

MODIFYING GUARDIANSHIPS AND RESTORING WARDS

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I. INTRODUCTION

An order finding a proposed ward incapacitated and appointing a guardian, although the equivalent of a final judgment, can later be modified if the circumstances change. For example, sometimes a person becomes incapacitated as a result of an accident. Although the person may have been in a comatose state at the time the guardianship was instituted, he often times recovers and regains some or all of the capacity he was previously without. On the other hand, a person may be determined to be partially incapacitated such as someone in the beginning stages of dementia or Alzheimer’s disease. Then, over time, his condition worsens and he loses some or all of the areas of capacity he had at the time the guardianship was instituted. Therefore, the legislature has enacted a series of statutes allowing for flexibility in guardianships and creating a method for modifying guardianships and, if the medical evidence is present, restoring a ward to capacity.

II. THE APPLICATION PROCESS

(A) Who may file and what may be filed?

As with most legal proceedings, the process of modification or restoration formally begins with the filing of a written application with the court. The application may be filed by the ward herself or by any person interested in the ward’s welfare. Tex. Prob. Code §694A(a) (West 2009). A “ward” is defined as a person for whom a guardian has been appointed. Tex. Prob. Code § 601(31) (West 2009). An “interested person” or “person interested” means heirs, devisees, spouses, creditors, or any others having a property right in, or claim against, the estate being administered; and anyone interested in the welfare of an incapacitated person, including a minor. Tex. Prob. Code § 601(15) (West 2009). However, the Texas Probate Code also provides that the ward can initiate the process by sending an informal

letter to the court. Tex. Prob. Code §694A(b) (West 2009). A person who knowingly interferes with the transmission of the ward’s request to the court may be adjudged guilty of contempt of court. *Id.*

Section 642 of the Texas Probate Code further provides that any person has a right to commence a guardianship proceeding, including a proceeding for restoration and modification, or to contest the same. Tex. Prob. Code. § 642(a) (West 2009). However, a person who is found to have an interest that is adverse to the ward may not initiate the proceeding or contest the proceeding. Tex. Prob. Code. § 642(b) (West 2009). Whether a person in fact has an interest adverse to the ward is determined by a unique version of a “motion in limine” which attacks the standing of the person who is alleged to have an interest adverse to the ward. Tex. Prob. Code. § 642(c) (West 2009).

(B) What may the applicant request?

The applicant may request that the court enter an order finding any of the following:

- ◆ that the ward is no longer an incapacitated person and ordering the settlement and closing of the guardianship [Tex. Prob. Code §694A(a)(1) (West 2009)];
- ◆ that the ward lacks the capacity to do some or all of the tasks necessary to provide food, clothing, or shelter for himself or herself, to care for the ward's own physical health, or to manage the ward's own financial affairs and granting additional powers or duties to the guardian [Tex. Prob. Code §694A(a)(2) (West 2009)]; or
- ◆ that the ward has the capacity to do some, but not all, of the tasks necessary to provide food, clothing, or shelter for

himself or herself, to care for the ward's own physical health, or to manage the ward's own financial affairs and (A) limiting the powers or duties of the guardian and (B) permitting the ward to care for himself or herself or to manage the ward's own financial affairs commensurate with the ward's ability [Tex. Prob. Code §694A(a)(3) (West 2009)].

(C) What if the Ward Sends an Informal Letter?

When the court receives an informal letter from the ward requesting restoration or modification of the guardianship, the court shall appoint the court investigator or a guardian ad litem to investigate the circumstances of the ward, including any circumstances alleged in the informal letter, to determine whether the ward is no longer an incapacitated person or whether a modification of the guardianship is necessary. Tex. Prob. Code §694A(c) (West 2009). The court investigator or guardian ad litem shall file with the court a report of the investigation's findings and conclusions and, if the court investigator or the guardian ad litem determines that it is in the best interest of the ward to terminate or modify the guardianship, the court investigator or guardian ad litem, as appropriate, shall file an application on the ward's behalf. *Id.*

The guardian ad litem appointed to investigate the ward's informal letter may also be appointed by the court to serve as attorney ad litem for the ward in the restoration or modification proceeding. *Id.* A guardian ad litem appointed in a proceeding involving the complete restoration of a ward's capacity or modification of a ward's guardianship is entitled to reasonable compensation for services in the amount set by the court to be taxed as costs in the proceeding, regardless of whether the proceeding results in the restoration of the ward's capacity or modification of the ward's guardianship. Tex. Prob. Code §694L (West 2009).

