

Guardianship Basics

<http://texasguardianship.org/guardianship-information/guardianship-basics/>

What is Guardianship?

Guardianship is a legal process designed to protect vulnerable persons from abuse, neglect (including self-neglect), and exploitation. Guardianship provides for the person's care and management of his or her money while preserving, to the largest extent possible, that person's independence and right to make decisions affecting his or her life.

Why are Guardianships Created?

Guardianships are created for a variety of different reasons. People become incapacitated due to disease, injury, or developmental disability. No matter what the cause, the decision to seek guardianship is often painful and difficult for the alleged incapacitated person and his or her family members.

What happens to the person's rights and what determines incapacity?

Guardianship removes certain rights and privileges from an incapacitated person, referred to as the "ward". An incapacitated person can be a minor (under 18 years old) or an adult. The guardianship statute defines an incapacitated adult as a person who, because of physical or mental condition, is substantially unable to

- provide food, clothing or shelter for himself or herself;
- care for the individual's own physical health; or
- manage the individual's own financial affairs. Please note that a person is not legally incapacitated until a court has declared that the person is incapacitated. Before the court makes a determination, a person for whom a guardianship application has been filed is called the "alleged incapacitated person" or the "proposed ward". The court may not use age as a factor in determining whether to appoint a guardian for an adult. The court appoints another person (guardian) to make some or all of these necessary decisions. Whether the court appoints a guardian with broad or limited authority depends upon the physical or mental limitations of the incapacitated person.

What are the types of guardianships?

A Guardian of the Person is appointed by the court to take care of the physical well-being of a ward and a Guardian of Estate is appointed to care for a ward's property. Often both a guardian of person and a guardian of estate are appointed and this can be the same person.

Guardianship Glossary

<http://texasguardianship.org/guardianship-information/guardianship-basics/guardianship-glossary/>

Agent – One who has permission to act.

Attorney Ad Litem – A lawyer appointed by the court to represent the proposed ward during the guardianship proceedings. The AAL advocate for the proposed ward’s wishes and desires.

Bond – An insurance policy required by the court in an amount set by the judge to cover the assets of the estate.

Clear and Convincing – Evidence or proof that the facts asserted are highly probable. A higher standard than a preponderance of the evidence, but a lower standard than proof beyond a reasonable doubt.

Conservatee - A minor being protected.

Conservator - Legally appointed protector; preserver of a minor.

Conservatorship – A legal relationship between the conservator and the conservatee.

Durable Power of Attorney – A document executed authorizing another person to act as agent which continues in effect upon the onset of incapacity of the principal.

Elderly - A person who is age 60 and over.

Estate – Both real and personal, tangible and intangible, and includes anything that may be the subject of ownership.

Fiduciary – A person or entity to whom property management or other responsibility is entrusted.

Guardian – A person who is appointed by the probate court to protect the property and/or person of one who does not have capacity to protect his or her own interests.

Guardian Ad Litem – A disinterested person who is appointed by the court on behalf of the ward to represent the ward’s best interest.

Guardian of the Estate – A guardian who possesses any or all powers and rights with regard to the property of an individual.

Guardian of the Person - A person who is responsible for and who advocates for the health, well-

being and personal needs of the ward.

Guardian of the Person and Estate – A person who acts in both capacities for a ward.

Incapacitated Person - An adult who, because of physical or mental conditioning, is substantially unable to feed, clothe or shelter himself/herself, to care for his/her physical health, or to manage his/her financial affairs.

Letter of Guardianship – An official letter issued by the County Clerk’s office which is written evidence of the appointment of a guardian and the authority of the guardian to act for the ward.

Oath - A sworn, written statement made by the guardian in which he or she swears to fulfill his or her obligations.

Payee – A person who receives and disburses the ward’s social security income or SSI outside of the jurisdiction of the court. These funds are monitored by the Social Security Administration. A person may also serve as payee for Veteran’s and Railroad Retirement benefits.

