to serve as guardian, and where the incapacitated person does not have adequate income or wealth for the compensation of a private guardian and payment of court costs and fees associated with the appointment proceeding. The legislature intends through this Act to establish the office of public guardian to furnish guardianship services at reduced or no cost for individuals who need them and for whom adequate services otherwise may be unavailable.

The legislature intends to treat liberty and autonomy as paramount values for all state residents and to authorize public guardianship only to the minimum extent necessary to provide for health or safety, or to manage financial affairs, when the legal conditions for appointment of a guardian are met. The legislature intends to establish public guardianship that permits incapacitated persons to participate as fully as possible in all decisions that affect them; that assists such persons to regain or develop their capacities to the maximum extent possible; and that accomplishes such objectives through the use of the least restrictive alternative. This Act shall be liberally construed to accomplish these purposes.

Section 3. [Alternative A] Definitions

- (a) The definitions found in [state guardianship and conservatorship law] shall apply to this Act.
- (b) "Court" means [the local or county court or branch having jurisdiction in matters relating to adult guardianships].
- (c) "Office" means the office of public guardian.
- (d) "Paid professional staff" means an individual employed by the office of public guardian who exercises decision-making authority for incapacitated persons for whom the office is serving as guardian.
- (e) "Public guardian" means the director of the office of public guardian.
- (f) "Values history survey" means a form documenting an individual's values about health care.

Section 3. [Alternative B] Definitions

As used in this Act:

- (a) "Court" means [the local or county court or branch having jurisdiction in matters relating to adult guardianships].
- (b) "Lack of capacity to make informed decisions about care, treatment, or management services" means the inability, by reason of mental condition, to achieve a rudimentary understanding, after conscientious efforts at explanation, of the purpose, nature, or possible significant benefits of care, treatment, or management services to be provided under public guardianship; provided that a person shall be deemed incapable of understanding such purpose if, due to impaired mental ability to perceive reality, the person cannot realize that his or her recent behavior has caused or has created a clear and substantial risk of serious physical injury, illness, or disease or of gross financial mismanagement or manifest financial vulnerability to oneself; and provided further that a person shall be deemed to lack the capacity to make informed decisions about care, treatment, or manage-

ment services if the reason for refusing the same is expressly based on either the belief that he or she is unworthy of assistance or the desire to harm or punish oneself.

- (c) "Office" means the office of public guardian.
- (d) "Paid professional staff" means an individual employed by the office of public guardian who exercises decision-making authority for incapacitated persons for whom the office is serving as guardian.
- (e) "Psychotropic medication" means any drug or compound affecting the mind, behavior, intellectual functions, perception, moods, and emotion and includes antipsychotic, antidepressant, antimanic, and anti-anxiety drugs.
- (f) "Public guardian" means the director of the office of public guardian.
- (g) "Severe mental disorder" means a severe impairment of emotional processes, ability to exercise conscious control of one's actions, or ability to perceive reality or to reason or understand, which impairment is manifested by instances of grossly disturbed behavior or faulty perceptions.
- (h) "Unable. . . to manage one's financial resources" means unable to take those actions necessary to obtain, administer, or dispose of real or personal property, intangible property, business property, benefits, or income so that, in the absence of public guardianship, gross financial mismanagement or manifest financial vulnerability is likely to occur in the near future. For purposes of this Act, any such inability must be evidenced by recent behaviors causing such harm or creating a clear and substantial risk thereof, and at least one incidence of such behavior must have occurred within twenty days of the filing of the petition for public guardianship, except that such inability shall not be evidenced solely by isolated incidents of negligence or improvidence. The requirement of the preceding sentence shall not apply in the case of a petition for renewal of guardianship.
- (i) "Unable to meet essential requirements for one's physical health or safety" means unable, through one's own efforts and through acceptance of assistance from family, friends, and other available private and public sources, to meet one's needs for medical care, nutrition, clothing, shelter, hygiene, or safety so that, in the absence of public guardianship, serious physical injury, illness, or disease is likely to occur in the near future. For purposes of this Act, any such inability must be evidenced by recent behaviors causing such harm or creating a clear and substantial risk thereof, and at least one incidence of such behavior must have occurred within twenty days of the filing of the petition for public guardianship. The requirement of the preceding sentence shall not apply in the case of a petition for renewal of public guardianship.
- (j) "Values history survey" means a form documenting an individual's values about health care.

