Disability Rights TEXAS

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GUARDIANSHIP FOR TEXANS WITH DISABILITIES

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This booklet is intended to serve as a general guide for persons considering guardianship for family members or friends. Guardianship laws were written to apply to all citizens of Texas. Therefore, some special thought must be given to these laws as they are used for persons with disabilities. We have tried to present this information in non- technical language. Texas guardianship laws are so extensive that an exhaustive treatment is beyond the scope of this booklet.

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INTRODUCTION

This booklet is written primarily for parents and other family members of a person with disabilities. Its purpose is to introduce you to guardianship and give you the information you need in order to make an appropriate decision about guardianship for a family member who has a disability.

Guardianship is a legal device used to protect the rights and interests of an incapacitated person, defined as someone who cannot manage her (1) personal and/or financial affairs by herself. In Texas, a guardianship can be appointed over the person or the estate, or both, of an incapacitated person. The court may grant the guardian full authority over the person, or may grant the guardian limited authority as indicated by the person's actual abilities. In each type of guardianship, the powers and duties of the guardian must be specifically stated. Where the guardian has limited authority, the court must design the guardianship to encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person. Which form of guardianship is appropriate depends upon the individual's needs.

The law also provides for a temporary guardianship, when a person needs the immediate and temporary appointment of a personal representative, appointed by a judge with only the limited powers that the circumstances may require.

Guardianship may be the only way to solve some of the problems faced by you and your family member who is disabled. Other problems, such as an adult person not being able to handle large amounts of money or valuable property, might be solved without getting guardianship. Because guardianship can be complicated and costly, and will limit the options available to a person with a disability, you should consider other ways of solving the problem before seeking guardianship.

Generally speaking, most minors who have a disability (a minor includes almost everyone under age 18) will not need a guardian. This is because parents are the natural guardians (as opposed to court-appointed guardians) over the personal affairs of their children under age 18. For example, parents must give their consent for most kinds of medical services for their children until they reach age 18. Once a person turns age 18, however, parents are no longer natural guardians. Parents do not have the legal authority to make decisions for their adult child unless they are appointed guardian by a judge. This is true even if the adult has a disability. This means that the law presumes that the adult with disabilities can make all of her own decisions unless a judge has appointed a guardian for her or otherwise restricts her rights.

This booklet discusses the need for guardianship and some common problems of persons with disabilities that might be solved without getting a guardianship. This booklet also explains the types of guardianship, how to get a guardianship, and the responsibilities of the guardian. Finally, this booklet tells about resources available to you in guardianship matters, including: how to find a lawyer, private lawyers and legal aid services, and technical assistance for your lawyer.

This booklet addresses appointment of a guardian for an adult with a mental or physical disability. Additional parts of the guardianship law govern the appointment of a guardian for a child, and a person who must have a guardian appointed to receive funds due the person from any governmental source. These topics are not addressed in this booklet.

I. THE NEED FOR GUARDIANSHIP

Many families first begin thinking about the need for guardianship of the person with a disability as she approaches her 18th birthday. The family may be contacted by a staff person of an agency, state school, community Mental Health/Mental Retardation (MHMR) center, or community service provider suggesting that the family consider obtaining guardianship for the person with a disability. If you are contacted by such a staff person by telephone, by letter, or at a staffing, you should make an appointment to sit down and talk with that staff person. Find out exactly why the staff person is suggesting guardianship and what type of guardianship they are suggesting. Ask that staff person to describe to you the kinds of things the person with a disability can and cannot do and why guardianship is suggested. Study the list of alternatives to guardianship below and see if any of them would alleviate the need for guardianship. Finally, always be sure the decision to seek guardianship is based totally on the needs of the person with a disability and not just for the convenience of someone providing services to the person with a disability.

How can you tell if your family member needs a guardian? Just because a person has a mental or physical disability does not mean that she must have a guardian. There is no easy test, but in considering whether or not your family member needs a guardian, you should look carefully at her ability to manage personal and financial affairs for herself. These are the questions that the court will ask if you decide to seek a guardian.

Some decisions that many adults with disabilities face are discussed below. If the person with a disability faces these decisions and is unable to make them for herself, and if other solutions are unavailable, then there may be need for some form of guardianship.

A. THE NEED FOR CONSENT FOR SERVICES

Many personal decisions involve giving consent for various things, such as medical treatment. Simply stated, giving your consent means giving your permission. For example, a doctor may have asked you to give your consent so that you could have a medical operation. As a parent, your consent may have been needed before your minor child could go on a school outing. Because minor children usually cannot legally give their own consent, their parents or guardians must give consent for them. But when a person reaches age 18, the law presumes she can give her own consent. This presumption means that the adult person with a disability will have the legal right to make all of her own decisions until a judge makes the decision

that the presumption is wrong and appoints a guardian for the person with a disability.

Many adults with disabilities need services from a residential service provider, in-patient mental health facility (public or private), community MHMR center, or other service provider. Unless special legislation states otherwise (see below), the individual or a guardian must consent to the services before the person with a disability can receive services. Many persons with a disability, upon reaching age 18, are fully capable of making their own personal decisions and giving their own consent when it is needed. Others are not able to give consent. Appointment of a guardian is one way to solve the problems that arise when a person with a disability cannot give legally adequate consent. See Disability Rights Texas' handout, Legally Adequate Consent, for more information on consent.

If consent is needed and the requirements of legally adequate consent are met, the adult with a disability can give her own consent to the action or procedure. A person does not need to be able to read or write in order to give consent. If consent is needed and the adult with a disability cannot meet these requirements, a guardian may be needed to give consent for the person with a disability.

B. Consent In Intermediate Care Facilities For The Mentally Retarded, Nursing Facilities, & Hospitals

In 1993, the Texas Legislature passed a special law that allows for surrogate decision-makers for some residents of Intermediate Care Facilities for the Mentally Retarded (ICF-MR), nursing homes, and hospitals. If a resident of a community-based ICF-MR lacks the capacity to make a major medical or dental treatment decision, and is an adult who has no guardian or is under age 18 and has no parent, guardian, or managing or possessory conservator, an adult surrogate may consent on behalf of the resident. The surrogate decision-maker must have decision-making capacity and be willing to consent on behalf of the client. Consent given by the surrogate is valid and competent to the same extent as if it were given by the person with a disability herself. The surrogate must be chosen from the following list, in order of descending preference:

1. An actively involved spouse;

2. An actively involved adult child who has the waiver and consent of all other actively involved adult children of the client to act as the sole decision-maker;

3. An actively involved parent or stepparent;

4. An actively involved adult sibling who has the waiver and consent of all other actively involved adult siblings of the client to act as the sole decision-maker;

5. Any other actively involved adult relative who has the waiver and consent of all other actively involved adult relatives of the client to act as the sole-decision-maker.

Surrogate decision-makers may not consent to experimental research, abortion, sterilization, electroconvulsive treatment, or management of client funds. If no guardian or surrogate decision-maker is available, the Texas Department of Aging and Disability (DADS) must establish and maintain a list of individuals qualified to serve on a surrogate consent committee, to consist of three (3) to five (5) members. This committee (like the surrogate) may consent to major medical or dental treatment, psychoactive medication, or a highly restrictive procedure. Consent is based upon consensus of the committee members. Detailed requirements govern how the committee is established and how the committee functions. The committee's decision may be appealed to court.

Similar criteria are followed for the selection of a surrogate decision maker for an adult patient in a hospital or nursing home who: is comatose; lacks the ability to understand and appreciate the nature and consequences of a treatment decision; or is otherwise mentally or physically incapable of communication. This surrogate decision-maker may consent, on behalf of the patient, to medical treatment except for voluntary inpatient mental health services, electro-convulsive treatment, or a decision to withhold or withdraw life-sustaining treatment.

For a copy of these laws, contact Disability Rights Texas. Ask for a copy of TEX. HEALTH & SAFETY CODE §§ 597.041-043 for the law relating to consent in ICFs-MR, and for TEX. HEALTH & SAFETY CODE § 313.004 for the law related to nursing homes and hospitals. The laws are detailed, but relatively easy to understand.

C. OTHER PERSONAL DECISIONS

Not all of the personal decisions an adult with a disability faces involve giving consent. A person receiving services from a state school, in-patient mental health facility (public or private), state center, or community MHMR center has many legal rights. For example, an adult with mental retardation has the right to participate in developing her program of services, the right to choose among alternative services where they are available, and the right to contest the results of a determination of mental retardation in an administrative hearing. Many adults with mental retardation are capable of asserting these legal rights, but some are not. If, as a factual matter, the adult with mental retardation cannot assert these rights herself, then it may be desirable for her to have a guardian to assert these rights for her.

D. ADMISSION TO RESIDENTIAL SERVICES

A guardian may not voluntarily admit an incapacitated person to a public or private inpatient psychiatric facility or to a residential care facility operated by DADS. If such services are necessary, the guardian must apply for emergency or respite care or for involuntary commitment.

