

Guardianship Overview

by:

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THE CURRENT REALITIES

- ❖ Currently there are 40 million Americans over age of 65 - representing approximately 13% of U.S. population.
- ❖ By 2030, it is estimated that there will be 72 million Americans over age of 65 - which will represent 20% of U.S. population.
- ❖ 5 percent of persons between 65-74 will have Alzheimer's disease -- that will increase to about 50% of persons over the age of 85.
- ❖ \$20 trillion will pass from estates to heirs in next 50 years -- the largest transfer of wealth in U.S. history.

The Basics

MENTAL CAPACITY

Mental capacity exists when person is able to reach decision as result of following four (4) step process:

- Understanding relevant information regarding choice;
- Appreciating likely consequences of each choice;
- Manipulating information rationally; and
- Communicating stable decision.

CONTRACTUAL CAPACITY

- ❖ A person has “mental capacity” to contract if, at time of contracting, he “appreciated the effect of what [he] was doing and understood the nature and consequences of [his] acts and the business [he] was transacting.” *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 845 (Tex. 1969).
- ❖ General presumption of capacity - no clear shift in burden.

GUARDIANSHIP INCAPACITY

- ❖ New guardianship PJC provides as follows:

An “incapacitated person” is adult individual who, because of physical or mental condition, is substantially unable to provide food, clothing, or shelter for himself or herself, to care for individual’s own physical health, or to manage the individual’s own financial affairs.

- ❖ Burden: Clear and convincing evidence.

JURISDICTION

- ❖ Original jurisdiction for guardianship proceedings will be in Statutory Probate Courts (Bexar, Collin, Dallas, Denton, El Paso, Galveston, Harris, Hidalgo, Tarrant, and Travis).
- ❖ Original jurisdiction for guardianship proceedings in other counties will either be in constitutional county court, or, if one exists, in statutory county court at law that has been given explicit guardianship jurisdiction by statute.
- ❖ In counties having no statutory probate court or county court at law exercising probate jurisdiction, contested guardianship proceedings originally filed in constitutional county court may, on the judge's motion, and must, on any party's motion, be transferred to district court or assigned to statutory probate judge.

VENUE

- ❖ Guardian of Adult Incapacitated Person:
 - County in which proposed ward resides or
 - County in which proposed ward is located on day application is filed;
 - County in which proposed ward's principal estate is situated.

Tex. Estates Code § 1023.001(a).

VENUE

❖ Guardian of Minor:

- County in which minor's parents reside.
- If parents live in different counties, county in which sole managing conservatorship parent resides or, if parents have joint custody, county in which parent with greater access and possession resides.
- If only one parent is living and has custody, county of that parent's residence.
- If both parents are dead and minor was in custody of now-deceased parent, county where last surviving parent having custody resided.
- If both parents died in common disaster, venue is in county in which they resided at time of death.

Tex. Estates Code § 1023.001(b).

Disqualification versus Adverse Interest

- ❖ Statutory Disqualifications:
 - Minor
 - Notoriously
 - Incapacitated person
 - Party to Lawsuit Involving Proposed Ward
 - Indebted to Proposed Ward
 - Asserting Claim Adverse to Proposed Ward
 - Incapable Person
 - Non-Resident Without Resident Agent
 - Unsuitable Person
 - Disqualified by Declaration
- ❖ Adverse Interest: Not defined by statute

Alternatives to Guardianship

- ❖ Medical Power of Attorney.
- ❖ Durable Power of Attorney.
- ❖ Declaration for mental health treatment.
- ❖ Joint bank accounts.
- ❖ Court created management trust per Section 1301.
- ❖ Special needs trust.
- ❖ Alternative forms of decision making.
- ❖ Emergency protective orders.
- ❖ Surrogate decision making.
- ❖ Mental health commitment.
- ❖ Katie's law.

Types of Guardianship

Temporary Guardianship

TEMPORARY GUARDIANSHIP

- ❖ Short term solution when insufficient time to create permanent guardianship but court has probable cause to believe immediate appointment of guardian is required for a minor or adult incapacitated person.
- ❖ Applicant: Any person who can seek permanent guardianship - and does not need to complete training before initial appointment
- ❖ Possible alternatives:
 - Temporary restraining order.
 - Temporary injunction.
 - Mental health commitment.
 - Powers of attorney.
 - Medical Consent Act.

