

**KATHLEEN TANNER BEDUZE**

**SHAREHOLDER**

Crain, Caton & James, P.C.  
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Admitted to the State Bar of Texas; May 2008  
Admitted to practice before the US District Court, Southern District of Texas

**Legal Education**

Juris Doctorate; February 2008  
Baylor University School of Law, Dean's List

**Undergraduate Education**

Bachelor of Psychology, Concentration in Neuroscience, Minor in Spanish; May 2005  
Davidson College, Davidson, NC

**Practice Area**

Representing fiduciaries and beneficiaries in trial courts in the State of Texas in matters relating to prosecution and defense of various fiduciary claims, will contests, will and trust interpretation, accounting and administration issues representing applicants and contestants in guardianship proceedings, as well as probate and trust administration. Representing applicants and contestants in guardianship proceedings, in addition to administrators, executors, trustees, beneficiaries, and guardians in matters relating to the administration of estates, trusts, and guardianships.

**Employment History**

Crain, Caton & James, PC; Houston, Texas  
2012-present

DLA Piper; Houston, Texas  
2008-2011

**Publications**

Contributing Author: Texas Guardianship Manual, State Bar of Texas, Manual Committee,  
2019-present

Contributing Author: Real Estate, Probate, and Trust Law Reporter, Guardianship Update, 2018-  
2021

### **Presentations/Papers**

Author and Presenter: “Temporary Guardianships and Other Emergency Relief”, presented at The University of Texas School of Law, 23<sup>rd</sup> Annual Estate Planning, Guardianship and Elder Law Conference, August 2021.

Author and Presenter: “Tips and Tricks for Will and Estate Planning”, presented at the Tri Delta Sisters Connect Virtual Event, October 2020.

Author and Presenter: “Ethical Terms of Engagement, Making Sure Your Client is the Right Client”, presented at National Business Institute’s Probate Boot Camp, April 2017, and the Fort Worth Probate Bar Association, March 2019

Co-Author: “Options for Seeking Interim Relief in Trust and Estate Litigation”, presented at State Bar of Texas 12<sup>th</sup> Annual Fiduciary Litigation Course, November 2017

Author: “Discovery in the Modern Era”, presented at State Bar of Texas 38<sup>th</sup> Annual Advanced Estate Planning and Probate, June 2014

Co-Author: “Navigating the Quagmire of Potential Claims Against Attorneys Involved in Estate Planning, Probate and Trust Matter”, June 2012

### **Nominations & Awards**

Best Lawyers in America – Litigation – Trusts and Estates (2020-2021)  
Texas Super Lawyers – Rising Star by Thomson Reuters (2016-2021)  
Texas Top Women Attorneys – Texas Rising Stars by Texas Monthly (2020-2020)  
Top Lawyers in Houston by *H-Texas Magazine* (2016-2020)  
Texas Outstanding Young Lawyers by Texas Monthly (2016-2020)  
Top Lawyer by *Houstonia Magazine* (2019-2020)

### **Professional Activities**

Houston Business and Estate Planning Council  
Houston Trust and Estates Club  
Houston Bar Association (Probate, Trusts & Estate Section Member)  
Texas State Bar Association (Real Estate, Probate, and Trust Law Section Member)  
Houston Young Lawyers Association  
Texas Young Professionals of Houston

An Overview of  
Guardianships...and How To  
Avoid the Process Entirely

Kathleen Tanner Beduze  
Crain Caton & James, PC  
October 21, 2021

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**The Current Realities**

- In 2019, over 54M Americans over 65
  - approximately 16.5% of U.S. Population
- By 2034, estimated to be 77M Americans over 65
  - first time in U.S. history that older people (65 or older) outnumber children (under 18).
- In 2020, estimated 5.8M Americans over 65 living with Alzheimer's
  - approximately 1.8% of the U.S. population.
- By 2050, number expected to nearly triple to approximately 14M.
- Up to 5M older Americans abused every year, with financial loss estimated to be atleast \$36.5 billion

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*I Care A Lot....[or does she?]*



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### The Basics

*With great power comes great responsibility.*

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### What is a guardianship?

- A Court-supervised procedure where one person is granted legal authority to make personal or financial decisions for someone who can no longer make such decisions for himself or herself.

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### Policy and Purpose of Guardianship

*"A court may appoint a guardian with either full or limited authority over an incapacitated person as indicated by the incapacitated person's **actual**(emphasis added) mental or physical limitations and only as necessary to promote and protect the well being of the incapacitated person."*

TEX. EST. CODE §1101.001(a).