E. DECISIONS WHICH CAN BE MADE BY A GUARDIAN OF A PERSON WHO IS COURT COMMITTED

1. Persons with Mental Retardation Act

When a person is court committed to a state school, the commitment does not end if a parent gets guardianship. The person will still remain in the state school unless the interdisciplinary team of the state school agrees that the person should be placed elsewhere or discharged. If the state school wants to transfer a court committed person or move them to a community placement, it is not required to have the consent of the guardian to do this, but the guardian can ask for a hearing before a hearing officer to try to stop the transfer or move. If the guardian wants a transfer or move, she can also ask for a hearing. The state school or the guardian may appeal the hearing officer's decision to a court. An attorney's assistance would be helpful in asking for a hearing.

Because the court orders a person to be committed to a state school for care, treatment and training, the state school is authorized by the Persons with Mental Retardation Act (PMRA) to provide medical care and other services for a court-committed person without consent from anyone. This means that a guardian may not usually stop the state school's program for a court-committed person (unless the school officials have violated other laws). The guardian does have a right to see the person's records and can participate in the planning of programs at the staffings held by the state school or community center to plan the programs. The state school or community MHMR center is required to get the guardian's consent for surgical procedures.

2. Texas Mental Health Code

When a person is involuntarily committed to a mental health facility (either public or private), the facility is ordered to provide certain kinds of care by the court and is allowed to provide other kinds of care by the statute. A guardian would not legally be entitled to prevent the hospital from providing a particular kind of care (except in the case of electro-convulsive therapy which at the present time requires consent under a DADS rule). Also, a guardian would not be able to demand that the hospital discharge the person. A guardian could ask a court to transfer the patient to a private facility. Also, any interested person may file an application with the court asking that the court look again to see if the person still needs to be committed to the mental health facility.

F. Financial Decisions

The law presumes that an adult with a disability can make her own financial decisions. Many adults with a disability are capable of handling their own financial affairs and do not need a guardian for this purpose. But if your family member with a disability acts foolishly by wasting large amounts of money or by signing contracts she does not understand, then you might consider guardianship so that the guardian can handle her financial affairs. However, it is important to remember that almost everyone, including those who are not disabled, makes mistakes of judgment in handling money and property. Remember this and, if possible, try to

teach your family member with a disability how to handle finances before you turn to guardianship. The next section, Alternatives to Guardianship, suggests some alternatives to guardianship.

Some individuals are so severely disabled that it is unrealistic to expect that they will ever be able to manage their own financial affairs. If such persons have assets, property, or income that must be managed and none of the alternatives suggested in the next section are available, then a guardian may be needed to manage their financial affairs.

II. ALTERNATIVES TO GUARDIANSHIP

Some problems may be solved without guardianship. Since a guardianship is often costly and complicated, you should look into other possible solutions. A number of problems experienced by a person with a disability that might be solved without the need for a guardian are discussed below. Of course, these solutions will not work in every situation. For this reason, you should always consider carefully the circumstances surrounding your particular situation before deciding on a solution.

PROBLEM #1: Retail merchants do not want to make contracts with a person with a disability. Example: John Jones, a 24-year old man with mental illness, wants to buy a mobile home in which to live. Even though John has a full-time job with the City of Dallas and earns over $550 per month, Sam Smith, a local mobile home dealer, will not agree to give John credit. When asked for his reasons, Mr. Smith says he does not think John could make the monthly payments on time because John has mental illness.

Possible Solutions To Problem #1: Sam Smith is violating the Americans with Disabilities Act (ADA) by refusing to sell to John Jones because he has a mental disability. You may contact Disability Rights Texas or a lawyer for help with filing a complaint under the ADA.

Whether or not you make a complaint under the ADA, if Mr. Smith cannot be convinced that John will meet the payments, there are other solutions besides getting a guardianship and having the guardian make the agreement for John. One possible solution involves an insuror or guarantor. Both John and the insuror or guarantor sign the agreement for buying the mobile home. Under this agreement, John would be made primarily liable for the monthly payments and the insuror or guarantor would be made secondarily liable. This means that the insuror or guarantor promises that if John does not pay a monthly installment, then the insuror or guarantor will make the payment.

A third possible solution is a multi-party contract. In a multi-party contract, John and other persons who sign the contract are all primarily liable for the monthly payments. While the multi-party contract means that Mr. Smith can ask any of the parties who sign the agreement for the monthly payments, he might agree to first ask John to pay. If John does not pay, then Mr. Smith will expect the other parties to the contract to pay.

Many retail merchants who do not want to sign contracts with an adult with a disability are willing to sign contracts with the adult with a disability and an insuror, guarantor, or third party. This way, the merchant has someone other than the person with a disability to look to if that person does not pay.

PROBLEM #2: A person with mental retardation or mental illness will not be able to manage money or property that her parents plan to leave her when they die.

Possible Solution to Problem #2: Rather than getting a guardianship, parents could create a trust in their wills for the benefit of the person with mental retardation. A trust is a legal device which permits one person to mange the property and money of another person. Under state law, the first $50,000 in a trust for the benefit of a person with mental retardation cannot be taken by the State of Texas for her support and maintenance at a state school and the first $50,000 in a trust for the benefit of a person with mental illness cannot be taken for support and maintenance in a hospital or community setting. If a trust is created in the parents' will, it should name a trustee who will manage the money and property in the trust. The success of such a trust depends a great deal on who is picked as the trustee. In most situations, it is desirable to have the trust managed by both a corporate trustee (like a bank) and by someone who knows and cares about the person with mental retardation or mental illness. You should know that the trustee has no legal power to make personal decisions for the person with a disability. This means that the trustee can only manage the financial assets in the trust but cannot make other personal decisions for the person with mental retardation or mental illness. You should consult with an attorney about the use of a trust for persons with disabilities before you take any other steps. For more information, see Disability Rights Texas' handout Guidelines for Estate Planning for Parents of a Family Member with Disabilities.

Because state law determines who gets a person's money and property when she dies if she does not have a will, it is very important for all persons to make a will. You should discuss this with your lawyer.

PROBLEM #3: An adult with a disability cannot manage money or property she now has. Example: Jane Wilshire, a 30-year old woman who is moderately mentally retarded, is an accomplished oil painter. She earns $400-$800 each month for her paintings. While Jane cannot manage so much money herself, she knows that someone else should manage it for her.

Possible Solution to Problem #3: If Jane wants to and is mentally competent to give somebody else the power to manage her earnings for her, she can give this power to someone else by using a power of attorney. A power of attorney gives one person the power to act for another person. The person who receives the power of attorney has limited authority to act on behalf of the person who gave the power of attorney. The adult with a disability must be competent to give the power of attorney for it to be valid. You should ask a lawyer about the possible uses of a power of attorney. There is a state statute that allows a power of attorney to remain in effect if the person later becomes incapacitated, but the statute must be

followed carefully and you should have the help of an attorney before you decide to do this.

PROBLEM #4: A person with a disability needs some guidance in spending her money, but there is no need to take away all her rights to manage her money.

Possible Solutions to Problem #4: One possible solution is to set up a checking account which requires that both the person with a disability and someone else (called a cosigner) sign the checks before they are valid. Your local banker may be able to assist you in setting up this kind of account. Another possible solution is to establish a checking account with a ceiling limit in the name of the person with a disability. Such a checking account does not allow the person with a disability to write valid checks over a certain amount. This might be combined with a second, pour-over account. As the person with a disability writes checks on her own account, the pour-over account transfers money into her account to bring it up to the ceiling limit. This arrangement limits the size of the checks the person with a disability can write, but the money she takes out of her account can be replaced. This way, the person's account will not run out. You should check with your bank to see what their rules are for checking accounts. You also need to know whether a person who co-signs the check will have the right to get the money in the account and what happens to the money if one of the people dies.

There may be problems in setting up a checking account with a ceiling limit for a person with a disability. First, some banks may refuse to set up this kind of account. Second, in order for this solution to work, merchants must know how large a check can be written by the person with a disability. This may pose no problem in rural areas and in situations where the person with a disability deals with only a few merchants who know her well. One way to avoid this problem is to have the ceiling limit printed on the face of the check.

PROBLEM #5: A person with a disability cannot manage her Supplemental Security Income (SSI) benefits.

Possible Solution to Problem #5: If a person with a disability cannot manage her SSI benefits, a parent or other responsible person may become a representative payee. A representative payee is someone who can receive and spend SSI benefits for the support of a person with a disability. Check with your local Social Security Administration for information on how to become a representative payee. A representative payee is not the same thing as a guardian and does not have the same powers and authority a guardian has. A representative payee has only the authority to manage the SSI payments for the benefit of the person with a disability.

PROBLEM #6: A person is incapacitated periodically by mental illness and is unable to make treatment decisions during the incapacitation.

Possible Solution to Problem #6: Under state law, a person can write down instructions for his mental health treatment--including medication, ECT, and emergency care--which generally must be followed by his doctors and other mental

health providers if he becomes incapacitated. There is particular language that must be used to make an effective Declaration for Mental Health Treatment, also called an advance directive. Please see Disability Rights Texas' handout, How to Make an Advance Directive. To make an advance directive, a person must be capable of making mental health decisions but does not need to be capable of handling all matters, such as finances. An advance directive is effective from the time a person becomes incapacitated until he becomes competent again. Unlike a power of attorney, described in Problem #3, the advance directive states the consumer's specific instructions for the treatment or medication which he prefers or wishes to avoid. The directive must be followed by doctors and mental health providers except in certain emergency situations. No other person needs to act on behalf of the consumer, and no one has discretion about the consumer's treatment or medication. Also, unlike a power of attorney, an advance directive cannot be revoked while the person who made the directive is incapacitated. This irrevocability during incapacitation is intended to afford a competent person an opportunity to prevent himself from making bad decisions while he is incapacitated.

