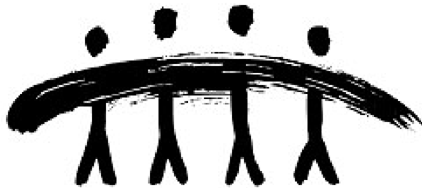
Guardianship Information Packet

Information compiled by:



The Arc of Greater Houston
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The Arc of Greater Houston advocates for the rights and full participation of all children and adults with intellectual and developmental disabilities in the community.

The Arc of the US and the AAMR
Position Statement on Guardianship

Policy Statement:

The majority of people with mental retardation and other related developmental disabilities can manage their own affairs with informal assistance and guidance from others, such as family and friends. If guardianship is necessary, it should be tailored to the person's needs. It must be adequately monitored to ensure that the best interests of the individual are protected.

Issue:

The appointment of a guardian is a serious issue because it limits a person's independence and rights. Guardianship has been over-used by those who were unaware of less intrusive alternatives or who simply wanted to have their views prevail over the wishes of the individual. Frequently lesser forms of legal intervention, such as limited use of guardianship and powers of attorney have been overlooked, intentionally avoided or unavailable.

Position:

The majority of our own constituents can manage their own affairs with informal guidance and assistance from family, friends and others. If guardianship is essential, it should be used only to the extent necessary with a presumption in favor of limited rather than full guardianship.

Some of the alternatives to guardianship include:

- **Representative or substitute payees**
- **Case/care management**
- **Health care surrogacy**
- **Trusts**
- **Durable power of attorney for property**
- **Durable powers of attorney for health care**
- **Living wills**
- **Community advocacy systems**
- **Joint checking accounts**
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Guardianship Glossary

Reprinted from the Texas Guardianship Association Website:
www.texasguardianship.org/guardianship_glossary.html

Agent - One who has permission to act.

Attorney Ad Litem - A lawyer appointed by the court to represent the proposed ward during the guardianship proceedings. The AAL advocate for the proposed ward's wishes and desires.

Bond - An insurance policy required by the court in an amount set by the judge to cover the assets of the estate.

Clear and Convincing - Evidence or proof that the facts asserted are highly probable. A higher standard than a preponderance of the evidence, but a lower standard than proof beyond a reasonable doubt.

Conservatee - A minor being protected.

Conservator - Legally appointed protector; preserver of a minor.

Conservatorship - A legal relationship between the conservator and the conservatee.

Durable Power of Attorney - A document executed authorizing another person to act as agent which continues in effect upon the onset of incapacity of the principal.

Elderly - A person who is age 60 and over.

Estate - Both real and personal, tangible and intangible, and includes anything that may be the subject of ownership.

Fiduciary - A person or entity to whom property management or other responsibility is entrusted.

Guardian - A person who is appointed by the probate court to protect the property and/or person of one who does not have capacity to protect her own interests.

Guardian Ad Litem - A disinterested person who is appointed by the court on behalf of the ward to represent the ward's best interest.

Guardian of the Estate - A guardian who possesses any or all powers and rights with regard to the property of an individual.

Guardian of the Person - A person who is responsible for and who advocates for the health, well-being and personal needs of the ward.

Guardian of the Person and Estate - A person who acts in both capacities for a ward.

Incapacitated Person - An adult who, because of physical or mental conditioning, is substantially unable to feed, clothe or shelter herself, to care for her physical health, or to manage her financial affairs.

Letter of Guardianship - An official letter issued by the County Clerk's office which is written evidence of the appointment of a guardian and the authority of the guardian to act for the ward.

Oath - A sworn, written statement made by the guardian in which he or she swears to fulfill her obligations.

Payee - A person who receives and disburses the ward's social security income or SSI outside of the jurisdiction of the court. These funds are monitored by the Social Security Administration. A person may also serve as payee for Veteran's and Railroad Retirement benefits.

Personal Surety Bond - Bond executed by a guardian and two persons (sureties) willing to vouch for the guardian that allows the court to seek restitution from the guardian or sureties if the guardian does not perform her duties.

Principal - The person from whom an agent's authority is derived.

Probable Cause - A reasonable ground for supposing that an allegation is true, more evidence for than against.

Probate - Matter relating to or involving guardianship, the probate of a will, the estate of a decedent, or a trust.

Probate Court - Court with statutory authority to hear probate matters.

Statutory Probate Court - Texas Courts with authority to hear only probate matters. These courts are created by statute and are found in the most densely populated counties in Texas.

Surrogate - One substituted for or appointed to act in place of another.

Testator - A person who dies leaving a will.

Trust - A legal method used to manage and distribute property without a guardianship.

Ward - An incapacitated person who has been placed in the care, custody and supervision of a guardian.

Attorneys and Specialists in the Houston Area Who are Knowledgeable about Guardianships and/or Estates Planning

Attorneys

Hayes & Wilson, Attorneys, PLLC
2525 North Loop West, Suite 125
Houston, TX 77008
713-880-3939

Michelle Goldberg, Attorney
6750 West Loop South
Bellaire, TX 77041
713-218-8800

Wesley Wright, Attorney
Wright & Associates
5433 Westheimer
Houston, TX 77056
713-660-9595

Catherine Scheid, Attorney
713-840-1840

Houston Bar Association
713-759-1133

Specialists

Jean Casagrande,
Met Desk Specialist
Office- 713-830-6340
Mobile- 281-450-1859
(not an attorney)

Jimmy Miller,Special Care Planner
Strategic Financial Group, LLP
Mass Mutual
3 Greenway Plaza, Suite 178
Houston, TX 77046
713-402-3848

Additional Legal Services Available

Free:

Houston Volunteer Lawyers Program
http://www.hvlp.org
713-228-0732
712 Main Suite 2700
Houston, TX 77002

Lone Star Legal Aid
713-652-0077
1-800-733-8394 (toll free)
*only available on Wednesday and Thursdays from 9:00 am-11:45am
1415 Fannin Street
Houston, TX 77002

Reduced:

Reduced Fee Panel
Houston Lawyer Referral Service
http://www.hlrs.org/
1-800-289-4577
Monday-Friday: 8:30-4:30

Guardianship/Probate

HVLP	713-228-0732
South Texas College of Law	713-652-0009
University of Houston Legal Aid Clinic	713-743-2094
Houston Lawyer Referral	713-237-9429
NAACP Legal Redress Program	713-526-3389

These lists are provided by The Arc of Greater Houston. However, The Arc of Greater Houston does not endorse any particular professional or any service that is not directly operated by the Arc.

Other Guardianship & Related Services

Disability Related Issues

Advocacy, Inc.	713-974-7691
The Arc of Greater Houston	713-957-1600
The Arc of Texas-programs and services for persons with mental retardation	800-252-9729
Mental Health Mental Retardation Authority of Harris Co., information, assessment, and referral	713-970-4444

Civil Rights Violations

American Civil Liberties Union	713-942-8146

General Legal

Houston Volunteer Lawyers Program	713-228-0732
Lone Star Legal Aid	713-652-0077
Dispute Resolution Center	713-755-8274
Houston Lawyer Referral Service	713-237-9429
Legal Line-free phone advice on 1st & 3rd Wednesday, each month, 5-9 pm	713-759-1133
Legales-Spanish-version of Legal Line, 1st Thursday each month, 5-9 pm	713-755-1133
Legal Hotline for Older Texans-for 60+Texans, answer legal questions free, referrals	800-622-2520

Social Security Matters

South Texas College of Law	713-652-0009

Reprinted from the National Guardianship Association, Inc Website (www.guardianship.org/)

GUARDIANSHIP AND DEVELOPMENTALLY DISABLED INDIVIDUALS

Introduction

When a child with disabilities reaches the age of majority adulthood (which in most cases is the age of 18, but may vary from state to state), it may be time for the child's parents to consider guardianship – they do not automatically remain their child's natural guardian. It is a decision that should not be taken lightly – in many states it means that the individual, deemed to be incapacitated, loses all civil rights, including the right to vote, drive, or marry. Guardianship is a judicial determination made in a court of law after an investigation in which the alleged incompetent person may be represented by legal counsel. Because the process of appointment of a guardian varies by state, the services of an attorney are often required.

When Is Guardianship Needed?

All adults with severe disabilities do not require a guardian. Guardianship is only an avenue to pursue if the person's parents, doctor, psychologist, and caregivers (such as teachers) all agree that the individual is incapable of making informed decisions with appropriate guidance and information.

Understanding Guardianship

Guardianship is considered with informed decisions about where a person should live, what care and supervision is required, and how to interact with the medical community. These areas of concern require that the guardian be informed of the services available to their ward within the community and how to access them.

Some states offer limited guardianship, in which the guardian is limited in the scope of decision-making. For example, the guardian may have the right to make decisions on medical issues, but not on decisions regarding where a person will live.

The role of the guardian is to enhance the ward's lifestyle while including the ward in the decision-making process as much as possible. The guardian is expected to determine the ward's wishes and goals and to advocate on the ward's behalf. Guardians must not view their role as a means of limiting activity. For instance, few courts would give a guardian control over social interactions of their ward.

Parents also have to consider who will be their adult child's guardian after they have passed away. It is most helpful to choose an individual who is of the child's generation, perhaps a sibling or a friend of the family. In some states, there are not-for-profit organizations that provide guardianship services.

In many states, parents can designate a substitute guardian (the next guardian) when they cease to be their child's guardian or they may name someone in their wills.

GUARDIANSHIP/CONSERVATORSHIP – AN OVERVIEW

Introduction

Guardianship, also, referred to as conservatorship, is a legal process, utilized when a person can no longer make or communicate safe or sound decisions about her person and/or property or has become susceptible to fraud or undue influence. Because establishing a guardianship may remove considerable rights from an individual, it should only be considered after alternatives to guardianship have proven ineffective or are unavailable.

Alternatives to Guardianship

Alternatives to guardianship may include:

- Representatives or substitute payees
- Case/care management
- Health care surrogacy
- Trusts
- Durable powers of attorney for property
- Durable powers of attorney for health care
- Living wills
- Community advocacy systems
- Joint checking accounts
- Community agencies/services

Rights that Might be Affected

A good guardian will take into account the wishes and desires of the ward when making decisions about residence, medical treatments, and end-of life decisions. The courts will remove *only* those rights that the proposed ward is incapable of handling.

When the courts appoint a guardian, the following rights of the ward may be removed. These rights may include the right to:

- Determine residence
- Consent to medical treatment
- Make end-of-life decisions
- Possess a driver's license
- Manage, buy, or sell property
- Own or possess a firearm or weapon
- Contract or file lawsuits
- Marry
- Vote

Due Process

Because establishing guardianship is a legal process that involves the removal of the individual's rights, considerable due process protection often exists when the guardianship is established. They include:

- Notice to the individual of all proceedings
- Representation of the individual by counsel
- Attendance of the individual at all hearings/court proceedings
- Ability of the individual to compel, confront and cross examine all witnesses
- Allowance of the individual to present evidence
- Appeal of the individual to the determination of the court
- Presentation of a clear and convincing standard of proof
- The right of the individual to a jury trial

Individual rights removed and due process rights may vary from state to state, the final authority is the state statues where the person with the disability lives. In any type of guardianship the court may limit the guardian's authority. The guiding principle in all guardianship is that of least intrusive measures to assure as much autonomy as possible. The guardian's authority is defined by the court and the guardian may not operate outside that authority. A guardian may be a family member, friend, or a public or private entity appointed by the court.

Guardianship of the Person

When the court appoints a guardian of the person, the guardian may have the following responsibilities:

- Determine and monitor residence
- Consent to and monitor medical treatment
- Consent and monitor non-medical services such as education and counseling
- Consent and release of confidential information
- Make end-of-life decisions
- Act as representative payee
- Maximize independence in least restrictive manner
- Report to the court about the guardianship status at least annually

Guardianship of the Estate or Property

"Estate" is defined as real and personal property, tangible and intangible, and includes anything that may be the subject of ownership.

When the court appoints a guardian of the estate, the guardian is assigned the following responsibilities:

- Marshall and protect assets
- Obtain appraisals of property

- Protect property and assets from loss
- Receive income for the estate
- Make appropriate disbursements
- Obtain court approval prior to selling any asset
- Report to the court on estate status

The Professional Guardian's Duties and Responsibilities

The professional guardian does not take the place of a family member, although the guardian may form an emotional bond with the incapacitated person. The professional guardian will coordinate and monitor professional services needed by the incapacitated person, such as selecting a caretaker, in-home care, and other services.

Funds that belong to the ward remain the property of that person, and do not become property of the guardian. All funds are accounted for and kept separate from the guardian's personal funds. The estate guardian acts on behalf of the incapacitated person only to the extent of the person's assets. For each person that a professional guardian serves, the guardian stands ready to give an accurate accounting of those funds to the court. The professional guardian is an advocate and acts on behalf of the incapacitated person only to the extent of the court order.

Guardianship is Not a Long-Term Arrangement

The goal of effective guardianship is to be able to restore the rights of the individual who, for whatever reason, has had some of them removed by a court after due process. It is true that in many instances once a guardianship has been initiated by a court, it is in place until the incapacitated person dies. However, an annual review and assessment will monitor the need for maintaining or terminating a guardianship, and alert the court to a potential restoration of some or all of the incapacitated person's rights.

Conclusion

This brief summary does not attempt to cover all of the aspects of guardianship. This especially does not cover guardianship information for your local area, where the law and local court rules may vary from county to county, or from state to state. It is a good idea to make inquires as to what is appropriate for your specific circumstances. Consult your local professional elder law advocate, or contact the National Guardianship Association.

RIGHTS OF AN INDIVIDUAL UNDER GUARDIANSHIP

Guardianship is the legal process by which a court determines that a person is incapable of making decision about some or all areas of life. Because of certain medical conditions, a developmental disability, mental retardation, dementia, mental illness, or the inability to communicate, a person may not be able to take care of her own finances, make medical decisions, or understand the need for assistance with the activities of daily living.

After the court has heard medical testimony and other reliable evidence, it may declare a person to be "**incapacitated**" and appoint a **guardian** to make decisions on the person's behalf. This determination of incapacity and the appointment of a guardian may take specific rights from the person. Once under guardianship, the court might refer to this person as the "**ward,**" the "**incapacitated person**" or the "**protected person**."

The court should specifically state which rights it is taking from the ward. The ward keeps all rights that the court

has not specifically given to the guardian. State laws may also restrict the ward's rights. The state Constitution, for example, may deny the ward the right to vote. The ward, however, has the right to the **least restrictive** guardianship suitable to her needs and conditions. The guardian also has the affirmative duty to advise the ward of her rights and to attempt to maximize the ward's self reliance and independence.

Rights of the Ward

In general, the ward keeps all legal and civil rights guaranteed to all residents under the states' and the United
States' Constitution, ***except*** **those rights which the court grants to the guardian**

These rights include, but are not limited to:

1. The right to be treated with dignity and respect
2. The right to privacy, which includes the right to privacy of the body, and the right to private and uncensored communication with others by mail, telephone, or personal visits
3. The right to exercise control over all aspects of life that the court has not delegated to the guardian
4. The right to appropriate services suited to the ward's needs and conditions, including mental health services
5. The right to have the guardian consider the ward's personal desires, preferences, and opinions
6. The right to safe, sanitary, and humane living conditions within the least restrictive environment that meets the ward's needs
7. The right to procreate
8. The right to marry
9. The right to equal treatment under the law, regardless of race, religion, creed, sex, age, marital status, sexual orientation, or political affiliations
10. The right to have explanations of any medical procedures or treatment. This includes information about the benefits, risks, and side effects of the treatment, and any alternative procedures or medications available.
11. The right to have personal information kept confidential. This may include withholding certain information the ward may not want her family to know. The guardian may have to provide personal information to apply for benefits, in emergency situations where the ward or others may be in danger, or if the information is required by law to be shared with agencies or health departments. Personal information may also be contained in the reports the guardian makes to the court, and which may be available for others to see.
12. The right to review personal records, including medical, financial, and treatment records
13. The right to speak privately with an attorney, ombudsman, or other advocate
14. The right to petition the court to modify or terminate the guardianship. This includes the right to meet privately with an attorney or other advocate to assist with this legal procedure.
15. The right to bring a grievance against the guardian, request the court to review the guardian's actions, request removal and replacement of the guardian, or request that the court restore rights if it can be shown that the ward has regained capacity to make some or all decisions. The guardian also has a responsibility to request that the ward's rights be restored when there is evidence that the ward has regained capacity.

Removal and Replacement of a Guardian

A **petition** asking the court to review the guardianship can be filed in the clerk of court's office by the ward, the ward's attorney, the ward's family, or any concerned party. This petition should simply state the reasons a review is being requested. It is strongly recommended that the petitioner seek **legal assistance** when considering whether to file such a petition. There may be quicker, more effective, and/or less costly remedies available, such as **writing a letter** to the guardian or asking an **ombudsman or other advocate** to intervene with the guardian.

