

GUARDIAN'S GUIDE

The following is a brief summary of the procedure for the appointment of a Guardian, along with a description of the duties of the Guardian after he or she has been appointed. This document is intended only as a guideline, so please feel free to contact us with more specific questions you may have.

The Office and Function of a Guardian

A guardian is appointed by the probate court whenever it becomes necessary to protect the person or property of a minor or of an adult who is not deemed mentally competent to protect his or her own interests. A person for whom a guardian is appointed is called a ward. A guardian may be appointed as the guardian of the person of the ward, guardian of the estate of the ward, or both.

The position of guardian is one of utmost trust and responsibility, and the guardian is strictly accountable for the performance of his official duties. He must act in strict accordance with the Texas Probate Code and under the close supervision and scrutiny of the probate court.

Appointment of Guardian

A guardianship proceeding begins with a written application filed in the probate court. Anyone may make this application, but usually the applicant is the person who wishes to become the guardian.

The law requires notices to be given when any application for guardianship is filed. All children must be notified. For an adult sixty (60) years of age or older, all adult siblings of the proposed ward must be notified. The court must then hold a hearing to determine whether a guardianship is necessary and to decide who is to be appointed guardian. The law also requires that the court appoint an attorney ad litem to represent the proposed ward and ensure that the guardianship is in the ward's best interests. The attorney ad litem interviews the ward and is present at the hearing. The fees for the attorney ad litem are to be paid from the ward's estate.

Because of the tremendous responsibilities involved, the court will not appoint just anyone who makes application. On the contrary, the court must be satisfied that a person to be appointed guardian is capable of properly and prudently managing and controlling the ward or the ward's estate, or both. The court must also determine that the proposed guardian is not disqualified by law.

Qualification of Guardian

After the guardian has been appointed, he must take the oath of office and must post a bond in an amount set by the court and with surety or sureties approved by the court. The guardian may not begin his duties until both the oath and the bond are filed with and approved by the court.

Letters of Guardianship

After the appointment and qualification are official, Letters of Guardianship will be issued to the guardian, and these letters will serve as evidence of the appointment and authority of the guardian to act for the ward.

Support and Maintenance of the Ward

If it becomes necessary for the guardian to expend funds for the ward's support, maintenance, and education, the guardian must apply to the probate court for an order authorizing these disbursements. This application must state the amounts required and the purposes for which the funds will be expended. It is also possible, in many instances, to get a blanket order, in advance, allowing the guardian to spend a definite sum of money each month for the general support and maintenance of the ward. Such an order may be entered covering a period of up to twelve months. The amount that will be allowed per month will depend on the size of the ward's estate. The guardian must file annual accounts of his expenditures and of the ward's condition.

Guardianship of the Person of the Ward

The guardian of the person is entitled to the charge and control of the person of the ward. The guardian has the right to have physical possession of the ward and the right to establish the ward's legal residence. The guardian also has the duty of care, control and protection of the ward, the duty to provide the ward with clothing, food, medical care and shelter, and the guardian also has the power to consent to medical, psychiatric and surgical treatment other than the in-patient psychiatric commitment of the ward.

The guardian of the person is required to file a written report annually containing information regarding the residence of the ward, how often the guardian has seen the ward, whether the ward's health has improved, deteriorated or remained unchanged, a description of the ward's activities during the past year, and other similar information regarding the health and status of the ward. If the guardian is the guardian of the person and estate, he or she must file both this report on the status of the person of the ward as well as the annual account described below.

Guardianship of the Estate of the Ward

The guardian holds and deals with the estate property in a trustee or fiduciary capacity. In that capacity, the guardian must always act in complete good faith and in the best interests of the ward. The guardian will not be permitted to promote his own interests at the expense of the ward or at the expense of the creditors of the estate.

- Gathering the Assets

The first duty of the guardian is to gather all property (the assets) belonging to the ward. All cash should be deposited into a guardianship bank account, and the guardian must exercise utmost care in handling this account. The bonding company (surety) may require

joint control of this account. This means that a bonding company representative must sign, along with the guardian, any check drawn on the account. However, in no event should a disbursement be made until the guardian obtains a court order approving it.

- Notice to Creditors

The guardian must see to it that all creditors of the ward are given notice of the guardian's appointment to give them the opportunity to present any claims they may have against the ward.

Unsecured creditors are notified by the guardian's publishing notice of his appointment in a local newspaper, which must be done within thirty days after the guardian has assumed his office.

Secured creditors, such as those holding a mortgage or other lien against the ward's property, must be notified by registered mail within 120 days after the guardian qualifies.