Personal Surety Bond - Bond executed by a guardian and two persons (sureties) willing to vouch for the guardian that allows the court to seek restitution from the guardian or sureties if the guardian does not perform his or her duties.

Principal - The person from whom an agent’s authority is derived.

Probable Cause – A reasonable ground for supposing that an allegation is true; more evidence for than against.

Probate – Matter relating to or involving guardianship, the probate of a will, the estate of a decedent, or a trust.

Probate Court - Court with statutory authority to hear probate matters.

Statutory Probate Court - Texas Courts with authority to hear only probate matters. These courts are created by statute and are found in the most densely populated counties in Texas.

Surrogate – One substituted for or appointed to act in place of another.

Testator – A person who dies leaving a will.

Trust – A legal method used to manage and distribute property without a guardianship.

Ward – An incapacitated person who has been placed in the care, custody and supervision of a guardian.

Guardianship: students in special education at age 18 and alternatives to guardianship

<http://texasprojectfirst.org/Guardianship.html>

As students move into high school, one of the topics that school districts will discuss with parents is guardianship. This discussion typically takes place in an ARD meeting and occurs during transition planning. A school district must inform the parents and the student of the “transfer of parental rights” concerning the ARD process. This notice should occur twice:

- At least one year before a student reaches age 18, the student’s IEP must include a statement that rights granted a parent, other than the right to receive notice required under IDEA, will transfer to student upon reaching age 18 unless someone has been granted guardianship of the student (TAC § 89.1049 (a)), and
- At the time the student reaches age 18, the school district must notify, in writing, the adult student and parent of the transfer of rights to the student (TAC § 89.1049 (c)). This notice is **separate** and distinct from the IEP statement noted above.

What this means is that at age 18, a student is considered an adult and all rights are transferred to that student. When a student reaches the age of majority (18), they are regarded as being able to make their own choices. This would include making choices about their education. Since an IEP is like a contract, it can be enforced in a court. Therefore, an 18 year old student would be responsible for signing and agreeing to the IEP. Parents and students with disabilities must look at all options before deciding if the student is responsible enough for the task.

Note! The transfer of rights occurs **regardless** of your child’s disability label and/or level of need, unless you have made other legal arrangements.

Before making a decision, families should discuss what supports the student will need now, and in the future. A good way to get started with this may be through the person centered planning process. It is important that families complete this process BEFORE a student’s senior year.

Guardianship is a legal process designed to protect people at risk of abuse, neglect, and exploitation. It removes rights and privileges from a person determined to be “incapacitated” under State law. The process involves the court system and an attorney. Guardianship may be full (whereby all rights and privileges are removed) or may be partial (where some rights are assigned to the person with a disability – like the right to vote, marry, or choose where they live).

Alternatives To Guardianship

For some students with disabilities, guardianship may be the only option. Yet, it is important for parents to know that guardianship is not the ONLY option which will allow them to actively participate in the ARD process after their child turns 18. In addition to guardianship, there are the following options:

- Power of Attorney
- Durable Power of Attorney

- Durable Power of Attorney over Health Care
- Directive to Physician
- Management of Community Property
- Money Management
- Social Security Representative Payment program
- Trusts
- Consent to Authorize Advocacy
- Supported Decision Making

It is important to note that if an alternative is chosen, the student should have an understanding of what the alternative implies; and the parents need to understand that if the adult student states “I don’t want you here” at some point, this could signify a revocation a Power of Attorney situation. Parents should consult an attorney before deciding on any option. Each family (including the student) will need to decide what is best for their child.

Notices under the Individuals with Disabilities Education Act, Part B

A school district shall provide any notice required under IDEA to **BOTH** the adult student and the parent. This notice doesn’t give the parent the right to consent to or participate in the proposal or refusal to which the notice relates.

For example – A notice of an ARD meeting would be sent to both the student and the parent. This does not constitute invitation to, or create right for parent to attend the meeting. It is important to remember that the members of the IEP team can include “other individuals that have knowledge or specific expertise regarding the child”. This means your adult child can invite you to participate in the meeting without having guardianship. While parents can attend, the students are the ones with decision making power and will be responsible for signing agreement with the IEP, not the parent.

