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Less Restrictive Alternatives Including Supports and Services

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LESS RESTRICTIVE ALTERNATIVES INCLUDING SUPPORTS AND SERVICES

I. INTRODUCTION

The very first section of the guardianship law, Tex. Est. Code § 1001.001, sets forth a statement of the purpose of guardianships. A guardianship, whether plenary or limited, is to be granted:

- as indicated by the incapacitated person's actual mental or physical limitations.
- only as necessary to promote and protect the well-being of the incapacitated person.

If the scope of the guardian's authority is to be limited, the guardianship must be designed to encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person.

The primary consideration then, in fashioning a guardianship is 1) determine the actual mental or physical limitations of the proposed ward and 2) ensure the well-being of that person.

In a limited guardianship, careful consideration must be given to craft the guardianship to allow the Ward to function at their highest possible level.

In addition to the policy statement contained in TEX. EST. CODE §1001.001, mandating the use of a less restrictive alternative, as of 2015, 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 possible alternatives to a full guardianship then, are literally the *vernacular* of guardianships. They are the language we all must learn in order to intelligently converse and be understood as we work in this area.

Some of these alternatives are furnished, in some instances, to provoke further thought. This is certainly not an exclusive list, but all of the suggested alternatives can serve to minimize, if not eliminate, the impact of a full guardianship. Some are applicable before creation of a guardianship and others afterward.

Closely allied to the concept of less restrictive alternatives is the idea of Supports and Services, addressed below.

II. AVOIDING GUARDIANSHIP OF THE PERSON

1. Emergency Protective Order ("EPO") 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 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 and identified as "Form 2638", can be accessed at: www.dfps.state.tx.us/documents/Child_Protection/2638.pdf

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

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