CREATING A GUARDIANSHIP UNDER THE TEXAS ESTATES CODE

Craig Hopper
And
Claire D. East

HOPPER MIKESKA, PLLC
400 West 15th Street, Suite 408
Austin, Texas 78701
(512) 615-6195
(512) 615-6194 Fax
chopper@hoppermikeska.com
ceast@hoppermikeska.com

16TH ANNUAL ESTATE PLANNING, GUARDIANSHIP AND ELDER LAW CONFERENCE
August 7-8, 2014
Moody Gardens Hotel, Galveston, Texas

CREATING A GUARDIANSHIP UNDER THE TEXAS ESTATES CODE

CREATING A GUARDIANSHIP UNDER THE TEXAS ESTATES CODE

I. SCOPE OF ARTICLE

The Texas Estates Code (TEC). defines "Incapacitated Person" to mean:

(1) a minor;

(2) 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; or

(3) a person who must have a guardian appointed to receive funds due the person from any governmental source.

TEC §1002.017.

We all begin life as incapacitated persons under one portion of the statutory definition, and the majority of us will end life as incapacitated persons under another portion of it. However the vast majority of the population will never need to be involved in guardianship proceedings. While under the age of 18, guardianships are avoided if a minor has no estate and otherwise has a natural guardian of the person (i.e., a parent) or other conservator. Most adult individuals can avoid guardianships with proper pre-planning in the form of statutory documents that delegate the powers that would otherwise need to be exercised by a guardian. However, when there is no feasible alternative to provide for the care of an incapacitated person or the incapacitated person's estate, Court supervision in the form of guardianship becomes inevitable.

This paper will discuss the process of creating a guardianship under the new Texas Estates Code, which came into effect on January 1, 2014, and replaced the Texas Probate Code. There is little substantive difference between the new Estates Code and the Probate Code, but the provisions in Texas Estates Code have been reorganized and renumbered to conform with the numbering system of other existing codes.

II. THRESHOLD QUESTIONS

The underlying, admirable instruction to practitioners regarding Texas guardianship laws is to create the least restrictive guardianship possible for an incapacitated person. TEC §1001.001 provides that "A Court may appoint a guardian … only as necessary to promote and protect the well-being of the [incapacitated] person." The section further provides that "the Court shall design the guardianship to encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person." These underlying concepts of encouraging independence and retention of all possible rights should always be considered when determining the scope of a requested guardianship.

A. Is the Proposed Ward Incapacitated?

An opinion regarding a person's capacity is largely subjective, and family members, mental health professionals, and physicians can all disagree as to the extent of any individual person's incapacity. The statutory definition of "incapacitated person" covers much ground, and the guardianship court will ultimately have to make its own determination as to whether and to what extent a Proposed Ward is legally incapacitated. Before determining whether a guardianship should be applied for, the practitioner must first determine that there is credible evidence that the Proposed Ward is incapacitated.

The most common type of information initially provided to a practitioner will be the anecdotal evidence of incapacity offered by the potential client, who is often a family member who has been struggling with care issues for several months or years. Often, the caregiver is so close to the situation that their determination of the individual's capacity is distorted by their own subjectivity. Even if all the family members agree that the Proposed Ward is incapacitated, such opinions are insufficient for the Court to create a guardianship. Rather, as discussed in more detail below, the Court must make its determination of incapacity based on a Physician's Certificate of Medical Examination. A prospective client will usually not have such a form completed when they are first exploring guardianship remedies, but they will probably have some sort of understanding of a medical provider's opinion, whether it be in the form of short letter from the physician indicating that they Proposed Ward cannot manage his own affairs, or through many discussions with medical staff regarding the recent behavior of a Proposed Ward. Proper medical evidence can be obtained in the weeks following the initial meeting with the client, but it is comforting to know early in the process whether a consensus exists that the Proposed Ward is incapacitated.

