



Texas Guardianship Association

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GUARDIANSHIP BASICS

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WHAT IS GUARDIANSHIP?

Guardianship is a legal process designed to protect vulnerable persons from abuse, neglect (including self-neglect), and exploitation.

Guardianship provides for the person's care and management of his or her money while preserving, to the largest extent possible, that person's independence and right to make decisions affecting his or her life.

WHY ARE GUARDIANSHIPS CREATED?

Guardianships are created for a variety of different reasons. People become incapacitated due to disease, injury, or developmental disability. No matter what the cause, the decision to seek guardianship is often painful and difficult for the alleged incapacitated person and his or her family members.

WHAT HAPPENS TO THE PERSON'S RIGHTS AND WHAT DETERMINES INCAPACITY?

Guardianship removes certain rights and privileges from an incapacitated person, referred to as the "ward". An incapacitated person can be a minor (under 18 years old) or an adult. The guardianship statute defines an

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incapacitated adult as a person who, because of physical or mental condition, is substantially unable to

- provide food, clothing or shelter for himself or herself;
- care for the individual's own physical health; or
- manage the individual's own financial affairs. Please note that a person is not legally incapacitated until a court has declared that the person is incapacitated. Before the court makes a determination, a person for whom a guardianship application has been filed is called the "alleged incapacitated person" or the "proposed ward". The court may not use age as a factor in determining whether to appoint a guardian for an adult. The court appoints another person (guardian) to make some or all of these necessary decisions. Whether the court appoints a guardian with broad or limited authority depends upon the physical or mental limitations of the incapacitated person.

WHAT ARE THE TYPES OF GUARDIANSHIPS?

A Guardian of the Person is appointed by the court to take care of the physical well-being of a ward and a Guardian of Estate is appointed to care for a ward's property. Often both a guardian of person and a guardian of estate are appointed and this can be the same person.

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THE GUARDIANSHIP APPLICATION

A family member, friend or interested party (the "applicant") files an Application for Appointment of Permanent Guardian. The application is usually filed in the county where the proposed ward resides. Along with the application, the applicant must provide documentation of a thorough examination performed within the past four months by a physician licensed in Texas. If the proposed ward's alleged incapacity results from intellectual disability, the proposed ward shall be examined by a physician or a psychologist licensed in this state or certified by the Texas Department of Mental Health and Mental Retardation to perform the examination, unless there is written documentation filed with the court that shows that the proposed ward has been examined according to the rules adopted by the Texas Department of Mental Health and Mental Retardation not earlier than 24 months before the date of a hearing to appoint a guardian for the proposed ward. The physician or psychologist shall conduct the examination according to the rules adopted by the Texas Department of Mental Health and Mental Retardation and shall submit written findings and recommendations to the court. In certain cases, the physician or psychologist may be asked to testify as to the nature and degree of the proposed ward's incapacity.

The application usually contains the following information:

- the name, sex, date of birth, and address of the proposed ward

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- the name, relationship and address of the person the applicant desires to have appointed as guardian, and
- the social security number of the proposed ward and of the person the applicant desires to have appointed as guardian if required by that court
- whether guardianship of the person or estate, or both, is sought
- the nature and degree of the alleged incapacity, the specific areas of protection and assistance requested, and the limitations of rights requested to be included in the court's order of appointment
- the facts requiring that a guardian be appointed and the interest of the applicant in the appointment
- the nature and description of any kind of guardianship existing for the proposed ward in Texas or in any other state
- the name and address of any person or institution having the care and custody of the proposed ward
- the approximate value and description of the proposed ward's estate, including any compensation, pension, insurance or allowance to which the proposed ward may be entitled
- the requested term (one year or continuing) of the guardianship, if known
- the name and address of any person holding a power of attorney, if known, and a description of the type of power of attorney
- if the proposed ward is a minor:
 1. whether the minor was the subject of a legal conservatorship proceeding within the preceding two-year period, and if so, where and what was the disposition; and
 2. the names of the parents and next of kin of the proposed ward and whether either or both of the parents are deceased
- if the proposed ward is 60 years of age or older, the names and addresses, to the best of applicant's knowledge, of the proposed ward's spouse, siblings, and children; or if there is no spouse, sibling or child, the names and addresses of the proposed ward's next of kin
- facts showing that the court has venue over proceeding; and
- if applicable, that the person whom the applicant desires to have appointed as a guardian is a private professional guardian who has complied with the requirements of the Texas Probate Code.

