



# **LEGISLATIVE UPDATE – 2015**

# **ALTERNATIVES TO GUARDIANSHIP**

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# CREDITS-REFERENCES



**Texas Bar College**  
Professionalism Through Education

- **HBA – GUARDIANSHIP ad Litem in Probate Court Institute - 24 July 2015**  
(Assoc. Judge Clarinda Comstock – HCPC #4 “Advocating to Avoid Guardianship”) 11 Aug 2015
- **REPTL (Real Estate, Probate & Trust Law) SBOT 2015 Texas Estate & Trust Law Legislative Update**  
Craig Hopper – Chair-Estate & Trust Legislative Affairs Committee  
William D. Pargaman – Past Chair – ETLAF
- **Judge Steven King – Tarrant County Probate Court #1 – Ad Litem Manual –**  
<http://access.tarrantcounty.com/en/probate-courts/probate-court>
- **Legislation – [www.legis.state.tx.us](http://www.legis.state.tx.us) (Top of page “Search Legislation”)**
- **Texas Judicial Counsel Elder’s Committee**
- **WINGS – Texas Interdisciplinary Network – Guardianship Stake Holders**



# CERTIFICATION REQUIREMENTS



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- CERTIFICATION (as of 1 Sept. 15) TEC § 1054.201

Four (4) hours CLE –

including 1 hour – Alternatives to Guardianship

- Initial certification – 2 years TEC § 1054.202
- Second certification – 2 years
- Subsequent certification – 4 years

- Applies to all appointees for Guardian and Attorney ad Litem

- Applies to all Attorneys of Record for Guardianship proceedings TEC §1054.201



# INCAPACITATED PERSON



- **Definition** (TEC §'s 22.016 & 1002.017)
  - Minor
  - Because of physical or mental condition
    - UNABLE to provide
      - Food, Clothing, Shelter
      - Care for physical health
      - Manage their own finances
  - Capacity is NOT Competency
- **Causes:**
  - Neurocognition (Dementia, Alzheimer's, "stroke", Parkinsonism)
  - Neurodevelopmental (Mental retardation, Autism)
  - Psychiatric (Schizophrenia, Depression, Bi-polar, substance abuse)
- **Consider the Physician to examine the Proposed Ward**
  - Neurologist/Primary Care/Psychiatrist
  - Time available to complete Physician's Certification and be a Witness

TEC 1101.153



## Physician's Certificate of Medical Examination

Revision September 2015

In the Matter of the Guardianship of \_\_\_\_\_  
an Alleged Incapacitated Person

For Court Use Only  
Court Assigned: \_\_\_\_\_

### To the Physician

*This form is to enable the Court to determine whether the individual identified above is incapacitated according to the legal definition (on page 4), and whether that person should have a guardian appointed.*

#### 1. General Information

Physician's Name \_\_\_\_\_ Phone: (\_\_\_\_\_) \_\_\_\_\_  
Office Address \_\_\_\_\_

YES  NO I am a physician currently licensed to practice in the State of Texas.

Proposed Ward's Name \_\_\_\_\_ Age \_\_\_\_\_ Gender  M  F  
Date of Birth \_\_\_\_\_

Proposed Ward's Current Residence: \_\_\_\_\_

I last examined the Proposed Ward on \_\_\_\_\_, 20\_\_\_\_ at a  
 a Medical facility  the Proposed Ward's residence  Other: \_\_\_\_\_

YES  NO The Proposed Ward is under my continuing treatment.

YES  NO Before the examination, I informed the Proposed Ward that communications with me would not be privileged.

YES  NO A mini-mental status exam was given. If "YES," please attach a copy.

