

GUARDIANSHIP PRIMER

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INTRODUCTION

This outline will provide a basic overview of the initiation and basic administration of a guardianship. The goal of this outline is to take an attorney through the guardianship process from the filing of the application through the closing of the guardianship.

It is the policy of the State of Texas regarding guardianships to limit the guardianship to that which is necessary to promote and protect the well-being of the person and preserve the estate. The Courts are charged with the power to design a guardianship that will promote and encourage as much self-reliance and independence as possible for the incapacitated person. See Section 602 of the Texas Probate Code

Because it is the policy of the State of Texas to protect an individual's rights, the guardianship must be necessary and no less restrictive alternative be available. Because of this requirement, this outline will also provide the reader with some basic alternatives to a guardianship.

FACT GATHERING

When assigned a potential guardianship matter, the most important thing to do is to gather the facts. When gathering the facts, you need to determine the following:

1. what is the background/history that has led the client to you,
2. who are the people/parties involved,
3. what areas are being handled based on the current status of the situation,
4. what areas are not being addressed because of the current status, and
5. what dangers, if any, is someone being subjected to.

Once all this information is gathered, you can begin your analysis to determine if guardianship is the appropriate option to pursue.

DEFINITIONS

Section 601 of the Texas Probate Code provides the definitions of terms relevant to the guardianship process. The following terms and definitions are critical for the

understanding of this paper and for communicating in the basic language of a guardianship proceeding:

1. “Incapacitated person” means
 - a. a minor;
 - b. an adult individual who, because of a physical or mental condition, is substantially unable to provide food, clothing, or shelter for himself or herself, to care for the individual’s own physical health, or to manage the individual’s own financial affairs; or
 - c. a person who must have a guardian appointed to receive funds due the person from any governmental source.
2. “Minor” means a person who is younger than 18 years of age and who has never been married, or has not had the person’s disabilities of minority removed for general purposes.
3. “Proposed Ward” means a person alleged to be incapacitated in a guardianship proceeding.
4. “Ward” is a person for whom a guardian has already been appointed.
5. “Estate/Guardianship Estate” means the real and personal property of a ward of deceased ward originally existed and has, from time to time, changed in form of sale, investment, or otherwise, and as augmented by any accretions and additions to (including any property to be distributed to the representative of the deceased ward by the trustee of a trust that terminates on the ward’s death) or substitutions for the property, and as diminished by any decreases to or distribution from the property.
6. “Guardian” means a person who is appointed guardian under Section 693 of the Texas Probate Code, or a temporary or successor guardian. “Guardian” refers to both guardian of the person and estate unless expressly provided otherwise.
7. “Attorney ad Litem” means an attorney who is appointed by a court to represent and advocate on behalf of a ward, an incapacitated person, or unborn person in a guardianship proceeding.

8. “Guardian ad Litem” means a person who is appointed by a court to represent the best interests of an incapacitated person in a guardianship proceeding.

METHODS TO AVOID GUARDIANSHIP OF THE PERSON FOR INCAPACITATED ADULTS

There are several options available to individuals to avoid the use of a guardianship of the person. These options can be divided into two areas: medical treatment and mental health treatment.

1. Medical Treatment

- a. Medical Power of Attorney – Pursuant to Section 166.151 et seq., Texas Health and Safety Code, a competent adult may execute a medical power of attorney. A disclosure form is completed in conjunction with the medical power of attorney. Section 166.163 of the Health and Safety Code provides the disclosure form. The statutory medical power of attorney form is provided under Section 166.164 of the Texas Health and Safety Code. See Appendix “A” for a copy of the medical power of attorney and disclosure form.
- b. Consent to Medical Treatment Act – Commonly referred to as the surrogate decision maker, this is used for adult patients of a home and community support services agency or in a hospital or nursing home, who are comatose, incapacitated or otherwise mentally or physically incapable of communication. Under this act, the surrogate decision-maker does not have the authority to consent to: (1) voluntary inpatient mental health treatment, (2) electro-convulsive treatment, or (3) the appointment of another surrogate decision-maker. See Section 313.001 et seq., Texas Health and Safety Code Ann. The role of the surrogate decision maker is left to the following persons in the following order of priority:
 1. the patient’s spouse;
 2. an adult child of the patient who has the waiver and consent of all the other qualified adult children of the patient to be the sole decision maker;

3. a majority of the patient's reasonable available adult children;
 4. the patient's parent; or
 5. the individual clearly identified to act for the patient by the patient before the patient became incapacitated; the patient's nearest living relative, or a member of the clergy.
- c. **Emergency Medical Treatment** – If an individual is unable to communicate because of an injury, accident or illness and is suffering from a life threatening injury, consent for emergency medical care of that individual is not required. See Texas Health and Safety Code Section 773.008.
- d. **Advanced Directives** – These are commonly referred to as “living wills.” The advanced directive advises medical personnel, family members or surrogate decision-makers of the preferred treatment for the declarant. The treatment preference is identified in the event that the declarant has a terminal or irreversible condition. See Section 166.033 of the Texas Health and Safety Code for the current advanced directive form. See Appendix “B” for a copy of the form.
- e. **Out-of-Hospital DNR Orders** – This is a specific directive to out-of-hospital health care professionals to withhold cardiopulmonary resuscitation and certain other life sustaining treatment. See Section 166.082 of the Texas Health and Safety Code. This document is to be prepared on a standard form as specified by the Texas Department of Health. This document may be revoked at any time without regard to the declarant's mental capacity. See Section 166.092 of the Texas Health and Safety Code. This type of directive is also available for the proxy or agent of an incapacitated person to execute on the behalf of the incapacitated person. Section 166.084 and Section 166.088 of the Texas Health and Safety Code provide options for issuing this directive in the non-written form by competent and incapacitated patients, respectively.

2. Mental Health Treatment

- a. Declaration for Mental Health Treatment – This declaration can be executed by only a person with capacity. It is effective upon execution and is valid for only three (3) years from the date of execution unless the Declarant is incapacitated at the time of the three-year anniversary date. If the Declarant is incapacitated at the time of the anniversary date, then the declaration stays in effect. See Section 137.001 of the Texas Civil Practice and Remedies Code. See Appendix “C” for a copy of the Declaration for Mental Health Treatment.
- b. Mental Illness Commitment pursuant to the Mental Health Act – See Section 462.001, 571.001 and 591.0001 of the Mental Health Code.

