

# Transition Planning for Individuals with Special Needs

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APRIL 16, 2021

# Overview of Presentation

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- Types of Guardianships
- Establishing a Guardianship
- Responsibilities of a Guardian
- Alternatives to a Guardianship
- Estate Planning for Parents and Persons with Special Needs

# What is a Guardianship?

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A guardianship is a legal proceeding where a person or persons are appointed by a court to protect the interests of minors or adults who because of a physical or mental condition cannot substantially care for themselves.

# Incapacity Defined

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Incapacitated person means:

1. A minor;
2. An adult who, because of a physical or mental condition, is substantially unable to:
  - A. Provide food, clothing, or shelter for himself or herself;
  - B. Care for the person's own physical health; or
  - C. Manage the person's own financial affairs; or
3. A person who must have a guardian appointed to receive funds due the person from any governmental source.

§ 1002.017; Texas Estates Code

# Types of Guardianships

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## ➤ Guardian of the Person

- Responsible for daily care of ward (*i.e.*, food, clothing, housing, health care, educational decisions, etc.).

## ➤ Guardian of the Estate

- Responsible for managing ward's property, income, and finances.

# Guardianship Pros and Cons

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- ❑ Removes an individual's decision-making rights and assigns those rights to a third-party
- ❑ Limits an individual's freedom of choice, self-determination, and independence
- ❑ Expensive – attorney fees, court costs
- ❑ Requires court order to establish and requires ongoing court oversight

# Guardianship Pros and Cons, Con't

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- ❑ Provides protections to those that may be vulnerable
- ❑ Provides certainty to third-parties dealing with matters concerning Ward
- ❑ Provides continuity to family structure

# Establishing a Guardianship

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- File Application with Court
- Register Guardianship with State of Texas
- Required Training for all Guardians
- Notice and Service
- Examination and Report by Physician
- Appointment of Attorney Ad Litem
- Hearing
- Oath and Bond
- Letters of Guardianship



# Attorney Ad Litem

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- ❑ Appointed by the Court to represent the interest of the Proposed Ward.
- ❑ Will review record including Physician's Certification, school records, TPC assessments, etc.
- ❑ Will also schedule visit with Proposed Ward and Applicant(s)
- ❑ May request consultations with other persons involved in Proposed Ward's life
- ❑ Attorney Ad Litem's is tasked to answer the following two questions and make a recommendation to the Court:
  - Is a Guardianship , as requested Appropriate and Necessary?
  - Is it in the Proposed Ward's Best Interest to have the Applicant(s) appointed as Guardian(s)?

# Guardian's Responsibilities

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- ❑ Following Hearing:
  - Notice to Creditors
  - Inventory of Ward's Estate
- ❑ Filing of Annual Report
- ❑ Filing of Annual Accounting
- ❑ Required to Seek Court Permission in Managing Certain Assets Owned by Ward
- ❑ Notice to Ward's relatives regarding change of residence, medical matters, and death.

# Alternatives to Guardianships

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Approximately 47,000 active guardianships in State of Texas

Over 50% are guardianships of young adults with intellectual disabilities and mental health issues

In an effort to reduce number of guardianships and address documented abuses of the process, 2015 Texas Legislative Session introduced major changes to Texas Estate Code, including:

- 1. Requiring applicants to consider alternatives to guardianships, as well as other supports and services available to proposed ward to avoid a guardianship; and
- 2. Codified Supportive Decision Making Agreements as an alternative to guardianship.

# Alternatives to Guardianships

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- General Durable Power of Attorney
- Medical Power of Attorney
- Representative Payee
- Joint Bank Account
- Management Trust
- Special Needs Trust
- Alternate Forms of Decision-Making Based on Person-Centered Planning
- Supported Decision Making Agreements

# Estate Planning for Parents of Special Needs Children

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## Will

- Name guardian for minor or adult child where you have been appointed guardian – court will honor unless person named is disqualified.

## Powers of Attorney

- Avoids the need for a guardianship if you ever become incapacitated.

# Estate Planning Cont.

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## Declaration of Appointment of Guardian for Children

- Allows parents to name guardian for minor, as well as incapacitated adult children.

## Special or Supplemental Needs Trusts

- Inter Vivos or Testamentary
- Allows parent or other third party to provide an inheritance to a disabled child or adult, while preserving and maintaining public benefits.

# Estate Planning Cont.

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## Texas ABLE Act – Texas Achieving a Better Life Experience Program

- ❑ Tax advantaged savings option for individuals with disabilities – distributions tax free if used for qualified expenses (i.e., expenses used in maintaining or improving his or her health, independence or quality of life).
- ❑ Persons with Disabilities can save money in their name to pay for certain disability-related expenses without regard to Medicaid asset limitations
- ❑ Each year person can save total of \$15,000 (2019) in ABLE account up to a total of \$100,000 before SSI eligibility is impacted.

# Estate Planning Cont.

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- ❑ Funds above \$100,000 will impact SSI but not Medicaid eligibility – can contribute maximum of \$370,000
- ❑ Funds can be from earned wages or gifts
- ❑ Anyone can contribute to a disabled individual's ABLE account
- ❑ Funds can be used for: education, housing (with exceptions), transportation, employment training, personal support services, health prevention and wellness, financial management, legal fees, funeral and burial services
- ❑ For more information about establishing an account – [www.texasable.org](http://www.texasable.org)