#### 2. Evaluation of the Proposed Ward's Physical Condition

Physical Diagnosis: \_\_\_\_\_

a. Severity:  Mild  Moderate  Severe

b. Prognosis: \_\_\_\_\_

c. Treatment/Medical History: \_\_\_\_\_

#### 3. Evaluation of the Proposed Ward's Mental Functioning

Mental Diagnosis: \_\_\_\_\_

a. Severity:  Mild  Moderate  Severe

b. Prognosis: \_\_\_\_\_

c. Treatment/Medical History: \_\_\_\_\_

If the mental diagnosis includes dementia, answer the following:

YES  NO — It would be in the Proposed Ward's best interest to be placed in a secured facility for the elderly or a secured nursing facility that specializes in the care and treatment of people with dementia.

YES  NO — It would be in the Proposed Ward's best interest to be administered medications appropriate for the care and treatment of dementia.

YES  NO — The Proposed Ward currently has sufficient capacity to give informed consent to the administration of dementia medications.

d. Possibility for Improvement:

YES  NO — Is improvement in the Proposed Ward's physical condition and mental functioning possible?

If "YES," after what period should the Proposed Ward be reevaluated to determine whether a guardianship continues to be necessary? \_\_\_\_\_

#### 4. Cognitive Deficits

a. The Proposed Ward is oriented to the following (check all that apply):

Person  Time  Place  Situation





b. The Proposed Ward has a deficit in the following areas (check all areas in which Proposed Ward has a deficit):

- Short-term memory
- Long-term memory
- Immediate recall
- Understanding and communicating (verbally or otherwise)
- Recognizing familiar objects and persons
- Solve problems
- Reasoning logically
- Grasping abstract aspects of his or her situation
- Interpreting idiomatic expressions or proverbs
- Breaking down complex tasks down into simple steps and carrying them out

c.  YES  NO — The Proposed Ward's periods of impairment from the deficits indicated above (if any) vary substantially in frequency, severity, or duration.

**5. Ability to Make Responsible Decisions**

Is the Proposed Ward able to initiate and make responsible decisions concerning himself or herself regarding the following:

- YES  NO — Make complex business, managerial, and financial decisions
- YES  NO — Manage a personal bank account
  - If "YES," should amount deposited in any such bank account be limited?  YES  NO
- YES  NO — Safely operate a motor vehicle
- YES  NO — Vote in a public election
- YES  NO — Make decisions regarding marriage
- YES  NO — Determine the Proposed Ward's own residence
- YES  NO — Administer own medications on a daily basis
- YES  NO — Attend to basic activities of daily living (ADLs) (e.g., bathing, grooming, dressing, walking, toileting) without supports and services
- YES  NO — Attend to basic activities of daily living (ADLs) (e.g., bathing, grooming, dressing, walking, toileting) with supports and services
- YES  NO — Attend to instrumental activities of daily living (e.g., shopping, cooking, traveling, cleaning)
- YES  NO — Consent to medical and dental treatment at this point going forward
- YES  NO — Consent to psychological and psychiatric treatment at this point going forward

**6. Developmental Disability**

- YES  NO — Does the Proposed Ward have developmental disability?

If "NO," skip to number 7 on page 4.

If "YES," answer the following question and look at the next page.

Is the disability a result of the following? (Check all that apply)

- YES  NO — Intellectual Disability?
- YES  NO — Autism?
- YES  NO — Static Encephalopathy?
- YES  NO — Cerebral Palsy?
- YES  NO — Down Syndrome?
- YES  NO — Other? Please explain \_\_\_\_\_

Please answer the questions in the box below only if both of the following are true:

- (1) The basis of a proposed ward's alleged incapacity is intellectual disability.  
and
- (2) You are making a "Determination of Intellectual Disability" in accordance with rules of the executive commissioner of the Health and Human Services Commission governing examinations of that kind.

If you are not making such a determination, please skip to number 7 on the next page.





**"DETERMINATION OF INTELLECTUAL DISABILITY"**

Among other requirements, a Determination of Intellectual Disability must be based on an interview with the Proposed Ward and on a professional assessment that includes the following:

- 1) a measure of the Proposed Ward's intellectual functioning;
- 2) a determination of the Proposed Ward's adaptive behavior level; and
- 3) evidence of origination during the Proposed Ward's developmental period.

