

TEXAS GUARDIANSHIP REFORMS

*A legal explanation to self-determination in the
real world*

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GUARDIANSHIP

Guardianship is a legal process to determine if a person is “incapacitated.”

A court decides if, due to a physical or mental condition, an individual is substantially unable to:

- manage their financial affairs,
- care for their physical health, or
- provide food, clothing, or shelter for themselves.

Under a guardianship, someone is appointed to make decisions on behalf of the incapacitated person, referred to as the “ward.”

Types of Guardianship

- There are two types of guardianship—**guardian of the person** and **guardian of the estate**.
 - A guardian of the person is responsible for the physical well-being of the person under guardianship.
 - A guardian of the estate is responsible for the person's property and assets.
- One person can be both guardian of the person and guardian of the estate, or two different people can assume these roles.
- Both types of guardianship can be either full or limited.

The Guardianship Process

- Guardianship is a legal process and decisions are made by a judge.
- An individual seeking to become guardian is called an “applicant,” and must be represented by an attorney to obtain guardianship.
- The applicant files an application for guardianship, including a physician’s certificate of medical examination (CME).
- An attorney ad litem will be appointed to represent the person with a disability’s desires.
- A guardian ad litem may also be appointed to advocate for the best interest of the person with a disability.
- The judge has the ultimate authority to decide whether or not someone needs a guardian, and if the guardianship should be full or limited.
- The judge also has the final say in who is appointed to be guardian.

The Road to Guardianship Reform

- In the summer of 2013, advocates for persons with disabilities and the elderly began meeting to discuss problems with guardianship system in Texas.
- This led to the creation of the Guardianship Reform and Supported Decision-Making Work Group (GRSDM), which developed 8 guardianship reform proposals.
- GRSDM presented the 8 proposals to Texas Working Interdisciplinary Network of Guardianship Stakeholders (WINGS).
- WINGS adopted the majority of the reform proposals.
- The Office of Court Administration supported the WINGS proposals.
- Chief Justice Hecht of the Texas Supreme Court testified in support of the reforms.

Reforming Guardianship in Texas

The 84th Legislature passed several bills protecting the rights of persons with disabilities in the guardianship system:

1. HB 39 – Alternatives to Guardianship;
2. SB 1881 – Supported Decision-Making Agreement Act; and
3. SB 1882 – Bill of Rights of Wards.

[Note: All references are to the Estates Code and not the Bill provisions.]

Significant Changes

- For the first time, the Texas legislature mandated that probate courts consider **alternatives to guardianships and supports and services** before a guardianship is created.
- Texas became the first state in the nation to codify **supported decision-making** in statute as an alternative to guardianship.
- Texas codified a **Bill of Rights of Wards**.

ALTERNATIVES TO GUARDIANSHIP

Alternatives to Guardianship: Texas Estates Code

Alternatives to guardianship include:

1. Medical Power of Attorney;
2. Durable Power of Attorney;
3. Declaration for Mental Health Treatment;
4. Representative Payee;
5. Joint Bank Account;

Alternatives to Guardianship

6. Management Trust;
7. Special Needs Trust;
8. Designation of Guardian Before the Need Arises;
9. Alternate Forms of Decision-Making Based on Person-Centered Planning; and
10. Supported Decision-Making Agreement.

Tex. Est. Code §§ 1002.0015 & 1357.001 et seq.

SUPPORTS AND SERVICES

Supports and Services: Now Defined in Estates Code

“Supports and Services” – available formal and informal resources and assistance that enable an individual to:

1. Meet the individual’s needs for food, clothing, or shelter;
2. Care for the individual’s physical or mental health;
3. Manage the individual’s financial affairs; or
4. Make personal decisions regarding residence, voting, operating a motor vehicle, and marriage.

