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**ALTERNATIVES TO GUARDIANSHIP
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

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