

THE OVERTON LAW FIRM, P.C.

CLIENT GUIDE

TO

SELECTING A GUARDIAN

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Introduction: This guide describes guardianship in Texas and its importance with regard to management of businesses, medical care, and other personal needs in the event of incapacity of an adult or the selection of a guardian for a child. Guardianship can be costly and disadvantageous when overlooked in instruments such as your Will. This document briefly discussed two types of guardians: 1) guardian of the estate and 2) guardian of the person. Additionally, it highlights certain legal concepts and definitions such as an incapacitated person. Finally, it outlines choices that must be made with regard to selecting a guardian and provides useful factors to consider in the selection process.

General Issues Regarding Selection of Guardians: Many persons may never complete an estate plan and Will because they cannot find or identify a person with the same ideals and characteristics that they desire to serve as Executor, Trustee, or Guardian. Pragmatically speaking, the ideal person does not exist. Use your experience, this guide, and other information to develop the factors most important to you and make a choice. The result of not making a choice will be that someone you do not know may choose someone who never knew your, your desires, wishes, or intent with regard to these important fiduciary positions. With all of this business of attempting to figure out who should be a guardian, you may think of persons that should not serve as a guardian. If so, list the persons that you do not wish to serve as guardian.

Legal Background: Selection of a guardian is regarded as an important task for most individuals. A majority of people prefer a trusted family member or friend over a court appointed guardian to make decisions regarding their personal care, medical treatment, and financial health. In Texas, an adult may execute a Will or other documents to make this important designation in the event of a disability.

Parents are the “natural guardians” of the person; however, the parents are not the natural guardian of the estate of the child, unless appointed by a court. As guardians of the person, parents have the authority to decide the child’s healthcare, education, and other important matters such as where the child lives. Contrary to popular belief, a parent is not the guarding of the estate of a child. By law, care of the children will require a guardian of the person and a guardian of the estate. Stated another way, unless a parent is appointed by a court, the parent does not have any authority over the child’s estate. Think of persons, based on the guides below in selecting: 1) Guardian of person; 2) Guardian of estate; 3) Guardian of person and estate; and 4) Co-guardians.

Please also be aware that in selecting guardians, Sections 767 and 768 of the Texas Probate Code allow different persons to be selected as guardian of the person and as guardian of the estate. Stated another way, a parent does not have to choose the same person to serve as guardian of the estate and guardian of the person.

Factors to Consider in Selecting a Guardian: In making this important decision, you should consider your values, morals, positions, and interests and compare them with the persons from your list of potential guardians. Consider persons to act as guardian of the person and as Guardian of the Estate.

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The following factors may be useful to consider in selecting guardian of person:

- 1) While persons appointed in an instrument do not have to consent to being appointed, however, it is strongly recommended that the guardian needs to agree to serve in the capacity that you wish.
- 2) Consider the age, health, and physical ability of proposed guardian to care for your children.
- 3) What is the guardians experience with parenting and caring for children or other obligations to serve as guardian?
- 4) The child's relationship with the guardian. Is the guardian a member of the family or a close personal friend?
- 5) Whether proposed guardian has children that they must also care for and the relationships of the guardian's children to your children.

Similarly, you may find it useful to consider several factors in selecting a guardian of estate. These factors may include:

- 1) The proposed guardian's ability to manage money, property, or both.
- 2) The proposed guardian's financial status.
- 3) Location of property with regard to location of the guardian.
- 4) Identity of guardian of the person, if different from guardian of the estate.
- 5) Any preference for a corporate fiduciary to serve as guardian of the estate.
- 6) Consider a testamentary trust as an alternative to guardianship of estate.

After selecting a guardian, determine persons to serve as alternate or successor guardians.

Bond, Compensation, and other Issues: Finally, determine whether to require or waive bond, realizing that Section 699 of the Texas Probate Code provides that a Will may relieve a guardian of the duty to furnish a bond. Guardians may be entitled to compensation and reimbursement of certain costs, including attorney's fees.

General Powers of the Guardian of a Person: Generally, the guardian of the person is entitled to the charge and control of the ward, and the duties of the guardian correspond with the rights of the guardian. A guardian of the person has:

- 1) the right to have physical possession of the ward and to determine where the ward will reside or live;
- 2) the duty of care, control, and protection of 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 and the power to transport the ward to an inpatient mental health facility for a preliminary examination other but not the power cause the psychiatric commitment of the ward; and
- 5) on application to and order of the court, the power to establish

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Certain trusts and direct that the income of the ward be paid directly to the trust, solely for the purpose of the ward's eligibility for medical assistance.

General Powers and Duties of Guardian of the Estate: The guardian of the estate of a ward is entitled to the possession and management of all property belonging to the ward, to collect all debts, rentals, or claims that are due to the ward, to enforce all obligations in favor of the ward, and to bring and defend suits by or against the ward subject to applicable provisions of Texas law. Generally, it is the duty of the guardian of the estate to take care of and manage the estate as a prudent person would manage the person's own property. The guardian of the estate must account for all rents, profits, and revenues that the estate would have produced by such prudent management.

Alternatives to Guardianship: Generally, guardianship is not the best alternative for any surviving children or their estates. Trusts and properly drafted instruments using alternatives are more suitable for most persons. If you have minor children, consider using your Will to appoint persons to care for children when both parents are deceased. Consideration should be made to appointing a primary guardian and alternates.

A revocable living trust, Will, or other properly drafted instrument may avoid the need for a guardian of the person in the event of that a person becomes incapacitated or incompetent. A court guardianship involves expense, cumbersome court procedures, and in some instances, undesirable publicity.

A trust is almost always better for handling a minor's estate than a guardianship of the minor's estate. A trustee has more flexibility and freedom of discretion and may receive your instructions with regard to the property and its management. An appointed guardian does not have the same flexibility or freedom. Additionally, with a trust, you can specify the date or your child's age when the trust should terminate. Comparatively, a guardianship of a minor terminates with the end of the ward's minority or age 18. Moreover, a trustee has title to the trust property and may deal with it without court approval, thus avoiding hearings and their attendant attorney's fees and court costs. In addition to saving fees and costs, a trustee has the ability to make and change investments more quickly.

Trusts do have one disadvantage. A trustee may deal only with the trust corpus, and a minor could receive property not covered by the trust. Life insurance proceeds and survivor benefits may be examples of this type of property. Therefore, a trust must be carefully drafted to attempt to eliminate the later need for a guardianship of the estate. Having a carefully prepared [Estate Plan Record](#) will help to minimize these risks because the trustee may be named beneficiary of any life insurance policies or survivor benefits. While this may be a disadvantage of using a trust, careful preparation will minimize the risks of guardianship of the estate.