(D) What Must be in the Application?

An application filed under Section 694A of the Texas Probate Code must be sworn to by the applicant and must:

- (1) contain the name, sex, date of birth, and address of the ward;
- (2) contain the name and address of any person serving as guardian of the person of the ward on the date the application is filed;
- (3) contain the name and address of any person serving as guardian of the estate of the ward on the date the application is filed;
- (4) state the nature and description of the ward's guardianship;
- (5) state the specific areas of protection and assistance and any limitation of rights that exist;
- (6) state whether the relief being sought is:
 - (A) a restoration of the ward's capacity because the ward is no longer an incapacitated person;
 - (B) the granting of additional powers or duties to the guardian; or
 - (C) the limitation of powers granted to or duties performed by the guardian;
- (7) if the relief being sought under the application is described by (6)(B) or (C) above, state:
 - (A) the nature and degree of the ward's incapacity;
 - (B) the specific areas of protection and assistance to be provided to the ward and requested to be included in the court's order; and
 - (C) any limitation of the ward's rights requested to be included in the court's order;

(8) state the approximate value and description of the ward's property, including any compensation, pension, insurance, or allowance to which the ward is or may be entitled; and

(9) if the ward is 60 years of age or older, contain the names and addresses, to the best of the applicant's knowledge, of the ward's spouse, siblings, and children or, if there is no known spouse, sibling, or child, the names and addresses of the ward's next of kin.

Tex. Prob. Code §694B (West 2009).

(E) Who Gets Notice?

Citation shall be issued on the application and personally served on the ward's guardian and on the ward if the ward is not the applicant. Tex. Prob. Code §694A(d) (West 2009). The notice requirement for an application for restoration/modification differs (and is less stringent) than that for the filing of an initial application for guardianship. *Compare* Tex. Prob. Code §694A(d) (West 2009) *with* Tex. Prob. Code §633 (West 2009)(requiring numerous persons to be served with citation and by certified mail).

(F) How Often Can the Ward (or someone on her behalf) Apply for Modification or Restoration?

A person may not apply for complete restoration of a ward's capacity or modification of a ward's guardianship before the first anniversary of the date of the hearing on the last preceding application, except as otherwise provided by the court on good cause shown by the applicant. Tex. Prob. Code §694A(e) (West 2009). Therefore, unless good cause is shown, the statute limits the filing of a request for modification to once a year.

III. ACTION UPON THE APPLICATION

(A) Is Ward Entitled to Representation in the Proceeding?

On the filing of an application for restoration or modification, the court shall appoint an attorney

ad litem to represent a ward in a proceeding for the complete restoration of the ward's capacity or for the modification of the ward's guardianship. Tex. Prob. Code §694C(a) (West 2009). As previously mentioned, the person appointed as guardian ad litem upon the court's receipt of the ward's informal letter may also be appointed as the ward's attorney ad litem. Tex. Prob. Code §694A(c) (West 2009). Unless otherwise provided by the court, an attorney ad litem appointed in the restoration/modification proceeding shall represent the ward only for purposes of the restoration or modification proceeding. Tex. Prob. Code §694C(b) (West 2009). The attorney ad litem is entitled to reasonable compensation for services in the amount set by the court to be taxed as costs in the proceeding, regardless of whether the proceeding results in the restoration of the ward's capacity or a modification of the ward's guardianship. Tex. Prob. Code §694C(c) (West 2009).

A ward may retain private counsel for a proceeding involving the complete restoration of the ward's capacity or modification of the ward's guardianship. Tex. Prob. Code §694K(a) (West 2009). The court may order that compensation for services provided by the privately retained attorney may be paid from funds in the ward's estate *only if the court finds that the attorney had a good-faith belief that the ward had the capacity necessary to retain the attorney's services.* Tex. Prob. Code §694K(b) (West 2009) (emphasis added). Any attorney approached for representation of a ward who has already been adjudicated to be incapacitated should proceed with caution, especially if the doctor's letter upon which the finding of incapacity was based states that the ward is without capacity to hire an attorney. The privately retained attorney must be found to have had a good-faith belief that the ward had capacity to retain her. Otherwise, that person may be working for free.