- Inventory, Appraisal, and List of Claims

Within ninety days after qualification, the guardian must file a complete inventory of the estate, together with a list of claims owing to the ward to be verified by a sworn affidavit. If the order appointing the guardian requires appraisers for the estate, they must also sign a sworn affidavit and attach it to the inventory. This inventory must contain a complete list of all property located within the State of Texas belonging to the estate and of all personal property belonging to the estate regardless of its location. If property not included in the inventory is discovered at any time during the pendency of the guardianship, the guardian should file a supplemental inventory showing the newly discovered assets.

- Powers and Duties

A guardian has the power to control all property belonging to the ward. Any cash received should be placed in a bank account separate from the guardian's personal funds. Property belonging to the ward's estate should never be commingled with the guardian's personal assets. The guardian must use diligence in collecting all claims and debts owed to the ward. Under certain circumstances, the guardian may borrow money on behalf of the estate and hire out or rent property belonging to the estate. He may also sell property, if it is advantageous to the estate or if it is necessary to pay expenses, claims, or allowances owed by the ward. The procedure for making sales is quite complicated and time consuming and requires the filing of a number of pleadings with the court. Subject to certain restrictions, the guardian may invest the ward's funds and lend the ward's money.

- Sales

No sale of the ward's property may be made without a court order authorizing the sale. Sales will be allowed only when it appears necessary or advisable for specific reasons set out in the Probate Code. An accurate description and sworn affidavit of the condition of

the estate, the debts existing and property to pay debts, and facts showing the reason and necessity for the sale must be filed with the application to the court.

- Veteran's Benefits

If the ward received benefits from the Veterans' Administration (VA), an application to expend or invest funds must be submitted to the probate court. Any such application or any accounting (described below) submitted to the court must first be submitted to the VA office. If the VA approves the request or accounting, it will execute a waiver of hearing, which will enable the court to process the request or accounting without delay. If the ward is a recipient of VA benefits, no instrument can be processed by the court without the VA waiver.

- Claims

Creditors' claims against the ward may be presented to the guardian at any time while the ward's estate remains open. The guardian may approve (which means he recommends approval by the court) any claim that is properly authenticated and presented to him, if the claim is not barred by the statutes of limitations. Once a claim is presented, the guardian must either approve or disapprove it within thirty days or it will be disapproved by operation of law. Once the guardian has allowed the claim, it will be presented to the probate court for approval or disapproval. The guardian should consult with his attorney regarding creditors' claims against the estate. If a claim is disallowed by operation of law, the creditor has the right to file suit in the district court to secure payment of the claim, and, if the claim is found to be a just one, the guardian may be held personally liable for the costs of suit and may even be removed from office for his failure to properly act on the claim.

- Annual Accounts

Within twelve months and sixty days after qualification, the guardian must file an annual account with the court showing all receipts and disbursements that have occurred since the filing of the original inventory. A sworn affidavit that it is true and correct must be attached. The status of all claims pending against the estate and the nature and extent of all property currently being administered must also be shown. Any cash or securities in the guardian's possession or held in safekeeping by any bank or depository must be verified by an appropriate letter or certificate. After the account has remained on file for ten days, it will be examined and reviewed by the court. If it is found to be correct, the court will enter an order, prepared by the guardian's attorney, approving it. The guardian must continue to file an annual account every twelve months while the ward's estate remains open.

- Compensation

A guardian of the estate is entitled to a fee of 5 percent of the gross income of the ward's estate and 5 percent of all money paid out. Guardians are also allowed reimbursement for reasonable and necessary expenses, such as attorney's fees, when they are properly verified in writing. However, all compensation to the guardian must first be approved by the court.

- Closing the Ward's Estate and Filing Final Account

The guardian of a minor may apply to close the minor ward's estate when the minor reaches eighteen years of age or marries. A guardian of an incompetent person may apply to close the guardianship when the ward's mental capacity has been restored. Either type of guardianship may be closed if the ward dies or if the funds of the estate are exhausted.

To apply for the closing of a guardianship, the guardian must prepare and file a sworn account showing all property that has come into the guardian's hands since the last annual account or the initial inventory, as well as any disposition of property. It must also show the debts that have been paid and any debts still unpaid. If any property remains in the guardian's possession, it should be fully reported and verified in the same manner as set forth above for annual accounts. After the court has audited the final account and entered an order approving it, the guardian may deliver the assets in his possession to the ward (or to his legal representative), after which he must show the court that he has complied in full. After all the property has been accounted for and all costs have been paid, the court will enter an order closing the guardianship and relieving the guardian and his surety of further responsibility for the guardianship.