

UPDATE ON THE LAW

GUARDIANSHIPS: PRO's and CON's

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GUARDIANSHIP BASICS

Age, disease or accident may rob a person of the ability to care for one's own personal or financial needs. Texas law prescribes a method by which a guardian can manage that person's affairs under the supervision of the Court. This is a legal action of last resort when other methods like a power of attorney, trust or joint accounts fail. It may also be used when family members or third parties will not accept the powers of other legal documents.

A guardian is appointed through a court proceeding and legally stands in the shoes of the person under disability, the Ward. Once appointed, the guardian holds the same rights and responsibilities as the Ward. The guardian is not personally responsible but only as the agent of the Ward.

LIMITED OR GENERAL. A guardianship may be a general or limited guardianship depending on the severity of the disability. The law states the court may only award the powers that are necessary to a guardian.

PERSON AND ESTATE. A guardianship may be of the person, meaning that the guardian manages the personal affairs of the Ward, or of the estate, meaning that the guardian manages the financial affairs. Often times, the guardianship is of both the person and estate.

TEMPORARY GUARDIANSHIP. A temporary Guardianship may be sought when there is a danger to the person or the estate of a person. It is an emergency action. The Temporary Guardian will only be granted the powers necessary to protect someone's person or estate. These are extraordinary measures and take place in a very short time period.

There is generally a very limited hearing. Temporary Guardianships must be reviewed later at set times.

PERMANENT GUARDIANSHIP. A permanent guardianship is granted when a person is unable to care for his or her personal or financial needs. The guardianship is usually based on a doctor's statement about a person's capacity to handle certain things like making decisions about medical needs, living arrangements or paying bills. There is a full hearing in front of a Judge.

THE PROCESS OF CREATING A GUARDIANSHIP

Guardianships are created through a Court proceeding. An application must be filed with the Court. If available, a statement by a medical doctor must also be filed. When the medical statement is not available, there is a court process through which such a statement may be obtained. The medical statement will outline exactly what a person is capable of doing. The medical statement is usually the blueprint for the powers that will be granted by the Court.

Once the Application is filed, it will be "served" on the proposed Ward. This is a formal process of notifying someone that there is a court action pending.

When the "service" is returned to the Court, the Judge must appoint an attorney for the proposed Ward. This attorney is called an attorney ad Litem. The attorney ad Litem will represent the proposed Ward throughout the application phase of the guardianship. The ad Litem must then meet with the Ward and review the medical records. Usually, the attorney ad Litem will be dismissed after the

guardianship is in place.

If the guardianship is uncontested, a hearing will be set and the court will hear the evidence and appoint a guardian.

If the application is contested, the proceeding can be much more complicated. The procedure may vary extensively from case to case.

All guardianships are medically driven. The court will listen carefully to what the physicians recommend and generally follows the physician's advice as to what limitations need to be put into place to protect the Ward.

In contested situations, the issue is often not does someone need a guardianship but who should be guardian. In these cases, the judge will listen to all sides, weigh the preferences of the proposed Ward and if a guardianship is indicated by the medical reports, appoint a guardian.

GUARDIANSHIP ADMINISTRATION

The process does not stop at the appointment of a guardian. As with dancing in Texas, a guardian must do a two-step (file an oath and bond to qualify to act as guardian). Once the guardian has qualified, the court will issue letters of guardianship to the Guardian. Letters of guardianship are the legal proof the guardian presents to show that he or she may act on behalf of the Ward.

Each year, the guardian must report to the court. The guardian of the person files a report about the Ward's conditions. He must report as to the Ward's health, living arrangement and general well being. The guardian of the estate must file a very detailed report accounting to the penny for every cent of income and expenditure made on behalf of the Ward. The court auditor will review the accounting. Anyone may come in and comment or protest the accounting. After a certain period of time, if no one has commented and the Judge finds the accounts in order, the accounting will be approved by the court.

SUMMARY

Guardianships are a very serious action made only as a last resort. If you need assistance in evaluating the need for a guardianship, contact a certified elder law attorney. People often shy away from attorneys but this is one area where only an attorney can give you complete advice. Good legal advice can save thousands of dollars.

Certified Elder Law Attorneys have passed a national exam which includes knowledge about public benefits. *The Elder Law Certification is recognized but not certified by the Texas Board of Legal Specialization.* It gives the public assurance that the professional they are consulting has the background necessary to advise them.

UPCOMING EVENTS....

K.T. Whitehead will speak at the following events:
March 22, noon, *When Power's of Attorney Fail*, at Hamilton House.

K.T. has been practicing in San Antonio since 1992. To receive additional copies of this newsletter, permission to reprint a portion, or to make arrangements for an in-service or community talk please contact

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