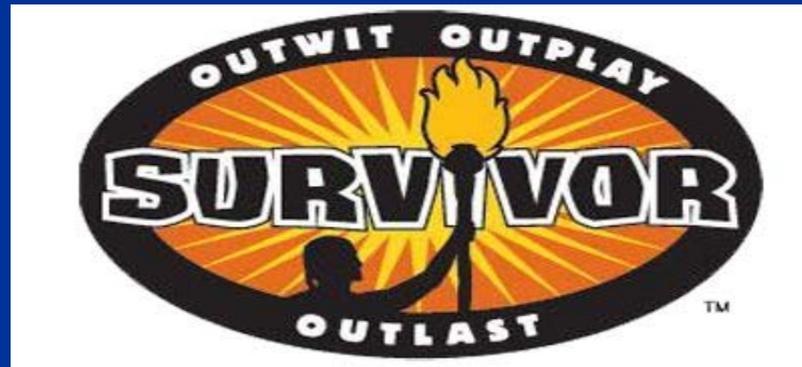


# SURVIVOR: PROBATE COURT

## How To More Than Survive Opening A Guardianship



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# **SURVIVOR: PROBATE COURT**

How To More Than Survive Opening  
A Guardianship

There are 8 easy steps in surviving the challenge of opening a Permanent Guardianship.

This presentation is intended to:

Simplify your understanding of the process; and

To give you direction as to the relevant Texas Estates Code Sections.

**DO YOU NEED A  
GUARDIANSHIP?**

Prior to proceeding with the guardianship application, you need to first determine whether the expensive and cumbersome nature of the guardianship is necessary, or whether there is an available alternative.

# There are two types of guardianship:

- Guardian of the Person

Authorizing the guardian to make any medical and living arrangement decisions for the Ward

- Guardian of the Estate

Authorizing the guardian to handle the financial affairs of the Ward

You first need to determine whether a guardianship of the person can be avoided by one of the following alternatives:

- (a.) Surrogate medical decision making under the Texas Consent to Medical Treatment Act CH. 313 Texas Health and Safety Code.
  
- (b.) Emergency Medical Treatment Act. §773.008 of the Texas Health & Safety Code.

- (c.) Medical Power of Attorney. §166.151-166.164, Texas Health & Safety Code.
  
- (d.) Directive to Physicians(a/k/a Living Will”) §166.031, et seq., Texas Health & Safety Code.

- (e.) Managing conservatorship §154.131 et seq., Texas Family Code.
  
- (f.) Court-ordered mental health services Chapter 574, Mental Health Code.

Available alternatives to guardianship of the estate include the following:

- (a.) Statutory Durable Power of Attorney (Chapter 751, Texas Estates Code): if the Proposed Ward has the capacity to execute one, then this can provide a tool for managing the proposed Ward's property (Problem: This does not prevent the Proposed Ward from still acting, or from revoking the POA at a later time).
- (b.) Trusts- If the Proposed Ward does not already have one, and has sufficient mental capacity, he or she may be able to execute one, making guardianship unnecessary.

- (c.) Probate Management Trust - (Chapter 1301, Texas Estates Code) - An application for Management Trust can now be brought by “a person interested in the welfare of an alleged incapacitated person”, without necessity of a full guardianship.
- (d.) §142 Trust - court-created trust, established in a court other than Probate Court, usually in a lawsuit brought by someone as “next friend” of the proposed Ward. (§142.005, Texas Property Code).

- (e.) Court Registry - §1355.001 of the Texas Estates Code - provides for payment of amounts, up to \$100,000, into the court registry, in lieu of a guardianship.
  
- (f.) Sale of Real Property - §1351.001 and §1351.051 of the Texas Estates Code - provide for the sale of a minor or incapacitated person's interest in real property, and the deposit of the proceeds of sale into the court registry; limited to \$100,000 in value.

- (g.) Representative Payee (42 USC §1383 (a)(2)) - provides a means for appointment of a “representative payee” to receive, manage, and distribute Social Security benefits without the appointment of a guardian.
- (h.) Suit by Next Friend (Rule 44, Texas Rules of Civil Procedure) - provides a means for someone to bring suit on behalf of a minor, or other incapacitated person, to assert a claim or right.

If the foregoing alternatives are not available to you, the following is a map to the 8 easy steps to obtaining guardianship:

# STEP 1:

DO YOU HAVE AN “INCAPACITATED  
PERSON”?

# 1. The proposed Ward must be an “Incapacitated Person”

In order to obtain a guardianship, the Probate Court must determine that the proposed ward is an “incapacitated person”. Incapacitated person is defined in §1002.017:

(a) a minor;

(b) An adult individual who, because of a physical or mental condition, is substantially unable to provide food, clothing, or shelter for himself or herself, to care for the individual’s own physical health, or to manage the individual’s own financial affairs...