The court may order a **hearing** at which the party bringing the petition presents evidence. At the conclusion of the evidence, the court may order the guardian to consider or pursue a different course of action, be more responsive to the needs of the ward, file timely reports or accountings, or the court may **remove and replace** the guardian. Where it can be shown that the ward has regained the capacity to make decisions in some or all areas, the court may **dismiss or modify** the guardianship.

Texas Guardianship Information

TEXAS LAW

- ✰ Provides a legal system for assigning a guardian for people who are incapacitated. Each guardianship can be tailored to provide only the specific assistance needed by such persons while preserving their rights and independence
- ✰ Requires an application for guardianship with a probate court clerk to begin the legal process
- ✰ Provides for a Guardianship Advisory Board to advise the Health and Human Service Commission on the creation of voluntary guardianship resources throughout the state. This is done to meet the needs of incapacitated individuals who have no access to a guardian
- ✰ Provides an alternative to the formal guardianship process by allowing individuals to name a guardian in their will

TEXAS LEGAL CITATION

Judicial Education on Guardianship and Disability Issues:
Texas Government Code, Section 22.013

Attorney Education on Guardianship and Disability Issues:
Texas Government Code, Section 81.114

Powers, Duties and Responsibilities of Guardians:
Texas Probate Code, Chapter 13, Part 1, Sections 601-741; Part 2, Sections 742-866

CONTACT

Office of Court Administration, Texas Statutory Probate Courts
http://www.courts.state.tx.us/trial/probate.asp

Reprinted from the Texas Guardianship Association Website (www.texasguardianship.org)

What is Guardianship?

Guardianship is a legal process designed to protect vulnerable persons from abuse, neglect (including self-neglect), and exploitation. Guardianship provides for the person's care and management of her money while preserving, to the largest extent possible, that person's independence and right to make decisions affecting her life.

Why are Guardianships Created?

Guardianships are created for a variety of different reasons. People become incapacitated due to disease, injury, or developmental disability. No matter what the cause, the decision to seek guardianship is often painful and difficult for the alleged incapacitated person and her family members.

What happens to the person's rights and what determines incapacity?

Guardianship removes certain rights and privileges from an incapacitated person, referred to as the "ward". An incapacitated person can be a minor (under 18 years old) or an adult. The guardianship statute defines an incapacitated adult as a person who, because of physical or mental condition, is substantially unable to:

- Provide food, clothing or shelter for himself or herself
- Care for the individual's own physical health
- Manage the individual's own financial affairs

Please note that a person is not legally incapacitated until a court has declared that the person is incapacitated.

Before the court makes a determination, a person for whom a guardianship application has been filed is called the "alleged incapacitated person" or the "proposed ward".

The court may not use age as a factor in determining whether to appoint a guardian for an adult. The court appoints another person (guardian) to make some or all of these necessary decisions. Whether the court appoints a guardian with broad or limited authority depends upon the physical or mental limitations of the incapacitated person.

What are the types of guardianships?

A Guardian of the Person is appointed by the court to take care of the physical well-being of a ward and a Guardian of Estate is appointed to care for a ward's property. Often both a guardian of person and a guardian of estate are appointed and this can be the same person.

Guardianship Alternatives

Because guardianship takes away a person's rights, the Texas courts will look for a less restrictive alternative before granting a guardianship. Less restrictive alternatives include the following:

Money Management

Volunteer money management programs offer a less restrictive alternative to guardianships for low-income elderly and adults with disabilities who are incapable of managing their checking accounts themselves and have no one else available or appropriate to assist them.

The Purpose of these programs is:

- To promote and prolong independent living for individuals who are at risk of losing their independence due to an inability to manage a checking account
- To prevent financial abuse, neglect and exploitation of those individuals

This is accomplished through the use of volunteers who serve as:

Bill Payers who provide budget set-up, checkbook balancing, bill paying assistance each month, or Representative Payees who provide budget set-up, checkbook balancing, bill paying assistance each month, have signature authority for government benefits and are designated by one of the following federal agencies to manage a client's government benefits:

a. Social Security Administration
b. Veterans Administration
c. Railroad Retirement
d. Office of Personnel Management

The following safeguards are built into most volunteer money management programs in an effort to protect clients:

- Insurance coverage for client's funds, volunteers and agencies
- Criminal background checks on all volunteers and staff
- Monitoring of bank accounts
- Monitoring of local programs
- Technical assistance to local programs
- Volunteer supervision and support

This program is intended for those who have no other source of assistance. A volunteer money manager must sign a conflict of interest statement and does not make any decisions about or give advice regarding property or investments.

Power of Attorney

A Power of Attorney (POA) is an instrument executed by an adult who has capacity authorizing another person to act as her agent. The power to the agent may be either specific or general.

Durable Power of Attorney

If specifically stated in the document, the POA becomes a durable power of attorney and does not terminate upon the disability or incapacity of the principal. The durable POA also may be limited so that it takes effect only upon the principal's disability. It must be signed by the principal and notarized, but does not need to be witnessed. A durable POA terminates upon qualification of a guardian of the estate. A durable POA also may be terminated by the principal or may have date of expiration as provided in the document.

Durable Power of Attorney for Health Care

The durable power of attorney for health care is an instrument executed by an adult with capacity giving another person the authority to make health care decisions for him or her. This power only takes effect upon written certification by a physician that the principal lacks capacity to make health care decisions. The physician's certificate must be filed in the medical records of the patient. The durable power of attorney for health care must be signed by the principal in the presence of two (2) disinterested witnesses. The witnesses must also sign the instrument. The durable power of attorney for health care does not terminate upon qualification of a guardian unless so ordered by the court.

Directive to Physicians

The Directive to Physicians is a document that allows an adult with capacity to instruct physicians to withhold artificial means of extending the natural process of dying. To make a valid Directive to Physician, one must be:

- At least eighteen (18) years old
- Of sound mind
- Acting of her own free will

A Directive to Physicians does not need notarization, but must be witnessed by two qualified persons. Two physicians must make a determination that the patient has a terminal condition and that the patient's situation meets other statutory requirements before acting on the directive. For further information on this option, contact the Texas Medical Association Board of Councilors in Austin.

Management of Community Property

If an individual is judicially declared incapacitated, the spouse may have the full authority to manage, control and dispose of the entire community estate without the necessity of a guardianship, if the court does not find the spouse to be disqualified.

The standards for disqualification are those which apply to guardians. The qualification of a guardian of the estate does not take away control from the competent spouse over the community property.

GUARDIANSHIP FOR TEXANS WITH DISABILITIES
reprinted from Advocacy Inc.
www.advocacyinc.org

Eleventh Edition
October 2000

This booklet is intended to serve as a general guide for persons considering guardianship for family members or friends. Guardianship laws were written to apply to all citizens of Texas. Therefore, some special thought must be given to these laws as they are used for persons with disabilities. We have tried to present this information in non-technical language. Texas guardianship laws are so extensive that an exhaustive treatment is beyond the scope of this booklet.

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INTRODUCTION

This booklet is written primarily for parents and other family members of a person with disabilities. Its purpose is to introduce you to guardianship and give you the information you need in order to make an appropriate decision about guardianship for a family member who has a disability.

Guardianship is a legal device used to protect the rights and interests of an incapacitated person, defined as someone who cannot manage her personal and/or financial affairs by herself. In Texas, a guardianship can be appointed over the **person** or the **estate**, or both, of an incapacitated person. The court may grant the guardian **full authority** over the person, or may grant the guardian **limited authority** as indicated by the person's actual abilities. In each type of guardianship, the powers and duties of the guardian must be specifically stated. Where the guardian has limited authority, the court must design the guardianship to encourage the development or maintenance of maximum self-reliance and independence for the incapacitated person. The individual's needs determine the type of guardianship which is appropriate.

The law also provides for a **temporary guardianship**, when a person needs the immediate and **temporary** appointment of a personal representative, appointed by a judge with only the **limited** powers that the circumstances may require.

Guardianship may be the only way to solve some of the problems faced by you and your family member who is disabled. Other problems, such as an adult person not being able to handle large amounts of money or valuable property, might be solved without getting guardianship. Because guardianship can be complicated and costly, and will limit the options available to a person with a disability, you should consider other ways of solving the problem before seeking guardianship.

Generally speaking, most minors who have a disability (a *minor* includes almost everyone under age 18) will not need a guardian. This is because parents are the natural guardians (as opposed to court-appointed guardians) over the personal affairs of their children under age 18. For example, parents must give their consent for most kinds of medical services for their children until they reach age 18. Once a person turns age 18, however, parents are no longer natural guardians. Parents do not have the legal authority to make decisions for their adult child unless they are appointed guardian by a judge. This is true even if the adult has a disability. This means that the law presumes that the adult with disabilities can make all of her own decisions unless a judge has appointed a guardian for her or otherwise restricts her rights.

This booklet discusses the need for guardianship and some common problems of persons with disabilities that might be solved without getting a guardianship. This booklet also explains the types of guardianship, how to get a guardianship, and the responsibilities of the guardian. Finally, this booklet tells about resources available to you in guardianship matters, including: how to find a lawyer, private lawyers and legal aid services, and technical assistance for your lawyer. This booklet addresses appointment of a guardian for an adult with a mental or physical disability. Additional parts of the guardianship law govern the appointment of a guardian for a child, and a person who must have a guardian appointed to receive funds due the person from any governmental source. These topics are not addressed in this booklet.

I. THE NEED FOR GUARDIANSHIP

Many families first begin thinking about the need for guardianship of the person with a disability as her 18th birthday approaches. The family may be contacted by a staff person of an agency, state school, community Mental Health/Mental Retardation (MHMR) center, or community service provider suggesting that the family consider obtaining guardianship for the person with a disability. If you are contacted by such a staff person by telephone, by letter, or at a staffing, you should make an appointment to sit down and talk with that staff person. Find out exactly why the staff person is suggesting guardianship and what type of guardianship they are suggesting. Ask that staff person to describe to you the kinds of things the person with a disability can and cannot do and why guardianship is suggested. Study the list of alternatives to guardianship below and see if any of them would alleviate the need for guardianship. Finally, always be sure the decision to seek

guardianship is based totally on the needs of the person with a disability and not just for the convenience of someone providing services to the person with a disability.

How can you tell if your family member needs a guardian? Just because a person has a mental or physical disability does not mean that she must have a guardian. There is no easy test, but in considering whether or not your family member needs a guardian, you should look carefully at her ability to manage personal and financial affairs. These are the questions that the court will ask if you decide to seek a guardian. Some decisions that many adults with disabilities face are discussed below. If the person with a disability faces these decisions and is unable to make them for herself, and if other solutions are unavailable, then there may be need for some form of guardianship.

A. THE NEED FOR CONSENT FOR SERVICES

Many personal decisions involve giving consent for various things, such as medical treatment. Simply stated, giving your consent means giving your permission. For example, a doctor may have asked you to give your consent so that you could have a medical operation. As a parent, your consent may have been needed before your minor child could go on a school outing. Because minor children usually cannot legally give their own consent, their parents or guardians must give consent for them. But when a person reaches age 18, the law presumes he/she can give her own consent. This presumption means that the adult person with a disability will have the legal right to make all of her own decisions until a judge makes the decision that the presumption is wrong and appoints a guardian for the person with a disability.

Many adults with disabilities need services from a residential service provider, in-patient mental health facility (public or private), community MHMR center, or other service provider. Unless special legislation states otherwise (see below), the individual or a guardian must consent to the services before the person with a disability can receive services. Many persons with a disability, upon reaching age 18, are fully capable of making their own personal decisions and giving their own consent when it is needed. Others are not able to give consent. Appointment of a guardian is one way to solve the problems that arise when a person with a disability cannot give legally adequate consent.

If consent is needed and the requirements of legally adequate consent are met, the adult with a disability can give her own consent to the action or procedure. A person does not need to be able to read or write in order to give consent. If consent is needed and the adult with a disability cannot meet these requirements, a guardian may be needed to give consent for the person with a disability.

B. CONSENT IN INTERMEDIATE CARE FACILITIES FOR THE MENTALLY RETARDED, NURSING FACILITIES, & HOSPITALS

In 1993, the Texas Legislature passed a special law that allows for **surrogate decision-makers** for some residents of Intermediate Care Facilities for the Mentally Retarded (ICF-MR), nursing homes, and hospitals. If a resident of a community-based ICF-MR lacks the capacity to make a major medical or dental treatment decision, and is an adult who has no guardian or is under age 18 and has no parent, guardian, or managing or possessory conservator, an adult ***surrogate*** may consent on behalf of the resident. The surrogate decision-maker must have decision-making capacity and be willing to consent on behalf of the client. Consent given by the surrogate is valid and competent to the same extent as if it were given by the person with a disability herself. The surrogate must be chosen from the following list, in order of descending preference:

1. An actively involved spouse
2. An actively involved adult child who has the waiver and consent of all other actively involved adult children of the client to act as the sole decision-maker
3. An actively involved parent or stepparent
4. An actively involved adult sibling who has the waiver and consent of all other actively involved adult siblings of the client to act as the sole decision-maker
5. Any other actively involved adult relative who has the waiver and consent of all other actively involved adult relatives of the client to act as the sole- decision-maker

Surrogate decision-makers may not consent to experimental research, abortion, sterilization, electroconvulsive treatment, or management of client finances. If no guardian or surrogate decision-maker is available, the Texas Department of Mental Health and Mental Retardation (TDMHMR) must establish and maintain a list of individuals qualified to serve on a *surrogate consent committee*, to consist of three to five members. This committee (like the surrogate) may consent to major medical or dental treatment, psychoactive medication, or a highly restrictive procedure. Consent is based upon consensus of the committee members. Detailed requirements govern how the committee is established and how the committee functions. The committee's decision may be appealed to court.

Similar criteria are followed for the selection of a surrogate decision maker for an adult patient in a hospital or nursing home who: is comatose; lacks the ability to understand and appreciate the nature and consequences of a treatment decision; or is otherwise mentally or physically incapable of communication. This surrogate decision-maker may consent, on behalf of the patient, to medical treatment except for voluntary inpatient mental health services, electro-convulsive treatment, or a decision to withhold or withdraw life-sustaining treatment.

For a copy of these laws, contact Advocacy, Inc. Ask for a copy of SB 1142 for the law relating to consent in ICFs-MR, and for SB 332 for the law related to nursing homes and hospitals. The laws are detailed, but relatively easy to understand.

C. OTHER PERSONAL DECISIONS

Not all of the personal decisions an adult with a disability faces involve giving consent. A person receiving services from a state school, in-patient mental health facility (public or private), state center, or community MHMR center has many legal rights. For example, an adult with mental retardation has the right to participate in developing her program of services, the right to choose among alternative services where they are available, and the right to contest the results of a determination of mental retardation in an administrative hearing. Many adults with mental retardation are capable of asserting these legal rights, but some are not. If, as a factual matter, the adult with mental retardation cannot assert these rights herself, then it may be desirable for her to have a guardian to assert these rights.

D. ADMISSION TO RESIDENTIAL SERVICES

A guardian may not voluntarily admit an incapacitated person to a public or private inpatient psychiatric facility or to a residential care facility operated by TDMHMR. If such services are necessary, the guardian must apply for emergency or respite care or for involuntary commitment.

E. DECISIONS WHICH CAN BE MADE BY A GUARDIAN OF A PERSON WHO IS COURT COMMITTED

1. Persons with Mental Retardation Act

When a person is court committed to a state school, the commitment does not end if a parent gets guardianship. The person will still remain in the state school unless the interdisciplinary team of the state school agrees that the person should be placed elsewhere or discharged. If the state school wants to transfer a court committed person or move her to a community placement, it is not required to have the consent of the guardian to do this, but the guardian can ask for a hearing before a hearing officer to try to stop the transfer or move. If the guardian wants a transfer or move, she can also ask for a hearing. The state school or the guardian may appeal the hearing officer's decision to a court. An attorney's assistance would be helpful in asking for a hearing. Because the court orders a person to be committed to a state school for *care, treatment and training*, the state school is authorized by the Persons with Mental Retardation Act (MRPA) to provide medical care and other services for a court-committed person without consent from anyone. This means that a guardian may not usually stop the state school's program for a

court committed person (unless the school officials have violated other laws). The guardian has the right to see the person's records and can participate in the planning of programs at the staffings held by the state school or community center. The state school or community MHMR center is required to get the guardian's consent for surgical procedures.

2. Texas Mental Health Code

When a person is involuntarily committed to a mental health facility (either public or private), the facility is ordered to provide certain kinds of care by the court and is allowed to provide other kinds of care by the statute. A guardian would not legally be entitled to prevent the hospital from providing a particular kind of care (except in the case of electro-convulsive therapy which at the present time requires consent under a TDMHMR rule). Also, a guardian would not be able to demand that the hospital discharge the person. A guardian could ask a court to transfer the patient to a private facility. Also, any interested person may file an application with the court asking that the court look again to see if the person still needs to be committed to the mental health facility.

