



Guardianships: Special Issues and Mental Health Considerations

TAC Fall Judicial Education Session
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- Personal service of Application on:
 - Proposed ward (if 12 or older)
 - Proposed ward's parents and spouse ("if the whereabouts of the parents [or spouse] are known or can be reasonably ascertained")
 - Court-appointed conservator of the proposed ward
 - Putative guardian named in the application

- “If the whereabouts of the parents [or spouse] are known or can be reasonably ascertained.”
 - Applicant should address this in a pre-hearing filing. For example, in the TEC 1051.104(b) notice affidavit.
 - Additional evidence should be elicited at the hearing (DWQ, Affidavit, or live testimony) to support finding.
 - Include the finding in the order.

- Notice of the Guardianship App (with copy) is required via registered mail or CM-RRR to:
 - Adult children;
 - Adult sibling;
 - Operator of residential facility;
 - POAs; and
 - Persons “designated to serve as guardians”
- Failure to provide notice to these does not affect the validity of the guardianship (except notice to adult children). TEC 1051.104(c)

- Who gets to participate?
 - “Any person” except a person with an “adverse interest”
- For standing, an “adverse interest” is fact-specific determination made by the court upon the filing of a motion in limine.
- This does not mean that someone can act as a legal representative of another unless they are a lawyer.

- TEC 1055.101 “The rules relating to witnesses and evidence that apply in the district court apply in a guardianship proceeding to the extent practicable”
 - Live witnesses with personal knowledge are best
 - Be careful with Ad Litem testimony and reports
 - Hearsay is the most common issue
 - Medical Records are not always admissible

- TRE 803(4)-Statement made for medical diagnosis or treatment
 - This covers basically anything that gets said to medical providers regarding medical history, past or present symptoms, their inception & cause.
- TRE 803(6)-Business Records Exception
 - This is how you would admit medical records if they were challenged.
 - But see TRE 902(10) for affidavit requirements (particularly the requirement to file them 14 days in advance)
- TRE 803(24)-Statement Against Interest

- Court may order mediation in a contested guardianship.
- Any mediated settlement agreement must:
 - Contain bold language that it is not subject to revocation by the parties;
 - Signed by each party; and
 - Signed by each party's attorney.
- Court can decline to approve the settlement if it is not in the best interest of the ward.

- Each court “shall establish and maintain” list of all:
 - attorneys qualified to serve as an attorney ad litem;
 - attorneys qualified to serve as a guardian ad litem;
 - persons registered with the court to serve as a mediator;
 - attorneys and private professional guardians qualified to serve as a guardian and registered with the Court.
- Court must post these lists annually at the Courthouse and on Court’s website.

- Court must appoint a guardian ad litem or court investigator to determine (1) whether the person is incapacitated and (2) whether a guardianship is necessary if court has “probable cause”
- “Probable cause” established through (1) receipt of an “information letter” from an “interested person” or (2) letter or CME from a physician within past 120 days prior to the date of the appointment of the guardian/investigator.
- TEC 1102.003 gives checklist of all items that must be addressed in the 1102 letter “to the best of the interested person’s knowledge.”

- Court-appointed ad litem/investigator can file the application for guardianship after the investigation.
- Court-appointed ad litem/investigator can get paid whether or not a guardianship ever is granted. Payment “may” come from:
 - Proposed ward’s estate;
 - Management trust; or
 - County treasury (but only if there are insufficient funds to pay from the proposed ward’s estate or an existing management trust).

- Before a Guardianship: APS has handbook addresses guardianships; sets internal timelines for investigations and making determinations about whether to file a guardianship application or make a referral to HHSC Office of Guardianship Services.
- During a Guardianship: Court may receive a letter from APS about an on-going investigation or findings of a completed APS investigation relating to the ward or the guardian.
 - Unless completely cleared by APS, you should potentially (1) appoint an ad litem to investigate for the Court; or (2) set a status conference and conduct your own exam of the guardian to decide best next steps; or (3) remove the guardian without notice under TEC 1203.051(a)(6)(if there is a finding of neglect, abuse, or exploitation)

- A person is disqualified to be a guardian if:
 - They are a minor;
 - Because of inexperience, lack of education, or other good reason, they are incapable of properly and prudently managing and controlling the person or estate of the ward;
 - They are “unsuitable” (TEC 1104.352);
 - They are “notoriously bad” (TEC 1104.353);
 - A conflict of interest exists (TEC 1104.354); or
 - If out of state, they haven’t appointed a resident agent.

- Bond issues
 - Attorneys should pre-qualify guardian candidates to know whether and to what extent they can get a bond.
 - You may not have all financial information at the time of the original hearing; potentially set follow-up hearing.
 - Bonds can be raised as needed throughout a guardianship (for example, if a new account is discovered or property is sold).
 - Instruct guardians at time of appointment about this
 - Compare annual accountings with size of bond to ensure sufficiency

- Agreement with a financial institution (or even a lawyer) that dictates how and for what purposes and to what extent money of the guardianship estate can be used.
- Good alternative to setting a high bond.
- Have it in place before qualification (if possible).
- An alternative to a safekeeping agreement is an order from the Court directed to a financial institution ordering the turnover of the money into the registry of the Court.
- Guardianship order (and safekeeping agreement) can provide for monthly allowance to cover known expenses.