Tex. Est. Code § 1002.031

Common Supports and Services

- 1. Supportive and Trusted Family Members and Friends** – Support and assist with explaining potential benefits and risks when making decisions about everyday issues like money management, cooking, hygiene, health care, safety, and relationships.
- 2. Medicaid Waiver Programs** – Assist with supports to ensure that medical and personal needs are met in the community.
- 3. Case Management Services** – Coordinate services with goal of individual with disability being as self-sufficient as possible.
- 4. Person-Centered Planning** – Process of planning with and supporting an individual that honors the individual's preferences, choices, and abilities.
- 5. Free or Reduced Price Meals, Foods, and Prescription Delivery**

Common Supports and Services

6. **Free or Reduced Price Transportation** – Taxi vouchers, van services, and public transit for appointments when mobility and safety are concerns.
7. **Daily Call or Home Visit Services** – Volunteer making daily calls to individual, get help if needed, and provide social contact.
8. **Utility Companies** – Notify third party if individual does not pay on time.
9. **Technology** – Devices such as smart phones and tablets can help the individual become and remain independent (e.g. timers to remind when to take medication, turn off stove, and lock the door.)

Common Supports and Services

- 10. Credit Union and Banking Services** – Provide services for individuals that may need assistance with money management. Some options are:
- **Direct Deposit:** Income or government benefits (e.g. SSI) can be directly deposited into an account and regular payments for rent, utilities etc. can be made from the account.
 - **Joint Accounts:** An account where at least two people have access to the funds either to make a deposit or withdrawal. A co-signer account requires both people to sign documents in order to authorize withdrawals.
- 11. Debit Cards** – Reloadable cards can be used as a money management tool to help the individual adhere to a budget.

Attorneys: Training on Alternatives Required

The attorney **representing an applicant** in a guardianship and a court-appointed attorney ad litem in guardianship proceeding must complete a four hour course of study in guardianship, which includes one hour on alternatives to guardianship and supports and services available to proposed wards.

Tex. Est. Code § 1054.201(a) & (b)

ADDITIONAL REFORMS

Attorney ad Litem: Duties to Investigate Alternatives

- An attorney ad litem shall discuss with the proposed ward whether alternatives to guardianship would meet the needs of the proposed ward and avoid the need for the appointment of a guardian.

AND

- Before a guardianship hearing, the attorney ad litem shall discuss with the proposed ward the attorney ad litem's opinion about whether a guardianship is necessary and if a guardianship is necessary, the specific powers or duties of the guardian that should be limited if the proposed ward receives supports and services. *Tex. Est. Code § 1054.004 (a) & (c)*

Guardian ad Litem: Duties to Investigate Alternatives

- The guardian ad litem shall investigate whether a guardianship is necessary and evaluate alternatives to guardianship and supports and services that would avoid the need for a guardian.
- The information gathered by the guardian ad litem is subject to examination by the probate court.

Tex. Est. Code § 1054.054 (c) & (d)

FINDINGS REQUIRED FOR GUARDIANSHIP ORDERS

Before Appointing a Guardian: Evidence Required

Before appointing a guardian, the probate court must find by **clear and convincing evidence** that alternatives to guardianship and supports and services have been considered and determined not to be feasible.

If the court grants a limited guardianship, the court order must specifically state whether the proposed ward lacks the capacity with or without supports and services to make personal decisions regarding residence.

Tex. Est. Code § 1101.101(a)(D) & (E) and (c)

Order Appointing Limited Guardian: Services and Supports

The order must specify:

1. The specific rights and power retained by the ward with or without supports and services; and
2. Whether the ward retains the right to make personal decisions regarding residence.

Tex. Est. Code § 1101.151(b)(2-a)(A) & (B)

Steps to End or Limit Guardianship:

- A ward or any interested person may petition the court for the full or partial restoration of rights, including the right to decide their residence if he or she has sufficient capacity with or without supports and services. *Tex. Est. Code § 1202.051(3)*
- The court shall consider whether the guardianship is needed and specific power or duties of the guardian should be limited if the ward receives supports and services. *Tex. Est. Code § 1202.151(a)*
- The court order must state any supports and services needed for the restoration or modification of the guardianship. *Tex. Est. Code § 1202.154(a)(4)*

THE SUPPORTED DECISION-MAKING AGREEMENT ACT

The Supported Decision-Making Agreement Act – We're Number One!

