

GUARDIANSHIP OF CHILDREN IN TRIBAL COURT

This page will explain what a guardianship is, how to file for guardianship and how to manage a guardianship. This page covers guardianship of minor children. Please review Title 1, Chapter 2 of the Rosebud Sioux Tribe Law and Order Code.

You will need to file for guardianship if you seeking custody of someone else's children.

WHAT IS A GUARDIANSHIP

A guardianship is created when the court appoints a guardian who has the authority to make decisions (such as health care, school, etc.) or to manage the estates (financial decisions for IIM accounts, etc.) of someone else's minor children or both. A guardian stands in place to raise and care for the minor children or to manage their estate or both..

A guardian is a person appointed to take care of the person or property of another. The person over whom or over whose property a guardian is appointed is called a ward. A general guardian is the guardian of the person or of all property of the ward within this state or of both.

POWERS AND RESPONSIBILITIES OF GUARDIANS

Every guardian appointed for the person and estate of a minor or incompetent shall have the care and management of said estate until the guardian is legally discharged. The guardian of a minor is responsible for making decisions regarding the minor's support, care, health, education and determine custody if allowed in the court order and shall act in the minor's best interest.

The guardian of a minor must apply the income and principal of the minor's estate as needed for the minor's support, care, health and education without prior court authorization.

Within forty five (45) days following appointment, a guardian is required to file an inventory and appraisal of the real and personal property of the minor or protected person with the court. The guardian is also required to file an annual accounting detailing any funds or property on behalf of the protected person's estate accounting for receipts and disbursements of estate funds and estate assets within the prior year. The guardian will be required to account for all receipts and disbursements of estate funds and property. The guardian must retain all canceled checks, vouchers, bills, receipts, statement or book records to prove and support expenditures made by the child(ren)'s estate(s). The court might require this backup at anytime.

A guardian has a fiduciary duty (a duty to act only in the best interest of the incompetent adult or minor child) to manage the estate in the best interest of the minor or protected person. A guardian does not have the power to use any of the minor child's property or estate for the benefit of the guardian.

A guardian does not have the authority to sell assets of the guardianship estate without prior permission of the Court unless such property is ordinarily traded on a day to day basis in a

recognized market, for example, grain and livestock. The Court will grant approval for sale of guardianship assets when the Court finds that such sale is in the best interests of the estate and when the Court also finds that the method of sale is reasonably likely to obtain the best price for the estate.

A guardian can be removed as such for a variety of reasons including failing to perform their duties such as caring for or mismanaging the minor child's or protected person's estate, or for committing fraud, or using the estate for their own benefit or gain to name a few. (See 1-2-18 of the RST Law and Order Code)

HOW TO FILE FOR GUARDIANSHIP

You can file for guardianship over a minor child(ren) of another person by filing a petition for guardianship with the tribal court. Use the **Guardianship (minor) Petition** form to file for guardianship of minor child(ren).

What is a petition. A petition is a document similar to a complaint except it does not require an answer from the respondent. It is a document where the petitioner formally requesting the court to order something and sets out the petitioner's version of the facts.

How to file a petition. A petition is filed when you take it to the courthouse and file it along with the filing fee with the clerk of courts. When you file your petition with the clerk, please date and sign the form in front of the clerk so they can notarize your signature.

Filing and service fees. The court will require payment of a filing fee unless waived to file your petition with the court. Use the **Motion to Waive Filing and Service Fees** form to ask the court to waive the filing fee or for a partial waiver of the fee.

Jurisdiction. In order for Rosebud Sioux Tribal Court to hear your claim the court must have jurisdiction. The court will need to have jurisdiction over the child(ren) you are seeking guardianship over and over you as guardian. The RST Law and Order Code requires that the child(ren) be tribal members or the parent(s) of the child(ren) be tribal members for guardianship purposes. If the child(ren) is a member or eligible for membership of the tribe, the court will find that it has jurisdiction. If one or both parents are members of the tribe, the court will probably find that it has jurisdiction.

Emergency Temporary Guardianship. The court has the authority to grant emergency orders for guardianship and custody when the court is satisfied that a true emergency exists by virtue of a sworn affidavit establishing the facts to the satisfaction of the court. Such Orders will be good for not more than 10 days. Within the 10 days, the court will hold a hearing on the question of whether a more permanent type guardianship or custody arrangement should be ordered.

