



LEGAL HOTLINE FOR TEXANS

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Questionnaire for Designation of Guardian In Advance of Need

THIS PUBLICATION IS NOT A SUBSTITUTE FOR THE ADVICE OF AN ATTORNEY.

The pamphlets of the Legal Hotline for Texans are general in nature and should not be relied on as advice for your particular circumstances. For advice that is specific to your particular circumstances, you should consult a lawyer.

The Legal Hotline for Texans (LHT) is a telephone hotline providing free legal advice and consultation and other free legal services to Texans Age 60 and Older or Eligible for Medicare; Crime Victims Age 60 and Older and their Family Members and Authorized Claimants; and Pension and Retirement Plan Employees, Participants and Beneficiaries.

Eligible Clients can consult with an attorney of the Legal Hotline for Texans free of charge by calling one of the phone numbers listed above. If clients would like to consult with an attorney in their communities, or if ongoing representation by an attorney is needed, the Legal Hotline for Texans may be able to make a referral.

Depending on individual circumstances and local availability, such a referral may be to an organization providing free attorneys to low income persons, or may be to an attorney on the Legal Hotline for Texans' reduced-fee panel, or may be to a statewide or local lawyer referral service.

The Legal Hotline for Texans is a project of the Texas Legal Services Center with support from the Texas Department of Aging, and Disability Services (DADS), the U.S. Centers for Medicare and Medicaid Services (CMS), the U.S. Administration on Aging (AoA) and the Texas Equal Access to Justice Foundation through the Texas Basic Civil Legal Services Program (BCLS) and the Texas Crime Victims Civil Legal Services Program (CVCLS)

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GUARDIANSHIP DECLARATION

Dear Client:

Thank you for your request that we prepare for you a Declaration of Guardian in the Event of Later Incapacity or Need of Guardian. We prepare this document at no charge for low income clients of the Legal Hotline for Texans. To prepare this document, we need certain information. This letter requests the needed information, and provides some guidance regarding the Declaration.

This letter, in the Questionnaire part, includes ten main questions (with sub-questions). Some of the questions may repeat questions that you have been asked by phone. It is still important that you answer all questions below, in writing, for two reasons: We want to double-check to make sure we accurately took down the information you gave us by phone, and by having correct information from you in writing, we can later on help rebut anyone who might say you were not competent to execute the Declaration of Guardian in the Event of Later Incapacity or Need of Guardian.

For further advice, we are enclosing a general article about the Declaration of Guardian in the Event of Later Incapacity or Need of Guardian. Please read this one-page article before filling in the blanks below.

To prepare the very important document that you have asked us to prepare, there are two general matters to consider:

- (1) Do you want to name a different individual as guardian of your person, from the individual who would serve as guardian of your estate, and
- (2) Do you want to forbid any individual(s) from being appointed as guardian of your person and/or estate?

Each of these matters will now be discussed, so that you can properly answer the questions further on.

(1) **General consideration #1.**

Although you can name a different individual to be appointed as guardian of your person, from the individual who is to serve as guardian of your estate, this is: (a) not required, and (b) not necessarily wise.

Unless you believe that the individual you want to name as guardian of your person will be unable to manage your property, you should seriously consider not naming separate individuals to serve as guardian of your person and guardian of your estate.

To help you decide whether to name the same individual as guardian of your person and estate (usually the wiser course of action), or to name different persons, we will set forth here certain portions of the Texas Probate Code.

The Texas Probate Code provides as follows:

§ 767. Powers and Duties of Guardians of the Person.

The guardian of the person is entitled to the charge and control of the person of the ward, and the duties of the guardian correspond with the rights of the guardian

§ 768. General Powers and Duties of Guardian of the Estate.

General Powers and Duties. The guardian of the estate of a ward is entitled to the possession and management of all property belonging to the ward, to collect all debts, rentals, or claims that are due to the ward, to enforce all obligations in favor of the ward, and to bring and defend suits by or against the ward; but, in the management of the estate, the guardian is governed by the provisions of this chapter. It is the duty of the guardian of the estate to take care of and manage the estate as a prudent person would manage the

person's own property. The guardian of the estate shall account for all rents, profits, and revenues that the estate would have produced by such prudent management.

