

# Gifts Aids Guardianship when Ward is Public Benefits Candidate

Those who may have a family member who is on or may be on public benefits in the future are often faced with an additional hurdle if a guardianship is necessary to deal with assets.

For those of you who wish to be better prepared, it is advisable to consider obtaining legal documents necessary to deal with a person's affairs before they become incapacitated in the event that they no longer have the requisite capacity in the future necessary to execute a given document. Such legal documents include a durable power of attorney for property, a medical power of attorney, a living will, a declaration of guardian in the event of incapacity and a medical authorization, also known as a HIPAA document.

The power of attorney for property, if constructed properly will, in most cases, avoid the problems that will be discussed in this article.

In 2011, the Estates Code was amended allowing the opportunity to create a plan for transferring assets in order to obtain governmental benefits within a guardianship proceeding for a ward. A ward is a person who is the subject of a guardianship proceeding.

In 2013, another amendment was passed which established a presumption that the ward would favor qualification for government benefits. This amendment improved the potential success of public benefits planning within a guardianship. Gifts for the purposes of tax and charitable planning within a guardianship have long been the law in Texas.

With nursing home costs averaging \$60,000 per year, many people will likely go broke if something is not done to help them become eligible for Medicaid, whether they're subject to a guardianship or not.

Although there are many public benefit programs that have strict transfer rules, including those within Medicaid and Veterans Benefits, this article will focus on nursing home Medicaid. Veteran's rules are changing substantially soon and would be better evaluated after the final rules are established.

In a guardianship proceeding, an applicant must establish to the court's satisfaction that the ward will probably remain incapacitated during the ward's lifetime. The court may order the guardian to transfer assets and income which are not required for the support of the ward or ward's family during the ward's lifetime to. Purposes for gifting include minimizing income, estate, inheritance or other taxes payable out of the ward's estate or to qualify the ward for government benefits. If for public benefits, transfers may consist of only a portion of the ward's estate necessary to qualify the ward for government benefits.

This type of planning is limited however, to the extent that it is allowed by federal and state laws and rules which address those benefits.

Gifts of the ward's property can be made to the ward's spouse, descendants or other persons related to the ward by blood or marriage, or a devisee under the ward's will, trust or other beneficial instrument.

Notice of an application to establish a plan must be given to all devisees under a ward's will, trust or other beneficial instrument, the ward's spouse and dependents and any other persons as directed by the court.

Families who may need to establish a guardianship over a family member should carefully interview a potential attorney regarding his or her knowledge of not only guardianship and the requirements for establishing a gifting plan for public benefits but also the public benefit program that will be desirable for the proposed ward. The attorney needs to be very familiar with Medicaid transfer rules.

*You may email your questions to [education@wrightabshire.com](mailto:education@wrightabshire.com) or visit our website at [www.wrightabshire.com](http://www.wrightabshire.com). Wesley E. Wright and Molly Dear Abshire are attorneys with the firm Wright Abshire, Attorneys, P.C., with offices in Bellaire, the Woodlands, and Carmine. Both Wright and Abshire are Board Certified by the Texas Board of Legal Specialization in Estate Planning and Probate Law and are certified as Elder Law Attorneys by the National Elder Law Foundation. Nothing contained in this publication should be considered as the rendering of legal advice to any person's specific case, but should be considered general information.*