

Ellis County Court at Law No. 1

JUDGE JIM CHAPMAN
Ellis County Courts Building
109 S. Jackson St.
Waxahachie, TX 75165



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Guide to Guardianship Procedures

Counselors,

Welcome to Ellis County Court at Law No. 1. As you know, representing a client who is seeking guardianship of a loved one or friend is an important responsibility. The families who come through this Court are going through a difficult time. That is why the staff of this Court is committed to ensuring that the guardianship process is as smooth as possible. This guide is designed to help you understand how the docket works in Ellis County when your client is seeking a guardianship.

I hope you will find this guide useful, but it comes with two important caveats. First, the guide is not intended as a substitute for your legal expertise. For example, although the guide includes selected pleading tips for different guardianship proceedings, it does not address which proceeding is appropriate given your client's situation. Although the most common proceedings involving guardianship are addressed in this guide, other guardianship alternative possibilities are not included which could be the most cost-effective proceeding for attending to the proposed ward's needs. Second, this guide is not a substitute for the Estates Code. Everything in this guide is consistent with the Estates Code, but this basic guide makes no pretense about being comprehensive.

Sincerely,

Jim Chapman, Judge Presiding

I. Administrative

A. Document checklist. Every guardianship sought to be created requires the following documents:

- an Application (compliant with TEC §1101.001 and the new pleading requirements);
- Return of Citation by posting and to any additional persons requiring notice under Ch. 1051 of the Estates Code;
- an Attorney's Affidavit of Notice compliant with the requirements of TEC §1051.104(b);
- a Physician's Letter or Certificate compliant with the requirements of TEC §1101.103, or a written letter or certificate that shows Intellectual Disability compliant with the requirements of TEC §1101.104;
- an Oath for the guardian (do not sign this ahead of time);
- an Order granting guardianship;
- a completed Guardian General Information Sheet (this form can be downloaded from the Court's website).;
- a completed Court-Ordered Instruction packet (either Person, Estate or Person/Estate as appropriate) (these forms can be downloaded from the Court's website).;

- a completed Initial Annual Report if guardianship of the person is sought (this form can be downloaded from the Court's website).;
- a criminal background check and if the liquid guardianship estate is \$50,000 or more a digital fingerprint background check must be completed; and
- a certificate of completion of guardianship training.

B. Attorney Ad Litem and Cost Deposit. In every guardianship the Court will appoint an attorney ad litem to represent the proposed ward. There has been a relatively recent change in the law on who bears the costs, including ad litem fees. If the guardianship estate or management trust created cannot bear the cost, the non-indigent applicant will bear the cost rather than the county treasury. §1155.151.

The applicant for a permanent guardianship, without a request for a temporary guardianship, shall pay a \$600.00 deposit into the registry of the Court towards the ad litem expense (unless the applicant, on the applicant's own behalf, has filed an affidavit of inability to pay the costs under TRCP145). This amount while a deposit only, should cover the expense in the majority of agreed cases.

If a temporary guardianship is sought, the applicant shall pay a \$1,500.00 deposit into the registry of the Court towards the ad litem expense (unless the applicant, on the applicant's own behalf, has filed an affidavit of inability to pay the costs under TRCP145). The larger deposit for temporary guardianships reflects the expedited time frame, the greater complexity of the case, the greater likelihood of a contest and the fact considerably more time will need to be spent by the ad litem on the case.

In the event that the attorney ad litem anticipates the cost of the proceeding shall exceed the deposit amount, they may seek additional security for costs pursuant to § 1053.052.

No case for which an ad litem deposit is required will be heard by the Court until such deposit has been paid. The ad litem will need to obtain prior Court approval before undertaking work on the case that will necessitate a fee greater than \$600.00 in an uncontested permanent guardianship.

C. Hearing Schedule. The Court prefers to expedite guardianship cases, but please do not call to schedule a guardianship prove-up hearing until the following have been taken care of:

1. An ad litem has been appointed, and you have talked with the ad litem about the hearing date.
2. Before the hearing date arrives, you will have posted notice and have service on or waivers from all of the interested parties and others requiring notice. See "Notice" below.
3. You either have already turned in all necessary documents (including any deposition responses), or you know you will be able to do so before the deadline. See "Submission of Documents" below.
4. The proposed guardian has submitted their registration information to the Judicial Branch Certification Commission at <http://www.txcourts.gov/jbcc/>, completed their guardianship training and had their criminal background check conducted.

