

## Appendix D:

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

In addition to the policy statement contained in TEX. EST. CODE §1001.001 mandating the use of a less restrictive alternative, there is now a statutory definition of "Alternatives to Guardianship" TEX. EST. CODE §1002.0015, which offers a non-exclusive list of alternatives:

1. medical power of attorney (14 below);
2. durable power of attorney(18 below);
3. declaration for mental health treatment (46 below);
4. representative payee (37, 38 below);
5. joint bank accounts (convenience accounts) (19 below);
6. guardianship management trust(24 below);
7. special needs trust (26 below);
8. pre-need designation of guardian(45 below); and
9. person-centered decision-making (6 below).

The alternatives suggested herein are, in some instances, designed to provoke further thought. They are certainly not an exclusive list.

Closely allied to the concept of less restrictive alternatives is the idea of Supports and Services, addressed in Appendix D-1.

#### **I. AVOIDING GUARDIANSHIP OF THE PERSON**

**1. Emergency Protective Order (“EPO”) or Emergency Order for Protective Services (“EOP”)** TEX. HUM. RES. CODE § 48.208 - A procedure to remove a person lacking capacity to consent to medical services from a situation posing an immediate threat to life or physical safety. Adult Protective Services files a verified petition and an Attorney Ad Litem is appointed. On a finding of probable cause by the probate court of the threat and lack of capacity, the person is removed to treatment and examined within 72 hours. The removal may last no longer than 72 hours unless extended by the court for up to 30 days. An application for temporary and permanent guardianship usually follows.

**2. Surrogate Decision -Making (“SDM”)** – TEX. HLTH. & SAF. CODE § 313.001-.007 – For **non-emergency** medical decisions to be made for incapacitated individuals who are either in a hospital or nursing home without the necessity of a guardianship.

**Decision-Maker Priority:** 1) the patient's spouse; 2) an adult child of the patient with the waiver and consent of all other qualified adult children of the patient to act as the sole decision-maker; 3) a majority of the patient's reasonably available adult children; 4) the patient's parents; or 5) the individual clearly identified to act for the patient by the patient before the patient became incapacitated, the patient's nearest living relative, or a member of the clergy.

**Limitations on consent:** Surrogate decision-maker cannot consent to: 1) voluntary inpatient mental health services; 2)

electro-convulsive treatment; 3) the appointment of another surrogate decision-maker; 4) emergency decisions; or 5) end-of-life decisions (extending or withdrawing life support).

**SDM does not:** 1) replace the authority of a guardian nor an agent under a medical power of attorney; 2) authorize treatment decisions for a minor unless the disabilities of minority have been judicially removed; 3) authorize patient transfers under Chapter 241 of the Health and Safety Code.

**Withdrawal of Life Support:** for provisions concerning withdrawal of life support where no Directive to Physicians has been executed, and in situations where there is no guardian, see TEX. HLTH. & SAF. CODE § 166.039.

#### **3. Surrogate Decision Making for Intellectually Disabled (MR)**

TEX. HLTH. & SAF. CODE § 597.041 – A more specialized form of surrogate decision-making, this statute allows SDM Committees to act for MR persons who reside in an intermediate care facility for the mentally retarded (ICF/MR) – Allows medical and non-medical decisions to be made by the committee.

**4. Surrogate Decision Making for Minors When Parent Unavailable** TEX. FAM. CODE § 32.001ff - consent to dental, medical, psychological, and surgical treatment of a child by persons authorized in statute.

#### **5. Authorization Agreement for Non-Parent Relative**

TEX. FAM. CODE Ch. 34 - A parent may authorize a grandparent, adult sibling or adult aunt or uncle to have decision-making authority for a minor child for: healthcare, insurance coverage, school enrollment, school activities, driver's education, employment and application for public benefits. This essentially authorizes the designee to do anything a guardian of the person could do.

The official form, promulgated by the Texas Department of Family and Protective Services, can be accessed at: [https://www.dfps.state.tx.us/site\\_map/forms.asp](https://www.dfps.state.tx.us/site_map/forms.asp), then look for “Form 2638”

#### **6. Supported Decision-Making Agreements** - TEX. EST.

CODE Ch. 1357 - Somewhat similar to a Power of Attorney, it is an agreement between 1) an adult with disabilities regarding his or her Activities of Daily Living (“ADLs”), but who is not incapacitated and 2) a “Supporter” who is willing to assist in: 1) understanding the options, responsibilities, and consequences of the life decisions, without actually making those decisions for the disabled adult and without impeding the adult’s self-determination; 2) obtaining the relevant information necessary (health, financial, or educational - the adult may execute HIPAA or similar releases to facilitate the information gathering); 3) understanding the information gathered; and 4) communicating those decisions to the appropriate persons.

The “life decisions” could include decisions regarding obtaining food, clothing, and residence and cohabitation choices; the supports, services, and medical care to be received; financial management assistance; and workplace choices.

Such an agreement extends until terminated by either party or by the terms of the agreement or if the Department of Family and Protective Services validates findings of abuse, neglect, or exploitation by the Supporter against the adult or the Supporter is found criminally liable for such actions.

