



TOPIC: GUARDIANSHIPS

PROBLEM STATEMENT:

How to prevent guardianship malfeasance and abuse by creating technology tools for:

- Guiding/educating individuals involved in a guardianship
- Making necessary reports to the courts
 - Two such reports: Annual Report (general report on the person under guardianship); and Accounting Report (report on the finances of the person under guardianship, which is only necessary if Person Under Guardianship has assets)
 - Financial institutions shy away from taking on reporting or notification burdens that the law does not require (unless fees can be charged)
- Alternatives to guardianship, i.e. creating other mechanisms to protect someone; this is preferable to guardianship, except in very limited circumstances; depends on planning by individuals, which normally involves executing certain agreements before being incapacitated
- Preparing for and controlling terms of potential future guardianship courts (namely in more rural locales) keeping track of guardianships (i.e. effective vigilance of activity in guardianship accounts, reports of potential abuse)

Understanding Key Concepts

Guardianship: a legal authority (and corresponding duty) granted to a person to care for the personal and/or property interests of another person.

- If a person does not have any assets, or is only receiving social security, disability, or other government fixed income payments, they are usually considered to not have assets to require a guardianship of the estate.

Two types of Protectors- Attorney ad litem (zealously represents); and Guardian ad litem (advisor to court as to whether guardianship needed, or may advise if necessary after guardianship established)

Attorney ad litem: an attorney, usually in private practice, appointed by the court, to zealously represent the person under potential guardianship to defend them against the need for guardianship.

- Usually the appointment of the attorney ad litem ends once the guardianship is established, but in appropriate cases, the court could require the “ad litem” to stay on duty as long as there was activity in the guardianship account. “Appropriate cases” would be those involving significant amounts of money, out of which the ad litem could receive a fee, as and the extent that the court approves.



- The tasks of an ad litem during such extended duty could include observing and analyzing the records of the account, and notices of account activity, and reporting to the court.

Reporting Requirements: A guardian is required to make annual reports to the court related to the guardianship, an annual Report on the Condition and Well-Being of a Person Under Guardianship and an Annual Account (if the guardianship is a guardianship of the estate, as well as being a Guardianship of the Person).

- Guardianship financial institution accounts almost always must contain *only* the money of the person under guardianship, and interest earned on that money.
- Courts typically require evidence of Annual Account transactions to be supported by copies of deposits slips and checks (for instances of deposits that are not *direct* deposits), and supported by copies of withdrawals and the vouchers that justify the withdrawals (keeping track of these is an issue)
- If courts are staffed well enough, they can have a show cause hearing if the guardian did not filing the annual Report and/or did not file the Annual Account. Sometimes the guardian themselves has become becomes incapacitated or they no longer want to be involved because there are no fees.
- In some instances (mostly rural counties), courts themselves don't have an automated tickler (calendaring/reminder) system for all filings required.

What can court do to help protect Person Under Guardianship assets, other than filing of Annual Account?

- A court could order the guardian to give the court staff the credentials for accessing the account (on-line) and that would mean that court staff and the guardian would have equal access whenever desired to view transactions.
- A court can order that each transaction be accompanied by a memo of what the transaction is for (on-line banking often allows for such memos).
- A court can order that the guardian establish notification with the financial institution such that each time there is any activity, including viewing the account records, the guardian is notified by email.
- The court can order that the guardian set up an email "rule" such that all such notifications are forwarded automatically to the court's designated staff. Changes of passwords can be "caught" by such alerts.
- All of this requires the court, either at the beginning of a guardianship of the estate or at some "triggered" point during the guardianship of the estate, to impose these requirements by order and to follow up to make sure they are implemented.
- Once implemented, to be effective, either on a staffed basis or an automated basis, the court must position itself to acquire awareness of out-of-the ordinary transactions.

Thoughts on Solutions- Ad Litem/guardianship tool to assist with tracking of reporting



requirements; tool describing best practices

How are Guardians chosen?

- Anybody who is 'interested' (e.g. relatives, close friend, etc.) can file application for a guardian to be appointed; the applicant does not necessarily have to be one nominated to be appointed.
- Private Professional Guardianship: usually involved when significant assets as then the guardian can be compensated
- If no money involved, then usually a family member steps forward and files application for guardianship
- If no individuals step forward and no assets, then private non-profits, religious charities, and public agencies (Adult Protective Services, Department of Aging and Disability Services (DADS)) may take the responsibility (depends on what county)(DADS only initiates guardianships on referral from Adult Protective Services APS), which may occur if there is an APS finding of abuse, neglect, or exploitation).
- There is also provision for "court-initiated guardianship," pursuant to Estates Code Chapter 1102.