METHODS TO AVOID GUARDIANSHIP OF THE ESTATE FOR AN INCAPACITATED ADULT PERSON

There are several options to avoid the use of a guardianship of an estate for an incapacitated adult person.

1. Durable Power of Attorney – This document is executed by a competent adult that may take effect upon the immediate execution of this document or spring into effect to grant an agent/attorney-in-fact powers regarding his personal property and financial matters. See Section 481 of the Texas Probate Code.
2. Statutory Durable Power of Attorney – See Section 490 of the Texas Probate Code for this form. See Appendix “D” for a copy of this form.
3. Revocable Trusts or Management Trusts – Commonly referred to as the “living” trust. A competent adult has the authority to create this trust and place his/her property under the management and control of the trust. Once the property is transferred to the trust, this property is no longer in the individual’s estate. See Section 112.001 et seq., of the Texas Property Code.
4. Community Administration – Commonly used when one spouse is incapacitated and the other spouse has capacity. The incapacitated

spouse must be judicially declared incapacitated. The spouse with capacity has the authority to manage, control, and dispose of the entire community estate. The spouse with capacity has no authority over the incapacitated spouse's separate property. See Section 883 of the Texas Probate Code.

5. Sale of Property of a Ward Without a Guardianship of the Estate – See Section 890 of the Texas Probate Code. The net value of the interest in the property must not exceed \$100,000.00 and the funds from the sale must be deposited into the Court registry. The guardian of the person must apply for permission to sell the property.
6. Court Created Management Trusts – Under Section 867 of the Texas Probate Code, a Texas Probate Court may create a management trust with the ward's funds. The court shall appoint a financial institution to serve as trustee except in limited circumstances.
7. Section 142 Trusts – See Section 142.001 et seq., of the Texas Property Code. Allows for management or property recovered in a suit by a next of friend or guardian ad litem in a suit in which a minor or incapacitated person has no legal guardian and is represented by a next of friend or an appointed guardian ad litem. Upon application and then a hearing, the Court may order for the investment of funds accruing to the minor or incapacitated person from the judgment. This trust is established in a Court other than a Probate Court.
8. Payment of Claims without a Guardianship (Court Registry) –This is commonly referred to as a “deposit in the Court registry.” This provision allows a creditor of an incapacitated person or minor who owes the incapacitated person or minor \$100,000.00 or less to pay those funds into the registry of the Court. See Section 887 of the Texas Probate Code.
9. Receivership – Under Section 885 of the Texas Probate Code, if an incapacitated person's estate is in danger of injury, loss or waste, the Court may appoint a receiver to manage the property until the estate is out of danger.

AVOIDING GUARDIANSHIP OVER A MINOR

There are several alternatives available to use regarding a minor and its related issues prior to pursuing a guardianship. Those options are as follows:

1. **Managing Conservatorship** – A managing conservatorship for a minor can be created under the Texas Family Code. However, the conservator has no authority over a minor’s property. The managing conservatorship is most appropriate as an alternative to a guardianship over the person for a minor. See Section 154.301 et seq., Texas Family Code.
2. **Sale of Property of a Minor without a Guardianship** – Section 889 of the Texas Probate Code allows a parent to sale real or personal property without the need for a guardian. In order to use this option, the minor’s interest in the property must be less than \$100,000.00, and the funds must be deposited into the Court registry. It is appropriate to use this option in conjunction with a managing conservatorship.
3. **School Admission Procedures** – The Texas Education Code permits a school district to establish rules regarding who can attend a public school. See Section 25.001 of the Texas Education Code.
4. **Medical Treatment for Minors** – A parent or managing conservator can consent for medical, dental, psychological and surgical treatment for a minor. This includes both emergency and non-emergency treatment. See Section 153.073 of the Texas Family Code.
 - a. Under Section 32.001 of the Texas Family Code, the following persons may consent to medical, dental, psychological and surgical treatment of a child when the person having the right to consent as otherwise provided by law cannot be contacted **and** that person has not given actual notice to the contrary:
 1. a grandparent of the child;
 2. an adult brother or sister of the child;
 3. an adult aunt or uncle of the child;
 4. an educational institution in which the child is enrolled that has been given written authorization to consent from the person having the right to consent;

5. an adult who has actual care, control and possession of the child and has written authorization from the person having the right to consent;
 6. a court having jurisdiction over a suit affecting the parent-child relationship of which the child is the subject;
 7. an adult responsible for the actual care, control, and possession of a child under the jurisdiction of a juvenile court or committed by a juvenile court to the care of an agency of the state or county; or
 8. a peace officer that has lawfully taken custody of a minor, if the peace officer has reasonable grounds to believe the minor is in need of immediate medical treatment.
- b. **Emergency Medical Treatment for Minors – Consent is not required for emergency care of a minor who is suffering from what reasonably appears to be a life-threatening injury or illness and whose parent, managing conservator or possessory conservator, or guardian is not available. See Section 773.008 of the Texas Health and Safety Code.**
- c. **Advance Directive for Minors – Under Section 166.035 of the Texas Health and Safety Code, an advanced directive on behalf of a minor may be executed by the following persons:**
1. a spouse of the minor if the spouse is an adult;
 2. the parents of a minor; or
 3. a guardian of the minor.
- d. **Out-of-Hospital DNR Order for Minors – Under Section 166.085 of the Texas Health and Safety Code, an out-of-hospital DNR order can be signed on behalf of a minor by the following persons:**
1. the parents of the minor;
 2. a guardian of the minor; or
 3. managing conservator of the minor.
5. **Payment of Claims to a Minor without a Guardianship – This option is commonly referred to as a “deposit in the Court registry.” Under**

Section 887 of the Texas Probate Code, a creditor of a minor who owes the minor \$100,000.00 or less may pay those funds into the registry of the Court without the necessity of a guardianship. The incapacity is determined when a minor receives these funds upon reaching the age of majority unless further instructions from the court.

6. Uniform Transfers to Minors Act – See Section 141.001 of the Texas Property Code.
7. Receivership – Under Section 885 of the Texas Probate Code, if a minor’s estate is in danger of injury, loss, or waste, a receiver may be appointed to manage the property until the estate is out of danger.