The code doesn't define what constitutes an emergency but courts have found an emergency when the child's well-being is endangered by their current living situation or were there is an immediate need for a decision to be made on behalf of the child and there is no one with the

authority to make such a decision.

Use the **Motion and Affidavit for Emergency Temporary Guardianship** form and file it with your petition for guardianship.

GUARDIANSHIP HEARING

Once you file your petition for guardianship the court clerk will schedule a guardianship hearing. Notices will be sent to all interested persons (next of kin) of the adult or minor children by the clerk. If the natural parents whereabouts is unknown the court may require that you publish notice of hearing in a local paper at your own expense. The court may require that you publish the notice of hearing in the Todd Country Tribune for 4 consecutive weeks at your own expense (the newspaper will charge you for publishing the notice of hearing). You will need to bring an affidavit of publication to the hearing to prove to the court that notice of hearing was in fact published in the newspaper. You must get the affidavit of publication from the newspaper in which the notice was published.

At the hearing the Court will examine the Petition and Petitioner and hear all evidence relative to whether or not a guardian should be appointed; determine if any person nominated by a Will is available and consents to act as guardian; determine if the proposed child(ren) protected person is of sufficient age or mental capacity to make an intelligent decision regarding a preference and given due consideration to the proposed child(ren) protected person's preference of a guardian. If the court grants the guardianship it will set out the scope of the guardian's authority, whether security bond for his performance will be required, and the duration of the appointment as guardian.

Any interested party (next of kin) may appear after receiving notice. An interested party may object to the guardianship or object to the petitioner being appointed the guardian for various reasons and present evidence at any hearing regarding their objection.

BURDEN OF PROOF. In a guardianship case you have the burden of proving your claim by clear and convincing evidence. This means that by representing your self in a legal matter it is your responsibility to prove your case. Don't expect the judge to prove your case for you. Proving something by clear and convincing evidence means evidence with greater weight or that is more convincing than the evidence of the opposing party(s). You as the petitioner have the burden of proving by clear and convincing evidence the following to the court:

1. You should either be closely related to the child(ren) you are seeking guardianship over or that you have some type of close connection or relationship with them. The court will probably give first preference as guardian to a close relative or someone nominated by the natural parents of the child(ren).

- 2 If both natural parents consent to the guardianship or fail to appear at the hearing, the court will more than likely grant you guardianship unless the court finds that there is a more suitable person to be guardian. If the natural parents are deceased and left a will nominating another

person guardian, the court will normally follow the deceased parents wishes if it is in the child(ren)'s best interest. Preference of a guardian is first given to those persons named in a will of the deceased parent. Next preference is given to relatives of the child(ren) in the order of closeness of the relationship. The court will also give consideration to the person with whom the child(ren) has been living with. The court may also consider the wishes of the child(ren) if the child(ren) are old enough and wise enough to make a choice. The court in choosing a guardian is always guided by what is in the best interest of the child(ren).

3 If either natural parent or both appear at the hearing and object to the guardianship, you must make a clear showing to the court that the natural parent(s) engaged in gross misconduct, is unfit or that there is some other compelling reason (meaning a very strong and good reason) why the parent should not have custody of the child(ren) and that you should be appointed their guardian. This means that you must show the court more than that you are a better custodian of the child(ren).

How to Prove Unfitness of a Parent. You can do this by introducing documents or through testimony of witnesses that the parent(s) lack the ability or unwillingness to raise the child(ren). This would include the parent's conduct of cruelty, morals, extreme neglect, abandonment, physical or mental infirmity (physically or mentally unable to care for the children).

WHAT DO I DO WHEN I GO TO COURT FOR A HEARING ON YOUR PETITION

The party bringing a petition for guardianship of a minor has the burden of proving their petition by a preponderance of the evidence. The petitioner (the party who brought the petition before the court) presents their evidence first and then any interested party who objects to the petition presents their evidence to the court.