## 2. Proving “Incapacity”

The applicant for probate must obtain from a physician licensed in the state of Texas a letter to the Court, known as a “Physician’s Certification” which supports the allegations that the proposed ward is totally or partially incapacitated. This letter must be based upon an examination performed no more than 120 days before the date of filing the application (§1101.103).

The physician's Certificate of Medical Examination should be attached to the Application for Guardianship if possible.

If the proposed ward's alleged incapacity is based upon mental retardation, a physician or psychologist certified by "DADS" (Department of Aging and Disability Services) may provide a written statement based upon any examination performed within two years prior to the hearing date (§1101.104).

# STEP 2:

IS YOUR APPLICANT “QUALIFIED”?

1. The **priority** of persons entitled to be appointed as Guardian for an **adult ward** is as follows:
  - (a) **A person designated** under A Declaration of Guardian In Advance of Need (§1104.202)
  - (b) **Spouse** (§1104.102(1))
  - (c) **Nearest of kin**, if the adult ward is not married or if their spouse is disqualified (§1104.102(2))
  - (d) The **“best qualified”** eligible person to serve (§1104.102(3))

2. The **priority** of the persons entitled to be appointed as guardian for a **minor ward** is as follows:
  - (a) **Parents** (§1104.051)
  - (b) **Persons appointed** by surviving parent before their death or incapacity (§1104.053)
  - (c) **Persons selected by minor** ward over age twelve, subject to a finding of the court that the choice is in the best interest of the minor (§1104.054)
  - (d) **Nearest ascendant kin** (§1104.052)
  - (e) **Nearest of kin** (§1104.052)
  - (f) Any qualified person (§1104.052)

### 3. Persons **disqualified** to serve as guardian

Texas Estates Code §1104.351 – 1104.059 lists the persons who are disqualified to serve as guardian of the person and estate of a proposed ward. The most common disqualifications include:

- (a) A person indebted to proposed ward, unless the debt is paid prior to appointment (§1104.354(2))
- (b) A person asserting a claim adverse to the proposed ward or the proposed ward's property, real, or personal (§1104.354(3))

#### 4. Can my applicant **qualify for a bond**?

Prior to filing an application for guardianship of the estate on behalf of an applicant, you should determine whether your proposed guardian can qualify to obtain a corporate surety bond. If you will have your client fill out a bond application form from a local bonding agent, you can attempt pre-qualify your client.

If the client cannot qualify for the bond, you will need to select another proposed guardian. For a person seeking to be guardian of the estate, the court must set a bond generally equal to the value of all non-real property and anticipated income to the guardianship estimated for twelve months (§1105.154).

If your applicant is applying only to be appointed as guardian of the person, bond is normally set by the court in a nominal amount, and the court will normally allow a personal surety bond as supposed to a corporate surety bond.

5. How many persons can be appointed as guardian?

Under Texas Probate Code §1104.001, **only one person** may be appointed as guardian of the person, and one person as guardian of the estate (it may be the same or different persons), with the following exceptions:

- 1) Husband and wife;
- 2) Joint Managing Conservators;
- 3) Foreign Co-Guardians; and
- 4) Both parents of an adult incapacitated person.

6. The Guardian must register online with the Judicial Branch Certification Committee (“JBCC”).

<http://www.txcourts.gov/jbcc/register-a-guardianship>

- a) Includes a criminal background check;
- b) Must complete online guardianship training.

# STEP 3:

FILE AN APPLICATION FOR  
GUARDIANSHIP AND GIVE NOTICE

# 1. Application

§1101.001 sets out the pleading requirements for an application for guardianship. The application must be sworn by the applicant.

**Affidavit of Inability to Pay Costs** - If the applicant cannot afford to pay the filing fees, you should complete an Affidavit of Inability to Pay Costs.

## 2. Notice/Citation on Application Required

- Personal service on ward – the proposed ward if 12 years of age or older must be personally served under §1051.103 with citation and a copy of the application for guardianship (**cannot be waived**).
- Posted Notice – in addition to personally serving the ward with citation, citation must be issued by the Probate clerk, posted, and returned prior to the hearing on the application for permanent guardianship (§1051.102). The probate clerk takes care of this.

