GUARDIANSHIP ISSUES IN CPS CASES

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WHAT IS GUARDIANSHIP?

- The Court appoints a guardian with full authority over an incapacitated person to promote and protect the well-being of the person.
- Gives guardian the legal authority to make decisions for another person.
- The protected person is called the “Ward”.
- Probate Court proceeding.
DEFINITION OF INCAPACITATED ADULT

• Per Texas Estates Code § 1002.017
  • Defined as a person, who because of physical or mental condition
  • Is substantially unable
  • To provide for his or her own food, clothing or shelter, or
  • To care for his or her own physical health, or
  • To manage personal financial affairs
4 TYPES OF GUARDIANSHIP

- Guardianship of the Person Only
- Guardianship of the Person and the Estate
- Guardianship of a Minor Child
WHEN IS GUARDIANSHIP NEEDED?

- Person unable to take care of himself due to
  - Age
  - Mental illness
  - Disability
  - Disease / illness
  - Injury
- Having a disability is NOT the same as being incapacitated
- Incapacity can be partial or total
6 CLUES IN OUR CASES

- Placed in an HCS slot
- Non-verbal
- Needs assistance with daily living
  - Can’t manage own medications
  - Has difficulty with finances
- Disability specialist involved
- Receiving SSI
- In a special school program (life skills, autism)
- Has serious medical needs
7 WHEN TO START WORKING ON GUARDIANSHIP

- Application for guardianship can be filed 6 months prior to 18\textsuperscript{th} birthday. (Estate Code, Ch 13, Sec 682A)
- Guardianship hearing can occur before the 18\textsuperscript{th} birthday, but the guardianship cannot go into effect until AFTER the 18\textsuperscript{th} birthday
- Can a request for guardianship be filed later?
  - YES! This often happens.
ALTERNATIVES TO GUARDIANSHIP:

- Supported decision making (Sec 1357.056)
- Powers of attorney
- Social security representative Payment Program
- Trusts – very important if child support is being paid
  - Dollar for dollar reduction in SSI payments if CS not paid into trust
- Practice Tip: Don’t forget child support!
CHILD SUPPORT

- TX Family Code Sec. 154.001(a)(4) – provides child support FOR AN INDEFINITE PERIOD if the child is disabled
- For Judges: TX Family Code 154.001(a-1) regarding child support after termination, subpart (2) allows the Court to order support for an INDEFINITE PERIOD if the child is disabled
- TX Family Code Sec. 154.302 sets forth requirements
  - Child requires substantial care & personal supervision b/c of mental or physical disability,
  - Will not be capable of self-support, and
  - Disability is known to exist on or prior to 18th birthday
  - Court can order the support be paid directly to special needs trust
10 SUPPORTED DECISION-MAKING AGREEMENT

- TX Estate Code, Chapter 1357
- Pros
  - Easy to execute
  - No Court involvement
  - No background checks
- Cons
  - Revocable by either party
  - No Court supervision
POWERS OF ATTORNEY

- Must have capacity to sign
- Not always recognized by institutions
- Grantor can over-ride POA’s decisions
SSA REPRESENTATIVE PAYEE PROGRAM

- Only handles financial decisions
- No authority to assist with medical decisions
- Not involved with decisions about placement/living arrangements
- Social Security Rep Payees must apply and be appointed by SSA
  - 2023 Monthly SSI Payment for an individual is $914/mo
- SSA requires completion of Annual Rep Payee Report to provide an annual accounting regarding use of funds
  - Natural or adoptive parents of disabled beneficiaries DO NOT have to file the annual report
  - Report can be submitted online
SPECIAL NEEDS TRUSTS

• Child support payments must go DIRECTLY into the trust, not thru the AG’s office

• Texas ABLE Account
  • Disability present before age 26
  • Can contribute up to $17,000 per year
  • Generally, up to $100,000 is disregarded for purposes of government benefits
  • Tax deferred
  • Anyone can contribute
MORE ON TRUSTS

• May be able to use the Arc of Texas Master Pooled Trust
  • No age requirement for onset of disability
  • Family members can pass assets to the trust upon death
  • The Arc serves as trustee
  • $500 minimum
WHO CAN SERVE AS GUARDIAN?

• Certain people have priority (spouse, parent, adult child, adult siblings, other family members)

• Only time co-guardians allowed is if: parents of the Ward or married to a parent of the ward

• Court will consider preference of the Ward
  • Does the Ward have any long-term relationships?

• TIPS: try CASA, former caseworkers, former or long-time foster placements
WHO IS NOT A SUITABLE GUARDIAN:

- Under 18 or otherwise incapacitated themselves
- Financial conflict (Indebted or in property dispute with the ward)
- Person whose conduct is “notoriously bad”
  - Convicted of certain crimes (sexual offenses, abuse of child or adult, serious drug history)
  - Certain property crimes (ie, embezzlement, fraud) – guardian controls Ward’s finances & must be able to get bonded
- Anyone “otherwise unsuitable” as determined by the Court (examples: Divorced parents as co-guardians, manager of HCS home)
HEALTH & HUMAN SERVICES (HHS)
GUARDIANSHIP SERVICES PROGRAM

• Until 2017, was the TX Department of Aging and Disability Services (DADS)
• For youth aging out to be referred to HHS for guardianship, they must be in Child Protective Services (CPS) conservatorship and appear to meet the adult definition of incapacity.
• When someone is referred to the Guardianship Services Program, HHS:
  • Determines if the person has indicators of diminished capacity
  • Identifies less restrictive alternatives to guardianship
  • Identifies other people or organizations that are willing, able and appropriate to serve as guardian
  • When all least restrictive options have been exhausted — and no family member, interested party or alternate guardian is available — HHS may ask the court to be appointed as guardian. TX HUM. RES. § 161.101
• To request information or assistance please email Guardianship@hhsc.state.tx.us.
18 THE GUARDIANSHIP PROCESS: STEP 1