How to present your Evidence to the Court. There are several ways of presenting your evidence and case in court. The best way is through live testimony of witnesses. This would include you (you need to testify to your claim) and any other person who has personal and relevant knowledge of the facts of your claim. It is your responsibility to get your witnesses to court and to ask them questions about their knowledge of the facts. In order to compel or force your witnesses to testify at your trial or hearing you may need to subpoena each of your witnesses well before the trial or hearing or hearing date (Use the **Motion to Subpoena Witnesses** form to request the court to issue a subpoena to compel a witness to appear at your trial or hearing if they won't voluntarily appear). You can also subpoena a person or witnesses to bring evidence such as documents to your hearing or trial (Use the **Motion to Subpoena a Person to Bring Evidence to Court** form to request the court to issue a subpoena to compel a person to appear at your trial or hearing and bring specified evidence with them if they won't voluntarily appear). Once you and your witnesses testify the opposing party can cross examine you and your witness. This means that they can ask you and your witnesses questions.

It will be your responsibility to directly ask questions (direct examination) of your witnesses and to get your evidence introduced into the record. You can only ask questions during direct examination. Do not attempt to make statements or comments when you ask questioning

witnesses. Your witnesses should be asked who they are, what they know and how they know it or anything they might have observed. Like cross examination you should prepare your questions for each of your witnesses well before the trial and take notes of any strong points testified to that you can use in your closing arguments to the Court.

It will also be your responsibility to get objects and other physical evidence, such as documents, introduced into the record. You do this by laying the foundation for the admissibility of the evidence by questioning the person you subpoenaed to bring the objects or pieces of evidence you want introduced into evidence. Ask the Court to mark the evidence as an Exhibit. Then you must ask this person who they are, what objects or pieces of evidence they brought to the Court, a description of the objects or pieces of evidence, how the evidence came into that persons possession and if the evidence are documents then you must ask if the documents are kept in the ordinary course of business. Then you must ask the Court to have the evidence introduced and accepted as evidence. Only evidence accepted by the Court after it is ruled admissible will be seen or considered by the Court.

Any interested party (next of kin) may appear after receiving notice. An interested party may object to the guardianship or object to the petitioner being appointed the guardian for various reasons. Any interested party can present evidence at the trial regarding their objection.

You must cross examine any interested party or their witnesses to cast doubt on the interested party's objections. Cross examination is your chance to ask questions of the interested party's witnesses. You can only ask questions of the interested party or their witnesses during cross examination. Do not attempt to make statements or to testify during cross examination of another witness, the Court will shut you off from doing so.

Be courteous in Court. When you go to court the judge will control the proceedings. The petitioner presents their case first. Then the any interested party may object and can present their side of the case. Do not interrupt the other side when they are testifying unless you have an objection. Both sides will have an opportunity to cross examine the other party and their witnesses. Be courteous to the other side. If you disrupt the proceedings the judge could hold you in contempt and throw you in jail.

WHAT HAPPENS IF THE COURT APPOINTS A GUARDIAN

Any guardian appointed by the court will be required to take an oath to the effect that they will faithfully perform their duties as guardian. After taking the oath and filing with the Court any security the court might order, the guardian will be issued Letters of Guardianship under the seal of the Tribal Court. Any limitation of the guardian's authority will be set forth on the Letters of Guardianship.

The Court may require a guardian to provide security in the form of a bond or otherwise to assure the faithful performance of the guardian's duties unless the Court finds that no need exists. A guardian who provides the bond is deemed to have consented to the jurisdiction of the Rosebud Sioux Tribal Court for the purpose of action against surety.

The Guardian will need a certified copy of the Letters of Guardianship to officially act as the protected person's guardian. The Guardian will need to present the letters to prove the guardian has the authority by law to act as guardian for the protected person(s). This could include communicating with schools or obtaining medical care for the protected person. It could include doing financial business on the protected person's behalf.

INVENTORY AND APPRAISAL

Within 45 days after the appointment of a general guardian or guardian of property, the guardian shall prepare and submit to the Court an inventory and appraisal of the assets of the guardianship estate. The appraisal must be made by at least one disinterested person who is required to certify under oath to the appraisal and may be awarded reasonable compensation for their services upon application to the Court by the guardian and approval of the court. The disinterested person who makes the appraisal must not have an interest or stake in the estate.

Use the **Inventory and Appraisal** form to file with the court.

ANNUAL ACCOUNTING

The guardian of an estate is required to submit an annual accounting of the receipts and disbursements of estate funds and estate assets on the first anniversary date of their appointment as guardian and annually thereafter, which accounting must be verified under oath by the guardian and contain an accounting of all additions to and withdrawals of the estate assets, and on request of the Court be accompanied by supporting canceled checks, vouchers, receipts, statements, or books of record.

Use the **Annual Accounting** form to file with the court.