OTHER ALTERNATIVES TO GUARDIANSHIPS

1. Representative Payee – Social Security Benefits are not considered a part of a Ward’s estate. As a result, guardianship of the estate is not necessary to receive and manage these benefits. Under U.S.C.A. Section 1383(a)(2), the social security administration may appoint a representative payee to handle the social security benefits of a minor or other incapacitated person.
2. Veteran’s Benefits Fiduciary – The Department of Veterans’ Affairs allows the appointment of a fiduciary to handle the administration of a veteran’s benefits without the appointment of a guardian. See 38 U.S.C.A. Section 5502(a)(1).
3. Commitment Actions for Veterans – 38 U.S.C.A. Section 5501 provides for the commitment actions by the Department of Veterans’ Affairs on behalf of mentally incompetent veterans.

THE INITIATION OF A GUARDIANSHIP

Once you have gathered facts and analyzed them to determine that guardianship is necessary, then you can proceed to initiating the guardianship.

JURISDICTION AND VENUE

Section 605 of the Texas Probate code provides for county court jurisdiction regarding probate proceedings. Section 610 of the Texas Probate Code governs

venue in a guardianship case. Venue for an incapacitated adult is proper in the county where the proposed ward resides or is found on the date the application is filed. Venue may also be based on the county in which the principal estate of the proposed ward is located. Generally, venue for the appointment of guardian for a minor is proper in the county in which both the minor's parents reside. However, there are several variations to this rule when there are managing conservators and deceased parents.

STANDING TO COMMENCE OR CONTEST A GUARDIANSHIP

Under Section 642 of the Texas Probate Code, any person has the right to commence any guardianship proceeding or to appear and contest any guardianship proceeding or the appointment of a particular person as guardian. However, a person who has an adverse interest to a proposed ward or incapacitated person may not do any of the above-entitled actions. A Motion in Limine is the proper procedure for challenging the standing of a person, who may have an adverse interest to the proposed ward in a guardianship proceeding. A person with an adverse interest to the proposed ward still has the option of bringing the need for a guardian to the court's attention through the court investigator via a court-initiated case.

DISQUALIFICATION

Under Section 681 of the Texas Probate Code, the following persons may NOT be appointed guardian:

1. a minor;
2. a person whose conduct is notoriously bad;
3. an incapacitated person;
4. a person who is a party or whose parent is a party to a lawsuit concerning the proposed ward or affecting the welfare of the proposed ward, unless the Court:
 - a. determines that the claim of the person who has applied to be appointed guardian is not in conflict with the claim of the proposed ward; or
 - b. appoints a guardian ad litem to represent the interests of the proposed ward throughout the litigation;
5. a person indebted to the proposed ward unless the person pays the debt before the appointment;

6. a person asserting a claim adverse to the proposed ward or the proposed ward's property;
7. a person who because of inexperience, lack of education, or other good reason, is incapable of properly and prudently managing and controlling the proposed ward's estate;
8. a person, institution or corporation found unsuitable by the Court;
9. a person disqualified in a declaration under Section 679 of the Texas Probate Code; or
10. a non-resident person who has not filed with the Court the name of a resident agent to accept service of process in all actions or proceedings related to the guardianship.

PROCEDURE FOR APPOINTMENT OF A GUARDIAN

A written application must be filed in the Court exercising probate jurisdiction by the person seeking to be appointed or by the person seeking to have someone else appointed. Generally, the person filing the application is the one seeking to be appointed guardian (proposed guardian). However, this is not always the case. A person can be the applicant in the matter, but propose someone else as the guardian. Section 682 of the Texas Probate Code provides the necessary contents of a guardianship application. The application must be sworn to by the applicant and contain the following information:

1. the name, sex, date of birth, and address of the proposed ward;
2. the name, relationship and address of the person the applicant desires to have appointed guardian;
3. whether the guardianship of the person or estate, or both is sought;
4. the nature and degree of the alleged incapacity, the specific area of protection and assistance requested and the limitation of rights requested to be included in the court's order of appointment, including:
 - a. termination of the right to vote; and
 - b. termination of the right to operate a motor vehicle.
5. the facts requiring that a guardian be appointed and the interest of the applicant in the appointment;
6. the nature and description of any guardianship of any kind existing for the proposed ward in Texas or any other state;

7. the name and address of any person or institution having the care and custody of the proposed ward;
8. the approximate value and description of the proposed ward's property, including any compensation, pension, insurance, or allowance to which the proposed ward may be entitled;
9. the name and address of any person whom the applicant knows to hold a power of attorney signed by the proposed ward and a description of the type of power of attorney;
10. if the proposed ward is a minor, and if known by the Applicant:
 - a. the name of each parent of proposed ward and the parent's address or the parent's are deceased;
 - b. the name, address and age of each sibling, if any, or state if sibling is deceased; and
 - c. if proposed ward's parents and siblings are deceased, the name and address of proposed ward's next of kin who are adults.
11. if the proposed ward is a minor, whether the minor was the subject of a legal or conservatorship proceeding within the preceding two-year period and, if so, the court involved, the nature of the proceeding, and final disposition, if any, of the proceeding;
12. if the proposed ward is an adult and known by the Applicant, the names, addresses and age of the proposed ward's spouse, parents, siblings, and children, or that each person is deceased, or if there is no spouse, parents, siblings, or children, or each person is deceased, the names and addresses of the proposed ward' next of kin;
13. facts showing the court has venue over the proceeding; and
14. if applicable, that the person whom the applicant desires to have appointed as a guardian is a private, profession guardian who has complied with the requirements of Section 697 of the Texas Probate Code. See Appendix "E" for a copy of a guardianship application.

When a guardianship is being pursued for a minor who will require guardianship after proposed ward is no longer a minor, then application for guardianship may be filed no earlier than the sixtieth (60) day before the proposed ward's 18th birthday. Section 682A of the Texas Probate Code.

In cases in which the proposed ward has no estate to pay court costs, an Affidavit of the Inability to Pay Court Costs should be signed by the applicant and then filed.

The affidavit is attesting to the condition of the proposed ward's financial status. See appendix "F" for a copy of the Inability to Pay Court Costs Affidavit.

ELIGIBILITY AND ENTITLEMENT

In guardianships of alleged incapacitated adults, the order of priority for persons equally entitled to be appointed is as follows:

1. designated person named under a declaration of guardianship, see Texas Probate Code Section 679;
2. proposed ward's spouse is entitled to guardianship in preference to any other person;
3. the eligible person nearest of kin to the to the ward is entitled if the ward's spouse is not one of the eligible persons; or
4. eligible person, who is **best** qualified, to serve as guardian if:
 - a. a person **entitled** to serve refuses to serve; or
 - b. two or more persons are entitled to serve in the same degree of kinship to the ward; and
 - c. neither the ward's spouse or any other person related to the ward is eligible to serve.