§ 769. Summary of Powers of Guardians of Person and Estate.

The guardian of both the person of and estate of a ward has all the rights and powers and shall perform all the duties of the guardian of the person and of the guardian of the estate.

Certainly, if you strongly believe that an individual should serve only as guardian of your person, and that a different individual should serve as guardian of your estate, you can nominate different individuals in the Declaration that you have asked us to prepare. But unless you have that type of well-founded preference, you should strongly consider allowing the same individual to be guardian of both your person and estate. This serves these purposes:

- (1) It avoids communication problems between different individuals;
- (2) It may avoid the need for duplicate bonds; and
- (3) It may reduce the number of times that successor (alternate) guardians will have to be appointed and qualify to serve by taking oath and posting bond. (A successor or alternate guardian is appointed to serve, if the first-named guardian (or a prior alternate) is no longer able to serve because of his or her death or disability or loss of bond, or if the first-named guardian or prior alternate is unwilling to serve).

Indeed, please note that this first general consideration -- whether to name a separate individual to serve as guardian of your person, from the individual who would serve as guardian of your estate -- is not the same question as whether to name successor (alternate) guardians. By naming alternates -- which is usually a good thing to do -- you provide for one individual to succeed another as your guardian, if the first-named individual dies, becomes disabled, fails or refuses to qualify, or resigns.

In sum, general consideration #1 is whether you want to name the same or differing individuals, to be guardian of your person and to be guardian of your estate, in the event of later incapacity or need of guardian.

(2) General consideration #2.

The second general consideration to address is this: Do you want to forbid the court from naming any individual(s) as guardian of your person or estate or both, in the event a guardian later on is needed? Texas law gives you the power to utterly prevent individuals you disqualify from ever being appointed your guardian. Thus, you can prevent an improperly meddling relative or other individual from ever being appointed your guardian, by listing such individuals in the appropriate place in the document you have asked us to prepare. Please keep these VERY IMPORTANT points in mind: If you disqualify too many individuals who you know, a stranger may be appointed if you later need a guardian; also, if you disqualify several individuals, this may call into question your competence. You must be of sound mind to execute the Declaration of Guardian in the Event of Later Incapacity or Need of Guardian. Also, please remember that you are not required to disqualify any individual(s).

In sum, general consideration #2 is whether you want to disqualify any individuals from being appointed by the court as your guardian, in the event of later incapacity or need of guardian.

Keeping the above points in mind, please now complete and return all pages of this letter and questionnaire with the exception of the page titled "Self Determination through Declaration." You should keep this page for your records, and you should read the entire page before filling in the Questionnaire below it.

Depending on which space you initial at Question (6)(a), Questions (8)(a) through (8)(b)(iii) will or will not apply. If you initial the first space at Question (6)(a), Questions (8)(a) through (8)(b)(iii) will not apply.

A self-addressed envelope has been enclosed for your convenience in returning this questionnaire.

BEFORE FILLING IN SPACES ON THE QUESTIONNAIRE, PLEASE READ THIS.

Self Determination through Declaration

Helping Clients Pre-Select a Guardian

by Bruce Bower

Texas has a well-deserved reputation of offering its citizens maximum personal liberty. One example is the right of any competent adult Texan to designate, prior to the need arising, a personal guardian, should one later prove to be necessary. Unless the court finds in a subsequent guardianship proceeding that the person designated earlier would not serve the best interests of the now incapacitated adult, or is otherwise disqualified, the court "shall appoint" the designated person.

This designation by a competent adult *declarant* may be accomplished by using a form that Texas law supplies, word for word. The form is called *Declaration of Guardian in the Event of Later Incapacity or Need of Guardian*. Its wording is contained in Section 679 of the *Texas Probate Code*.

The statutory form allows for the designation of a guardian of the person, and up to three alternates. It also allows for the designation of a guardian of the estate and up to three alternates. The same person(s) may be named as guardian of both the person and estate, if the declarant so desires. It is wisest to name residents of Texas as guardian and alternates because a bond is required of a guardian. Out-of-state residents may have great difficulty obtaining a bond that a Texas court would approve.

