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A PROFESSIONAL LIMITED LIABILITY COMPANY

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*Wills ~ Trusts ~ Estate Planning ~ Guardianship ~ Probate*

### ***INFORMATION ABOUT SOME LESS RESTRICTIVE ALTERNATIVES TO GUARDIANSHIP***

Texas law requires that less restrictive alternatives to guardianship be considered and eliminated as not feasible before starting the guardianship process. This document provides general information about some of the less restrictive alternatives that may make a guardianship unnecessary. This is not meant to be a comprehensive list but provides a brief overview of some alternatives.

Terms: The proposed guardian is the “Applicant” and the person being placed under a guardianship is the “Proposed Ward”. For documents being executed by a person who is not incapacitated, such as powers of attorney, the person granting the power is the “Principal” and the person receiving the power is the “Agent”. In some documents the person executing the document is referred to as the “Declarant”.

#### ***LESS RESTRICTIVE ALTERNATIVES TO FULL GUARDIANSHIP***

In Texas, the Applicant is required to consider all less restrictive alternatives to guardianship prior to beginning an application for Guardianship. The Application must state the degree and nature of the alleged incapacity, the specific areas of protection and assistance requested, as well as the limitation or termination of rights requested to be included in the court’s order of appointment.

*Tex. Estates Code § 1101.001. Application For Appointment Of Guardian*, sets out in part that the Applicant must state: (3.a) whether alternatives to guardianship and available supports and services to avoid guardianship were considered, and (3.b) whether any alternatives to guardianship and supports and services available to the proposed ward considered are feasible and would avoid the need for a guardianship.

You will learn more about alternatives to guardianship when you complete the guardianship course that is now required for all proposed guardians. For more information see the section on guardianship training below.

#### ***WHEN THE PROPOSED WARD IS A DISABLED CHILD TURNING 18***

When the disabled child is high functioning, the use of available “supports and services” that could work in conjunction with a limited guardianship may be more appropriate than a full guardianship. With a limited guardianship a high functioning disabled individual can retain some or all of the following basic rights as is appropriate for their situation: right to vote, drive, marry, choose where they want to live, maintain a bank account, etc.

## Supported Decision-Making Agreements

Under Tex. Estates Code Section 1357.051, this is a new type of agreement in Texas regarding activities of daily living (ADLs). The Agreement is between an adult with disabilities who is not incapacitated and a “supporter” who is willing to assist in:

1. Understanding the options, responsibilities and consequences of life decisions without actually making those decisions for the disabled adult
2. Assist the adult with obtaining relevant information necessary to make decisions
3. Understand the information, and
4. Communicate those decisions to the appropriate persons

“Life decisions” includes making decisions about obtaining food, clothing, where to live as well as co-habitation choices; supports and services; medical care to be received, financial management assistance and workplace choices. The Agreement can be terminated by either party. The Agreement must be signed by both the disabled adult and the supporter before two witnesses or a notary.

## Appointment of a Representative Payee for Receipt of Social Security Benefits

You do not need to be appointed as guardian to receive Social Security benefits on behalf of another person. You will need to complete **Social Security Form SSA-11-BK, Request to be Selected as Payee**. This form is completed during a face-to-face interview at the Social Security Administration’s offices. For more information see:

<https://secure.ssa.gov/poms.nsf/lnx/0200502115> and

<https://www.ssa.gov/payee/faqrep.htm>.

The Social Security Administrations guide for Representative Payees is available to download from my website or can be downloaded here: <https://www.ssa.gov/pubs/EN-05-10076.pdf>.

### ***ALTERNATIVES FOR PERSONS WITH CURRENT CAPACITY TO MAKE DECISIONS***

#### ***STATUTORY DURABLE POWER OF ATTORNEY VS STATUTORY POWER OF ATTORNEY***

A Statutory POA allows the principal to designate an agent to handle his or her financial affairs. To avoid a guardianship, be sure to use a Statutory **Durable** Power of Attorney. A “durable power of attorney” means a written instrument that:

1. Designates another person as attorney-in-fact or agent
2. Is signed by an adult principal
3. Contains the words “this power of attorney is not affected by subsequent disability or incapacity of the principal”, or “this power of attorney becomes effective on the disability or incapacity of the principal”, or similar language that shows the principal’s intent shall be exercise notwithstanding subsequent disability or incapacity
4. Is acknowledged by the principal before a notary

Note that if a guardian is appointed later who is a different person than the one holding the POA, the agent can be made to account to the guardian for all actions taken under the POA regardless of when the actions were taken. If the POA is used in a real estate transaction it must be recorded in the county or counties where the real property is located not later than 30 days after the instrument signed by the agent is recorded.