A permissive form is supplied in the statute. The agreement must be signed by both the disabled adult and the Supporter either in the presence of two or more subscribing witnesses (above age 14) or a notary public.

**7. Emergency Medical Treatment Act** - TEX. HLTH. & SAF. CODE § 773.008 - In certain limited circumstances involving emergency situations, consent to medical treatment does not have to be given, it is implied. Hospital emergency rooms could not function if consent had to be secured beforehand.

**Emergency treatment of minors** - Consent is also implied for the treatment of a minor who is suffering from what reasonably appears to be a life-threatening injury or illness (even if they can communicate) if the minor's parents, conservator, or guardian is not present. TEX. HEALTH & SAFETY CODE § 773.008(3).

**8. Managing Conservatorships** TEX. FAM. CODE Ch. 153  
**- Functional equivalent to Guardian of the Person**  
Especially for families involved in a divorce context, a conservatorship may be used in place of a guardianship of the person for a minor, but only when there is no issue of assets belonging to the minor children.

**Check the small print** - The divorce decree, if there is one, should be carefully examined regarding any management powers granted either spouse regarding property of the children. TEX. FAM. CODE §153.132 grants a parent appointed sole managing conservator essentially the full rights of a guardian of the person and in TEX. FAM. CODE §153.073, the right to manage the property of the child “to the extent that the estate has been created by the parent or the parent’s family.” The Family Code provides no monitoring mechanism for property management.

**9. School Admission Procedures** - TEX. EDUC. CODE §25.001(d) – Under §25.001(d) of the Education Code, a school district may adopt guidelines to allow admission of non-resident children to school without the need for a guardianship. You may want to find out who in the school district administration possesses this information before you need it.

**10. School Admission Procedures (Grandparents)** - TEX. EDUC. CODE § 25.001(b)(9) – A school district may adopt guidelines to allow admission of non-resident children to school if a grandparent of the child resides in the school district and the grandparent provides “a substantial amount”

of after-school care for the child. The local school board is to adopt guidelines to implement this provision. No cases yet as to how this might square with TEX. EDUC. CODE § 25.001(d) if there is a guardian, but the child wants to live with the grandparent.

**11. Court-Ordered Mental Health Services** - TEX. HLTH. & SAF. CODE §§ 462.001, 571.001, 574.001 – In the case of a chronically mentally ill person, a temporary involuntary commitment may well be preferable to a guardianship. A guardianship, with its attendant removal of functional rights, might well be much more restrictive once the patient/ward has become stabilized on medication. Commitment provisions for the chemically dependent, mentally retarded, persons with AIDS and tuberculosis are also available in limited circumstances.

**12. Driving Issues: Katie’s Law and the Re-Test Request** - Effective September, 1, 2007, Texas drivers aged 79 or older can no longer renew a driver’s license by mail or electronic means, but must renew the license in person at an authorized license renewal station. In addition, drivers aged 85 and older will now have to renew every two years, rather than every six years. TEX. TRANSPORT. CODE § 521.2711

**“Re-Test Request”** A potential ward who refuses to stop driving may be reported to the DPS by a physician, a family member, or even a stranger, if the person’s driving capability is impaired. Although physicians are somewhat reticent to report their patients because of the physician-patient privilege and HIPAA, it is possible for the applicant in a guardianship or the ad litem to request the court to make a request to the Department of Public Safety for the proposed ward to be re-tested under DPS regulations to determine the proposed ward’s suitability to continue to drive.

A relatively new concept is the “Family Driving Agreement” a type of advance directive for driving decisions. The driver agrees in writing to designate someone to advise him or her when it is time to “give up the keys.” For more information, see keepingussafe.org.

**13. Mental Illness Diversion Programs (Criminal Courts)**  
Persons with mental health issues are often jailed for crimes over which they had little or no control.

In a mental illness diversion program, individuals with a documented mental health problem are treated as patients, not criminals.

In the program, individuals are placed on a strict, supervised probation with regular court check-in dates to document and receive progress updates. Psychiatrists and other professionals develop a mental health treatment program, customized to meet the specific needs of the participants.

Following completion of the program, the charges are dismissed and may be eligible for expunction.

## **II. ADVANCED MEDICAL DIRECTIVES**

**The Federal Patient Self-Determination Act** 42 USCA § 1395cc(f) requires health care providers, to be eligible for Medicare and Medicaid payments, to supply patients with

information regarding Medical Powers of Attorney as well as Directives to Physicians. Patients are to be given information regarding their rights under Texas law to make decisions regarding medical care (including the right to accept or refuse treatment) and the right to formulate advance directives. TEX. HLTH. & SAF. CODE Ch. 166 consolidates the location of the law regarding the 1) the Medical Power of Attorney, 2) and the Directive to Physicians. and 3) the "Out of Hospital Do Not Resuscitate" form. The chapter also provides common definitions to be used among all three documents

**14. Medical Power of Attorney** - TEX. HLTH. & SAF. CODE § 166.151 The most commonly used tool to avoid guardianship, the Medical Power of Attorney (formerly the Durable Power of Attorney for Health Care) is a creature of statute and should be prepared and executed with close attention to the statutory scheme set out in the Health & Safety Code. Most prudent estate planners will include the Medical Power of Attorney along with a Will and Durable Power of Attorney in a basic estate plan.

