

TAKE THE WHEEL.

The value of guardianship.



A guide for Guardianship Applications in Guernsey (Curatelle)

If one of your relatives or friends is struggling to manage their financial affairs alone because of a mental or physical condition affecting their capacity, or in some cases due to old age, they may need a guardian to act on their behalf.

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The role of a guardian encompasses various responsibilities and the process to become a guardian involves multiple people and processes designed to safeguard vulnerable individuals. Trusted advice is essential, as is an understanding of the process before you begin.

Our guide can help you navigate the application and our advisors can be on hand to ensure your successful appointment as a guardian.

What is a Guardianship application?

A guardianship application is an application to the Royal Court made by a person wishing to be appointed as guardian (“curateur aux biens”) for a person who is unable to manage his or her affairs (“the patient”) because that person lacks the mental or physical capacity to do so themselves.

What can a Guardian do?

- A guardian has legal authority to manage the patient’s financial affairs (e.g. access their bank accounts, write cheques, liaise with financial institutions, and generally manage investments).
- A guardian can also (subject to an additional application to the Court) sell the patient’s house (for instance if the patient has moved to live in a care home or with a relative) or consent to a charge on their property.
- It is essential that at all times the guardian acts in the best interests of the patient.
- A guardian will retain this authority throughout the lifetime of the patient. On the death of the patient, the legal personal representative appointed in the patient’s Will, or entitled by law, will take over the administration of the patient’s estate.

Who can be a Guardian?

Typically, the prospective guardian will be a relative or close friend of the patient, but occasionally in the absence of family or friends the Court will appoint a professional such as an advocate.

The application must be supported by a “Family Council”, usually consisting of three other relatives or close friends of the patient, who are willing to recommend to the Court the appointment of the applicant as guardian.

There can be more than one guardian. If that is the case, they can be appointed with power to the survivor to act alone so that if one guardian dies, the surviving guardian can continue to act. For practical reasons it is unlikely more than two guardians will be appointed.

Usually the Court requires the prospective guardian to be a Guernsey resident, but in exceptional cases the Court will consider appointing an off-island guardian. In past cases the Court might appoint an advocate jointly with the off-island guardian. Each case is dealt with on its own facts. It may assist if members of the Family Council living in Guernsey can assist the off-island guardian or the financial affairs of the patient can be dealt with remotely.

What is the procedure for a Guardianship application?

- The patient must first be assessed by a medical practitioner to confirm that they are unable to manage their affairs and that their condition is unlikely to improve, to the extent that a guardianship order is required.
- If this is confirmed by the medical practitioner, the prospective guardian makes an application to the Royal Court.
- The evidence of the medical practitioner is usually submitted to the court in the form of an affidavit (sworn written statement). The medical practitioner must have seen the patient in the last 6 weeks before the hearing to ensure the evidence is up-to-date.
- There will then be a Court hearing where an advocate will present the application. The prospective guardian must always be present at the hearing to be sworn in, unless they have a legitimate reason not to attend (such as residing outside of Guernsey). Members of the Family Council must also be present and can be asked to give oral evidence. Non-resident members can be represented by advocates through Powers of Attorney.
- If the application is granted an Act of Court will be issued confirming who the Court has appointed as guardian. This Act can then be presented to the various financial institutions (banks etc...) to allow the guardian to take full control of the financial affairs of the patient.

What must be included in a Guardianship application?

- The application must contain details of the patient, the prospective guardian(s) and their relationship. Details of the members of the Family Council must also be provided.
- The application must also contain general details of the patient's financial assets. This assists the Court when it considers whether the applicant has the skills and knowledge required to manage them.
- The application and evidence submitted must comply with various requirements to be accepted by the Court. It is important that the details given in the application are correct as errors could jeopardise or delay the application.

What are the duties of the Guardian?

- The guardian holds a very important role which is not to be taken lightly. The guardian must ensure that they always act in the best interests of the patient.
- The guardian may be required by the Court to render a full account of the administration of the patient's estate.
- The guardian must also keep the Family Council reasonably informed of the course of administration of the patient's estate, and consult them in respect of any major decisions (such as the sale of a house).

Can a Guardian be replaced?

A guardian appointed by the Court may be discharged from their position and replaced. This might be necessary for example if the guardian suffers a loss of mental or physical capacity.

What about Powers of Attorney?

A person (donor) can give a power of attorney to another person (attorney) to act on their behalf. The power of attorney can either be general or for a specific purpose.

A donor can only give power of attorney if they have sufficient capacity. If such capacity is lacking, guard-

ianship may be the only option. If a donor subsequently loses capacity, the power of attorney is no longer valid and should not be used.

In other jurisdictions, such as the UK, the law allows for Enduring or Lasting Powers of Attorney, which continue to be valid after the donor has lost capacity. The Royal Court will hear applications to "recognise" such foreign Powers in Guernsey where, for example, a UK resident patient has assets in Guernsey which the patient's attorney or guardian needs to access.

A new Capacity Law introducing Lasting Powers of Attorney in Guernsey is due to come into force soon. This will allow a person to decide, when they still have capacity, whom to appoint as their attorney to deal with financial affairs and matters relating to their health and welfare in the event that they lose capacity in the future.

Guardianship applications will still be available in cases where capacity has already been lost, or in the absence of Lasting Powers of Attorney.

Do you require legal advice regarding a Guardianship application?

Making a guardianship application can be a demanding matter at an already worrying time, particularly as it involves an application to the Royal Court. The requirements for a successful application can vary depending on the patient's needs, their family circumstances and their estate. In addition, the interpretation of the law and requirements of the Court can evolve over time.

Babbé LLP is a leading Guernsey law firm with a reputation for providing world-class legal services. We have extensive experience in representing clients making guardianship applications, so let us assist you through this process to ensure it runs as smoothly as possible and you can effectively help your loved ones.

Key contacts

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