

Guardianship

❖ *What does it mean to have guardianship of my adult loved one with Special Needs?*

Seeking guardianship over an adult is a legal process requiring an attorney with the sole purpose of protecting vulnerable disabled loved ones from the financial, medical, and social challenges and complexities that come with being an adult. That said, guardianship is a relationship created and monitored by a court that takes away legal rights from a person (called the ward) and gives those rights to another person (the guardian). Those rights include voting, marriage, and medical decision-making.

In Texas, a guardianship is almost always sought for incapacitated adults (rather than children). Legal incapacity means that a person who, because of a physical, cognitive, or mental condition, is substantially unable:

- *To provide for his or her own food, clothing, or shelter, or*
- *To care for his or her own physical health, or to manage personal financial affairs.*

❖ *What are the different types of guardianship?*

- **Guardianship of the person** has control over the ward's personal matters such as housing, medical care and educational decisions (most common).
- **Guardianship of the estate** has control only over the ward's personal finances (this option is much more expensive and typically not necessary if one becomes a representative payee—see below).
- **Guardianship of the person and the estate**
- **Temporary Guardianship** is only used and approved during emergencies such as the death of the original guardian. Temporary guardianship is only valid for 60 days and one would still need to apply for permanent guardianship of the person, if needed.
- **Power of Attorney** is not a form of guardianship, but rather a document where a person authorizes another to make financial decisions, medical decisions, or both on their behalf. However, to sign off on a PoA, one needs to understand what they are signing over.
- **Supported Decision Making** is an alternative to guardianship that allows people with disabilities to retain their decision-making capacity by choosing supporters to help them make choices. The disabled loved one would still maintain all control over financial, medical, and personal decisions. While this can be a good alternative to the stricter rules of guardianship, some have argued that it does little more than what parents/caregivers are already doing and isn't necessary.

❖ *What do I need to consider when making this decision?*

Whether or not to obtain guardianship over your loved one is a big decision. Often, it is the right decision for families with loved ones who have IDD and an IQ below 70. This is because an individual with IDD might not be able to fully understand their own finances and medical care or the instructions for power of attorney or other less restrictive agreements. **Being their own guardian can make them vulnerable to abuse, neglect, and exploitation.**

However, it is very important to consider whether your loved one IS able to make these decisions given that their rights are restricted when they become another's ward. **Someone with a legal guardian no longer has the right to vote, to make medical decisions, to marry without approval, and, oftentimes, to drive.**

If guardianship is the right choice for you and your loved one, you will need to decide between guardianship of the person, of the estate, or both. As mentioned, guardianship of the estate is a

more expensive option and can usually be avoided by having a special needs trust which protects money in the loved one's name. A guardian of the person can also apply through the social security administration to be a representative payee so that SSI checks go directly to the guardian to protect the ward's finances. It will be important to speak with your attorney about which option would work best for your family.

To read more about the nuances of guardianship in Texas, and to see a list of pros and cons, visit: [A Texas Guide to Adult Guardianship](#)

❖ ***What is the process for seeking guardianship?***

- **For children under 18** it is recommended that you begin this process about 3-4 months in advance of your loved one's 18th birthday in order to give enough time for it to be processed through the legal system. You can start as early as 6 months before their birthday, but just keep in mind that the physician's "**certificate of medical examination**" (required to verify ability/need for guardianship) must be **no older than 120 days** when the guardianship paperwork is filed.
- **For adults older than 18** you can begin this process at any time. Keep in mind that once your loved one turns 18, they are legally their own guardian. This means that you will have no authority to make medical and financial decisions, and doctors and financial institutions will be legally bound to what your loved one chooses.
- **You will need an attorney** to go through this process. This is a legal process which is approved by a judge at a hearing. Typically attorney's fees range from \$2000-\$4000 for the full guardianship process. As long as you fulfill your annual report thereafter, you will not need to pay any ongoing fees outside of the small processing fees for that annual report (about \$20). The attorney can walk you through the process from beginning to end. **It is strongly advised that the attorney specifically works with Special Needs guardianship as there are nuances to this process that a typical attorney likely isn't familiar with.**
- **You will need a Certificate of Medical Examination** within 120 days of filing. This can be completed by any trusted physician. This should be a physician who is either familiar with your loved one or who fully understands your loved one's capabilities so that they fill the form out accurately.
- **If seeking Guardianship of the Person and your loved one receives SSI** you can complete SSA form 3288—which allows them to speak with you about your loved one's benefits— and then a representative payee form for payments to come to you.
- **Successor Guardians** can be named in the unfortunate instance that the legal guardian is incapacitated or dies. This person would still need to seek primary legal guardianship, but this is a way for the court to know your wishes. **The only instance in which a person can have two legal guardians (co-guardians) is when there are two married parents.**

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If it is difficult to afford the attorney's fees, **Legal Aid of North Texas** is also able to assist with guardianship on a sliding scale. Their number is: (888) 529-5277

For more information: [Guardianship | Office of the Texas Governor](#)
[Legal Guardianship for Young Adults with Disabilities | Navigate Life Texas](#)