COURT-INITIATED CASES

When a court has probable cause to believe that a person domiciled or found in the county in which the court is located is an incapacitated person, and the person does not have a guardian in Texas, the court shall appoint a guardian ad litem or a court investigator to investigate and to file an application for guardianship. In order to establish probable cause, the court may require and information letter about the proposed ward that satisfies the requirements of Section 683A of the Texas Probate Code. The court also has the option of establishing probable cause by accepting a written letter from a doctor that conforms to the requirements of Section 687(a) of the Texas Probate Code. The requirements for the information letter are as follows:

1. include the name, address, telephone number, county of residence and date of birth of the person;
2. state whether the residence of the person is a private residence, health facility or other type of facility;

3. describe the relationship between the interested person and the proposed incapacitated person;
4. contain the names and telephone numbers of any known friends or relatives of the person;
5. state whether a guardian of the person or estate has been appointed in this state;
6. state whether the person has executed a power of attorney, and if so, the designee's name, address and telephone number;
7. describe any property of the person, including the estimated value of the property;
8. list any amount and source of monthly income of the person; and
9. describe the nature and degree of the person's alleged incapacity and include a statement about whether the person is in imminent danger of serious impairment to the person's physical health, safety or estate.

The Dallas County Probate Courts can and do accept the information letter outlined in Section 683A of the Texas Probate Code, but more commonly use a Guardianship Referral Form accompanied by a medical evidence letter. However, if the person completing the guardianship referral form does not have the ability or authority to have the medical evidence letter completed, then the court simply works with the referral form. See Appendix "G" for a copy of the Dallas County Probate Courts Guardianship referral form.

EXAMINATION AND REPORTS – MEDICAL EVIDENCE

Along with the application or after the filing of the application, but before the hearing, a medical evidence letter must be filed. Under Section 687 of the Texas Probate Code, the letter should state that the person for whom the appointment of a guardian is sought is incapacitated and should describe the extent of the incapacity. The doctor's letter must be completed by a physician licensed in the State of Texas. The date of the letter and the date of the evaluation must be no earlier than the 120th day before the filing of the application. The medical evidence letter must comply with the statutory requirements. The Dallas County Probate Courts have their own version of the medical evidence form letter. See Appendix "H" for a copy of this letter. This form must be used or if the doctor uses his/her own form, then all the information outlined in the Dallas County Probate Court's form must be used to be considered adequate.

The above requirements for a medical evidence letter are not used if the basis of the proposed wards alleged incapacity is mental retardation. In the case of mental

retardation, the proposed ward must be examined by a physician or psychologist, who is licensed in Texas, or certified by the Texas Department of Mental Health and Mental Retardation. This requirement can be avoided when written documentation is filed with the court showing that the proposed ward has already been examined according to the rules adopted by the Texas Department of Mental Health and Mental Retardation within twenty-four (24) months of the date of the hearing to appoint the guardian.

In the event an applicant is unable to obtain a medical evidence letter to file, then the applicant can file a motion for examination. See Texas Probate Section 687(b). When a motion for mental examination is filed, then an attorney ad litem is appointed and a hearing is held. The burden of proof for the examination is necessary. If the court does not grant the motion or the applicant does not obtain a medical evidence letter, then the application would be dismissed.

NOTICE AND CITATION

Notice of parties in a guardianship proceeding is governed by Section 633 of the Texas Probate Code. Notice must be given to parties who have an interest in the guardianship proceeding. Upon the filing of an application for guardianship, the court clerk will issue notice stating the following:

1. the application for guardianship has been filed;
2. identification of the name of the proposed ward;
3. identification of the name of the applicant; and
4. identification of the proposed guardian, if different from the applicant.

The notice must cite all persons interested in the welfare of the proposed ward to appear at the time and place stated in the notice if such person wishes to contest the application. A copy of the notice must also be posted.

The Sheriff or other officer posting the notice must personally serve a copy of the notice with citation to appear and answer the application for guardianship to the following persons:

1. the proposed ward, who is 12 years of age or older;
2. the proposed ward's parents, if their whereabouts are known or can be reasonably ascertained;
3. any court-appointed conservator or person having control of the care and welfare of the proposed ward;

4. the proposed ward's spouse, if their whereabouts are known or can be reasonably ascertained; and
5. the person named in the application to be appointed guardian, if that person is not the applicant.

The applicant must mail a copy of the notice by registered mail or certified mail, return receipt requested, or by any other form of mail that provides proof of delivery to the following persons, if their whereabouts are known or can be reasonably ascertained:

1. all adult siblings of the proposed ward;
2. all adult children of the proposed ward;
3. the administrator of the nursing home or similar facility in which the proposed ward resides;
4. the operator of a residential facility in which the proposed ward resides;
5. a person whom the applicant knows to hold a power of attorney signed by the proposed ward;
6. any person designated to serve as guardian of the proposed ward in the case of a later need under a declaration pursuant to Section 679 of the Texas Probate Code, if the applicant knows of the existence of the declaration;
7. any person designated guardian under a probated will of the last surviving parent of the proposed ward;
8. any person designated to serve as guardian in a written declaration by the proposed ward's last surviving parent, if the applicant knows of the existence of the declaration; and
9. each person named as next-of-kin in the application for guardianship as required by 682(10) or (12) of the Texas Probate Code.

A waiver may **NOT** be used for the proposed ward. However, any other party, who is competent may either in person or through their attorney ad litem waive their right to receipt of notice or the issuance of personal service of citation in writing. All such waivers must be filed with the clerk. The applicant must file with the court a sworn affidavit regarding the proof of notice. See Appendix "H" for a copy of an inventory, appraisal and list of claims form.

The court may not hold a hearing to create permanent guardianship until the first Monday following the expiration of the ten (10) day period beginning the date of service of notice and citation has been made.

COURT INVESTIGATOR

Once the application has been filed, the notice and citation on the proposed ward have been served, and the medical evidence letter has been filed, the court investigation will be initiated. However, this rule does not apply in cases where in the proposed ward's alleged incapacity is mental retardation. In the case of mental retardation, the court investigation can be initiated without the receipt of the medical evidence letter.