It is possible that the privately retained attorney may be released from duty at the inception of the proceeding if the applicant, attorney ad litem, or other party files a motion to show authority. *See* Tex. R. Civ. P. 12 (Tex. 2009). This motion

requires the privately retained attorney to appear before the court and prove her right to be retained by the ward. *Id.* The motion must be sworn and the challenged attorney must be given 10 days notice of the hearing on the motion. *Id.* At the hearing, the burden of proof is on the challenged attorney to show sufficient authority to prosecute or defend the action on behalf of the ward. *Id.* Upon a failure to show such authority, the court shall refuse to permit the attorney to appear in the cause. *Id.*

(B) What Happens at the Hearing?

At a hearing on an application for complete restoration of a ward's capacity or modification of a ward's guardianship, the court shall consider only evidence regarding the ward's mental or physical capacity at the time of the hearing that is relevant to the restoration of capacity or modification of the guardianship, as appropriate. Tex. Prob. Code §694D(a) (West 2009). The party who filed the application has the burden of proof at the hearing. Tex. Prob. Code §694D(b) (West 2009).

(C) What Evidence Must be Presented?

The court may not grant an order completely restoring a ward's capacity or modifying a ward's guardianship unless, in addition to other requirements prescribed, the applicant presents to the court a written letter or certificate from a physician licensed in this state that is dated not earlier than the 120th day before the date of the filing of the application or dated after the date on which the application was filed but before the date of the hearing. Tex. Prob. Code §694F(a) (West 2009).

The letter or certificate must:

- (1) describe the nature and degree of incapacity, including the medical history if reasonably available, or state that, in the physician's opinion, the ward has the capacity to provide food, clothing, and shelter for himself or herself, to care for the ward's own physical health, and to

manage the financial affairs of the ward;

- (2) provide a medical prognosis specifying the estimated severity of any incapacity;

- (3) state how or in what manner the ward's ability to make or communicate responsible decisions concerning himself or herself is affected by the person's physical or mental health;

- (4) state whether any current medication affects the demeanor of the ward or the ward's ability to participate fully in a court proceeding;

- (5) describe the precise physical and mental conditions underlying a diagnosis of senility, if applicable; and

- (6) include any other information required by the court. *Id.*

If the court determines it is necessary, the court may appoint the necessary physicians to examine the ward in the same manner and to the same extent as a ward is examined by a physician under Section 687 of the Texas Probate Code. Tex. Prob. Code §694F(b) (West 2009).

(D) What Findings are Required?

Before ordering the settlement and closing of the guardianship, the court must find by a preponderance of the evidence that the ward is no longer partially or fully incapacitated. Tex. Prob. Code §694E(a) (West 2009). Before granting additional powers to the guardian or requiring the guardian to perform additional duties, the court must find by a preponderance of the evidence that the current nature and degree of the ward's incapacity warrants a modification of the guardianship and that some or all of the ward's rights need to be further restricted. Tex. Prob. Code §694E(b) (West 2009). Before limiting the powers granted to or duties required to be performed by the guardian, the court must find by a preponderance of the evidence that the current

nature and degree of the ward's incapacity warrants a modification of the guardianship and that some of the ward's rights need to be restored. Tex. Prob. Code §694E(c) (West 2009).

(E) Why is there a Different Burden of Proof in a Modification/Restoration Proceeding?