F. FINANCIAL DECISIONS

The law presumes that an adult with a disability can make her own financial decisions. Many adults with a disability are capable of handling their own financial affairs and do not need a guardian for this purpose. But if your family member with a disability wastes large amounts of money or signs contracts he/she does not understand, then you might consider guardianship so that the guardian can handle her financial affairs. However, it is important to remember that almost everyone, including those who are not disabled, makes mistakes of judgment in handling money and property. Remember this and, if possible, try to teach your family member with a disability how to handle finances before you turn to guardianship.

Some individuals are so severely disabled that it is unrealistic to expect them to manage their own financial affairs. If such persons have assets, property, or income that must be managed and none of the alternatives suggested in the next section are available, then a guardian may be needed to manage their financial affairs.

II. ALTERNATIVES TO GUARDIANSHIP

Some problems may be solved without guardianship. Since a guardianship is often costly and complicated, you should look into other possible solutions. A number of problems experienced by a person with a disability that might be solved without the need for a guardian are discussed below. Of course, these solutions will not work in every situation. For this reason, you should always consider carefully the circumstances surrounding your particular situation before deciding on a solution.

PROBLEM #1: Retail merchants do not want to make contracts with a person with a disability. *Example:* John Jones, a 24-year old man with mental illness, wants to buy a mobile home in which to live. Even though John has a full-time job with the City of Dallas and earns over $550 per month, Sam Smith, a local mobile home dealer, will not agree to give John credit. When asked for his reasons, Mr. Smith says he does not think John could make the monthly payments on time because John has mental illness.

Possible Solutions to Problem #1: Sam Smith is violating the Americans with Disabilities Act (ADA) by refusing to sell to John Jones because he has a mental disability. You may contact Advocacy, Inc. or a lawyer for help with filing a complaint under the ADA.
Whether or not you make a complaint under the ADA, if Mr. Smith cannot be convinced that John will make the payments, there are other solutions besides getting a guardianship and having the guardian make the agreement for John. One possible solution involves an insurer or guarantor. Both John and the insurer or guarantor sign the agreement for buying the mobile home. Under this agreement, John would be made primarily liable for the monthly payments and the insurer or guarantor would be made secondarily liable. This means that the insurer or guarantor promises that if John does not pay a monthly installment, then the insurer or guarantor will make the payment.

A third possible solution is a multi-party contract. In a multi-party contract, John and other persons who sign the contract are all primarily liable for the monthly payments. While the multi-party contract means that Mr. Smith can ask any of the parties who sign the agreement for the monthly payments, he might agree to first ask John to pay. If John does not pay, then Mr. Smith will expect the other parties on the contract to pay.

Many retail merchants who do not want to sign contracts with an adult with a disability are willing to sign contracts with the adult with a disability and an insurer, guarantor, or third party. This way, the merchant has someone other than the person with a disability to look to if that person does not pay.

PROBLEM #2: A person with mental retardation or mental illness will not be able to manage money or property that her parents plan to leave her when they die.

Possible Solution to Problem #2: Rather than getting a guardianship, parents could create a trust in their wills for the benefit of the person with mental retardation. A trust is a legal device which permits one person to mange the property and money of another person. Under state law, the first $50,000 in a trust for the benefit of a person with mental retardation cannot be taken by the State of Texas for her support and maintenance at a state school and the first $50,000 in a trust for the benefit of a person with mental illness cannot be taken for support and maintenance in a hospital or community setting. If a trust is created in the parents' will, it should name a trustee who will manage the money and property in the trust. The success of such a trust depends a great deal on who is chosen as the trustee. In most situations, it is desirable to have the trust managed by both a corporate trustee (like a bank) and by someone who knows and cares about the person with mental retardation or mental illness. You should know that the trustee has no legal power to make **personal** decisions for the person with a disability. This means that the trustee can only manage the financial assets in the trust but cannot make other personal decisions for the person with mental retardation or mental illness. You should consult with an attorney about the use of a trust for persons with disabilities before you take any other steps. For more information, see Advocacy, Inc.'s handout **Guidelines for Estate Planning for Parents of a Family Member with Disabilities**.

Because state law determines who receives a person's money and property when she dies if she does not have a will, it is very important for all persons to make a will. You should discuss this with your lawyer.

PROBLEM #3: An adult with a disability cannot manage money or property she now has. Example: Jane Wilshire, a 30-year old woman who has moderate mental retardation, is an accomplished oil painter. She earns $400- $800 each month for her paintings. Jane cannot manage this amount of money herself and she knows that someone else should manage it for her.

Possible Solution to Problem #3: If Jane wants to and is mentally competent to give someone else the power to manage her earnings for her, she can give this power to someone else by using a power of attorney. A power of attorney gives one person the power to act for another person. The person who receives the power of attorney has limited authority to act on behalf of the person who gave the power of attorney. The adult with a disability must be competent to give the power of attorney for it to be valid. You should ask a lawyer about the possible uses of a power of attorney. There is a state statute that allows a power of attorney to remain in effect if the person later becomes incapacitated, but the statute must be followed carefully and you should have the help of an attorney before you decide to do this.

PROBLEM #4: A person with a disability needs some guidance in spending her money, but there is no need to take away all her rights to manage her money.

Possible Solutions to Problem #4: One possible solution is to set up a checking account which requires that both the person with a disability and someone else (called a cosigner) sign the checks before they are valid. Your local banker may be able to assist you in setting up this kind of account. Another possible solution is to establish a checking account with a ceiling limit in the name of the person with a disability. This type of checking account does not allow the person with a disability to write valid checks over a certain amount. This might be combined with a second, pour-over account. As the person with a disability

writes checks on her own account, the pour-over account transfers money into her account to bring it up to the ceiling limit. This arrangement limits the size of the checks the person with a disability can write, but the money she takes out of her account can be replaced. This way, the person's account will not run out. You should check with your bank to see what their rules are for checking accounts. You also need to know whether a person who co-signs the check will have the right to get the money in the account and what happens to the money if one of the people dies.

There may be problems in setting up a checking account with a ceiling limit for a person with a disability. First, some banks may refuse to set up this kind of account. Second, in order for this solution to work, merchants must know how large a check can be written by the person with a disability. This may pose no problem in rural areas and in situations where the person with a disability deals with only a few merchants who know her well. One way to avoid this problem is to have the ceiling limit printed on the face of the check.

PROBLEM #5: A person with a disability cannot manage her Supplemental Security Income (SSI) benefits.

Possible Solution to Problem #5: If a person with a disability cannot manage her SSI benefits, a parent or other responsible person may become a representative payee. A representative payee is someone who can receive and spend SSI benefits for the support of a person with a disability. Check with your local Social Security Administration for information on how to become a representative payee. A representative payee is not the same thing as a guardian and does not have the same powers and authority a guardian has. A representative payee has only the authority to manage the SSI payments for the benefit of the person with a disability.

Problem #6: A person is incapacitated periodically by mental illness and is unable to make treatment decisions during the incapacitation.

Possible Solution to Problem #6: Under a new state law, a person can write down instructions for his mental health treatment--including medication, ECT, and emergency care--which generally must be followed by his doctors and other mental health providers if he becomes incapacitated. There is particular language that must be used to make an effective Declaration for Mental Health Treatment, also called an *advance directive*. Please see Advocacy, Inc.'s handout, **How to Make an Advance Directive**. To make an advance directive, a person must be capable of making mental health decisions but does **not** need to be capable of handling all matters, such as finances. An advance directive is effective from the time a person becomes incapacitated until he becomes competent again.

Unlike a power of attorney, described in Problem #3, the advance directive states the consumer's specific instructions for the treatment or medication which he prefers or wishes to avoid. The directive must be followed by doctors and mental health providers except in certain emergency situations. No other person needs to act on behalf of the consumer, and no one has discretion about the consumer's treatment or medication. Also, unlike a power of attorney, an advance directive cannot be revoked while the person who made the directive is incapacitated. This irrevocability during incapacitation is intended to afford a competent person an opportunity to prevent himself from making bad decisions while he is incapacitated.

PROBLEM #7: Jose Gonzales is a resident of an ICF-MR and is unable to understand the effects of the cancer he has and is unable to make treatment decisions. His condition will worsen and probably be terminal without treatment.

Possible Solution to Problem #7: Mr. Gonzales' siblings (or other qualified adults) may seek recognition by the ICF-MR as the surrogate decision-maker for Mr. Gonzales. They may then access all of Mr. Gonzales' records and consent to services, including treatment for the cancer, on Mr. Gonzales' behalf.

III. GENERAL CONSIDERATIONS ABOUT GUARDIANSHIP

After you have carefully examined the abilities of the person with a disability and her needs for assistance, and after you have determined that other alternatives will not give the assistance needed, then you will want to think about guardianship. In the next sections we will take a closer look at guardianships.

In 1993, the Texas Legislature made sweeping changes of the guardianship laws; changes that make guardianships more flexible. Under the current law, either the guardianship of the person or the guardianship of the estate may be full or limited, depending on the needs of the person with a disability. Previously, Texas law had provided for three distinct types of guardianship:

1. Limited guardianship
2. Full guardianship of the person or of the estate, or of the person and the estate
3. Temporary guardianship

Different legal requirements governed each type of guardianship, and each was applied for independently. With the 1993 changes, the court will examine each application for guardianship to determine whether the powers of the guardian should be limited or whether the guardian should have full authority over the person, the estate, or both. The law states that a guardian should have authority over a person with a disability only as indicated by the person's actual mental or physical limitations, and only as necessary to promote and protect the well-being of the person. When only limited authority is necessary, the court is to design the guardianship to encourage the development or maintenance of maximum self-reliance and independence for the person with a disability.

Temporary guardianships are still provided for by law, and few changes have occurred in those procedures. The 1993 amendments require that judges who handle guardianship proceedings will have received special training on issues related to people with disabilities and their rights. The training will include the principles of equal access and accommodation, community resources for people with disabilities, avoidance of stereotypes, duties of guardians, communication needs of people with disabilities and the right to the least restrictive alternative. This training should better prepare judges to understand the needs of people with disabilities and their guardians, and enable them to make more appropriate decisions regarding the powers and duties to be exercised by the guardian, and those to be retained by the person with a disability.

A. THE NEED FOR AN ATTORNEY

The law in Texas requires you to have an attorney in a guardianship proceeding because a guardianship changes the legal relationship of the **ward** (the person who has a guardian) to other people in very important ways. It also places responsibilities on guardians, and courts can fine and even imprison guardians who violate the law. A lawyer can help in explaining these changes and responsibilities and in making certain that the guardianship papers are written so that they will do exactly what you want them to do. There are complicated rules of procedure for filing the necessary papers, presenting evidence, examining and cross-examining witnesses, and for making objections to the testimony of witnesses. For these reasons, it is important that you have a lawyer to file the necessary papers with the court to represent your interests at the hearing, and to help you with required annual accountings. A separate lawyer, called the **attorney ad litem**, will be appointed by the court to represent the person with a disability.

B. CHOOSING THE GUARDIAN

Another concern is the selection of the person who will be the guardian. It is very important to select a guardian who is acceptable to the person with a disability and who sincerely and unselfishly cares for the person with a disability. In addition, the guardian of a person with a disability should live near that person so that the guardian can direct her care, treatment, and training. Even if the person with a disability lives

at a state school or state hospital, the guardian should be willing and able to visit the person regularly to make sure that good care, treatment, and training are provided. Finally, because a person with a disability generally has a normal life span, preference should be given to someone close in age or younger than the person with the disability.

Some persons cannot be guardians. These ineligible persons include:

- Minors (most persons under age 18)
- Persons whose conduct is notoriously bad
- An incapacitated person (someone who cannot care for herself)
- Persons who themselves or whose parents are involved in a lawsuit which may affect the welfare or property of the person with a disability (unless an exception is made by the court)
- Persons who owe the person with a disability money or property, unless they pay the debt before becoming guardian
- Persons making any claim adverse to the person with a disability or to land or personal property owned by the person with a disability
- Persons who, because of inexperience, lack of education, or other good reason, cannot properly manage and control the person with a disability and her property
- A person, institution, or corporation found unsuitable by the court
- A non-resident who has not filed with the court the name of a resident agent to accept service of process regarding the guardianship

The guardian is chosen according to the circumstances and considering the best interests of the person with a disability. Texas law sets out those persons who have preference in being appointed guardian if they are eligible, i.e., they are not in one of the categories listed above. The spouse (husband or wife) of an adult with a disability, if eligible, is entitled to be appointed guardian before anyone else. If a person with a disability has no qualified spouse or if the spouse does not want to be guardian, the nearest eligible kin (parents, children, brothers and sisters, aunts and uncles, etc.) is entitled to be guardian. If both the spouse and nearest kin are ineligible or do not want to be guardian, the court will appoint the eligible person who is best qualified to serve. A private or public agency which serves a person who is incapacitated may be appointed guardian, but only as a last resort.

The judge is required to make a reasonable effort to consider the preference of the person with a disability in selecting the guardian. The judge does not have to follow the person's wishes, but she must *give due consideration* to the preference of the person with a disability. A minor who is at least 12 years of age may also express a preference for a guardian. The court may approve the choice if it determines that the choice is in the best interest of the minor.

It is presumed not to be in the best interests of a person with a disability to appoint a person as guardian if the person has been finally convicted of any sexual offense, sexual assault, aggravated assault, aggravated sexual assault, injury to a child, abandoning or endangering a child, or incest.

C. INDIVIDUAL RIGHTS WHICH CANNOT BE TRANSFERRED TO A GUARDIAN

1. Marriage: Because marriage is a personal right, the right to make decisions about marriage cannot be transferred to a guardian. Texas courts say a marriage is valid unless an individual is shown incapable of consenting to it. If a person who is incapacitated marries without the ability to consent to the marriage or to understand the ceremony, the proper solution may be to have the marriage annulled.

2. Voting: Voting is another personal right which cannot be transferred to a guardian.

3. Sterilization: Under Texas law, only the person to be sterilized can consent to the sterilization. The following people do not have the authority to consent to a non-medically necessary sterilization or abortion: parent, a full guardian, or a limited guardian. Furthermore, in Texas law, a judge cannot give a guardian the power to consent to a non-medically necessary sterilization for a person who is incapacitated.

The Texas courts have not decided whether or not a medically necessary procedure which results in sterilization may be authorized by a full guardian or a limited guardian who has the power to consent to medically necessary procedures. Because of the strong prohibition against involuntary sterilizations, a court order may be desirable for medically necessary procedures which result in sterilization.

In some other states outside of Texas, judges have authorized guardians to consent to non-medically necessary sterilizations if strict procedures are followed to safeguard the rights of the person who is incapacitated. Such a change in Texas can only be brought about by a change in the law by the Texas Legislature or by a Texas Supreme Court decision.

D. MOVING TO ANOTHER STATE

Guardianship laws differ from state-to-state. If you move from Texas, you should have your guardianship reviewed by a lawyer in your new state.

IV. GUARDIANSHIP FOR PERSONS WHO ARE INCAPACITATED

In Texas, an **incapacitated person** is defined as an adult who, because of a physical or mental condition, is substantially unable to provide food, clothing, or shelter for herself, to care for her own physical health, or to manage her financial affairs. The law permits limited guardianships for persons who are incapacitated but who are capable of managing some, but not all, of their personal or financial affairs. It is important that you and your lawyer decide together, and with input from professionals who are familiar with the person's abilities and disabilities, what you think will be the most appropriate form of guardianship for the needs of the person with a disability, and what limitations there should be on the guardian's powers.

In growing up and assuming responsibility, in learning to live on our own and to deal with our own affairs, and in learning to deal with other persons both socially and in our work, we all make mistakes. We often learn through our mistakes. Take time to think about your own mistakes in life and do not be too quick to assume that your family member who has a disability cannot deal with her rights just because she may make some mistakes.

A. APPLICATION FOR GUARDIANSHIP

A guardianship proceeding is started by filing a written application in the proper probate or county court. The proceeding is the same for a guardianship of the person or of the estate, or both, and for a guardian with full or limited powers. The application must contain at least the following information:

- basic information about the person with a disability and the person the applicant desires to have appointed as guardian, including name, relationship, address, and date of birth
- whether a guardian of the person or estate, or both is sought
- the nature and degree of the alleged incapacity, the specific areas of protection and assistance requested, and the limitation of rights requested to be included in the court's order of appointment
- the facts requiring that a guardian be appointed and the interest of the applicant in the appointment
- the nature and description of any existing guardianship
- the name and address of any person or institution having care and custody of the proposed ward
- the approximate value and description of the property of the person with a disability
- the requested term of the guardianship
- the name and address of any person whom the applicant knows to hold a power of attorney by the proposed ward and a description of the type of power of attorney
- facts showing that the application is filed in the correct court
- if applicable, that the person whom the applicant desires to have appointed as a guardian is a private professional guardian who has met the requirements of the law

Any person has the right to commence or appear and contest any guardianship proceeding **unless** he or she has an interest that is adverse to the proposed ward or incapacitated person. It is important that you have a lawyer file the necessary court papers and to represent you at the guardianship hearing. The lawyer will probably want to meet with you to get the information needed in order to file the application with the county or probate court.

