Senate Committee on Jurisprudence
Charge 2 - Guardianship

Department of Aging and Disability Services
Commissioner Chris Traylor
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Department of Aging and Disability Services (DADS) provides access to long-term services and supports for older individuals and individuals with intellectual and physical disabilities.

This presentation focuses on:

• DADS Guardianship program, including:
  ➢ Overview of the program
  ➢ Relationship between DADS and the Department of Family and Protective Services (DFPS)
  ➢ Efficiency and effectiveness of the program
  ➢ Protection of clients and their assets
Overview of Guardianship

Guardianship is a legal method of protecting the well-being of an incapacitated individual.

• An incapacitated adult is defined in Chapter 13, Probate Code, Section 601, 14 (B) (C) as an 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 their own physical health, or to manage their own financial affairs
  ➢ Must have a guardian appointed to receive funds due the person from any governmental source

• A guardian is a court appointed person or entity who makes decisions on behalf of an incapacitated individual (referred to as a “ward”).
Overview of Guardianship

Chapter 13, Probate Code also defines the purpose and responsibilities of a guardian.

• **Guardian of the Person** has the:
  - Right to have physical possession of the ward and to establish the ward’s legal domicile
  - Duty to provide care, supervision, and protection for the ward
  - Duty to provide the ward with clothing, food, medical care, and shelter
  - Power to consent to medical, psychiatric, and surgical treatment other than in-patient psychiatric commitment of the ward
  - Power to establish a trust and direct that the income of the ward be paid directly to the trust upon order of the court
Overview of Guardianship

• **Guardian of the Estate** is entitled to:

  ➢ The possession and management of all property belonging to the ward, to collect all debts, rentals, or claims due to the ward
  ➢ To enforce all obligations in favor of the ward, and to bring and defend suits by or against the ward

• It is the duty of the Guardian of the Estate to:

  ➢ Take care of and manage the person’s own property
  ➢ Account for all rents, profits, and revenues the estate would have produced by such prudent management

• DADS is more often appointed Guardian of the Person than Guardian of the Estate.
Guardianship in Texas

• In Texas a number of individuals, entities or fiduciaries may serve as guardian of an incapacitated person. They include:
  ➢ Family Members and Friends
  ➢ Private Professional Guardians
  ➢ Private Guardianship Programs
  ➢ County Operated Guardianship Programs
  ➢ DADS Guardianship Program

• Courts with probate authority have jurisdiction to establish a guardianship.

• Guardianship certification is required for all professional guardians.
DADS Guardianship Program

- Under the Human Resource Code, Section 161.101(b), DADS is directed to provide services to individuals who are:
  - Referred by Adult Protective Services as victims of abuse, neglect or exploitation, and subsequently determined by a court to lack capacity and there are no other means of providing protective services
  - Incapacitated and aging out of Child Protective Services conservatorship who are incapable of managing their own affairs as determined by a court with probate authority
  - Referred directly to the program by a court with probate authority in certain circumstances which includes persons who:
    - Appear to need a guardian and a joint agreement is reached between the court and DADS.
    - Are wards of the court and located more than 100 miles from the court which created the guardianship and no other individual or entity is available to serve as guardian. This type of referral is limited to 55 annually.
DADS Guardianship Program

• Number of active guardianships as of March 31, 2010:
  ➢ 1,213 wards are served by the DADS guardianship program
    ▪ 820 wards served directly by DADS staff
    ▪ 393 wards served by contract guardianship providers

• Requirements of a Guardian:
  ➢ DADS staff who deliver guardianship services are required to achieve and maintain certification through the Texas Guardianship Certification Board by passing a comprehensive examination and an initial and recurring fingerprint based criminal background check at the state and federal level

  ➢ Must complete twelve hours of continuing education in the field of guardianship or related subjects for recertification every two years

• According to state law, DADS must limit its Guardianship services to individuals who have private assets or government benefits to fund their needs.
Relationship between DADS and DFPS

In an effort to strengthen the relationship between DADS and the Department of Family and Protective Services (DFPS), the agencies have:

• Clarified multiple policies and procedures.

• Established more clear processes for referrals, joint staffing, and reviews of decision.