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The court clerk will issue a citation to be served in person on the proposed ward. If the application is filed in a Statutory Probate Court, the court will appoint a court investigator. The investigator meets with the proposed ward, attorney of record, social workers, family members and any other persons necessary to determine if guardianship is the least restrictive manner in which to handle the case.

The court investigator files a report with the court. This report is made available to the attorney of record. If the application is not withdrawn based on the court investigator's review and recommendation, an attorney ad litem is appointed to advocate for the alleged incapacitated individual.

The attorney ad litem reviews the report furnished by the court investigator, conducts further investigation, if necessary and meets with the proposed ward. A time and date for a court hearing is set and notice is issued to all interested persons, including the alleged incapacitated individual.

The proposed ward must be at the hearing unless the court determines that a personal appearance is not in the proposed ward's best interest. The court may close the hearing if the proposed ward or the proposed ward's counsel requests a closed hearing. The proposed ward is entitled, on request, to a jury trial.

Any person who does not have an adverse interest may contest the guardianship. This includes the alleged incapacitated person. At the hearing, the court inquires into the ability of the alleged incapacitated adult to feed, clothe and shelter himself or herself, to care for his or her own physical health and to manage his or her own property and financial affairs.

Before appointing a guardian, the court must find by clear and convincing evidence that:

- the proposed ward is an incapacitated person
- it is in the best interest of the proposed ward to appoint a guardian; and
- the rights of the proposed ward or the proposed ward's property will be protected by the appointment of a guardian.

The court must find by a preponderance of the evidence that:

- the court has venue or that this court is the proper court to make the determination of necessity of guardianship

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- the person to be appointed as guardian is eligible and qualified to serve as guardian
- the guardianship of a minor is not solely to determine or change school districts, and
- the proposed ward is totally incapacitated; or is partially incapacitated, and can perform some, but not all, of the tasks necessary to care for himself or herself and manage the individual's property.

If the court finds that the adult person possesses the capacity to care for himself or herself, the court dismisses the application.

If the court finds that the person lacks some, but not all, of the ability necessary to care for himself or herself, or to manage his or her property, the court appoints a guardian with limited powers, leaving as many decisions as possible to the incapacitated individual.

If the court finds that the proposed ward is totally without the capacity to care for himself or herself, the court includes a finding of that fact in its final order and appoints a guardian with full authority.

The order contains findings of fact and specifies powers and duties granted to the guardian and any limitations of those powers, the name of the person appointed guardian, the name of the ward, whether the guardianship is of the person or the estate or both, the amount of the bond, whether an appraisal is necessary, and gives directions to the guardian regarding the appraisal of the ward's assets.

The bond is an insurance policy which protects the assets of the ward should the guardian's action create financial loss to the estate. The penal amount, or dollar amount, is set by the judge in the amount that is equal to the value of the ward's personal property plus one year's income.

When the bond has been approved by the court and the guardian files the oath, the guardian is considered qualified, and Letters of Guardianship are issued by the county clerk.

Letters of Guardianship are evidence of the authority of the guardian to act on behalf of the ward. Letters expire sixteen months after the date of issue. The guardian may renew Letters of Guardianship of the person after he or she files an annual report of the person and the court approves that report. The guardian of the estate may renew letters after the court



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Guardianship Qualifications

PERSONS QUALIFIED TO ACT AS GUARDIAN

The Estates Code dictates and prioritizes persons who are eligible to become guardians. The ward's spouse is entitled to be the guardian before any other individual. If there is no spouse or if the spouse declines or is unable to serve, then the next of kin is the next eligible individual to serve as guardian. If more than one person is entitled to serve in the same degree of kinship, the court appoints the best qualified person. If there is no family member willing or able to serve, the court may appoint any disinterested person, bank, financial institution, or guardianship program. The DADS Guardianship Program or other agencies may be appointed as guardian for an incapacitated person who does not have a family member or friend who can serve in this capacity.

When determining who to appoint as guardian, the court will consider the incapacitated person's best interest. The court will give consideration to the ward's preference and may appoint this person if he or she is not disqualified. It is important to note at this point, Texas residents may designate a guardian prior to incapacity by completing a brief statutory form.