B. NOTICE

Once the application for guardianship is filed, a court official will personally serve a copy of the notice to the person with a disability, and her parents, and any conservator or person having control of the care and welfare of the person with a disability. The following other individuals (if their whereabouts are known) will receive notice by mail: the spouse, siblings and all children of the proposed ward; the administrator/operator of a nursing home or other residential facility in which the proposed ward lives; and any person holding a power of attorney for the proposed ward. The notice notifies the person that the application for guardianship has been filed, and that they must appear and answer the application if they wish to contest the application.

The person with a disability must actually receive the notice. Giving notice to staff at the residential facility in which he/she resides or to her parents is not enough. The court may not act upon an application for a guardianship until the Monday following the expiration of ten days from the date of receipt of this notice.

C. APPOINTMENT OF ATTORNEY AD LITEM, GUARDIAN AD LITEM, COURT INVESTIGATOR & INTERPRETER

Once the application for guardianship has been filed, the court will appoint an **attorney ad litem** to represent the interests of the person with a disability. To serve as an attorney ad litem, the attorney must be certified by the State Bar of Texas as having successfully completed a course of study in guardianship law and procedure sponsored by the state bar. (This is not required of attorneys who served as an attorney ad litem in a guardianship proceeding before September 1, 1993) The certificate must be renewed every two years.

The 1993 amendments require the state bar to provide a course of instruction for attorneys who handle guardianship cases. The course must include at least the following: information about the law, the nature of disabilities, laws protecting the rights of people with disabilities, principles of equal access and accommodation, community services for people with disabilities, and avoidance of stereotypes through a focus on people's individual abilities, support needs, and inherent individual value. This should improve the quality of legal representation received by people with disabilities and applicants for guardianship.

The attorney ad litem is required by law to interview the person with a disability within a reasonable time before the hearing. To the greatest extent possible, he or she must discuss with the proposed ward the law and facts of the case, the legal options, and the grounds on which guardianship is sought. Before the hearing, the attorney ad litem must review all relevant records.

The judge may also appoint a **guardian ad litem** to represent the interests of the person with a disability in the guardianship proceeding. The guardian ad litem is an officer of the court and is charged with helping the court to determine what action will be in the best interests of the person with a disability. The guardian ad litem is paid for her services.

Each statutory probate court (which is generally only found in large cities) must have a **court investigator** who must investigate the circumstances alleged in each guardianship application to determine whether a less restrictive alternative than guardianship is appropriate, and file the findings with the court. Commissioners' courts may authorize additional court investigators.

If a language **interpreter** or sign language interpreter is needed to ensure effective communication between the person with a disability and the attorney, one should be appointed at the time of the appointment of the attorney ad litem.

For the first time, the 1993 amendments give the court the authority to authorize payment out of funds of the ward's estate to the **attorney who filed the application** for the guardianship, in addition to the attorney ad litem. To do so the court must find that the attorney acted in good faith and for just cause in filing the application.

D. COURT VISITOR PROGRAM

Each statutory probate court is required to operate a court visitor program to assess the conditions of wards and proposed wards. Any interested person, including a ward or proposed ward, may request an assessment either during an existing guardianship or prior to the appointment of a guardian. Upon request or on its own motion, the court may appoint a court visitor to evaluate the ward or proposed ward and provide a sworn written report to the court within 14 days that must include the following information:

- A description of the nature and degree of capacity and incapacity of the ward or proposed ward, including the medical history of the ward or proposed ward, if reasonably available and not waived by the court
- A medical prognosis and a list of the treating physicians of the ward or proposed ward, when appropriate
- A description of the living conditions and circumstances of the ward or proposed ward
- A description of the social, intellectual, physical, and educational condition of the ward or proposed ward
- A statement that the court visitor has personally visited or observed the ward or proposed ward
- A statement of the date of the most recent visit by the guardian, if one has been appointed
- A recommendation as to any modifications needed in the guardianship or proposed guardianship, including removal or denial of the guardianship
- Any other information required by the court

The court visitor programs will rely heavily on volunteer court visitors, but those that have not expressed a willingness to serve without compensation will be compensated in an amount set by the court that is taxed as costs (meaning that it is paid out of the funds of the ward or the county if there are no funds of the ward).

E. USE OF RECORDS

Current and relevant medical, psychological, and intellectual testing records of the proposed ward must be provided to the attorney ad litem before the guardianship hearing, unless the court finds that no such records exist and it is impractical to examine the person with a disability to create such records. Current records are sufficient, i.e., updates will not be necessary where existing records are *current*.

If the guardianship is sought over a person who has mental retardation, the individual must be examined by a physician or psychologist licensed in Texas or certified by TDMHMR, unless he/she has been examined in accordance with TDMHMR rules within the six months prior to the hearing on guardianship. The findings and recommendations of the physician or psychologist must be submitted in writing to the court. If the proposed ward is unable to pay for the cost of the examination, the county is responsible for the costs.

If the guardianship is sought over a person whose disability is other than mental retardation, the court must receive a written letter or certificate from a physician licensed in Texas before granting an application for guardianship. The certificate must be dated within 120 days prior to the hearing on guardianship. It must state that the person for whom the guardianship is sought is incapacitated and

generally describe the extent of the incapacity. If necessary, the court may appoint a physician to examine the proposed ward. If appointed, the physician must make available to the attorney ad litem a report that:

- Describes the nature and degree of incapacity
- Provides a medical prognosis specifying the estimated severity of the incapacity
- States how the proposed ward's ability to make or communicate responsible decisions concerning herself is affected by the person's physical or mental health
- States whether any current medication affects the demeanor of the proposed ward or the proposed ward's ability to participate fully in a court proceeding
- Includes any other information required by the court

F. HEARING

At the hearing, the judge or jury will decide whether or not the person is in fact incapacitated. That requires the court to inquire into the ability of the person with a disability to feed, clothe and shelter herself, to care for her own physical health, and to manage her property or financial affairs. Also, the court will look at the proposed guardian's qualifications and abilities.

In all guardianship proceedings, the person with a disability must be present at the guardianship hearing unless the court, on the record, determines that personal appearance is not necessary. At or before the hearing, the judge should ask the person with a disability who he/she wants to be the guardian. The person with a disability may not want a guardian, but the judge must hear her reasons to make a wise decision. If the reason for guardianship is explained well to the person with a disability, and if it is presented positively as a way of helping her with her rights, she will probably benefit from appearing in court. In addition, whenever a person is given a chance to express her feelings and to take part in a decision which affects her, he/she is more likely to feel better about that decision. The person with a disability will probably feel better if he/she knows that other people respect her feelings and care enough to listen to what he/she has to say. If there are no serious medical, psychological, behavioral, or emotional problems, the person with a disability should attend.

The person with a disability has a right to have her own lawyer. If the person with a disability wants a lawyer but cannot pay for one, the court will appoint and pay for the lawyer (called the attorney ad litem). If he/she asks for it, the person with a disability has a right to have a jury, rather than the judge, make the decision about guardianship. The hearing is open to the public, but may be private if the person with a disability or her lawyer asks for it.

G. APPOINTMENT OF A GUARDIAN

Before appointing a guardian, the court must find by clear and convincing evidence that the person with a disability is an incapacitated person as defined above. Evidence of the incapacity must include recurring acts or occurrences within the preceding six-month period and cannot be based upon isolated instances of negligence or bad judgment. The court must also find that:

- The application is filed in the proper court
- The person to be appointed guardian is eligible to act as guardian, and is either entitled to be guardian or a proper person to act as guardian
- The rights of persons or property will be protected by the appointment of a guardian

The incapacitated person (called the **ward**) for whom a guardian is appointed retains all legal and civil rights and powers except those specifically granted to the guardian by court order. Therefore, the court order must be specific about the type of guardianship and the powers and duties of the guardian.

If the court finds that the proposed ward is totally without capacity to care for herself and to manage her property, the court shall include that finding in its final order and may appoint a guardian of the person or estate, or both, with full authority over the incapacitated person except as provided by law.

If the court finds that the proposed ward lacks the capacity to do some but not all of the tasks necessary to care for herself or to manage her property, the court may appoint a guardian with limited powers and permit the individual to care for herself or to manage her property commensurate with the individual's ability. The guardian has only those powers spelled out in the court order. Any powers not specifically granted to the guardian may continue to be exercised by the person with a disability.

If the court finds that an adult person can care for herself and manage her property as would a reasonably prudent person, the court must dismiss the application for guardianship.
The order appointing the guardian must contain the following:

- The name of the person appointed guardian and of the ward
- Whether the guardian is of the person, the estate or both
- The amount of bond required
- The names of appraisers for the estate, if necessary
- The specific powers, limitations or duties of the guardian with respect to the care of the person or the management of the person's property by the guardian
- If necessary, the amount of funds from the person's estate that the court will allow the guardian to expend for the education and maintenance of the person. The court order must authorize the guardian to expend funds of the guardianship to care for and maintain the ward.

A person can be appointed **guardian of the person, guardian of the estate**, or **guardian of the person and estate**. Usually only one person may be appointed guardian over another person's personal or financial affairs. A husband and wife may together be appointed guardian of the person, guardian of the estate, or guardian of the person and estate. The appointment of other joint guardians cannot be made in Texas, unless they were previously appointed co-guardians in another state, but one person may be named guardian of the person and a different person named guardian of the estate if a court is satisfied that this will be advantageous to the ward.

A guardian is not liable to a third person for the conduct of her ward solely because of the guardianship.

An order appointing a guardian may specify a period of up to one year during which a petition for a finding that the ward no longer requires the guardianship may not be filed without special leave.

All orders in guardianship matters must be made in open court.

H. GUARDIANSHIP OF THE PERSON

The 1993 law allows for more flexible guardianships. The guardian of the person or the estate may have full or limited powers, depending on the needs of the person with a disability. If a guardian is appointed to manage the ward's personal affairs, she is called the **guardian of the person**. A guardian of the person is given the power to make personal decisions, such as where the ward should live, what services she should receive and what medical care she should have. The law spells out certain duties of the guardian of the person who has full authority over the ward:

- The right to have physical possession of the ward and to establish the ward's legal residence
- The duty of care, control and protection of the ward
- The duty to provide the ward with clothing, food, medical care, and shelter
- The power to consent to medical, psychiatric, and surgical treatment other than the in-patient psychiatric commitment of the ward

The court may limit any of these powers of the guardian of the person, depending on the needs of the ward. The guardianship should encourage the development of maximum self-reliance and independence in the ward.

The guardian may expend funds of the guardianship as provided by court order to care for and maintain the ward. Expenses for things that are necessary for the ward to maintain life, and necessary medicines and the services of medical personnel are proper expenses to be paid by the guardian for the ward out of the ward's estate. The ward's estate is based on any money, property, or income that the ward has, and is not based on the financial assets of the guardian. This is true even if the person with a disability lives with the guardian. While a guardian usually does not have to use her own money to care for the ward, the guardian will probably be found to have a duty to do everything in her power to see the ward receives the services that are within the responsibility of the guardian to oversee. Being a guardian of the person can involve many responsibilities and duties and should be taken very seriously.

I. GUARDIANSHIP OF THE ESTATE

The guardian who manages the ward's financial affairs and property is called the guardian of the estate. Many persons with a disability will not have an estate large enough to require the services of a **guardian of the estate**. However, for those wards for whom a guardian of the estate is necessary, the relationship of the guardian to the ward is one of great trust. The laws require strict inventory, implementation of responsibility, and regular accounting for a guardianship of the estate.

The guardian of the estate who is given full authority by the court is responsible for the possession and management of all properties belonging to the ward. The guardian must also collect all debts, rentals, or claims that are due to the ward, enforce all obligations, and bring and defend lawsuits by or against the ward. It is the duty of the guardian of the estate to take care and manage the ward's estate as a prudent person would manage her own property. If the guardian fails to maintain the estate as a prudent person would, the guardian must account to the court for all rents, profits, and revenues that the estate would have produced by such prudent management. Courts can and should limit the authority of the guardian when the person with a disability has the mental and physical capability of managing some of their own financial affairs, so as to encourage the development or maintenance of maximum self-reliance and independence for that person.

A guardian of the estate does not have title to the ward's property, only the right to its custody and management. The guardian of the estate is required to take possession of the personal property, record books, title papers, and other business papers of the estate of her ward. The guardian is responsible for managing the estate of the ward. The personal financial assets of the guardian are not included as a part of the ward's estate, even if the ward with a disability lives with the guardian.

It is the duty of the guardian of the estate to file an annual accounting with the court. The guardianship laws contain specific instructions about this annual report and about all other actions the guardian of the estate may or may not take. A guardian's ignorance of the law is not an excuse for failures or errors, since the law requires the guardian to acquaint herself with those duties and to perform them. In certain instances, the guardian of the estate may be entitled to compensation for the performance of her duties.

The responsibilities of the guardian of the estate are numerous, and the requirements for reports that they must file are detailed. This booklet does not attempt to address these requirements. The guardian of the estate also has financial liability for mistakes or misconduct. We strongly urge anyone appointed guardian of the estate to seek legal advice from an attorney experienced in such matters. Advocacy, Inc. attorneys will not be able to advise you on the responsibilities of the guardian of the estate.

J. LIMITATIONS ON THE AUTHORITY OF THE GUARDIAN

The 1993 amendments require that the court examine each application for guardianship and determine whether the powers of the guardian should be limited or whether the guardian should have full authority over the person, the estate, or both. The guardian should have only that authority as indicated by the person's actual mental or physical limitations, and only as necessary to promote and protect the well-being of the person. If authority is to be limited, the court must design a guardianship to encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person.

If you believe that the incapacitated person lacks the capacity to do some but not all of the tasks necessary to care for herself or to manage the property, you will want to think carefully about which powers and duties should be requested for the guardian so that he/she may adequately protect the interests of the person who is incapacitated while at the same time allowing the person to retain the right to make the decisions that he/she is able to make alone.

While the 1993 law does not list any specific powers that might be granted to a limited guardian, the previous law did list some examples that are still helpful. These are listed to give you an idea of some powers that might be granted to a guardian if the person who is incapacitated is not able to do these things herself. Possible powers include:

- The power to possess and to manage the properties of the person who is incapacitated
- The power to collect or to file suit on debts, rentals, wages, or other claims owed to the person who is incapacitated
- The power to contract or to make other obligations for the person who is incapacitated
- The power to pay, settle, or defend claims against the person who is incapacitated
- The power to spend money for the care of the person who is incapacitated
- The power to apply for non-residential care and other services, such as mental health and mental retardation services, for the person who is incapacitated. The guardian **may not** admit the person who is incapacitated to inpatient psychiatric services or a residential care facility operated by TDMHMR without the consent of the person who is incapacitated.

These are the possible powers of a guardian suggested in the law. Other powers of the guardian which may be needed might include such things as:

- The power and duty to apply for and to receive governmental funds for which the person who is incapacitated is eligible, including:
    - Supplemental Security Income Benefits (SSI)
    - HUD Section 8 Rent Subsidies
    - Childhood Disability Benefits under the Old-Age, Survivors and Disability Insurance Program (OASDI)
    - Aid to Families with Dependent Children (AFDC)
- The power and duty to apply for and to consent to needed psychological and psychiatric testing for the person who is incapacitated
- The power and duty to consent to medical tests needed by the person who is incapacitated
- The power and duty to consent to needed medical and dental treatment for the person who is incapacitated
- The power and duty to get insurance for the person who is incapacitated
- The power and duty to file required federal income tax returns for the person who is incapacitated
- The power and duty to get a needed identification card for the person who is incapacitated
- The power and duty to help the person who is incapacitated to get appropriate vocational training and to secure a job
- The power and duty to help the person who is incapacitated to find a place to live
- The power and duty to help the person who is incapacitated to get a driver's license
- The power and duty to help the person who is incapacitated get an appropriate education

- The power and duty to take part in developing the individual education, habilitation and program plans of the person who is incapacitated
- Where the incapacity is mental retardation, the power to propose or to contest a proposed transfer or discharge of the person who is incapacitated from a state school, state center, or community MHMR center
- The power to review and to consent to the disclosure of the confidential records of the person who is incapacitated
- The power to make purchases for the person who is incapacitated that cost in excess of a specified amount

K. LETTERS OF GUARDIANSHIP, OATH, & BOND

Once a guardian is appointed, she must take an oath that she will faithfully perform her duties. The oath must be taken before a person who can give oaths under Texas law, such as a notary public, court clerk, or justice of the peace. The person appointed guardian must taken the oath within 20 days after the guardianship is granted. When an appointed guardian takes an oath and files a bond, the court will issue letters of guardianship and the guardianship is then effective.