Texas is the first state to recognize supported decision-making as a substitute for guardianship.

Tex. Est. Code § 1357.001 et seq.

The Drawbacks of Guardianship

- Expensive – attorney’s fees, court costs and bond.
- Requires a court order to establish and ongoing court oversight, including submitting annual accountings and reports on the condition of the ward.
- Removes some or all of the individual’s decision-making rights and assigns decision-making to a third party.
- Curtails the individual’s freedom of choice, self-determination and independence.
- May be difficult to terminate or modify.
- Can lead to family conflict.

Why Families May Seek Guardianship

- Their child with a disability turns 18.
- Their child's school or physician tells them it is necessary.
- They believe it is necessary to continue to be involved in school, health care or other decisions after their child turns 18.
- To help their child handle money.
- Lack of awareness of other legal alternatives.

Important Things to Remember

- Texas law presumes that adults have decision-making capacity – this applies to everyone, including people with disabilities.
- Decision-making is a learned skill – people with disabilities need opportunity, experience and support to learn to make well-informed decisions.
- There are legal ways to assist people with decision-making that do not restrict, limit, or remove their rights.

What is Supported Decision-Making?

A process of **supporting and accommodating** an adult with a disability to enable the adult to make life decisions, including decisions related to where the adult wants to live, the services, supports, and medical care the adult wants to receive, whom the adult wants to live with, and where the adult wants to work, **without impeding the self-determination of the adult.**

Tex. Est. Code § 1357.002(3)

What is Self-Determination?

- Self-determination means making your own choices, learning to effectively solve problems, and taking control of and responsibility for one's life.
- Practicing self-determination also means that one experiences the consequences of making choices.

(National Parent Center on Transition and Employment)

The Benefits of Self-Determination

People with greater self-determination are:

- Healthier
- More independent
- More well-adjusted
- Better able to recognize and resist abuse

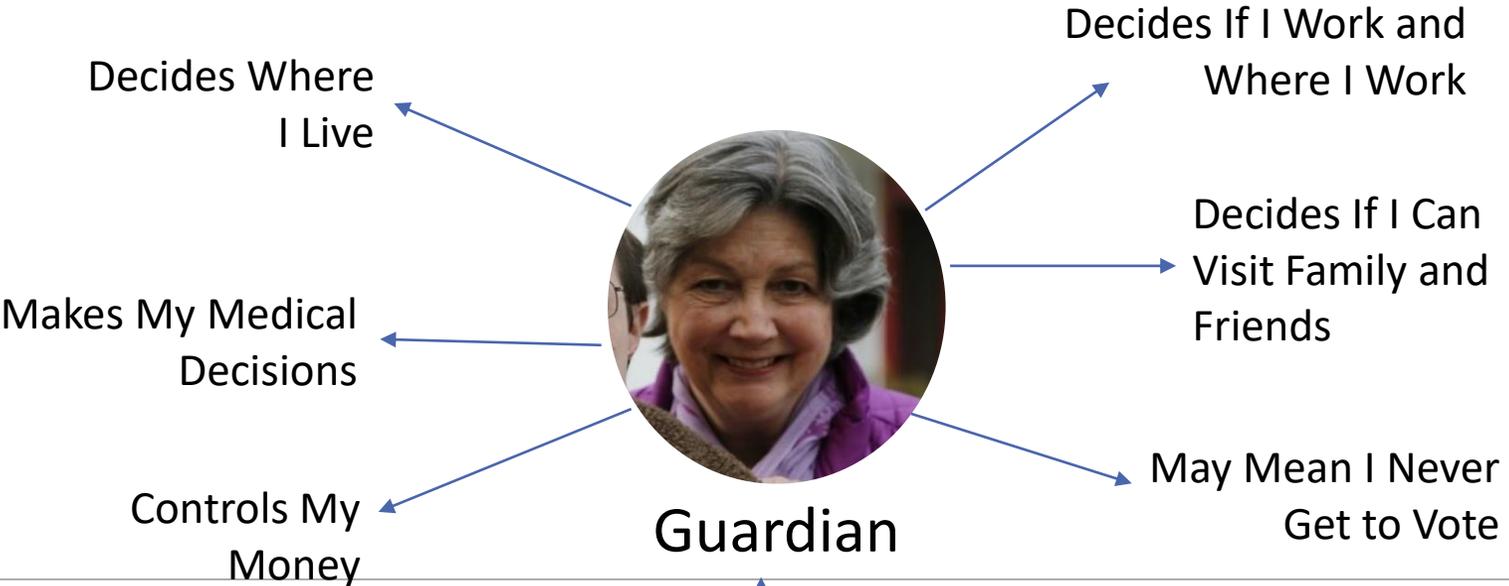
(Khemka, Hickson and Reynolds, 2005; O'Connor and Vallerand, 1994; Wehmeyer and Schwartz, 1998).

