

# GUARDIANSHIP

Guardianship (sometimes called living probate) is a probate court proceeding in which:

- 1) A mentally disabled person is sued to take away their right to manage their assets or personal care.
- 2) Those rights are then transferred to a person or financial institution appointed by the court.
- 3) The court may appoint one person or institution, "Guardian of the Person," and another, "Guardian of the Estate."
- 4) The Guardian of the Estate takes control of all the assets, income, and expenses of the disabled person or, "ward."
- 5) The ward cannot sell his or her own assets or determine how his or her money is invested or spent. Whether the protected person has any spending money is the guardian's decision.

## *Guardianship Characteristics*

**Cost:** In addition to the attorney representing the party seeking the guardianship, the court appoints an independent attorney to represent the disabled person, both of whom are paid by the family. Once selected, the Guardian of the Estate must report to the judge all financial dealings made on the ward's behalf. All of the ward's assets and income and expenses must be reported to the penny. The two attorneys and court auditor are then paid to review the income and expense reports at least annually.

**Visibility:** Both the proposed ward and all

the proposed guardians have their personal and financial affairs dissected by attorneys in open court to determine their competency.

**Predictability:** The Court selects guardians based on the judge's assessment of each proposed guardian's capacity to serve ably. Though the family and the allegedly disabled person have input on the selection of Guardian, other candidates may propose themselves. The court requires the Guardian to post a bond in the amount of the disabled person's assets, possibly precluding or discouraging the ideal Guardian from serving.

**Accountability:** The required legal reviews offer iron-clad accountability.

**Transparency:** In situations where family members do not trust each other, the legally required transparency of a Guardianship can be appealing.

## *Filing For Guardianship*

**Who:** Anyone can file a guardianship lawsuit.

**When:** If you believe a loved one's condition makes them a threat to their own financial and physical health and they are hostile to your intervention, a guardianship lawsuit may be your only option.

**How:** If a family member needs to have a guardian appointed, you should contact an attorney who is familiar with this area of the law so the necessary pleadings can be filed with the appropriate court and the correct procedures can be followed. The attorney can also advise you of various alternatives to guardianship that may be

available.

Parents of special needs children that are transitioning to adulthood may consider using guardianship as a way to continue helping their child make important financial and care decisions after they turn eighteen. Similarly, spouses of those with degenerative conditions may consider Guardianship. However, there are many alternatives to consider. Estate planning mechanisms such as trusts in conjunction with Medical Power of Attorney, for instance, may allow a family to avoid guardianship.

## *Alternatives to Guardianship*

Rather than relying on courts to select and monitor caretakers, proactive estate planning tools can be more cost effective, more expedient, less public, and better reflect the preferences of the would-be ward and their family. These include:

- 1) Trusts: Placing assets in the care of a trust on behalf of the special needs beneficiary can eliminate the need for any court oversight of assets.
- 2) Durable Power of Attorney: While not legally required to do so, financial institutions may accept a power of attorney to accomplish such tasks as selling the disabled person's assets to pay for care. Note: This must be signed prior to the advent of incompetency.
- 3) Medical Power of Attorney: Doctors are obligated to honor these written directives granting decision-making power to surrogates.

## ***Unwelcome Guardianship Lawsuits***

Like all laws, Guardianship statutes can be abused by the unscrupulous.

***Avoiding:*** Neither a will nor a power of attorney guarantees that your matters will avoid an unwanted guardianship lawsuit. However, a properly prepared estate plan incorporating a trust and Medical Power of Attorney can both prevent the need for guardianship and also make you undesirable quarry for those who might bring an unwanted guardianship lawsuit.

***Disputing:*** Whether a result of a simple disagreement over your mental fitness or a less benign motive, if someone has filed a petition for the unwelcome appointment of a guardian for you or a loved one, you should contact an attorney. You will have to decide whether to oppose the petition, propose alternative solutions, or oppose the appointment of the particular person in favor of one of your choice.

Remember,

### ***Planning Adds Predictability!***



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***Practice Limited to Estate Planning, Estate Administration, Probate, and Elder Law***

The hiring of an attorney is an important decision. The items discussed in this brochure are of a general nature and not intended to provide legal advice. Please consult a qualified estate planning/elder law attorney to determine the best options for your personal circumstances.

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## **About the Author**



Ronald Greening, Attorney and Counsellor at Law, is the founder of The Greening Law Firm, P.C. Ron grew up in Houston and after earning a B.S.E.E. from the University of Texas at Austin in 1969, he worked as an electrical engineer for three years. He has practiced law since 1975, starting in Washington, D.C. for six years,

then for two years on Wall Street before returning home to central Texas in 1983. He is a member of the Real Estate, Probate & Trust Law Sections of the State Bar of Texas and the Probate and Estate Planning Law Section of the Austin Bar Association. He is a founding member and past president of the American Association of Trust Estate and Elder Law Attorneys, a member of the Texas and National Association of Elder Law Attorneys and a member and director of the Estate Planning Council of Central Texas. He is fully licensed by the Texas Supreme Court, Washington D.C. Court of Appeals, and various federal courts. His practice is limited to estate planning, estate administration, probate and Medicaid planning.

Ron continues to be active in Westlake Hills Presbyterian Church, WHPC.org, serves on the Board of Directors and Secretary of the Board of the Georgetown Community Foundation, GACF.org, belongs to the Rotary Club of Austin, Rotary-Austin.org, the Texas Longhorn Breeders Association, TLBAA.org, serves on the Advisory Board of the Travis County Retired and Senior Volunteer Program, RSVPAustin.org, and other community and professional organizations. Ron lives on Lake Travis and has a herd of one Longhorn steer who lives in his backyard.

Mr. Greening is committed to researching and preparing high quality, tax-sensitive estate plans. His mission in law is to help people accomplish their estate planning goals, and to take the mystery out of the estate planning process. His clients have their estate plans explained in straight-forward language that they and their families can understand. Good planning avoids needless court interference, public records, attorney fees, and government interference when an estate is settled.

Ron teaches workshops for the public as well as accredited continuing education seminars for C.P.A.s, nursing home administrators, attorneys, C.F.P.s, and other financial advisors. He provides complimentary initial office consultations for estate planning.

Austin 476.0888

Georgetown 931.0888

## **GUARDIANSHIP**



By

**Ronald G. Greening**

**THE GREENING LAW  
FIRM, P.C.**

ATTORNEYS AND COUNSELLORS AT LAW

Austin

506 W. 15th Street

476.0888

800.768.8898

Georgetown

1601 Williams Drive

931.0888

RONGREENING@GREENINGLAWFIRM.COM

[WWW.GREENINGLAWFIRM.COM](http://WWW.GREENINGLAWFIRM.COM)

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