In addition, pick a date you know will work for everyone who needs to testify, including the witnesses and the ad litem. Once the hearing is set, make sure everyone receives sufficient notice.

D. Submission of Documents. The Court needs to have access to all documents required for an uncontested hearing no later than 10:00 a.m. three days before the hearing. Compliance with this rule allows the Court to review the file and contact the attorney should any deficiencies be present. Compliance with the rule also ensures that the attorneys are not embarrassed in front of their clients for lack of preparation. Documents that are ready to be filed by this deadline are returns of service, notarized consents and waivers, the attorney affidavit on service of notice compliance, and proposed orders to be signed. The Court does not want to risk losing an executed document that has not been filed and scanned. Therefore, please file all original documents to be filed in the Clerk's office. All proposed orders or proofs may be submitted electronically to the Court at cc1coordinator@co.ellis.tx.us in Word format.

TIP: At the time you file the application, submit to the Clerk's Office with your application all of the documents you have prepared at that time.

TIP: If you don't file all necessary documents at the time you file the application, the unexecuted proposed documents (e.g., Order, etc.), should be submitted to the Judge's chambers before the deadline, **preferably by emailing them to the Court Coordinator, Tianta Schwartz (cc1coordinator@co.ellis.tx.us), in Word format.** When submitting documents to the Judge's chambers, always include the date and time of your scheduled hearing to ensure the documents make it to the file.

TIP: Carefully review your client's criminal history prior with the client prior to the hearing. The report provided to the Court will contain arrests, deferred adjudications and even items that may be otherwise covered by a non-disclosure order. You do not want your client to have an unpleasant surprise when the Court questions your client regarding these matters at the hearing. As your client is requesting the Court to appoint them in a fiduciary role, your client needs to be prepared to explain these matters to the Court as they will pertain to their suitability to service as a fiduciary.

If you miss the deadline for submitting documents, you should still get the missing documents to the Judge's chambers as soon as possible. Documents you're submitting after the deadline should be submitted directly to the Court, not to the Clerk's Office. However, there is no guarantee that the Court will be able to review the tardy documents before the hearing. The Court may postpone the hearing if an attorney fails to comply with the posted guidelines for uncontested docket paperwork and it appears that there might be significant problems with the paperwork at the scheduled hearing or the Court does not have time to review the tardy documents.

E. Review of Documents with Client Prior to the Hearing. It is highly recommended that you review all documents that your client will sign with the client prior to the hearing. These include the Oath, Information Sheet and Instruction packet.

F. Attorney Certification Required. All attorneys for an applicant for guardianship and all court-appointed attorneys in a guardianship proceeding, including an attorney ad litem, must be certified by the State Bar of Texas, or a person or other entity designated by the state bar, as having successfully completed a course of study in guardianship law and procedure sponsored by the state bar or the state bar's designee. §1054.201. An attorney lacking such certification shall not be permitted to act in the case until such certification is obtained.

G. Registration, Guardianship Training and Criminal Background Check. A proposed guardian must register with the Judicial Branch Certification Commission, complete guardianship training and obtain a criminal background check (with fingerprinting if handling an estate of \$50,000 or more).

II. Applications

A. Permanent Guardianships of the Person and/or Estate

1. Statutory Requirements. Section 1101.001 of the Code outlines the requirements of an application for the appointment of a guardian. The requirements are extensive, and the Court does check to see that all of the required information is included and will require an amended application if required information is missing. The application required elements include:

- ♦ Application is sworn to by the applicant (with an effective jurat) (§1101.001(b))
- ♦ Attorney's email address is included on the application (TRCP Rule 21(f)(2))

In all cases, application states:

