

# Temporary Guardianships and Other Emergency Relief

## I. Introduction

Chapter 1251 of the Texas Estates Code governs the appointment, qualification, duties and duration of temporary guardians and temporary guardianships. A temporary guardianship is an emergency remedy available when imminent danger exists to a proposed ward's physical health or safety and/or his or her estate. Tex. Estates Code §1251.010. For purposes of the temporary guardianship only, the proposed ward – for whom a temporary guardian is appointed – is not presumed to be an incapacitated person. Tex. Estates Code §1251.002.

## II. Overview

A guardianship is a Court supervised procedure wherein the Court gives one person the legal authority to make personal or financial decisions for someone who can no longer make such decisions for himself or herself. Oftentimes, the person applying to become guardian is a spouse or a child of an individual who is showing signs of incapacity or otherwise unable to care for herself. *In re Eunice Kelm*, 2018 WL 6053809, No. 01-18-00688-CV (Tex. App.—Houston [1<sup>st</sup> Dist.] November 20, 2018, no pet.) (daughter sought appointment as temporary guardian of mom due to concerns regarding financial spending).

A “guardianship proceeding” is any matter relating to: (i) the appointment of a guardian of a minor or other incapacitated person; (ii) guardianship or a substitute for a guardianship; (iii) a mental health action; and (iv) a management trust under Section 1301 of the Texas Estates Code.

There are numerous reasons why an individual would seek to be appointed as temporary guardian – the most predominant being in the event of exploitation or danger to the proposed ward. *See, e.g., Vidakovic v. State of Texas*, 2019 WL 1388363, No. 01-18-00443-CR (Tex. App.—Houston [1<sup>st</sup> Dist.] March 28, 2019, no pet.) (not desig. for publication) (elder exploitation).

There are two types of guardians: guardian of the person and guardian of the estate. A guardian of person must provide food, clothing, medical care, and shelter for a ward. As well, the guardian of person must inform relatives of changes in health and/or residence. A guardian of the estate, on the other hand, must take care of and manage the ward's estate (i.e., finances). And, while a guardian of the estate is not required to spend personal funds to provide for the ward, he or she may not expend funds of ward's estate unless specifically authorized by the Texas Estates Code or by prior court approval. If guardian of the estate must expend estate funds without prior court approval, the Texas Estates Code provides procedures for subsequent approval of these expenditures.

Only one person can be appointed as guardian of the person or estate. The same individual can serve as both guardian of the person and guardian of the estate, or two different persons can serve in each role. As with all rules, however, there is an exception. Joint appointment is permitted

for a husband and wife, joint managing conservators, or co-guardians appointed under the laws of another state.<sup>1</sup>

### **III. Purpose of Temporary Guardianship<sup>2</sup>**

Because obtaining a permanent guardianship is a time consuming process, courts are authorized to appoint a temporary guardian with limited power as the circumstances require when presented with substantial evidence that a person is a minor or adult incapacitated person and the court has probable cause to believe that the immediate appointment of a guardian is required. Tex. Estates Code § 1251.001. However, for a temporary guardianship to be granted, it must be proven that there is an immediate need to safeguard the person and/or property of the proposed ward.

A temporary guardianship created for immediate necessity may not remain in effect for more than sixty days. Tex. Estates Code § 1251.151. Theoretically, this should allow sufficient time to complete all the formalities and notice requirements to create a permanent guardianship.

Many courts are reluctant to create a temporary guardianship for immediate necessity if other remedies are available that will allow the status quo to be reasonably kept until the notice requirements of a permanent guardianship can be completed. If the primary concern is that the proposed ward needs to be protected from his own bad choices or the exploitation by others, it is often more appropriate to seek immediate injunctive relief, discussed *infra*, when filing the initial guardianship application.

### **IV. Standing to Bring Application**

In general, anyone who does not have an adverse interest to the proposed incapacitated person (i.e., the ward) can file an application to be appointed as temporary guardian. Certain individuals have priority over others, however, and some people are prohibited from serving as guardians.