It is the duty of the court investigator to investigate the circumstances alleged in the application and to determine whether a less restrictive alternative than guardianship is appropriate. The court investigator must also supervise the court visitor program and serve as chief court visitor. The court visitor program encompasses all wards under existing guardianship. The investigators are also vested with the responsibility to investigate complaints received from any person about a guardianship and report it to the judge if necessary. Per the Texas Probate Code, each statutory probate is to have a court investigator and a court visitor program. See Texas Probate Code Section 648.

The Dallas County Probate Courts have four (4) court investigators and one (1) head court visitor. Presently, the four (4) court investigators are: (1) Margaret Webster (Department Head), (2) Suzanne Thornberg, (3) Hank Vermote, and (4) Myra Kirkland, who is also the Attorney for the investigators office. The Head Court Visitor is Garnett Grevelle. The assistant for the court investigators office is Laura Woods, who takes the telephone calls for the court investigators [may be reached at **(214) 653-6446**].

Once the investigation is completed, the court investigator files a report indicating the investigator's findings and conclusions. Disclosure of the contents of the court investigator's report is subject to the Texas Rules of Civil Evidence. In a contested case, the court investigator must provide a copy of the report to the attorneys of the parties before the earliest of:

1. the seventh (7) day after the day the report is completed; and
2. the tenth (10) day before the day the trial is scheduled to begin.

Nothing concerning the court investigator's duties should be construed to supersede any duty or obligation to report, investigate abuse, or neglect under the Texas Statutes. See Texas Probate Code Section 648A.

APPOINTMENT OF AN ATTORNEY AD LITEM

Once the court investigator's report is filed, a judge must appoint an attorney ad litem for the proposed ward. However, in certain cases, judges will appoint an attorney ad litem prior to the filing of the court investigator's report, but after the proposed ward has been personally served with notice and citation. One such time, which the court will appoint an attorney ad litem before the court investigator's report is filed, is when a motion for a mental examination has been filed and the proposed ward requires the representation of an attorney ad litem. Another instance in which the court will appoint an attorney ad litem prior to the court investigator's report being filed, is when an application for temporary guardianship has been filed. The attorney ad litem is appointed to represent the interests of the proposed ward. The attorney ad litem is entitled to receive copies of all current records in the case and access to all of the proposed ward's relevant medical, psychological, and intellectual testing records. The attorney ad litem has the following duties:

1. meeting with the proposed ward and explain the facts and the law to the proposed ward;
2. review of medical records;
3. reviewing of documents (i.e. pleadings and mental examination);
4. interviewing of witnesses;
5. appearance of proposed ward at hearing; and
6. filing an answer.

In the case of a contested guardianship, there are several other additional duties of an attorney ad litem that will not be addressed in this outline.

In order to serve as an attorney ad litem, the attorney must be certified as required by Section 647A of the Texas Probate Code. For certification, the State Bar of Texas requires three (3) hours of credit. The first certification expires after two (2) years. A new certificate obtained by an attorney, who previously had been issued a certificate expires on the fourth (4th) anniversary of the new certificate that is issued provided the attorney had been certified each of the four (4) years immediately preceding the date the new certificate is issued. By operation of law, an attorney ad litem is discharged when the court a guardian or denies the application for the appointment of a guardian. See Texas Probate Code Section 646.

HEARING

Once the attorney ad litem has filed his/her answer, a hearing date to prove-up the guardianship can be set with the court docket assistant. The telephone numbers for the three (3) courts are as follows:

1. The Probate Court: (214) 653-7236 (Melissa Quinones)
2. Probate Court Number 2: (214) 653-7138 (David Caddell)
3. Probate Court Number 3: (214) 653-6166 (Shawna McKay)

FINDINGS REQUIRED

Before appointing a guardian, the court must make certain findings. Section 684 of the Texas Probate Code governs the findings requirements. Certain findings must be made by a preponderance of the evidence and while other findings must be made by clear and convincing evidence. The court must find by clear and convincing evidence that:

1. the proposed ward is an incapacitated person;
2. it is in the best interest of the proposed ward for the court to appoint someone as a guardian of the proposed ward; and
3. 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:

1. the court has venue of the case;
2. the person to be appointed is eligible to act as guardian and is entitled to be appointed, or if no eligible person is entitled to appointment applies, the person appointed is proper to act as guardian;
3. if a guardian is appointed for a minor, the guardianship is not created for the primary purpose of enabling the minor to establish residence for enrollment in a school or school district for which the minor is not otherwise eligible for enrollment; and
4. the proposed ward is totally without capacity as provided by this code to care for himself or herself and to manage the individual's property, or the proposed ward lacks the capacity to do some, but not all of the

tasks necessary to care for himself or herself or to manage the individual's property.

The applicant must prove each element required by the Texas Probate Code. A determination of incapacity of an adult proposed ward must be evidenced by recurring acts or occurrences within the preceding six (6) month period and not by isolated instances of negligence or bad judgment. The court must also make a specific finding on the proposed ward's right to drive and to vote in matters decided by public election.

PRESENCE OF THE PROPOSED WARD

The proposed ward must be present at the hearing unless the court determines that a personal appearance is not necessary on the record or in the order granting guardianship. As previously stated, it is the duty of the attorney ad litem to make arrangements for the appearance of the proposed ward. There are several methods that may be utilized to prove why the proposed ward's presence at the hearing would not be beneficial. The most common is to have the attorney ad litem make a statement in open court at the beginning of the hearing, but prior to the introduction of evidence, regarding the proposed ward's absence. Some reasons for the proposed ward's absence are: (1) not medically able, and (2) the proposed ward refuses to attend.

JURY

The proposed ward is entitled, upon a request, to a jury trial in the same manner as other proceedings. Hearings are usually open, but may be closed at the request of the proposed ward or the proposed ward's counsel. See Texas Probate Code Section 685.

PREFERENCE OF THE WARD

The preference of the proposed ward is governed by Section 689 of the Texas Probate Code. A proposed ward has a right to have a say about whom the guardian should be. The court must make a reasonable effort to consider the incapacitated person's preference for guardian. The proposed ward's choice can be communicated to the court in the attorney ad litem's answer, the proposed ward's testimony in open court or by deposition, or by written designation of the proposed ward. The code does not indicate whether a previous designation of guardian in the event of later incapacity overrides a current designation.