- ♦ Proposed ward's full name, sex, date of birth, and address. (§1101.001(b)(1))
- ♦ Name, relationship to proposed ward, and address of person the applicant seeks to have appointed guardian. (§1101.001(b)(2))
- ♦ Whether seeking guardianship of the person or estate, or both. (§1101.001(b)(3))
- ♦ Whether alternatives to guardianship and available supports and services were considered and are feasible and would avoid the need for guardianship. (§1101.001(b)(3-a) - §1101.001(b)(3-b))
- ♦ Nature and degree of the alleged incapacity. (§1101.001(b)(4))
- ♦ Specific areas of protection and assistance requested. (§1101.001(b)(4))
- ♦ Limitation or termination of rights requested to be included in the court's order of appointment, including a termination of (A) the right of a proposed ward who is 18 years of age or older to vote in a public election; (B) the proposed ward's eligibility to hold or obtain a license to operate a motor vehicle under Chapter 521, Transportation Code; and (C) the right of the proposed ward to make personal decisions regarding residence. (§1101.001(b)(4))
- ♦ Facts requiring that a guardian be appointed. (§1101.001(b)(5))
- ♦ Interest of the applicant in the appointment. (§1101.001(b)(6))
- ♦ Nature and description of any guardianship of any kind existing for the proposed ward in any other state. (§1101.001(b)(7)) If none, please indicate.
- ♦ Name and address of any person or institution having the care and custody of the proposed ward. (§1101.001(b)(8))
- ♦ Approximate value and description of the proposed ward's property, including any compensation, pension, insurance, or allowance to which the proposed ward may be entitled. (§1101.001(b)(9))

- ♦ Name and address of any person whom the applicant knows to hold a power of attorney signed by the proposed ward and a description of the type of power of attorney. (§1101.001(b)(10)) If none, please indicate.
- ♦ Facts showing that the court has venue over the proceeding. (§1101.001(b)(14))
- ♦ If applicable, that person to be appointed as guardian is a private professional guardian certified as required by the Government Code, who has complied with the requirements of Section 1104.301 of this code. (§1101.001(b)(15)) (If a person named in the application is protected by a protective order issued under Chap. 85, Family Code, see Estates Code §1101.002.)

If proposed ward is an adult, application states:

- ♦ (1) name of the proposed ward's spouse, if any, and (2a) the spouse's address or (2b) that the spouse is deceased, if known by applicant. (§1101.001(b)(13)(A)) If proposed ward is not married or if any information is not known, indicate.
- ♦ (1) name of each of the proposed ward's parents and (2a) each parent's address or (2b) that the parent is deceased, if known by applicant. (§1101.001(b)(13)(B)) If any information is not known, please indicate.
- ♦ (1) name of each of proposed ward's siblings, if any, and (2a) each sibling's address or (2b) that the sibling is deceased, if known by applicant. (§1101.001(b)(13)(C)) If proposed ward has none or if any information is not known, indicate.
- ♦ (1) name and age of each of the proposed ward's children, if any, and (2a) each child's address or (2b) that the child is deceased, if known by applicant. (§1101.001(b)(13)(D)) If proposed ward has no child or if any information is not known, indicate.
- ♦ If there is no living spouse, parent, adult sibling, or adult child of the proposed ward, the names and addresses of the proposed ward's other living relatives who are related to the proposed ward within the third degree by consanguinity and who are adults. (§1101.001(b)(13)(E))

If proposed ward is a minor, application states:

- ♦ (1) name of each parent of the proposed ward and (2a) each parent's address or (2b) that the parent is deceased, if known by applicant. (§1101.001(b)(11)(A)) If any information is not known, please indicate.
- ♦ (1) name and age of each sibling, if any, of the proposed ward and (2a) each sibling's address or (2b) that the sibling is deceased, if known by applicant. (§1101.001(b)(11)(B)) If proposed ward has no siblings or if any information is not known, please indicate.
- ♦ If each of the proposed ward's parents and adult siblings are deceased, the names and addresses of the proposed ward's other adult living relatives who are related to the proposed ward within the third degree by consanguinity. (§1101.001(b)(11)(C))
- ♦ Whether the minor was the subject of a legal or conservatorship proceeding within the preceding two-year period and, if so, the court involved, the nature of the proceeding, and the final disposition, if any, of the proceeding. (§1101.001(b)(12))