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**Policy and Purpose of Guardianship (cont'd)**

*"In creating a guardianship that gives a guardian limited authority over an incapacitated person, the court shall design the guardianship to encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person, including by presuming that the incapacitated person retains capacity to make personal decisions regarding the person's residence."*

TEX. EST. CODE §1101.001(b).

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**What matters are appropriate for a guardianship proceeding?**

- Any matter relating to:
  1. The appointment of a guardian of a minor or other incapacitated person;
  2. A guardianship or a substitute for a guardianship;
  3. A mental health action; and
  4. A management trust under Ch. 1301.

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**General Requirements for Guardianship**

- Venue
- Jurisdiction
- Proposed ward is "incapacitated person"
- Best interest of proposed ward
- Proposed ward's rights or property will be protected
- No lesser restrictive alternatives
- Supports and services not feasible

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**Jurisdiction – §§1022.001 - 003**

- Original jurisdiction is in a Statutory Probate Court (Bexar, Collin, Dallas, Denton, El Paso, Galveston, Harris, Hidalgo, Tarrant, and Travis).
- Where no Statutory Probate Court, original jurisdiction in Constitutional County Court, or, if one exists, a Statutory Court at Law that has been given explicit guardianship jurisdiction by statute.
- In counties without Statutory Probate Court or County Court at Law exercising guardianship jurisdiction, contested guardianship proceedings originally filed in Constitutional County Court may, on judge's motion, and must, on motion of any party, be transferred to District Court or assigned to Statutory Probate Court.

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**Venue (Adult) – §1023.001(a)**

- County in which the proposed ward resides or is located on date the application is filed; or
- County in which the proposed ward's principal estate is located.

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**Venue (Minor) - §1023.001(b)**

- County in which minor's parents reside;
- If parents live in different counties: county where sole managing conservatorship parent resides; or, if joint custody, county where parent with greater period of physical possession of and access to minor resides;
- If only one parent living and has custody, county of parent residence;
- If both parents dead and minor in custody of deceased parent, county in which last surviving parent having custody resided; or
- If both parents dead, county in which parents resided at death.

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## Temporary v. Permanent

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### Standing to Apply

Order of Priority. If two or more eligible persons are equally entitled to be appointed guardian, the priority of appointment is:

1. Person pre-designated in Declaration of Guardian;
2. Spouse of incapacitated person;
3. Nearest of kin, considering the incapacitated person's best interest; or
4. Any eligible person who is best qualified to serve.

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### Temporary Guardianships

Short-term solution when insufficient time to create permanent guardianship, but court has probable cause to believe immediate appointment of guardians is required for minor or adult "incapacitated person."

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### Temporary Guardianship Application

- Sworn application that provides:
  - Name and address of proposed ward;
  - Alleged imminent danger to proposed ward's person or estate;***
  - Type of appointment and particular protection and assistance being requested;
  - Facts supporting allegations and requests;
  - Name, address, and qualification of proposed temporary guardian;
  - Name, address, and interest of applicant

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### Notice & Hearing

- Sworn application should be presented promptly so court may issue order setting a hearing date.
- Clerk issue notice with copy of application must be attached and served on:
  - Proposed ward by personal service; and
  - Proposed ward's attorney ad litem by copy of notice.

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### Initial Hearing

- Held within ten days of application
  - unless proposed ward or his/her attorney consents to extension for up to thirty days after filing.
- Proposed ward is entitled to prior notice of hearing, to be present, and to be represented by attorney.

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**Required Capacity Findings**

Court must find:

- Substantial evidence of incapacity; and
- There is either (i) ***imminent danger to proposed ward's physical health or safety*** or (ii) ***estate will be seriously damaged or dissipated unless immediate action is taken.***

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**Temporary Guardianship Order**

- Must state:
  - Reasons for temporary guardianship;
  - Powers and duties of temporary guardian;
  - Term of guardianship (up to 60 days);
  - Amount of bond; and
  - Direction to clerk to issue Letters of Temporary Guardianship, after qualification
- Expires after 60 days (unless contest filed)

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**Qualification**

Guardian of the Estate

- All guardians of estate must be bonded other than:
  1. Corporate fiduciary; and
  2. Guardianship program operated by a county.

Guardian of the Person

- All guardians of person must be bonded other than:
  1. Corporate fiduciary;
  2. Guardianship program operated by a county; and
  3. Qualified person appointed in will by surviving parent that has been probated or in similar written declaration.

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**Qualification, continued**

- Letters of guardianship issued by Clerk to person appointed guardian upon qualification.
- Appointed guardian is deemed to have qualified on:
  1. Taking and filing oath;
  2. Giving required bond and filing with clerk; and
  3. Bond being approved by court.
- Must complete guardianship certification course.
- Sufficient evidence of appointment and qualification for all purposes.
- Any number of duplicate letters of guardianship may be issued by clerk, upon request by guardian.