PROBLEM #7: Jose Gonzales is a resident of an ICF-MR and is unable to understand the effects of the cancer he has and is unable to make treatment decisions. His condition will worsen and probably be terminal without treatment.

Possible Solution to Problem #7: Mr. Gonzales' siblings (or other qualified adults) may seek recognition by the ICF-MR as the surrogate decision-maker for Mr. Gonzales. They may then access all of Mr. Gonzales' records and consent to services, including treatment for the cancer, on Mr. Gonzales' behalf.

III. GENERAL CONSIDERATIONS ABOUT GUARDIANSHIP; TEX. PROB. CODE ANN. § 602

After you have carefully examined the abilities of the person with a disability and her needs for assistance, and after you have determined that other alternatives will not give the assistance needed, then you will want to think about guardianship. In the next sections we will take a closer look at guardianships.

In 1993, the Texas Legislature made sweeping changes of the guardianship laws; changes that make guardianships more flexible. Under the current law, either the guardianship of the person or the guardianship of the estate may be full or limited, depending on the needs of the person with a disability. Previously, Texas law had provided for three distinct types of guardianship:

1. Limited guardianship;

2. Full guardianship of the person or of the estate, or of the person and the estate; and

3. Temporary guardianship.

Different legal requirements governed each type of guardianship, and each was applied for independently. With the 1993 changes, the court will examine each

application for guardianship to determine whether the powers of the guardian should be limited or whether the guardian should have full authority over the person, the estate, or both. The law states that a guardian should have authority over a person with a disability only as indicated by the person's actual mental or physical limitations, and only as necessary to promote and protect the well-being of the person. When only limited authority is necessary, the court is to design the guardianship to encourage the development or maintenance of maximum self-reliance and independence in the person with a disability. Temporary guardianships are still provided for by law, and few changes have occurred in those procedures.

The 1993 amendments require that judges who handle guardianship proceedings will have received special training on issues related to people with disabilities and their rights. The training will include the principles of equal access and accommodation, community resources for people with disabilities, avoidance of stereotypes, duties of guardians, communication needs of people with disabilities and the right to the least restrictive alternative. This training should better prepare judges to understand the needs of people with disabilities and their guardians, and enable them to make more appropriate decisions regarding the powers and duties to be exercised by the guardian, and those to be retained by the person with a disability.

A. THE NEED FOR AN ATTORNEY; SEE TEX. PROB. CODE ANN. § 646

THE LAW IN TEXAS REQUIRES YOU TO HAVE AN ATTORNEY IN A GUARDIANSHIP PROCEEDING BECAUSE A GUARDIANSHIP CHANGES THE LEGAL RELATIONSHIP OF THE WARD (THE PERSON WHO HAS A GUARDIAN) TO OTHER PEOPLE IN VERY IMPORTANT WAYS. IT ALSO PLACES RESPONSIBILITIES ON GUARDIANS, AND COURTS CAN FINE AND EVEN IMPRISON GUARDIANS WHO VIOLATE THE LAW. A LAWYER CAN HELP IN EXPLAINING THESE CHANGES AND RESPONSIBILITIES AND IN MAKING CERTAIN THAT THE GUARDIANSHIP PAPERS ARE WRITTEN SO THAT THEY WILL DO EXACTLY WHAT YOU WANT THEM TO DO. THERE ARE COMPLICATED RULES OF PROCEDURE FOR FILING THE NECESSARY PAPERS, PRESENTING EVIDENCE, EXAMINING AND CROSS-EXAMINING WITNESSES, AND FOR MAKING OBJECTIONS TO THE TESTIMONY OF WITNESSES. FOR THESE REASONS, IT IS IMPORTANT THAT YOU HAVE A LAWYER TO FILE THE NECESSARY PAPERS WITH THE COURT TO REPRESENT YOUR INTERESTS AT THE HEARING, AND TO HELP YOU WITH REQUIRED ANNUAL ACCOUNTINGS. A SEPARATE LAWYER, CALLED THE ATTORNEY AD LITEM, WILL BE APPOINTED BY THE COURT TO REPRESENT THE PERSON WITH A DISABILITY.

B. CHOOSING THE GUARDIAN; SEE TEX. PROB. CODE ANN. §§ 677, 678, 681, 689

Another concern is the selection of the person who will be guardian. It is very important to select a guardian who is acceptable to the person with a disability and who sincerely and unselfishly cares for the person with a disability. In addition, the guardian of a person with a disability living in the community should live near that person so that the guardian can direct her care, treatment, and training. Even if the person with a disability lives at a state school or state hospital, the guardian should be willing and able to visit the person regularly to make sure that good care, treatment, and training are provided. Finally, because a person with a disability

generally has a normal life span, preference should be given to someone close in age or younger than the person with the disability.

Some persons cannot be guardians. These ineligible persons include:

- Minors (most persons under age 18);
- Persons whose conduct is notoriously bad;
- An incapacitated person (someone who cannot care for herself);
- Persons who themselves or whose parents are involved in a lawsuit which may affect the welfare or property of the person with a disability (unless an exception is made by the court);
- Persons who owe the person with a disability money or property, unless they pay the debt before becoming guardian;
- Persons making any claim adverse to the person with a disability or to land or personal property owned by the person with a disability;
- Persons who, because of inexperience, lack of education, or other good reason, cannot properly manage and control the person with a disability and her property;
- A person, institution, or corporation found unsuitable by the court; and
- A non-resident who has not filed with the court the name of a resident agent to accept service of process regarding the guardianship.

The guardian is chosen according to the circumstances and considering the best interests of the person with a disability. Texas law sets out those persons who have preference in being appointed guardian if they are eligible, i.e., they are not in one of the categories listed above. When the person with a disability is an adult, her spouse is entitled to be appointed guardian before anyone else. This presumes the spouse is eligible to be appointed guardian. If a person with a disability has no qualified spouse or if the spouse does not want to be guardian, the nearest eligible kin (parents, children, brothers and sisters, aunts and uncles, etc.) is entitled to be guardian. If both the spouse and nearest kin are ineligible or do not want to be guardian, the court will appoint the eligible person who is best qualified to serve. A private or public agency which serves a person who is incapacitated may be appointed guardian, but only as a last resort.

The judge is required to make a reasonable effort to consider the preference of the person with a disability in selecting the guardian. The judge does not have to follow the person's wishes, but she must give due consideration to the preference of the person with a disability. A minor who is at least 12 years of age may also express a preference for a guardian. The court may approve the choice if it determines that the choice is in the best interest of the minor.

It is presumed not to be in the best interests of a person with a disability to appoint a person as guardian if the person has been finally convicted of any sexual offense, sexual assault, aggravated assault, aggravated sexual assault, injury to a child, abandoning or endangering a child, or incest.

C. INDIVIDUAL RIGHTS WHICH CANNOT BE TRANSFERRED TO A GUARDIAN; SEE TEX. PROB. CODE ANN. § 693(A)(5)

1. Marriage: Because marriage is a personal right, the right to make decisions about marriage cannot be transferred to a guardian. Texas courts say a marriage is valid unless an individual is shown incapable of consenting to it. If a person who is incapacitated marries without the ability to consent to the marriage or to understand the ceremony, the proper solution may be to have the marriage annulled.

2. Voting: Voting is another personal right which cannot be transferred to a guardian, but the court will indicate whether the person has capacity to vote.

3. Sterilization: Under Texas law, only the person to be sterilized can consent to the sterilization. Neither a parent, a full guardian, nor a limited guardian has the authority to consent to a non-medically necessary sterilization or abortion. Furthermore, in Texas law, a judge cannot give a guardian the power to consent to a non-medically necessary sterilization for a person who is incapacitated.

The Texas courts have not decided whether or not a medically necessary procedure which results in sterilization may be authorized by a full guardian or a limited guardian who has the power to consent to medically necessary procedures. Because of the strong prohibition against involuntary sterilizations, a court order may be desirable for medically necessary procedures which result in sterilization.

In some other states outside of Texas, judges have authorized guardians to consent to non-medically necessary sterilizations if strict procedure are followed to safeguard the rights of the person who is incapacitated. Such a change in Texas can only be brought about by a change in the law by the Texas Legislature or by a Texas Supreme Court decision.

D. MOVING TO ANOTHER STATE

Guardianship laws differ from state-to-state. If you move from Texas, you should have your guardianship reviewed by a lawyer in your new state.

IV. GUARDIANSHIP FOR PERSONS WHO ARE INCAPACITATED; SEE TEX. PROB. CODE ANN. §601

In Texas, an incapacitated person is defined as an adult who, because of a physical or mental condition, is substantially unable to provide food, clothing, or shelter for herself, to care for her own physical health, or to manage her financial affairs. The law permits limited guardianships for persons who are incapacitated but who are capable of managing some, but not all, of their personal or financial affairs. It is important that you and your lawyer decide together, and with input from professionals who are familiar with the person's abilities and disabilities, what you think will be the most appropriate form of guardianship for the needs of the person with a disability, and what limitations there should be on the guardian's powers.

