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Did I Do that? Understanding Supports and Services and Alternatives to Guardianship

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“POLICY; PURPOSE OF GUARDIANSHIP

a) A court may appoint a guardian with either full or limited authority over an incapacitated person as indicated by the incapacitated person's actual (emphasis added) mental or physical limitations and only as necessary to promote and protect the well being of the incapacitated person.

(b) In creating a guardianship that gives a guardian limited authority over an incapacitated person, the court shall design the guardianship to encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person, including by presuming that the incapacitated person retains capacity to make personal decisions regarding the person's residence.” TEX. EST. CODE § 1101.001(a) and (b).

1) Introduction.

As of September 1, 2015, the Texas Estates Code mandates the consideration of “supports and services” and “alternatives to guardianships” to the extent that either would avoid the need for a guardianship. In fact, on application to the court to initiate a guardianship proceeding, the Texas Estates Code requires that an applicant allege that supports and services and alternatives to guardianship were considered and found not to be feasible. TEX. EST. CODE § 1101.001(b)(3-a) and (3-b). Though Texas guardianship law prior to September 1, 2015 contemplated the requirement to consider and implement guardianship avoidance tools or less restrictive alternatives (See, TEX. PROB. CODE § 648A(a); see also, TEX. PROB. CODE § 687(a)(5); see also, TEX. PROB. CODE § (a)(c)(1), the legislature has so tasked parties, lawyers and judges to exercise best efforts to take reasonable measures to promote the independence of an individual who may need assistance with various tasks in life. See, Naishtat Smithee (Zaffirini), *Bill Analysis*, <http://www.lrl.state.tx.us/scanned/srcBillAnalyses/84-0/HB39ENG.PDF>; see also, *Interim Report to the 85th Legislature of Sen. Comm. on State Affairs*, <http://www.lrl.state.tx.us/scanned/interim/84/ST29a.pdf>. Supports and services and alternatives to guardianships, relatively new tenants of Texas guardianship law, are a dynamic body of changes to the Texas Estates Code meant to shift the thinking and operation of guardianships as being person-centered tools focused on independence and quality of life as explained in the citation of Section 1101.001(a) and (b) above.

The underlying goal of this paper is to help practitioners understand the purposes of these guardianship concepts and how to apply them to the unique set of circumstances any given guardianship may present. To unpack these concepts of supports and services and alternatives to guardianship, this paper will focus on the legislative history, statutory language, case law and provide a decision tree analysis for supports and services and alternatives to guardianship.

2) The Legislative History

To address expected growth in the number of disabled individuals, potential guardianships and the attendant demand on the judicial system, the Texas Judicial Council made recommendations to change how guardianships are established and continued. *Id.* One of the Elder Committee’s hopes was that the legislative changes regarding supports and

services and alternatives to guardianship would “result in meaningful change in protecting and improving the quality of life for the elderly and incapacitated person.” *State of Texas Resolution of the Texas Judicial Council*; <http://www.txcourts.gov/media/709998/EldersCommitteeRecommendations.pdf>.

Proponents of these legislative changes maintained that they were meant to ensure that guardianships were used as a last resort, to educate lawyers and the court handling guardianship matters, and to create a balance in guardianships, which can be useful tools that can nonetheless be “costly” and an “excessive restriction.” *Committee Report (House Research Organization)*, <http://www.lrl.state.tx.us/scanned/hroBillAnalyses/84-0/HB39.PDF>. Data collected by the Guardianship Compliance Pilot Project that was funded in 2015 to monitor the judicial system’s performance in guardianships suggests the review of guardianships is warranted to some degree. Initial findings of the project (as of August 30, 2016) include:

- 5,637 cases reviewed;
- 54% of cases should not have been active (i.e. deceased ward, temporary guardianship or minor emancipated);
- 49% guardianship of the person;
- 51 % guardianship of the estate;
- 32% of cases were missing annual reports of the person;
- 45% of cases were missing initial inventory reports of assets;
- 47% of cases were missing annual accounting reports; and
- 25% of cases the presiding judge waived the bond. *Monitoring Interim Charge: Hearing Before the S. Comm. on State Affairs*, supra note 196.

Opponents of the 84th Legislative Sessions’ changes, however, decried the legislative changes as unnecessarily burdensome, especially in cases where guardianships were clearly necessary, a monopolizing factor in the bar such that guardianship certification works as a barrier to the practice of guardianship law, especially in smaller counties, and a conflict of interest for attorneys ad litem who would be obligated to report to the court in violation of attorney-client privilege and confidentiality. *Id.* Despite the opposition offered, the legislature adopted changes to the Texas Estates Code to include guardianship avoidance concepts in the form of supports and services and alternatives to guardianship.

- 3) Statutory Changes
 - a. Alternatives to Guardianship
 - i. Definition

Effective September 1, 2015, guardianships in Texas must consider “alternatives to guardianships.” Alternatives to guardianships are:

- (1) *execution of a medical power of attorney under Chapter 166, Health and Safety Code;*
- (2) *appointment of an attorney in fact or agent under a durable power of attorney as provided by Subtitle P, Title 2;*
- (3) *execution of a declaration for mental health treatment under Chapter 137, Civil Practice and Remedies Code;*
- (4) *appointment of a representative payee to manage public benefits;*

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