For students whose disabilities make it inappropriate for them to make these types of educational decisions, parents must consider guardianship and the other options available to them to continue making legal decisions for their children.

If guardianship or other options are necessary, it is imperative that parents and students make these decisions and begin any process **before** the student turns 18. The guardianship process takes a great deal of time and requires the use of an attorney.

Guardianship Reform



<http://www.txdisabilities.org/guardianship-reform>

In 2013, CTD and a number of our partners noticed a growing problem. Older Texans and people with intellectual and developmental disabilities (I/DD) found themselves in situations where they were no longer in control of their assets and living situations. Or they had been legally cut off from family members for reasons no one could ascertain. These individuals had been placed under

guardianship, a legally binding agreement that allows a person (the guardian) to make major decisions for another person (the ward).

The Office of Court Administrators reports that 51% of people under guardianship have I/DD (source: Texas Guardianship Cases report).

Traditional Guardianships

Guardianship was designed to protect a person who is deemed by a court to be unable to make decisions for him or herself. The person is placed under a **Guardianship of the Person or the Estate**, and a judge appoints someone else to be the guardian (who the ward may not know). A judge can also place a ward under **full guardianship**, which results in a **forfeiture of all rights** regarding personal and financial decisions.

In many cases, guardianships function as they were intended, where the guardian acts in the genuine best interests of his or her ward. However, abuse and neglect can happen, and when the ward has limited legal rights or means to help themselves, dangerous situations can emerge.

In so-called **Guardian Industry cases**, a guardian is appointed to many different people at once and may take financial advantage of their situation. Some guardians do the bare minimum to maintain the appearance of adequate care for their ward, while collecting fees to do more.

In other cases, a guardian isolates the ward from his or her life and social network. Take the now-famous story of **Jenny Hatch**, a 29-year-old woman with Down syndrome who legally fought her mother and stepfather's request for guardianship over her. They insisted that a group home environment away from her friends and her job was best. Jenny disagreed entirely. After a long legal battle, Jenny convinced a judge that she was capable of making her own decisions with a little support, and he gave her friends temporary guardianship. This paved the way for other people with disabilities to gain more control over their own lives.

Learn more about the Jenny Hatch case or visit The Jenny Hatch Justice Project to see how she's helping others.

Supported Decision Making

Jenny's case resulted in a Supported Decision-Making (SDM) agreement, an alternative to guardianship that has garnered considerable attention in Texas. Simply put, SDM enables people to receive assistance from one or more trusted friends, family members, professionals or advocates to make important decisions. It is distinct from traditional guardianship in that **a person can receive support without giving up rights**. Not unlike an ASL interpreter, the supporter is a go-between, rather than a

substitute, for the person they serve.

Learn more about Supported Decision-Making for Texans with Disabilities in our guest blog post by The Arc of Texas' Megan Morgan.

Guardianship and SDM in Texas

This legislative session, **Texas became the first state in the country to formally implement SDM** (SB 1881, Zaffirini), in addition to passing a number of guardianship reform measures, including:

1. The creation of a **Bill of Rights** that lists the rights that a person under guardianship or proposed person under guardianship gets to keep. Rights for a person under guardianship include the right to live, work and play in the most integrated setting, visit with people of their choice, and appear before the court to express their preferences or concerns. Rights for a proposed person under guardianship include the right to petition the court and due process. (SB 1882, Zaffirini; HB 1438, S. Thompson)
2. The establishment of less restrictive **alternatives to guardianship**, such as a power of attorney or representative payee, and direct the court to determine whether alternatives could meet the needs of the person rather than guardianship. (CSHB 39, Smithee)
3. The establishment of **Limits of Guardianship with Services and Supports** to require the court to determine if formal and informal supports are in place or available that enable individuals to meet their needs for food, clothing, or shelter, care for their physical or mental health, manage financial affairs and/or make decisions so that guardianship may be averted or limited. (CSHB 39, Smithee)
4. The requirement that individuals under guardianship should, if possible, **be able to make decisions about where they reside**. (CSHB 39, Smithee)

Power of Attorney

from <https://www.legalzoom.com/knowledge/power-of-attorney>

A power of attorney is a simple document giving another person (called an “agent”) the legal authority to act on your behalf. The extent of the power you grant the other can be limited—it’s up to you. It is used in matters of legal significance, such as in financial dealings and health care matters. It can help avoid going through a guardianship proceeding in the event you or a family member become incapacitated.

