

PRESENTED AT

26th Annual Estate Planning, Guardianship and Elder Law Conference

August 8-9, 2024

San Antonio, TX

ALTERNATIVES TO GUARDIANSHIP (INCLUDING SUPPORTS AND SERVICES)

Authored by:

Gus G. Tamborello

Presented by:

Judge Jason Cox

Harris County Probate Court #3

Author Contact Information:

Gus G. Tamborello

Gus G. Tamborello, PC

1455 West Loop South, Suite 775

Houston, TX 77027

gus@tamborellolaw.com

713.659.7777

TABLE OF CONTENTS

| | | |
|------|--|----|
| I. | INTRODUCTION: SEEKING A LESS INTRUSIVE WAY OF MANAGING SOMEONE=S AFFAIRS..... | 1 |
| II. | LEGISLATURE MANDATING CONSIDERATION OF LESS-RESTRICTIVE ALTERNATIVES..... | 1 |
| III. | PROCEDURAL ISSUES..... | 1 |
| IV. | ALTERNATIVES TO GUARDIANSHIP OF THE PERSON..... | 2 |
| A. | Medical Power of Attorney | 2 |
| B. | Directive to Physicians and Family or Surrogates (fka the "Living Will") | 3 |
| C. | Out-of Hospital Do Not Resuscitate Orders | 4 |
| D. | Non-Emergency Medical Decision by Surrogate for an Adult | 5 |
| E. | Non-Emergency Medical Decision by Surrogate for an Intellectually Disabled Person | 6 |
| F. | Non-Emergency Medical Decision by Surrogate for Minors When Parent Unavailable | 7 |
| G. | Emergency Medical Treatment Decisions..... | 7 |
| H. | Emergency Order for Protective Services | 8 |
| I. | Statutory Rights and Duties of a Parent | 9 |
| J. | Authorization Agreement for Non-Parent Adult Caregiver | 10 |
| K. | Managing Conservator of Minor in Divorce Situation..... | 10 |
| L. | Court-Ordered Support for Disabled Child | 11 |
| M. | Treatment for Chemical Dependency of an Adult or Minor | 11 |
| N. | Involuntary Emergency Detention | 12 |
| O. | Voluntary Services for Persons With Mental Retardation | 13 |
| P. | School Admission For Non-Resident Children | 13 |
| V. | ALTERNATIVES TO GUARDIAN OF THE ESTATE..... | 13 |
| A. | Durable Power of Attorney | 13 |
| B. | Living Trusts | 15 |
| C. | Court Created Trust under the Texas Property Code (ASection 142 Trust@) | 16 |
| D. | Court Created Trust under the Texas Estates Code (AChapter 1301 Trust@ fka A867 Trust@)..... | 17 |
| E. | Pooled Trust Sub-accounts under Chapter 1302 of the Texas Estates Code | 18 |
| F. | Special Needs/Medicaid Qualification Trusts | 18 |
| G. | Convenience Bank Accounts..... | 18 |
| H. | Deposit of Funds Owed to Resident Creditor into Court Registry | 19 |
| I. | Deposit of Funds Owed to Non-Resident Creditor into Court Registry..... | 19 |
| J. | Sale of Minor's Interest in Property Without a Guardianship | 19 |
| K. | Sale of Adult Incapacitated Ward's Interest in Property Without a Guardianship | 20 |
| L. | Mortgage of Minor=s or Minor Ward's Interest in Property | 20 |
| M. | Uniform Transfers to Minors Act..... | 20 |
| N. | Receivership | 21 |
| 1. | Receivership under Estates Code | 22 |
| 2. | Receivership Under Civil Practice & Remedies Code | 23 |
| O. | Appointment of Representative Payee to Receive and Manage Social Security Benefits | 24 |
| P. | Appointment of Fiduciary to Receive and Manage Veteran's Benefits..... | 24 |
| Q. | Payment of Employees Retirement System Funds to Parent of Minor | 25 |
| R. | Community Administrator for Incapacitated Spouse | 25 |
| S. | Order of No Administration in a Decedent=s Estate | 25 |
| T. | Suit by ANext Friend@ of Minor or Incapacitated Person..... | 25 |
| VI. | SUPPORTED DECISION-MAKING AGREEMENT | 26 |
| VII. | CONCLUSION | 26 |
| | APPENDIX 1: WARD'S BILL OF RIGHTS | |
| | APPENDIX 2: SUPPORTS AND SERVICES..... | |