Persons disqualified to serve are:

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- a minor
- a person whose conduct is notoriously bad
- an incapacitated person
- a person who is a party, or whose parent is a party, to a lawsuit concerning or affecting the welfare of the proposed ward
- a person indebted to the ward, unless the debt has been paid
- a person asserting a claim adverse to the proposed was or the ward's property
- a person who, by lack of education or experience, is incapable of prudently managing the ward's estate, or
- a person, corporation, or institution found unsuitable by the court.

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It is also presumed not to be in the best interest of a ward to appoint a person as guardian if they have been convicted of:

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- any sexual offense
- sexual assault
- aggravated assault
- aggravated sexual assault
- injury to a child
- abandoning or endangering a child, or
- incest.

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Duties of the Attorney Ad Litem

An attorney ad litem is appointed by the court to represent and advocate on behalf of a proposed ward or an incapacitated person in a guardianship proceeding.

Before the hearing, the AAL interviews the proposed ward and reviews the application, medical certificates, and other pertinent information available concerning the capacity of the proposed ward.

The AAL discusses with the proposed ward, if possible, the law and facts of the case, the proposed ward's legal options regarding disposition of the case, and the grounds on which the guardianship is sought.

If appropriate, the AAL files a contest to the guardianship. The AAL assures that the proposed ward has been served with proper notice, interviews the family and doctors and guarantees that no conflict of interest exists between the proposed guardian and ward.

The AAL represents the proposed incapacitated individual until the guardianship is granted, denied or the attorney is discharged by court order.

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Certification by the State Bar of Texas is required in order to serve as an AAL. Certification is based on successful completion of a course of study.

Duties of the Guardian Ad Litem

The guardian ad litem (GAL) is an officer of the court but is not necessarily an attorney. His or her duty is not to offer legal advice but to advocate for the best interest of the incapacitated person in a manner that will enable the court to determine what action will be the least restrictive for the proposed ward.

A GAL is not always appointed in guardianship proceedings and is only utilized when the court has reason to believe their services would be beneficial in determining the best interest of the proposed ward.

Expenses of Guardianship

Expenses associated with creating a guardianship include:

- filing and service of process fees charged by the County Clerk
- fees charged by the applicant's attorney
- the attorney ad litem's fees
- medical examination costs, and
- bond premiums.

These expenses may be paid out of the ward's estate if the judge creates a guardianship.

In cases of a contested guardianship where no guardianship is created because the court finds the proposed ward has full capacity, the applicant may not be reimbursed by the proposed ward's estate for funds spent on costs and attorneys fees.

In cases where the proposed ward is indigent, some or most of the court expenses may be paid out of the funds of the county in which the alleged 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.

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The guardianship process may also be initiated when the court is notified by an individual or agency that a resident of the county over which the court has jurisdiction appears to be incapacitated and is experiencing abuse, neglect (including self-neglect), or exploitation and is in need of a guardian to remedy the situation. If the court finds probable cause that the person is an incapacitated person and does not have a guardian in this state, the court shall appoint a guardian ad litem or court investigator to investigate the situation.

The court investigator or guardian ad litem reviews the complaint and determines if a guardianship is the least restrictive alternative to protect the interests of the alleged incapacitated person. If guardianship appears appropriate, the court investigator or guardian ad litem files their report and causes an application for guardianship to be filed. Upon the filing of the application, an attorney ad litem (AAL) is appointed by the court to advocate for the desires of the alleged incapacitated individual.

Temporary Guardianship

Temporary guardianship gives the guardian the power to act for thirty to sixty days, or less if the court determines that the guardian can complete his or her duties in less time. This action is reserved for critical situations when there is imminent danger to the person or property of the individual in need of the temporary guardianship (the "respondent"). The court may appoint a temporary guardian when it is presented with substantial evidence that a person may be incapacitated and the court has probable cause to believe that the person or that person's estate requires the immediate appointment of a guardian.

The temporary guardian's powers are limited to those requested of and granted by the court. A person for whom a temporary guardian is appointed is not presumed to be incapacitated and retains all rights and powers that are not specifically granted to the temporary guardian. If a permanent guardianship is not in place at the time the temporary guardianship expires, then the respondent regains all rights taken away with the temporary guardianship.

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