The Medical Power of Attorney is not automatically revoked upon the appointment of a guardian. The court may choose to suspend or revoke the power of the agent or to leave the Medical Power of Attorney in place as a less restrictive alternative.

**CAVEAT:** Nursing homes and hospitals may be reluctant to accept Medical Powers of Attorney which are executed made close to the time they are needed, particularly if the patient's capacity is questionable.

**15. Directive to Physicians and Family or Surrogates ("Living Will")** – TEX. HLTH. & SAF. CODE § 166.031

The newly revised and renamed form also now requires a disclosure statement (much like in the medical power of attorney), a place to indicate a choice between two treatment options, and a place for designation of an agent. The Directive interrelates to the Medical Power of Attorney in that it instructs the principal not to designate an agent on the Directive if a Medical Power has been executed. The new Directive form is **permissive**.

**Intractable Pain Treatment Act.** - TEX. REV CIV. STATS Art. 4495c. This act, adopted in 1995, was the first state statute in the nation designed to protect doctors for prescribing morphine to terminal patients for pain management during end-stage treatments without fear of professional disciplinary action for addicting the patients. See [www.medsch.wisc.edu/painpolicy](http://www.medsch.wisc.edu/painpolicy), the website for the Pain & Policy Studies Group of the University of Wisconsin Medical School for additional information and discussion on pain management policy.

**16. Out-of-Hospital DNR ("EMT-DNR")**- TEX. HLTH. & SAF. CODE § 166.081 – requires the ambulance personnel to let you die if that is your expressed wish. The tricky thing is having the right document or indicator available. This is one form that you cannot prepare. The forms are actually

printed by the Texas Department of Health. Only the officially printed forms (with red ink in the right places) will be honored by the EMTs. The Texas Department of Health has information on ordering the forms and necessary identifying bracelets at

<http://www.tdh.state.tx.us/hcqms/ems/index.htm#EMSRESOURCES>

### **17. End-Stage Planning: The Patient's Intent, If Known**

With or without legal assistance, a person may express his or her wishes and desires as to treatment decisions as disability or death approach. The oldest and most widespread of these is the "Five Wishes," a pamphlet developed in Florida and used in 33 states. It combines 1) surrogate decision making, 2) a medical power of attorney and 3) palliative care choices, many of which are sufficiently thought-provoking to promote some discussion on the topic with the one considering such choices.

**CAVEAT:** Because of the stringent witnessing requirements under the Advanced Medical Directives Act (TEX. HLTH. & SAF. CODE Ch. 166) and the mandatory nature of the form of the Texas Medical Power of Attorney, the universal *Five Wishes*™ pamphlet has not been implemented in Texas, however, Texas law does require that the patient's wishes, if known, are to be followed, (e.g.: TEX. HLTH. & SAF. CODE § 166.152(e)(1)). As a result, the Five Wishes may still function as a statement of the patient's intent. [www.agingwithdignity.com](http://www.agingwithdignity.com)

### **III. AVOIDING GUARDIANSHIP OF THE ESTATE**

**18. Durable Power of Attorney** - TEX. EST. CODE § 751.001ff – provides for all acts done by the attorney in fact (agent) to have the same effect, inure to the benefit of, and bind the principal and the principal's successors in interest as if the principal were not disabled. The statutory form allows the grant of broad authority. **If** the Proposed Ward still has enough capacity to grant the power, this is virtually a "no-brainer".

**Will the Bank accept it?** If you have a client who is planning to use a durable power of attorney and you have some special provisions that have been requested, it is really a good idea to check with your client's banker, stockbroker and other people who are gatekeepers with respect to the client's assets. If they are not prepared to accept those special provisions, you probably want to go a different direction.

**Other drawbacks** – Because there are no real checks-and-balances on the attorney-in-fact, anecdotal evidence of fraud and abuse often comes "too little, too late" for effective relief. Amendments in 2001 impose a duty on the agent to inform and account to the principal of actions taken under the power and to maintain complete records of actions taken. TEX. EST. CODE § 751.101.

**Patriot Act – Know Your Customer** – A further complication hampering the use of Durable Powers of Attorney comes as a result of the "Know Your Customer" provisions of the "Patriot Act" (Public Law 107-56 – Oct. 26, 2001). Because the bank must aggressively verify identities,

if the attorney in fact presents the power of attorney in question after the incapacity of the principal, there will most likely be insurmountable problems.

#### **19. Convenience Accounts** - TEX. EST. CODE § 113.102

- allows a depositor to name a co-signer on his or her account without giving the co-signer ownership rights before or after the depositor's death.
- creates a straightforward agency relationship for a potential ward to allow a family member or friend to help them pay bills and handle other banking business.
- a Convenience Signer cannot pledge the assets of the account. TEX. EST. CODE § 113.251.

**Convenience Signer On Other Accounts** TEX. EST. CODE § 113.106 – Account owner may designate “Convenience Signers” on other types of multi-party accounts such as joint tenancy with right of survivorship, pay-on-death and trust accounts.