TEMPORARY GUARDIANSHIP

- ❖ Requires sworn application that provides:
 - Name and address of proposed ward;
 - Alleged imminent danger to proposed ward's person or estate;
 - Type of appointment and particular protection and assistance being requested;
 - Facts supporting allegations and requests;
 - Name, address, and qualification of proposed temporary guardian;
 - Name, address, and interest of applicant.

TEMPORARY GUARDIANSHIP

- ❖ Sworn application should be presented promptly so judge may issue order setting hearing date.
- ❖ Attorney Ad Litem is required to be appointed before hearing.
- ❖ Clerk must issue notice that describes rights of parties and date, time, place, purpose, and possible consequences of hearing on application and copy of application must be attached and served on:
 - Proposed Ward by personal service;
 - Proposed Ward' attorney ad litem by copy of notice.

TEMPORARY GUARDIANSHIP

- ❖ Initial hearing:
 - Must be held within ten days of application filing unless proposed ward or his/her attorney consents to extension for up to thirty days after filing.
 - Proposed ward is entitled to prior notice of hearing, to be present, and to be represented by attorney
- ❖ Medical Evidence: Substantial evidence of incapacity (that which reasonable minds could have viewed as supporting finding) as established by:
 - Doctor's certificate per Texas Estates Code Section 1101.103.
 - Other sources.

TEMPORARY GUARDIANSHIP

- ❖ Capacity findings:
 - Substantial evidence of incapacity; and
 - There is either imminent danger to proposed ward's physical health or safety or his estate will be seriously damaged or dissipated unless immediate action is taken.
- ❖ Substantial evidence is that which reasonable minds could have viewed as supporting finding. Powers of Temporary Guardian: Limited to those necessary to protect proposed ward against imminent danger shown may be granted.
- ❖ Reasons for temporary guardianship and powers and duties of temporary guardian must be described in order of appointment.

TEMPORARY GUARDIANSHIP

- ❖ Qualification: Temporary guardian must qualify in same form and manner required of permanent guardian.
- ❖ Termination:
 - Sixty days.
 - On one day's notice to Applicant, proposed ward may move to dismiss temporary guardianship. Court must hear and determine motion expeditiously.
 - Can be extended if contest is filed.
- ❖ Appointment of temporary guardian is not adjudication of incapacity.
- ❖ Proposed Ward's Powers: Retains all rights and powers not specifically granted to temporary guardian by court order.

Permanent Guardianship

PERMANENT GUARDIANSHIP

- ❖ Applicant: Any person who can seek permanent guardianship who does not have an interest adverse to proposed ward
- ❖ Requires sworn application that provides:
 - Proposed ward's name, gender, date of birth, and address;
 - Name, relationship, and address of applicant;
 - Facts showing court has venue;
 - Type of guardianship sought—person, estate, or both;
 - Whether alternatives to guardianship and available supports and services to avoid guardianship were considered, and
 - Whether such alternatives and supports and services are feasible and would avoid need of guardianship.

PERMANENT GUARDIANSHIP

- ❖ Requires sworn application that provides:
 - Nature and degree of alleged incapacity;
 - Specific areas of protection and assistance requested and limitation or termination of rights requested;
 - Facts showing why guardian should be appointed and interest of applicant in appointment;
 - Whether guardianship of any kind exists for proposed ward in Texas or any other state and, if so, description of guardianship;
 - Name and address of any individual or institution having care and custody of proposed ward;
 - Description and estimated value of proposed ward's property, including any compensation, pension, insurance, or allowance;
 - Name and address of agent under any power of attorney signed by proposed ward and description of type of power of attorney.

PERMANENT GUARDIANSHIP

- ❖ Requires sworn application that provides:
 - If proposed ward is minor, names and addresses of proposed ward's parents and siblings; ages of any siblings, and whether either or both of parents or any of siblings are deceased; and, if each of parents and adult siblings are deceased, names and addresses of other adult living members related to proposed ward within third degree by consanguinity;
 - If proposed ward is minor, whether minor was subject of legal or conservatorship proceeding within last two years and, if so, the court involved, nature of proceeding, and final disposition, if any, of proceeding;
 - If proposed ward is adult, names and addresses of proposed ward's spouse, parents, siblings, and children or, if none, adult next of kin related within third degree by consanguinity; ages of any siblings or children; and whether either parent, spouse, or any child or sibling is deceased.