Why is Self-Determination Important?

When denied self-determination, people:

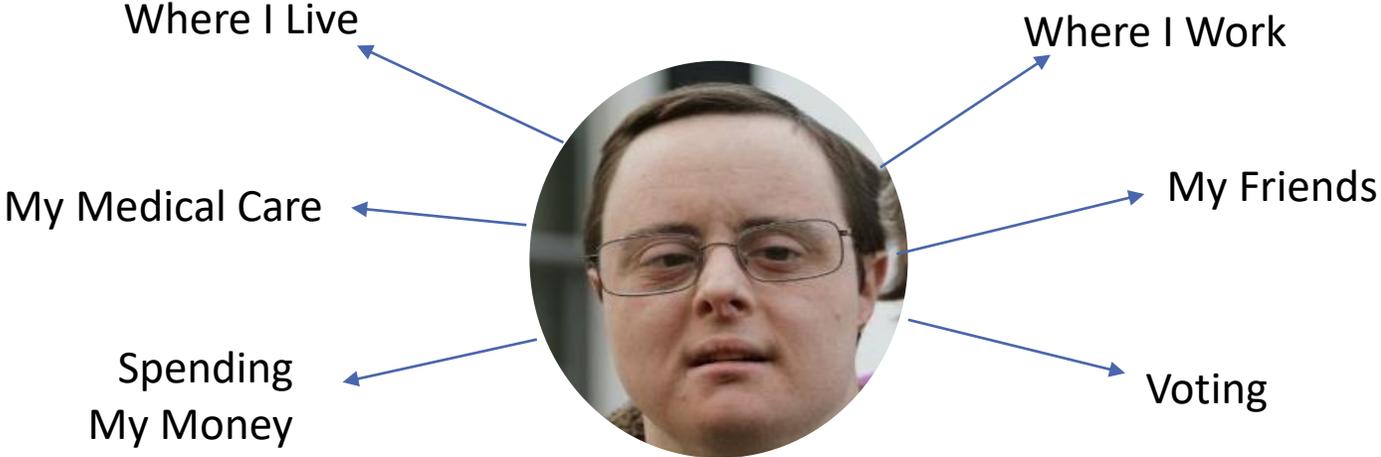
- “[F]eel helpless, hopeless, and self-critical” (Deci, 1975).
- Experience “low self-esteem, passivity, and feelings of inadequacy and incompetency,” decreasing their ability to function (Winick, 1995).

GUARDIANSHIP



**Makes The Decisions
About My Life**

SUPPORTED DECISION-MAKING



I Make My Own Decisions with Help of My Supporter



Who Can Enter into a Supported Decision-Making Agreement?

- Any individual over 18 who has a physical or mental impairment that substantially limits one or more major life activity. *Tex. Est. Code § 1357.002(1) & (2)*
- A level of capacity a person must have in order to enter a supported decision-making agreement is not defined, but a person must have sufficient capacity to agree to the supporter assisting him or her in making particular decisions.

Who Can Be the Supporter? Any Adult

- The law does not place any restrictions on who may become a supporter.
- The person who needs the support decides on someone they trust.
- Typically, the supporter may be a family member, relative or friend.

Tex. Est. Code § 1357.002(5)

Is it Voluntary or Court Ordered?