In Texas, a pre-designated declaration to serve as guardian (i.e., a *Designation of Guardian*) has first priority. If no guardian designation exists, then, if married, the ward's spouse has priority over all others to serve as guardian. If a ward is not married, his/her spouse is dead, is unable to serve, or declines to serve as guardian, then the next of kin can be appointed. Lastly, the Court will look to appoint any eligible person who is best qualified to serve as guardian. Tex.

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<sup>1</sup> Both parents of an incapacitated person can serve as guardians if the incapacitated person (a) has not been the subject of a Suit Affecting the Parent-Child Relationship (SAPCR), or (b) has been the subject of a SAPCR and both parents are named as joint managing conservators, but are no longer serving in that capacity.

<sup>2</sup> Another type of temporary guardianship is a temporary guardianship pending contest. If an application for a temporary guardianship, for the conversion of a temporary guardianship to a permanent guardianship, or for a permanent guardianship is contested, the court, on its own motion or on that of any interested party, may appoint a temporary guardian without issuing additional citation if it finds the appointment necessary to protect the proposed ward or the proposed ward's estate. Tex. Estates Code §1251.051. A temporary guardianship pending contest continues until the contest is concluded or the nine-month anniversary of the temporary guardian's qualification, whichever is earlier. The temporary guardianship pending contest may be extended past the nine-month anniversary by court order after a hearing on a filed motion to extend the term. Tex. Estates Code §1251.052.

Estates Code §§1104.102 and 1104.202. If there are no family members that are willing to serve as guardian, then the Court can assign a disinterested individual, a financial institution or a guardianship service to serve as guardian.<sup>3</sup>

All permanent guardianship provisions regarding a party's standing also apply to temporary guardianships. Tex. Estates Code §1251.102. Thus, anyone who has the right to commence a permanent guardianship proceeding and be appointed permanent guardian may also commence a temporary guardianship proceeding and be appointed temporary guardian. Similarly, anyone disqualified to be appointed permanent guardian is also disqualified to be appointed temporary guardian. The most common cause of a finding of lack of standing is if the applicant has an adverse interest to the proposed ward. *Guardianship of Leon R. Bensen, Sr., an incapacitated person*, 2018 WL 2355198, No. 13-17-00076-CV (Tex. App.—Corpus Christi, May 10, 2018, no pet.) (appellee lacked standing, thus trial court lacked jurisdiction over claims and order awarding appellee's attorneys' fees was void).

## **V. Where do I file for a Temporary Guardianship?**

The Texas Estates Code is very specific in outlining the filing and procedural requirements to initiate a temporary guardianship.

### **a. Venue**

For an adult incapacitated person, the proper venue to initiate a guardianship proceeding is either (i) the county in which the proposed ward resides or is located on the date the guardianship application is filed, or (ii) the county in which the proposed ward's principal estate is located. Tex. Estates Code §1023.001(a).

The proper venue to initiate a guardianship proceeding over a minor child is: (i) the county in which the minor's parents reside; (ii) if parents live in different counties, the county where the sole managing conservatorship parent resides; or, if parents have joint custody, the county where parent with greater period of physical possession of and access to minor resides; (iii) if only one parent is living and has custody, the county of that parent's residence; (iv) if both parents are dead and minor was in custody of deceased parent, the county in which last surviving parent having custody resided; or (v) if both parents died in a common disaster, the county in which both parents resided at time of death. Tex. Estates Code §1023.001(b).

### **b. Jurisdiction**

Original jurisdiction for a guardianship proceeding is in a Statutory Probate Court. The following counties in Texas hold a Statutory Probate Court: Bexar, Collin, Dallas, Denton, El Paso, Galveston, Harris, Hidalgo, Tarrant, and Travis. Tex. Estates Code § 1022.002(c). In other counties, original jurisdiction will be either in a Constitutional County Court, or, in a Statutory Court at Law that has been given explicit guardianship jurisdiction by statute, if one exists. Tex. Estates Code §1022.002.

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<sup>3</sup> Due to the limited period of time a temporary guardianship can exist, this is typically only in the event of a permanent guardianship.

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First appeared as part of the conference materials for the

23<sup>rd</sup> Annual Estate Planning, Guardianship and Elder Law Conference session

"Temporary Guardianships and Other Emergency Relief in a Guardianship Proceeding"