

## What is guardianship?

Guardianship is a judicial proceeding in which a person or entity (a guardian) may be granted full or limited authority over an incapacitated person (a 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 to match the ward's actual physical or mental limitations. Courts do not take the granting of a guardianship lightly; it is the legal method for taking away certain constitutional and state rights from the ward and imposing certain duties removed from the ward to the guardian.

**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. Many counties require legal representation in guardianship proceedings.

There are two types of guardianship – guardianship of the person and guardianship of the estate. The guardian of the person is charged with providing care for the ward to the extent the ward's estate allows. The guardian of the estate is charged with the protection and preservation of the ward's property and finances. Factors considered in creating a guardianship include determining 1) the extent of the ward's diminished capacity and the areas in which the ward needs assistance, 2) the necessity and propriety of a guardianship, and 3) the most appropriate person to be appointed guardian. The best interest of the ward is the guiding principle in creating both a guardianship of the person and guardianship of the estate.

## Who is an incapacitated person?

An incapacitated person is a person who (1) is a minor; (2) is an adult who, because of a physical or mental condition, is substantially unable to provide food, clothing, or shelter for himself or herself, care for his own physical health, or manage

the his own financial affairs; or (3) must have a guardian appointed for the person to receive funds due the person from a governmental source.

## Who can be appointed as guardian?

Certain individuals have priority to serve as guardian by statute, such as spouses, adult children, parents and adult siblings. The court will usually perform a criminal background check on the proposed guardian and will generally investigate the facts and circumstances of the case to ensure that the right person is appointed guardian.

## What if I am not a family member, but am concerned for someone's welfare?

You can make a referral to the court that handles probate matters in your county for follow-up. If you suspect that a child or elderly person is the victim of abuse, neglect or exploitation, you should contact Child Protective Services or Adult Protective Services as the case may be.

## What does a guardian do?

Guardians do as much or as little as necessary to protect the ward and/or his estate as determined by the court in the order appointing the guardian. The guardian must not take any action that is not expressly permitted by the order appointing the guardian or any subsequent order of the court, must maintain meticulous records about actions they have taken and any financial transactions, and must make annual reports to the court regarding the ward's health and welfare and accounting for each of the ward's assets, income and expenses down to the penny. A guardian may not sell or dispose of the ward's property, commingle the ward's funds with his own, make gifts of any property, or use the ward's assets for himself. A guardian of the person is not liable for bad acts of the ward unless he is otherwise individually liable, and is not financially liable to provide care for the ward.

## Can I create a guardianship without filing paperwork with a court?

Only the court can create a guardianship. However, before a person becomes incapacitated, he can sign a legal document known as a Designation of Guardian in which he expresses who he would like to serve as the guardian of his person and/or estate if he later becomes incapacitated. Likewise, a parent can sign a Designation of Guardian in which he expresses who he would like to serve as the guardian for his minor children should he die or become incapacitated.

**Note:** A Designation of Guardian is a legal document. Be sure to talk to an attorney to make sure your wishes can be carried out.

## Which court creates a guardianship, and where should the guardianship be filed?

First, you must determine in which county the guardianship will be filed. For adult guardianships, it will be the county (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. For guardianships for minors, it will be the county where his parents reside, or in which the parent with whom the child lives most of the time resides.

Then, you must determine which court in that county exercises probate jurisdiction. In small counties, the county court or the county court at law will hear the case. The largest counties in Texas have dedicated probate courts known as Statutory Probate Courts.

In most cases, the court will remain the same from the filing of the application until the guardianship is settled and closed. If the ward moves to another county or another state (with court permission), the guardianship can be transferred to the new county or state.

## Who participates in the guardianship proceeding?

In addition to the proposed guardian and the proposed ward, an attorney ad litem will be 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. The court may also appoint a guardian ad litem to advocate for what is in the ward's best interest. 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.

## What happens at the court hearing?

The exact procedure varies from case to case and county to county. Generally speaking, the proposed guardian's attorney will elicit testimony from the proposed guardian regarding the need for and propriety of the guardianship, the extent of protection the ward requires, and the qualifications of the proposed guardian to serve. He may call other witnesses as necessary, and the attorney ad litem will have an opportunity to ask questions of the proposed guardian as well. If practicable, the attorneys may also ask the ward some questions to ensure he has an opportunity to be heard.

The court will require medical evidence of the nature and extent of the ward's incapacity, usually in the form of a physician's letter. Your county may have a specific form for the ward's physician to complete and submit to the court.

The hearing will end when the judge signs the order appointing the guardian, articulating the guardian's powers and duties, and imposing the appropriate bond on the guardian.

### What happens after the court hearing?

If required by the court, the guardian must secure and file his bond, and must take and file an oath of office to ensure that the guardian faithfully discharges his duties. Once the oath and bond have been approved and filed, the clerk of the court will issue Letters of Guardianship to the guardian. Letters of Guardianship evidence the guardian's appointment, 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.

### What if there is nobody able or willing to serve as a ward's guardian?

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

### 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 a terminal or irreversible condition. Other Texas laws provide methods of making medical decisions in emergency scenarios.

There are trust alternatives to avoid guardianship as well. A trust is a legal document by which a person or entity (settlor) gives another person or entity (trustee) the power to manage the settlor's assets. Before a person becomes incapacitated, he may create and fund a trust and appoint a trustee to manage the person's assets. After a person becomes incapacitated, a court-created trust may help avoid guardianship as well.

A competent spouse, once appointed by the court as the Community Administrator, has the right to manage, control, and dispose of the community estate.

A ward's debtor can deposit monies owed to the ward into the registry of the court (if \$100,000 or less).

When an individual's only asset is a federal benefit (Social Security, SSI, and some VA benefits), the person with custody or responsible for the care of the proposed ward can file an application with the appropriate agency to be appointed representative payee or fiduciary.

If the purpose of the guardianship is to sell property worth less than \$100,000, the court can order a sale with the proceeds being placed in the court registry.

### Conclusion

This pamphlet is published as a public service project of the Texas Young Lawyers 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](http://www.texasguardianship.org) and the National Guardianship Association's website at [www.guardianship.org](http://www.guardianship.org).

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