PERSONS APPOINTED GUARDIAN

The general rule is that only one person may be appointed as guardian of the person or estate; however, one person may be appointed as guardian of the person and another person as guardian of the estate, so long as the appointments are in the best interest of the proposed ward. Also, the above rule does not apply to the following:

1. husbands and wives;
2. joint managing conservators;
3. co-guardians appointed under the law of a jurisdiction other than Texas; or
4. both parents of an incapacitated adult, if the incapacitated adult has not been the subject of a suit-affecting the parent-child relationship, or has been the subject of a suit-affecting the parent-child relationship, and both parents were named as joint managing conservators; and, a husband and wife may serve jointly.

See Section 690 of the Texas Probate Code.

ORDER OF THE COURT

The order of the court is governed by Section 693 of the Texas Probate Code. The court is required to make findings of fact prior to the appointment of a guardian. If the court finds that the proposed ward is totally without capacity to care for himself/herself, or to manage his/her property, the court may appoint a guardian of the person's estate, a guardian of the person, or a guardian of both the person and estate with full authority over the incapacitated person. An order appointing a guardian for a proposed ward with total incapacity must contain findings of fact **AND** must specify the following:

1. the name of the person appointed guardian;
2. the specific power, limitations or duties of the guardian with respect to the care of the person and management of the property;
3. whether the person is incapacitated because of a mental condition, and if so, whether the person retains the right to vote in matters decided by public election, or to operate a motor vehicle;
4. the name of the ward;
5. whether the guardianship is of the person, estate or both;

6. the amount of any bond;
7. whether the court deems an appraisal is necessary for guardianship of the estate;
8. that the clerk will issue letter of guardianship to the person appointed when the person has qualified;
9. that the guardian has full authority over the incapacitated person; and
10. if necessary, the amount of funds from the corpus of the person's estate that the court will allow the guardian to expend for the education and maintenance of the ward. See Section 776 of the Texas Probate Code.

If it is found that a proposed ward lacks the capacity to do some, but not all, of the tasks necessary to care for himself/herself or to manage his/her property, the court may appoint a guardian with limited powers and permit the proposed ward to care for himself/herself or to manage his/her property as the proposed ward has the ability to do so. An order for partial incapacity must contain all the information listed above along with the specific powers, limitation of duties of the guardian, and the powers retained by the proposed ward. The order establishes the scope and nature of the guardianship. See Appendix "J" for a copy of a sample order appointing guardian.

BOND AND OATH

Once the hearing is completed and a guardian is appointed, the guardian must qualify before he/she can be issued his/her letters of guardianship.

BOND - Section 702 of the Texas Probate Code lays out the basic rules concerning the bond of the guardian of the person and estate. The purpose of the bond is to ensure performance of the guardian's duties. As to the guardian of the person only, the court may accept personal surety bonds, cash in lieu of a bond, and corporate surety bonds.

As to a person appointed guardian of the person and estate or guardian of the estate only, the court will set the bond in an amount equal to the estimated value of all the non-real property and the anticipated income for a twelve (12) month period. The bond must be sufficient to protect the guardianship and its creditors. See Section 703 of the Texas Probate Code.

OATH - Once the court has approved the bond, the guardian must take his/her oath and file it with the clerk's office. See Section 700 of the Texas Probate Code. See Appendix "K" for a copy of the guardian's oath. The bond must be approved by the court and the oath must be filed with the clerk's office.

ISSUANCE OF LETTERS OF GUARDIANSHIP

Once the oath has been filed and the order approving the bond has been signed, the clerk shall issue a certificate under seal stating the fact of the appointment, the date of appointment and qualification, and the date the Letters of Guardianship expires. The certificate issued by the clerk constitutes Letters of Guardianship. All Letters of Guardianship expire one (1) year and four (4) months after the date of issuance, unless renewed. The court may not renew letters of guardianship until the court receives and approves the guardian's Annual Accounting Report or Annual Report of Well-Being, or both, if applicable.

ADMINISTRATION

Once an individual has qualified as the guardian of the person and/or the estate, they are issued his/her Letters of Guardianship and have certain duties. Also, from previously stated, the order appointing the guardian establishes the scope and nature of the guardianship. The Letters of Guardianship serves as the evidence of an individual's appointment and the scope of the guardian's authority. The rest of the paper will outline and discuss the duties and responsibilities of a guardian of the person and the guardian of the estate.

GENERAL POWERS AND DUTIES OF THE GUARDIAN OF THE PERSON

The general duties of the guardian of the person are as follows: (1) the guardian of the person is entitled to take charge of the person of the ward, and (2) the duties of the guardian correspond to rights of the guardian. The guardian of the person has the following duties and powers:

1. the right to have physical possession of the ward and establish the ward's legal domicile;
2. the duty to provide care, supervision and protection for the ward;
3. the duty to provide the ward with food, clothing, medical care and shelter;

4. the power to consent to medical, psychiatric, and surgical treatment other than inpatient psychiatric commitment of the ward; and
5. with the permission of the court the power to establish a trust in accordance with 42 USC Section 1396p(d)(4) (B).

The guardian may not voluntarily admit an incapacitated person to a public or private inpatient psychiatric facility, or to a residential facility operated by the Texas Department of Mental Health and Mental Retardation for care and treatment, except in the following limited situations:

1. the guardian may apply for services under Section 593.027 or 593.028 of the Health and Safety Code;
2. may apply to a court to commit the person under Subtitle D Title 7 of the Health and Safety Code, Subtitle C Title 7 of the Health and Safety Code, or Chapter 462 of the Health and Safety Code; or
3. transport the ward to an inpatient mental health facility for preliminary examination in accordance with Subchapter A and C, Chapter 573 of the Health and Safety Code, See Texas Probate Code Section 770.

The guardian of the person is also required to file an annual report to the court, which will be due once a year, describing the ward's current care, condition and well-being. The reporting period for the guardianship begins on the date of qualification and follows annually thereafter. See Appendix "L" for a copy of annual report of the person.