The amount of the bond (also called the penalty of the bond) depends on the duties and powers granted the guardian and the value of the assets, property, and income that are to be managed by the guardian. If there is only a guardianship of the person, the judge will usually set the bond for a relatively small amount. The reason for the bond is to make sure that the guardian faithfully performs her powers and duties. If the same person is appointed guardian over personal and financial affairs, then the amount of the bond depends only on the value of the property of the person with a disability. A bond is not required if the guardian is a corporate fiduciary.

If the guardian manages property and/or money of the person with a disability, then the judge will need to set the bond high enough to protect the person's property and money, and any creditors. Before setting bond, the judge will hold a hearing to determine in detail the value of the property of the person with a disability and the income she will likely receive over the next year and any debits owed by the ward. This may include the value of the land, personal property, stocks and bonds, notes receivable, salary, stock dividends, and interest on savings accounts, of the person with a disability. The judge will also determine the amount needed for administering the guardianship.

Payments from the Social Security Administration will not be considered when the judge sets the amount of the bond, but other kinds of governmental payments may be included. The judge may order that some of the cash, stocks and bonds, and personal property of the person with a disability be placed out of the guardian's control in safekeeping (usually at a bank). Or, if the court agrees, the guardian herself may place the cash, securities, or personal property of the person with a disability in safekeeping. If these assets cannot be taken out of safekeeping except on the judge's order, then the value of that property is not included in the amount of the bond the judge sets. Judges have a great deal of discretion in setting the amount of the bond and in deciding how the bond is made. For this reason, the practice of setting bond may vary throughout the state. It is best to talk with your attorney before the hearing to find out what bond, if any, will be required by the judge.

The letters of guardianship expire one year and 120 days after the date of issuance unless renewed. They are renewed when the court receives and approves the guardian's annual accounting.
Judges may enforce orders against a guardian by attachment and imprisonment for up to three days.

L. ACCOUNT & INVENTORY

At least annually, judges are required to examine the well-being of each ward. In order to help the judge, several reports must be filed annually by the guardian.

Within 90 days of being appointed, any guardian who is managing properties must prepare and file a verified inventory of all known property of the incapacitated person, including a statement of all encumbrances, liens, and other secured charges on any item. The court then examines and approves the inventory, or requires another inventory to be done. The judge may get three appraisers to determine the value of the estate of the person with a disability. If the judge doesn't, then the guardian must determine the fair market value of the ward's property with the appraisers' help. The judge will also want a list of all debts (also called a List of Claims) owed the ward.

The guardian of the estate must annually file, within 60 days of the anniversary date of the guardian's appointment, a written sworn account of the guardian's administration of the guardianship of the estate. The guardian is required to take care of and manage the property as a prudent person would manage the person's own property. It is very important that the guardian be able to show that she has taken good care of the ward's property. Extensive information is required to be supplied in the account, and we recommend that an attorney be consulted for assistance with the inventory and at least the first annual report.

When there is a separate guardian of the estate, the guardian of the person must annually file a sworn account showing each item of receipts and disbursements for the support and maintenance of the ward, the education of the ward, and support and maintenance of the ward's dependents (when authorized by order of court). Each guardian of the person, whether or not there is a separate guardian of the estate, must file with the court a sworn annual report that updates the court on the status of the ward's activities, residence, health, etc. Extensive information is required to be supplied in the report, and we recommend that an attorney be consulted for assistance with at least the first annual report.

If a guardian fails to file any required report or accounting, the guardian may be cited to appeal before the court. There will be a hearing and the court may order the report to be filed, may revoke the letters of guardianship and may fine the guardian up to $1,000.

M. COMPENSATION OF GUARDIAN & COSTS AGAINST A GUARDIAN

A guardian is entitled to be reimbursed from the guardianship estate for all necessary and reasonable expenses incurred in performing any duty as guardian. All expenses charged to the estate must be in writing, specifying each item of expense and the date of the expense; verified by an affidavit signed by the guardian; and filed with the court.

A court may authorize compensation for a guardian of the person from available funds of the ward's estate. The compensation may not exceed five percent of the ward's income. The court must consider the ward's monthly income from all sources before awarding compensation to the guardian.

The guardian of the estate is entitled to a fee of five percent of the gross income of the ward's estate and five percent of all money paid out of the estate, if the court finds that the guardian has taken care of and managed the estate in compliance with the law. If the fee is an unreasonably low amount, the court may authorize reasonable compensation. The court may also deny a fee in whole or in part if the court finds that the guardian has not adequately performed her duties or if the guardian is removed for cause.

Costs of the guardianship proceeding, including the costs of the guardian ad litem and court visitor, are paid out of the guardianship estate. If the estate is too small to pay these costs, they are paid by the county.

When a guardian neglects to perform a required duty or is removed for cause and costs are incurred, the guardian and the sureties on the guardian's bond are liable for the costs of removal of the guardian and any other costs that were not expenditures authorized by the court, including attorney's fees.

N. ANNUAL REVIEW REQUIRED

A very important change in guardianship law is the new requirement that the courts must annually review each guardianship to determine whether the guardianship should be continued, modified, or terminated. The guardianship is reviewed by the court in which the guardianship proceedings were held. A statutory probate court must review the report prepared by the court investigator and the report prepared by the court visitor. The court may conduct a hearing if necessary. Courts other than statutory probate courts may use any appropriate method to review the guardianship, with consideration to the court's caseload and the resources available to the court.

O. REMOVAL OR MODIFICATION OF GUARDIANSHIP

The ward, or any person interested in the ward's welfare, may petition the court for an order finding that the ward no longer needs the guardian and ordering the guardian to resign or be removed. The court may find that the ward lacks the capacity to take care of herself or manage property and grant additional powers to the guardian. The court may also find that the ward has regained the capacity to do some, but not all, of the tasks necessary to care for herself and limit the power or duties of the guardian and permit the ward to exercise those powers commensurate with her ability.

A request for an order modifying the guardianship or removing the guardian may be by an informal letter to the court. Anyone who interferes with the transmission of the request to the court may be adjudged guilty of contempt. Grounds for removal include:

1. Neglecting to qualify as guardian in the manner and time required by law
2. Failing to return an inventory of the estate within 90 days after qualification as guardian
3. Failing to post bond
4. Leaving the state for three months or more without permission of the court
5. Failing to inform the court of the guardian's whereabouts or avoiding service of process
6. Misapplying, embezzling or removing the wards property from the state, or other gross misconduct
7. Treating a ward cruelly, or neglecting to educate or maintain the ward as liberally as the means of the ward and the conditions of the ward's estate permit
8. Mismanaging the ward's estate or personal affairs
9. Failing to obey an order of the court to return any account required by law
10. Interfering with the ward's progress or participation in programs in the community
11. Being sentenced to prison
12. Becoming incapacitated or in any other way becoming incapable of properly performing the duties of the guardian's trust
13. Failing to register as a private professional guardian

When a guardian is removed, the court enters an order stating the reason for removal and revoking all Letters of Guardianship, whether delivered or not. If the guardian was personally served with citation, the guardian may be required by the court to surrender any Letters of Guardianship in the guardian's possession. The order will also require the removed guardian to deliver any property remaining in the guardian's hands to the persons entitled to it or to the successor guardian, if one is appointed and qualifies. If the removed guardian was a guardian of the person, the order will require the removed guardian to relinquish control of the person with a disability.

Any person interested in a guardianship may allege, in writing filed with the court, that the guardian's bond is insufficient. The court will order the guardian to appear and will inquire into the sufficiency of the bond. The court may order a new bond, and the guardian's powers are suspended until the new bond is approved by the court. A guardian may resign by filing with the court a written application for resignation, accompanied by a final accounting (if guardian of the estate) and an annual report (if guardian of the person).

P. SUCCESSOR GUARDIANS

Texas law permits the appointment of a successor guardian if the first guardian dies, resigns, or is removed. Successor guardians take on all the rights, powers, and duties that the first guardian had. Successor guardians can be named at the time the initial guardian is named, or at a later date, upon application to the court and notice as directed by the court.

Q. ENDING THE GUARDIANSHIP

The guardianship does not end if the guardian dies, resigns, or is removed. In these cases, a guardianship remains in effect, though no person serves the role of guardian until a successor guardian is appointed by the court. However, there are times when the guardianship itself ends. If the ward is a minor, then the guardianship ends when she reaches age 18, marries, or when a court says she has the rights of an adult. If the ward is an adult, then the guardianship ends when the ward dies, or when the court sets aside a guardianship and restores all rights to the former ward upon a showing that the ward is now able to manage her own personal affairs. Guardianship of the estate ends when:

- The adult with a disability becomes able to manage her own financial affairs
- The estate of the adult with a disability is completely used up
- The judge decides that the person's income is too small to continue the guardianship
- The guardian of the estate is removed by a court

A final accounting is needed whenever a guardianship of the estate ends. In cases where there is a guardianship of the person and estate and the guardianship of the estate ends, the guardianship of the person may continue, if necessary.

R. COSTS

For most guardianship proceedings the greatest costs are the lawyer's fees. Guardianship proceedings are complicated and time consuming. For this reason, you should do everything you can to help your lawyer and to keep the lawyer's fees as low as possible. For some tips on cutting the lawyer's fees, see the **Resources** section at the end of this booklet.

There are also *court costs*. While there may be other costs, the *court costs* for a full guardianship include a filing fee, which varies from county to county. In some counties this fee is as high as $250. You will probably want to check with your lawyer about how much the court costs will be for your case. If the person with a disability is found to need a guardian, the costs of the full guardianship proceeding can be paid out of the persons' estate. There are also court fees for the annual accountings and other papers that will be filed in later years. As discussed earlier, there may be other costs if the judge sets a bond. Under certain circumstances, a court may order that the fees be waived because the person is unable to pay them.

S. APPLICATION OF THE NEW AMENDMENTS TO EXISTING GUARDIANSHIPS

A court may modify any guardianship in effect on September 1, 1993, to conform to the requirements of the 1993 amendments. The court may make such modifications on its own motion, or on application of the ward, the guardian or any other interested party.

Proceedings for appointment of a guardian that were filed before September 1, 1993, are governed by the law in effect at that time. These amendments apply only to proceedings for the appointment of a guardian that were instituted on or after the effective date of these amendments.

V. TEMPORARY GUARDIANSHIP

Texas law permits the appointment of temporary guardians for certain persons if the court has probable cause to believe that the person, the person's estate, or both require immediate appointment of a guardian. If the person with a disability does not have an attorney, one will be appointed by the court to represent her.

The court may appoint a temporary guardian before a written application for temporary guardianship has been filed, but the application must be filed before the end of the next business day. The application may be filed before the appointment. The application shall state:

1. The name and address of the person for whom the guardianship is sought
2. The danger to the person or property that is alleged to be imminent
3. The type of guardianship requested (of the person or estate)
4. The type of help and protection the person needs
5. All of the facts and reasons supporting the request for a temporary guardianship
6. The name, address, and qualifications of the proposed temporary guardian, and whether that person is a private professional guardian
7. The name, address, and interest of the person filing the application
8. The Social Security numbers of the applicant and the proposed ward

A hearing must be held within ten days of the date of filing the application and the person for whom the guardianship is sought will have the following rights:

1. Prior notice (This means the person must have been formally served with notice which tells the rights of the people involved and the date, time, purpose, and possible consequences of the hearing.)
2. Representation by an attorney (An attorney shall be appointed by the court unless the person already has an attorney.)
3. To be present at the hearing
4. A closed hearing, if the person requests it
5. The right to present evidence, and to confront and cross-examine witnesses

Any temporary guardianship granted before the hearing on the application shall expire at the end of the hearing, unless the person for whom the guardianship is sought consents to the extension of the appointment. Any temporary guardianship granted before the hearing on the application shall include an order setting a date for hearing and shall be set down for hearing at the earliest possible date.

Anytime a temporary guardian is appointed before the hearing on the application, the person for whom the guardianship was obtained may get a hearing sooner if the person seeks to modify or remove the temporary guardianship. The person for whom the temporary guardianship was obtained must give one

day's notice to the person who obtained the temporary guardianship. The court shall proceed to hear and determine this motion for modification or removal as soon as possible.

The temporary guardianship cannot be granted unless the court finds that there is imminent danger that the physical health or safety of the person will be seriously impaired and/or that the person's estate will be seriously damaged or dissipated unless immediate action is taken. The court will only give a temporary guardian the powers necessary to protect against the imminent danger. The powers and duties must be described in the court's order. Unless the guardianship is contested, a temporary guardianship may last no longer than sixty days.

The court may not customarily appoint the Texas Department of Protective and Regulatory Services as a temporary guardian.

If you need to get a guardianship only for an emergency medical or other need which will cause imminent danger to the physical health or safety of an individual who cannot consent to the necessary treatment to take care of the problem, you might want to consider a temporary guardianship. A temporary guardianship may be helpful where a person can usually deal with everyday affairs but cannot do so for a specific thing, such as a complex medical decision, where there is a threat to the person's physical health or safety.

If a serious danger is imminent and you cannot get a regular guardianship in time to deal with it, getting a temporary guardianship in the meantime may be helpful. You should keep in mind that an uncontested temporary guardianship can only last sixty days. Temporary guardians must make an accounting to the court when the temporary guardianship expires.

VI. PRIVATE PROFESSIONAL GUARDIANS

The 1993 amendments to the guardianship law create a *private professional guardian*, who is a person engaged in the business of providing guardianship services. Attorneys and corporate fiduciaries are not considered to be private professional guardians. A court may appoint a private professional guardian to serve as a guardian, if the private professional guardian meets the following standards. A private professional guardian must apply annually to the county clerk in the county of the guardianship proceeding. The application must be sworn and contain the following information about the private professional guardian:

- Educational background and professional experience
- Three or more professional references
- The names of all the wards the private professional guardian will be serving as guardian
- The aggregate fair market value of the property of all wards that is being or will be managed by the private professional guardian
- Place of residence, business address, and business telephone number
- Whether the private professional guardian has ever been removed as a guardian by the court or resigned as a guardian in a particular case, and if so, a description of the circumstances causing the removal or resignation, and the style of the suit, the docket number, and the court having jurisdiction over the proceedings.

The application must be renewed annually. The court will do a criminal history record check on the private professional guardian and use such information only to determine whether to appoint, remove, or continue the appointment of the private professional guardian.

VII. OTHER ISSUES ABOUT GUARDIANSHIP

A. DESIGNATION OF GUARDIAN BEFORE NEED ARISES

Any person who is not incapacitated may designate in writing person(s) that she wishes to serve as guardian in the event the person becomes incapacitated. The person may also name persons that she does not want to serve as guardian. Such *disqualified* persons may not be appointed guardian under any circumstances.

A declaration designating a future guardian or disqualifying a future guardian must be carefully drafted and witnessed. If the declaration is properly done, it is considered in court to be strong evidence that the person signing it was competent and that the wishes expressed in the declaration should be followed as being in the best interests of the person. To make such a declaration, you should see an attorney, or call Advocacy, Inc. for sample forms that you may follow to make such a declaration.

If a person who has signed such a declaration becomes incompetent and an application for a guardian is filed, the declaration must be filed with the court. Once it is filed, the court must appoint the proposed guardian unless the court finds that the proposed guardian is disqualified or would not serve the best interests of the person who is incapacitated. A declaration of guardian may be revoked by an individual's will or by the individual properly executing a new declaration.

B. CO-GUARDIANS

Ordinarily, only one person can be appointed as guardian. However, persons appointed co-guardians in another state may be appointed co-guardians in Texas.

C. NON-RESIDENT GUARDIANS OF THE ESTATE

Non-residents of Texas may be appointed and qualified as guardians or co- guardians of a non-resident ward's estate situated in Texas in the same manner and by the same procedure provided in the Probate Code for appointment and qualification of residents of Texas as guardians if, by proceedings in and decrees of a court of competent jurisdiction in the state or county of the guardian's residence, the non-resident applicant has been previously duly appointed, is still qualified as guardian or other fiduciary legal representative of the property or estate of the ward situated within the jurisdiction of the foreign court, and files with the court a complete, certified transcript of the proceedings in which the non-resident was appointed guardian.

There must be a written application for appointment filed in a county court in Texas where all or part of the ward's estate is situated. The applicant must file, along with her application, complete transcript of the proceedings from the records of the out-of-state court of her residence in which she was appointed showing her appointment and qualification as guardian or other fiduciary representative of her ward's property or estate. The transcript must be certified to and attested by the clerk of the foreign court. The certificate of the judge of the foreign court to the effect that the attestation of the transcript by the clerk is in due form should be attached to the transcript.

If these requirements are met, an order appointing the non-resident as guardian of the estate will be made and entered without the necessity of notice or citation. The non-resident applicant thus appointed must qualify by making and filing oath and bond, subject to the court's approval, the same as is required of residents who are appointed guardians. The non-resident applicant must also file with the court a power of attorney appointing a resident agent to accept service of process in all actions or proceedings with respect to the estate. Thereupon, the clerk must issue letters of guardianship to the non-resident guardian or co-guardians. After qualification, the non-resident guardian must file an inventory and

appraisement of the estate, and is subject to all provisions of the Probate Code. A court may remove a guardian if the guardian leaves the state, but does not have to do so. However, an out-of-state guardian must be able to fulfill all the duties of a guardian.

