
GUARDIANSHIP OF YOUR CHILD WITH SPECIAL NEEDS

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INTRODUCTION

As long as a child is under the age of 18 years, parents have all the authority to decide where he or she lives, give consent to medical treatment, advocate on the child's behalf, as well as the duty to make sure the child's basic needs are being met. Once a child reaches adulthood (age 18) the legal authority of the parent terminates, and the adult child can make his or her own decisions. If, because of a disability, an adult child is limited in his or her ability to make decisions, then a guardianship may be the best way to protect his or her interest and well-being.

I. WHAT IS GUARDIANSHIP?

A guardianship is a court-created and court-monitored relationship between an incapacitated person and a court-appointed surrogate decision maker. Texas law defines an **"incapacitated person"** as an adult individual "who, because of a physical or mental condition is substantially unable to provide food, clothing, or shelter for himself or herself, to care for the individual's own physical health, or to manage the individual's own financial affairs." If a person becomes "incapacitated" through injury or illness and can no longer make decisions for him or herself, guardianship is often the best way to protect that person's rights.

There are two types of guardianship: guardianship of the person and guardianship of the estate. A guardian of the person has the right to decide where the incapacitated person (the **"Ward"**) resides and the right to give consent to medical treatment. The guardian of the person also has the duty of care and protection of the Ward. A guardian of the estate is responsible for the possession and management of all of the real property and personal property of the Ward. Most parents of adult children with disabilities will seek guardianship of the person only, as the child usually does not have an estate.

A guardianship may be complete, giving the guardian full control and authority over the Ward, or it may be a limited guardianship, with some rights being retained by the Ward. The court will determine that no less restrictive alternative is available or appropriate for the Ward before appointing a guardian.

II. ALTERNATIVES TO GUARDIANSHIP (LESS RESTRICTIVE ALTERNATIVES)

A. Durable Power of Attorney. With a power of attorney, an individual names an agent to handle financial and business matters on their behalf in the event of their incapacity. Limitations of this alternative are: that the person granting the power must have legal capacity at the time the document is executed; the person granting the power can later revoke it; that a power of attorney may become "stale" and not be accepted by financial institutions; that some financial institutions will only accept their own forms; that someone may execute several conflicting powers of attorney; and that the agent may die or become

incapacitated and no alternate has been designated. There is arguably a greater risk of exploitation with a power of attorney than with a court monitored guardianship.

B. Medical Power of Attorney. Similar to a Durable Power of Attorney, but for medical matters. Limitations are also similar to those under a Durable Power of Attorney.

C. Surrogate Decision Making Statutes Under the Texas Family Code, Texas Probate Code, and Texas Health and Safety Code. These statutes name individuals who can make a decision on behalf of a person with a disability in specific circumstances, such as when hospitalized and incompetent. Not all situations in which a surrogate decision-maker is necessary are covered by the statutes, and because many doctors do not want to have to interpret the statutes, they will not perform invasive procedures without a surrogate decision-maker that has unarguable legal authority to provide consent. The authority of a surrogate is more limited than the authority of an appointed agent.

D. Trusts. A trust can eliminate the need for a guardian of the estate, either by advance planning, or by a court created trust-usually with a corporate trustee (a bank trust company).

E. Representative Payee for Social Security Benefits; Veterans Administration Fiduciary. A person can be designated to receive benefits on behalf of the individual with the disability, and they are required to report to the agency regarding the use of the funds.

III. PROCEDURE FOR ESTABLISHING A GUARDIANSHIP

A. Physician's Mental Status Report. Must be completed by a physician licensed in the State of Texas and be based on a recent examination of the proposed Ward. If the primary basis of the incapacity is intellectual and developmental disability, the exam may be conducted by a psychologist. Obtaining the physician's or psychologist's report is usually the first step in pursuing a guardianship.

B. Application. The applicant is usually a family member who, with the assistance of an attorney, will file an application with the county clerk in the county where the proposed Ward resides. A husband and wife (or joint managing conservators appointed in a divorce decree) may serve as co-guardians.

C. Court Investigator. In Harris County and other more populous counties in Texas where there are designated statutory probate courts, the court will appoint an investigator (usually a social worker, sometimes an attorney) who will visit with the proposed Ward, gather information about his or her situation, and make a report back to the court with a recommendation as to whether or not the guardianship seems appropriate.

D. Service of Citation. The proposed Ward must be personally served, by Sheriff, with a copy of the application and a notice that tells them when to answer the lawsuit in order to preserve their rights.

E. Notice to Certain Individuals. Copies of the application must be sent by certified mail to the immediate family of the proposed Ward, including their spouse, parents, and adult children, and also to the director of any residential facility where the proposed Ward resides.

F. Attorney Ad Litem. The court will appoint an attorney to represent the proposed Ward.

G. Hearing. If everyone is in agreement that a guardianship is necessary, and everyone agrees on the appointment of the person indicated in the application, then a hearing is held in which the judge will declare the proposed Ward incapacitated and will appoint a guardian. If the parties are not in agreement, then the attorney ad litem will file a contest, and the case heads towards trial.

H. Bond. At the hearing the judge will set a bond for the guardian. The amount of the bond is based on the value of the Ward's assets. A minimal bond is set for the guardian of the person.

I. Duties of the Guardian of the Person. The guardian of the person has the duty to protect and care for the Ward, including consenting to their medical procedures and determining their residential arrangements.

J. Duties of the Guardian of the Estate. The guardian of the estate needs to inventory and take possession of all of the Ward's assets and file an inventory, appraisal, and list of claims with the court. The guardian must apply to the court for a monthly allowance for the care of the Ward, and must file an investment plan. Each year an annual account must be filed with the court, with all receipts for expenditures of the Ward's funds and all cancelled checks included.

K. Annual Renewal of Guardianship. An annual report on the location, condition, and well-being of the Ward must be completed and filed by the guardian of the person each year (in addition to an annual account which needs to be filed by the guardian of the estate, if any).

IV. COMMON MISCONCEPTIONS ABOUT GUARDIANSHIP

A. As guardian, you become financially responsible for all of the Ward's care (not necessarily true)

B. As guardian, you can be liable if the Ward commits a crime or causes injury or damage (not necessarily true)

C. The court will unnecessarily interfere in a guardian's affairs (not necessarily true)

D. A guardianship must be established before a child turns 18 (generally a guardianship cannot be established until a child with a disability attains age 18, although the court proceeding can be initiated six months before their 18th birthday)