It is important to emphasize here that just about everyone makes mistakes of judgment from time-to-time in spending their money and in their personal lives. One or two mistakes, or even large errors by a person with a disability, are not necessarily a good enough reason to determine that a guardianship is needed. In growing up and assuming responsibility, in learning to live on our own and to deal with our own affairs, and in learning to deal with other persons both socially and in our work, we all make mistakes. We often learn through our mistakes. Take time to think about your own mistakes in life and do not be too quick to assume that your family member who has a disability cannot deal with her rights just because she may make some mistakes.

A. APPLICATION FOR GUARDIANSHIP; SEE TEX. PROB. CODE ANN. § 642, 682

A guardianship proceeding is started by filing a written application in the proper probate or county court. The proceeding is the same for a guardianship of the person or of the estate, or both, and for a guardian with full or limited powers. The application must contain at least the following information:

- Basic information about the person with a disability and the person the applicant desires to have appointed as guardian, including name, relationship, address, and date of birth;
- Whether a guardian of the person or estate, or both is sought;
- The nature and degree of the alleged incapacity, the specific areas of protection and assistance requested, and the limitation of rights requested to be included in the court's order of appointment;
- The facts requiring that a guardian be appointed and the interest of the applicant in the appointment;
- The nature and description of any existing guardianship;
- The name and address of any person or institution having the care and custody of the proposed ward;

- The approximate value and description of the property of the person with a disability;

- The name and address of any person whom the applicant knows to hold a power of attorney by the proposed ward and a description of the type of power of attorney;

- Facts showing that the application is filed in the correct court; and

- If applicable, that the person whom the applicant desires to have appointed as a guardian is a private professional guardian who has met the requirements of the law.

Any person has the right to commence or appear and contest any guardianship proceeding unless he or she has an interest that is adverse to the proposed ward or incapacitated person.

It is important that you have a lawyer file the necessary court papers and to represent you at the guardianship hearing. The lawyer will probably want to meet with you to get the information needed in order to file the application with the county or probate court.

B. NOTICE, SEE TEX. PROB. CODE ANN. § 633

Once the application for guardianship is filed, a court official will personally serve a copy of the notice to the person with a disability, the spouse, and her parents, and any conservator or person having control of the care and welfare of the person with a disability. The following individuals (if their whereabouts are known) will receive notice by mail: all adult siblings and children of the proposed ward; the administrator/operator of a nursing home or other residential facility in which the proposed ward lives; and any person holding a power of attorney for the proposed ward. The notice must notify the person that the application for guardianship has been filed, and that they must appear and answer the application if they wish to contest the application.

The person with a disability must actually receive the notice. Giving her notice to staff at the residential facility in which she resides or to her parents is not enough. The court may not act upon an application for a guardianship until the Monday following the expiration of ten (10) days from the date of receipt of this notice.

C. APPOINTMENT OF ATTORNEY AD LITEM, GUARDIAN AD LITEM, COURT INVESTIGATOR & INTERPRETER; SEE TEX. PROB. CODE ANN. §§ 645-648, 665

Once the application for guardianship has been filed, the court will appoint an attorney ad litem to represent the interests of the person with a disability. To serve as an attorney ad litem, the attorney must be certified by the State Bar of Texas as having successfully completed a course of study in guardianship law and procedure sponsored by the state bar. (This is not required of attorneys who served as an

attorney ad litem in a guardianship proceeding before September 1, 1993.) The certificate must generally be renewed every two (2) years.

The 1993 amendments require the state bar to provide a course of instruction for attorneys who handle guardianship cases. The course must include at least the following: information about the law, the nature of disabilities, laws protecting the rights of people with disabilities, principles of equal access and accommodation, community services for people with disabilities, and avoidance of stereotypes through a focus on people's individual abilities, support needs, and inherent individual value. This should improve the quality of legal representation received by people with disabilities and applicants for guardianship.

The attorney ad litem is required by law to interview the person with a disability within a reasonable time before the hearing. To the greatest extent possible, he or she must discuss with the proposed ward the law and facts of the case, the legal options, and the grounds on which guardianship is sought. Before the hearing, the attorney ad litem must review all relevant records.

The judge may also appoint a guardian ad litem to represent the interests of the person with a disability in the guardianship proceeding. The guardian ad litem is an officer of the court and is charged with helping the court to determine what action will be in the best interests of the person with a disability. The guardian ad litem is paid for his or her services.

Each statutory probate court (which is generally only found in large cities) must have a court investigator who must investigate the circumstances alleged in each guardianship application to determine whether a less restrictive alternative than guardianship is appropriate, and file the findings with the court. Commissioner's courts may authorize additional court investigators.

If a language interpreter or sign language interpreter is needed to ensure effective communication between the person with a disability and the attorney, one should be appointed at the time of the appointment of the attorney ad litem.

For the first time, the 1993 amendments give the court the authority to authorize payment out of funds of the ward's estate to the attorney who filed the application for the guardianship, in addition to the attorney ad litem. To do so the court must find that the attorney acted in good faith and for just cause in filing the application.

D. COURT VISITOR PROGRAM, SEE TEX. PROB. CODE ANN. § 648

Each statutory probate court is required to operate a court visitor program to assess the conditions of wards and proposed wards. Any interested person, including a ward or proposed ward, may request an assessment either during an existing guardianship or prior to the appointment of a guardian. Upon request or on its own motion, the court may appoint a court visitor to evaluate the ward or proposed ward and provide a sworn written report to the court within 14 days that must include the following information:

- A description of the nature and degree of capacity and incapacity of the ward or proposed ward, including the medical history of the ward or proposed ward, if reasonably available and not waived by the court;
- A medical prognosis and a list of the treating physicians of the ward or proposed ward, when appropriate;
- A description of the living conditions and circumstances of the ward or proposed ward;
- A description of the social, intellectual, physical, and educational condition of the ward or proposed ward;
- A statement that the court visitor has personally visited or observed the ward or proposed ward;
- A statement of the date of the most recent visit by the guardian, if one has been appointed;
- A recommendation as to any modifications needed in the guardianship or proposed guardianship, including removal or denial of the guardianship; and
- Any other information required by the court.

The court visitor programs will rely heavily on volunteer court visitors, but those that have not expressed a willingness to serve without compensation will be compensated in an amount set by the court that is taxed as costs (meaning that it is paid out of the funds of the ward or the county if there are no funds of the ward).

E. USE OF RECORDS; SEE TEX. PROB. CODE ANN. §§ 686, 687

Current and relevant medical, psychological, and intellectual testing records of the proposed ward must be provided to the attorney ad litem before the guardianship hearing, unless the court finds that no such records exist and it is impractical to examine the person with a disability to create such records. Current records are sufficient, i.e., updates will not be necessary where existing records are current.

If the guardianship is sought over a person who has mental retardation, the individual must be examined by a physician or psychologist licensed in Texas or certified by DADS, unless she has been examined in accordance with DADS rules within the 24 months prior to the hearing on guardianship. The findings and recommendations of the physician or psychologist must be submitted in writing to the court. If the proposed ward is unable to pay for the cost of the examination, the county is responsible for the costs.

If the guardianship is sought over a person whose disability is other than mental retardation, the court must receive a written letter or certificate from a physician licensed in Texas before granting an application for guardianship. The certificate

must be dated within 120 days prior to filing of the guardianship application (2). It must state that the person for whom the guardianship is sought is incapacitated and generally describe the extent of the incapacity. If necessary, the court may appoint a physician to examine the proposed ward. If appointed, the physician must make available to the attorney ad litem a report that:

- Describes the nature and degree of incapacity,
- Provides a medical prognosis specifying the estimated severity of the incapacity;
- States how the proposed ward's ability to make or communicate responsible decisions concerning herself is affected by the person's physical or mental health;
- States whether any current medication affects the demeanor of the proposed ward or the proposed ward's ability to participate fully in a court proceeding; and
- Can include the Physician's opinion on the proposed ward's capacity to vote and operate a motor vehicle; and
- Includes any other information required by the court.

F. HEARING; SEE TEX. PROB. CODE ANN. §§ 643, 646

At the hearing, the judge or jury will decide whether or not the person is in fact incapacitated. That requires the court to inquire into the ability of the person with a disability to feed, clothe and shelter herself, to care for her own physical health, and to manage her property or financial affairs. Also, the court will look at the proposed guardian's qualifications and abilities.

In all guardianship proceedings, the person with a disability must be present at the guardianship hearing unless the court, on the record, determines that personal appearance is not necessary. At or before the hearing, the judge should ask the person with a disability who she wants to be her guardian. The person with a disability may not want a guardian, but the judge must hear her reasons to make a wise decision. If the reason for guardianship is explained well to the person with a disability, and if it is presented positively as a way of helping her with her rights, she will probably benefit from appearing in court. In addition, whenever a person is given a chance to express her feelings and to take part in a decision which affects her, she is more likely to feel better about that decision. The person with a disability will probably feel better about herself if she knows that other people respect her feelings and care enough to listen to what she has to say. There may be some situations when it would be bad for the person with a disability to be at the hearing. But if there are no serious medical, psychological, behavioral, or emotional problems, the person with a disability should attend.