*As a physician, you may use a previous assessment, social history, or relevant record from a school district, another physician, a psychologist, a public agency, or a private agency if you determine that the previous assessment, social history, or record is valid.*

1. Check the appropriate statement below. If neither statement is true, skip to number 7 on the next page.
  - I examined the proposed ward in accordance with rules of the executive commissioner of the Health and Human Services Commission governing Intellectual Disability examinations, and my written findings and recommendations include a determination of an intellectual disability.
  - I am updating or endorsing in writing a prior determination of an intellectual disability for the proposed ward made in accordance with rules of the executive commissioner of the Health and Human Services Commission by a physician or psychologist licensed in this state or certified by the Department of Aging and Disability Services to perform the examination.
2. What is your assessment of the Proposed Ward's level of intellectual functioning and adaptive behavior?
  - Mild (IQ of 50-55 to approx. 70)
  - Moderate (IQ of 35-40 to 50-55)
  - Severe (IQ of 20-25 to 35-40)
  - Profound (IQ below 20-25)
3.  Yes  No — Is there evidence that the intellectual disability originated during the Proposed Ward's developmental period?

**Note to attorneys:** If the above box is filled out because a determination of intellectual disability has been made in accordance with rules of the executive commissioner of the Health and Human Services Commission governing examinations of that kind, a Court may grant a guardianship application if (1) the examination is made not earlier than 24 months before the date of the hearing or (2) a prior determination of an intellectual disability was updated or endorsed in writing not earlier than 24 months before the hearing date. If a physician's diagnosis of intellectual disability is not made in accordance with rules of the executive commissioner — and the above box is not filled out — the court may grant a guardianship application only if the Physician's Certificate of Medical Examination is based on an examination the physician performed within 120 days of the date the application for guardianship was filed. See Texas Estates Code § 1101.104(1).

**7. Definition of Incapacity**

For purposes of this certificate of medical examination, the following definition of incapacity applies:

An "Incapacitated Person" is an adult who, because of a physical or mental condition, is substantially unable to:  
(a) provide food, clothing, or shelter for himself or herself; (b) care for the person's own physical health; or (c)  
manage the person's own financial affairs. Texas Estates Code § 1002.017.

**8. Evaluation of Capacity**

YES  NO — Based upon my last examination and observations of the Proposed Ward, it is my opinion that the Proposed Ward is incapacitated according to the legal definition in section 1002.017 of the Texas Estates Code, set out in the box above.

If you indicated that the Proposed Ward is incapacitated, indicate the level of incapacity:

Total — The Proposed Ward is totally without capacity (1) to care for himself or herself and (2) to manage his or her property.

Partial — The Proposed Ward lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself or to manage his or her property.

If you indicated the Proposed Ward's incapacity is partial, what specific powers or duties of the guardian should be limited if the Proposed Ward receives supports and services? \_\_\_\_\_



If you answered "NO" to all of the questions regarding decision-making in Section 5 (on page 2) and yet still believe the Proposed Ward is partially incapacitated, please explain: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

If you answered "YES" to any of the questions regarding decision-making in Section 5 (on page 2) and yet still believe the Proposed Ward is totally incapacitated, please explain: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**9. Ability to Attend Court Hearing**

YES  NO — The Proposed Ward would be able to attend, understand, and participate in the hearing.  
 YES  NO — Because of the Proposed Ward's incapacities, I recommend that the Proposed Ward not appear at a Court hearing.  
 YES  NO — Does any current medication taken by the Proposed Ward affect the demeanor of the Proposed Ward or his or her ability to participate fully in a court proceeding?

**10. What is the least restrictive placement that you consider is appropriate for the Proposed Ward:**

— Nursing home level of care  
— Memory care unit  
— Other \_\_\_\_\_

**11. Additional Information of Benefit to the Court:** If you have additional information concerning the Proposed Ward that you believe the Court should be aware of or other concerns about the Proposed Ward that are not included above, please explain on an additional page.

