

GUARDIANSHIP SUMMARY

OVERVIEW

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INTRODUCTION

The laws governing guardianships are principally found in the Texas Estates Code (Tex. Est. Code) §§ 1001.001 – 1356.056. The Courts are required to customize each guardianship to fit the needs of the Incapacitated Person. The Courts are also required to supervise guardianships more closely and are given three methods to do so:

1. Guardian of the Person Reports (Tex. Est. Code §1163.101);
2. The Court Visitor Program (Tex. Est. Code §1054.102); and
3. Annual Determination (Tex. Est. Code §1201.052)

This supervision is in addition to the auditing process that is mandated if the incapacitated person has an estate.

Statutory Probate Courts also employ Court Investigators who review guardianship applications to determine if less restrictive alternatives to guardianship are available, to investigate complaints about guardianships and, generally, to act as a liaison between the public, social workers, attorneys and the Court.

I. WHAT IS A GUARDIANSHIP?

A. Basic Definition A guardianship is a Court supervised procedure where the Court gives one person the legal authority to make personal or financial decisions for a person who can no longer make such decisions for himself or herself.

B. Incapacitated Person A person for whom a guardianship is necessary is known as an “Incapacitated Person” which is defined in Tex. Est. Code § 1002.017 as

1. a minor;

2. an adult who, because of a physical or mental condition, is substantially unable to:
 - a. provide food, clothing, or shelter for himself or herself;
 - b. care for the person’s own physical health; or
 - c. manage the person’s own financial affairs; or
3. a person who must have a guardian appointed for the person to receive funds due the person from a governmental source.

C. Policy – Purpose of Guardianship

Unless a Court determines that a guardian with full authority over an IP is necessary, the Court should limit the authority of the guardian so that it is the least restrictive authority possible. Tex. Est. Code § 1001.001 provides that:

1. A court may appoint a guardian with full authority over an Incapacitated Person; or
2. A court may appoint a guardian with limited authority over an Incapacitated Person:
 - a. As indicated by the incapacitated person’s actual mental or physical limitations, and
 - b. Only as necessary to promote and protect the well-being of the person.
3. Except for minors, the Court may not use age as the sole factor in determining whether to appoint a guardian for the person.
4. In creating a guardianship that gives a guardian limited power or authority over an Incapacitated Person, the Court shall design the guardianship to encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person.

D. Guardian A guardian is the person who accepts the Court’s appointment to be responsible for making decisions for the Incapacitated Person. A guardian has only those powers specified in the Order Appointing Guardian. Generally, two types of guardians exist:

1. Guardian of the Person – A guardian of the person has the:
 - a. right to have physical possession of the Incapacitated Person and to establish the Incapacitated Person’s legal domicile;
 - b. duty of care, control and protection of the Incapacitated Person;
 - c. duty to provide the Incapacitated Person with clothing, food, medical care and shelter; and
 - d. power to consent to medical, psychiatric, and surgical treatment other than the in-patient psychiatric commitment of the Incapacitated Person.

2. Guardian of the Estate – A guardian of the estate of the Incapacitated Person has the following powers and duties:
 - a. to possess and manage all property of the Incapacitated Person;
 - b. to collect all debts, rentals or claims that are due to the Incapacitated Person;
 - c. to enforce all obligations in favor of the Incapacitated Person; and
 - d. to bring and defend suits by and against the Incapacitated Person.

II. WHEN IS A GUARDIANSHIP NECESSARY?

- A. Common Situations** – intellectual disability, Alzheimer’s dementia, multi-infarct dementia, Down’s syndrome, Parkinson’s disease, closed head injuries, chronic mental illness, excessive short term memory loss.
- B. Guardianship Not Appropriate** - treatable mental illness, drug addiction, alcoholism, homelessness, spendthrifts, persons receiving only social security benefits (no Guardian of the Estate is necessary).
- C. Less Restrictive Alternatives – Mandated by Tex. Est. Code § 1001.001.** Court Investigators are to investigate the circumstances of each application to determine if a less restrictive alternative to guardianship is available. In counties without a Court Investigator, the attorney ad litem for the

Incapacitated Person should examine these alternatives. A list of some of the most common Less Restrictive Alternatives is attached to this paper.

III. HOW DOES ONE GET A GUARDIANSHIP STARTED?

- A. Courts** Statutory Probate Courts, County Courts at Law and County Courts (in that order) have jurisdiction of guardianship cases.
- B. Attorneys** Most Courts will allow only attorneys to file a guardianship application. In an ideal situation, a concerned family member will contact an attorney to file an application to be appointed as guardian of an Incapacitated Person.
- C. Court Initiated Guardianships** - The Texas Estates Code provides that “if a Court has probable cause to believe that a person domiciled or found in the county in which the Court is located is an incapacitated person, and the person does not have a guardian in this state, the Court shall appoint a guardian ad litem or a court investigator to investigate and file an application for the appointment of a guardian of the person or estate, or both, of the person believed to be incapacitated.” Tex. Est. Code § 102.001.

In Tarrant County, the Courts require an information letter and a doctor’s letter to establish probable cause. If the Incapacitated Person’s incapacity is intellectual disability, the Court must be provided with a Determination of Intellectual Disability (DID) pursuant to Tex. Est. Code § 1101.104. This section states that if the basis of the Proposed Ward’s incapacity is intellectual disability, a physician or psychologist shall conduct an examination according to the rules adopted by the Texas Department of Mental Health and Mental Retardation and shall submit written findings and recommendations to the Court. This report must be based upon an examination conducted not earlier than twenty-four months before the date of a hearing to appoint a guardian for the proposed ward. Unless the Incapacitated Person is in imminent danger, Court-Initiated

Guardianships take at least 4 to 6 weeks from the date the Court receives the proper letters.

