

The Mental Health Association

of Greater Houston

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Guide to Guardianship

A task force working with the Mental Health Association of Greater Houston has developed this booklet as a guideline to assist you in the guardianship process. We gratefully acknowledge and thank the Texas Guardianship Association for permitting us to use their book "Texas Guardianship and Its Alternatives" as the basis for this handbook.

Published 1997

Revised October 2001

Revised October 2003

Revised September 2004

Family

Introduction

Guardianship is a legal process in which a court appoints and monitors someone, called a “guardian”, to make decisions for a person who does not have the capacity to do so, called a “ward”. This process is designed to protect vulnerable persons from abuse, neglect (including self-neglect), and exploitation, and to provide for their care and the appropriate management of their property. The ward’s right to make some decisions is preserved, based on his or her individual abilities.

Guardianships are created for a variety of reasons. People become incapacitated due to disease, mental disorder, or injury. When a person is no longer able to care for one’s self or property, a guardianship may be considered. Usually, a family member makes the decision to pursue a guardianship. In some instances, however, a caregiver or other concerned person will call a case to the court’s attention. After investigation, if the court determines that a guardianship may be appropriate, that legal process will be initiated.

The role of guardian is a serious commitment that is to be assumed only by persons who are reliable and trustworthy. Guardians are strictly accountable to the court for their actions.

The procurement of a guardianship can be a complicated legal process. The court’s and clerk’s office staff, moreover, is not allowed to give out legal advice. Using a lawyer who is experienced in guardianship law and procedure can save a great deal of time and frustration.

Many lawyers in the Houston area are familiar with guardianship law, and can provide excellent representation in the Harris County Probate Courts. Be an informed consumer and ask your lawyer about his or her guardianship law experience and fee schedule before you make any commitment.

These documents may be copied for distribution. If you have any suggestions for future reference guidelines or comments on the enclosed, please call or write to the Mental Health Association of Greater Houston, 2211 Norfolk, Suite 810, Houston, Texas 77098: (713) 523-8963.

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GUARDIANSHIP

Guardianship removes certain legal rights and privileges from an incapacitated person. An incapacitated person is someone who is substantially unable to:

- provide food, clothing, or shelter for himself,
- care for his own physical health, or
- manage his own financial affairs.

The court appoints another person, the guardian, to make some or all of the decisions necessary to manage the ward's affairs. Whether the court appoints a guardian with general or limited authority depends upon the physical or mental limitations of the incapacitated person. The court may not use age as the sole factor in determining whether to appoint a guardian for an adult.

In Texas, guardianship is designed to encourage the development and maintenance of maximum self-reliance and independence for each incapacitated person. As part of this process, the court must first determine that a guardianship is the least restrictive alternative for the ward by ruling out any other options for surrogate decision-making. Some of these options are discussed in part two of this book.

A guardianship with limited authority gives a guardian control over specific aspects of an incapacitated person's life, while leaving as much decision making authority as possible to the ward.

A court may appoint a guardian with full authority over an incapacitated person when it finds that this type of guardianship is the least restrictive alternative.

A guardian may be appointed as:

- guardian of the person
- guardian of the estate, or
- guardian of the person and estate.

INCAPACITY

An incapacitated person is defined by law 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." Incapacity exists in varying degrees, which is the reason guardianships are tailored by the court to meet the individual needs of the ward.

ELIGIBLE GUARDIANS

Any adult can apply to be a court-appointed guardian for a ward, unless disqualified by bad conduct, incapacity, or a conflict of interest.

The law establishes a priority for the spouse and family of the ward to serve as guardian. The judge has broad discretion in determining which person is in the ward's best interest to serve as guardian. The court also considers the ward's preference.

If there are no kin, the judge may appoint a friend to serve as guardian. If no one familiar with the ward is available to serve as guardian and the assets of the ward's estate are sufficient, the court may appoint an attorney or a financial institution to handle the ward's affairs.

Or, if the ward is indigent and there are no known family members or friends who can serve as guardian, the guardianship will be referred to the Harris County Guardianship Program (HCGP).

The appointment of a professional guardian does not prevent a relative or friend from becoming guardian at a later date.

INDIGENT WARDS: THE HCGP GUARDIANSHIP PROGRAM

In a unique response to indigent guardianship the Commissioners' Court, in January, 1992, designated the Harris County Guardianship Program to assume the responsibility for administering guardianships of the indigent. With the cooperation of other county departments, the indigent guardianship program provides services to the county's indigent wards.

