

GUARDIANSHIP

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Elements of a Guardianship Case

1. Incapacity
2. Who should be the Guardian
3. Less Restrictive Alternatives/Supports and Services

Legal Definition of Incapacity

An “Incapacitated Person” is 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. Texas Estates Code § 1002.017

Guardian of the Person

- 1) the right to establish the ward's legal domicile;
- 2) the power to arrange for the ward's food and housing needs;
- 3) the power to apply for, to arrange, and to consent to any and all medical and dental care, including but not limited to medical tests, examinations, and the administration of medication, as required and needed by the ward;
- 4) the power to apply for, to arrange, and to consent to any and all psychological tests and evaluations which may be needed by the ward other than the inpatient psychiatric commitment of the ward;
- 5) the power to authorize the administration of psychoactive medications;
- 6) the power to apply for and receive funds from state or federal government sources for the ward's benefit;
- 7) the power to apply for and secure governmental services for the ward;
- 8) the power to apply for and to secure an identification card for the ward;
- 9) the power to consent to the disclosure of the ward's confidential records;
- 10) the power to execute all documents necessary to facilitate employment; and
- 11) the authority to manage the property of the ward with all of the powers granted by law to a guardian of the estate of a ward who is totally incapacitated.

Guardian of the Estate

- 1) Manage the Ward's property, access assets and accounts, pay expenses
- 2) Sell/Buy real estate, vehicles, personal property
- 3) Litigation

Full Authority v. Limited Authority

Scope of the Guardianship

- Based on capacity of the Ward to make decisions or manage own affairs in different areas of life.
- Determined by the medical opinion in the Physician's Certificate of Medical Examination (PCME) or Determination of Intellectual Disability Report

Physician's Certificate of Medical Examination

- Form prepared by doctor used as evidence of incapacity and relied upon for the scope of the Guardianship.
- Must be filed within 4 months of the last visit with the doctor.
- https://www.traviscountytx.gov/images/probate/Docs/Physicians_Certificate_Medical_Examination.pdf

Evidence Required for Individual With Intellectual Disability

If an intellectual disability is the basis of the proposed ward's alleged incapacity, instead of a Physician's Certificate of Medical Examination, the court may consider a written letter or certificate (DID) that:

1. shows that not earlier than 24 months before the hearing date:
 - a) the proposed ward has been examined and the written findings and recommendations include a determination of an intellectual disability; or
 - b) provide an updated or endorsed prior determination of an intellectual disability for the proposed ward.

Who should serve as Guardian

- Co-Guardians must be married or be the parents of the proposed Ward (PW)
- Guardian of the Person and Guardian of the Estate can be split between 2 people.
- Texas Estates Code sets up an Order of priority to serve as Guardian
- Criminal background check required
- May not have conflicts of interest with the PW, including owe money to PW

Less Restrictive Alternatives/Supports & Services

- Powers of Attorney
- Declaration of Mental Health Treatment
- Trust/ Special Needs Trust (to avoid Guardian of Estate)
- Court Management Trust
- Caregivers

Process to Obtain Guardianship

- Obtain Physician's Certificate of Medical Examination or DID
- File sworn Application
- PW will be served with the Application
- Immediate family has a right to written notice and chance to object
- Court will appoint an Attorney ad Litem to represent the PW
- Criminal background check provided to the Court
- JBCC registration and training
- Hearing

Court requirements for Guardian of the Person after Appointment

- Bond
- Oath
- Annual Report on Condition of the Ward
- No attorney required

Court Requirements for Guardian of the Estate After Appointment

- Bond
- Oath
- Monthly allowance
- Inventory
- Notice to Creditors
- Annual Accounting
- Permission required for most actions such as sale of property and expenditure of funds
- Final Accounting at close of Guardianship

Will a Guardianship help?

- Consider goals
- Consider PCME/DID and areas of incapacity
- Practical considerations