- **Service of citation on others** – the following additional persons must be personally served by a sheriff or constable with citation (§1051.103):
  1. The **parents** of a proposed ward if the whereabouts of the parents are known or can be reasonably ascertained;
  2. Any **court-appointed conservator** or person having control of the care and welfare of the proposed ward;
  3. A proposed ward's **spouse** if the whereabouts of the spouse are known or can be reasonably ascertained; and
  4. The person named in the application to be appointed **guardian** if that person is the not applicant.
- Note that all of the services of citation in 1- 4 above may be waived by the signing of a written Waiver of Citation.
- The Applicant does not have to be served. (§1051.101)

- **Notice by certified mail by applicant** –

§1051.104 sets out the persons who the applicant must serve by certified mail, return receipt requested, with notice of filing of the application and a copy of the Application, or must obtain their waiver.

- **Sworn statement and Proof of Mailing required-**

Under §1051.104, you must file proof of mailing

### 3. Things which must happen at least 10 days prior to hearing under §1051.101:

- (a) Must serve the proposed Ward;
- (b) Must personally serve the persons listed in §1051.103, or obtain and filed their waivers;
- (c) Must file the sworn statement and proof of certified mail notice with the Court.

# STEP 4:

**YOU NEED A COURT  
INVESTIGATOR'S REPORT ON FILE**

Upon the return of the citation on the ward, the Probate Court will send out one of the probate court investigators to interview the ward and all proposed applicants to investigate their circumstances alleged in the application to determine whether a less restrictive alternative is appropriate.

**You cannot have your guardianship hearing until the Court Investigator's Report has been filed.**

The Dallas Probate Court Investigator's office can be contacted at 214-653-6446.

# STEP 5:

YOU NEED AN  
ATTORNEY AD LITEM

The court is required to appoint an attorney ad litem to represent the proposed ward pursuant to §1054.001. The court will normally automatically appoint an ad litem once the Court Investigator's Report has been filed. However, you should:

- Check with the Court after the report is filed to make sure the Court is aware that it has been filed and that an ad litem needs to be appointed.
- Send the ad litem a copy of your application, along with the contact information for the proposed ward.

## Attorney Ad Litem's Duties (§1054.004)

- Interview the proposed ward and discuss the law and facts of the case, their legal options, etc.
- Review the application, the doctor's certificate, and all of the proposed ward's relevant medical psychological intellectual testing records.
- Consider whether the proposed ward intends to contest the application, and if a guardian is appointed, the ward's preference, which must be taken in account by the court.

# STEP 6:

SET A HEARING ON THE  
APPLICATION FOR GUARDIANSHIP

# Things to check prior to scheduling your hearing:

1. Coordinate the hearing with the attorney ad litem.
2. Check to make sure that the proposed ward was personally served, that all other service and notice has been completed or waivers were obtained, that the sworn proof of notice is on file, and that the 10 day period has passed. (see STEP 3)
3. Is the guardianship being contested?

If **uncontested**, the “prove up” of the guardianship should take less than 30 minutes.

If **contested**, you should discuss with the attorney ad litem:

- (a) whether they will object to admission of the Physician’s Certificate in lieu of testimony;
- (b) number and nature of witnesses they intend to call (estimate of time for hearing).

## Persons who should attend:

- The applicant and the applicant's attorney.
- The attorney ad litem.
- The proposed ward. (Unless evidence is presented that the proposed ward is unable to participate in a meaningful manner at the hearing and that attendance at the hearing would not be in the ward's best interest, or that the proposed ward did not want to attend)
- Fact witnesses necessary to establish incapacity, that there is no less restrictive alternatives to guardianship, and that their person and property will be protected by a guardianship.

## Evidence at Hearing:

Under §1101.101(a)(1), findings which must be established by “clear and convincing” evidence:

- (A) That the proposed ward is an incapacitated person;
- (B) It is in the proposed ward's best interest to have the court appoint a person as the proposed ward's guardian;
- (C) That the rights of the proposed ward or the proposed ward's property will be protected by the appointment of guardian;
- (D) Alternatives to guardianship that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible; and
- (E) Supports and services available to the proposed ward that would avoid the need for the appointment of a guardian have been considered and determined not be feasible.

**Evidence which must be established by a  
preponderance of the evidence:**

- (a) Venue;
- (b) Eligibility of proposed guardian is to act as guardian;
- (c) If the ward is a minor, that the guardianship is not created for the primary purpose of enabling the minor ward to establish residency for enrollment for a specific school or school district;
- (d) That the ward is either totally incapacitated, or is partially incapacitated and can perform some, but not all of the tasks necessary to care for himself or herself and manage property.

## The Hearing: Practical Proof Issues

In order to prevail at the hearing on your guardianship application, you need to put on evidence to support all of the findings required in §1101.101.