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**Disqualification v. Adverse Interest**

<p><b><u>Statutory Disqualifications</u></b></p> <ul style="list-style-type: none"> <li>• Minor or "incapacitated person"</li> <li>• Person incapable of managing and controlling the person or estate</li> <li>• Unsuitable persons</li> <li>• Notoriously bad person/conduct</li> <li>• Party to a lawsuit involving proposed ward</li> <li>• Person indebted to proposed ward</li> <li>• Person asserting a claim adverse to proposed ward</li> <li>• Person who is disqualified by declaration</li> <li>• Person who does not possess required certification</li> <li>• Non-resident without resident agent</li> <li>• Persons found to have committed family violence</li> </ul>	<p><b><u>Adverse Interest</u></b></p> <ul style="list-style-type: none"> <li>• Not defined by statute</li> <li>• Possibly:           <ul style="list-style-type: none"> <li>- Unrelated creditor</li> <li>- Divorcing spouse</li> <li>- Spouse with financial interest opposed to spouse's</li> <li>- Parent with financial interest opposed to child's</li> <li>- Person with duty to account to Proposed Ward (partner, agent under power of attorney, trustee, etc.)</li> </ul> </li> </ul>
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**Effect of Temporary Guardianship**

- Ward retains all rights and powers not specifically granted to temporary guardian by court order.
- No adjudication of incapacity.

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**Permanent Guardianship**

- Process the same as Temporary Guardianship:
  - Sworn Application
  - Personal Service

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**Permanent Guardianship**

- Differences:
  - Appointment of Attorney Ad Litem.
  - Possible appointment of Guardian Ad Litem.
  - Notice provided to interested persons
  - Trial – bench or jury (upon request)
  - Court considers proposed ward's preference of guardian, regardless of whether prior designation made

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**Permanent Guardianship - Order**

- **Findings Requiring Clear and Convincing Evidence:**
  - Adjudication of incapacity;
  - Guardian is in the best interests of proposed ward;
  - Rights or property of proposed ward will be protected by appointment of guardian;
  - Alternatives to guardianship considered and determined not to be feasible; and
  - Available supports and services considered and determined not to be feasible.

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**Permanent Guardianship - Order**

- **Findings Requiring Preponderance of the Evidence:**
  - Venue;
  - Proposed guardian eligible and entitled to be appointed;
  - Minor guardianship is not created for primary purpose of enabling enrollment in school or school district; and
  - Proposed ward is totally incapacitated or partially incapacitated
    - *Finding of partial incapacity: Must specifically state whether proposed ward lacked capacity, or lacks sufficient capacity without supports and services, to make personal decisions regarding residence, voting, operating a motor vehicle and marriage.*

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**Permanent Guardianship - Bond**

- **Permanent Guardian Required to Post a Bond**
- **Court considers several factors to determine amount:**
  1. Value of non-real estate;
  2. Estimate of annual receipts;
  3. Familial relationship of guardian to ward;
  4. Guardian's ties to community;
  5. Guardian's financial condition;
  6. Guardian's past history of compliance with court; and
  7. Reason the guardian may have previously been denied corporate surety bond.

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**Permanent Guardianship - Termination**

- *Ward dies.*
- *Minor becomes adult by:*
  1. *Becoming 18; or*
  2. *Having disabilities removed.*
- *Ward is restored.*
- *Spouse qualifies as community administrator and no separate property.*
- *Ward's estate is exhausted.*
- *Ward's estate so small cost prohibitive.*
- *Guardianship assets transferred to court created trust, e.g., management trust.*
- *Any other reason court determines appropriate.*

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### How Can You Avoid A Guardianship?

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### Plan Ahead

- Estate Planning
- Alternatives to Guardianship

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### Alternatives to Guardianship

- Medical Power of Attorney
- Durable Power of Attorney
- Pre-need Declaration for mental health treatment
- Joint bank accounts
- Court-created "management trust" under Section 1301
- Special needs trust
- Alternative or "surrogate" forms of decision making
- Emergency protective orders
- Mental health commitment
- Katie's Law

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## Communicate

- Talk to your spouse, your kids, your loved ones
- Share your desires of what you want to happen when you can no longer make the decisions for yourself
  - Housing
    - 24 hour home care
    - Assisted living
    - Nursing home
    - World-wide cruise line
  - End of life decisions

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## Closing

*Because a person's liberty interest is implicated in a guardianship proceeding, the Estates Code sets out uniform, strict procedural safeguards to protect a person's liberty and property interests before a court may take the drastic action of removing his ability to make his own legal decisions.*

Gauci v. Gauci, 471 S.W.3d 899 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

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