PERMANENT GUARDIANSHIP

- ❖ Attorney Ad Litem is required to be appointed before hearing.
- ❖ Guardian Ad Litem may be appointed.
- ❖ Citation of all applications for guardianship must be by posting. Tex. Estates Code § 1051.102.
- ❖ Personal service required on:
 - (1) Proposed ward who is twelve years of age or older,
 - (2) Parents of proposed ward if their location is known or can be reasonably ascertained,
 - (3) Court-appointed conservator or person having control of care and welfare of proposed ward,
 - (4) Proposed ward's spouse, and
 - (5) Person named in application to be appointed guardian, if person is not applicant. Tex. Estates Code § 1051.103.
- ❖ Any party than proposed ward may waive service.
- ❖ Attorney ad litem for proposed ward cannot waive personal. Tex. Estates Code § 1051.055(e).

PERMANENT GUARDIANSHIP

- ❖ Notice by certified or registered mail, return receipt requested, or by any other form of mail that provides proof of delivery on
 - Proposed ward's adult children;
 - Proposed ward's adult siblings
 - Administrator of nursing home or similar facility;
 - Operator of residential facility in which proposed ward resides;
 - Person known by applicant to hold power of attorney;
 - Person designated to serve as guardian in written declaration;
 - Person designated to serve as guardian in probated will of minor's last surviving parent;
 - Person designated to serve as minor's guardian in written declaration of proposed ward's last surviving parent before death; and
 - Each adult named in application as "other living relative" of proposed ward within third degree of consanguinity if no other family.

Applicant should file certificate of service compliance.

PERMANENT GUARDIANSHIP

❖ Hearing:

- Bench or jury if contested and requested.
- Proposed ward must be present at hearing to appoint guardian unless court determines on record or in its order that appearance is not necessary.
- Court should inquire into proposed ward's ability to care for himself and manage his affairs, ascertain age of minor proposed ward, and review government reports is sought to government funds.
- Court should confirm medical evidence is presented - by Texas licensed physician.
- Court should also inquire into qualifications of party seeking to be appointed guardian.
- Court should confirm criminal check has been completed.
- Court should confirm education course.
- Court should require testimony of information need to set bond.

PERMANENT GUARDIANSHIP

- ❖ Findings requiring clear and convincing evidence:
 - Proposed ward is incapacitated person - based on recurring acts or occurrences within the preceding six months. Isolated instances of negligence or bad judgment cannot be used to prove incapacity.
 - Best interests of proposed ward to have court appoint guardian;
 - Rights or property of proposed ward will be protected by appointment of guardian; and
 - Alternatives to guardianship that would avoid the need for appointment of guardian have been considered and are not feasible; and
 - Supports and services available to proposed ward that would avoid need for appointment of guardian have been considered and determined not to be feasible.

PERMANENT GUARDIANSHIP

- ❖ Findings requiring preponderance of evidence:
 - Court has venue of case,
 - Proposed guardian is eligible and entitled to be appointed or is proper person to be appointed;
 - Minor guardianship is not created for primary purpose of enabling enrollment in school or school district; and
 - Proposed ward is either totally without capacity or lacks only some capacity.
- ❖ Finding of partial incapacity must specifically state whether proposed ward lacked capacity, or lacks sufficient capacity without supports and services, to make personal decisions regarding residence, voting, operating a motor vehicle and marriage.

PERMANENT GUARDIANSHIP

- ❖ Preference of Proposed Ward:
 - Before appointing guardian, court is required to give due consideration to proposed ward's preference as to who should be appointed guardian regardless whether proposed ward has previously designated by declaration pre-need guardian.
 - Court is not obligated to appoint proposed ward's selection. Rather, court will weigh whether:
 - Proposed ward retains ability and judgment to make such preference and
 - Selection is in proposed ward's best interest.

PERMANENT GUARDIANSHIP

- ❖ In determining type and amount of bond, court should consider—
 - Value of non-real estate;
 - Estimate of annual receipts
 - Familial relationship of guardian to ward;
 - Guardian's ties to community;
 - Guardian's financial condition;
 - Guardian's past history of compliance with court;
and
 - Reason the guardian may have previously been denied corporate surety bond.

