

Misc. rules/statutes on the guardian issue

From Rule 1.02 of the Rules of Professional Conduct.

(g) A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.

From the comments to the rules.

Client Under a Disability

12. Paragraph (a) assumes that the lawyer is legally authorized to represent the client. The usual attorney-client relationship is established and maintained by consenting adults who possess the legal capacity to agree to the relationship. Sometimes the relationship can be established only by a legally effective appointment of the lawyer to represent a person. Unless the lawyer is legally authorized to act for a person under a disability, an attorney-client relationship does not exist for the purpose of this rule.

13. If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, paragraph (g) requires a lawyer in some situations to take protective steps, such as initiating the appointment of a guardian. The lawyer should see to such appointment or take other protective steps when it reasonably appears advisable to do so in order to serve the clients best interests. See Rule 1.05 (c)(4), d(1) and (d)(2)(i) in regard to the lawyers right to reveal to the court the facts reasonably necessary to secure the guardianship or other protective order.

From the Texas Property Code and Section 142 trusts:

§ 142.007. Incapacitated Person

For the purposes of this chapter, "incapacitated person" means a person who is impaired because of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or any other cause except status as a minor to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.

Section 3(p) of the Probate Code defines incapacitated person as:

- (1) a minor;
- (2) an adult individual who, because of a physical or mental condition, is substantially unable to provide food, clothing or shelter for himself or herself, to care for the individual's own physical health, or to manage the individual's own financial affairs.

Same definition is used in Section 601 under guardianships.

Section 603(b) of the Probate Code provides that "A reference in other sections of this code or in other law to a person who is mentally, physically or legally incompetent, a person who is judicially declared incompetent, an incompetent or an incompetent person, a person of unsound mind, or a habitual drunkard means an incapacitated person."

Chapter XIII Guardianship was added to the Probate Code in 1993 (original code enacted in 1955) and was an attempt to pull together all of the guardianship provisions in the prior version of the code plus add new provisions

Protections for an incapacitated adult:

In the Probate Code there are all sorts of protections afforded for an adult who is claimed to be incapacitated. Some examples include service of the proposed guardianship on the adult children of the ward and any siblings of the ward; appointment of a guardian ad litem and an attorney ad litem to assist in the determination of whether a guardianship is needed (and certification of those attorneys by the bar); a jury trial on the issue of incapacity, a court visitor and a court investigator to assist the court. See sections 601-673 of the Probate Code.

Rule 44 May Appear by Next Friend

Minors, lunatics, idiots, or persons non compos mentis who have no legal guardian may sue and be represented by "next friend" under the following rules:

- (1) Such next friend shall have the same rights concerning such suits as guardians have, but shall give security for costs, or affidavits in lieu thereof, when required.
- (2) Such next friend or his attorney of record may with the approval of the court compromise suits and agree to judgments, and such judgments, agreements and compromises, when approved by the court, shall be forever binding and conclusive upon the party plaintiff in such suit.

Article 1994 was repealed in 1983

Under Tex. Rev. Civ. Stat. Ann. art. 1994(4), a court is authorized to reimburse a next friend for all reasonable and necessary expenses incurred in prosecuting a claim for a

minor, including attorney's fees, or the court may, upon proof by the attorney, allow reasonable attorney's fees paid directly to the attorney out of the recovery in a next friend proceeding