Section 4. Establishment of Office

- (a) Establishment of office. Each county within the state shall establish an independent office of public guardian. The office may not be established by contract. Paid professional staff shall be county public employees.
- (b) Conflict of Interest. The office of public guardian shall be independent from all service providers and shall not directly provide housing, medical, legal, or other direct, non-surrogate decisionmaking services to a client.
- (c) Authority. The office of public guardian is authorized to take any actions on behalf of an incapacitated person that a private guardian may take, except as otherwise provided in this Act.
- (d) Effectiveness; Staffing Ratio. No office of public guardian shall assume responsibility for any incapacitated persons beyond a ratio of twenty incapacitated persons per one paid professional staff. When this ratio has been reached, the office of public guardian may not accept further appointments. The office shall adopt procedures to ensure that appropriate notice is given to the court.

Section 5. Appointment of Public Guardian

- (a) **Appointment.** The county [board of supervisors; council] shall appoint a public guardian to administer the office of public guardianship. The public guardian shall be appointed for a term of five years. The public guardian shall be a licensed attorney, shall be hired based on a broad knowledge of law, human development, sociology, and psychology, and shall have business acuity.
- (b) **Part-time Appointments.** If the needs of the local jurisdiction do not require that a person hold only the position of public guardian, the county [board of supervisors; council] may appoint an individual as public guardian on a part-time basis with appropriate compensation, provided that no other part-time position occupied by such individual may present any conflict of interest.
- (c) **Compensation.** The county [board of supervisors; council] shall fix the compensation for the position of public guardian.
- (d) **Succession in office.** When a person is appointed as public guardian, he or she succeeds immediately to all rights, duties, responsibilities, powers, and authorities of the preceding public guardian.
- (e) **Continuation of Staff Activities.** When the position of public guardian is vacant, staff employed by the office shall continue to act as if the position were filled.
- (f) **Time Limit to Fill Vacancy.** When the position of public guardian becomes vacant, the county [board of supervisors; council] shall appoint a successor in office within forty-five days.

Section 6. Bond Required

- (a) **General Bond.** The office of public guardian shall file with the clerk of the court in which the office is to serve a general bond in the amount fixed by the county [board of supervisors; council], payable to the state or to people of the county in which the court is seated and issued by a surety company approved by the [chief judge; presiding judge] of the court. The bond shall be conditioned upon the faithful performance by the office of public guardian of duties as conservator or guardian.
- (b) **Nature of Bond.** The general bond and oath of the public guardian is in lieu of the bond and oath required of a private conservator or guardian.

Section 7. [Alternative A] Powers and Duties

- (a) **Appointment by Court.** The office of public guardian may serve as guardian and/or conservator, after appointment by a court pursuant to the provisions of the [guardianship and conservatorship law of the state].

Section 7. [Alternative B] Powers and Duties

- (a) **Appointment by Court.** The office of public guardian may serve as guardian and/or conservator, after appointment by a court pursuant to the provisions of the [guardianship and conservatorship law of the state], provided that the alleged incapacitated person has had the opportunity for the hearing prescribed in Section 9 of this Act.
- (b) **Same Powers and Duties.** The office of public guardian shall have the same powers and duties as a private guardian or conservator, except as otherwise limited by law or court order.
- (c) **Delegation of Powers and Duties.** The public guardian may delegate to members of the paid professional staff powers and duties in making decisions as guardian or conservator and such other powers and duties as are created by this Act, although the office of public guardian retains ultimate responsibility for the proper performance of these delegated functions. All paid professional staff with decision-making authority at least shall have graduated from an accredited four-year college or university; have a degree in law, social work, or psychology; [and be certified by the state guardian certification entity].