PERMANENT GUARDIANSHIP

- ❖ The order must contain findings of fact and specify—
 - Names of guardian and ward;
 - Whether guardians is of person, estate, or both;
 - Specific powers, limitations and duties of guardian;
 - Specific rights and powers retained by ward with/without necessary supports and services;
 - Whether ward can decide residence, vote and drive;
 - Amount of the guardian's bond;
 - If physician's certificate stated improvement in ward's physical or mental condition was possible and specified that reevaluation within year should occur, order must state date by which guardian must submit updated physician's certificate.

Qualification

QUALIFICATION

- ❖ Estate Oath and Bond: All guardian of estate must be bonded other than:
 - Corporate fiduciary.
 - Guardianship program operated by a county.
- ❖ Person Oath and Bond: All guardian of person must be bonded other than:
 - Corporate fiduciary.
 - Guardianship program operated by a county.
 - Qualified person appointed in will by surviving parent that has been probated or in similar written declaration.

QUALIFICATION

- ❖ Letters of guardianship are issued by clerk to person appointed guardian on guardian's qualification.
- ❖ The appointed guardian is deemed to have qualified on:
 - Taking and filing oath;
 - Giving required bond and filing with clerk;
 - Bond being approved by court.
- ❖ This is sufficient evidence of appointment and qualification of guardian for all purposes.
- ❖ Any number of duplicate letters of guardianship may be issued by clerk if requested by guardian.

Duties of Guardian

DUTIES

- ❖ Guardian of person must provide food, clothing, medical care, and shelter for ward.
- ❖ Guardian of person must now inform relatives of changes in health and residence.
- ❖ Guardian of estate must take care of and manage estate.
- ❖ Guardian is not required to spend personal funds to provide for ward, but may not expend funds of ward's estate unless specifically authorized by the Texas Estates Code or by prior court approval.
- ❖ If guardian of estate must expend estate funds without prior court approval, Texas Estates Code provides procedures for subsequent approval of these expenditures.

WHEN COURT APPROVAL IS REQUIRED

- ❖ Guardian of the Person:
 - Can take most actions without specific court approval.
 - Court approval required to:
 - Establish income trust to allow ward to qualify for Medicaid.
 - Place ward in more restrictive care facility unless an emergency.
 - Commit ward to inpatient mental health facility if over the age of 18.

WHEN COURT APPROVAL IS REQUIRED

- ❖ Guardian of the Estate:
 - Most actions require specific court approval;
 - Court approval not required to:
 - Release lien at maturity.
 - Vote stocks by limited or general proxy.
 - Pay guardian's bond premiums.
 - Purchase insurance.
 - Pay taxes, insurance premiums, calls and assessments.
 - Guardian may still seek court approval of approved actions as advisable.

Required Filings

PRIMARY INITIAL FILINGS

- ❖ Inventory and List of Claims (30 days).
- ❖ Annual Allowance (30 days if not in appointment order).
- ❖ Application to sell assets likely to “perish, waste or deteriorate” or expensive and/or disadvantage of kept (after approval of Inventory).
- ❖ Notice to secured creditors (4 months).
- ❖ Investment Management Plan (180 days or date specified by court).

OTHER FILINGS

- ❖ Applications to reimburse guardian for expenses.
- ❖ Applications to pay non-budgeted expenses.
- ❖ Applications to sell property.
- ❖ Reports of sale.
- ❖ Applications to purchase assets.
- ❖ Applications to settle a claim or lawsuit.
- ❖ Applications to pay professional fees.
- ❖ Applications to ratify unauthorized expenses.
- ❖ Application to engage in estate planning.
- ❖ Applications to move to more restrictive residence.
- ❖ Annual Accountings.
- ❖ Annual Reports.

TERMINATION OF GUARDIANSHIP

- ❖ Ward dies.
- ❖ Minor becomes adult by:
 - Becoming 18; or
 - Having disabilities removed.
- ❖ Ward is restored.
- ❖ Spouse qualifies as community administrator and no separate property.
- ❖ Ward's estate is exhausted.
- ❖ Ward's estate so small cost prohibitive.
- ❖ Guardianship assets transferred to court created trust.
- ❖ Any other reason court determines appropriate.