D. OUT-OF-STATE GUARDIANSHIP OVER TEXAS WARD

An adjudication of incompetence and the issuance of letters of guardianship in one state ordinarily precludes the notion that a ward could voluntarily change her place of residence in order to become the resident of another state and subject herself to that state's jurisdiction, since the courts may be unwilling to enforce the letters of guardianship from another state. However, a non-resident guardian who has not qualified in Texas may be unable to deal with the ward's estate. It is important to know what kind of guardianship outside the state is involved, as different states have different kinds. It is possible that the person might not need a guardian at all or may need a less restrictive kind of guardianship. If the ward is disabled enough to need a guardian and plans to stay in Texas, a lawyer should look at the out-of-state guardianship to see if the ward and the ward's estate can be adequately protected by that guardianship. If not, the ward may need to have a Texas guardian appointed. And if the ward is, in fact, competent, she should consult a lawyer to get the out-of-state guardianship ended.

E. TRANSFER OF GUARDIANSHIP BETWEEN TEXAS COUNTIES

If the guardian changes her residence within the state she may wish to transfer the guardianship to the county of her new residence. However, the court may refuse to allow the removal to another county if the court finds that removal would be against the best interest of the ward. The court may also appoint a new guardian in the county, if the court finds that it would be unduly expensive to the ward's estate, or unduly inconvenient for the guardian to continue as guardian in the new county.

VIII. RESOURCES

While finding a competent lawyer is not a sure thing, it is now easier to find a lawyer qualified to handle a particular kind of case than it was in the past. In this section of the booklet we will discuss:

- Private attorneys
- Legal services and legal aid offices
- Determining a lawyer's competence
- Assistance for your lawyer

A. FINDING A PRIVATE LAWYER

Names of private lawyers may be obtained from other individuals who have gone through guardianship proceedings, in the business section of your telephone book, or from the State Bar of Texas lawyer referral service. You can reach the State Bar of Texas' Lawyer Referral Service by calling, toll free, 1-800-252-9690. You should also check your local phone directory for the number of the lawyer referral service operated by your local bar association, if you are in a highly populated county.

B. THE LAWYER'S FEE

For many clients, the cost of the lawyer's services is the most important factor in selecting an attorney. Although the adage *you get what you pay for* is often true, a high fee does not always mean you will get good legal services. Before visiting a lawyer's office, find out what the first visit will cost, if anything. Many lawyers offer a free initial visit. If, after the first visit, you feel the lawyer is competent and you are pleased with her, you should talk about the fee openly. If one lump payment is too difficult for you, you should tell the lawyer this and ask if you can pay on an installment plan.

Lawyers set fees for their services in many ways. **Flat fees** are usually charged for standard procedures like divorces and guardianships. The lawyer should be willing to put the fee in writing. The agreement should clearly state the actual cost of the lawyer's services. You should keep a copy of the agreement, together with any receipts, cancelled checks, or other proof of payment. The agreement should describe the services the lawyer will perform, who will pay the lawyer's fee, and how any other expenses will be handled. These may include expense for filing legal papers, for notices, for photocopies, for long-distance phone calls, for court transcripts, for the lawyer's travel expenses, for expert witnesses, and for telephone calls between you and the lawyer. You may not know in advance what the final amount of these expenses will be, but the agreement should specify the kinds of expenses for which you will be charged.

Another way for a lawyer to charge is by an hourly rate. You might ask if the hourly rate differs, depending on the experience of the lawyers in the firm. You should find out what is included in the hourly rate. You should also get an estimate of the time it will take. The lawyer may charge another fee or a different hourly rate for court appearances for a half or full day. You may be charged part or all of this fee, even though your hearing may take less than a half or full day.

Another way for a lawyer to charge is on a contingent fee basis. Contingent fee arrangements are very rarely used in guardianship cases.

C. COST-SAVING IDEAS

The high cost of lawyers prevents many middle-income Americans from getting needed legal services. Legal services and legal aid offices provide legal assistance to lower-income Americans. But the problem of getting legal services for middle income persons remains. Some labor unions and other organizations have prepaid legal insurance plans. Under these plans, participants in the program pay a premium or fee each month. If a participant needs a lawyer, the program pays the lawyer's fees. Under most programs, you can select your own lawyer. Prepaid legal insurance programs may become a major way of providing legal services at reasonable cost. Unfortunately, few of these programs are presently operating.

D. LEGAL AID OFFICES & OTHER LOW-COST LEGAL SERVICES

Some legal services and legal aid programs, if there are any in your area, are excellent resources. However, these services are often available only for persons with limited income, such as persons who receive SSI and other governmental benefits. There may be a legal services program in your area for the aged, serving persons over 60 years of age. Another resource is a local law school. Many law schools operate legal clinics where law students practice under the supervision of licensed attorneys. However, many of these legal clinics serve only low-income clients.

If a person or an agency refers you to a lawyer and you feel that the lawyer did not provide you competent services, **PLEASE** tell the person or agency that referred you.

E. DETERMINING A LAWYER'S ABILITIES

The diplomas, certificates, and other awards usually hanging on a lawyer's office wall do not guarantee that the lawyer is able to handle your particular case. Lawyers may be skilled in one area of the law, such as divorces, yet not know about the legal problems of persons with a disability. You should ask about the lawyer's knowledge and experience to find out if she will be able to competently handle your case. A lack of experience in a specific area of the law may, but does not always, mean that the lawyer cannot represent you well.

The 1993 amendments require the state bar to provide a course of instruction for attorneys who handle guardianship cases. You can ask whether the attorney you are interviewing has taken the course, but attorneys who served as attorney ad litem prior to September 1, 1993, are not required to take the course.

A lawyer's personal commitment does not replace knowledge and experience, but it should be weighed when choosing a lawyer. A lawyer who has a personal interest in or commitment to your case can be a very good representative.

Finally, if you feel the lawyer you picked is not representing you fairly or competently, you can complain about that lawyer to the local bar association.

F. REFERENCES & ASSISTANCE FOR YOUR LAWYER

Advocacy, Inc. is a federally funded, non-profit corporation which provides protection and advocacy services to Texans with developmental disabilities. You may reproduce this booklet or order additional copies from Advocacy, Inc. Please check the booklet cover for the address and telephone number of the nearest office.

You might also call local consumer agencies, such as the Arc or Parent Association for the Retarded of Texas to find out if they have any knowledge about other resources. You should check with your local library regarding the availability of material on guardianship.

The **Texas Guardianship Manual** was removed from the State Bar of Texas' list of publications due to the necessity for revisions. You may call (512) 463-1463 regarding the availability of an updated version.

1. Advocacy, Inc. alternates male and female pronoun usage in its handouts. In this handout, we use the female pronoun.

2. Pursuant to § 112A of the Probate Code, the court may not grant an application for guardianship unless a written letter or certificate from a physician is presented to the court (unless the alleged incapacity is mental retardation). The letter or certificate must be "dated not later than the 120th day before the date of the hearing on the application...." (Tex. Prob. Code Ann. § 112A(a) (Vernon Supp.)). (Note that it is unclear what "not later than the 120th day before the date of the hearing" means. In plain English, this would seem to indicate that the exam must be dated at least 120 days prior to the hearing. However, this interpretation would clearly be contradictory to the intent that the exam be as updated and recent as possible. This is believed to be a legislative oversight; it should have ready, "not earlier than the 120th day before the date of the hearing." Advocacy, Inc. has brought this to the attention of Leslie Windham, who serves on the Texas Guardianship Association, and it is expected to be rectified in the near future.)
Advocacy, Incorporated's goal is to make each handout understandable by and useful to the general public. If you have suggestions on how this handout can be improved, please contact Advocacy, Inc. at the address and telephone number shown on [www.advocacyinc.org] or e-mail Advocacy, Inc. at [infoai@advocacyinc.org]. Thank you for your assistance. This handout is available in Braille and/or on audio tape upon request. Advocacy, Inc. strives to update its materials on an annual basis, and this handout is based upon the law at the time it was written. The law changes frequently and is subject to various interpretations by different courts. Future changes in the law may make some information in this handout inaccurate. The handout is not intended to and does not replace an attorney's advice or assistance based on your particular situation.

FREQUENTLY ASKED QUESTIONS ABOUT GUARDIANSHIP AND ALTERNATIVES TO GUARDIANSHIP

reprinted from the Texas Probate website
www.texasprobate.com

What is a guardianship and how do they work? A guardianship is a court-supervised administration for a minor or for an incapacitated person. A person – called the guardian – is appointed by a court to care for the person and/or property of the minor or incapacitated person – called the *ward*. In some other states, guardianships are called conservatorships, but in Texas they are called guardianships.

What types of guardianships are there? There are two types of guardians and guardianships. A guardian appointed to take care of the physical well-being of a ward is called a *guardian of the person,* while a guardian appointed to take care of the ward's property is called a *guardian of the estate*. In some cases, only one type of guardian is appointed for a particular ward. In many cases, both a guardian of the person and a guardian of the estate is appointed for a ward. (Often, but not always, they are the same person.)

What are the definitions of "minor" and "incapacitated person?" A minor is a person younger than 18 years who has never been married or who has not had his or her disabilities of minority removed by judicial action. A minor is considered an incapacitated person. An adult who, because of physical of mental condition, is substantially unable to provide food, clothing or shelter for himself or herself, to care for his or her own physical health, or to manage his or her own financial affairs is considered an incapacitated person. The definition of incapacitated person also includes a person who must have a guardian appointed to receive funds due the person from any governmental source.

I think I know someone who meets the definition of an incapacitated person. What must I do to get a guardian appointed? Texas law has very specific procedures in place for proving the need for guardianship and getting a guardian appointed. These procedures are too complicated for a lay person to undertake without a lawyer's help, and most courts will not entertain guardianship applications filed by non-lawyers. To get a guardianship, incapacity must be proven by clear and convincing evidence – a very high standard. Unless the proposed ward is a minor, a certificate for a doctor who has examined the proposed ward must be filed with the court. There are specific requirements for the certificate and it must be dated within 120 days of the filing of the application for guardianship, so you should consult an attorney for the specific requirements *before* the doctor conducts the examination which forms the basis for the certificate. (Slightly different requirements apply for mentally retarded persons.) The court will appoint an attorney – called an *attorney ad litem* – to represent the proposed ward, since the granting of a guardianship takes away some of the ward's civil rights. Texas courts typically employ the doctrine of *least restrictive alternatives* in guardianship cases – taking away as few of the ward's right as possible and giving the guardian only those rights and powers as is necessary to protect the ward or the ward's property.

Who is likely to be appointed guardian? If the court decides that a guardian is needed, Texas law provides a priority list for choosing the guardian. If the ward is a minor, the following persons have priority in the following order: parents, the person designated by the last surviving parent of the ward in a properly executed designation of guardian, in some cases, the person designated by the last surviving parent of the ward in a properly executed designation of guardian, the nearest ascendant in the direct line of the minor (ascendants are the grandparents, great-grandparents, etc.), next of kin, and a non-relative. If the ward is an adult, the following persons have priority in the following order: the person designated by the ward prior to his or her incapacity in a properly executed designation of guardian, in some cases, the person designated by the last surviving parent of the ward in a properly executed designation of guardian, the ward's spouse, next of kin, and non-relative. If more than one person of the same priority wishes to be guardian, the court chooses the one who is best qualified to serve. In considering priority it is important to note that the court has the authority to skip over a person higher on the priority list if the court

finds that person to be ineligible. A person is disqualified and ineligible to be appointed guardian if he or she is a minor, a person whose conduct is notoriously bad, an incapacitated person, a person who has certain conflicts of interest with the ward, a person who, because of inexperience, lack of education, or other good reason, is incapable of properly and prudently managing and controlling the ward or the ward's estate, a person found unsuitable by the court, a person specifically disqualified from serving as guardian by the ward prior to his or her incapacity in a properly executed designation of guardian, and a person who is not a resident of Texas and who has not designated an agent in Texas for service of process. Because of these priorities, it is important for an adult individual who is worried about his or her possible future incapacity to consider designating those persons he or she wishes to serve as guardian and those persons he or she wishes to disqualify from serving as guardian, especially if a non-relative is preferred.

What is a guardian of the estate required to do? It is impossible to include an exhaustive list of the duties of the guardian of the estate here. In general, a guardian of the estate is a fiduciary and is held to the high standards to which all fiduciaries are held in caring for the estate of the ward. The guardian of the estate is required to post a bond in an amount set by the court to assure that the guardian fulfills his or her duties. Insurance companies issue the bond and the guardian pays the premium. Generally the guardian reimbursed for the cost of the premium from the ward's estate. The guardian of the estate also is required to publish a notice to creditors in a local newspaper and file an inventory of the ward's assets. Each year, the guardian of the estate is required to file an annual account, detailing the receipts and disbursements during the year. This is a checkbook-type accounting – the beginning balance, plus receipts, minus disbursements, must equal the ending balance to the penny. When the guardianship terminates, the guardian must file a final account. The annual and final accounts are complicated enough that a lawyer's assistance is needed. **(Legislation proposed in 2003 may require guardians of the estate to establish monthly allowances and investment plans approved by the court.)**

What are the powers and duties of a guardian of the person? It is impossible to include an exhaustive list of the duties of a guardian of the person here. In general, a guardian of the person is a fiduciary and is held to the high standards to which all fiduciaries are held in caring for the ward. The guardian of the person is required to post a bond in an amount set by the court to assure that the guardian fulfills his or her duties. Unless the guardian's duties are restricted by the court, the guardian of the person is entitled to the charge and control of the person of the ward and has the right to have physical possession of the ward and to establish the ward's domicile, the duty of care, control and protection of the ward, the duty to provide the ward with clothing, food, medical care and shelter and the power to consent to medical, psychiatric, and surgical treatment. However, the guardian of the person's powers to commit the ward to in-patient psychiatric treatment are limited. Some families pursue a guardianship only to discover that the guardian cannot force the ward to submit to in-patient psychiatric care. Be sure to ask your lawyer about this if this is one of the main reasons for seeking a guardianship. **(Legislation proposed in 2003 may change the guardian's powers regarding in-patient psychiatric commitments.)**

All of this sounds pretty expensive. Is it? Yes. Guardianship law is designed to protect the rights and interests of the ward, and it does so by establishing procedures intended to assure guardian compliance with the rules. These procedures necessitate a lot of lawyer involvement. Establishing a guardianship can be expensive, and the costs of administering a guardianship of the estate can easily exceed the annual income of the estate. For this reason, it is usually a good idea to see if there are any alternative to a guardianship before starting down the guardianship path.

My loved one needs the assistance of a guardian but can't afford it. What can be done? Alternatives to guardianship should be considered. If not alternatives are available, some charitable organizations provide assistance for guardianships of the estate. Check with the local bar association of with the county court or probate court in your area to see if any are active in your area. Guardianships are complicated and expensive, but sometimes they are necessary.

Do I have to be appointed guardian for my minor child? In most cases, parents are considered to be the natural guardians of the person of their minor children, so no court procedure is required to appoint a guardian of the person. Even though a parent may be the natural guardian of the person of their minor child, they are not natural guardian of the estate – a court proceeding is always required to become guardian of the estate. If the child has property or income, in some cases provisions of the Family Cod may permit guardianship of the estate to be avoided. For example, parents have certain rights to the income of their minor child, and a managing conservator has certain rights regarding the child's property. In many cases, however, a guardian of the estate will be required if the minor has property. You should consult a lawyer for an evaluation of your particular fact situation an evaluation which is appropriate for you.

I want to leave property to or for the benefit of a minor or incapacitated person when I die. Can I do so in a way which avoids guardianship? Yes. A well-drafted will or trust will create a trust for a person who is a minor or who is incapacitated. The trustee can be someone you trust to administer the property for the benefit of the minor or incapacitated person. In most cases, the trustee is authorized to use the money to pay for the person's health, education, maintenance, and support. (Sometimes called an 867 trust because they are set up under Section 867 of the Probate Code) can be established. Court approval is required, and these trusts are less flexible and more expensive to establish than a trust in a will. In most cases the trustee is authorized to use the money to pay for the person's health, education, maintenance, and support. (Sometimes it is prudent to use a special needs trust to help assure the availability of Medicaid or other government benefits.) When the minor reaches an appropriate age (Most people pick an age beyond 18, since the child may not be ready to manage property as an 18-year-old), the trust can terminate and the property can be distributed to the child.

Uncle Benny left something to my minor child without creating a trust. Is there some way to get it into a trust now? Yes. Even if property is left to a minor outside of a trust, a guardianship management trust (Sometimes called an 867 trust because they are set up under Section 867 of the Probate Code) can be established Court approval is required, and these trusts are less flexible and more expensive to establish than a trust in a will. In most cases the trustee must be a bank or trust company. Also, the age of trust termination is set by the court and has to be 18, 25, or some age in between. Guardianship-style accountings are required each ear, and there are restrictions on the compensation a trustee can receive. For these reasons, banks and trust companies are sometimes reluctant to take small trusts. If no bank or trust company will take an 867 trust, the court may appoint an individual, but the individual must post bond, which may be difficult to obtain.