D. Social Worker Involvement

1. Adult Protective Services If there is concern that an adult is being abused, exploited or neglected, Adult Protect Services should be called (1-800-252-5400). APS sends a worker to investigate. If APS believes a guardianship is necessary, the worker will take a doctor to examine the Incapacitated Person. If no emergency action is necessary, APS should make a referral to the Texas Department of Aging and Disability Services for a guardianship investigation.

2. Nursing Home and Hospital Social Workers Social Workers at nursing homes and at hospitals have also used the court initiated guardianship procedure to begin the guardianship process for clients or patients who are Incapacitated Person. Hospital discharge planners should determine if the patient is an IP as soon as possible since the procedure may take a while. Stating that the **Incapacitated Person** will be in imminent danger when discharged is not considered imminent danger by most courts.

E. Guardian Appointment Process

1. An Application for Guardianship is filed by a private attorney, guardian ad litem or court investigator. Only attorneys can file applications.

2. The Sheriff or Constable personally serves the Incapacitated Person with a copy of the Application.

3. The Court appoints an Attorney Ad Litem to represent and advocate for the Incapacitated Person.

4. The known relatives of the Incapacitated Person must receive statutory notice of the application.

5. Unless the application is for the appointment of a temporary guardian, the guardianship cannot be established until the Monday following ten days from the date the Incapacitated Person is personally served.

6. The Attorney ad litem must personally visit the Incapacitated Person and determine if the Incapacitated Person wants to contest the guardianship.

7. The applicant's attorney must file a doctor's letter with the court which states that the

Incapacitated Person is incapacitated and generally describes the nature of the incapacity.

8. A hearing date is set with the Court. The Incapacitated Person must attend the hearing unless the Court determines that it is not in the best interests of the Incapacitated Person to attend.

9. The Judge or jury hears testimony and decides if a guardianship is necessary, what powers the guardian should have, how the Incapacitated Person's rights should be limited and whether the person seeking to be appointed guardian is suitable.

10. The Judge then signs an Order Appointing Guardian. The Guardian must file an Oath and Bond in order to qualify. The Clerk then issues Letters of Guardianship to the guardian.

IV. WHO WILL SERVE AS GUARDIAN? -

Tex. Est. Code §§ 1104.051ff & 1104.101 provides guidance for the priority of persons seeking to be appointed guardian.

A. Guardian of a Minor

1. If the parents live together, both parents are the natural guardians of the person of the minor children by the marriage. One of the parents is entitled to be appointed guardian of the children's estates. If the parents disagree, the court shall appoint the parent who is better qualified to serve. If the parents do not live together, the court shall appoint a guardian considering only the best interests of the child or children. If one parent is deceased, the surviving parent is the natural guardian and entitled to be appointed guardian of the estate for the children. Tex. Est. Code § 1104.051.

2. If the minor has no parents, or no parent is suitable for appointment,

a. the court is to appoint a guardian designated by a deceased parent in a will or written declaration. Tex. Est. Code § 104.053

b. if there is no designation by will or written declaration, and two or more eligible persons are equally entitled to be appointed guardian, the priority of appointment is as follows (Tex. Est. Code § 1104.052):

1. the nearest of kin ("ascendant") in the direct line of the minor,

- considering the minor's best interests; or
 - 2. the nearest of kin of the minor, considering the minor's best interests; or
 - 3. a qualified person.
- c. If the minor is at least 12, the minor may select a guardian in writing, subject to the court's finding that it is in the best interest of the minor. Tex. Est. Code § 1104.054.

B. Guardian of an Adult

The overriding concern of the court is to consider the best interests of the Incapacitated Person. If two or more eligible persons are equally entitled to be appointed guardian, the priority of appointment is as follows (Tex. Est. Code § 1104.102):

- a. the spouse of the Incapacitated Person;
- b. the nearest of kin, considering the minor's best interests; or
- c. an eligible person who is best qualified to serve.

V. HOW IS A GUARDIANSHIP SUPERVISED?

A. Annual Reports A guardian of the person is required to file a guardian of the person report each year concerning the Incapacitated Person's mental and physical condition and stating any change of the residence of the

Incapacitated Person or guardian. A guardian of the estate is required to file an annual account stating all receipts, disbursements, cash on hand, and assets being administered. Failure to file either of these reports may lead to fines and/or removal.

B. Court Visitor Program Each statutory probate court is required to establish a Court Visitor Program. As a part of this program a volunteer makes an annual visit on each Incapacitated Person who is the subject of a guardianship. The Court Visitor personally visits the Incapacitated Person and the guardian and reports his or her findings and conclusions to the Court concerning the social and intellectual functioning of the Incapacitated Person as well as living conditions. If the Court Visitor recommends an increase or decrease in the guardian's powers or removal of the guardian or guardianship, the Court will appoint a Court Investigator or Guardian ad litem to investigate, and, if necessary, to file a petition to modify the guardianship order or to remove the guardian or guardianship.

C. Annual Determination Each Court is required to make an annual review and determination of whether a guardianship should be continued, modified or terminated. In making this annual determination, the Court reviews the Court Visitor report and the guardian of the person report.