*Beware of unintended consequences.*

#### **20. Sophisticated Tax Planning**

This alternative is included by way of issue recognition, rather than as an attempted exposition. Non-tax-planners might consult their tax planning brethren if a situation presents itself where there is a potential to employ tax planning as a part of disability planning/guardianship avoidance.

**21. Inter Vivos (“Living”) Trusts** - TEX. PROP. CODE §§ 111-115 – Like any tool in the toolbox, a revocable inter vivos trusts has its particular applications. It is an excellent and highly flexible tool when drafted by a knowledgeable, competent estate planning lawyer, working with a full understanding of the client's needs, objectives, and circumstances, and when coordinated with other appropriate estate planning tools and techniques. The trustee can be given much more freedom than a guardian would enjoy, especially in such areas as investments and distributions.

**Scam Trusts - IRS** - The See IRS Pamphlet 2193 for the attempts of the IRS to educate the public about trust scams. It gives consumers some simple ways to help decide if the trust they are contemplating is "too good to be true."

**Irrevocable Trusts** – To protect clients from themselves.

#### **22. §142 Trusts** – TEX. PROP. CODE § 142.005

In a suit in which a minor who has no legal guardian or an incapacitated person is represented by a next friend or an appointed Guardian Ad Litem, the court may, on application by the next friend or the Guardian Ad Litem and on a finding that the creation of a trust would be in the best interests of the minor or incapacitated person, order the clerk to deliver any funds accruing under the judgment to a trust company or a state or national bank with trust powers. TEX. PROP. CODE § 142.005.

**Drawback:** These trusts generally fail to provide for any accountability on the part of the trustee. A burgeoning number of fiduciary breach suits are being brought as a result.

**Advance Planning:** If the suit in question has not already

gone to judgment, consider instituting a guardianship proceeding and requesting that the suit be transferred into the probate court.

If you are not in a statutory probate court, ask for a Statutory Probate Judge to be appointed under TEX. GOVT CODE § 25.0022. The Statutory Probate Judge brings with him or her all of the jurisdiction of a statutory probate court, including the transfer power under TEX. EST. CODE § 1022.007. TEX. GOVT CODE § 25.0022(n).

Once you are in the probate court, a Guardianship Management Trust may be created without the necessity of also creating a guardianship. TEX. EST. CODE § 1301.051.

#### **23. Testamentary Trusts**

Testamentary trusts can be used to avoid a guardianship for the Testator's spouse, any family members with special needs and children and grandchildren of the Testator. When combined with traditional disability and tax planning, the potential for avoiding guardianship (and most of probate altogether) is great. As always, getting the client in to start the planning process is the hardest part.

#### **24. Guardianship Management Trusts** – TEX. EST. CODE § 1301.051 - An effective property management tool while protecting the property from malfeasance.

- may be established whether a guardian is ultimately appointed or not.

- Applicants can include a guardian, an Attorney Ad Litem, a Guardian Ad Litem or a person interested in the welfare of the ward.

The ability to continue the administration of the trust until age 25 (TEX. EST. CODE § 1301.203) can be particularly advantageous to provide a few more years of professional money management during an extended “training wheels” period for the ward/beneficiary.

**Distribution to Pooled Trust Subaccount** – In light of the global economic downturn since 2008, the Guardianship Management Trust assets can be transferred to a subaccount of a Master Pooled Trust for more economic management of assets that might otherwise be too modest for a bank trust department. TEX. EST. CODE §§ 1302.001ff. See *infra*.

#### **25. Pooled Trust Subaccounts** TEX. EST. CODE §§ 1302.001ff - As an alternative to a Guardianship Management Trust, funds otherwise appropriate for a Management Trust to be transferred to a pooled trust, such as that operated by the Association for Retarded Citizens (ARC). It will preserve Medicaid qualification. It requires that an annual report be filed, but not a guardianship-style accounting. The trustee may assess its standard fees against the subaccount.

#### **26. Special Needs/ Medicaid Qualification Trusts - 42 USC 1396p (1)(d)(4)(A)**

Medicaid is a federal, means-tested program health program for eligible individuals and families with low incomes and resources. It is jointly funded by the state and federal governments, and is managed by the states. In Texas, an individual whose resources or income exceed certain

limits cannot qualify for Medicaid benefits. However, certain resources, or assets, do not count for Medicaid eligibility purposes.

The enabling statute, "OBRA 93", allows the use of very specific trusts which may be established with an individual's own assets, but which will not count against the resource limit for that individual for Medicaid purposes.

Although there are three types of such trusts, it is the trust for disabled persons under age 65, authorized pursuant to 42 U.S.C. § 1396p(d)(4)(A) which typically involves the courts. These are most often called "Special Needs Trusts" or "Supplemental Needs Trusts."

Personal injury attorneys are only recently appreciating the utility of these trusts in preserving assets for the permanently disabled client who will remain institutionalized.

Be aware of the potential exposure for an Attorney Ad Litem in a P.I. case who fails to consider the appropriate use of the supplemental needs trust, resulting in a much smaller net benefit for the disabled client.

