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Health and Human
Services

Guardianship

A Basic Introduction

Agenda

1. Definitions
2. Process
3. Responsibilities
4. Alternatives
5. Myths & Misconceptions



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Incapacity Defined

What is it and what does it mean?

Incapacitated Person (Incapacity)

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.

Sec. 1002.017.



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Guardian Defined

What is it and what does it mean?

GUARDIAN.

(a) "Guardian" means a person appointed as a:

- (1) guardian under Subchapter D, Chapter 1101;**
- (2) successor guardian; or**
- (3) temporary guardian.**

(b) Except as expressly provided otherwise, "guardian" includes:

- (1) the guardian of the estate of an incapacitated person; and**
- (2) the guardian of the person of an incapacitated person.**

Sec. 1002.012.



Who Can be a Guardian?

What is it and what does it mean?

- Guardians can be a person or an entity
 - Family member
 - Friend
 - Private Professional Guardian
 - Guardianship Program (Non-Profit or For Profit)
 - County or state agency (e.g. Harris County, HHSC)



Guardianship Types

What is it and what does it mean?

- Types of guardianship
 - Guardian of the person
 - Guardian of the estate
 - Guardian of person and estate (plenary)
 - Limited or Full guardianship
- Lengths of guardianship
 - Temporary
 - Permanent



Rights Removed

What is it and what does it mean?

Rights Removed Under Guardianship

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Ward no longer have the right to:

- a) vote in a public election or any other matter;
- b) own, possess, purchase, or use a firearm or ammunition;
- c) operate a motor vehicle or hold or obtain a license to operate a motor vehicle under Transportation Code Chapter 521;
- d) consent to marriage;
- e) execute a will or make a codicil or amendment to any existing will;



Rights Removed Continued

What is it and what does it mean?

Rights Removed Under Guardianship

- f) execute a trust or make an amendment to any existing trust;
- g) execute a power of attorney or make an amendment to any existing power of attorney;
- h) make decisions or give consent to medical or surgical treatment;
- i) choose his or her domicile or residence or make personal decisions regarding residence;
- j) personally to seek employment, obtain government assistance or access government benefits or funds.



Obtaining Guardianship

Basic Components

- Application must be filed with the probate court where the alleged incapacitated person is residing at the time;
- A Physician's Certified Medical Examination (CME) form is required;
- An attorney ad litem is appointed to represent the **alleged** incapacitated person;
- Hearing is held and the judge makes a determination.



Court Initiated

Court Initiated Guardianship

- Begins with an information letter or referral directly to the court;
- Judge may appoint an attorney or assign to a court investigator;
- Application may be filed to appoint an interested party;
- May be referred to a local program or private professional to file an application;
- Follows the normal process after application is filed.



Required Court Findings

What are the court's duties?

During the court hearing the judge must find:

- The person is partially or totally incapacitated;
- The applicant is qualified to serve as guardian;
- There are no alternatives to avoid a guardianship;
- Guardianship is the only option to protect the person and/or their estate and is in the best interests of the person.



Who cannot be a guardian?

Guardian Disqualifications

Someone is disqualified to serve as guardian if they are:

- a minor or other incapacitated person
- a person who, because of inexperience, lack of education, or other good reason, is incapable of properly and prudently managing and controlling the person or estate of the ward
- a person who is a party, or whose parent is a party, to a lawsuit concerning or affecting the welfare of the proposed ward, unless otherwise ordered by the court
- a person who is otherwise indebted to the ward, which creates a conflict of interest
- a person whose conduct is notoriously bad
- a person who has been disqualified in a previously executed declaration
- a person who is not a resident of Texas and has not designated a resident agent

Estates Code Sections §1104.351-359



Guardian Appointed

Guardian Appointed & Next Steps

Once a guardian has been appointed by the court the guardian must complete certain steps:

- Take an oath or declaration
- Pay a bond
- Obtain Letters of Guardianship
- Provide the person under guardianship with a copy of the Letters of Guardianship, Bill of Rights, and contact information for the guardian and other resources*
- Provide the Letters of Guardianship to the providers of services**



Responsibilities of a Guardian

Decision-Making

The guardian should involve the person under guardianship in the decision-making process to the extent they are able to participate. Areas included but not limited to are:

- Medical
- Residence
- Visitors
- Financial
- Property



Responsibilities of a Guardian to the Court

Reporting to the Court

- Annually
- Major Events

The guardian is required to submit an annual report to the court every year. In addition the guardian is required to keep the court informed of substantial changes or events.



Ongoing Responsibilities of a Guardian

Contact and Communication

- Family & Friends
- Available to Providers of Services

The guardian is required to keep family members informed of changes in residence or the medical condition.

The guardian is required to be available to providers of services, including residential and medical.



Alternatives to Guardianship

Alternatives to Guardianship include but are not limited to;

- Power of Attorney
- Representative Payee or Fiduciary
- Community Services
- Supported Decision-Making Agreement
- Consent for Medical Treatment, H&S Code
- Advance Directives
- Management or Special Needs Trust



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Myths & Misconceptions

Common myths & misconceptions about guardianship

- A guardian can force treatment or medication
- Guardianship is a remedy for mental health crisis or compliance with treatment
- The opinion of the person under guardianship does not matter
- Guardianship is a remedy for poor decision making
- A guardian is needed for major medical decisions
- Someone with an IDD diagnosis must have a guardian



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References & Resources

- HHSC Office of Guardianship
<https://www.hhs.texas.gov/laws-regulations/legal-information/guardianship>
- Texas Estates Code Title 3 Guardianship
<https://statutes.capitol.texas.gov/?link=ES>
- Texas Estates Code Section 1102.003
<https://statutes.capitol.texas.gov/Docs/ES/htm/ES.1102.htm>
- Judicial Branch Certification Commission
<http://www.txcourts.gov/jbcc/>
- Health & Safety Code, Chapter 313
<https://statutes.capitol.texas.gov/Docs/HS/htm/HS.313.htm>
- The ARC of Texas
<https://www.thearcoftexas.org/get-informed/family-member/alternatives-to-guardianship/>



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Questions?



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Thank you

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