When the Probate Court determines that a ward is indigent, the HCGP submits an application to become guardian. Once it is appointed guardian, HCGP social workers adopt a "case management" approach to address the ward's basic needs such as food, shelter, clothing, and physical and mental healthcare. The HCGP also manages the ward's resources or government entitlements.

GUARDIAN OF THE ESTATE

The guardian of the estate holds and manages a ward's property, such as a house, other real estate, cash, stocks, bonds, or jewelry.

A guardian must act in good faith and in the best interests of the ward. The guardian is not permitted to promote personal interests at the expense of the ward and is accountable to the court for all decisions and expenditures made on behalf of the ward.

The guardian of the estate has the following duties and responsibilities:

- Posts a surety bond in the amount ordered by the court.
- Completes and files an oath of guardian.
- Secures all assets and property of the ward.
- Prepares and files a detailed inventory of the ward's assets and property.
- Files and publishes a notice to creditors.
- Obtains the court's permission before spending the ward's money, or before selling any of the ward's property.

- Prepares an annual accounting to the court for all receipts and disbursements of funds. Failure to file an accounting may result in the expiration of the authority to act as guardian, removal and fines.
- Manages and cares for the estate in the same way that a prudent person would manage one's own property.
- Pays taxes and files tax returns.
- Requests modifications of guardianship to suit the needs of the ward's estate. If the ward is indigent it may be possible to terminate the guardianship of his estate.

SUGGESTIONS:

A guardian should consult legal counsel concerning any questions about the duties or responsibilities to the ward. In general, approval from the probate court is needed before the guardian can act on the ward's behalf. Always check with your attorney before spending any money or selling any property.

Indicate on the bank accounts that the guardian is acting on the ward's behalf. Use safekeeping agreements with banks holding the ward's money, bonds, or stocks.

Keep informed of the requirements and restrictions of entitlement programs such as Medicare, SSI or Medicaid.

GUARDIAN OF THE PERSON

The guardian of the person has the right to have physical custody of the ward and to establish the ward's legal domicile. The authority of the guardian may be restricted by the court in order to allow the ward to retain some personal decision making power.

A guardian of the person generally has the following powers and duties with respect to the ward:

- Care, control, and protection of the ward.
- The provision of food, clothing, medical care, and shelter, and
- The power to consent to medical, psychiatric, and surgical treatment (other than in-patient psychiatric commitment.)

After attending to the ward's basic needs for food, shelter, clothing, and medical care, the guardian of the person maintains the ward as well as the ward's income and estate permit. The guardian of the person monitors the care being given to the ward, maintains contact with any social workers or nursing staff providing care, arranges for appropriate medical care, and intervenes on behalf of the ward if neglect or abuse is occurring.

Annual reports on the location and condition of the ward are filed with the court. These reports are carefully reviewed by the court.

SUGGESTIONS

- Know at all times the location of the ward and inform the court in writing of changes in residence.
- Be an advocate for the ward. Be aware of and attend to the ward's medical, social, and legal needs.
- Visit the ward's home, hospital, or personal care home to ensure that the best quality of life or care is being given. Review the residence of the ward to ensure that all needs are adequately met.
- Know the ward's medical history and understand the prognosis. Understand all medications that the ward is taking.
- Have good communication with the ward and the ward's physicians and medical care providers. Make arrangements for any physician or therapy appointments.
- Ensure that caregivers and medical care providers can contact you.
- Inform the court if your address should change.

TEMPORARY GUARDIANSHIP

A temporary guardianship is of limited duration, generally no longer than 60 days. This type of guardianship is reserved for critical situations when there is imminent danger to the person or property. The court may appoint a temporary guardian when it finds that there is substantial evidence and has probable cause to believe that the person, or person's estate, requires the immediate appointment of a guardian. A person for whom a temporary guardian is appointed only loses those rights specifically described in the court's order appointing the temporary guardian. A temporary guardianship is generally followed by a permanent guardianship.

THE GUARDIANSHIP PROCESS

First, an application is filed with the probate court in the county where the proposed ward resides or is presently situated. A family member, friend, or interested person may file an application, usually with the assistance of an attorney experienced in guardianship law. The applicant's attorney consults with the physician treating the proposed ward. If they determine that a guardianship is necessary, the physician prepares a letter which states that the proposed ward is incapacitated and describes the extent of the proposed ward's incapacity.

In the case of a person who is (1) indigent, and (2) without a family member who can apply for guardianship, the Harris County Guardianship Program will file the application.