The person with a disability has a right to have her own lawyer. If the person with a disability wants a lawyer but cannot pay for one, the court will appoint and pay for her lawyer (called the attorney ad litem). If she asks for it, the person with a disability has a right to have a jury, rather than the judge, make the decision about the guardianship. The hearing is open to the public, but may be private if the person with a disability or her lawyer asks for it.

G. APPOINTMENT OF A GUARDIAN; SEE TEX. PROB. CODE ANN. §§ 673, 684, 690, 692, 693

Before appointing a guardian, the court must find by clear and convincing evidence that the person with a disability is an incapacitated person as defined above. Evidence of the incapacity must include recurring acts or occurrences within the preceding six-month period and cannot be based upon isolated instances of negligence or bad judgment.

The court must also find that:

The application is filed in the proper court;

- The person to be appointed guardian is eligible to act as guardian, and is either entitled to be guardian or a proper person to act as guardian; and

- The rights of persons or property will be protected by the appointment of a guardian.

The incapacitated person (called the ward) for whom a guardian is appointed retains all legal and civil rights and powers except those specifically granted to the guardian by court order. Therefore, the court order must be specific about the type of guardianship and the powers and duties of the guardian.

If the court finds that the proposed ward is totally without capacity to care for herself and to manage her property, the court shall include that finding in its final order and may appoint a guardian of the person or estate, or both, with full authority over the incapacitated person except as provided by law.

If the court finds that the proposed ward lacks the capacity to do some but not all of the tasks necessary to care for herself or to manage her property, the court may appoint a guardian with limited powers and permit the individual to care for herself or to manage her property commensurate with the individual's ability. The guardian has only those powers spelled out in the court order. Any powers not specifically granted to the guardian may continue to be exercised by the person with a disability.

If the court finds that an adult person can care for herself and manage her property as would a reasonably prudent person, the court must dismiss the application for guardianship.

The order appointing the guardian must contain the following:

- The name of the person appointed guardian and of the ward;
- Whether the guardian is of the person, the estate or both;
- The amount of bond required;
- The names of appraisers for the estate, if necessary;
- The specific powers, limitations or duties of the guardian with respect to the care of the person or the management of the person's property by the guardian; and
- If necessary, the amount of funds from the person's estate that the court will allow the guardian to expend for the education and maintenance of the person. The court order must authorize the guardian to expend funds of the guardianship to care for and maintain the ward.

A person can be appointed guardian of the person, guardian of the estate, or guardian of the person and estate. Usually only one person may be appointed guardian over another person's personal or financial affairs. A husband and wife may together be appointed guardian of the person, guardian of the estate, or guardian of the person and estate. The appointment of other joint guardians cannot be made in Texas, unless they were previously appointed co-guardians in another state, but one person may be named guardian of the person and a different person named guardian of the estate if a court is satisfied that this will be advantageous to the ward.

A guardian is not liable to a third person for the conduct of his or her ward solely because of the guardianship.

An order appointing a guardian may specify a period of up to one year during which a petition for a finding that the ward no longer requires the guardianship may not be filed without special leave.

All orders in guardianship matters must be made in open court.

H. GUARDIANSHIP OF THE PERSON; SEE TEX. PROB. CODE ANN. §§ 693, 743, 767, 770

The 1993 law allows for more flexible guardianships. The guardian of the person or the estate may have full or limited powers, depending on the needs of the person with a disability. If a guardian is appointed to manage the ward's personal affairs, she is called the guardian of the person. A guardian of the person is given the power to make personal decisions, such as where the ward should live, what services she should receive and what medical care she should have. The law spells out certain duties of the guardian of the person who has full authority over the ward:

- The right to have physical possession of the ward and to establish the ward's legal residence;

- The duty of care, supervision and protection of the ward;
- The duty to provide the ward with clothing, food, medical care, and shelter;
- The power to consent to medical, psychiatric, and surgical treatment other than the in-patient psychiatric commitment of the ward;
- By order of the court, the power to establish a trust and direct the income to be paid directly to the trust for purposes of the ward's eligibility for medical assistance as set forth in the Human Resources Code.

The court may limit any of these powers of the guardian of the person, depending on the needs of the ward. The guardianship should encourage the development of maximum self-reliance and independence in the ward.

The guardian may expend funds of the guardianship as provided by court order to care for and maintain the ward. Expenses for things that are necessary for the ward to maintain her life, and necessary medicines and the services of medical personnel are proper expenses to be paid by the guardian for the ward out of the ward's estate. The ward's estate is based on any money, property, or income that the ward has, and is not based on the financial assets of the guardian. This is true even if the person with a disability lives with the guardian.

While a guardian usually does not have to use her own money to care for the ward, the guardian will probably be found to have a duty to do everything in her power to see the ward receives the services that are within the responsibility of the guardian to oversee. Being a guardian of the person can involve many responsibilities and duties and should be taken very seriously.

I. GUARDIANSHIP OF THE ESTATE; SEE TEX. PROB. CODE ANN. §§ 665, 741, 742, 768, 771-782

The guardian who manages the ward's financial affairs and property is called the guardian of the estate. Many persons with a disability will not have an estate large enough to require the services of a guardian of the estate. However, for those wards for whom a guardian of the estate is necessary, the relationship of the guardian to the ward is one of great trust. The laws require strict inventory, implementation of responsibility, and regular accounting for a guardianship of the estate.

The guardian of the estate who is given full authority by the court is responsible for the possession and management of all properties belonging to the ward. The guardian must also collect all debts, rentals, or claims that are due to the ward, enforce all obligations, and bring and defend lawsuits by or against the ward. It is the duty of the guardian of the estate to take care and manage the ward's estate as a prudent person would manage her own property. If the guardian fails to maintain the estate as a prudent person would, the guardian must account to the court for all rents, profits, and revenues that the estate would have produced by such prudent management.

Courts can and should limit the authority of the guardian when the person with a disability has the mental and physical capability of managing some of their own financial affairs, so as to encourage the development or maintenance of maximum self-reliance and independence in the person.

A guardian of the estate does not have title to the ward's property, only the right to its custody and management. The guardian of the estate is required to take possession of the personal property, record books, title papers, and other business papers of the estate of her ward. The guardian is responsible for managing the estate of the ward. The personal financial assets of the guardian are not included as a part of the ward's estate, even if the ward with a disability lives with the guardian.

It is the duty of the guardian of the estate to file an annual accounting with the court. The guardianship laws contain specific instructions about this annual report and about all other actions the guardian of the estate may or may not take. A guardian's ignorance of the law is not an excuse for failures or errors, since the law requires the guardian to acquaint herself with her duties and to perform them. In certain instances, the guardian of the estate may be entitled to compensation for the performance of her duties.

The responsibilities of the guardian of the estate are numerous, and the requirements for reports that they must file are detailed. This booklet does not attempt to address these requirements. The guardian of the estate also has financial liability for mistakes or misconduct. We strongly urge anyone appointed guardian of the estate to seek legal advice from an attorney experienced in such matters. Disability Rights Texas attorneys will not be able to advise you on the responsibilities of the guardian of the estate.

J. LIMITATIONS ON THE AUTHORITY OF THE GUARDIAN; SEE TEX. PROB. CODE ANN. § 693

The 1993 amendments require that the court examine each application for guardianship and determine whether the powers of the guardian should be limited or whether the guardian should have full authority over the person, the estate, or both. The guardian should have only that authority as indicated by the person's actual mental or physical limitations, and only as necessary to promote and protect the well-being of the person. If authority is to be limited, the court must design a guardianship to encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person.

If you believe that the incapacitated person lacks the capacity to do some but not all of the tasks necessary to care for herself or to manage her property, you will want to think carefully about which powers and duties should be requested for the guardian so that she may adequately protect the interests of the person who is incapacitated while at the same time allowing the person to retain the right to make the decisions that she is able to make for herself.

While the 1993 law does not list any specific powers that might be granted to a limited guardian, the previous law did list some examples that are still helpful.

These are listed to give you an idea of some powers that might be granted to a guardian if the person who is incapacitated is not able to do these things herself. Possible powers include:

- The power to possess and to manage the properties of the person who is incapacitated;
- The power to collect or to file suit on debts, rentals, wages, or other claims owed to the person who is incapacitated;
- The power to contract or to make other obligations for the person who is incapacitated;
- The power to pay, settle, or defend claims against the person who is incapacitated;
- The power to spend money for the care of the person who is incapacitated; and/or
- The power to apply for non-residential care and other services, such as mental health and mental retardation services, for the person who is incapacitated. The guardian may not admit the person who is incapacitated to inpatient psychiatric services or a residential care facility operated by DADS without the consent of the person who is incapacitated.