**27. Trusts for Intellectually Disabled (MR) Persons** TEX. HLTH. & SAF. CODE § 593.081 - Up to \$250,000 may be placed in a trust for the benefit of MR individuals in certain residential-care facilities without disqualifying them from receiving state benefits and without the need for a guardianship.

A copy of the trust must be provided to Health & Human Services Commission (formerly DADS).

HHSC may request current financial statements.

Guardianship funds - Ch. 142 trusts, patient's trust fund's in a residential-care facility, child support, an interest in a decedent's estate, and funds in the registry of the court are not considered trusts and are not entitled to the exemption.

**28. Community Administrator** - TEX. EST. CODE § 1353.002 - Upon a declaration of incapacity of one spouse, the other spouse, in the capacity of "community administrator" (not the decedent's estates kind) has the power to manage, control and dispose of the entire community estate without the necessity of a guardianship upon a finding by the Probate Court that: 1) it is in the best interest of the ward for the incapacitated spouse to manage the community property, and 2) the incapacitated spouse would not be disqualified to be appointed as guardian of the estate under §1104.351ff.

An ad litem may be appointed, the administrator required to return an inventory and accountings and a guardian of the estate may retain management rights over some specified varieties of real and personal property. These matters are considered in the context of a guardianship application and are not freestanding applications.

TEX. FAM. CODE § 3.301ff (the corollary provision to TEX. EST. CODE § 1353.002) was drastically amended in 2001. It is no longer possible to have the incapacitated spouse manage or sell the community property under the Family Code, absent highly unusual circumstances.

**29. Court Registry** - TEX. EST. CODE § 1355.001 - This

provision is often viewed as simply an administrative deposit mechanism and is often overlooked as an opportunity to avoid administration of a minor's or other incapacitated person's guardianship estate. Up to \$100,000 may be deposited into the court's registry during the period of incapacity. The clerk is to bring the matter to the judge's attention and the funds are to be ordered invested in an interest-bearing account.

**"Mini-administration:"** Certain specified persons are permitted to withdraw all or a portion of the funds in the registry under bond to be expended for the benefit of the incapacitated person. After an accounting to the court, the bond may be released. This provides a very simple alternative to guardianship, particularly in a rural county. Upon attaining majority, minors are able to withdraw the funds upon proof of age and an order of the court. TEX. EST. CODE § 1355.105.

**CAVEAT:** TEX. LOC. GOVT. CODE §§ 117.054 & 117.055 authorize the county clerk to charge investment management fees on funds in the court's registry: a) 10% of any interest earned on interest-bearing accounts and b) 5% (but not to exceed \$50.00) on non interest bearing accounts.

Where funds are interplead because of a settlement but no probate case is pending, make sure the order specifies that the funds are to be deposited in an interest-bearing account.

Institutionalized incapacitated individuals: TEX. EST. CODE § 1355.151ff allow funds being held for an incapacitated individual who is institutionalized by the State of Texas to be paid to the institution for a trust account for the benefit of the individual, up to a maximum of \$10,000.

**30. Payment to Non-Resident Creditor** TEX. EST. CODE § 1355.002 Permits money payable to a non-resident minor, a non-resident adult ward or a non-resident former ward of a terminated Texas guardianship ("non-resident creditor") to be paid either to the guardian of the non-resident creditor in the domiciliary jurisdiction or to the county clerk where the non-resident creditor owns property or in the county of the debtor's residence.

**31. Sale of Minor's Interest in Property** - TEX. EST. CODE § 1351.001- This relatively simple procedure allows the interest of a minor in realty to be sold and deposited into the court's registry if the minor's interest is less than \$100,000. The minor's interest needs to be cash only, so it sometimes is necessary to do a bit of structuring to "cash out" a minor's undivided interest.

The sworn application (which may now be filed by an ad litem appointed for this proceeding), which must contain the name of the minor and a legal description of the property, is filed and then is supposed to sit for five days. Citation is optional with the court. Most courts will want to see some indication of value beyond a contract and tax statement. Venue for this procedure is the same as for a guardianship. Court approval is subject to a 'best interest' test on behalf of the minor.

Upon approval by the court (check your local practice as to whether a hearing is actually required), the sale is closed and

the proceeds deposited into the court's registry. The funds are available for withdrawal as described above.

If the minor is not a ward and does not have a parent or managing conservator willing or able to file the application, the court may appoint an attorney ad litem or guardian ad litem to act on the minor's behalf for the limited purpose of applying for an order to sell the minor's interest in the property.

### **32. Sale of Adult Incapacitated Ward's Interest in Property** - TEX. EST. CODE § 1351.051

Until this section was enacted, adult incapacitated individuals with meager personal property but with undivided interests in real property were often required to have somewhat meaningless guardianships of the estate. This provision allows adult incapacitated individuals to proceed with a guardian of the person only where their interest in real property is valued at less than \$100,000.

This provision is now also available for a ward of a guardian appointed by a foreign court.

### **33. Mortgage of Minor Interest/ Minor Ward's Interest in Property** - TEX. EST. CODE §§ 1352.051, 1352.101

These provisions allow the parents, managing conservator or guardian of the person (as applicable), to obtain a home equity loan secured by the minor's interest in homestead property for the payment of education and medical expenses, for repairs to the homestead property, and for repayment of the loan.