Once the application is filed, the court assigns an investigator, whose duty is to determine whether a guardianship is necessary or if another option is possible. The investigator will meet with the proposed ward. To gather information about the case, the investigator may also contact people who are familiar with the proposed ward's present situation

such as the applicant's attorney, the proposed ward's medical care providers, social workers, family members, and friends.

While the investigation is ongoing, the clerk of the probate court prepares a notice of the guardianship proceeding that must be served on the ward, either by the constable or a private process server. The applicant is required to give notice by certified mail to family members and certain other individuals.

The court investigator files a report recommending that a guardianship is either necessary or not necessary. If the investigator decided that the guardianship is necessary, the court appoints an attorney ad litem to represent the proposed ward.

THE ATTORNEY AD LITEM

The attorney ad litem is the representative and advocate of the proposed ward. A guardianship severely impacts the ward's legal rights, and it is essential that the proposed ward be represented by competent counsel.

The attorney ad litem must inform the proposed ward, as much as possible, of the law and facts of the case, the legal options, and the grounds on which the guardianship is sought. The attorney ad litem also (1) reviews the application, the medical records, and any other information pertinent to the case, (2) assures that the ward and family members have received proper legal notification of the guardianship proceeding, (3) determines that there is no conflict of interest between the proposed guardian and the proposed ward, and (4) attends the guardianship hearing. In certain situations the attorney ad litem may contest the guardianship if its necessity is in question.

The representation of the proposed ward ceases when the guardianship is granted, denied, or when the attorney ad litem is discharged by the court.

THE GUARDIAN AD LITEM

A guardian ad litem is sometimes appointed by the court to assess the proposed ward's situation and to make a report to the court. A guardian ad litem is not necessarily an advocate for or against the guardianship, but rather is usually an experienced guardianship attorney who is asked by the court to make recommendations about whether a guardianship will be in the ward's best interests, who would be the best guardian for the proposed ward, and what limitations, if any, should be imposed on the guardianship.

THE HEARING

The final determination of whether a guardian should be appointed takes place at the court hearing. At this time, evidence of the proposed ward's ability to feed, clothe, and provide shelter for himself, to care for his physical health, and to manage his property and financial affairs is presented.

The court will appoint a guardian at the hearing if there is clear and convincing evidence that:

- The proposed ward is an incapacitated person,
- The proposed guardian is eligible to serve,
- The rights or property of the individual will be protected by the guardian, and
- The appointment of a guardian is in the best interests of the proposed ward.

The proposed ward not only has a right to be present at the hearing, but is required to attend unless the court and attorney ad litem determine otherwise. Any interested person may also consent to the need for the guardianship or the appointment of a particular person as guardian. A jury trial may be requested.

FAILURE OF GUARDIAN TO PERFORM DUTIES

A guardian is strictly accountable to the court for all decisions made on behalf of the ward and may be removed with or without notice for:

- Failing to meet any of the filing requirements imposed on guardianships,
- Mistreating the ward,
- Misusing the ward's assets for the guardian's benefit,
- Failing to use the ward's assets for the ward's benefit, or
- Leaving the state for an extended period or being unavailable for service.

Removal does not terminate the guardianship. In a removal proceeding the court appoints a successor guardian to take charge of the ward and collect the assets of the estate. This successor guardian will pursue the prior guardian for damages to the estate, including attorney fees and court costs. The funds will be collected from the prior guardian or from the prior guardian's bond. The prior guardian is not discharged until all damage done to the ward's estate has been resolved.

TERMINATION OF GUARDIANSHIP

Termination of guardianship generally occurs when a ward dies or is no longer incapacitated. In either case, the guardian must (1) file a final account or report and (2) be formally discharged by the court.

Restoration of capacity by the ward terminates any guardianship upon a finding of that fact by the court. This takes place when the ward, an interested party, or the court on its own motion

institutes a competency hearing. Upon the ward's restoration, the guardian then provides a final accounting and files an application for discharge.

EXPENSES OF GUARDIANSHIP

Expenses associated with creating a guardianship include:

- Filing and service of process fees,
- Fees for the attorney for the application,
- Fees for the attorney ad litem,
- Fees for the guardian ad litem, if one is appointed,
- Costs of a medical examination, and
- The bond premium.

These expenses are usually paid from the ward's estate, if the judge creates a guardianship.

If a guardianship is not found to be necessary, the applicant for the guardianship may not be reimbursed from the estate of the proposed ward.

In cases where the proposed ward is indigent, some or most of the expenses of filing and service of process may be paid by the county in which the incapacitated person resides. The filing fees may vary from county to county, but in almost every case there will be charges associated with creating a guardianship.