These are the possible powers of a guardian suggested in the law. Other powers of the guardian which may be needed might include such things as:

- The power and duty to apply for and to receive governmental funds for which the person who is incapacitated is eligible, including:
    - Supplemental Security Income Benefits (SSI)
    - HUD Section 8 Rent Subsidies
    - Childhood Disability Benefits under the Old-Age, Survivors and Disability Insurance Program (OASDI)
    - Aid to Families with Dependent Children (AFDC);
- The power and duty to apply for and to consent to needed psychological and psychiatric testing for the person who is incapacitated;
- The power and duty to consent to medical tests needed by the person who is incapacitated;
- The power and duty to consent to needed medical and dental treatment for the person who is incapacitated;
- The power and duty to get insurance for the person who is incapacitated;

- The power and duty to file required federal income tax returns for the person who is incapacitated;
- The power and duty to get a needed identification card for the person who is incapacitated;
- The power and duty to help the person who is incapacitated to get appropriate vocational training and to secure a job;
- The power and duty to help the person who is incapacitated to find a place to live;
- The power and duty to help the person who is incapacitated to get a driver's license;
- The power and duty to help the person who is incapacitated get an appropriate education;
- The power and duty to take part in developing the individual education, habilitation and program plans of the person who is incapacitated;
- Where the incapacity is mental retardation, the power to propose or to contest a proposed transfer or discharge of the person who is incapacitated from a state school, state center, or community MHMR center;
- The power to review and to consent to the disclosure of the confidential records of the person who is incapacitated; and
- The power to make purchases for the person who is incapacitated that cost in excess of a specified amount.

K. LETTERS OF GUARDIANSHIP, OATH, & BOND; SEE TEX. PROB. CODE ANN. §§ 651, 700-703

Once a guardian is appointed, she must take an oath that she will faithfully perform her duties. The oath must be taken before a person who can give oaths under Texas law, such as a notary public, court clerk, or justice of the peace. The person appointed guardian must taken the oath within 20 days after the guardianship is granted. When an appointed guardian takes an oath and files a bond, the court will issue letters of guardianship and the guardianship is then effective.

The amount of the bond (also called the penalty of the bond) depends on the duties and powers granted the guardian and the value of the assets, property, and income that are to be managed by the guardian. If there is only a guardianship of the person, the judge will usually set the bond for a relatively small amount. The reason for the bond is to make sure that the guardian faithfully performs her powers and duties. If the same person is appointed guardian over personal and financial affairs, then the amount of the bond depends only on the value of the property of the person with a disability. A bond is not required if the guardian is a corporate fiduciary or with a guardianship program operated by a county.

If the guardian manages property and/or money of the person with a disability, then the judge will need to set the bond high enough to protect the person's property and money, and any creditors. Before setting bond, the judge will hold a hearing to determine in detail the value of the property of the person with a disability and the income she will likely receive over the next year and any debits owed by the ward. This may include the value of the land, personal property, stocks and bonds, notes receivable, salary and other include, such as stock dividends and interest on savings accounts, of the person with a disability. The judge will also determine the amount needed for administering the guardianship.

Payments from the Social Security Administration will not be considered when the judge sets the amount of the bond, but other kinds of governmental payments may be included. The judge may order that some of the cash, stocks and bonds, and personal property of the person with a disability be placed out of the guardian's control in safekeeping (usually at a bank). Or, if the court agrees, the guardian herself may place the cash, securities, or personal property of the person with a disability in safekeeping. If these assets cannot be taken out of safekeeping except on the judge's order, then the value of that property is not included in the amount of the bond the judge sets.

Judges have a great deal of discretion in setting the amount of the bond and in deciding how the bond is made. For this reason, the practice of setting bond may vary throughout the state. It is best to talk with your attorney before the hearing to find out what bond, if any, will be required by the judge.

The letters of guardianship expire one year and four months, after the date of issuance unless renewed. They are renewed when the court receives and approves the guardian's annual accounting.

Judges may enforce orders against a guardian by attachment and imprisonment for up to three days.

L. ACCOUNT & INVENTORY; SEE TEX. PROB. CODE ANN. §§ 727, 729, 730, 741, 743, 744

At least annually, judges are required to examine the well-being of each ward. In order to help the judge, several reports must be filed annually by the guardian.

Within 30 days of being appointed, any guardian who is managing properties must prepare and file a verified inventory of all known property of the incapacitated person, including a statement of all encumbrances, liens, and other secured charges on any item. The court then examines and approves the inventory, or requires another inventory to be done. The judge may get three appraisers to determine the value of the estate of the person with a disability. If the judge doesn't, then the guardian must determine the fair market value of the ward's property with the appraisers' help. The judge will also want a list of all debts (also called a List of Claims) owed the ward.

The guardian of the estate must annually file, within 60 days of the anniversary date of the guardian's appointment, a written sworn account of the guardian's

administration of the guardianship of the estate. The guardian is required to take care of and manage the property as a prudent person would manage the person's own property. It is very important that the guardian be able to show that she has taken good care of the ward's property. Extensive information is required to be supplied in the account, and we recommend that an attorney be consulted for assistance with the inventory and at least the first annual report.

When there is a separate guardian of the estate, the guardian of the person must annually file a sworn account showing each item of receipts and disbursements for the support and maintenance of the ward, the education of the ward, and support and maintenance of the ward's dependents (when authorized by order of court).

Each guardian of the person, whether or not there is a separate guardian of the estate, must file with the court a sworn annual report that updates the court on the status of the ward's activities, residence, health, etc. Extensive information is required to be supplied in the report, and we recommend that an attorney be consulted for assistance with at least the first annual report.

If a guardian fails to file any required report or accounting, the guardian may be cited to appeal before the court. There will be a hearing and the court may order the report to be filed, may revoke the letters of guardianship and may fine the guardian up to $1,000.

M. COMPENSATION OF GUARDIAN & COSTS AGAINST A GUARDIAN; SEE TEX. PROB. CODE ANN. §§ 665, 668, 669

A guardian is entitled to be reimbursed from the guardianship estate for all necessary and reasonable expenses incurred in performing any duty as guardian. All expenses charged to the estate must be in writing, specifying each item of expense and the date of the expense; verified by an affidavit signed by the guardian; and filed with the court.

A court may authorize compensation for a guardian of the person from available funds of the ward's estate. The compensation may not exceed five percent of the ward's income. The court must consider the ward's monthly income from all sources before awarding compensation to the guardian.

The guardian of the estate is entitled to a fee of five percent (5%) of the gross income of the ward's estate and five percent (5%) of all money paid out of the estate, if the court finds that the guardian has taken care of and managed the estate in compliance with the law. If the fee is an unreasonably low amount, the court may authorize reasonable compensation. The court may also deny a fee in whole or in part if the court finds that the guardian has not adequately performed his or her duties or if the guardian is removed for cause.

Costs of the guardianship proceeding, including the costs of the guardian ad litem and court visitor, are paid out of the guardianship estate. If the estate is too small to pay these costs, they are paid by the county.

When a guardian neglects to perform a required duty or is removed for cause and costs are incurred, the guardian and the sureties on the guardian's bond are liable for the costs of removal of the guardian and any other costs that were not expenditures authorized by the court, including attorney's fees.

N. ANNUAL REVIEW REQUIRED; SEE TEX. PROB. CODE ANN. § 672

A very important change in guardianship law is the new requirement that the courts must review annually each guardianship to determine whether the guardianship should be continued, modified, or terminated. The guardianship is reviewed by the court in which the guardianship proceedings were held. A statutory probate court must review the reports prepared by the court investigator, the court visitor, and by the Guardian Ad Litem. The court may conduct a hearing if necessary. Courts other than statutory probate courts may use any appropriate method to review the guardianship, with consideration to the court's caseload and the resources available to the court.

O. REMOVAL OR MODIFICATION OF GUARDIANSHIP; SEE TEX. PROB. CODE ANN. §§ 712-715, 760-761

The ward, or any person interested in the ward's welfare, may petition the court for an order finding that the ward no longer needs the guardian and ordering the guardian to resign or be removed. The court may find that the ward lacks the capacity to take care of herself or manage property and grant additional powers to the guardian. The court may also find that the ward has regained the capacity to do some, but not all, of the tasks necessary to care for herself and limit the power or duties of the guardian and permit the ward to exercise those powers commensurate with her ability.

A request for an order modifying the guardianship or removing the guardian may be by an informal letter to the court. Anyone who interferes with the transmission of the request to the court may be adjudged guilty of contempt. Grounds for removal include:

1. Neglecting to qualify as guardian in the manner and time required by law;

2. Failing to return an inventory of the estate within 30 days after qualification as guardian;

3. Failing to post bond;

4. Leaving the state for three (3) months or more without permission of the court;

5. Failing to inform the court of the guardian's whereabouts or avoiding service of process;

6. Misapplying, embezzling or removing the wards property from the state, or other gross misconduct;

7. Treating a ward cruelly, or neglecting to educate or maintain the ward as liberally as the means of the ward and the conditions of the ward's estate permit;

8. Mismanaging the ward's estate or personal affairs;

9. Failing to obey an order of the court;

10. To return any account required by law;

11. Interfering with the ward's progress or participation in programs in the community;

12. Being sentenced to prison;

13. Becoming incapacitated or in any other way becoming incapable of properly performing the duties of the guardian's trust; or

14. Failing to register as a private professional guardian.

When a guardian is removed, the court enters an order stating the reason for removal and revoking all Letters of Guardianship, whether delivered or not. If the guardian was personally served with citation, the guardian may be required by the court to surrender any Letters of Guardianship in the guardian's possession. The order will also require the removed guardian to deliver any property remaining in the guardian's hands to the persons entitled to it or to the successor guardian, if one is appointed and qualifies. If the removed guardian was a guardian of the person, the order will require the removed guardian to relinquish control of the person with a disability.