- An adult with a disability decides they need supports with decisions.
- The person with a disability and supporter enter into the agreement voluntarily, just like a power of attorney.
- It is informal and does not require going to court.

Tex. Est. Code § 1357.001

How is it Different from Power of Attorney?

- A supported decision-making agreement is distinct from a power of attorney because it does not allow a person to make the decisions for a person.
- In a supported decision-making agreement, **the person with a disability retains the right to make decisions.**
- Chief Justice Hecht described supported decision-making agreements as “Power of Attorney Lite.”

Tex. Est. Code § 1357.054

What Can a Supporter Do?

A supporter may do any or all of the following:

1. Assist adult with a disability in understanding options, responsibilities and consequences of life decisions;
2. Assist adult with a disability in accessing, collecting and obtaining medical, psychological, financial, educational and treatment records;
3. Assist adult with a disability in understanding information in (2); and
4. Assist adult with a disability in communicating his or her decision to appropriate persons.

Tex. Est. Code § 1357.051

What Legal Duties Does the Supporter Have to the Person with a Disability?

- A supported decision making agreement creates a statutory fiduciary relationship between the supporter and the person with a disability, (*Tex. Est. Code § 1357.052*).
- When a person agrees to provide support to an adult with a disability under a supported decision-making agreement, the supporter has a duty to:
 - Act in good faith
 - Act loyally and without self-interest; and
 - Avoid conflicts of interest.
- A supporter could be held liable for violating these duties.

When Does a Supported Decision-Making Agreement End?

A supported decision-making agreement ends:

1. When terminated by the adult with a disability or the supporter;
2. By the terms of the agreement;
3. If DFPS finds that adult with a disability has been abused, neglected or exploited by the supporter; or
4. The supporter is found criminally liable for the abuse, neglect, or exploitation of the adult with a disability.

Tex. Est. Code § 1357.053

What About Confidential Information?

- A supporter is only authorized to assist adult with a disability to access, collect, or obtain information.
- This includes protected health information under HIPAA and education records under FERPA.
- A supporter shall ensure that information is kept privileged and confidential and is not subject to unauthorized access, use, or disclosure.
- A supported decision-making agreement does not prevent an adult with a disability from seeking personal information on his or her own without the assistance of the supporter.

Tex. Est. Code § 1357.054

What are the Requirements for the Supported Decision-Making Agreement Form?

- The adult with a disability and the supporter must sign the agreement voluntarily in the presence of two witnesses over 14 *or* a notary public.
- There is a sample agreement in Texas Estates Code § 1357.056.
- A supported decision-making agreement may be in any form as long as it substantially complies with §1357.056(a).
- A simplified supported decision-making agreement form is available on DRTx's website at www.drtx.org.

Reliance Upon a Supported Decision-Making Agreement

- A person shall rely upon the original or a copy of the supported decision-making agreement.
- A person is not subject to criminal or civil liability or professional misconduct for an act or omission done in good faith and in reliance upon the supported decision-making agreement.

Tex. Est. Code § 1357.101

What If Someone Suspects Abuse or Exploitation?

If a person who receives or is aware of the supported decision-making agreement has cause to believe that an adult with a disability is being abused, neglected, or exploited by the supporter, the person shall report the allegation to DFPS.

Tex. Est. Code § 1357.102

Can a Supported Decision-Making Agreement Be Used Along With Other Alternatives to Guardianships?

- Yes. A supported decision-making agreement can be used in conjunction with other alternatives to guardianships, such as a medical power of attorney or representative payee.
- This is consistent with the goal of supported decision-making as a way to promote the self-determination of persons with disabilities and avoid guardianships.

BILL OF RIGHTS FOR PERSONS UNDER GUARDIANSHIP

Bill of Rights for Wards

- The bill of rights for persons under guardianship were compiled in one statute so that it would be easier for wards, guardians, and attorneys to be aware of the rights of wards.
- State and federal rights for persons under guardianship are now listed in the Texas Estates Code.

Tex. Est. Code §1151.351.