- File application with the Probate Court OR Initiate a Guardianship Investigation by filing an Information Letter pursuant to TX Estate Code Sec. 1102
- All attorneys involved in the process must be Guardianship certified
- Obtain Certificate of Medical Examination (CME)
  - Must be signed by TX licensed MD
  - Must be dated within 120 days of the filing of the application for guardianship
  - Does not have to be primary care doctor
  - There are doctors that specialize in CME’s
CME ASKS ABOUT COGNITIVE DEFICITS

- Is the Proposed Ward oriented to Person, Time, Place, Situation?
- Does Proposed Ward has a deficit in:
  - Short-term memory,
  - Long-term memory,
  - Immediate recall,
  - Understanding and communicating (verbally or otherwise),
  - Recognizing familiar objects and persons
• Solving 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
• Do the Proposed Ward’s periods of impairment from the deficits vary substantially in frequency, severity, or duration?
CME ALSO ASKS ABOUT ABILITY TO MAKE DECISIONS

- Make complex business, managerial, and financial decisions?
- Manage a personal bank account? Should amount in account be limited?
- Safely operate a motor vehicle?
- Vote in a public election?
- Make decisions regarding marriage?
- Determine the Proposed Ward’s own residence?
• Administer own medications on a daily basis
• Attend to basic activities of daily living (ADLs) (e.g., bathing, grooming, dressing, walking, toileting) without supports and services
• Attend to instrumental activities of daily living (e.g., shopping, cooking, traveling, cleaning)
• Consent to medical and dental treatment at this point going forward
• Consent to psychological and psychiatric treatment at this point going forward
INCAPACITY CAN BE PARTIAL OR TOTAL

- Guardianship order will specify what rights are retained by the Ward
- Based on recommendations in the CME
- Court may require a follow up hearing if recovery is possible
STEP 2: SERVICE

- Proposed ward
- Family members: Parents, Siblings
- Anyone with POA
- DFPS
- Residential facility
- Publication in the HartBeat and posting also required
STEPS 3 & 4:

- Attorney ad litem will be appointed to represent proposed ward
  - AAL will file an Answer & Report to the Court
- Court investigator will contact proposed ward and proposed guardian
  - Court investigator will file a report with their recommendation
STEP 5:

• Guardian must complete the Judicial Branch Certification Commission (JBCC) guardianship certification class

• Guardian must complete background check
  • Fingerprints thru Identogo

• Guardian must purchase bond - $375 lifetime bond fee or pay annually
STEP 6:

- Go to Court!
- Prove-up the Guardianship
  - Ward may not have to go, depending on recommendation in CME
  - Uncontested matters heard by zoom
- After the hearing, the Guardian must sign Oath to receive Letters of Guardianship
  - Letters expire in 16 months and are re-issued after receipt of the guardian’s annual report
28 WHAT’S NEXT:

• Requirement for annual reports to be filed with the Court, about the finances and current condition of the ward.

• Annual visits by the Court Visitor Program
POWERS AND DUTIES OF GUARDIAN

(1) the right to have physical possession of the ward and to establish the ward's legal domicile;
(2) the duty to provide care, supervision, and protection for the ward;
(3) the duty to provide the ward with clothing, food, medical care, and shelter;
(4) the power to consent to medical, psychiatric, and surgical treatment other than the inpatient psychiatric commitment of the ward;
(5) the power to establish a trust solely for the purpose of the ward’s eligibility for medical assistance
(6) the power to make employment and academic decisions for the ward
(7) the power to apply for government benefits & services
(8) the power to personally transport the ward or to direct the ward’s transport by emergency medical services or other means to an inpatient mental health facility for a preliminary examination
THINGS GUARDIAN IS NOT RESPONSIBLE FOR:

- Poor decisions by the Ward
- Illegal activities committed by the Ward
- Personally providing for Wards financial needs
- Personally paying Ward’s debts
- Supervising the Ward at all times
- Living with the Ward
- Guardian cannot put ward in mental hospital or force Ward to take medications
- Be careful with decisions about reproductive rights
RESTORATION OF RIGHTS

• Guardianship is NOT the end

• The Court “shall design the guardianship to encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person.” TX Estate Code, Ch 13, Sec 602

• Voc rehab or dayhab activities

• Most common I have seen is to restore the right to hold a driver’s license
• Eligibility: Must have a disability that results in barriers to employment
• Apply for Services: Decision within 60 days
• Create a Plan of Services: With 90 days of eligibility decision
WHAT IS AVAILABLE THRU TWC VOC REHAB?

- Vocational counseling
- Evaluations: hearing tests, visual exams, medical exams, psych evals
- Therapy: sp/lang, psychical, psychological or behavioral
- Education: College, vocational, on-the-job training
- Job placement & matching
- Transportation – to & from job; usually bus passes
- Referral to other agencies & organizations
INTERESTED IN HANDLING GUARDIANSHIPS?

- Get certified thru the TX State Bar
  - See Tex. Estates Code §1054.201
  - Complete 4-hour guardianship training approved by the TX State Bar
  - Submit application & fee
  - Initially good for 2-year term, after 2 consecutive 2-yr terms, switches to 4-year terms
- Volunteer with SALSA
  - Legal service center at the MAC is always looking for help
NEED HELP WITH A GUARDIANSHIP?

- Contact Ruchi Davis to see if the Court can fund a guardianship attorney
- Catholic Charities Guardianship Program (sliding scale)
- SALSA may be able to provide pro bono assistance
- Contact my office: 210-552-7737