

PRIMER ON GUARDIANSHIP

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Note: Parentheticals containing numbers are references to the Texas Probate Code section.

1. What is a Guardianship? It is the judicial process by which the State of Texas names a surrogate to make life decisions about an incapacitated individual's person and estate. It is a highly regulated means by which the State can limit a person's constitutional rights of self-determination because of a mental or physical disability. The concept arises from the theory of *parens patriae*. The *parens patriae* doctrine is the doctrine that all incompetent persons, are under the control and special protection of the state. *See for example, In re SSP Partners*, 241 S.W.3d 162 (Tex.App.–Corpus Christi 2007, mandamus denied). The Guardianship section of the Probate Code does not define Guardianship. However, §602 sets out the policy and purpose of a guardianship is to promote and protect the well-being of the person.

2. What is a guardian? Section 601(11) defines two types of guardians: (1) The Guardian of the Person is charged with making decisions about the Ward's health and living arrangements. (2) The Guardian of the Estate is charged with possession, protection and management of the Ward's Estate.

3. Who is the "Ward?" An incapacitated person defined as:

minor

adult who because of physical or mental condition is SUBSTANTIALLY unable to provide FOOD, CLOTHING OR SHELTER for himself
CARE FOR his own physical health

or

MANAGE his financial affairs (601)

ALSO:

a determination of incapacity of an adult must be evidenced by RECURRING ACTS or OCCURRENCES within the preceding 6 MONTHS and NOT BY ISOLATED INSTANCES OF NEGLIGENCE OR BAD JUDGMENT (684)

4. Who can bring an application for the appointment of a guardian? Any person may commence a proceeding for the appointment of a guardian by filing a written application in a court having jurisdiction and venue. (682)

5. Who has standing to contest a guardianship proceeding? Any person who does not

have an interest that is adverse to the proposed ward. (642)

6. Who is disqualified from serving as guardian?

- a minor
- person whose conduct is notoriously bad
- incapacitated person
- person who is a party to a lawsuit affecting the welfare of the ward unless the court determines that there is no conflict or there is a guardian ad litem to represent the proposed ward throughout the lawsuit
- person who is indebted to the ward
- person asserting a claim adverse to the proposed ward
- person who lacks experience or education
- person who is found to be unsuitable by the court
- nonresident who has not filed the appointment of a resident agent
- a person who is disqualified by the proposed ward (prior to incapacity) in a Designation of Guardian in advance of Need (681)

7. How does the court get jurisdiction over the proposed ward? By personal service of citation (633) Any order issued without personal service on the proposed ward is Void. *Guardianship of B.A.G.*, 794 S.W.2d 510 (Tex.App.--Corpus Christi 1990, no writ).

8. Who else must you serve with notice of the application for guardianship? Parents & spouse. (633)

9. Who else must at least have notice by certified mail?

children, siblings, administrator and operator of the nursing home or residential facility, person who has the power of attorney, person who is designated as guardian in a Designation of Guardian in advance of need. (633)

10. Can service or notice be waived? Yes, except for service on the Ward. An order establishing a guardianship upon waiver by proposed ward is Void. *Dyer v. Wall*, 645 S.W.2d 317 (Tex.App.--Corpus Christi 1982, no writ).

11. How does the ward defend himself in a guardianship action? After the court has jurisdiction, the court will appoint an attorney ad litem to represent the Ward. (646)

12. What evidence must be submitted to the court in support of incapacity? Doctor's report. (686 & 687) **How can the report be attacked?** hearsay. **So how do you plan for this?** talk to the ad litem. if you are the ad litem, determine if you need to object.

13. If a court finds that the proposed ward is suffering from only limited incapacity, then how may the court proceed? The court MUST impose the least restrictive guardianship. (684)

14. What findings are required to impose a guardianship on a person?

By clear and convincing evidence:

- ▶he proposed ward meets the definition of an incapacitated person
- ▶it is in the best interest of the proposed ward to have a person appointed as guardian
- ▶the rights of the proposed ward or the proposed ward's property will be protected by imposing a guardianship

By preponderance of the evidence:

- ▶the court has venue
- ▶the person appointed as guardian is eligible to serve, entitled to the appointment or is a proper person to act
- ▶the extent of the proposed ward's incapacity (full or limited)
- ▶recurring acts or occurrences within the preceding 6 month period and not by isolated instances of negligence or bad judgment (684)

15. To further protect the ward's person or property the court will set a bond. How is that bond set? (Always make sure that the applicant can post a bond.) The total of the personal property assets plus one year's annual income. (702 & 703) An insurance company generally will issue the bond policy. In very rare cases, individuals can guarantee the bond amount.

16. If a guardian of the Estate is appointed, how does that affect an agent appointed in a durable power of attorney? Revokes the power of attorney (485) (But a medical power of attorney may be continued by order of the court.) If a guardian of the person and estate is appointed, the power of attorney and medical power of attorney are both revoked unless continued by specific order of the Court.

17. Can a guardian commit a person to a mental institution? NO. (767 & 770) A guardian has no such authority. Only a judge upon a finding that the person is a danger to himself or others or is so ill that such a finding is imminent, can a person be committed. Since this commitment robs a person of their constitutional rights of self-determination, it requires strict adherence to the law. A good description of the process is found in the assignment, *In the Matter of R.S.C.*

18. Once a guardian is appointed, the guardian must post a Bond and file an Oath. (699-701) **What reports must a guardian make to the court?** Inventory (guardian of the estate), annual account (guardian of the estate) and annual report on well being of the ward (guardian of the person). (729-730, 743)

19. The Guardian may have to justify the annual accountings that have been previously approved when resigning- see *di Portanova v. Hutchison case*.

There is no statute of limitation on an accounting in a guardianship

The code requires strict responsibility and accountability so reconstruction over 20 years was not unreasonable

Even though the court approved each annual accounting, the court could require a comprehensive accounting at the final account by the guardian.

20. Court supervision means that a guardian must have authority to spend a Ward's assets in the vast majority of cases. A guardian may not simply spend a Ward's funds, so you must obtain an order approving expenditures on a monthly basis and any specific expenditures or sales of property. Only certain payments may be made without court order: bond, taxes, nursing home payment. Otherwise, the guardian has personal liability. (774)

21. Attorney must have fee and expenses approved before payment out of the Ward's funds. Finally, an attorney cannot request payment of attorney fees until the attorney has submitted an application for attorney fees, a detailed description of services and a sworn statement that "the claim is just and that all legal offsets, payments and credits have been allowed" and obtained an order approving the fees and ordering the guardian to pay the attorney. (665A&B)