

## SEARCHING FOR THE LESS RESTRICTIVE ALTERNATIVE

### I. INTRODUCTION

The legislature, through the mandatory language in the Estates Code, requires the use of less restrictive alternatives to guardianship if the same are available and appropriate. The following list is not meant to be an exhaustive list; there may be less restrictive alternatives available that are not contained in this list.

**DEFINITION OF INCAPACITY**  
"Incapacitated person" means "*an adult who, because of a physical or mental condition, is substantially unable to: (A) provide food, clothing or shelter for himself or herself; (B) care for the person's own physical health; or (C) manage the person's own financial affairs; ...*" Texas Estates Code §1002.017(2) (formerly Texas Probate Code §601(14)).

### II. AVOIDING GUARDIANSHIP OF THE PERSON

**1. Emergency Order for Protective Services ("EOP") or Emergency Protective Order ("EPO")** §48.208, Texas Human Resources Code – *Not to be confused with a Domestic Violence Protective Order - Texas Code of Criminal Procedure, Ch 5.*

This option is only available to Adult Protective Services and allows Adult Protective Services, upon the filing of a verified (sworn and notarized) petition, the appointment of an attorney ad litem, and a finding of probable cause at a hearing for that purpose, to remove the person from a situation posing an immediate threat to their life or physical safety.

Referrals should always be made to Adult Protective Services when abuse, exploitation, or neglect (including self-neglect) is suspected. Contact Adult Protective Services at (800) 252-5400.

**2. Surrogate Decision -Making ("SDM")** – Texas Health and Safety Code §§313.001-313.007.

A procedure that allows **non-emergency** medical decisions to be made without the necessity of a guardianship for incapacitated individuals who are either in a hospital, nursing home or are receiving services through a "home and community support services agency."

**A. "Incapacity":** if the person is "comatose, incapacitated, or otherwise mentally or physically incapable of communication." The incapacity may be either temporary or permanent.

**B. Patient's Known Desires Followed:** Any medical treatment consented to under the SDM statute must be based on knowledge of what the patient would desire, if known.

**C. 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, 6) the patient's nearest living relative, or 7) a member of the clergy.

**D. 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 Texas Health and Safety Code, Chapter 241.

**E. Limitations on Consent:** A surrogate decision-maker cannot consent to:

- 1) voluntary inpatient mental health services;
- 2) electroconvulsive treatment;
- 3) the appointment of another surrogate decision-maker;
- 4) emergency decisions; or
- 5) end-of-life decisions (extending or withdrawing life support).

**F. Withdrawal of Life Support:** When there is no Directive to Physicians or guardian, making a treatment decision that may include withholding or withdrawing life-sustaining treatment is to be made pursuant to Texas Health and Safety Code §166.039.

The protocol for such a decision is, in descending order of availability:

- 1) the attending physician and the patient's legal guardian or agent under a medical power of attorney.
- 2) the attending physician and either:
  - a) the patient's spouse;
  - b) the patient's reasonably available adult children;
  - c) the patient's parents; or
  - d) the patient's nearest living relative; or
- 3) the attending physician and another physician who is not involved in the treatment of the patient or who is a representative of an ethics or medical committee of the health care facility in which the person is a patient.

### **G. Documenting consent**

1. The attending physician is required to:
  - a) describe the patient's incapacity in the patient's medical record;
  - b) describe the proposed medical treatment;
  - c) make a reasonably diligent effort to contact or cause to be contacted the

persons eligible to serve as surrogate decision-makers; and

d) document, in detail, the efforts to contact those persons listed in the patient's medical record.

2. If a surrogate decision-maker consents to medical treatment on behalf of the patient, the attending physician should record the date and time of the consent and sign the patient's medical record. The surrogate decision-maker countersigns the medical record or signs an informed consent form.

**H. Telephone consent** - The act provides that consent by a SDM, if not given in person, must be documented in the patient's medical record, signed by the staff member receiving the consent, and countersigned by the SDM as soon as possible. Texas Health and Safety Code §313.005.

**I. Costs of treatment** - The act does not make the SDM liable for the cost of treatment. The result is the same as if the patient had consented to the treatment. Texas Health and Safety Code §313.006.

**J. Limitation on Liability.** Neither the SDM, nor the attending physician, hospital, or nursing home or home and community support services agency, nor their agents, are subject to criminal or civil liability or professional liability, provided all of the parties are acting in good faith and the

medical treatment consented to does not constitute a failure to exercise due care. Texas Health and Safety Code §313.007

**K. Disputes** regarding the right to act as a surrogate decision-maker are to be resolved by courts with probate jurisdiction.