PART TWO

ALTERNATIVES TO GUARDIANSHIP

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DURABLE POWER OF ATTORNEY

A Power of Attorney (POA) is an instrument executed by an adult who has capacity. A POA authorizes another person to act as their agent. The power given to the agent may either be specific or general.

If specifically stated in the document, the durable POA will not terminate upon the disability or incapacity of the principal and may be limited so that it takes effect only upon the principal's disability. It must be signed by the principal and notarized, but it does not need to be witnessed.

A durable POA terminates upon qualification of a permanent guardian of the estate or person. It does not terminate upon qualification of a temporary guardianship unless ordered by the court. A durable POA also may be terminated at any time by the principal, even after the onset of incapacity.

MEDICAL POWER OF ATTORNEY

The medical power of attorney is an instrument executed by an adult with capacity giving another person the authority to make health care decisions for her or him.

This power only takes effect upon written certification by a physician that the principal lacks capacity to make health care decisions. The physician's certificate must be filed in the medical records of the patient.

The medical power of attorney must be signed by the principal in the presence of two (2) disinterested witnesses. The witnesses must also sign the instrument.

The medical power of attorney does not terminate upon qualification of a guardian, unless so ordered by the court.

MANAGEMENT OF COMMUNITY PROPERTY

If an individual is judicially declared incapacitated, the spouse has the full authority to manage, control, and dispose of the entire community estate without the necessity of guardianship, if the court does not find the spouse to be disqualified.

The standards for disqualification are those which apply to guardians. The appointment of a guardian of the estate does not deprive the competent spouse of control over the community property.

This does not apply to decisions regarding the health or medical care of an incapacitated person which would necessitate a guardianship of the person.

TRUST

A trust creates a method of managing property, both real and personal, without the necessity of a guardianship, but it will not convey the authority to make medical or health care decisions for an incapacitated individual. It is an arrangement made for a person or entity to hold and manage property for the benefit of another.

Testamentary trusts are written into a will of the testator. A testamentary trust goes into effect upon the probate of the will, but will relate back to the date of death of the testator for most purposes. The trust is managed according to the trust provisions in the will and the Texas Trust Code.

An "inter vivos" trust or "living trust" is a trust created to provide care or support for another person. It is a method of managing property, both real and personal without the necessity of a guardianship. This trust operates outside the jurisdiction of the court and can be revocable or irrevocable.

A trust will not, however, convey the authority to make medical or health care decisions for an incapacitated individual.

SURROGATE DECISION MAKING FOR INCAPACITATED INDIVIDUALS

The Consent to Medical Treatment Act, effective September 1, 1993, allows a person to make certain medical decisions on behalf of an incapacitated individual.

Priorities within the act designate who serves as the surrogate decision-maker. Disputes regarding who will be the surrogate decision-maker are resolved in a court with the probate jurisdiction. Surrogate decision-makers may not decide:

- 1) To withhold or withdraw life-sustaining treatment from qualified terminal patients,
- 2) To interfere with a health care decision made under a medical power of attorney,
- 3) To consent to medical treatment of minors,
- 4) To consent for emergency care (consent of any kind is not necessary if the injury is life-threatening),
- 5) To transfer a hospital patient,
- 6) To interfere with a decision made by a patient's legal guardian,
- 7) To consent to voluntary inpatient mental health services, electro-convulsive therapy, or the appointment of another surrogate decision-maker.

A surrogate decision-maker may not make decisions regarding property.

DIRECTIVE TO PHYSICIANS

A Directive to Physicians is a form empowered by the Texas Natural Death Act. This allows you to instruct your physician not to use artificial methods to extend the natural process of dying. To utilize this provision one must be:

- At least age 18,
 - Of sound mind,
 - Acting on your own free will, and
 - Must sign the directive in the presence of two qualified witnesses.

A Directive to Physicians need not be notarized. It has no operative effect until a physician determines the patient has a terminal condition and that death is imminent despite the use of "life-sustaining procedures", or death will result within a relatively short time without applications of such procedures.

For further information on this option, contact the Texas Medical Association Board of Councilors in Austin.

REPRESENTATIVE PAYEE/CUSTODIAN

Both the Social Security Administration and the Department of Veteran's Affairs provide mechanisms for payment of benefits to an identified individual other than the person entitled to receive the benefit. In the Social Security System, the individual is called a Representative Payee and in the VA system, the individual is called a Custodian. In either case, this may be an alternative to guardianship for someone who just needs assistance in money management.

Both systems provide a way to redirect funds from one who is unable to manage them directly to a person who can. Each system is supervised to protect the person whose money is being handled. Neither is as difficult to obtain, nor as expensive as a guardianship.