### ***MEDICAL POWER OF ATTORNEY***

A Medical POA allows the principal to designate an agent to consent to medical treatment. It must be signed by two witnesses or a notary. A separate disclosure statement is required. A medical POA can be revoked by written or oral notice to the agent without regard to the principal's capacity; the execution of a subsequent POA, or by divorce unless the POA directs otherwise.

### ***DIRECTIVE TO PHYSICIANS***

A directive to physicians allows the principal state instructions on the use or withholding of life-sustaining procedures. The principal must not be incapacitated at the time of execution. It must be signed before two witnesses or notarized. There are limitations on who the witnesses can be. It covers two categories, irreversible condition and terminal condition.

**Irreversible Condition** – when one cannot make decisions for himself or take care of himself, has a condition that might be treatable but is not curable, and that is fatal without life-sustaining treatment. Examples are Alzheimer's disease and Parkinson's disease and ALS.

**Terminal Condition** – when life expectancy is less than six months

### ***OUT-OF-HOSPITAL DO-NOT RESUSCITATE ORDER***

If you have a medical emergency and someone calls for an ambulance the Emergency Medical Technicians (EMTs) are required to revive you unless you have executed an Out-of-Hospital Do-Not-Resuscitate Order. This form is available on my website. It requires the signature of the person executing it, as well as two witnesses and a notary. All four people sign this document in two places on the form, so be sure you don't miss the signature lines at the very bottom of the page. After executing the form you can order a vinyl bracelet. The form, instructions, and information about how to order a bracelet is on the website here:

<https://www.dshs.texas.gov/emstraumasystems/dnr.shtm#form> .

### ***COURT-ORDERED MENTAL HEALTH SERVICES***

If a person is chronically mentally ill, a temporary involuntary commitment may be preferable to a guardianship. If the person can be stabilized with medication, commitment of less than a year is less restrictive than a guardianship which must be in place for at least one year.

### ***RE-TEST REQUEST FOR UNSAFE DRIVERS OVER AGE 79***

You can request a re-examination by the Texas Department of Public Safety of a person aged 79 or older who can no longer drive safely, but who refuses to stop driving, The form to fill out is DL-76. It is available on my website or can be downloaded here:

<https://www.dps.texas.gov/internetforms/FormDetail.aspx?Id=306&FormNumber=DL-76.pdf>.

Additionally, at age 79 Texas drivers must renew their license in person. Drivers age 85 and older must now renew every two years.

***DESIGNATION OF GUARDIAN IN EVENT OF LATER INCAPACITY***

This is a document drafted by an attorney in which the declarant can designate who they would like to serve as their guardian should the need arise. It can also be used to designate who should not be appointed. This prevents family arguments over who should be appointed guardian.

***DECLARATION OF APPOINTMENT OF GUARDIAN FOR CHILDREN IN EVENT OF DEATH***

This document sets out who should become guardian of minor children should both parents die. It must be attested to by the declarant and two witnesses before a notary and it must contain a self-proving affidavit. This document should be filed in any later guardianship proceeding.

***DECLARATION FOR MENTAL HEALTH TREATMENT***

The declarant must not be incapacitated at the time this document is executed. The statutory form must be used for this document to be effective. The form can either consent to or refuse mental health treatment. It expires after three years or on revocation unless the declarant is incapacitated on the date of expiration in which case it is effective until no longer incapacitated. This form requires two witnesses and a notary. Instructions in this document supersede any conflicting instructions given by a guardian or agent under a Medical POA. The declaration can be disregarded only if the person is under an involuntary commitment or if an emergency exists.