Note that the evidentiary standard of proof in a restoration proceeding differs from that in an initial guardianship proceeding. Whereas the initial applicant must prove that the ward is incapacitated by “clear and convincing evidence,” the ward may be restored or the guardianship modified by only a “preponderance of the evidence,” a lower standard. *Compare* Tex. Prob. Code §684 (West 2009) with Tex. Prob. Code §694E(a) (West 2009). Why does it take so much proof to put someone under guardianship but lesser proof to get them out? The answer appears to lie in the legislature’s stated purpose of guardianship. Beginning September 1, 1993, the legislature enacted Section 602 of the Texas Probate Code. That section provides, in part, that in creating a guardianship, the court shall design the guardianship to encourage the development and maintenance of maximum self-reliance and independence of the incapacitated person. Tex. Prob. Code §602 (West 2009). Therefore, the purpose of the guardianship proceeding is now to employ the least intrusive controls on the person’s right to manage his own affairs. Accordingly, if the ward has, in fact, improved, that proof need only be shown by the “more likely than not” preponderance of the evidence standard. On the other hand, if the modification is to *increase* rather than decrease the guardian’s powers, the lower “preponderance of the evidence” standard is also employed.

(F) What are the Possible Orders the Court Can Enter?

At the conclusion of the evidence, the court may enter any one of the following orders:

☐ *Order Completely Restoring the Ward's Capacity*

If the court finds that a ward is no longer an incapacitated person, the order completely restoring the ward's capacity must contain findings of fact and specify:

- (1) the information required by Section 694J of the Texas Probate Code;
- (2) that the ward is no longer an incapacitated person;
- (3) that there is no further need for a guardianship of the person or estate of the ward;
- (3-a) if the ward's incapacity resulted from a mental condition, that the ward's mental capacity is completely restored;
- (4) that the guardian is required to:
 - (A) immediately settle the guardianship in accordance with this chapter; and
 - (B) deliver all of the remaining guardianship estate to the ward; and
- (5) that the clerk shall revoke letters of guardianship when the guardianship is finally settled and closed.

Tex. Prob. Code §694G (West 2009).

☐ *Order Modifying the Guardianship*

If the court finds that a guardian's powers or duties should be expanded or limited, the order modifying the guardianship must contain findings of fact and specify:

- (1) the information required by Section 694J of Texas Probate Code;
- (2) the specific powers, limitations, or duties of the guardian with respect to the care of the ward or the management of the property of the ward, as appropriate;

(3) the specific areas of protection and assistance to be provided to the ward;

(4) any limitation of the ward's rights;

(5) if the ward's incapacity resulted from a mental condition, whether the ward retains the right to vote; and

(6) that the clerk shall modify the letters of guardianship to the extent applicable to conform to the order.

Tex. Prob. Code §694H (West 2009).

□ *Order Dismissing the Application*

If the court finds that a modification of the ward's guardianship is not necessary, including that the ward's capacity has not been restored, the court shall dismiss the application and enter an order that contains findings of fact and specifies:

(1) the information required by Section 694J of the Texas Probate Code; and

(2) that the powers, limitations, or duties of the guardian with respect to the care of the ward or the management of the ward's property will remain unchanged.

Tex. Prob. Code §694I (West 2009).

(G) What Must the Order Contain?

A court order entered with respect to a request made under Section 694A of Texas Probate Code to completely restore a ward's capacity or modify a ward's guardianship must:

(1) contain the name of the guardian;

(2) contain the name of the ward; and

(3) state whether the type of guardianship being addressed at the proceeding is a:

(A) guardianship of the person;

(B) guardianship of the estate; or

(C) guardianship of both the person and the estate. Tex. Prob. Code §694J(a) (West 2009).

The court may not grant a power to a guardian or require the guardian to perform a duty that is a power granted to or a duty required to be performed by another guardian. Tex. Prob. Code §694J(b) (West 2009).

IV. CONCLUSION

A person appointed as an attorney ad litem or guardian ad litem in a restoration or modification proceeding has a role which may vary from the role as an attorney ad litem or guardian ad litem in the initial proceeding. The guardian ad litem continues his usual role of advocating for what he believes to be in the best interest of the ward. Instead of advocating whether he believes the ward is incapacitated or which of competing applicants for guardianship should be appointed, in a restoration proceeding, the guardian ad litem files a report with the court making findings and conclusions as to whether it is in the best interest of the ward to terminate or modify the guardianship. If so, the guardian ad litem files the appropriate application. The attorney ad litem continues to represent the interests of the ward which typically means that she advocates for the ward's wishes. In a modification proceeding, this could involve advocating for complete restoration or for a modification which restores to the ward certain powers.