GENERAL POWERS AND DUTIES OF THE GUARDIAN OF THE ESTATE

The guardian of the estate has the following powers and duties:

1. guardian of the estate is entitled to the possession and management of all property belonging to the ward;
2. to collect all debts, rentals or claims due the ward;
3. to enforce all obligations in favor of the ward; and
4. to bring and defend suits by or against the ward. (See Texas Probate Code Section 768)

The guardian of the estate has the duty to take care and manage the ward's estate as a prudent person would manage his own property. The guardian of the estate is

a dependent type administration, which requires the permission of the court for the guardian of the estate to take action, except for in the following areas:

1. to release a lien on payment at maturity of a debt secured by lien;
2. vote stocks;
3. pay calls and assessments;
4. ensure the estate property against liability;
5. ensure the estate against fire, theft and other hazards; and
6. paying taxes, court costs and bond premiums. (See Texas Probate Code Section 774).

The guardian of the estate needs the court's permission to perform these additional duties:

1. purchase or exchange property;
2. take a claim or property for the use and benefit of the ward's estate;
3. compound a bad debt;
4. make a compromise or settle a dispute;
5. compromise or pay in full any secured claim;
6. abandon property;
7. establish a prepaid funeral benefit contract; and
8. establish a trust in accordance with Section 42 UFC Section 1396p(d)(4)(B). (See Texas Probate Code Section 774).

The administration of a guardianship estate, like a probate estate, has very time sensitive deadlines. There are a number of administrative obligations for a guardian of the estate that must be met within the first thirty (30) days of the initiation of the guardianship. The clock begins to run based on the date of the guardian's qualification, not the date the Judge signs the order. Texas Probate Code Section 699 defines qualification for a guardian of the estate when the guardian has taken and filed the oath and has made the required bond, which has been filed with the clerk and has been approved by the Judge. Thus, the key date for qualification is the day the Judge has signed the Order Approving the Bond. The qualification date determines the date permitting the guardian's administrative obligations.

Within the first thirty (30) Days of Qualification.

Within the first thirty (30) days of qualification, the guardian of the estate should do the following:

1. Take possession of the ward's property immediately after receiving Letters of Guardianship.

The guardian of the estate is expected to collect and take possession of all the personal property, records, books, title papers of other business and records of the ward. See Texas Probate Section 771.

2. File an inventory, appraisal and list of claims.

Under Texas Probate Code Section 729 and the Guardian of the estate must file an inventory and appraisal of the ward's estate not later than thirty (30) days after qualifying as guardian. The inventory and appraisal must be a verified and detailed inventory of all the property of the ward that has come into the guardian's possession or knowledge. The inventory must also include a list of claims, which is a list of claims due and owing the ward. This is not debts, which the Ward owes, but is money that is owed to the ward. See Texas Probate Code Section 730. If a guardian becomes aware of additional property, or additional claims, after the filing of the inventory and appraisal, the guardian must file a supplement to the inventory, appraisal and list of claims. See Texas Probate Code Section 734 and 735. See Appendix "M" for a copy of an inventory, appraisal and list of claims form.

3. Publish notice to creditors.

Within one month after qualifying as guardian of the estate, the guardian must publish a notice to creditors in a newspaper of general circulation in the county where the guardianship is established. The guardian must file a copy of the notice and the publisher's affidavit with the court in the guardianship proceedings. See Texas Probate Code Section 783. See Appendix "N" for a copy of a publisher's credit notice form.

4. Application for Monthly Allowance.

Under Section 776 of the Texas Probate Code, a guardian must make application for a monthly allowance for every guardianship. The application for a monthly allowance must clearly set forth the amounts

requested for the education and maintenance of the ward as well as the support and maintenance of the ward's real property. See Appendix "O" for a sample application for a monthly allowance.

Within four (4) months.

The next administrative deadline in a guardianship occurs within four (4) months of qualification. These administrative requirements are as follows:

1. Notice to secure creditors.

Within four(4) months after the date of issuance of Letters of Guardianship, the guardian must give notice of his/her appointment to creditors having a claim for money against the estate of the ward that the claim is secured by deed of trust, mortgage, vendor's mechanic or other contractor's lien on real estate belonging to the estate. Notice is given by certified mail or registered letter with return receipt requested. See Texas Probate Code Section 784.

2. Notice to unsecured creditors.

Within four (4) months after the date of issuance of Letters of Guardianship, the guardian must give notice to general unsecured creditors by certified or registered mail, if the guardian has actual notice of the debt or claim. See Texas Probate Code Section 784. The guardian may expressly state in the notice to any unsecured creditor that the creditor has 120 days to file the claim with the County Clerk or that the claim will be barred from future consideration of payment. This is an effective tool to bar creditors of the ward. See Appendix "P" for an example of a notice to unsecured creditors.

3. Sales of certain personal property.

Under Section 812 of the Texas Probate Code, a guardian of the estate has the duty imposed upon them to apply to the court for authorization to sale certain personal property of the estate that is liable to perish, waste or deteriorate in value, or that would be an expense or disadvantage to this estate if kept. The guardian of the estate has the

duty to seek authorization for the sale of any such personal property promptly after the approval of the inventory and appraisal.

Within six (6) months.

The next administrative deadline in a guardianship occurs within six (6) months / 180 days of qualification. The administrative requirement, which occurs within 180 days after the date in which the guardian of the estate qualifies, deals with the investment and management of the ward's property. The guardian must have all the estate assets invested according to Section 855(b) of the Texas Probate Code, or file an application with the court seeking approval on the specific investment plan, or eliminating the guardian's duty to invest the estate. See Texas Probate Code Section 855B. The court may approve an investment plan without a hearing. See Texas Probate Code Section 855 regarding statutory default management plan.

ANNUAL ACCOUNT

The final administrative requirement with a deadline based on the day of qualification is the filing of the annual accounting. Every year within sixty (60) days of the anniversary date of the guardian's qualification as guardian, the guardian of the estate must file an annual accounting that sets forth the detailed information regarding the guardian's management and use of the ward's property, cash and investments.

The annual accounting covers the period beginning on the date of qualification and continues through the day before the anniversary of the day of qualification. For example, if a guardian qualified on September 5, 2007, the accounting period would be September 5, 2007 through September 4, 2008. The initial inventory and the annual account should both relate to each other in such that the person examining the document will know the following:

1. what was on hand at the beginning of the guardianship;
2. what has transpired during the period; and
3. what money is on hand at the end of the accounting period.

The ending cash balance from the first annual accounting would then begin the beginning balance for the second annual accounting.