How big must an 867 trust be for a bank or trust company to be interested in handling it? Because of accounting requirements and restrictions on fees, banks and trust companies are reluctant to take on 867 trusts below a certain size. The minimum size varies from bank to bank and somewhat depends on the nature of the assets in the trust. In some cases, banks and trust companies have declined to accept trust with assets of less than $400,000. Other banks and trust companies will accept certain trusts under $100,000. It may be necessary to shop around to learn which banks and trust companies – if any – are interested.

My son was injured in an automobile accident and I expect that he will receive a big insurance settlement. Does this money have to go into a guardianship? Yes. There are several non-guardianship alternatives if the property is being received pursuant to a judgment, including annuities and a special type of trust usually called a 142 trust because it is set up under Chapter 142 of the Texas Property Code. A 142 trust is similar to an 867 trust. The trustee generally must be a bank or trust company, and the trust can last until the minor reaches age 25. A big advantage of 142 trusts over 867 trust is that there is no annual accounting requirement and trustee compensation is less restrictive. For these reasons, banks and trust companies often are willing to take smaller 142 trusts.

Uncle Benny left my daughter less than $100,000 without creating a trust. Do I have to set up a guardianship? No. One possibility is an 867 trust , discussed above. If the property is cash and is under $100,000, Texas law has a procedure where the money may be placed in an interest bearing account by the county clerk and held until the minor reaches age 18. Your lawyer can tell you if this procedure is a good idea in your case. The interest earned on the money may not be as great as a trust would earn, and it will be difficult or impossible to spend the money prior to the child reaching age 18, but there is no annual accounting requirement so the costs are reduced.

My child inherited an undivided interest in real property. Do I have to set up a guardianship to sell it? Maybe not. If the child's interest in the real property is worth less than $100,000 and if the other co-owners agree, Texas law has a procedure for getting court approval or the sale of the property and for placing the child's share of the proceeds in a interest-bearing account by the county clerk, where the money is held until the child turns 18. Your lawyer can tell you if this procedure is available in your case.

Be sure to discuss guardianships and guardianship alternatives with your lawyer.

Texas Advocates Speak Out For Independence, Freedom and Self-Determination

A paper written by the 2000-2001 Texas Advocates Leadership Academy

We are “Texas Advocates.” We are a group of self-advocates—people with disabilities—who are working hard for “self-determination.” Our mission is to fight to stop unfair treatment and advocate for more and better services and supports for people with disabilities to be included in their communities.

Like any other person, each of us wants to be in control of our own life. The services and supports we receive should help us to do that.

What follows are answers to questions that we asked ourselves about “self-determination.” This is our voice about speaking up for ourselves and others for independence.

1. What does self-determination mean?

- Controlling my own life so I can make decisions and put my goals into action, even if others don’t think that I can.
- Getting and keeping a job with the supports I need so that I can have my own place if I want and live more independently.
- Using public transportation in my community to get around town.
- Getting supports so I can find and keep a job.
- Picking where I live and being as independent as possible.
- Being my own self, getting a job, getting married and having kids.
- Even when people give me advice, I have final say over all decisions that concern me.

2. What kinds of things help you to control your own life?

- Having my own money, choosing how to spend it, and paying my own bills.
- Controlling what services and supports I receive.
- Planning for my own future so I can get the supports I need.
- Having a real job and earning a paycheck.
- Making my own decisions for myself.
- Having the supports I need to learn to be more independent.
- Having money to do what I want to do with my free time.
- Being part of a support group like family, church, other self-advocates and friends.

3. What gets in the way of controlling your own life?

- Some people have a bad attitude because they don’t understand.
- My friends and parents try to put words in my mouth about what I say and the decisions I make.
- My parents have guardianship and don’t want to let go.
- My family doesn’t want me to work because I can lose government benefits like SSI and Medicaid.
- My work schedule can change daily. I lose money, can’t buy clothes or go places.
- In some places, transportation is not available. If we have transportation, it lacks quality.
- We have to do everything between 8:00 a.m. and 5:00 p.m.
- I don’t get to control my own money because it goes directly to the service providers.
- My disabilities can make it hard for me to do things for myself.

4. What can Self-Advocates do to overcome those barriers?

- Write or call our representatives and staff at MH/MR centers to voice opinions.
- Talk to the media (newspaper, radio stations, & television) to explain about the barriers we face.
- Go out there and look for a job to prove to our parents and others that we can do it.
- Have better communication with staff, family and others.
- Use a PASS Plan or the Ticket To Work program to get a job without losing benefits.
- Stay determined to prove myself, learn new job skills, get a job, and plan ahead for transportation.
- Get needed therapies, like physical therapy, to set and reach goals.
- Find someone to teach me to read.
- Be my own guardian.
- Understand how to balance eligibility for SSI benefits and Medicaid with work.
- Ask people to change things so we can be in control of our own lives.

5. What can parents or others do to overcome those barriers?

- They could explain about the services and supports that we need to be independent.
- They can come to our planning meetings.
- Family members can help us be more independent, guiding us but not controlling us.
- Let us make up our own minds.
- Advocate along with me by writing letters to local senators, representatives and news media to promote community support and services.
- Family and others can help me figure things out about how to pay for the things I need.
- Have classes at college to learn how to be more independent.

POOLED TRUST PROGRAMS FOR

PEOPLE WITH DISABILITIES

A GUIDE FOR FAMILIES

INTRODUCTION

Pooled trust programs enable families or other caregivers, and in some cases individuals with disabilities, to establish relatively inexpensive and effective trust accounts that provide supplemental funds for the person with a disability while protecting him or her from losing important government benefits. Families set up a sub-account with a trust program. The program then pools these funds to manage and invest as one account. Pooling reduces administrative fees and increases the principal for investment purposes. Pooling may also allow access to better quality investments that pay a higher rate of return than what is available for a small individual trust. Beneficiaries of these trusts usually receive earnings based on their share of the principal. Accounting methods can separate out each person's account. Some states actually use separate trust agreements for each beneficiary, but pool all funds for investment.

More information and details about pooled trust programs are presented in this guide. However, there are several important points to remember as you review the contents of this guide:

- Pooled trust programs can vary considerably, so this guide is a general description of trust programs. Do not rely solely on this guide to make a decision about using a pooled trust program or to make any other legal/financial plans. It is very important to read the materials from any program you are considering and meet with the trust program representative to discuss the details of the program. You should also consult with your own attorney and financial planner to determine a plan that is best for you and your child.

- There may not be a pooled trust program in your area or state. Many states have one or more pooled trust programs, while other states do not have any. Additionally, a program may have restrictions on who can be served, depending on disability group, financial status or geographic location. However, a growing number of states are exploring the development of pooled trust programs.

- This guide uses certain terms and language when describing the people involved in planning. The people who plan are usually referred to as parents, even though siblings or others may also set up trusts. The son or daughter with a disability is referred to as their child, even if this person is an adult. Referring to this person as a child is not meant to demean the individual. It is used only to indicate the relationship.

- Your family member with a disability is a unique individual. Planning should be tailored toward her unique needs, and the member should be involved in the planning process as much as possible. The presence of a disability does not necessarily mean that your family member will require ongoing services and/or specialized financial planning.

The purpose of this guide is to assist parents, family members or other caregivers of people with mental retardation and related developmental disabilities to learn about financially planning for an adult or minor child with a disability. The guide focuses on a special method of planning called pooled trust programs. Trusts established to cover supplemental needs add significantly to an individual's quality of life, paying for things that the parents paid for during their lifetime. **Part One** of this guide presents an overview of general financial planning for people with disabilities through a legal trust and is the groundwork for understanding Part Two of this guide. **Part Two** describes pooled trust programs and how they can assist in financial planning.

PART ONE: AN OVERVIEW OF FINANCIAL PLANNING AND PEOPLE WITH DISABILITIES*

Is there a connection between the benefits my child with a disability receives and her income and/or assets or resources (such as checking and savings accounts)?

There is a strong possibility that the answer is yes. Many individuals with disabilities receive means-tested benefits, such as Supplemental Security Income (SSI), a monthly monetary allowance that in many states makes the person eligible for Medicaid health and community support benefits. Means-tested benefits are benefits available to people with minimal income and minimal assets or resources. If a person's income or assets/resources exceed the specified limit, he or she will not be eligible for the benefit. Two primary examples of means-tested benefits are Supplemental Security Income (SSI) and Medicaid. Adults are eligible for SSI if they have a disability that prevents them from working and earning a self-sufficient wage, and they do not have more than a certain amount of assets. Minor children (under age 18) may also be eligible for SSI if they have "marked and severe functional limitations" from a physical or mental condition. Minor children living with parents have some of the parents' income and assets countable to their application for benefits, while individuals over 18 only have their own income and assets counted. If they are in school between ages 18 and 21, parents' income and assets may be counted.

In most states, in order to remain eligible for Medicaid, a person cannot have more than $2,000 (Year 2001 amount) in cash or assets that can be converted to cash. These services are often referred to as means-tested because the individual's means (assets) are part of the eligibility criteria to qualify for services. Sometimes, items such as a home, car or a burial plot may not count as available assets. The home is not countable if the individual with a disability lives in it. It is countable if he or she does not live there.

If my child is receiving Medicaid-funded residential services, will he or she continue to receive Supplemental Security Income?

Usually people with disabilities receiving residential-related services that are paid for by Medicaid must contribute toward the cost of their care with money from earnings or from other sources such as their SSI or Social Security Disability Insurance payments. Cost of care charges are designed so that the person can only keep a small amount of money, usually referred to as a personal care allowance, to pay for many services and items that publicly funded services do not cover. Non-covered costs may include medical and support expenses not covered by Medicaid or another program, entertainment, travel, books and other items and services that would enhance the individual's quality of life. This personal care allowance is usually small--as low as $30 a month in many states so that parents must often use their own money to pay for the extra personal items and services their child needs, even if their child is an adult.

How can I plan for future financial security for my child without jeopardizing her benefits?

Often, parents or others leave the child with a disability an inheritance, funds or property passing directly to another individual. If your daughter receives SSI and/or Medicaid and has access to more than $2,000 in assets (e.g., from an inheritance), she would lose eligibility for SSI and Medicaid. She would have to spend down the amount to below $2,000 before she could reapply for these benefits. If she is receiving means-tested public services such as Medicaid, SSI, HUD housing or food stamps, the state might consider the inheritance an asset and the individual receiving it would incur "cost-of-care" charges. Publicly funded residential costs, for example, can amount to several thousand dollars per month. Having to pay even some of these costs can quickly deplete funds that parents intended to supplement the individual's low personal care allowance. In some states, the state can bill for back cost of care if the individual lived at a state funded institution, even if they do not live there now. In this situation, the inheritance or gift will not have the intended benefit if the result is loss of benefits.

There are ways that you can help plan some financial security for your child with a disability without risking his SSI and related benefits. Some parents do not leave an inheritance to their child. Instead, a sibling or other family member receives an additional share of the inheritance to use to benefit the person with a disability. This is sometimes referred to as a "morally obligated" gift. Unfortunately, the assets intended to benefit the person with a disability may not be spent on this person. For example, if the non-disabled sibling divorces or dies early, the extra funds may end up going to the divorced or widowed spouse or another heir.

One way to provide for the financial security of someone with a disability without jeopardizing government benefits is by using a trust. Trusts hold money or property that the grantor, the person who sets up the trust, leaves for the benefit of another person, called a beneficiary. Unlike an outright gift or inheritance through a will, a trust usually contains carefully written instructions on when and how to use the trust's assets.

You or others can fund a trust while still alive or as part of a will. If you establish a trust while still alive, you can be the trustee (the person who manages the trust). You can also assign someone else to be trustee. A trustee can be a person, financial institution (bank), and, in many cases, a not-for-profit pooled trust program. Laws regulating who may serve as trustee vary from state to state.

You may design a trust to distribute assets to one or more beneficiaries at certain times or under certain conditions. Some trusts make distributions to the beneficiary (or beneficiaries) over time. Others instruct the trustee to distribute just the trust's earnings (from interest or investments) or the amount the trustee thinks the beneficiary needs. Some trusts may require the accumulation of all income for distribution at a future time.

What kinds of trusts are used to plan for the future needs of an individual with a disability?

There are many different trusts for various purposes. Laws that affect trusts can also vary from state to state. However, most states have laws that authorize some form of supplemental, discretionary or even master pooled trust. Experts recommend specialized trusts when parents want to protect government benefits that their child needs. Some of these trusts are called "special needs" trusts. (The term special needs trust may have a specific legal and/or technical definition to state/federal agencies, attorneys or others.)

Supplemental discretionary trusts - Supplemental discretionary trusts are designed so that the principal (the amount put in the trust account) and its earnings (from interest or investments) supplement the beneficiary's basic care and do not replace the public funds required to pay for this basic care. This kind of trust is good for the SSI and Medicaid recipient whose assets cannot go above a specific level. The trust grantor can carefully direct that the trust not pay for services covered by Medicaid or other benefits received as a result of the child's disability. Instead, the trust would require the trustee to provide funds for certain items, services or other expenses not covered by SSI and Medicaid. Supplemental discretionary trusts can also be set up for someone who is not on SSI and Medicaid.

Discretionary trusts - Some states allow the trust grantor to give the trustee full discretion in how much or how little of the trust to distribute. This kind of trust can also contain provisions that limit distributions so that the person remains eligible for government benefits. The trustee of a discretionary trust must be careful not to distribute money from the trust for goods and services or outright to the beneficiary in a way that will disqualify him from receiving or remaining eligible for public-funded services. There are several drawbacks to a discretionary trust. The trustee must be knowledgeable about the benefits a person is receiving and how to report correctly on the distributions. The trustee has total power over all distributions and may hold back all or some of the trust's distributions. It is important that you choose a trustee whom you trust and who will take the time to learn how certain distributions from a discretionary trust will affect government benefits.

The difference between a supplemental discretionary trust and a discretionary trust is that the supplemental discretionary trust includes language that directs the trustee to use the trust funds to supplement government benefits and not supplant them. The discretionary trust simply states that all distributions are in the sole discretion of the trustee. The qualifying language regarding the grantors intent to supplement government benefits is not included. Some states have required the trustee of a discretionary trust to pay for basic support when the grantors intent to supplement government benefits has not been made clear.

How do I go about setting up a trust?

There are usually two ways to set up a legal trust with your attorney. It can be testamentary or intervivos (living).

Testamentary - This means the trust is part of a will and does not take effect until after the person who drew up the will dies. Parents can change the trust's provisions any time the will is changed. So, if the intended beneficiary should die first, the will and trust can change. Tax-wise, this kind of trust does not require the person to file or pay income tax on it since there are no funds in it until after that person dies.

Intervivos (or Living) - This means the person establishes a trust before dying. In doing so, the parents and/or others can make regular gifts to such a trust. Grandparents can make testamentary bequests from their will to the trust set up for their grandchild with a disability. Parents can be the trustee and manage the trust according to their own discretion. They can also assign someone else to be trustee to see how that person would manage the trust.

Which laws affect trusts?

Third party trust is a general term for a trust that a parent or others (the third party) establish for another person. Third party trusts are based on common law, which means that trusts can be established by one person for another with certain conditions about how and when the trust is used (e.g., a special needs trust). Some states like New York and Illinois have specific state laws about special needs trusts. If established within certain parameters, third party trusts will not affect SSI or Medicaid eligibility.

The federal Omnibus Budget Reconciliation Act of 1993, called OBRA 93 for short, is a federal law that affects how people with disabilities can have a trust and still qualify for Medicaid. The Foster Care Independence Act of 1999 is a federal law that affects how people with disabilities can have a trust and still qualify for SSI. Both laws allow many people with disabilities to place their own money into a trust and become (or remain) eligible for Medicaid and SSI. For purposes of this booklet, these trusts will be called OBRA trusts. There are limited ways that people with disabilities can place personal assets into an OBRA trust:

- **Individual "special needs" trust.** The person with a disability must be under the age of 65, and the assets are her own assets (from an inheritance, personal injury suit, etc.) However, a parent, grandparent, court or legal guardian must establish the trust, and not the person with a disability. If any money is left in the trust after the person with a disability dies, it must then be used to pay back the state to cover the costs of publicly funded services that the person received over her lifetime. This is sometimes called a payback trust or self settled trust. The Social Security Administration also refers to this type of trust as a "special needs" trust.

- **Pooled trust**. The assets of a person with a disability are placed into a sub-account of a pooled trust program. The trust sub-account in the pooled trust program must be set up and managed by a not-for-profit organization. The trust is established for the individual by a parent, grandparent, court, legal guardian or by the individual himself. Part Two of this guide describes other important aspects of pooled trust programs.