A bond set in twice the amount of the loan amount is required, as well as a hearing on the front end and annual accountings while the loan is being paid off.

### **34. Uniform Transfers to Minors Act** - TEX. PROP. CODE § 141.001 et. seq. - The ability of a donor to make transfers of various types of assets to a minor by the donor's appointment of a custodian has broad coverage and far-reaching implications. The custodian has authority to invest and expend the transferred assets – without court order – for the support, education, maintenance and benefit of the minor.

Again, the lack of supervision may dictate against this as a vehicle of choice unless the custodian is sophisticated enough to really understand fiduciary responsibility.

### **35. Receivership** TEX. EST. CODE § 1354.001, TEX. CIV. PRAC. & REM. CODE §§ 64.001ff, - Of particular interest is where the incapacitated person owns an interest in a going business or commercial property which is in danger of injury. The court may appoint a receiver, who is subject to the same compensation and bonding provisions under the Estates Code as a personal representative. The Receiver administers the property until the need for the receivership is over. In 1999, the provisions for guardianship for missing persons were repealed. Receivers are now to be appointed for missing persons.

### **36. Order of No Administration** TEX. EST. CODE §§ 451.001ff

If your object is simply to transfer title to estate assets to a disabled surviving spouse or minor children and your facts meet the criteria specified, this somewhat archaic procedure, sort of an amalgamation of a small estate affidavit and an application for family allowance, may be employed if there is otherwise no necessity for administration. The court may dispense with notice or may prescribe the quality and quantity of notice required. TEX. EST. CODE § 451.002.

The court's order reads like the "facilitation of payment" language in a muniment of title proceeding and acts as authority to effect the transfer of the property involved. TEX. EST. CODE § 451.003. Such an order may be "undone" within one year if other information comes to light showing a necessity for administration. TEX. EST. CODE § 451.004.

### **37. Representative Payee** 42 USC § 1383(a)(2)

A Representative Payee may be appointed by the Social Security Administration to manage Social Security benefits without the appointment of a guardian. Potentially available to all of the 50 million individuals receiving some sort of Social Security benefits, close to 7 million people currently receive Social Security benefits under the representative payee program. This is approximately ten times greater than all active court-supervised guardianships in the United States.

### **38. Veteran's Benefits Fiduciary** - 38 USC § 5502(a)(1)

Very similar to the Social Security rep payee program, the Department of Veteran's Affairs allows the appointment of a person to handle the administration of veteran's pension benefits without the appointment of a guardian. [www.vba.va.gov/bln/21/Fiduciary/index.htm](http://www.vba.va.gov/bln/21/Fiduciary/index.htm)

### **39. Payment of Employees Retirement System Funds to Parent of Minor** - Op. Tex. Att'y Gen. No. H-1214 - a parent may receive and manage a minor child's Texas Employees Retirement System (ERS) benefits without guardianship. This opinion relies on two propositions:

- a parent has authority to manage the estate of a minor child without court appointment of a guardian. TEX. FAM. CODE § 151.001(a)(4).

- A parent may also receive, hold, and disburse funds for the minor's benefit. TEX. FAM. CODE § 151.001(a)(8).

### **40. International Treaty**

There is at least one international treaty between Mexico and the united States that provides for judgments benefitting minors who are Mexican Nationals to be paid to the Mexican Government to as trustee. E-mail from Judge Guy Herman, April 12, 2002 to Texas Probate Listserve [www.texasprobate.net](http://www.texasprobate.net)

Similarly, Memoranda of Understanding are frequently executed between governmental agencies providing for international cooperation regarding minors in cross-border situations. See Memorandum of Understanding Between the Monterey County Department of Social and Employment Services, Family and Children Services and the Consulate General of México in San José, California Regarding Consular Involvement in Cases Involving Minors

[www.f2f.ca.gov/res/pdf/Monterey](http://www.f2f.ca.gov/res/pdf/Monterey)

[MOUMexicanconsulate.pdf](http://MOUMexicanconsulate.pdf) Accessed February 16, 2011

#### **41. Suit by Next Friend** - TEX. RULES CIV. PROC. 44

A minor without a legal guardian may sue by next friend. A next friend has the same rights concerning such suits as guardians have. These rights include seeing that the funds or other property recovered is placed in the court's registry, placed in a § 142 Trust under the Property Code or a Guardianship Management Trust under the Estates Code.

Under no circumstances should a non-parent next friend be allowed to seek to manage the funds personally, as neither the Property Code nor the Rules of Civil Procedure provide for any oversight mechanism for next friend management of a minor's property.

**CAVEAT:** Next Friends are subject to the same restrictions as guardians re contingent fee agreements. *Massey v. Galvan* 822 S.W.2d 309 (Tex. App. – Houston – [14<sup>th</sup> District] 1992, wr. den.) In *Stern v. Wonzer* 846 S.W.2d 939 (Tex. App. – Houston - [1<sup>st</sup> District] 1993, no pet.).

