

Attachment 3



Guardianship Position Statement

The appointment of a guardian is a legal proceeding designed to promote and protect the well-being of the person.¹ Establishing a guardianship removes rights and privileges from the individual and assigns control to someone else. The Council believes guardianship should be granted only if all other alternatives are insufficient, and only to the extent and only for the length of time determined to be necessary, with annual reviews to determine if the guardianship can be terminated or reduced. The Council supports the position that individuals should receive support, education or training to develop their capacity to make decisions for themselves, so that the guardianship may be averted.

The Texas Probate Code requires that all guardianships be as limited as possible. The Council also supports the position that guardianship must be demonstrated to be the most appropriate and least restrictive alternative. When determined to be necessary, a guardianship should be tailored such that it is limited to only those specific areas in which surrogate decision making is likely to be needed. The individual's ability to make decisions should be developed and supported to the maximum extent possible, and guardianship should not decrease an individual's dignity or the right to make choices if there is no undue risk.

According to Texas Probate Code, Chapter XIII, a court may appoint a guardian with full authority over an "incapacitated person" or may grant a limited authority over an "incapacitated person" as indicated by the person's actual physical or mental limitations and only as necessary to promote and protect the well-being of the person. Texas Probate Code further defines "incapacitated person" to mean (A) a minor; (B) an adult who, because of a physical or mental condition, is substantially unable to provide for their own food, clothing or shelter; to care for their own physical health; or to manage their financial affairs; or (C) a person who must have a guardian appointed to receive funds due the person from any government resource.

The Council supports the position that such limitations in abilities must be carefully evaluated, with a presumption that persons with disabilities are competent and individual's decision-making abilities can be supported with education, training and/or assistance. Individuals may require assistance from others or accommodations based on their disability but still be able to make informed decisions based on their own preferences. Most importantly, the presence of a physical or mental disability or the age of an individual does not indicate the need for guardianship. The Council supports the position that the evaluation of a person's mental status must take into consideration and rule out any reversible conditions that can cause confusion and seeming incapacity before certifying the need for a guardian.

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¹ Texas Probate Code, Sec. 602. Purpose of Guardianship.

The vast majority of people with disabilities, including intellectual disabilities, do not need guardians. An in-depth capacity assessment must be conducted prior to any guardianship hearing, focusing on the person's decision-making skills, experience, capacity and support system. The assessment should be conducted by a professional trained to administer and interpret an appropriate instrument related to need for guardianship. Additionally, there must be a mechanism for individuals to provide input during their own capacity assessment and guardianship reviews.

There are a number of alternatives to guardianship that should be explored before proceeding with a guardianship hearing. In the financial area, multi-party contracts, trusts, powers of attorney, representative payees, and money management programs may enable an individual to successfully manage financial issues without the necessity of having a **guardian of the estate** appointed. For health and programmatic concerns, the use of advance directives or surrogate decision-makers (under the Health and Safety Code) might prevent the need to establish a **guardian of the person**. Consideration should be given to providing education and support to develop decision-making skills and opportunities for additional experience.

If the alternatives are not sufficient to protect the interests of the individual, a guardianship hearing may be necessary. It is important that a judge carefully evaluates the qualifications and interests of a proposed guardian and gives special consideration to the nature of the relationship. It is also essential that an appointed **attorney ad litem** adequately represent the interests of the person for whom guardianship is being proposed, and that all attorneys ad litem appointed by judges in guardianship proceedings have been certified in guardianship law by the State Bar of Texas as required by the Texas Probate Code. Further, a professional evaluation of the individual by a physician or psychologist must clearly indicate how the individual's disability affects his or her ability to make and communicate informed decisions and what proactive measures have been taken to maximize the ability of that individual to make and communicate informed decisions.

The Council supports the position that if a **guardianship of the person** is granted, it should be of the limited type in which the specific areas of needed assistance are listed in the order by the judge. The guardianship should encourage the development of maximum self-reliance and independence for the individual. Further, the required annual review of the guardianship must involve a serious consideration of whether it needs to be continued, modified or terminated, and a yearly report of this review must be filed in each guardianship. It is essential that annual reviews are not limited to a financial review, but also consider the individual's capacity and needs. Additionally, the judicial system must have the resources needed to make and review guardianship assessments. The Council further recommends that participants in the annual review should include, but not be limited to, the individual, the guardian, attorney ad litem, and an outside advocate/ombudsman.

It is estimated that many of the Texans with disabilities who do not have the capacity to provide informed consent for services, treatments or legal issues have no one to provide assistance in decision-making or even to serve as a guardian. Financial barriers (bonds and court costs) often prevent family members from serving in this role. The Council supports the position that the state of Texas should remove these barriers. Local guardianship and money management programs (supported in part by the Health and Human Services Commission) plus surrogate consent committees (for ICF-MR residents only) fill part of this gap, as do services provided by the Texas Department of Family and Protective Services. However, more resources are sorely needed in this area. Additionally, the Council believes that the state needs to establish statutory authority to regulate private professional guardians more closely.

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