

What is guardianship?

Guardianship is a judicial proceeding in which a person or entity may be granted full or limited authority over an incapacitated person (ward) to promote and protect the well-being of the ward and/or the ward's estate. The guardianship should be designed to encourage the development or maintenance of maximum self-reliance and independence of the ward by limiting the power or authority of the guardian based upon the person's actual physical or mental limitations.

Note: Guardianship is a specialized area of practice; you are highly encouraged to *speak with an experienced attorney* about the requirements of appointing a guardian.

There are two types of guardianship - guardianship of the estate and of the person. The guardian of the estate is in charge of the ward's property and finances. The guardian of the person is in charge of care and custody of the ward. Factors considered in the guardianship proceeding include 1) the extent of the ward's diminished incapacity 2) the necessity of guardianship, and 3) the most appropriate person to be appointed guardian, with "the best interest of the ward" as the underlying guideline. If the potential ward is a child, incapacity is not an issue because it is automatic under the law. Incapacitation is the threshold issue in determining guardianship for an adult since guardianship is an extreme taking of the ward's rights. Only if the ward is found to be incapacitated are the other issues considered.

What are the alternatives to guardianship?

There are several alternatives to help avoid guardianship. A durable power of attorney allows another to act as your agent in financial matters. A medical power of attorney allows another to act as your agent to make healthcare decisions. Directive to physician or "Living Will" directs your physician(s) how to act regarding "life-sustaining procedures" in the event of an incurable or irreversible condition. You may also appoint a person to make

such decisions for you if the situation should arise. A surrogate decision maker is a person who may consent to medical care and treatment if a person to make decisions cannot be located.

There are several trusts alternatives to avoid guardianship as well. A trust is the management of the individual's assets by an individual or corporate trustee(s), with the highest duty of care to the beneficiary. A competent spouse has the right to manage, control, and dispose of the community estate as the community administrator to include that portion of the community estate that was under the sole management of the incapacitated spouse. A ward's debtor can pay monies due the ward to the clerk of the court if \$100,000.00 or less. When an individual's only asset is a government benefit, then the person with custody or care of the proposed ward can file an application with the appropriate agency to be appointed representative payee. If the purpose of the guardianship is to convey title of property worth less than \$100,000.00 the court can order a sale with the proceeds being placed in the court registry.

Who can be appointed as guardian?

Certain individuals have priority to serve as guardian by statute but any person who does not have an "adverse interest" to the proposed ward can file an application for guardianship and seek appointment as guardian.

The following people are ineligible to be appointed as guardian:

- a minor;
- persons whose conduct is notoriously inappropriate;
- an incapacitated person;
- person who is a party or whose parent is a party to a lawsuit concerning or affecting the welfare of the proposed ward;
- a person indebted to the ward unless the person pays the debt before appointment;
- a person asserting a claim adverse to the ward or the ward's property;

- a person who, because of inexperience, lack of education, or other good reason is incapable of properly and prudently managing and controlling the ward or the ward's estate;
- a person, institution or corporation found unsuitable by the court; or
- a person disqualified in a declaration made by the ward prior to incapacity.

When appointing a guardian for a child "the best interest of the ward" must be considered. It is presumed not to be in the child's best interest to appoint a guardian, if that person has been convicted of any sexual offense, sexual assault, aggravated assault, aggravated sexual assault, injury to a child, to an elderly individual, or to a disabled individual, abandoning or endangering a child, or incest.

What does a guardian do?

The guardian possesses and manages the ward's property and manages the estate as a prudent person would manage his own property. The guardian has authority over the care and protection of the ward, but this authority is limited by the court to promote and protect the well being of the ward. A guardian is prohibited to act without court order, but there are few exceptions to this rule. He or she may act without court order to release a lien, vote stock, insure the estate against liability, insure property of the estate against fire, theft or other hazards, and pay taxes, court cost, and bonds.

Can guardianship be created in a will?

A guardianship can be created in a will or written declaration of guardianship. If the guardian is appointed in a will, the will must meet the requirements of a valid will under Texas Law. If the guardian is appointed in a written declaration, it must be signed by the declarant or another person for the declarant under his direction and in his presence. The declaration must also be dated and witnessed by two or more credible witnesses 14 years of age or older. A "self-proving affidavit" can be attached to the will so long as it is signed by

the declarant and the witnesses attest to the declarant's competence, intent to create the declaration, and the execution of the declaration. If the declaration is handwritten then it must be entirely written in the declarant's handwriting, but does not need to be witnessed. If the designated guardian is unavailable to serve, for any reason, the next designated alternate is appointed. The declaration and "self-proving affidavit" may be filed anytime after the application is filed and before a guardian is appointed.

