

2021

TEXAS GUARDIANSHIP

Understanding How It Works for an Incapacitated Parent or Child

A **fiduciary** is a person or organization that acts on behalf of another person or persons, putting that person's interest ahead of their own, with a duty to preserve good faith and trust. Being a **fiduciary** thus requires being bound **both legally and ethically** to act in the other's best interests.

Guardian of the person and estate

A person must be determined to be incapacitated in order to be under a guardianship.

This applies to guardian of the person and guardian of the estate

Texas Estates Code section 1002.017

“Incapacitated person” means:

- (1) a minor;
- (2) an adult who, because of a physical or mental condition, is substantially unable to:
 - a. *provide food, clothing, or shelter for himself or herself;*
 - b. *care for the person’s own physical health; or*
 - c. *manage the person’s own financial affairs; or*
- (3) a person who must have a guardian appointed for the person to receive funds due the person from a governmental source.

Texas Estates Code section 1002.019

“Minor” means a person younger than 18 years of age who:

- (1) has never been married; and
- (2) has not had the disabilities of minority removed

Capacity?

When and how to evaluate

All persons over 18 years of age are presumed to have capacity.

Even adult “kids” who have developmental disabilities are presumed to have capacity.

Who evaluates a person to determine capacity?

A medical doctor in Texas can evaluate a person for capacity – use the Physician’s Certificate of Medical Examination.

No psychologists or nurse practitioners.

Are there lesser restrictive alternatives to guardianship? Powers of attorney for example.

What Will Happen to Rapper Nipsey Hussle's Children?

The death of Rapper Nipsey Hussle leads many to wonder if he had an estate plan, and if so, if he named a guardian for his two minor children. All of his estate would go to them, but they are minors and will need guardians or a trustee to manage his assets.

When Rapper Nipsey Hussle was killed in front of his store in Los Angeles, he left behind two minor children and a girlfriend. If he did not have an estate plan, he joins artists like Aretha Franklin and Prince who also died with no estate plans. He also created a problem for his children, because minors are not permitted to own more than a certain amount of assets, according to *Rolling Out's* article, ["RIP Nipsey Hussle: 5 reasons you need an estate plan."](#)

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Guardianship of an estate

For minors who inherit property directly

Guardianship

Guardianship for adults

Developmental disability

Adult child who is without capacity due to a lifelong disability.

At age 18 every person has the same civil liberties.

If the adult child is without capacity and needs protection seek a guardianship.

The person who has been disabled their entire life, cannot execute powers of attorney if they are incapacitated.

Disease or trauma

Adults who had capacity, but no longer have capacity due to disease or a trauma.

If there are no powers of attorney (or they fail to work) and the adult is incapacitated, then a person can seek guardianship of the adult.

Examples: Dementia, brain injuries, stroke, mentally ill persons.

Guardianship of Person and Estate

Person

- Makes medical decisions
- Makes residency decisions

Estate

- Makes financial decisions
- Pays bills
- Makes real estate decisions
- Signs contracts
- Pays taxes
- Represent ward in the ward's business
- Serves as the legal representative for the ward in court

Pros and Cons of guardianship – A Texas Guide to Adult Guardianship

Pros

- Guardianship protects vulnerable people from those who would abuse, neglect or exploit them.
- Guardians support their wards by helping them handle their personal or business affairs.
- Guardians advocate for their wards - make decisions for them or help them make decisions:
 - Where they will live.
 - Medical treatments they will receive.
 - Who has access to them.
- Guardianships are legal actions, require annual reporting, court oversight. Guardians are fiduciaries.

Cons

- Guardianship is the most restrictive action taken to protect a vulnerable person.
- Wards can lose many or most of their basic rights.
- Family members may no longer be involved in decision-making if they are not appointed guardian and may have limited access to the ward.
- Guardianships require hiring an attorney, the necessity of accounting to the court and are expensive. Guardians must post a bond. All actions require Court approval.

#FREEBRITNEY

Modification

Restoration

Termination

For more information

<https://www.traviscountytexas.gov/probate> - Judge Herman

<https://www.wilco.org/ccl4> - Judge McMaster

www.blsolaw.com **Ellen P. Stewart**