**CAVEAT #2:** When a P.I. case settles and little or no thought is given to the allocation of the award between the survival cause of action and the wrongful death cause of action, some sticky tax issues and angry creditors (and probate judges) may have to be faced. *Texas Health Insurance Risk Pool v. Sigmundik*, 315 S.W.3d 12 (Tex. 2010); *Elliott v. Hollingshead*, 327 S.W.3d 824 (Tex. App. Eastland, 2010, no pet.).

**42. Social Service Agencies** - Many social services agencies provide a variety of services specifically tailored to the needs of children, the disabled and elderly. A quick check of the yellow page listings under "social service agencies," will reflect literally dozens of organizations existing to this purpose. Many will have a particular emphasis toward a target group: veterans, the elderly, intellectually disabled, etc.

Beyond the Order for Emergency Protection (*supra*) the ability of either Adult Protective Services or Child Protective Services to investigate a potential exploitation or neglect situation is vital.

#### **43. Geriatric Care Manager**

A Geriatric Care Manager (GCM) is a health and human services professional, such as a gerontologist, social worker, counselor, or nurse, with a specialized body of knowledge and experience on issues related to aging and elder care issues.

GCMs are able to coordinate and manage eldercare services, which often includes conducting an assessment to identify problems, eligibility for assistance and need for services; coordinating medical services, including physician contacts, home health services and other necessary medical services; screening, arranging and monitoring in-home help or other services; reviewing financial, legal, or medical issues and offering appropriate referrals to community resources; providing crisis intervention; ensuring everything is going well with an elder person and alerting families to problems; and assisting with moving an older person to or from a retirement complex, care home, or nursing home.

While California has developed a state registry of Geriatric Care Managers, Texas does not yet have any central registry. The National Association of Professional Geriatric Care Managers, the non-profit association of these professional practitioners, has promulgated a Pledge of Ethics and Standards of Practice. Their website has a locator database. [www.caremanager.org](http://www.caremanager.org)

### **IV. LIMITING THE EFFECT OF THE GUARDIANSHIP**

#### **44. Pre-Need Designation of Guardian For Self** – TEX. EST. CODE § 1104ff

An adult with capacity may, by written declaration designate those persons whom the declarant wishes to serve as guardian of the person or of the estate of the declarant in the event of later incapacity. The declaration may be in any form adequate to clearly indicate the declarant's intention to designate a guardian for the declarant's self in the event of the declarant's incapacity. The designation may be holographic, acknowledged before a notary or attested to by two witnesses, age 14 years of age or older and who are not designees to be guardian. In the case of attestation, a self-proving affidavit should be executed and attached.

A declaration that is not written wholly in the handwriting of the declarant may be signed by another person for the declarant under the direction of and in the presence of the declarant.

The court is required to follow the designations in the declaration, unless the court finds such designee to be disqualified or their appointment not to be in the ward's best interest.

A new form to allow simultaneous execution, attestation, and making the designation self-proving is available Tex. Est. Code § 1104.205(a).

**Pre-Need Disqualification** - Perhaps more importantly, the declarant may also indicate those persons who are to be specifically disqualified from serving as guardian, either of the person or estate. Such a disqualification is binding on the court and is among the listed reasons for disqualification under TEX. EST. CODE § 1104.202.

**Revocation/Nullification** - The designation may be revoked by execution of another designation or by following the same formalities as revoking a will. Divorce will serve to nullify a designation of a former spouse.

#### **45. Pre-Need Designation of Guardian by Parent** - TEX. EST. CODE §§ 1104.103, 1104.151

Similarly, a parent may designate, either in by separate written declaration or in the parent's will, those persons (in preferential order) whom they desire to be guardian of the person and/or estate of their child or children. The designation may specify that the court waive bond as to a guardian of the person, but not as to a guardian of the estate. This designation may be for either minor children or for adult incapacitated children.

Like the designation for one's self, the designation for a child may be in any form adequate to clearly indicate the

declarant's intention to designate a guardian for the declarant's child in the event of the declarant's death or incapacity.

Unlike the Pre-Need Designation for Self, the Pre-Need Designation of Guardian by Parent does not contain the provision to expressly disqualify others as guardian.

A new form to allow simultaneous execution, attestation, and making the designation self-proving is available Tex. Est. Code § 1104.154(a).

**46. Pre-Need Declaration for Mental Health Treatment -** TEX. CIV. PRAC & REM. CODE § 137.007

A capacitated adult may, by written declaration, indicate his or her preferences or instructions for mental health treatment, including the right to refuse such treatment. Such a declaration is effective on execution and expires on the third anniversary of its execution or when revoked, whichever is earlier.

**Witnesses** - The declaration is to be witnessed by two qualified witnesses (similar to other advanced directives). Physicians or other health care provider are to follow such declaration, however, as long as the declarant is capable for giving informed consent, such informed consent is to be sought.

**Does not apply** – The declaration is ineffective if the declarant, at the time of making the designation, is under a temporary or extended commitment and treatment is authorized under the Mental Health Code or in the case of an emergency when the declarant's instructions have not been effective in reducing the severity of the behavior that has caused the emergency.

