

GUARDIANSHIP

INTRODUCTION

The purpose of this chapter is to outline potential legal issues which may arise when you have dependent children, or would like to designate a guardian for yourself should you become incapacitated.

MINOR CHILDREN AND GUARDIANSHIPS

Oftentimes and understandably, children take a back seat to the patient's battle with cancer. As you know, it is always important to consider the needs - both long-term and short-term, emotional and physical - of your children. Listed below are topics that may be of assistance when considering issues surrounding the children of a cancer patient.

How can I secure my child's future in the event of my incapacity or death?

Guardianship is the most common method of pre-arranging who will take care of your child if you die or become incapacitated.

GUARDIANSHIPS

What is a guardianship?

A guardianship is a court-supervised administrator designated for a minor child or an incapacitated person. There are two types of guardianships: 1) of the person; and 2) of the estate. Legally speaking the child or incapacitated person is often referred to as the "ward." A guardian of the person is in charge of the child's care and custody. A guardian of the estate is also in charge of the child's property and finances, if there is any money or property in the child's name.

Because a guardianship is a court-supervised proceeding, there are specific rules regarding all areas of guardianship, and it is highly encouraged that you *Speak with a lawyer* about the requirements and specifications of appointing a guardian for your child, or yourself should you become incapacitated. This is especially true when you are not married to the child's other parent.

The type guardianship addressed in this section is legally referred to as "guardianship of a person," namely a guardianship of your child, or yourself should you become incapacitated.

Who can be a guardian?

In general, the following may not be appointed a guardian ("ineligible people"):

- a minor;
- a person whose conduct is notoriously inappropriate;

- an incapacitated person;
- a person who is a party or whose parent is a party to a lawsuit concerning or affecting the welfare of the proposed ward (your child);
- a person who is indebted to the proposed ward, unless the person pays the debt before appointment;
- a person asserting a claim adverse to the proposed ward or the proposed ward's property (real or personal);
- 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, institution or corporation found unsuitable by the court; or
- a person disqualified in a declaration made by you in the event of your incapacity.

When appointing a guardian, you, like the court, should consider the best interests of the child. Under the law, it is presumed not to be in the best interests of a child to appoint a person as guardian of the child, if that person has been convicted of (i) any sexual offense or (ii) aggravated assault. In addition, a guardian cannot have (i) injured a child, (ii) injured an elderly individual, (iii) disabled an individual, (iv) abandoned or endangered a child, or (v) committed incest.

What does a guardian do?

In general, a guardian has wide authority over the care, control and protection of the ward, but that right of control is not unlimited under the law. The guardian's duties may be restricted by a court.

The guardian is entitled to establish the ward's domicile, to care for, control and protect the ward, to provide the ward with clothing, food, medical care and shelter, and to consent to medical, psychiatric and surgical treatment on behalf of the ward.

How do I create a guardianship for my child?

Because it is important that your wishes for your child's future are followed, and because the guardianship process is not easy, we strongly encourage you to seek an attorney to help you with this process. That being said, it is helpful to know that there are legal requirements for creating a guardianship for your child.

- When appointing a guardian for your child it **MUST** be in writing. A guardianship can be created in a will or in a written declaration of guardianship.
- If you appoint an eligible person as a guardian (see list above of ineligible persons) in a will, the will must meet the requirements of a valid will under Texas

law. (See the Estate Planning section for more information regarding wills.)

- If you appoint an eligible guardian by a written declaration, the written declaration **MUST** be signed by you. (When using a declaration to create a guardianship, you are known as the “declarant.”) Also the declaration should be dated. If the declaration is handwritten, then it must be entirely in your handwriting. A declaration that is not written wholly in your handwriting may be signed by another person for you under your direction and in your presence; or
- If the declaration is not handwritten, then you will need to have it witnessed (i.e., “attested to”) in your presence by at least 2 credible witnesses 14 years of age or older, who are not named as a guardian or alternate guardian. This kind of declaration may have attached a “self-proving affidavit” signed by you and the witnesses attesting to your competence and the execution of the declaration. A self-proving affidavit is a document that would be attached to the declaration and would say you are competent, and that you intended to create the declaration.
- The declaration and any self-proving affidavit may be filed with the court at any time after the application for appointment of a guardian is filed and before a guardian is appointed.
- If the designated guardian does not qualify, is dead, refuses to serve, resigns, dies after being appointed guardian, or is otherwise unavailable to serve as guardian, the court shall appoint the next eligible designated alternate guardian named in the declaration. If the guardian and all alternate guardians do not qualify, the court shall appoint another person to serve.

Note: A declaration and affidavit in any form may be adequate to clearly indicate your intention to designate a guardian for your child.

REVOCACTION

A will and declaration of guardianship may be revoked in any manner as provided in a will. (See the Estate Planning section of this Guide for further information).

Is there anything else I should know about guardianships?

In the event that you become permanently incapacitated or die, the declaration of guardianship and/or last will and testament will need to be filed with the proper probate court. Also, the guardian will need to fill out an application for guardianship with that probate court and abide by the guardianship requirements imposed by law and by the court.

GUARDIANSHIP IN CASE OF YOUR INCAPACITY

You can also designate a guardian for yourself should you become incapacitated and require a guardian of your person. This kind of guardianship of you as an incapacitated person follows most of the same requirements as a guardianship of your minor child. In other words, you can only appoint or designate eligible people to be your guardian.

How to Execute?

You will need to designate a guardian in writing. When creating a guardianship for yourself you will follow the same steps as if you were creating a declaration of guardianship for your child. (See section above discussing the creation of a guardianship for a child.). One important difference when creating a declaration of guardianship for yourself is that you can designate the people that you do not want to become your guardian. These designated people will be disqualified from being your guardian, in the event that your pre-selected guardian is unable to serve as your guardian.

What else should I know about a guardian for myself?

If you designate your spouse to serve as your guardian, and you subsequently divorce before a guardian is appointed, the provision of the declaration designating your spouse has no effect.

Revocation of a declaration of guardianship for yourself is revoked just like a guardianship for your child. (See above section)

What else?

Talk to your child about the cancer

Often the scariest part for a child dealing with a parent who has cancer is the lack of information. There are numerous resources out there for help in explaining and dealing with cancer. Talk to the nurses regarding possible resources for kids (e.g., age appropriate books). In addition, contact your local American Cancer Society or Hospice for more help.

Talk to your child about his or her future

Children need to be reassured that they will be taken care of and provided for under any circumstance. Just as you would discuss with your child what to do in case of a fire, you need to talk to your child about how cancer will affect your child's future.

Let your child's school administrators and counselors know about your condition

It is important to let your child's school know about what your child is having to deal with at home. Often school counselors will be able to provide a support group of other children that have, or are currently dealing with, a similar situation involving a parent with cancer. The more support the child has the better they can cope with the stress of dealing with a parent with cancer.

A child dealing with stress under these situations may begin to act out while in school, which gives the school a "heads-up" that your child needs assistance.