Following are some particular proof issues that you will need to pay attention to:

# 1. Medical Evidence of Incapacity

- (a) Introduce the physician's certificate into evidence
- (b) The examination and date of the certificate must be less than 120 days old as of the date of filing for guardianship (§1101.103)
- (c) The certificate is hearsay, but most Courts allow it into evidence
- (d) Ask the attorney ad litem well in advance of the hearing if they are going to object to its admission
- (e) If the ad litem is going to object, you need the physician to come live and testify

## 2. Applicant's Testimony

- (a) Their understanding of the proposed ward's diagnosis.
- (b) Recurring acts or occurrences **WITHIN THE 6 MONTHS BEFORE THE HEARING**, evidencing incapacity (§1101.102).
- (c) Amount of bond necessary - If requesting guardianship of the estate, testimony is needed as to the proposed ward's non-real estate assets, plus an estimate of the ward's income projected for the next one year, so the court can set the amount of the guardian of the estate's bond.
- (d) Qualification/Disqualification – Ask your client whether they are disqualified to serve as guardian under any of the grounds set out in §1104.351-1104.359.

### 3. Other Fact Witnesses (if contested)

- (a) The proposed ward – It is often effective in a contested matter to call the proposed ward and cross-examine them to demonstrate their lack of capacity and lack of understanding of their finances.
- (b) Neighbors, friends, and family members can also be called to testify about recent occurrences (within the last 6 months) demonstrating incapacity.

# STEP 7:

**YOU NEED TO BRING AN ORDER  
APPOINTING GUARDIAN**

Pursuant to §1101.151, the Order Appointing Guardian must contain certain findings of fact and orders as set out in that section. Note that if it is found that the proposed ward lacks the capacity to do some, but not all of the tasks necessary to care for himself or to manage his property, the court may appoint a guardian with limited powers. In that event, the ward retains all powers except those taken away from him in the order granted to the guardian. In a case of partial incapacity, the order will need to list the specific powers being granted to the guardian.

# STEP 8:

YOU NEED TO QUALIFY YOUR  
GUARDIAN TO SERVE

Pursuant to §1105.003, a guardian has twenty days to “qualify” after the signing of the Order appointing the guardian:

- (1.) “Qualifies” by taking and filing an oath with the clerk of the court; (§1105.051)
- (2.) Filing the bond required by the court; (§1105.101 et seq) and
- (3.) Obtaining an order of the court approving the bond (§1105.002).

WHERE DO YOU GO FROM HERE?

Once your guardian has qualified and has received Letters of Guardianship, the guardian will need to keep the following in mind:

## “Guardian of the Estate”

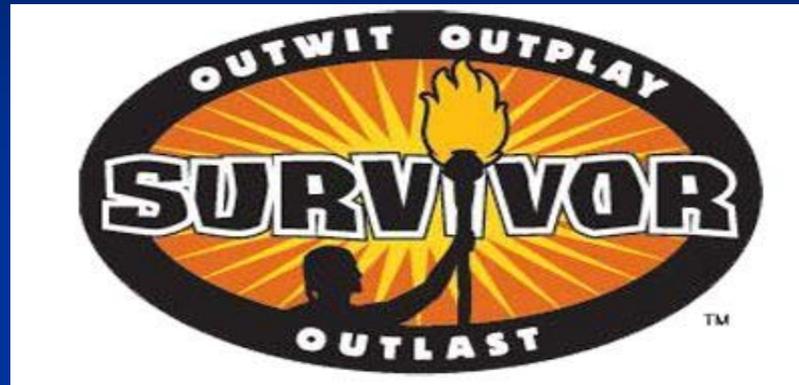
- (a) A guardian of the estate is required to file an **inventory, appraisement and list of claims** within 30 days of his appointment.
- (b) The guardian must file an **“investment plan”** with the court pursuant to §1161.051.
- (c) The guardian must open a **segregated guardianship account**, segregating guardianship funds from his own personal funds, and must take possession and control of all of the Ward’s assets.

- (d) The guardian of the estate must obtain advance permission, i.e., a court order authorizing a monthly allowance or to **expend funds** for the monthly care of the Ward.
- (e) A guardian of the estate must have permission of the court to **buy or to sell assets**.
- (f) A guardian of the estate is required to file an **annual accounting** reflecting all receipts and disbursements from the guardianship within sixty (60) days of the one year anniversary date of his qualifications as guardian.

## “Guardian of the Person”

- (a) The guardian of the person must file an **annual report of the guardian** yearly, normally provided directly by the court to the guardian.

If you follow these 8 steps



YOU WILL NOT BE VOTED OFF OF THE  
PROBATE COURT ISLAND.

**THE TRIBE HAS SPOKEN**

Staubus

ESTATE LITIGATION

Randall

ESTATE PLANNING

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