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Alternatives to Guardianship

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I. Alternatives to Guardianship¹

The Texas Estates Code requires the use of less restrictive alternatives to guardianship if they are found to exist and are effective. EC § 1001.001. In 2015, the Texas Legislature emphasized this point by mandating that any persons seeking to establish a guardianship must allege in their application that they investigated whether alternatives to guardianship and available supports and services were considered and were feasible to avoid guardianship.² EC § 1101.001(b)(3-a) and (3-b). In addition, the Texas Legislature amended Texas Estates Code § 1101.101 to require the probate court to make an additional finding by clear and convincing evidence that alternatives to guardianship and supports and services have been considered and found to not be feasible before a guardianship can be established. EC § 1101.101(a)(1)(D) & (E). Therefore, it is incumbent on any applicant seeking to establish guardianship over another person to exhaust all possible less restrictive alternatives and supports and services before turning towards guardianship.

Unless established otherwise, there is no presumption that a person does not have legal capacity to make decisions about his or her life or to look after his or her own affairs. Sometimes, some people need help and support, on an informal or formal basis, to make some decisions in their lives. However, these supported and substitute decision-making arrangements do not always require a formal guardian. They can operate informally with trusted, supportive, and diligent family and/or friends.

There are legally-recognized mechanisms and instruments that can assist in creating and structuring informal arrangements for an incapacitated individual and avoid the need for formal orders. Examples of such arrangements include powers of attorney and inter vivos trusts. The use of these alternatives in the estate-planning process has become commonplace in recent years, and it is the norm for attorneys drafting wills to also prepare various types of decision-making alternatives as part of the necessary package of instruments needed in contemplation of death.³

¹ Judge Steve M. King of the Tarrant County Probate Court No. 1 has created a checklist of many alternatives to guardianship. His list (at least in part) can be found in Appendix A.

² The Texas Legislature also provided some guidance by amending the Estates Code to define “alternatives to guardianship,” which includes a list of possible alternatives. EC § 1002.0015.

³ Not all of these alternatives transfer decision-making to another. Some limit the decision-making abilities of others in regard to the person creating the alternative by directing that certain things be or not be done. The Texas Living Will

Advance preparation for whatever circumstances may occur before death can circumvent the necessity for court intervention in those situations when an individual becomes incapacitated. In this author’s opinion, the creation of most guardianships is due to lack of advanced planning.

Below is a list of common alternatives to guardianship, as well as supports and services. Some of these alternatives affect personal decisions while others affect business decisions. Although a few of these alternatives require court action, most of them require no court intervention.

A. Avoiding Guardianship of the Person

Numerous statutory mechanisms in Texas law serve as alternatives to creating a guardianship of the person of an incapacitated person. These alternatives are often quicker and cheaper than creating a guardianship. In no particular order of importance, the following are most, if not all, of the alternatives to a guardianship of the person:

1. Surrogate Decision-Making under the Consent to Medical Treatment Act

Under the procedure commonly known as surrogate decision-making, certain enumerated individuals are permitted to make medical decisions for individuals in hospitals and nursing homes found incapacitated by a physician without the necessity of seeking a court-created guardianship. Tex. Health & Safety Code § 313.001 *et seq.* This procedure has certainly reduced the need for temporary guardianships and reduced the need for permanent guardianships created only for medical-consent purposes. This procedure, however, does not apply in certain grave situations and cannot be delegated. Nor will the procedure apply if there is a guardianship or medical power of attorney in effect.

2. Surrogate Decision-Making for Persons with Intellectual Disabilities

A similar provision exists for patients with intellectual disabilities residing in “Intermediate Care Facilities for People with Mental Retardation.” Upon a medical assessment of incapacity, any “adult surrogate,” broadly defined to include most relatives, may make “major medical or dental treatment” decisions for the “client” with intellectual disabilities. Tex. Health & Safety Code § 597.041 *et seq.* Certain matters, however, including abortion and sterilization, as well as financial decisions, are beyond the power of

is a good example of a method of limiting another’s decision-making over the creator of the instrument. See Tex. Health & Safety Code § 166.033.

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the “adult surrogate.” Tex. Health & Safety Code §597.003.