Additionally, all non-cash investment property should be reported in each accounting and all changes of any property should be fully described so that the

management of handling of such property can be easily followed throughout the course of the guardianship. See Texas Probate Code Section 741. The specific requirements of annual accounting are as follows:

1. a list of claims against the estate that were presented to the guardian within the period covered by the accounting and specify which claims have been allowed, paid or rejected;
2. the date any such claim has been rejected, which has the subject of a lawsuit and the status of the lawsuit;
3. identify all property, which has come into the guardian's knowledge that was previously not identified;
4. any changes in property of the ward;
5. a complete statement of all receipts and disbursements for the period covered by the accounting;
6. a complete, accurate and detailed description of property being administered and the condition of the property;
7. the cash balance on hand identifying the depositor of such cash;
8. a description of the personal property of the estate with respect to bonds, notes and other security; and
9. the accounting must be sworn to by the guardian and that the guardian has paid the bond premium and filed all necessary income tax and paid any taxes due.

All the items that must be attached to the accounting are as follows:

1. proper vouchers for each item of credit claimed in the accounting;
2. a letter from each bank or other financial institution serving as a verification of funds; and
3. an affidavit or certificate to approve the existence of all securities.

See Appendix "Q" for a sample accounting.

The annual accounting must be on file for at least ten (10) days before it can be approved by the court. See Texas Probate Code Section 742.

Each of the probate courts has an auditor and an assistant auditor who examines the annual accountings for the court. If the court finds an error in the accounting, the court may order that the accounting be corrected, which may be solved by either filing a supplement to the accounting or an amended accounting. Once the accounting is approved, the court may order that the guardian pay any unpaid

claims if the estate has sufficient funds on hand, or may order that some other claims be paid. If the guardian fails to file an annual accounting, then the court may cite the guardian to appear at a show cause hearing at which the guardian would be expected to show cause why he/she should not be removed as the guardian of the estate. See Texas Probate Code Section 744. If the court does not act first, then any interested person in the estate may file a motion asking the court to cite the guardian of the estate to appear at a show cause hearing.

CLOSING A GUARDIANSHIP PROCEEDING

The guardianship is most likely to come to a close when one of the following occurs:

1. a minor ward has reached the age of 18;
2. the ward has died;
3. the ward's capacity has been restored by the court; or
4. the ward has run out of money and a guardianship of the estate is depleted.

Texas Probate Code Section 745 outlines the situations requiring the final settlement of the guardianship estate.

Guardianship of the Person

The closing of a guardianship of the person is fairly simple in comparison to the closing of a guardianship estate. The guardian of the person must deliver all property of the ward to either the ward, if alive, or to the person representing the ward's estate, if the ward is deceased. See Texas Probate Code Section 747(a).

If the guardian of the person does not have any of the ward's property in his/her possession, then the guardian must file a sworn affidavit stating the reason for the termination of the guardianship and to whom the property of the ward in the guardian's possession was delivered.

Each court has its own preference regarding informing the court of the ward's death. At a minimum, notice should always be given to the court investigator's office with a telephone call notifying them of the ward's death. Some courts prefer a suggestion of death being filed while others prefer a final report of the guardian of the person. However, keep in mind any order signed closing the guardianship,

should close the guardianship, discharge the guardian from his duties and discharge and release the surety on the guardian's bond.

Guardianship of the Estate

The closing of the guardianship of the estate is a multi step process that is more complex than the closing of the guardianship of the person. Under Texas Probate Code Section 749, the guardian of the estate is required to do the following:

1. Prepare and file an accounting for the final settlement.

In the accounting, it is sufficient to refer to the inventory without describing each item of property in detail and to refer to and adopt any and all guardianship proceedings that concerns sales, renting or hiring, and leasing for mineral development, or any other transaction on behalf of the guardianship of the estate. Each final account shall be occupied by proper vouchers and shall include the following:

- a. the property of rents and revenues and profits received;
 - b. disposition of all property;
 - c. expenses and debts against the estate;
 - d. property estate that remains in the hands of the guardian;
 - e. that the guardian has paid all bond premiums;
 - f. any tax returns that have been filed;
 - h. the amount of taxes owed;
 - i. a complete of taxes the guardian has paid during the guardianship;
 - j. a description of all current delinquencies in the filing of tax returns; and
 - k. other facts that appear necessary and give a full and complete understanding of the condition of the guardianship estate.
2. The guardian must provide notice of the filing of the final accounting to one or more relevant persons. Texas Probate Code Section 751 provides service of citation on the following:
 - a. if the ward is a living resident of the state over the age of 14, then the ward must be served by personal citation;
 - b. if the ward is deceased, then the ward's executor or administrator, if one has been appointed, is personally served

unless the personal representative of the probate estate is also the guardian;

- c. if the ward's residence is unknown, if the ward is a non-resident of the Texas, or if no personal representative of the probate estate has been appointed, the citation is to be served by publication; and
- d. the court may require any additional notice that it deems necessary and appropriate.

3. Court action on the final accounting.

Once the account for the final settlement has been served and return of citation and notices and waivers and citation have been filed with the court, the court can approve the accounting for final settlement. See Texas Probate Code Section 752.

The order approving the final accounting generally should include language ordering the remaining property of the estate to be paid to the ward if alive, or if the ward is deceased, then to the personal representative of the probate estate, if one has been appointed, or any other person legally entitled to the estate. The guardian should obtain a receipt and release from the person or persons to whom the estate is delivered or other proof of delivery. See Appendix "R" for a sample of the order closing the guardianship and discharging the guardian.

4. Motion to close and discharge Guardian.

Once the estate property has been properly delivered, the guardian then files a motion or application requesting an order discharging the guardian and closing the estate. Any application or motion to close the estate should be accompanied by receipts and releases or other proof of delivery of the estate property. The order should include language discharging the guardian and the surety on the guardian's bond. The order discharging the guardian of the estate and closing the guardianship of the estate should be given to the surety in order to release the bond.

ADDITIONAL ASSISTANCE

In order to assist a practitioner in a more extensive set of guardianship forms, you may purchase at a minimal cost from the Dallas Bar Association's Probate, Trusts and Estate Section, a Dallas County Probate Practice Manual. You may contact the Secretary - Treasurer of the Section, Michael B. Cohen. His email address is coeldlaw@flash.net.

Also, available for newly appointed guardians is the Dallas County Probate Courts Guide. This is available to be downloaded from the Dallas Bar Website at www.dallasbar.org.