Any person interested in a guardianship may allege, in writing filed with the court, that the guardian's bond is insufficient. The court will order the guardian to appear and will inquire into the sufficiency of the bond. The court may order a new bond, and the guardian's powers are suspended until the new bond is approved by the court.

A guardian may resign by filing with the court a written application for resignation, accompanied by a final accounting (if guardian of the estate) and an annual report (if guardian of the person).

P. SUCCESSOR GUARDIANS; SEE TEX. PROB. CODE ANN. § 759

Texas law permits the appointment of a successor guardian if the first guardian dies, resigns, or is removed. Successor guardians take on all the rights, powers, and duties that the first guardian had. Successor guardians can be named at the time the initial guardian is named, or at a later date, upon application to the court and notice as directed by the court.

Q. ENDING THE GUARDIANSHIP; SEE TEX. PROB. CODE ANN. § 745

The guardianship does not end if the guardian dies, resigns, or is removed. In these cases, a guardianship remains in effect, though no person serves the role of guardian until a successor guardian is appointed by the court. However, there are times when the guardianship itself ends. If the ward is a minor, then the guardianship ends when she reaches age 18, marries, or when a court says she has the rights of an adult. If the ward is an adult, then the guardianship ends when the ward dies, or when the court sets aside a guardianship and restores all rights to the former ward upon a showing that the ward is now able to manage her own personal affairs.

Guardianship of the estate ends when either:

- The adult with a disability becomes able to manage her own financial affairs;
- The estate of the adult with a disability is all used up; or
- The judge decides that the person's income is too small to continue the guardianship; and
- The guardian of the estate is removed by a court.

A final accounting is needed whenever a guardianship of the estate ends. In cases where there is a guardianship of the person and estate and the guardianship of the estate ends, the guardianship of the person may continue, if necessary.

R. Costs

For most guardianship proceedings the greatest costs are the lawyer's fees. Guardianship proceedings are complicated and time consuming. For this reason, you should do everything you can to help your lawyer and to keep the lawyer's fees as low as possible. For some tips on cutting the lawyer's fees, see the Resources section at the end of this booklet.

There are also court costs. While there may be other costs, the court costs for a full guardianship include a filing fee, which varies from county to county. In some counties this fee is over $250. You will probably want to check with your lawyer about how much the court costs will be for your case. If the person with a disability is found to need a guardian, the costs of the full guardianship proceeding can be paid out of the persons' estate. There are also court fees for the annual accountings and other papers that will be filed in later years. As discussed earlier, there may be other costs if the judge sets a bond. Under certain circumstances, a court may order that the fees be waived because the person is unable to pay them.

S. Application Of The 1993 Amendments To Existing Guardianships

A court may modify any guardianship in effect on September 1, 1993, to conform with the requirements of the 1993 amendments. The court may make such modifications on its own motion, or on application of the ward, the guardian or any other interested party.

Proceedings for appointment of a guardian that were filed before September 1, 1993, and governed by the law in effect at that time. These amendments apply only to proceedings for the appointment of a guardian that were instituted on or after the effective date of these amendments.

V. TEMPORARY GUARDIANSHIP; SEE TEX. PROB. CODE ANN. §§ 875, 878

Texas law permits the appointment of temporary guardians for certain persons if the court has probable cause to believe that the person, the person's estate, or both require immediate appointment of a guardian. If the person with a disability does not have an attorney, one will be appointed by the court to represent her.

A sworn, written application for the appointment of a temporary guardian shall be filed before the court appoints a temporary guardian. The application shall state:

1. The name and address of the person for whom the guardianship is sought;

2. The danger to the person or property that is alleged to be imminent;

3. The type of guardianship requested (of the person or estate);

4. The type of help and protection the person needs;

5. All of the facts and reasons supporting the request for a temporary guardianship;

6. The name, address, and qualifications of the proposed temporary guardian, and whether that person is a private professional guardian; and

7. The name, address, and interest of the person filing the application;

A hearing must be held within ten (10) days of the date of filing the application and the person for whom the guardianship is sought will have the following rights:

1. Prior notice (This means the person must have been formally served with notice which tells the rights of the people involved and the date, time, purpose, and possible consequences of the hearing.);

2. Representation by an attorney (An attorney shall be appointed by the court unless the person already has an attorney.);

3. To be present at the hearing;

4. A closed hearing, if the person requests it; and

5. The right to present evidence, and to confront and cross-examine witnesses.

The hearing must be held within 10 days of the application, unless the respondent postpones the hearing up to 30 days after the day the application is filed.

A temporary guardianship will not be granted before the hearing unless the proposed guardian appears in court. The person for whom the temporary guardianship was obtained must give one day's notice to the person who obtained the temporary guardianship. The court shall proceed to hear and determine this motion for modification or removal as soon as possible.

The temporary guardianship cannot be granted unless the court finds that there is imminent danger that the physical health or safety of the person will be seriously impaired and/or that the person's estate will be seriously damaged or dissipated unless immediate action is taken. The court will only give a temporary guardian the powers necessary to protect against the imminent danger. The powers and duties must be described in the court's order. Unless the guardianship is contested, a temporary guardianship may last no longer than sixty (60) days.

The court may not customarily appoint the Texas Department of Aging and Disability Services. The appointment of the department as a temporary guardian should be made only as a last resort.

If you need to get a guardianship only for an emergency medical or other need which will cause imminent danger to the physical health or safety of an individual who cannot consent to the necessary treatment to take care of the problem, you might want to consider a temporary guardianship. A temporary guardianship may be helpful where a person can usually deal with everyday affairs but cannot do so for a specific thing, such as a complex medical decision, where there is a threat to the person's physical health or safety.

If a serious danger is imminent and you cannot get a regular guardianship in time to deal with it, getting a temporary guardianship in the meantime may be helpful. You should keep in mind that an uncontested temporary guardianship can only last sixty (60) days.

Temporary guardians must make an accounting to the court when the temporary guardianship expires.

VI. PRIVATE PROFESSIONAL GUARDIANS; SEE TEX. PROB. CODE ANN. §§ 697, 698

The 1993 amendments to the guardianship law create a *private professional guardian* who is a person engaged in the business of providing guardianship services. Attorneys and corporate fiduciaries are not considered to be private professional guardians. A court may appoint a private professional guardian to serve as a guardian, if the private professional guardian meets the following standards. A private professional guardian must apply annually to the county clerk in the county of the guardianship proceeding. The application must be sworn and contain the following information about the private professional guardian:

- Educational background and professional experience;
- Three or more professional references;

- The names of all the wards the private professional guardian will be serving as guardian;
- The aggregate fair market value of the property of all wards that is being or will be managed by the private professional guardian;
- Place of residence, business address, and business telephone number; and
- Whether the private professional guardian has ever been removed as a guardian by the court or resigned as a guardian in a particular case, and if so, a description of the circumstances causing the removal or resignation, and the style of the suit, the docket number, and the court having jurisdiction over the proceeding.

The application must be renewed annually. On an annual basis, the court will do a criminal history record check on the private professional guardian and use such information only to determine whether to appoint, remove, or continue the appointment of the private professional guardian

VII. OTHER ISSUES ABOUT GUARDIANSHIP

A. DESIGNATION OF GUARDIAN BEFORE NEED ARISES; SEE TEX. PROB. CODE ANN. § 679

Any person who is not incapacitated may designate in writing person(s) that she wishes to serve as guardian in the event the person becomes incapacitated. The person may also name persons that she does not want to serve as guardian. Such disqualified persons may not be appointed guardian under any circumstances.

A declaration designating a future guardian or disqualifying a future guardian must be carefully drafted and witnessed. If the declaration is properly done, it is considered in court to be strong evidence that the person signing it was competent and that the wishes expressed in the declaration should be followed as being in the best interests of the person. To make such a declaration, you should see an attorney, or call Disability Rights Texas for sample forms that you may follow to make such a declaration.

If a person who has signed such a declaration becomes incompetent and an application for a guardian is filed, the declaration must be filed with the court. Once it is filed, the court must appoint the proposed guardian unless the court finds that the proposed guardian is disqualified or would not serve the best interests of the person who is incapacitated. A declaration of guardian may be revoked by an individual's will or by the individual properly executing a new declaration.

B. CO-GUARDIANS; SEE TEX. PROB. CODE ANN. § 690

Ordinarily, only one person can be appointed as guardian. However, persons appointed co-guardians in another state may be appointed co-guardians in Texas, as well as Joint Managing Conservators, and both parents of an adult who have not been subject to a suit affecting the parent-child relationship.