**3. Surrogate Decision Making for Intellectually Disabled (IDD) Persons** – Texas Health and Safety Code §597.041 – Regulations at Texas Administrative Code, Title 40, Part 1, Chapter 9, Subchapter E, Division 10.

This option is a more specialized form of surrogate decision-making. This statute allows an individual SDM, an SDM Committee, a Surrogate Consent Committee and an Interdisciplinary Team to interact to make major medical and dental decisions (including the administration of psychotropic medications and behavior interventions) and the release of medical records for persons who reside in an intermediate care facility for the mentally retarded (ICF/MR) – The statute also allows medical and non-medical decisions to be made by the committee.

**Note:** Effective October 5, 2010: All references in Federal law and regulation to *mentally retardation* have been changed to *intellectual disability*.

**4. Authorization Agreement for Non-Parent Relative** – Texas Family Code, Chapter 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 Protective and Family Services and identified as "Form 2638", can be accessed at: [www.dfps.state.tx.us/documents/Child\\_Protection/2638.pdf](http://www.dfps.state.tx.us/documents/Child_Protection/2638.pdf)

**5. Emergency Medical Treatment Act** - Texas Health and Safety 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** – Texas Health and Safety Code §773.008(3).

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.

**6. Managing Conservatorships** - Texas Family Code, Chapter. 153.

Conservatorship should be used for minors, especially for families involved in a divorce context, when there is not an issue regarding assets belonging to the minor children.

**7. School Admission Procedures** – Texas Education Code §25.001(d).

A school district may adopt guidelines to allow admission of non-resident children to attend school in that school district 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.

*One of the required findings in establishing a guardianship for a minor is that "the guardianship is not created for the primary purpose of enabling the minor to establish residency for enrollment in a school or school district for which the minor is not otherwise eligible for enrollment; ..."* (Texas Estates Code §1101.101(a)(2)(C).)

**8. School Admission Procedures** – Texas Education 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.

**9. Mental Health Services** - Texas Health and Safety Code §§462.001, 571.001, and 574.001.

In the case of a chronically mentally ill person, a temporary involuntary commitment is preferable to a guardianship. Guardianships are not generally available for persons who may be become stabilized on medication. Commitment provisions for the chemically dependent and persons with AIDS and tuberculosis are also available in limited circumstances.

**10. Driving Issues: the Re-Test Request** – Texas Transportation Code §521.2711.

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.

**"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.

### III. ADVANCED MEDICAL DIRECTIVES AND OTHER OPTIONS

**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.

**Plan Ahead:** Individuals should make sure their primary care physician has current copies of these documents. Extra copies should be available for family members to furnish to medical personnel in case the originals get "lost" after they are furnished the first or second time.

**11. Medical Power of Attorney** – Texas Health and Safety Code §166.151.

The most commonly used tool to avoid guardianship, the Medical Power of Attorney 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.

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. Importantly, the Medical Power of Attorney only “kicks in” if the principal is unable to make his own decision.

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

**12. Directive to Physicians and Family or Surrogates ("Living Will")** – Texas Health and Safety Code §166.033.

This form 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.

**13. Out-of Hospital DNR (“EMT-DNR”)** - Texas Health and Safety Code §166.081.

This advanced directive 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 ID bracelets at [www.dshs.state.tx.us/emstraumasystems/dnr.shtm](http://www.dshs.state.tx.us/emstraumasystems/dnr.shtm).

The really hard thing is for family and friends to allow the EMT-DNR to control.

**14. End-Stage Planning: The Patient's Intent, If Known** - Texas Health and Safety Code §166.152(e)(1)).

A person may express his or her wishes and desires as to treatment decisions when death approaches. Texas law requires that the patient's wishes, if known, are to be followed.

**15. Durable Power of Attorney** – Texas Estates Code, Chapter 752.

A pervasive authorization, the Texas Durable Power of Attorney Act, 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.

**Durable and Not Automatically Terminated by Guardianship** - The Principal, even if totally incapacitated, is not otherwise limited in his or her ability to act unless guardianship proceedings are instituted and the court is put on notice of the possible necessity to void the durable power.

**Statutory Form** - 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".

Banks must aggressively verify identities; therefore if an attorney in fact presents a power of attorney after the alleged start of incapacity of the principal, there may be problems.

Imposed on the agent is a "duty to inform and to account" to the principal for actions taken under the power and to maintain complete records of actions taken. (Texas Estates Code §§751.001-751.003.)