- (d) Other Duties. The office of public guardian shall:
- (1) Use the substituted judgment principle of decision making that substitutes as the guiding force in any surrogate decision the values of the incapacitated person, to the extent known.
 - (2) Establish criteria and procedures for the conduct of and filing with the court for each incapacitated person of: a values history survey, annual functional assessment, decisional accounting reports, and such other information as may be required by law.
 - (3) Prepare for each incapacitated person within 60 days of appointment and file with the court an individualized guardianship or conservatorship plan designed from a functional assessment.
 - (4) Personally visit each incapacitated person at least twice a month; and maintain a written record of each visit, to be filed with the court as part of the guardian's report to court.
 - (5) Visit any facility in which an incapacitated person is to be placed if outside his or her home.
 - (6) Have a continuing duty to seek a proper and suitable person who is willing and able to serve as successor guardian or conservator for an incapacitated person served by the office.
 - (7) Develop and adopt written standards of practice for providing public guardianship and conservatorship services.
 - (8) Establish record-keeping and accounting procedures to ensure (i) the maintenance of confidential, accurate, and up-to-date records of all cases in which the office provides guardianship or conservatorship services; and (ii) the collection of statistical data for program evaluation, including annually the number of guardianship and conservatorship cases open, the number handled by the office and their disposition, the age and condition of clients, and the number institutionalized.
 - (9) Establish and provide public information about procedures for the filing, investigation, and resolution of complaints concerning the office.
 - (10) Prepare a yearly budget for implementation of the Act.
 - (11) Contract for an annual independent audit of the office by a certified public accountant.
 - (12) Prepare an annual report for submission to the county [board of supervisors; council] and the state court administrative office.
- (e) Other Powers: The office of public guardian may:
- (1) Not initiate a petition of appointment of the office as guardian or conservator.
 - (2) On motion of the office, or at the request of the court, intervene at any time in any guardianship or conservatorship proceeding involving an alleged incapacitated person or an incapacitated person by appropriate motion to the court, if the office or the court deems such intervention to be justified because an appointed guardian or conservator is not fulfilling his or her duties, the estate is subject to disproportionate waste, or the best interests of the individual require such intervention.
 - (3) Employ staff necessary for the proper performance of the office, to the extent authorized in the budget for the office;
 - (4) Formulate and adopt policies and procedures necessary to promote the efficient conduct of the work and general administration of the office, its professional staff, and other employees.
 - (5) Serve as representative payee for public benefits only for persons for whom the office serves as guardian or conservator.
 - (6) Act as a resource to persons already serving as private guardian or conservator for education, information, and support.
 - (7) Make funeral, cremation, or burial arrangements after the death of an incapacitated person served by the office if the next of kin of the incapacitated person does not wish to make the arrangements or if the office has made a good faith effort to locate the next of kin to determine if the next of kin wishes to make the arrangements.
 - (8) Not commit an incapacitated person to a mental health facility without an involuntary commitment proceeding as provided by law.

Section 8. Persons Eligible for Services

- (a) Eligible persons. Any incapacitated person residing in the state who cannot afford to compensate a private guardian or conservator and who does not have a willing and responsible family member or friend to serve as guardian or conservator is eligible for the services of the office of public guardian where the individual resides or is located.

Section 9. [Alternative A] Appointment and Review Procedure

[Alternative A does not include this section.]