Alternatives to Guardianship: this is PREFERRED to actual guardianship when it will meet the need of the supposed incapacitated person.

- Courts have duty to make sure no alternative to guardianship available that will meet the need.
- Texas Legislature working to promote alternatives to guardianship; for example, they may pass legislation that will require that attorneys for applicants for guardianship to go through same training required of Guardians ad litem (which includes establishing controls against improper guardianship and training on alternatives)
- Relationships and Agreements (Advance Directives) that may be in place alleviating need for Guardianship:
 - Representative Payee: person who acts as the receiver of Social Security Disability Benefits or Supplemental Security Income (SSI) for a person who is not fully capable of managing their own benefits
 - Fiduciary: person who receives VA benefits for a person who is not fully capable of managing their own benefits
 - Durable Power of Attorney: gives another person the right to do certain things for the maker of the Durable Power of Attorney; may be a 'General' power of attorney giving them the right to make almost all decisions, or may be more specific
 - Medical Power of Attorney: gives another person the right to make medical decisions for the maker



- Supported Decision Making Agreement: an agreement made by someone incapacitated (but still of sound mind) setting out how they would like decisions made with regards to health, accommodation and lifestyle.
- Manager of Community Estate: management agreement when potential Person Under Guardianship is still married giving spouse right to manage assets
- Note: if a person has a medical power of attorney and only have SSI, then very likely guardianship would be made because no assets to watch out for and interests be looked after
- Texas Legislative Work on Topic: Texas Government Code §81.1011 added following the definition of practice of law at Government Code §81.101, to allow specially trained Benefits Counselors at Area Agencies on Aging to prepare advance directives, which would otherwise require a lawyer to perform
- Required by Medicare/Medicaid that patient be informed about what advance directives exist; no requirement for them to execute advance directives

Thoughts on Solutions- tool to help find alternatives to guardianship and match them to the unmet needs of the individual for assistance in decision-making (e.g. tool would locate the available alternatives and match the needs of the individual to the alternatives); education tool for those most vulnerable to guardianship; estate planning tool to address the above

Preparing for Potential Guardianship: if a person can execute a Designation of Guardianship before Need Arises, while they are of sound mind, it would be instructive for the court and would simplify the court designation process, because it would tell the court the name of the individual the person would want the court to appoint as guardian. A “gap” in regard to the Designation of Guardian before Need Arises is that it may be executed many years before a guardianship is filed, and thus Designation may not always be associated with the application for appointment of guardian.

Financial Exploitation, Neglect and Abuse

- When a person becomes aware that another is being abused, neglected or exploited, Adult Protective Services *may* open a case for the victim of the abuse, neglect, or exploitation, and *can* refer the victim to the Department of Aging and Disability Services (DADS) for DADS to apply to be guardian.

Probable Cause to Investigate: a hearing to determine whether there is a need for guardianship; depending on resources, court may send an investigator; in smaller counties, court will appoint attorney ad litem. This is part of the above-mentioned court-initiated guardianship process under Chapter 1102 of the Texas Estates Code. Based on findings of the investigation, the court may initiate its own guardianship.



Additional Resources:

Texas Guardianship Cases: Improving Court Processes and Monitoring Practices in Texas Courts, prepared by the Texas Office of Court Administration

http://www.txcourts.gov/media/701080/GUARDIANSHIP-STUDY_11-12-14-Final.pdf

Guardianships: Cases of Financial Exploitation Neglect, and Abuse of Seniors, U.S. Government Accountability Office

<http://www.gao.gov/assets/320/310741.pdf>

Travis County Guardianships Homepage

Includes: Instructions for Guardians, Guardian Duties, Annual Report and Accounts info, related court documents.

<https://www.traviscountytx.gov/probate/guardianship>

Less Restrictive Alternatives To Guardianships

Available on TechForJustice website.

Example of a Supported Decision-making Agreement and Related Legislation being debated before Texas Legislature

Available on TechForJustice website.

Provider Letter Discussing How to Refer Person For Potential Guardianship

Texas Department of Aging and Disability Services (DADS) sent to nursing facilities. The Provider Letter has an attachment which is the form by which the circumstances of a person with incapacity can be made known to a court with guardianship jurisdiction, so that that court can decide whether a guardianship application should be filed. (The attachment to Provider Letter 2-10 refers to Probate Code Section 683A. That is now Estate Code Section 1102.003.)

<http://www.dads.state.tx.us/providers/communications/2002/letters/PL02-10.html>.