**47. Safekeeping or "Freeze" Agreements** - TEX. EST. CODE § 1105.155 - Where the personal representative deposits estate cash or other assets in a state or national bank, trust company, savings and loan association, or other domestic corporate depository, to be held under an agreement that the depository will not allow withdrawal or transfer of the principal of the assets and/or interest on the deposit except on written court order. (See example in Appendix Ad.) The amount of the bond of the personal representative may then be reduced in proportion to the cash or other assets placed in safekeeping.

**48. Restoration of Ward** - TEX. EST. CODE § 1202.051 - A Guardian Ad Litem must be appointed and everyone noticed similar to the original grant of guardianship.

**49. Annual Determination** - TEX. EST. CODE § 1201.052 - Each year, the probate judge is required to review each guardianship file created after September 1, 1993, and may review annually any other guardianship files to determine whether the guardianship should be continued, modified, or terminated. This provision appears fairly innocuous, but is in reality very powerful. It was recently used in a very large guardianship with massive pending litigation to restore the ward's capacity and terminate the guardianship. Because the standards for the court are somewhat of a blank slate (i.e.

discretionary), especially in courts other than statutory probate courts, this provision could be employed in a number of creative ways. Even though the procedure and standards for modification under § 1202.051 are fairly restrictive (see above), the annual determination under § 1201.052 contains no such procedural requirements.

**50. Emancipation of Minor Ward** - TEX. FAM. CODE § 31.01ff - Where a minor who is over 16, self-supporting (or married) and living apart from parents, a conservator or guardian may ask the court to legally remove the disabilities of minority for either limited or general purposes. The petition is decided on a "best interest" standard and the order is to specify whether the removal of disabilities is limited or general in scope and the purposes for which disabilities are removed.

**51. Enumeration of Powers in Guardianship Order** TEX. EST. CODE § 1101.151ff - If the guardianship is to be a plenary guardianship, it is perhaps best to simply reflect in the order that "*The guardian is to be granted all power and authority allowed under Texas law and the rights of the ward are limited to the extent not inconsistent therewith.*" Otherwise, attempting to cover everything by an exhaustive listing may leave the guardian with specific deficits. Some attorneys feel that a listing of eight or ten powers is complete, while others can go on for pages.

However, if the ward is partially capacitated, a careful enumeration of those areas in which the ward's rights are not to be limited can have a great effect on the ward's functioning ability and self-esteem.

**52. Interstate Guardianships** TEX. EST. CODE § 1253.001ff - Where a guardianship exists in another state and the ward has been moved to this state, it can be advisable to allow a part of the guardianship to remain in the other state until affairs (pending litigation, etc) are resolved before all of the remnant is transferred.

**53. Negligible Estate** TEX. EST. CODE §§ 1204.001 - When the ward's estate is exhausted or when the foreseeable income accruing to a ward or his estate is so negligible that maintaining the guardianship would be a burden, the court may authorize the income to be paid to a parent or other person acting as guardian, to assist as far as possible in the maintenance of the ward, and without any liability for future accountings as to the income.

**54. Minor Ward's Estate <\$100,000** TEX. EST. CODE §§ 1204.001(d) & 1355.102 - Unlike the adult ward's estate, which is needed for the upkeep and maintenance of the ward, a minor ward's guardianship estate is less likely to be called upon for day-to-day living expenses. If the guardian of the estate is a parent of the ward, the court is usually going to want to see some proof that the guardian/parent cannot make the expenditures out of his/her own pocket rather than out of guardianship assets. The mindset here is more of asset preservation and maybe some college planning, assuming of

course that the minor ward has no special needs to deplete the estate. If the estate cash falls below \$100,000 (up from \$50,000 in 2001), the guardianship of the estate may be closed and the remaining funds paid into the court registry. Withdrawals are then possible under the procedure set out under TEX. EST. CODE § 1355.102 above.

**55. Mediation and Family Settlement Agreements** TEX. EST. CODE § 1055.151 - Rarely on a guardianship contest is issue of incapacity the real issue. Most often, decades of unresolved conflict among the family members of the proposed ward spark the contests. Perceived favoritism, sibling rivalry, jealousy of a stepparent or step-children or step-siblings, unresolved grief, etc. are all manifested in the guardianship arena.

While resolution of a guardianship contest might remove the procedural obstruction in granting a guardianship, it rarely resolves the family disputes and wounded relationships which led to the contest. Mediation can provide a level playing field for the family to resolve those issues behind the guardianship fight. The long-standing "burrs under the

saddle" that so often give rise to fights in the probate arena can be aired and often resolved. TEX. EST. CODE § 1055.151 allows those settlements to be made irrevocable.

"A family settlement agreement is a favorite of the law."  
*Shepherd v Ledford*, 962 S.W.2d 28 (Tex. 1998).

#### **56. Mother Nature and Father Time -**

**Spontaneous Remission** - It is not unusual - once a person gets adequate nutrition/ hydration/ socialization / therapy/ medication for a few weeks or months - for many symptoms of delirium/ confusion/ diabetic conditions to clear up. In some instances, it is a question of employing successive alternatives in an effort to forestay the inevitable, whether a guardianship or death.

It is rarely in the best interest of a terminally-ill proposed ward to go through successive independent medical examinations and for extensive litigation to exhaust an already beleaguered estate, only to have the ward die the day after letters are granted.

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