A power of attorney is a document you can use to appoint someone to make decisions on your behalf. The person you designate is called an "attorney-in-fact." The appointment can be effective immediately or can become effective only if you are unable to make decisions on your own.

There are two essential elements of a valid power of attorney:

1. **Soundness of Mind:** The person signing the document must be mentally competent (i.e., understand what is being signed and what it does). In addition, he or she must be acting by choice, without undue pressure from anyone.
2. **Witnesses:** In most states, your signature on your power of attorney must be notarized, or at least two adults, unrelated to you and each other, and who are not named as the attorney-in-fact, must witness you sign the power of attorney.

<https://www.texmed.org/template.aspx?id=65>

What is a Medical Power of Attorney?

It is a document, signed by a competent adult, i.e., "principal," designating a person that the principal trusts to make health care decisions on the principal's behalf should the principal be unable to make such decisions. The individual chosen to act on the principal's behalf is referred to as an "agent." - See more at: <https://www.texmed.org/template.aspx?id=65#sthash.dKM63o7R.dpuf>

Who can be an agent?

Anyone may act as an agent other than the following:

The principal's health care provider,

- An employee of the health care provider unless the person is a relative of the principal,
- The principal's residential care provider, or
- An employee of the principal's residential care provider unless the person is the principal's relative.

How can you obtain a Medical Power of Attorney?

You may contact your local hospital, long term care facility, physician, attorney, or state health organization such as the Texas Conference of Catholic Health Facilities, Texas Medical Association, Texas Hospital Association, Texas Health Care Association, or the Texas Association of Homes for the Aging.

Do you need a witness?

Yes, two witnesses must sign the Medical Power of Attorney. At least one of the witnesses must not be:

Designated by the principal to make a health care decision on the principal's behalf;

- Related to the principal by blood or marriage;
- The principal's attending physician or an employee of the attending physician;
- Entitled to a part of the principal's estate;
- A person having a claim against the principal's estate;
- An employee of a health care facility in which the principal is a patient if the employee is providing direct care to the principal; or
- An officer, director, partner, or business office employee of the health care facility or of any parent organization of the health care facility.

Does a person need a lawyer to execute a Medical Power of Attorney?

No, a lawyer is not necessary in order to execute a Medical Power of Attorney

From <https://www.nolo.com/legal-encyclopedia/texas-financial-power-of-attorney-31992.html>

Why do I need a Texas financial power of attorney?

If you become ill or injured and you can't take care of your own finances, someone else must step in to help. With a financial power of attorney, you name a trusted person to pay bills, make bank deposits, watch over investments, collect insurance or government benefits, and handle other money matters on your behalf. Without this important document, your loved ones will have to go to court to get authority over your financial affairs.

Who makes financial decisions for me under a Texas financial power of attorney?

In Texas, the person you name to make decisions for you is called your agent. Any competent adult can serve as your agent; the person most definitely doesn't have to be a lawyer. Honesty, common sense, and dependability should be the most important factors in your decision. It's also wise to choose someone who lives nearby—this will make it easier to take care of practical tasks.

Do I need a lawyer to make a financial power of attorney in Texas?

You usually don't need a lawyer to prepare a durable power of attorney for finances. In fact, state governments have designed these forms for people to complete on their own by filling in the blanks. You can find a form for Texas in Nolo's Quicken WillMaker Plus software, including detailed instructions for completing your document and making it legal in Texas.