

GUARDIANSHIP PROCEDURES AND ISSUES FOR NEW JUDGES

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What is a guardianship?
How is one created and managed?
What does a guardianship accomplish?

PART ONE

The Texas Estates Code, (formerly known as the Texas Probate Code) establishes the law that governs the creation of Texas guardianships, procedures during the duration of the guardianship, and the final accounting and closing of guardianships. Court use of the Estates Code (EC) is subject to: legislative changes to the Code every two years, case law from settled causes, and AG opinions.

Terms to define

Guardianship: The fiduciary relationship between a guardian and a ward, whereby the guardian assumes the power to make decisions about the ward's person or property. Types of guardianships; permanent, temporary, with limited powers, with full powers.

Guardian: One who has the legal authority and duty to care for another's person or property, especially because of the ward's infancy, incapacity, or other legal disability.

Ward: A person who is under a guardian's charge or protection. Types of ward; minor child, incapacitated adult.

Incapacity: Lack of physical and/or mental capabilities. Lack of ability to have certain legal consequences attach to one's actions. A person under 18 years of age generally does not have legal capacity.

Incompetency: Lack of legal ability in some respect, especially to stand trial or testify; often in criminal causes.

Incapacitated person: EC 1002.017 "Incapacitated person means: (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.

Applicant: A person who requests a guardianship to be initiated (or person who requests appointment of a guardian for another person)

Attorney for the Applicant: Licensed attorney retained to represent the applicant, AKA, the proposed guardian. (Must be guardianship certified.) Usually paid by the proposed guardian.

Attorney ad Litem: A court-appointed attorney who represents the proposed ward. (Must be guardianship certified) May be paid by the estate of the ward or by the county if ward is indigent.

Guardianship of the Person only: A guardianship in which the guardian is authorized (by law through court proceedings) to make all significant decisions affecting the ward's well-being, including the ward's physical custody, education, health, activities, residence, personal relationships, and general welfare.

Estate: All that a person (the proposed ward) owns, including both real and personal property.

Guardianship of the Estate only: A guardianship in which the guardian is authorized (by law through court proceedings) to make decisions only about the ward's assets and property.

Guardianship of the Person and the Estate: Guardian has authority to make decisions about ward's physical well-being, etc. and decisions about the ward's assets and property.

Bond: A legally-binding promise or obligation that is required to be filed by the guardian in a probate proceeding to ensure faithful performance by the person under bond. Estates Code 1105.101 explains the requirements for bonds in guardianship causes in Texas. EC 1105.154 lists the requirements to be met for the setting of the bond amount. Corporate surety bonds are more effective than personal surety bonds. Corporate surety bonds are typically sold by insurance agents and establish a fiduciary relationship after the bond premium is paid and the bond is approved by the court. Personal surety bonds are merely promises to pay made by private individuals.

PART TWO

A guardianship in its simplest terms is a method to remove the legal rights of one person and give those rights to another person. Sometimes, all of the legal rights of a ward are removed; in some cases, just a few specific rights are removed. Guardianship proceedings should have this objective in mind: To promote and protect the well-being of the incapacitated person and their estate. The judge

should require due diligence of all parties to accomplish this stated objective. The Texas Estates Code allows for creating a guardianship that best fits the fact scenario. EC 1001 is the Chapter that begins addressing guardianship. Action by a Probate Court with competent jurisdiction and proper venue is required for a guardianship to be initiated. An application to initiate a guardianship is filed by an attorney, usually by the attorney for the applicant who desires to become the guardian for a ward. This Application to Appoint a Guardian for the Person and the Estate starts the process. The court must then appoint an attorney ad litem to represent the proposed ward. Citation must be served in the proscribed manner and to the proper parties in the manner required by the EC. Work with your clerk to accomplish the notice process. The proposed guardian must take training, must have a criminal background check, and must register the guardianship. The Judicial Branch Certification Commission (JBCC) has the authority to perform these three tasks. The JBCC is a division of the Office of Court Administration (OCA.)