C. NON-RESIDENT GUARDIANS OF THE ESTATE; SEE TEX. PROB. CODE ANN. § 881

Non-residents of Texas may be appointed and qualified as guardians or co-guardians of a non-resident ward's estate situated in Texas in the same manner and by the same procedure provided in the Probate Code for appointment and qualification of residents of Texas as guardians if, by proceedings in and decrees of a court of competent jurisdiction in the state or county of the guardian's residence, the non-resident applicant has been previously duly appointed, is still qualified as guardian or other fiduciary legal representative of the property or estate of the ward situated within the jurisdiction of the foreign court, and files with the court a complete, certified transcript of the proceedings in which the non-resident was appointed guardian.

There must be a written application for appointment filed in a county court in Texas where all or part of the ward's estate is situated. The applicant must file, along with her application, complete transcript of the proceedings from the records of the out-of-state court of her residence in which she was appointed showing her appointment and qualification as guardian or other fiduciary representative of her ward's property or estate. The transcript must be certified to and attested by the clerk of the foreign court. The certificate of the judge of the foreign court to the effect that the attestation of the transcript by the clerk is in due form should be attached to the transcript.

If these requirements are met, an order appointing the non-resident as guardian of the estate will be made and entered without the necessity of notice or citation. The non-resident applicant thus appointed must qualify by making and filing oath and bond, subject to the court's approval, the same as is required of residents who are appointed guardians. The non-resident applicant must also file with the court a power of attorney appointing a resident agent to accept service of process in all actions or proceedings with respect to the estate. Thereupon, the clerk must issue letters of guardianship to the non-resident guardian or co-guardians. After qualification, the non- resident guardian must file an inventory and appraisement of the estate, and is subject to all provisions of the Probate Code.

A court may remove a guardian if the guardian leaves the state, but does not have to do so. However, an out-of-state guardian must be able to fulfill all the duties of a guardian.

D. OUT-OF-STATE GUARDIANSHIP OVER TEXAS WARD

An adjudication of incompetence and the issuance of letters of guardianship in one state ordinarily precludes the notion that a ward could voluntarily change her place of residence in order to become the resident of another state and subject herself to that state's jurisdiction, since the courts may be unwilling to enforce the letters of guardianship from another state. However, a non-resident guardian who has not qualified in Texas may be unable to deal with the ward's estate. It is important to know what kind of guardianship outside the state is involved, as different states have different kinds. It is possible that the person might not need a guardian at all

or may need a less restrictive kind of guardianship. If the ward is disabled enough to need a guardian and plans to stay in Texas, a lawyer should look at the out-of-state guardianship to see if the ward and the ward's estate can be adequately protected by that guardianship. If not, the ward may need to have a Texas guardian appointed. And if the ward is, in fact, competent, she should consult a lawyer to get the out-of-state guardianship ended.

E. Transfer Of Guardianship Between Texas Counties; see Tex. Prob. Code Ann. §§ 612, 614, 618

If the guardian changes her residence within the state she may wish to transfer the guardianship to the county of her new residence. However, the court may refuse to allow the removal to another county if the court finds that removal would be against the best interest of the ward. The court may also appoint a new guardian in the county, if the court finds that it would be unduly expensive to the ward's estate, or unduly inconvenient for the guardian to continue as guardian in the new county.

VIII. RESOURCES

While finding a competent lawyer is not a sure thing, it is now easier to find a lawyer qualified to handle a particular kind of case than it was in the past. In this section of the booklet we will discuss:

- Private attorneys;
- Legal services and legal aid offices;
- Determining a lawyer's competence; and
- Assistance for your lawyer.

A. Finding A Private Lawyer

Names of private lawyers may be obtained from other individuals who have gone through guardianship proceedings, in the business section of your telephone book, or from the State Bar of Texas lawyer referral service. You can reach the State Bar of Texas Lawyer Referral Service by calling, toll free, 1-800-252-9690 or 1-877-9TEXBAR (986-9227) and online at www.texasbar.com. You should also check your local phone directory for the number of the lawyer referral service operated by your local bar association, if you are in a highly populated county.

B. The Lawyer's Fee

For many clients, the cost of the lawyer's services is the most important factor in selecting an attorney. Although the adage you get what you pay for is often true, a high fee does not always mean you will get good legal services.

Before visiting a lawyer's office, find out what the first visit will cost, if anything. Many lawyers offer a free initial visit.

If, after the first visit, you feel the lawyer is competent and you are pleased with her, you should talk about the fee openly. If one lump payment is too hard for you, you should tell the lawyer this and ask if you can pay on an installment plan.

Lawyers set fees for their services in many ways. Flat fees are usually charged for standard procedures like divorces and guardianships. The lawyer should be willing to put the fee in writing. The agreement should clearly state the actual cost of the lawyer's services. You should keep a copy of the agreement, together with any receipts, cancelled checks, or other proof of payment. The agreement should describe the services the lawyer will perform, who will pay the lawyer's fee, and how any other expenses will be handled. These may include expense for filing legal papers, for notices, for photocopies, for long-distance phone calls, for court transcripts, for the lawyer's travel expenses, for expert witnesses, and for telephone calls between you and the lawyer. You may not know in advance what the final amount of these expenses will be, but the agreement should specify the kinds of expenses for which you will be charged.

Another way for a lawyer to charge is by an hourly rate. You might ask if the hourly rate differs, depending on the experience of the lawyers in the firm. You should find out what is included in the hourly rate. You should also get an estimate of the time it will take. The lawyer may charge another fee or a different hourly rate for court appearances for a half or full day. You may be charged part or all of this fee, even though your hearing may take less than a half or full day.

Another way for a lawyer to charge is on a contingent fee basis. Contingent fee arrangements are very rarely used in guardianship cases.

C. Cost-Saving Ideas

The high cost of lawyers prevents many middle-income Americans from getting needed legal services. Legal services and legal aid offices provide legal assistance to lower-income Americans. But the problem of getting legal services for middle income persons remains. Some labor unions and other organizations have prepaid legal insurance plans. Under these plans, participants in the program pay a premium or fee each month. If a participant needs a lawyer, the program pays the lawyer's fees. Under most programs, you can select your own lawyer. Prepaid legal insurance programs may become a major way of providing legal services at reasonable cost. Unfortunately, few of these programs are presently operating.

D. Legal Aid Offices & Other Low-Cost Legal Services

Some legal services and legal aid programs, if there are any in your area, are excellent resources. However, these services are often available only for persons with limited income, such as persons who receive SSI and other governmental benefits. There may be a legal services program in your area for the aged, serving persons over 60 years of age. Another resource is a local law school. Many law

schools operate legal clinics where law students practice under the supervision of licensed attorneys. However, many of these legal clinics serve only low-income clients.

If a person or an agency refers you to a lawyer and you feel that the lawyer did not provide you competent services, PLEASE tell the person or agency that referred you.

E. Determining A Lawyer's Abilities

The diplomas, certificates, and other awards usually hanging on a lawyer's office wall do not guarantee that the lawyer is able to handle your particular case. Lawyers may be skilled in one area of the law, such as divorces, yet not know about the legal problems of persons with a disability. You should ask about the lawyer's knowledge and experience to find out if she will be able to competently handle your case. A lack of experience in a specific area of the law may, but does not always, mean that the lawyer cannot represent you well.

The 1993 amendments require the state bar to provide a course of instruction for attorneys who handle guardianship cases. You can ask whether the attorney you are interviewing has taken the course, but attorneys who served as attorney ad litem prior to September 1, 1993, are not required to take the course.

A lawyer's personal commitment does not replace knowledge and experience, but it should be weighed when choosing a lawyer. A lawyer who has a personal interest in or commitment to your case can be a very good representative.

Finally, if you feel the lawyer you picked is not representing you fairly or competently, you can complain about that lawyer to the local bar association.

F. References & Assistance For Your Lawyer

Disability Rights Texas is a federally funded, nonprofit corporation which provides protection and advocacy services to Texans with developmental disabilities. You may reproduce this booklet or order additional copies from Disability Rights Texas. Please check the booklet cover for the address and telephone number of the nearest office.

You might also call local consumer agencies, such as the Association for Retarded Citizens or Parent Association for the Retarded of Texas to find out if they have any knowledge about other resources. You should check with your local library regarding the availability of material on guardianship.

The Texas Guardianship Manual can be purchased online at http://www.texasbarcle.com. Other resources are available at http://www.texasbar.com.

NOTES

1. Disability Rights Texas alternates male and female pronoun usage in its handouts. In this handout, we use the female pronoun.

2. Pursuant to § 687(a) of the Probate Code, the physician's letter or certificate must be "based on examination the physician performed not earlier than the 120 day before the day of the filing the application."

Disability Rights Texas' goal is to make each handout understandable by and useful to the general public. If you have suggestions on how this handout can be improved, please contact the agency at the address and telephone number shown on our website home page or e-mail Disability Rights Texas at info@ Disability Rights Texas.org. Thank you for your assistance. This handout is available in Braille and/or on audio tape upon request. Disability Rights Texas strives to update its materials on an annual basis, and this handout is based upon the law at the time it was written. The law changes frequently and is subject to various interpretations by different courts. Future changes in the law may make some information in this handout inaccurate. The handout is not intended to and does not replace an attorney's advice or assistance based on your particular situation.