Perhaps even more important than the ability to name one's own guardian is that the declaration allows the declarant to *disqualify* named persons from serving as guardian. The law clearly states that, "the persons named may not be appointed guardian under any circumstance." *See Tex. Prob. Code, § 679(b)*. This is an extraordinary power that any competent adult Texan can use. By naming who is *not* to be appointed guardian, the declarant can utterly avoid a court later naming as guardian unwelcome, intrusive, hostile siblings or other relatives or persons.

It is not required that a reason be stated as to why a certain person is disqualified, however, the law does allow reasons to be stated. "A declaration . . . may be in any form adequate to clearly indicate the . . . intention to designate a guardian . . ." *See Tex. Prob. Code, § 679(g)*. The declaration must be witnessed by two credible witnesses 14 years of age or older who are not named as guardian or alternate guardian and must have attached a self-proving affidavit.

The declaration may be filed with the court at anytime after the application for appointment of a guardian is filed and before a guardian is appointed. *See Tex. Prob. Code, § 679(d)*.

Requests should include the name, address, phone number, and date of birth of the requester. The Legal Hotline will respond by telephone.

The Hotline is a joint project of Texas Legal Services Center and the American Association of Retired Persons/Legal Counsel for the Elderly; it also receives funding from the Texas Equal Access to Justice Foundation and the Texas Department on Aging. Ayudamos en ambos idiomas de Texas.

Bruce Bower is the Director of Advocacy and Client Services for Texas Legal Services Center. A version of this article suitable for community education is also available.

**AFTER READING THIS, PLEASE DETACH IT FROM THE QUESTIONNAIRE.
PLEASE KEEP THIS AND DO NOT SEND IT BACK WITH THE QUESTIONNAIRE.**

*** QUESTIONNAIRE ***

(1) If you have read and understand the above matters, (including the enclosed one-page article) please sign your name here:

(2) On the line below, please print your **full** name:

First name Middle or Maiden name Last name

(3) On the three lines below, please print your address:

Number and street name or P.O. Box number Apartment or Suite number (if applicable)

City, Town or Village , TX
Zip Code

(4) What county do you live in? _____

(5) Please state your full date of birth: _____
Month Day Year

(6)(a) Please initial the space that states your position:

_____ I do not want a separate individual to be guardian of my person, from the individual who is to be guardian of my estate.

_____ I do want a separate individual to be guardian of my person, from the individual who is to be guardian of my estate.

(6)(b) If you initialed the second space in (6)(a), please state here fully why you want the guardian of your person to be a different individual from the guardian of your estate:

(If more space is needed, please so indicate, and use the lines at Question (10), below).

(7)(a) Please print the name and address of the person you want to nominate as guardian of your person and estate (or just as guardian of your person, if you initialed the second space in Question (6)(a)).

space):

_____ I disqualify the above individual as guardian of both my person and estate.

_____ I disqualify the above individual as guardian of my person, but the above individual is not disqualified as guardian of my estate.

_____ I disqualify the above individual as guardian of my estate, but the above individual is not disqualified as guardian of my person.

(9)(c)(ii)(b) Please print fully the reasons why you have disqualified the above individual as guardian of your person and estate, or as guardian of your person, or as guardian of your estate:

(9)(c)(iii) If you want to disqualify a third person, please print below, the details that are requested below:

Please print the name and address of the third individual that you want to disqualify:

The printed full name of this person is: _____

His/her address is:

Number and street name or P.O. Box number Apartment or suite number (if applicable)

City, Town or Village State Zip Code

(9)(c)(iii)(a) Please initial the space that states your position regarding the above individual (initial only one space):

_____ I disqualify the above individual as guardian of both my person and estate.

_____ I disqualify the above individual as guardian of my person, but the above individual is not disqualified as guardian of my estate.

_____ I disqualify the above individual as guardian of my estate, but the above individual is not disqualified as guardian of my person.

(9)(c)(iii)(b) Please print fully the reasons why you have disqualified the above individual as guardian of your

- (11) Please date and sign this Questionnaire and return it in the enclosed self-addressed envelope.

Date: _____

Signed: _____

The Legal Hotline for Texans will review the information provided in your Questionnaire, and will prepare for you to execute, the Declaration of Guardian in the Event of Later Incapacity or Need of Guardian.

Thank you.

LEGAL HOTLINE FOR TEXANS.