**16. Convenience Accounts** – Texas Estates Code §113.004.

Because of the great potential for confusion as to the types of accounts, the unforeseen

effect of the treatment of the account post-death, the lack of any uniformity as to the forms of the account agreements, and the all-too-familiar scenarios when one child or "friend" is made a "co-signer" on an account that ends up being a joint tenancy with right of survivorship, multi-party accounts should generally be totally avoided as an alternative to guardianship. Texas Estates Code §113.004 (formerly TEX. PROB. CODE §438A - Convenience Accounts) is a tool to allow 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. The potential ward can allow a family member or friend to help them pay bills and handle other banking business without giving the Convenience Signer any ownership interest (intentionally or unintentionally). Texas Estates Code §113.105 and §113.154 allow the depositor to name more than one Convenience Signer on the account. Also a multi-party account (e.g., an account in both husband's and wife's names) can designate one or more Convenience Signers. The Convenience Signer cannot pledge the assets of the account. Extreme caution should be exercised in using Convenience Signers on any accounts other than purely convenience accounts.

**17. Management by Community Administrator** – Texas Estates Code, Chapter 1353.

Upon a declaration of incapacity of one spouse, the other spouse, in the capacity of "community administrator" 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 capacitated spouse to manage the community property, and
- 2) the capacitated spouse would not be disqualified to be appointed as guardian of the estate under Texas Estates Code §§1104.351-1104.358.

**18. Payment of Claims Without Guardianship (Court Registry)** – Texas Estates Code, Chapter 1355.

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. Texas Estates Code 1355.105.

**CAVEAT:** Texas Local Government Code §§117.054 and 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.

#### **Institutionalized incapacitated individuals:**

Texas Estates Code §§1355.151-1355.154 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.

**19. Sale of Adult Incapacitated Ward's Interest in Property** – Texas Estates Code §§1351.052-1351.057.

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.

**20. Uniform Transfers to Minors Act** - Texas Property 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.

**21. 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.

**22. Veteran's Benefits Fiduciary Program** - 38 USC§5502.

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)

**23. Social Service Agencies** - Many social services agencies provide a variety of

services specifically tailored to the needs of children, the disabled and elderly.

#### **24. 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.

**25. Pre-Need Designation of Guardian For Self** – Texas Estates Code, Chapter 1104.

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.

**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 Texas Estates Code §1104.202(b).

## **26. Pre-Need Designation of Guardian by Parent**

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.

## **27. Pre-Need Declaration for Mental Health Treatment** - Texas Civil Practice and Remedies 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.

**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.

**Mental Illness Warrants:** MI Warrants are issued in Dallas County when a person is either mentally ill or chemically dependent AND is a danger to themselves, incapable of taking care of themselves, or a danger to others.

A person applying for a Mental Illness Warrant must be 18 years of age or older and must have first-hand knowledge of the behavior, state specific recent act(s), attempt(s), or threat(s). And the person applying for the warrant must be willing to sign a notarized statement about the behavior.

A warrant may be obtained at:

1) Mental Illness Court Office located in the Records Building at 501 Main Street, Room 201 Dallas from 8:00 AM to 4:00 PM.,

2) Magistrate's office in the Lew Sterrett Justice Center at 111 W. Commerce Street Dallas 75202 after 4:30 PM, on weekends, and on holidays, and

3) Most local Justice of the Peace offices.

An Apprehension by a Police Officer without a Warrant (APPOW) may also be obtained through a Sherriff or police officer if there is not enough time to obtain a warrant.

## **28. Emancipation of Minor Ward** – Texas Family Code, Chapter 31.

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.

**Requisites** - Although a guardian ad litem must be appointed, the minor may proceed in his or her own name and no next friend is required. If there is a conservator or guardian, they are to verify the pleadings, but if they are unavailable, the guardian ad litem may verify the pleadings.

**Standard** - 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.

**Adult capacity** - Except for specific constitutional and statutory age requirements, if the disabilities of the minor are removed for general purposes, the minor then has the capacity of an adult, including the capacity to contract. Such orders from other states may be effective when filed in the deed records of any county in this state.

### **29. Money Management Programs**

Volunteer money management programs offer a less restrictive alternative to guardianships for low-income elderly and adults with disabilities who are incapable of managing their checking accounts themselves and have no one else available or appropriate to assist them.

### **Prevent Identity Theft**

Placing a security freeze (also called a fraud alert or credit freeze) with the Big Three Credit Unions could prevent an individual's identity from being illegally used by someone else. For individuals who no longer need to secure credit or do not have the capacity to manage their finances, assisting them with contacting the credit unions and placing a freeze on their social security numbers would be in their best interest. The credit union phone numbers are Equifax

(800) 525-6285, Experian(TRW) (888) 397-3742, and TransUnion (800) 680-7289. The "freeze" may expire after some period of time and have to be renewed – when placing the freeze ask customer service how long it will remain in place and determine how it can be lifted should the need arise. A parent can place a freeze on his or her minor child's social security number.

### **30. 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.

Alternatively, it is rarely in the best interest of a terminally-ill person 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.