B. Application for Temporary Guardianship

1. **Statutory Requirements.** Section 1251.003 of the Code outlines the requirements of an application for the appointment of a temporary guardian. The Court does check to see that

all of the required information is included and will require an amended application if required information is missing. A temporary guardianship will only be granted if the Court is presently with substantial evidence that a person may be incapacitated and has probable cause to believe that the person, the person's estate, or both require the *immediate* appointment of a guardian. In other words, temporary guardianships are difficult to obtain unless there is a truly immediate need, such as for a medical procedure or to stop a theft that is occurring. The application must state:

- The name and address of the person who is the subject of the guardianship proceeding;
- The danger to the person or property alleged to be imminent;
- The type of appointment and the particular protection and assistance being requested;
- The facts and reasons supporting the allegations and requests;
- The proposed temporary guardian's name, address and qualification;
- The applicant's name, address and interest; and
- If applicable, that the proposed temporary guardian is a private professional guardian who is certified under Subchapter C, Chapter 155, Government Code, and has complied with the requirements of Subchapter G, Chapter 1104.
- The application must be sworn to by the applicant.

PRACTICE TIP: Temporary Guardianships are difficult to obtain and add considerable expense to the proceedings; there must be an immediate need, a danger to the person or property alleged to be imminent, before a temporary guardianship is granted, and such relief can't be granted ex parte (a temporary guardianship requires the appointment of an ad litem followed by a hearing to be conducted within 10 days of the application). Given these limitations, you should seriously consider whether a temporary restraining order, other guardianship alternative or simply applying for a permanent guardianship might be more appropriate in your client's case.

III. Notice

A. Permanent Guardianship

1. **Service.** See TEC Ch. 1051.

a. Personal Service. The sheriff or other officer shall personally serve citation to appear and answer an application for guardianship, including the information required by §1051.252, on:

- (1) a proposed ward who is 12 years of age or older;
- (2) the proposed ward's parents, if the whereabouts of the parents are known or can be reasonably ascertained;
- (3) any court-appointed conservator or person having control of the care and welfare of the proposed ward;
- (4) the proposed ward's spouse, if the whereabouts of the spouse are known or can be reasonably ascertained; and

(5) the person named in the application to be appointed guardian, if that person is not the applicant.

b. Notice to Interested Persons. The person filing an application for guardianship shall mail a copy of the application and a notice containing the information required in the citation issued under §1051.252 by registered or certified mail, return receipt requested, or by any other form of mail that provides proof of delivery, to the following persons, if their whereabouts are known or can be reasonably ascertained:

- (1) each adult child of the proposed ward;
- (2) each adult sibling of the proposed ward;
- (3) the administrator of a nursing home facility or similar facility in which the proposed ward resides;
- (4) the operator of a residential facility in which the proposed ward resides;
- (5) a person whom the applicant knows to hold a power of attorney signed by the proposed ward;
- (6) a person designated to serve as guardian of the proposed ward by a written declaration under Subchapter E, Chapter 1104, if the applicant knows of the existence of the declaration;
- (7) a person designated to serve as guardian of the proposed ward in the probated will of the last surviving parent of the proposed ward;
- (8) a person designated to serve as guardian of the proposed ward by a written declaration of the proposed ward's last surviving parent, if the declarant is deceased and the applicant knows of the existence of the declaration; and
- (9) each adult named in the application as an "other living relative" of the proposed ward within the third degree by consanguinity, as required by §1101.001(b)(11) or (13), if the proposed ward's spouse and each of the proposed ward's parents, adult siblings, and adult children are deceased or there is no spouse, parent, adult sibling, or adult child.

The applicant shall file with the court a copy of any notice required above and proofs of delivery of the notice as well as an affidavit sworn to by the applicant or the applicant's attorney stating that the notice was mailed as required and the name of each person to whom the notice was mailed, if the person's name is not shown on the proof of delivery.

It is **important to note** that the Court may not act on the application for the creation of a guardianship until the applicant has complied with §1051.104(b) regarding notice. See §1051.106.

c. Posting. Upon payment of the requisite fees, the county clerk shall cause notice to be posted by the sheriff or constable at the door of the county courthouse before the return day of the citation or notice including the information required by §1051.252.