• Strengthened the interagency steering committee authority to discuss trends, issues, and resolve concerns.
Referral Received From APS, CPS or a Court

Proposed Ward Is Assessed
- Search for least restrictive alternative
- Meets Probate Code requirements
- Meets Human Resource Code requirements
- Determine appropriateness based on agency policy

Professional Evaluation
- Certified medical examination (effective for 120 days)
- Current determination of MR within 24 months

Seek Alternate Guardian
- Ensure no other individual or entity is willing and able to pursue guardianship

Application Process
- File within 70 days from referral date
- Legal review by agency attorney
- Prepare documents
- Submit application to County or District Attorney to file

Will DADS pursue guardianship?

Yes

No

Notify Referral Source of Decision
- APS or CPS may request Review of Decision

Court Determines Guardianship Type
- Guardianship of person or estate
- Guardianship of person and estate
- Permanent or temporary guardianship

DADS Guardianship Process
DADS Guardianship Process

• When the DADS Guardianship Program receives a referral from DFPS, a certified guardianship specialist:
  ➢ Conducts a complete and thorough assessment of the individual’s circumstances and condition
  ➢ Attempts to identify less restrictive alternatives to guardianship
  ➢ Searches for family members, other individuals or entities to serve as guardian

• DADS files an application with the appropriate court to be appointed guardian if no other alternative is available and DADS guardianship services are appropriate:
  ➢ DADS is required to file for guardianship within 70 days from the date the referral is received from Adult Protective Services (APS)
  ➢ A 30-day extension may be submitted for consideration and approval by APS under extenuating circumstances
DADS Guardianship Process

• After the application is filed, a court with probate authority:
  ➢ Makes the final determination regarding the individual’s capacity based on the evidence presented and establishes the type of guardianship
  ➢ May appoint a temporary or permanent guardian of the person, guardian of the estate, or guardian of person and estate
  ➢ May find the individual has capacity and terminate the guardianship proceeding
DADS Guardianship Process

- Once a court makes a determination of incapacity:
  - The court grants the guardian certain authority over the individual, the estate, or both
  - Guardianship responsibilities for the ward may include:
    - Arranging for services (personal care, arranging therapy, finding property managers, social normalization, education, vocational training)
    - Making medical decisions (approving medication, procedures, surgeries, end of life issues)
    - Arranging for placement (locating appropriate facilities, relocating wards)
    - Managing finances (paying bills, applying for benefits, completing taxes, property management, investments)
Protection of Wards

• By the court:
  ➢ Annual report of person
  ➢ Annual accounting of financial management
  ➢ Monitoring by officers of the court
  ➢ Prior court approval for all significant expenditures

• To ensure additional protection DADS:
  ➢ Conducts quality assurance and monitoring visits specific to the delivery of guardianship services by DADS staff and contracted providers
  ➢ Conducts complaint investigations
  ➢ Establishes rules, standards, procedures, and protocols for contracted guardianship providers and DADS staff
Protection of Wards

• Active cases in the DADS program are reviewed annually to ensure:
  ➢ The guardianship is still necessary and appropriate for the individual
  ➢ The individual is being served in the least restrictive, most integrated setting possible
  ➢ DADS is the only program or entity available and appropriate to serve as guardian

• Under the requirements of the Probate Code, DADS staff may help the individual seek restoration and dismissal of the guardianship under the direction of the court.
Appendix
Guardianship Example 1

A 22-year old woman in Child Protective Services (CPS) conservatorship since the age of two with multiple physical disabilities including an intellectual disability from birth.

- She is unable to manage her own affairs
- She cannot feed and dress herself and perform other activities of daily living and cannot communicate her needs to caregivers
- Less restrictive alternatives could not be identified by DADS or CPS
- There is no family involvement or alternate guardian available
- DADS applied to be named guardian
- The court appointed DADS as guardian of the person
Guardianship Example 2

A 40-year old man with significant mental and physical impairment

- His impairment was caused by a head injury
- Partial paralysis renders him unable to perform activities of daily living
- His impaired judgment causes inappropriate and potentially dangerous behaviors
- Adult Protective Services validated abuse by a caregiver
- There is no family involvement and alternate guardians are not available
- Less restrictive alternatives cannot adequately protect the man
- DADS applied to be named guardian
- Court appointed DADS Guardian of the Person
Guardianship Example 3

A 70-year old woman with severe dementia

- Is medically non-compliant
- Has a tendency to wander which places her in danger of physical harm
- Adult Protective Services validated abuse and exploitation on her caregiver
- Her only family member is inappropriate to become guardian and no other appropriate alternate guardian could be identified
- DADS applied to be named guardian
- Court appointed DADS Guardian of the Person and Estate