Section 9. [Alternative B] Appointment and Review Procedure

- (a) Appointment. The initial appointment by a court of the public guardian as guardian or conservator shall be for no longer than six months, after the court determines by clear, unequivocal, and convincing evidence that the individual is incapacitated; cannot afford to compensate a private guardian; does not have appropriate, willing, and responsible family members or friends to serve as guardian; and lacks the capacity to make informed decisions about proposed care, treatment, or management services and that necessary services are available to protect the person from serious injury, illness, or disease, or from gross financial mismanagement or manifest financial vulnerability. Successive appointments for a term no longer than one year may be made by the court after the same determinations.
- (b) Accounting and Review of Appointment. No later than thirty days prior to the expiration of his or her term as guardian or conservator, the public guardian shall file with the court an inventory and account in accord with the provisions of (section _____ of the guardianship and conservatorship law of the state), which shall be subject to examination pursuant to the provisions of (section _____ of the guardianship or conservatorship law of the state). At the same time, the public guardian shall file a statement setting forth facts that indicate at least: (1) the present personal status of the incapacitated person; (2) the public guardian's plan for regaining, developing, and preserving the person's well-being and capacity to make informed decisions about care and treatment services; and (3) the need for the continuance or discontinuance of the guardianship or conservatorship or for any alteration of the powers of the public guardian.
- (c) Hearing. The court shall hold a hearing to determine the findings set forth in subsection (a), above, concerning the appointment, or renewal of the appointment of the public guardian, unless the court dismisses the petition for lack of substantial grounds.
- (d) Presence of Alleged Incapacitated Person. The alleged incapacitated person shall be present at the hearing unless he or she is medically incapable of being present to the extent that attendance is likely to cause serious and immediate physiological damage. Such waiver for medical incapability shall be determined on the basis of factual information supplied to the court by counsel, including at least the affidavit or certificate of a duly licensed medical practitioner.
- (e) Counsel. The alleged incapacitated person has the right to counsel whether or not the person is present at the hearing, unless the person knowingly, intelligently, and voluntarily waives the right to counsel. If the alleged incapacitated person cannot afford counsel or lacks the capacity to waive counsel, the court shall appoint counsel who shall always be present at any hearing involving the person. If the person cannot afford counsel, the state shall pay reasonable attorney's fees as customarily charged by attorneys in this state for comparable services.
- (f) Trial by Jury. The alleged incapacitated person shall have the right to trial by jury.
- (g) Evaluation. The alleged incapacitated person has the right to secure an independent medical and/or psychological examination relevant to the issues involved in the hearing at the expense of the state if the person is unable to afford such examination and to present a report of this independent evaluation or the evaluator's personal testimony as evidence at the hearing. At any evaluation, the

alleged incapacitated person has the right to remain silent, the right to refuse to answer questions when the answers may tend to incriminate the person, the right to have counsel or any other mental health professional present, and the right to retain the privileged and confidential nature of the evaluation for all proceedings other than proceedings pursuant to this Act.

- (h) Right to Present Evidence. The alleged incapacitated person may present evidence and confront and cross-examine witnesses.
- (i) Duties of Counsel. The duties of counsel representing an alleged incapacitated person at the hearing shall include at least: a personal interview with the person; counseling the person with respect to his or her rights; and arranging for an independent medical and/or psychological examination as provided in subsection (g) above.
- (j) Rules of Evidence. Except where specified otherwise, the rules of evidence and rules of procedure, including those on discovery, that are applicable in civil matters shall govern all proceedings under this Act. Any psychiatrist or psychologist giving testimony or reports containing descriptions and opinions shall be required to provide a detailed explanation as to how such descriptions and opinions were reached and a specification of all behaviors and other factual information on which such descriptions and opinions are based. Such witnesses shall not be permitted to give opinion testimony stating the applicable diagnostic category unless the alleged incapacitated person raises the issue through cross-examination or in the presentation of evidence.
- (k) Psychotropic Medication. The alleged incapacitated person shall be entitled upon request to have the court and the jury, if any, informed regarding the influence of any psychotropic medication being taken by the person and its effect on his or her actions, demeanor, and participation at the hearing.
- (l) Appeal. The alleged incapacitated person shall have the right to appeal adverse orders and judgments as prescribed in [the Rules of Civil Procedure], and the right to appellate counsel, who shall be compensated as provided in subsection (e) above.

Section 10. Allocation of Costs

- (a) Determination of Costs. If the office is appointed guardian or conservator for an incapacitated person, the administrative costs of the public guardianship services and the costs incurred in the appointment procedure shall not be charged against the income or the estate of the incapacitated person, unless the court determines at any time that the person is financially able to pay all or part of such costs.
- (b) Financial Ability. The ability of the incapacitated person to pay for administrative costs of the office or costs incurred in the appointment procedure shall be measured according to the person's financial ability to engage and compensate a private guardian. The ability is dependent on the nature, extent, and liquidity of assets; the disposable net income of the person; the nature of the guardianship or conservatorship; the type, duration, and the complexity of the services required; and any other foreseeable expenses.
- (c) Investigation of Financial Ability. The office shall investigate the financial status of a person for whom a court is considering the appointment of the office. In connection with such investigation, the office may require the alleged incapacitated person to execute and deliver written requests or authorizations to provide the office with access to records of public or private sources, otherwise confidential, needed to evaluate eligibility. The office may obtain information from any public record office of the state or of any subdivision or agency thereof upon request, without payment of any fees ordinarily required by law.
- (d) In any proceeding for appointment of the office, or in any proceeding involving an individual for whom the office has been appointed conservator or guardian, the court may waive any court costs or filing fees.