2. Waiver of Personal Service. A person other than the proposed ward may waive personal service or notice in writing; however, a proposed ward can never waive personal service, and the attorney for the proposed ward cannot waive service for the proposed ward.

B. Temporary Guardianship

1. Personal Service. Notice of the application for temporary guardianship must be personally served on:

- (1) the proposed ward;
- (2) the proposed ward's appointed attorney; and
- (3) the proposed temporary guardian named in the application, if that person is not the applicant.

The notice must describe the rights of the parties (as listed in §1251.008), the date, time, place, purpose, and possible consequences of a hearing on the application. A copy of the application must be attached to the notice which is served.

2. Waiver of Personal Service. A person other than the proposed ward may waive personal service or notice in writing; however, a proposed ward can never waive personal service, and the attorney for the proposed ward cannot waive service for the proposed ward.

IV. Documents expected to be submitted at the hearing

The following documents should be brought to the prove-up hearing so that the guardianship may be granted at the time of the hearing.

A. The Order Appointing Guardian. The Order should:

- ♦ contain all the required findings with the requisite level of proof specified in §1101.101;
- ♦ contain the contents required by §1101.153, including the date by which the guardian must submit an updated medical letter or certificate if the original letter required by §1101.103 stated that improvement in the ward's physical or mental functioning is possible and specified a period of less than a year after which the ward should be reevaluated to determine the continuing necessity for the guardianship;
- ♦ contain, if the guardian is to have full authority, findings of fact and specify the information required by §1101.151;
- ♦ require the guardian to provide the ward, within 24 hours of appointment, a copy of the Bill of Rights for Wards contained within §1151.351;
- ♦ specify that if the guardianship is of the person only that the required bond be a cash bond with a blank left for the amount to be filled in (usually \$100 in most cases);
- ♦ if a permanent guardianship, specify that "the Guardian appointed in this Order only has authority to exercise the powers granted in this Order upon presentation of valid unexpired Letters of Guardianship";
- ♦ if a temporary guardianship, specifically list the powers and duties of the temporary guardian, the reasons the temporary guardianship was granted and the term limitation. §1251.010 and §1251.052.

B. Oath of Guardian. Do not have your client sign prior to appointment.

C. Attorney's Affidavit of Notice. This is an oft overlooked document, but one that must be presented before the Order may be signed. §1101.101.

D. Guardian's General Information Sheet. Please have the proposed guardian completely fill out this sheet prior to the hearing. This information will stay in the court file, not in the public clerk's file.

E. Court Ordered Instruction Packet. Please review this packet (using the appropriate Person, Estate or Person/Estate packet) with your client and have it signed prior to the hearing.

F. Initial Annual Report. If a guardianship of the person is sought, have your client complete the Initial Annual Report prior to the hearing. (This form may be downloaded from the Court's website).

G. Safekeeping Agreement in Lieu of Some Portion of the Required Bond.

Please note that if it is contemplated that your client may prefer a Safekeeping Agreement in lieu of some portion of the required bond you will need to bring an Order Authorizing Safekeeping Agreement to the prove-up hearing. The Order and Safekeeping Agreement are promulgated by the Court and fillable pdf versions of these documents are available on the Court's website. The Court will establish a full bond amount at the prove-up hearing and if the signed Safekeeping Agreement is ultimately approved the bond will be reduced at that time to reflect the assets kept in safekeeping. It is important to note that only Financial Institutions as defined by §201.101 of the Texas Finance Code qualify for Safekeeping Agreements.

H. Investment Plan.

While not required at the prove-up hearing, if the estate assets are not invested in accordance with §1161.051 within 180 days after the guardian of the estate qualifies, the guardian must file a request with the court to authorize an investment plan.

I. Criminal Background Check and proof of registration with the Judicial Branch Certification Commission and completion of guardianship training.

V. Additional forms for administration of the guardianship

Additional forms on the website. The Ellis County Court at Law No. 1 website has additional forms for use in the administration of the guardianship, such as the required Annual Report form and the Annual Account checklist amongst other forms. These forms are updated frequently so please check to make sure you have the most recent forms.