Cornerstone of the Bill of Rights

A person under a guardianship has all of the rights, benefits, responsibilities, and privileges granted by the constitution and laws of Texas and the United States except where specifically limited by a court-ordered guardianship or where otherwise lawfully restricted.

Tex. Est. Code § 1151.351(a)

24 Specific Rights

Unless limited by a court or otherwise restricted by law, **a ward is authorized** to the following:

1. To have a copy of guardianship order and letters of guardianship and contact information for the court;
2. To have a guardianship that encourages the development or maintenance of maximum self-reliance and independence in the ward with the eventual goal, if possible, of self-sufficiency;
3. To be treated with respect and dignity with recognition of the ward's individuality;

24 Specific Rights (continued)

4. To reside and receive supports and services in the most integrated setting, including home-based or other community-based settings required under Title II of the Americans with Disabilities Act;
5. To consideration of ward's current and previously stated preferences, desires, medical, and psychiatric treatment preferences, religious beliefs, and living arrangements;
6. To financial self-determination for all public benefits after essential living expenses and health needs are met and to have access to a monthly personal allowance;

24 Specific Rights (continued)

7. To receive timely and appropriate health care and treatment;
8. To exercise full control of all aspects of life not specifically granted to guardian by the court;
9. To control of personal environment based on the ward's preferences;
10. To complain or raise concerns regarding the guardian or guardianship to the court, including living arrangements, retaliation by guardian, conflicts of interest between the guardian and service providers, or a violation of any of the Bill of Rights;

24 Specific Rights (continued)

11. To receive notice in ward's native language or preferred mode of communication of a court proceeding to continue, modify, or terminate the guardianship and the opportunity to appear in court to express the ward's preferences and concerns;
12. To have court investigator, guardian ad litem, or attorney ad litem investigate a complaint received by the court from the ward or any other person;
13. To participate in social, religious, and recreational activities, training, employment, education, habilitation, and rehabilitation of the ward's choice in the most integrated setting;

24 Specific Rights (continued)

14. To self-determination in maintenance, disposition, and management of real and personal property after essential living expenses and health needs are met, including the right to receive notice and object about the substantial maintenance, disposition, and management of clothing, furniture, vehicles and other personal effects;
15. To personal privacy and confidentiality in personal matters, subject to state and federal law;

24 Specific Rights (continued)

16. To unimpeded, private, and uncensored communication and visitation with persons of the ward's choice, except if the guardian determines that it would cause substantial harm:
 - a. Guardian may limit, supervise, or restrict communication or visitation, but only to the extent necessary to protect ward from substantial harm; and
 - b. The ward may request a hearing to remove any restrictions imposed by the guardian;

24 Specific Rights (continued)

17. To petition the court and retain counsel of ward's choice who is certified, to represent ward's interest in the termination or modification of guardianship, the appointment of a different guardian or other appropriate relief under the Bill of Rights, including transition to a supported decision-making agreement;
18. To vote, marry or operate a motor vehicle, unless restricted by the court;
19. To personal visits from guardian or the guardian's designee at least once every three months, but more often, if necessary, unless the court orders otherwise;

24 Specific Rights (continued)

- 20. To be informed of and allowed to meet and talk with Disability Rights Texas, the federal legal protection and advocacy body for people with disabilities.
- 21. To be informed of the name, address, phone number, and purpose of independent living centers, area agencies on aging, aging and disability resource centers, and the LMHA and LIDDA and to communicate and meet with representatives from these agencies;
- 22. To be informed of the Judicial Branch Certification Commission and the procedure for filing a complaint against a certified guardian;

24 Specific Rights (continued)

- 23. To contact DFPS to report abuse, neglect, exploitation, or violation of rights; and
- 24. To have guardian explain the Bill of Rights in the ward's native language or preferred mode of communication upon appointment and on annual renewal.

Enforcing the Bill of Rights

- A person under guardianship may file a complaint with the probate court regarding a violation of any of the rights.
- A person under guardianship may petition the court and retain counsel to represent their interest “for other appropriate relief” under the Bill of Rights.

Tex. Est. Code § 1151.351(b)(10) & (17)

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THANK YOU