Physician's Signature \_\_\_\_\_

Date \_\_\_\_\_

Physician's Name Printed \_\_\_\_\_

License Number \_\_\_\_\_

Page 4 of 4

Revised September 2015





# Ad Litem

- Attorney ad Litem (mandatory)
  - Definition – represent & advocate on behalf of the proposed Ward TEC 1002.002
  - Duties -
    - Review all pleadings, documents & records (medical)
    - Discuss with the PW the law, facts, grounds, legal options & **alternatives to Guardianship**, available Supports & Services & **preference for Guardian** TEC 1104.002 
    - Access to medical records (*in Order Appointing*) TEC 1054.003
    - PW may hire own lawyer (certified) if capacity to contract
  
- Guardian ad Litem (discretionary – report to Court)
  - Definition –represent the “best interests” of the PW TEC 1002.013
  - Duties - protect & insure best interests of the PW TEC 1054.054
  - Investigate of Guardianship **necessity + alternatives** 



# COURT STAFF POSITIONS



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- **Court Investigator (Mandatory – report to Court)**

Investigate Guardianship necessity + alternatives

TEC 1054.151



## Investigate Guardianships

- All new applications
- Applications to modify and /or restore
- Concerns with existing guardianships

## Supervise the Court Visitor Program

- Recruit and train volunteers to perform annual home visits and prepare reports to be reviewed by the court and filed

## Investigate Community Referrals

Make referrals to appropriate agencies when necessary

- - locate family members / friends to file guardianship applications
- - file applications when necessary

- **Court Visitors (Mandatory Statutory Probate Courts)**

Discretionary all others - report to Court      TEC 1054.102



Monitor condition and well-being of ward      TEC 1054.103

- **VISITING ANGELS PROGRAM**



# BILL OF RIGHTS



- **BILL OF RIGHTS FOR WARDS (PW)** TEC 1151.351
  - All rights of Constitution & Laws – Texas & Federal
  - Copy of Application / Order
  - Guardianship to insure maximum self reliance
  - Due Respect, Consideration, Dignity & Privacy
  - Integrated setting & support services
  - Consideration: desires, preferences, belongings, social & religious activities
  - Timely health care
  - Control of life & environment (minimize limitation)
  - Right to complain (living arrangements, treatment, retaliation) & legal representation
  - Notice of Court Action
  - Vote, marry, drive (if allowed)
  - Informed of resources





**SUBCHAPTER H. RIGHTS OF WARDS**  
**TEXAS ESTATES CODE, SEC. 1151.351.**

**BILL OF RIGHTS FOR WARDS.**

(a) A ward has all the rights, benefits, responsibilities, and privileges granted by the constitution and laws of this state and the United States, except where specifically limited by a court-ordered guardianship or where otherwise lawfully restricted.

(b) Unless limited by a court or otherwise restricted by law, a ward is authorized to the following:

(1) to have a copy of the guardianship order and letters of guardianship and contact information for the probate court that issued the order and letters;

(2) to have a guardianship that encourages the development or maintenance of maximum self-reliance and independence in the ward with the eventual goal, if possible, of self-sufficiency;

(3) to be treated with respect, consideration, and recognition of the ward's dignity and individuality;

(4) to reside and receive support services in the most integrated setting, including home-based or other community-based settings, as required by Title II of the Americans with Disabilities Act (42 U.S.C. Section 12131 et seq.);

(5) to consideration of the ward's current and previously stated personal preferences, desires, medical and psychiatric treatment preferences, religious beliefs, living arrangements, and other preferences and opinions;

(6) to financial self-determination for all public benefits after essential living expenses and health needs are met and to have access to a monthly personal allowance;

(7) to receive timely and appropriate health care and medical treatment that does not violate the ward's rights granted by the constitution and laws of this state and the United States;

(8) to exercise full control of all aspects of life not specifically granted by the court to the guardian;

(9) to control the ward's personal environment based on the ward's preferences;

(10) to complain or raise concerns regarding the guardian or guardianship to the court, including living arrangements, retaliation by the guardian, conflicts of interest between the guardian and service providers, or a violation of any rights under this section;