PART TWO: POOLED TRUST PROGRAMS

Many pooled trust programs administer **third party trusts** and **OBRA trusts** as described above. These terms are used throughout the remainder of this guide to distinguish between the two. Remember the important difference between **third party trusts** and **OBRA trusts**:

- **Third party trusts** are set up by parents or others with assets that do not belong to the person with the disability and do not require that the state be reimbursed. The trust remainder can go to other heirs and/or organizations.

- **OBRA trusts** are set up with the money of the person with a disability. OBRA trusts can be individual trusts or pooled trusts. Payback provisions to the state may apply. Depending on the circumstances the balance (or a portion of the balance) that remains in the trust after the beneficiary has died will be paid to the state as reimbursement for publicly funded services the state provided to the beneficiary while the beneficiary was alive.

WARNING
It is important to remember that this guide gives a general description and overview of pooled trust programs. Pooled trust programs vary in their operations. It is important to examine the specific details about any program you are considering using. Before signing any papers or investing in a trust, review written information on the particular program that you are considering, consult with your attorney and speak with other families who use the program. Meet with the people who operate the trust to ask questions and insist on clear answers. Carefully explore whether or not the program is a good and solid option for you and your family member.

What are pooled trusts?

Pooled trust programs provide a convenient and economical way to have trust funds administered for people with disabilities that will supplement the benefits offered by entitlement programs. These programs normally use a discretionary, irrevocable trust for supplemental needs. The assets placed in the trust by parents or others are allocated to a separate sub-account. The assets from all sub-accounts are pooled together to invest and manage as one larger amount. Records are maintained of the amount of each person's trust and the amount spent for that individual. The program divides the trust earnings among the individual sub-accounts in shares equal to the amount that each sub-account has in the pooled amount. A simple example is that if one sub-account makes up 10 percent of the total pooled amount, then that sub-account would get 10 percent of the pooled account's investment earnings (minus any fees).

A pooled trust program usually undertakes the daily management of the trust sub-accounts. This includes handling requests for and expediting disbursements, maintaining each sub-accounts records, reporting to various agencies that might be affected by disbursements, preparing necessary reports (e.g., tax-related reports) and general management of the program. Many trust program representatives also spend considerable time meeting with families about the program and assisting families and others with future planning information.

Pooled trust programs are set up as or administered by a not-for-profit organization. They may be under the auspices of or closely connected with one or more disability-related organizations. Groups like state and local chapters of The Arc, Goodwill, and National Alliance for the Mentally Ill (NAMI) and others have been active in establishing pooled trust programs. Members of these organizations often comprise the program's board of directors or other governing body. Pooled trust programs typically work closely with a bank, trust company or other financial institution. Some pooled trust programs have banks serve as trustee for the program's funds, while other pooled trust programs are their own trustees and may use the bank as an investment manager or a co-trustee. The pooled trust staff are usually responsible for expediting disbursements from trusts, tracking and reporting how disbursements are made, assisting with tax preparation and other management responsibilities. Some pooled trust programs include direct care coordination services for their beneficiaries, or contract with care coordinators to provide services. Services vary depending on the agency and amount of services provided, but the care coordinator may visit the beneficiary, be present at meetings about the individual, advocate on the individual's behalf and provide related services as needed. Usually the costs of these services are covered by the individual's trust funds and are charged hourly.

Why is good management of the trust important after it becomes active?

Government agencies often have complex, strict regulations and reporting requirements to monitor the means-tested eligibility of the people with disabilities who receive their services and have trust funds. They want to know when the person receives a trust disbursement and how the disbursement was made (e.g., what was purchased). These disbursements must often be reported and explained according to each agency's regulation and note why neither income nor a countable resource was created. Regulations and reporting rules may vary considerably from state to state and even from agency to agency within a state. Agencies may also change their regulations from time to time, so keeping current on their rules is equally important. Additionally, reporting can be complicated further when the trust recipient is receiving a mix of services that may have different regulations.

Ensuring that the trust disbursements do as they are intended (i.e., improve the individual's quality of life while not interfering with eligibility for means-tested benefits) is an extremely important responsibility. If parents have no one to count on for learning the regulations and making the reports, the trust will not do what they want.

A trust program can and should be responsible for this role. It should know about people with disabilities and know about the regulations and reports. It is responsible for ensuring that disbursements and proper reporting occur in a timely matter. It can also intervene, when necessary, when an agency questions a disbursement or report, which happens from time to time. A well-intentioned family member designated as a trustee may not have the time, inclination or energy to fulfill this important role.

What are the usual steps in establishing a pooled trust account?

The steps or process of establishing an account with a pooled trust program will vary and may depend on whether the trust is a **third party trust** or an **OBRA trust**. Consult with the trust program about the process for that program. In general, a pooled trust program will usually have you complete and sign a legal document that enrolls you in the trust. It gives the program the information needed about your child, how and when you plan to fund the trust, how you would like to see the trust funds used when it becomes active (when the trust is funded and disbursements begin) and other information. Once enrolled, the trust program maintains your file and should periodically contact you to update it.

Before signing any papers, the program representative should carefully explain the process including fees and other factors that you need to consider. You should then discuss the plan with your own attorney and/or financial planner to decide how you want to fund the trust and to help you prepare any necessary documents. There may also be tax issues to discuss with your attorney before establishing a trust.

Pooled trust programs that include care coordination usually require that families meet with a care coordinator to complete a detailed plan for providing these services. Enrollment needs to occur before the grantor dies, so that a care plan can be developed together. This plan may also be updated periodically.

Are there fees for pooled trust programs?

Yes. Pooled trust programs usually must charge fees for their services. Programs vary in their fees, and when and how they charge for them. The frequency and amount may depend on the type of trust (**third party** or **OBRA**) plus the trust fund amount. The trust may also charge a sliding scale fee based on the amount of the trust account. Most trusts tend to have an enrollment fee, paid when you sign the joinder agreement (legal document that enrolls you in the trust) or activate the trust. They may also have a periodic maintenance fee (usually annual) to provide ongoing management. Certain fees may change due to inflation or as the trust's principal decreases with distributions.

Banks and other financial institutions also charge fees for a trust account. Pooled trust programs and financial institutions should provide a written copy of their fees and payment schedules. An important consideration about the fees for pooled trust programs is to compare them to those that a bank or trust company would charge for a trust of comparable size and with similar provisions. Banks and other financial institutions often charge much higher fees to manage an individual trust. By pooling resources for investment and management, pooled trust programs can minimize costs, so that fees are usually reduced considerably. Most bank trust departments require a minimum of $200,000 - $400,000 for a single trust fund, while pooled trust programs are more flexible about the size of trusts they are willing to accept. Most pooled trusts have lower minimums.

Can I specify exactly how I want the trust used?

A trust program should seek input and advice from you, and whenever possible from the person with a disability, about how the trust funds are to be used. However, the trust is designed to protect SSI, Medicaid and publicly funded services, so the trustee must have sole discretion about how disbursements are made, including how much is spent and items and services that are purchased. Medicaid or other public services may currently approve trust disbursements for certain items and services, but there is no guarantee that this will not change in the future after you are gone. Changes in the law, new restrictions and other unforeseen events may make it necessary for the trustee to modify the amount of, or reason for, disbursements to help ensure the trust continues to serve its intended purpose.

It is important to remember that disbursements made directly to the beneficiary, or for food, clothing and shelter on a regular basis may reduce or eliminate essential benefits like Medicaid and SSI. Both third party and OBRA trusts are designed for meeting supplemental needs rather than basic needs. Beneficiaries will need to use their income from government benefits or employment to meet basic needs.

How do I go about funding a trust account?

Parents can fund a **third party trust** in a pooled trust program as they would fund an individual trust with a bank. The trust account can be funded by an inheritance through a will, from life insurance, from savings or in other ways. Parents may fully fund the trust when it is established. They may also enroll in the trust and not fund it until later, for example, at their death, or they may decide to fund it incrementally over time. Pooled trust programs usually accept only cash assets; assets such as property are usually difficult for pooled trust programs to manage. A parent, grandparent, or anyone in need of long-term care services in a nursing home may be able to transfer assets into a trust for her child, grandchild, relative or other person with a disability, and thus qualify for Medicaid, without having to wait through the look back period. Consult with your attorney or trust program for more information on this option.

OBRA trusts established in pooled trust programs allow certain individuals with disabilities to use their own assets in a trust established by a parent, grandparent, legal guardians, court or the individual himself. For many families, funding a trust will not have any significant impact on estate or death taxes. However, you should consult with your attorney and financial planner on these issues including any other tax issues that might arise.

What amount of money can or should I place in a pooled trust program?

Pooled trust programs may have different rules on the minimum and maximum amounts allowable in trust accounts. These restrictions are often dependent on whether the trust is a **third party trust** or an **OBRA trust**. The pooled trust program should provide you with specific information on any restrictions.

Each person with a disability will have different needs that may affect how the trust is set up and with what amount. The person's age, services being received (or someday received) and other variables can affect these decisions.

Families should seek the advice of their own attorney, financial planner and trust program staff for information and guidance on this aspect of planning. The trust program may also provide information on the average life expectancies of people at certain ages and how different trust amounts would be spent down over time (based on the amount placed in trust, plus average earnings, disbursements, inflation and fees over the beneficiary's lifetime).

What can a trust pay for?

When the person with a disability is receiving SSI and/or publicly funded services such as Medicaid, a trust normally cannot pay for food, clothing, shelter and basic health care costs. There are sometimes exceptions, but you need to discuss these with the trust program representative. Pooled trusts, like individual trusts, are normally set up to provide services and items that do not jeopardize means-tested benefits.

What happens to any remainder in the trust if the beneficiary dies before it is used?

If sufficient funding is available, trusts are often set up with the goal of spending all principal and earnings by the time the beneficiary dies. However, the beneficiary may die prematurely, or if the trust account is quite large, funds may remain after the beneficiary dies. How the remaining funds are used depends on the type of trust, conditions set forth by the donor and/or the policy of the trust program.

Third party trusts do not require that the state be reimbursed for publicly funded services that the beneficiary may have used during his lifetime. You can usually designate another person, several people or an organization you want to receive some or all funds that remain. You may also designate that the remainder is split between people and/or organizations. The trust program may also have a policy that allows it to retain a portion of the remainder amount after the beneficiary dies. Before establishing a **third party trust**, discuss the program's policy and options for remaining trust funds.

OBRA trusts do require that the state be reimbursed from remaining funds in an account. The pay back is for publicly funded expenses incurred in providing Medicaid services to the person with a disability. However, the law allows the trust program to set a policy regarding the first right to retain any portion or percentage of the **OBRA trust** remainder. After the trust program retains its portion of the remainder, the state can then recoup payment from what is left. If funds remain in an OBRA trust afterwards, provisions in the trust could designate how remaining funds are distributed. However, state funded services are usually extremely costly and can amount to several thousand dollars per month, so it unlikely that an OBRA trust will result in any significant amount of funds that can be distributed to other heirs. Trust programs put the funds that they retain to good use. These funds may be used to assist other beneficiaries whose trust funds run out prematurely. Funds may also be used to operate the program. When given the option of how remaining funds are distributed, consider earmarking some or all of these remaining funds to the trust program or a related charitable organization.

Can I establish a trust for anyone?

Most pooled trust programs have policies about whom they choose to serve as beneficiaries. To participate in an OBRA trust, Medicaid states that the person must meet the Social Security Administration (SSA) definition of disabled. Adults are eligible for SSI if they have a severe physical or mental impairment that prevents them from working and earning a self-sufficient wage, and they do not have more than a certain amount of assets. Children also are eligible for SSI if they have "marked and severe functional limitations" from a physical or mental condition and their parents do not have more than a certain amount of assets.

Sometimes a person does not fit SSA's criteria for disabled, but will fit a state's definition of having a disability. If the person for whom you are planning does not fit SSA's criteria, consult with the trust program to determine if the person is eligible under a state definition and if the trust program serves people with the particular disability.

What are the benefits of using a pooled trust program?

There are advantages for individuals with disabilities and their families or others who use the services of a reputable trust program:

- Parents may not have or know someone who is willing to be a trustee. Trust programs usually have knowledgeable staff and volunteers who will serve as trustee or manager of the trust.
- An individual trustee could die, move away or not fulfill the trustee role for some other reason. Trust programs offer continuity, as the program does not depend on just one individual.
- The trust document used by programs usually has been developed and reviewed by attorneys with expertise in this area of law. There is also the likelihood that publicly funded agencies have also reviewed the trust document for compliance with their agency regulations.
- Banks and trust companies will not accept or manage a trust that is not funded at a threshold amount. Depending on the bank, the trust account may have to be several hundred thousand dollars or more. Parents who cannot afford to fund a large trust are often able to fund an adequate account in a pooled trust program.
- Pooled trust program staff or volunteers often have expertise and experience with people who have disabilities. The volunteer board of the program may also be comprised of legal and financial experts, family members of people with disabilities and advocates.
- Trust programs usually work closely with banks and trust companies to maintain trust accounts and can tap the expertise of financial institutions. This relationship can help maintain good financial accountability without incurring high fees for the beneficiaries.
- It is also worth repeating that one of the biggest advantages to using a pooled trust program is the expertise brought to managing the trust and making the required reports after it begins to make disbursements.

Are there disadvantages to using a pooled trust program?

Some families and individuals may find that using a pooled trust has some disadvantages. These include:

- Parents or other family members have no direct control over trust disbursements. The trust program usually seeks advice and input from families and others, but may deny requests, especially if the request jeopardizes the person's benefits.
- Trust programs usually pool all the resources for investment purposes. Families cannot direct how their specific family member's trust account is individually invested. Investment policies are usually conservative.
- If you decide to withdraw from a trust program early and have already paid enrollment and/or other fees, you may forfeit some or all of those fees.
- A trust program may have a policy about retaining a portion of assets that remain in a third party trust after the beneficiary dies. However, you may want all remaining assets to go to other individuals and/or organizations.
- A trust program's policy about retaining a portion of remaining assets, plus its full discretion to disperse as much (or as little) of the trust as it decides, raises the theoretical potential that the program will withhold disbursements to increase its share of the amount of remaining assets it might retain. Trustees are required to exercise fiduciary responsibility precisely because of this kind of concern.

What safeguards are in place to ensure that a pooled trust program is operated effectively, my money is safe and that my family member is well cared for?

Federal and state statutes dictate some of what a pooled trust can and cannot do, but there are no enforceable standards for the operation of pooled trust programs. There is no certification or accreditation process for pooled trust programs. Consumers should be cautious about accepting certifications and similar credentials as a definitive sign of quality.

There are also no guarantees with this type of financial planning. Possible changes in SSI and Medicaid regulations or state/federal laws, investment fluctuations, the beneficiary's future service needs and numerous other factors may affect how your individual plan is carried out. Trust programs should advise you conservatively on the benefits and possible risks when planning. These benefits and risks may exist regardless of using a pooled trust program, bank or other method of financial planning. Beware of anyone who promises that a service or program guarantees or ensures or assures a plan for your son or daughter.

The following questions may assist you in making some judgments about the trust program:

- Does the trust program have the financial and/or volunteer support of one or more well-known disability organizations?
- Is the governance board comprised of people with expertise in disability, legal and financial matters?
- Does the trust program use the services of a reputable bank, trust company or other financial institution as a trustee or for account management?
- If you contact this financial institution, do they know about the program and its operation?
- Do program staff or volunteers provide clear and comprehensive written and verbal information about how the trust operates including its fees and services?
- Do they answer your questions in easy-to-understand language?
- Are they knowledgeable about federal/state benefits, laws that affect planning and the reporting requirements after the trust is active?
- Does the program evaluate its services and the satisfaction of families and others already using the trust?
- Does the program readily share this information?
- If you speak with others who use the trust program, do they indicate they are satisfied with the program?
- Does the program produce a regular (annual) report of its activities?
- Is it clear that the program is operated in a businesslike manner and with a mission that places the welfare of its clients above all?

I already have an individual trust written into my will, what should I do if I want to consider using a pooled trust?

You need to speak with the trust program and with your attorney about using a pooled trust account instead of an individual trust or possibly using a pooled trust in conjunction with another trust. Your current discretionary (special needs) trust may already allow the trustee discretion to distribute money to a pooled trust account, which in turn, could then make distributions for the beneficiary and ensure proper reporting. However, you should not assume that this is the case. Even if you currently have no desire to use a pooled trust, consider discussing this option with your attorney and a representative of the pooled trust program. This may help ensure a wider array of options in the future.

What is the role of my child with a disability and other family members when considering a pooled trust plan?

A trust program should seek input and guidance from parents, the person with a disability, siblings and significant others. Family members should discuss and understand how the trust program operates and stay involved when the trust becomes active and disbursements begin. Since the individual with a disability and family members may be the ones to request trust fund disbursements, it is important that these individuals know how the program works and have a good relationship with the trust program representative.

PART THREE:
TEXAS POOLED TRUST PROGRAM

The Arc of Texas Pooled Trust
8001 Centre Park Dr.
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