3. Implied Consent for Emergency Care

When faced with a life-threatening injury or illness, consent to medical treatment is unnecessary for an unconscious adult or for a minor whose parents, managing or possessory conservator, or guardian is not present. Tex. Health & Safety Code §773.008.

4. Advance Directives (formerly Natural Death Act)

An advance directive (a directive to physicians) is another mechanism used to avoid guardianships under Texas law. The provisions allow a person to designate in writing, before the need arises, instructions on the use or withholding of life-sustaining procedures. Tex. Health & Safety Code §166.031 *et seq.* Thus, an individual may specify in advance what kinds of treatment the person wants in case the person is not competent to make decisions when later suffering from a terminal or irreversible condition. In fact, the individual may designate another to make treatment decisions in those instances.⁴ In those instances when a person suffering from a terminal or irreversible condition has not issued a directive to physicians and is incompetent or incapable of communicating, the statute sets out a priority list of those individuals empowered to make treatment decisions. Tex. Health & Safety Code §166.039. A relative who wishes to challenge a treatment decision made under this section must apply for temporary guardianship under Texas Estates Code (“EC”) Chapter 1251.

Another advanced directive is the Out-of-Hospital Do-Not-Resuscitate Order, whose procedures for executing the directive as well as procedures for a person who has not executed a directive and is not competent or not able to communicate are governed by Tex. Health & Safety Code §166.081 *et seq.* As the name implies, a terminally ill individual or his or her personal representative may direct health care professionals operating in an out-of-hospital setting not to initiate or continue certain designated life sustaining procedures.

5. Medical Power of Attorney

The medical power of attorney is commonly used as a tool of guardianship avoidance. Tex. Health & Safety Code §166.151 *et seq.* Prudent estate planners generally will offer to draft a medical power of attorney for the client needing a will. Since 1987, federal law requires health care providers to notify all incoming patients of these instruments and give them an opportunity to sign one. The Texas Health and

Safety Code provides a suggested form. Tex. Health & Safety Code §166.164.

6. Managing Conservatorships

A conservatorship is similar to a guardianship for those families involved in divorce proceedings. While a conservatorship may be used in place of a guardian of the person in the context of divorce, a conservatorship should not be used in lieu of a guardianship of the estate when there are assets belonging to minor children because family law courts do not have monitoring mechanisms available. Ongoing jurisdictional problems exist between family law courts and probate courts as to visitation when a disabled minor under a conservatorship is placed under guardianship after reaching the age of majority. Tex. Fam. Code §154.301 *et seq.*

7. School-Admission Procedures

A guardianship of the person may not be created solely for the purpose of getting a student enrolled in a school or school district other than the one in which the student is a resident. EC §1101.101(a)(2)(C). Sometimes, however, placing a child in another school is clearly in the best interest of the child. To ease the burden for all concerned in such situations, the Texas Legislature authorized the board of trustees of a school district to adopt guidelines for admission to a school without the need for the creation of a guardianship. Tex. Educ. Code §25.001.

8. Commitment Statutes

In Texas, the general rule is that guardians do not have the authority to voluntarily admit an incapacitated person to an inpatient psychiatric facility or to a residential facility operated by the Texas Department of Aging and Disability Services (formerly Texas Department of Mental Health and Mental Retardation). EC §1151.053. Therefore, the statutory schemes for commitment of persons with mental illness, persons with intellectual disabilities, and persons who are chemically dependent can substitute for guardianship if the purpose is to get treatment for an incapacitated person who is chemically dependent, who has a mental illness, or who has intellectual disabilities. Tex. Health & Safety Code §§462.001 *et seq.*, 571.001 *et seq.*, and 591.001 *et seq.* There are even commitment procedures available in very limited circumstances for those with AIDS and tuberculosis.

9. Chapter 48 Intervention (Human Resources Code)

Chapter 48 of the Human Resources Code authorizes a probate court to intervene in an emergency situation when an incapacitated elderly person 65 years or older or a disabled person is suffering from abuse, neglect, or exploitation presenting a threat to life or physical safety. Tex. Hum. Res. Code §48.208. The

⁴ An advance directive may be executed on behalf of a patient younger than 18 years. Tex. Health & Safety Code §166.035.

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