(11) to receive notice in the ward's native language, or preferred mode of communication, and in a manner accessible to the ward, of a court proceeding to continue, modify, or terminate the guardianship and the opportunity to appear before the court to express the ward's preferences and concerns regarding whether the guardianship should be continued, modified, or terminated;

(12) to have a court investigator, guardian ad litem, or attorney ad litem appointed by the court to investigate a complaint received by the court from the ward or any person about the guardianship;

(13) to participate in social, religious, and recreational activities, training, employment, education, habilitation, and rehabilitation of the ward's choice in the most integrated setting;



# GUARDIANSHIP OF THE PERSON



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- Definition TEC 1104.001
  - One person unless best interests of Ward served &
    - Husband & Wife, Joint managing conservators, out of state Guardianship, Parents
- Duties TEC 1151.051
  - Take charge of the Ward's person – possession, domicile, transport
  - Care, supervise, protection, clothing, food, medical care, shelter
  - Consent to medical treatment, including psychiatric & surgery
  - Establish trust, facilitate employment
- Alternatives TEC Ch. 1102.015
  - ***Medical POA – Ch. 166 Health & Safety Code***
  - ***Designation of guardian before need arises (TEC 1004)***
  - ***Declaration for Mental Health Treatment, CPRC Ch. 137***
  - ***Directive to Physician, Health & Safety Code Ch. 166***
  - ***Establishment of alternate forms of decision-making based on person-centered planning.***





# GUARDIANSHIP OF THE ESTATE



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- Definition TEC 1104.001
  - One person unless best interests of Ward served &
    - Husband & Wife, Joint managing conservators, out of state Guardianship, Parents
- Duties TEC 1151.051
  - Take charge of the Ward's person – possession, domicile, transport
  - Care, supervise, protection, clothing, food, medical care, shelter
  - Consent to medical treatment, including psychiatric & surgery
  - Establish trust, facilitate employment
- Alternatives TEC CH 1102
  - ***Durable POA*** TEC Ch 751
  - ***Appointment of Representative Payee for public benefits***
  - ***Creation of a Management Trust*** TEC CH 1301
  - ***Creation of a Special Needs Trust***
  - ***Joint Bank accounts and Right of Survivorship/Beneficiary designations***



# LIMITED GUARDIANSHIP



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- Definition TEC 1101.152
  - Ward lacks the capacity to do some but NOT ALL of the tasks necessary to care for themselves or manage property
- Duties TEC 1151.051
  - Exercise the duties necessary to perform the duties necessary to assist the proposed Ward manage their person and estate.
- Estates Code Chapter 1001:
  - Changes primarily related to limited/partial guardianship
  - Proposed Wards are presumed to retain the capacity to make decisions regarding residence unless found otherwise (much like the right to vote and drive)





# SUPPORTS & SERVICES



*Available formal and informal resources and assistance that enable an individual to:*

- *(1) meet the individual's needs for food, clothing, or shelter* TEC1002.031(1)
- *(2) care for the individual's physical or mental health;* TEC1002.031 (2)
- *(3) manage the individual's financial affairs* TEC1002.031(3)
- *(4) make personal decisions regarding residence, voting, operating a motor vehicle, and marriage.*
  - 2015-2016 Blue Book – Houston Area Resource Guide, available in pdf, mobile download or by mail:  
[http://www.rwpchouston.org/Blue\\_Book/15-16/1516BB\\_MAIN.htm](http://www.rwpchouston.org/Blue_Book/15-16/1516BB_MAIN.htm)



# SUPPORTS & SERVICES



- Nutrition: Food Banks/Meals on Wheels/Church Programs
- Adult Day Care – socialization/safety
- Assisted Living
- Private Residence/Group Homes
- Safety Adaptations in the Home: grab bars, lifts, ramps, safety consult
- Case/Care Management Services
- Home Management Services – Household Tasks
- Respite Care
- Public Charities
- Veterans Administration
- Home Health/Qualified Medicare/Medicaid Provided Services
- Mental Health Mental Retardation Centers
- Care Managers