- Some practical ideas on how to handle an uncooperative ward
 - Regular status conferences with the ward to set goals and reaffirm expectations
 - Keep the ad litem in place and do not discharge them
 - Replace the guardian, if the uncooperative ward is a result of lack of oversight

- Ways to try to ensure compliance:
 - Monthly notices based on report due month
 - Annual or semi-annual compliance dockets
 - DWOP docket setting
 - Status hearings
 - Show cause hearings
 - Removal of guardian (or threat of removal)
 - Refusal to allow withdrawal by attorneys

- Applicants
 - Applicants have an absolute right to non-suit their case (unless another claim for relief is pending)
 - Non-suit is effective on the date filed; no order is technically needed (though advisable)
- Attorneys
 - Try to force substitution instead of withdrawal
 - Make sure to include all deadlines in the order
 - Set status hearing or potential DWOP docket if no substitution is made.

- Appointed Guardians
 - Existing guardians need to find successor guardians before withdrawal is allowed.
 - If a guardianship is necessary, the Court should not allow a voluntary vacancy of the guardian position.
 - If guardian dies, potentially appoint a guardian ad litem to investigate and provide report of status of ward and potential successor guardians.
 - Personal representative information is key at this point to locate others who may be interested in ensuring that the ward is protected and guardianship continues.

- Without Notice (TEC 1203.051)
 - If Guardian does not qualify
 - If no inventory is filed within 30 days
 - If new bond is not given within time period ordered
 - If Guardian is absent from the state for 3 months
 - If Guardian can't be found or is eluding service
 - If Guardian has engaged in bad conduct (financial or physical)
 - Need clear and convincing evidence
 - Guardian has 30 days to seek reinstatement

- With Notice (TEC 1203.052)
 - “sufficient grounds appear to support a belief” of financial bad conduct
 - Guardian fails to file annual report or account
 - Guardian fails to obey Court order
 - Gross misconduct or mismanagement
 - Guardian becomes incapacitated
 - Abuse, neglect, or exploitation
 - Guardian neglects to educate or maintain the ward “as liberally as the means of the” estate permit
 - Guardian interferes with the ward’s progress or participation in programs in the community.

- Resigning guardian must file an application with the court accompanied by a final account and final report that ultimately needs approval before discharge of the guardian. (TEC 1203.001)
- Court can accept the resignation immediately, but cannot discharge them or the sureties until 1203.001 requirements are fully met. (TEC 1203.002)
- Guardian must deliver all estate property to a person appointed by the Court or has qualified as the successor guardian (TEC 1203.003)

- Costs
 - If transferring in from out of state, applicant must provide certified copy of the entire out-of-state record. Alternative would be to dismiss the out-of-state guardianship and simply file a new one.
- Resetting bonds
 - Upon accepting a transfer of a guardianship, evaluate the bond amount in light of current assets.
 - You must set a new bond (though cash bonds can be transferred).

- You must hold a hearing before accepting the guardianship case.
 - Make determination that the guardianship is not a collateral attack on an existing guardianship.
 - Accept the transfer only if it is in the best interest of the ward.
- Practice Tip: Provide written instructions for Texas guardianship requirements and visit with guardian at the receipt hearing.

- Procedure
 - Applicant can request transfer to another County or sending court can *sua sponte* transfer a case if ward resides in another county.
 - Receiving court must accept the transfer if it is in the best interest of the ward unless good cause is shown to deny the transfer.
 - Transfer is final when receiving County Clerk (i) actually receives the case file and certified index and (ii) issues a certificate to the sending court that the case file and certified index have been filed in the receiving court.
 - Receiving court must hold a hearing within 90 days.

- Uncontested vs. Contested
 - TEC 1251.101: Uncontested Temporary Guardianship cannot last longer than 60 days.
 - TEC 1251.052: Contested Temporary Guardianship expires on the earlier of (i) resolution of the contest (ii) appointment of permanent guardian or (iii) 9 months from the date of qualification.
- What do you do with uncontested temporary guardianships that linger past 60 days?
 - Order the turnover of ward's property (TEC 1251.153)
 - Set status hearing, compliance hearing, or DWOP docket

- Scenario 1:
 - Mixed physical and Mental Health issues
 - MH issues caused a physical ailment; MH issues now resolved, but patient is physically unable to provide for basic needs
- Scenario 2:
 - You receive a guardianship application for a patient you know is presently committed

- Definition of a “Mental Illness” under Texas Health & Safety Code 571.003(14)
 - “an illness, disease, or condition, other than epilepsy, dementia, substance abuse, or intellectual disability, that:
(a) substantially impairs a person’s thoughts, perception of reality, emotional process, or judgment; or (B) grossly impairs behavior as demonstrated by recent disturbed behavior.”

- Detention

- Once in the system, a dementia patient would have no ability to exit the system under current code.

- Treatment

- Medication to treat the two conditions is different.
- Prognosis is much different (dementia does not improve once the patient is stabilized and medicated).
- Despite similar symptoms, etiology of conditions is much different; therefore treatment protocols vary.
- Physicians involved are often different (neurologist vs. psychiatrist).

- Public Policy

- This would displace family decisions and care with institutional care.
- Is this a slippery slope to detention of those with intellectual disabilities?
- This would open up Pandora's Box for patient dumping by long-term care facilities and families.

- Practical

- Bed space is limited. Consider short-term stay of mental health patients (10-14) days versus long-term stay of those with dementia (years).

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