TEXAS GUARDIANSHIP GLOSSARY

Abuse – The willful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm or pain or mental anguish or the willful deprivation by a caretaker or one's self of goods or services which are necessary to avoid physical harm, mental anguish, or mental illness.

Agent – One who has permission to act.

Attorney Ad Litem – A lawyer appointed by the court to represent the potential ward during the guardianship proceeding. Serves as disinterested person for an objective investigation.

Bond – An insurance policy required by the court in an amount set by the judge to cover the assets of the estate.

Conservatee – A minor being protected.

Conservator – Legally appointed protector, preserver of a minor.

Conservatorship – A legal relationship between the conservator and the conservatee.

Durable Power of Attorney – A document executed authorizing another person to act as agent which continues in effect upon the onset of incapacity of the principal.

Estate – Denotes the real and personal property of a ward.

Exploitation – The illegal or improper act or process of caretaker using the resources of an elderly or disabled person for monetary or personal benefit, profit, or gain.

Fiduciary – A person or entity to whom property management or other responsibility is entrusted.

Guardian – A person who is appointed by the probate court to protect the property and/or person of one who does not have the capacity to protect his or her own interests.

Guardian Ad Litem – A disinterested person who is appointed by the court on behalf of the ward to represent the ward's best interest.

Guardian of the Estate – A person or entity who is responsible for managing the financial affairs of the ward, e.g., paying the bills, collecting benefits, selling property.

Guardian of the Person – A person who is responsible for and who advocates for the health, well-being, and personal needs of the ward.

Guardian of the Person and Estate – A person who acts in both capacities for a ward.

Incapacitated Person – An adult, who because of physical or mental condition, is substantially unable to feed, clothe, or shelter himself-herself, to care for his or her physical health, or to manage his/her financial affairs.

Letter of Guardianship – An official letter issued by the County Clerk's office which is written evidence of the appointment and authority of the guardian to act for the ward.

Neglect – The failure to provide for one's self the goods or services which are necessary to avoid physical harm, mental anguish, mental illness, or the failure of a caretaker to provide such goods or services.

Oath – A sworn statement made by the guardian in writing in which he or she swears to fulfill their obligation.

Probate – Relating to a matter or proceeding involving a guardianship or an estate of a decedent.

Probable Cause – A reasonable ground for supposing that an allegation is well founded.

Principal – The person from whom an agent's authority is derived.

Representative Payee – A person who receives and disburses the ward's Social Security income or SSI outside of the jurisdiction of the court.

Surrogate – One appointed to act in place of another.

Testator - A person who dies leaving a will.

Trust – A legal method used to manage and distribute property without a guardianship.

Ward – A person who is unable to care for himself/herself or to manage his/her own property or financial affairs.

SOURCES OF ASSISTANCE AND HELPFUL TELEPHONE NUMBERS

Adult Protective Services

Austin

800-252-5400

Advocacy and Legal Services

Advocacy, Inc. (Mental Health-Mental Retardation & Development Disabilities)

713-974-7691

Attorney General of Texas Consumer and Elder Rights Hotline

800-621-0508

Governor Ombudsman Helpline

Austin

800-843-5789

Harris County Probate Courts

Probate Court One

713-755-6084

Probate Court Two

713-755-6090

Probate Court Three

713-755-6953

Probate Court Four

713-755-5959

Houston Bar Association

-Judicare

(legal services for low-income senior citizens)

713-228-0732

-Lawyer Referral Service

713-237-9429

-Legal Line

713-759-1133

-Houston Volunteer Lawyers Program

713-228-0732

-Legal Hotline for Older Texans

800-622-2520

Information and Referral Services

Alzheimer Association

National

800-272-3900

Harris County

713-266-6400

Houston/Harris County Area Agency on Aging:

Information and Assistance and Services for Elderly

713-794-9001

800-213-8471

Mental Health Association of Greater Houston
Information and Referral 713-522-5161

Mental Health-Mental Retardation
Authority of Harris County 281-488-2839

Texas Department on Aging
Austin 800-252-9240

Texas Guardianship Association 254-399-9115

United Way Information and Referral 713-957-4357

Medicare or Medicaid

Medicaid: Texas Department of Human Services
Austin 888-834-7406

Medicare 800-442-2620

Nursing and Personal Care Homes

Texas Department of Human Services
- Long Term Care Regulatory Nursing and Licensed Personal Care Home
Complaints
Austin 800-458-9858

Consumer Advocate for Nursing Home Residents 800-252-8016

Social Security 800-772-1213