A physician's certificate of medical examination or a determination of intellectual disability must be filed into the cause. These medical docs are only valid for a certain amount of time. These docs are used for evidentiary purposes. Review suitability of proposed guardian. Contact the attorney ad litem (AAL) with any concerns that you have. The AAL needs to file a response into the case file stating their concerns. Unsuitability of the proposed guardian will cause the case to be continued until an amended application is filed to name a suitable proposed guardian. Training and a background check of the second applicant must be done by the JBCC before the hearing. Prepare for the hearing by reviewing every doc that has been filed. Notice of a contest may require the appointment of a statutory probate judge or you may need to transfer the cause to the district judge.

At the hearing, place the applicant and anyone else who will testify under oath, then begin.

Questions:

Separate Handouts: 1) ***Procedures and Issues to Consider for an Application for a Guardianship in Texas.*** 2) ***Findings of the Court.***

Questions:

PART THREE

Successfully Managing Guardianship Cases

What we need to discuss now is the concept of docket mgmt with these variables: Estate Code deadlines, local attorneys, out-of-county attorneys,

bewildered guardians, lazy guardians or attorneys, bad estate accounting, and non-responsive guardians and/or attorneys. Since I don't allow pro se guardianships, I always go back to the attorney of record listed for the applicant/guardian and make my requests for information and filings. Guardianships are complex enough without adding the extra issue of pro se applicants.

Begin at the beginning: During the hearing where the permanent guardianship is created, I give the deadlines to the guardian (30 days for the initial inventory, 1 year for the report of the person and annual accounting) so the new guardian is not just hearing the deadline info from their attorney. Immediately after this hearing, we enter the case info into our calendar system for scheduling of deadline dates. We use Lotus Organizer which networks my three office computers together. Court Coordinator, Admin assistant, judge's computer are linked so any of the three people can enter info for case mgmt. There are dozens and dozens of calendar and schedule programs available for you to use. We just happen to have the Lotus Organizer already on our computers, so we use it for our case mgmt. Find one that you like and put it to use.

At about three weeks after the guardianship is started, my calendar will show "Inventory due on Probate Cause #11,999 Jones." Either I or my staff will pull the file located in the clerk's office to see if the inventory has been filed. If no inventory has been filed, I will call the attorney of record to remind them of the requirement. I keep notes of my call and the attorney's response. I keep the file in my office in the "Wait Stack." Eventually, the initial inventory is timely filed or a request is filed for additional time to submit the inventory. If I don't get an inventory, I file a Notice of a show cause hearing for successor guardian. The show cause Notice usually gets compliance.

I use a similar procedure for the annual report of the person and annual accounting. Right after the first hearing to create the guardianship, the annual requirements are entered into our calendar system for a review at about 11 months after the date that the Order for the guardianship was signed. If no annual report and accounting has been filed, a call is made to remind the attorney. If these docs have been filed, I review the report and check the math on the accounting. If I see mistakes or have concerns, a call or email is sent to the attorney. I will request an Amended report or accounting, receive the amended docs, then wait the ten days before signing the Order to approve. Finally, the new annual date is bumped into the next year to start the process over for each year that the guardianship is in effect.

Temporary guardianships are a different animal. Temps require a final accounting when the guardianship terminates on day 60. Just flag your calendar system at about day 50 so you can be reminded that the temp is about to expire and then check the file for the final accounting and Order to close.

All that I have spoken about so far is applicable to new guardianships that your court creates. How do you get a handle on your overall guardianship docket, new and old cases? Work with your clerk to get a list of active guardianships; they may have a module in their file system software that can pull up the active guardianships in your court. The OCA mandated that the Judicial Branch Certification Commission (JBCC) was required to register every guardianship in Texas. So, my clerk used her NetData system to produce a list of active cases so that I could send a letter outlining the JBCC requirements to each guardian. Hopefully, your clerk can get you a list which you can then enter into your calendar system to stay current on the reports.

Finally, stay up to date with your guardianship docket; don't get too far behind or you will have difficulty catching up with management of the cases. Adopt my method or adapt it to fit your individual situation, staff, and time available for taking care of the docket. Or invent your own docket mgmt method and share it with us at a future conference!

Questions:

Thank you,

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