Section 11. Right to Services

- (a) **Right to Services.** Each incapacitated person served by the office has the right to prompt and adequate personal and medical care, treatment, and rehabilitative services to meet needs for protection from physical injury, illness, or disease, and for restoration of the abilities to care for oneself and to make one's own informed decisions about care and treatment services.
- (b) **Petition for Order to Provide Services.** If the office is unable to secure such services out of funds available from the incapacitated person's estate and income and other private and governmental benefits to which he or she is entitled, the office or the incapacitated person may petition the court for an order requiring the [state and/or county] to provide necessary funds for services that would implement the individual's right to services. Such petition shall provide complete details concerning funds and other benefits at the public guardian's disposal and justification for the necessity and appropriateness of the services for which finances are unavailable. Upon receipt of the petition, the court shall schedule the matter for a hearing within twenty days and cause the petition and notice of the hearing to be served upon the public guardian, the incapacitated person, the person's attorney, and [appropriate state and/or local officials]. In preparation for the hearing, the [appropriate state and/or local officials] shall have access to relevant care and treatment records of the individual. At the hearing, the burden of proof by a preponderance of the evidence shall be upon the petitioning party.
- (c) **Order.** At the conclusion of the hearing, the court shall enter an order dismissing the petition or requiring the [state and/or county] to provide the necessary funds for any services to which the individual has a right under subsection (a).

Section 12. Duties of State Court Administrative Office

- (a) The state court administrative office shall provide training and support for the local offices of public guardian; encourage consistency in data collection, forms, and reporting instruments; and facilitate the exchange of information and promising practices.
- (b) The state court administrative office shall contract with an appropriate research or public policy entity with expertise in gerontology, disabilities, and public administration for an evaluation of the local offices of public guardian.
 - (1) The evaluation shall include an analysis of costs and off-setting savings to the state, and other benefits from the delivery of public guardianship services.
 - (2) An initial report is due two years following the effective date of this Act and thereafter reports with recommendations are due to the governor and the legislature four years following the effective date of the Act.

Section 13. Statewide Public Guardianship Advisory Committee

- (a) The governor shall establish a public guardianship advisory committee consisting of the following members:
 - (1) Two persons designated by the supreme court;
 - (2) Two senators and two members of the House of Representatives from the state legislature;
 - (3) One person from the state agency on aging, and one person from the area agency on aging;
 - (4) One person from the state protection and advocacy system, and one person from the state developmental disabilities council;
 - (5) One person from the state long-term care ombudsman;
 - (6) One person from the state guardianship association; and
 - (7) One person from the state bar association.
- (b) Members of the committee shall each serve a three-year term, subject to renewal for no more than one additional three-year term; except that the first appointments to the committee shall be for

terms of varying duration, as specified by the governor. A vacancy occurring other than by expiration of term shall be filled for the unexpired term.

- (c) Members shall receive no compensation for their services, but may be reimbursed for travel and other expenses incurred in the discharge of their duties.
- (d) The purpose of the committee shall be to report to and advise the governor and the legislature on the means for effectuating the purposes of this Act.
- (e) The meetings of the advisory committee shall be open to the public, with agendas published in advance, and minutes available to the public. The public notice of all meetings shall indicate that accommodations for disability will be available on request.

Section 14. Authorization of Appropriations

To carry out the purposes of this Act, there is authorized to be appropriated \$ _____ for the fiscal year ending _____, \$ _____ for the fiscal year ending _____, and \$ _____ for the fiscal year ending _____.

Section 15. Effective Date

This Act takes effect _____.