Note: A declaration and affidavit in any form may be adequate to indicate your intention to designate a guardian.

What court can hear the guardianship and where should the guardianship be filed?

The county court of each county has the general jurisdiction of a probate court. In those counties in which there is no statutory probate court, county court at law, or other statutory court exercising the jurisdiction of a probate court, all applications, petitions, and motions regarding guardianships shall be filed and heard in the county court. In contested guardianship matters, the judge of the county court may on the judge's own motion, or shall on the motion of any party to the proceeding, request the assignment of a statutory probate court judge to hear the contested portion of the proceeding, or transfer the contested portion of the proceeding to the district court, which may hear the transferred contested matter as if originally filed in the district court.¹

From the filing of the application until the guardianship is settled and closed, the administration is one proceeding for purposes of jurisdiction. The court has the power to adjudicate the rights to a given piece of property against all persons at anytime claiming an interest to that property in the guardianship or any other proceeding. The

¹ Texas Probate Code §605 and §606

proper or a possible venue for the proceeding is dependent on the type of ward. If the ward is an incapacitated adult, venue is proper 1) where the ward is located, 2) where the ward resides when the application is filed, or 3) the county where the principal estate of the ward is located. If the ward is a minor child then venue is proper in the county where the parent or parents reside. If the parents are separated, venue is proper in the county of the parent who has greater period of physical possession.

Who participates in the proceeding?

In addition to the applicant and the ward, an attorney ad litem is appointed to represent the ward. The attorney ad litem represents and advocates on behalf of a proposed ward and has certain statutory duties. The attorney ad litem's duties include: meeting the ward prior to any hearing to provide legal options, requesting medical history and records from the applicant's attorney, reviewing the court file for proper service on the ward and third parties, and making sure the application has been sworn to by the applicant. An attorney ad litem can also serve as the guardian ad litem which represents the best interest of the ward. In some cases a Court investigator may be appointed to investigate the circumstances alleged in the application and makes an initial determination. A court investigator assesses the ward's conditions at periodic intervals during the guardianship proceeding.

How does the guardian qualify?

The court appoints a guardian who must qualify as required by law. The court may also remove a guardian who fails to qualify. The guardian takes and files an oath of office to ensure that the guardian faithfully discharges the duties of the guardian of the ward, estate, or both. The court will set a bond, but a bond is not required for a corporate fiduciary. If a ward has named a guardian in his or her will, the will may direct that the named guardian to serve without bond. A bond cannot be waived for a guardianship of the estate.

What are Letters of guardianship?

Once appointed and qualified, a guardian obtains letters evidencing the appointment, qualification, date of qualification, and authority to act. The letters expire one year and 120 days from the date of issuance, but may be renewed by an annual accounting approved by the court.

Are professional guardians licensed?

The Texas Guardianship Certification Board, which is administered through the Office of Court Administration. (www.courts.state.tx.us/gcb) develops and administers a guardianship certification exam for professional guardians who are not family members, attorneys, or corporate fiduciaries.

Are there standards for guardians?

Texas has adopted standards for professional guardians, guardianship programs, and for guardians in the DADS program. They can be found at (www.courts.state.tx.us/gcb/pdf/ms-011907amend.pdf). The Texas Standards are derived from the National Guardianship Association's Standards of Practice, which may be found at www.guardianship.org and which provide valuable guidance to all courts, guardians, and attorneys.

Conclusion

This pamphlet is published as a public service project of the Texas Young Lawyer's Association. It provides you with a brief overview of the legal system as it pertains to Guardianship and is not intended to replace legal advice from an attorney. If you have specific legal questions, you should seek counsel from an attorney in your area.

For more information about guardianships, visit the Texas Guardianship Association's website at www.texasguardianship.org and the National Guardianship Association's website at www.guardianship.org.

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PROTECTING THE INCAPACITATED: A GUIDE TO GUARDIANSHIP IN TEXAS FROM APPLICATION TO OATH