There will be occasions when a caregiver or family member wants to bring the Proposed Ward to an initial meeting with you, perhaps in the hopes that you will be comfortable creating powers of attorney or other documents that would obviate the need for a

guardianship. If such a meeting occurs, you will probably quickly make your own subjective determination whether the person is incapacitated, at which point you can, if appropriate, shift the focus of the meeting to begin gathering information for the eventual guardianship application. Alternatively, it may appear that the Proposed Ward has some capacity, but it is unclear whether they have the ability to execute ancillary estate planning documents. The practitioner may want to subtly administer a simply diagnostic test, such as a Mini-Mental Status Examination, to assist the practitioner in advising the other family members. It is sometimes helpful for a loved one to see their incapacitated family member "fail" an MMSE in front of them, as it may serve as a reality check regarding the extent of the Proposed Ward's incapacity.

Of course, we are not physicians, and our opinions and the opinions of our clients are not conclusive. However, it is always beneficial to have your own good-faith belief that a Proposed Ward is likely incapacitated, based on whatever information has been provided to you, before providing comprehensive advice regarding available options.

B. Is There An Alternative to Guardianship?

As the definition in TEC §1002.012 indicates, there are two categories of guardianship, guardianship of the person (GP) and guardianship of the estate (GE).

As practitioners we should always want to avoid creating a guardianship, if the incapacitated person's needs can be met without court supervision. After all, the "least restrictive" guardianship is no guardianship at all. Before determining whether the Court must be involved, the practitioner should confirm that there is no guardianship alternative that would meet the existing need. There are many theoretical ways that guardianships could be avoided, but the majority of effective guardianship avoidance will come from pre-planning by the Proposed Ward when he still had capacity. The most useful alternative to a GP is an effective Medial Power of Attorney as provided for in Texas Health and Safety Code §166.151. In a medical power of attorney, the principal appoints an agent to make medical decisions on his behalf only if the principal is unable to make his own decisions. If a physician determines that an individual lacks capacity to make his own health-care decisions, he can get guidance from any agent who is able and willing to serve under the document. As a practical matter, this document is often sufficient to extend past immediate care decisions and will be useful in establishing an incapacitated person's residence at an assisted living facility. However, the medical power of attorney does not specifically give an agent the power to determine a principal's residence, and it is not uncommon for facilities to require the creation of a GP even if it is only limited to the ability to determine a Ward's residence, especially if the Ward is inclined to wander or escape from a chosen facility. A medical power of attorney does not give a nursing home the ability to keep a residence with dementia in the facility against their will, even if there is no dispute that the resident is fully incapacitated. MPOAs can also quickly become useless as a guardianship alternative if they are revoked by the principal. Keep in mind that an MPOA can be revoked by the principal <u>without regard</u> to whether the principal is competent or the principal's mental state. See Texas Health and Safety Code §166.155.

The management of an incapacitated person's estate that would result from a GE can be avoided by the pre-incapacity execution by the principal of a Statutory Durable Power of Attorney naming an agent to manage the principal's financial affairs. The statutory form is now provided for in Texas Estates Code §752.051, but it is common for estate planning practitioners to elaborate upon the statutory form to add powers and/or otherwise make it clear that the principal wishes the agent's abilities to be as broad as possible. If a valid SDPOA is in existence and is accepted by the affected third-parties, a GE can be avoided as long as the agent is willing and able to serve. Note, however, that third parties are not forced to accept SDPOAs, and may be reluctant and/or refuse to do so if there has been any dispute over whether the SDPOA was valid, even if the person disputing the validity of the SDPOA was the clearly incapacitated principal. Financial institutions do not want to take the risks associated with uncertainty regarding a principal's level of capacity, and will often require the creation of a guardianship so there is a court-appointed personal representative in charge.

Another commonly effective alternative to a GE is the pre-incapacity creation of an intervivos trust by the incapacitated person. Theoretically, if all of the incapacitated person's estate that would require management has already been transferred to an intervivos trust (that would likely have the incapacitated person serving as original trustee), when the settlor lost capacity, the management of his estate would fall to whoever he named as successor trustee.

Honorable Steve M. King of Tarrant County Probate Court Number 1, in Fort Worth, Texas, regularly updates the comprehensive list of

Title search: Creating a Guardianship Under the Texas Estates Code

Also available as part of the eCourse
Determination of Capacity; Creating a Guardianship; plus Top 10 Mistakes

First appeared as part of the conference materials for the
16th Annual Estate Planning, Guardianship and Elder Law Conference session
"Creating a Guardianship"