# SUPPORTS & SERVICES



- Adaptive Aids: glasses, hearing aids, orthotics, dentures, speaking devices
- Rehab Services: Cognitive/Speech, OT, PT
- Personal Care: ADLs, toileting, meal prep, grooming, exercising
- Medication Management Services
- Medical Services
- Medical Supplies
- Employment Assistance
- Bill Payment Programs
- Homebound Educational Services
- Supported Employment
- Utility Bill Assistance
- Veterans benefits/services
- Joint accounts/Representative Payee Benefits, Counseling/Legal Services
- Day Care Services/ Caregivers
- Court Visitor Programs
- Transportation & Escort Services
- Home/Safety Modifications
- Social, Educational & Recreational Activities
- Transition Assistance Services, counseling, home cleaning
- Organized Visits



## SUPPORTED DECISION MAKING AGREEMENT ACT



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- **Disabled Persons, not declared incapacitated**   
**TEC 1357**
  - Life decisions/arrangements for care, supports and services with assistance
  - A process of supporting and accommodating an adult with a disability to enable the making of life decisions regarding residence, supports, medical care, employment...without guardianship
  - May only assist with accessing information, not replace as decision maker, & will be subject to privacy laws
  - 1357.102 requires that any person aware of this type of agreement in which the adult disabled person is being abused, neglected or exploited SHALL make a report to the Department of Family and Protective Services in accordance with Section 48.051, Human Resources Code



# APPLICATION & ORDERS



- Application TEC 1101.001 
  - What alternatives, supports/services were considered;
  - Which alternatives, supports/services are feasible and could avoid the need for guardianship
  - Whether a proposed ward should retain the right to make personal decisions regarding residence (as well as marriage, voting & driving)
  - Must prove that supports & services were considered and determined not to be feasible
  - Notice to relatives in 3<sup>rd</sup> degree of sanguinity if no spouse, parents, siblings, children
- Findings & Proof TEC 1151.056 
  - Clear & convincing:
    - "That alternatives to Guardianship that would avoid the need for the appointment of a Guardian have been considered and determined not to be feasible."
    - "That Supports & Services available to the Proposed Ward that would avoid the need for the appointment of a Guardian have been considered and determined not to be feasible."
  - Preponderance of the evidence:
    - if finding PW lacks capacity to do some, but NOT ALL requirements to avoid incapacity, must specifically state whether the PW lacks the capacity or sufficient capacity, with Supports and Services to make personal decision regarding residence, voting operating a motor vehicle or marriage.



# ADDITIONAL CHANGES



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- **INTERVENTION** TEC 1055.003 

  - ANY Interested Person may intervene
  - Discretionary with the Court – no delay, no adverse relationship

- **NOTICE TO RELATIVES** TEC 1151.056 

Guardian to give Notice to Immediate Family of death (including funeral arrangements and final resting place), admittance to acute care facility  $\geq 3$  days, changes in residence or temporary change in residence  $\geq 1$  week

- **ACCESS TO WARD** TEC 1151.055 

  - Immediate Family may request access to the adult Ward. Requires notice and personal service to the Guardian and a Hearing. Subject to Protective Orders

- **CRIMINAL BACKGROUND CHECKS** TEC 1104.402(a) 

  - Eliminates exemption for Criminal Background Checks of Family members
  - Adds background checks for DADS Contractors TEC 1104.406(a)



# QUESTIONS & COMMENTS



- JUDGE KING'S AD LITEM MANUAL –
  - LESS RESTRICTIVE ALTERNATIVES TO GUARDIANSHIP- APPENDIX D
- REVIEW "BILL OF RIGHTS FOR WARDS"
- INSURE CURRENT PHYSICIANS CERTIFICATION ("DOCTOR'S LETTER")
- CHANGES TO APPLICATIONS AND ORDERS
- CHECK ON ACCEPTANCE OF ALTERNATIVES
  - DPOA
  - MPOA
- BE WARY OF SUPPORTED DECISION-MAKING AGREEMENTS