ALTERNATIVES TO GUARDIANSHIP (INCLUDING SUPPORTS AND SERVICES)

I. INTRODUCTION: SEEKING A LESS INTRUSIVE WAY OF MANAGING SOMEONE'S AFFAIRS

Guardianship is considered to be a last resort when it comes to the protection of someone's person and estate. The guardianship provisions of the Texas Estate Code set forth an objective to avoid placing an incapacitated person under a guardianship if a less intrusive method can be employed. *See* Tex. Estates Code '1001.001 (West 2023). That section provides:

- (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 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. Estates Code '1001.001 (West 2023) (emphasis added). The italicized portion was added by the 84th Legislature and became effective September 1, 2015. This additional language is indicative of the new focus on allowing even an incapacitated person to retain as much self-reliance and independence as possible.

II. LEGISLATURE MANDATING CONSIDERATION OF LESS-RESTRICTIVE ALTERNATIVES

Although the policy of seeking the least restrictive alternative to formal guardianship has been in place for some time, the 84th Texas Legislature enacted some new legislation and amended existing statutes to make clear that the Courts, applicants for guardianship, attorney ad litem, and guardian ad litem are required to explore the feasibility of alternatives to guardianship. The legislature even acted a Ward's Bill of Rights (*see* Appendix 1) which is an attempt to protect the integrity of those who are, in fact, placed under guardianship. So as to emphasize the importance of the exploration of

alternatives to guardianship, the legislature also increased from three to four hours the guardianship ad litem certification the course, requiring the additional hour to focus on less restrictive alternatives to guardianships and supports and services available to proposed wards. *See* Tex. Estates Code 1054.201(b) (Tex. 2023).

The 84th Legislature passed new Section 1002.0015 of the Texas Estates which is an attempt to list various alternatives to guardianship. Section 1002.0015 of the Texas Estates Code lists the following alternatives to guardianship:

- (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;
- (5) establishment of a joint bank account;
- (6) creation of a management trust under Chapter 1301;
- (7) creation of a special needs trust;
- (8) designation of a guardian before the need arises under Subchapter E, Chapter 1104; and
- (9) establishment of alternate forms of decision-making based on person-centered planning.

Tex. Estates Code '1002.0015 (Tex. 2023).

However, there are other alternatives in addition to those set forth in the statute. This article explores the various alternatives to a formal guardianship of the person and/or estate of a minor or alleged incapacitated person.

III. PROCEDURAL ISSUES

A. The Application

The applicant for guardianship must state in the application for guardianship whether alternatives to

guardianship and available supports and services to avoid guardianship have been considered and whether such alternatives or supports and services are feasible. Tex. Estates Code '1101.001(b) (West 2023).

B. The Attorney Ad Litem

The attorney ad litem *shall* discuss with the proposed ward whether alternatives to guardianship would meet the needs of the proposed ward and avoid the need for the appointment of a guardian. Tex. Estates Code '1054.004(a)(4) (West 2023). In addition, before the hearing, the attorney ad litem shall discuss with the proposed ward the attorney ad litem's opinion regarding:

- (1) whether a guardianship is necessary for the proposed ward; and
- (2) if a guardianship is necessary, the specific powers or duties of the guardian that should be limited if the proposed ward receives supports and services.

Tex. Estates Code '1054.004(c) (West 2023)

C. The Guardian Ad Litem

A guardian ad litem, if one is appointed, shall:

- (1) investigate whether a guardianship is necessary for the proposed ward; and
- (2) evaluate alternatives to guardianship and supports and services available to the proposed ward that would avoid the need for appointment of a guardian.

Tex. Estates Code '1054.054(c) (West 2023).

D. What are "Supports and Services"?

"Supports and services" is defined as available formal and informal resources and assistance that enable an individual to:

- (1) meet the individual's needs for food, clothing, or shelter;
- (2) care for the individual's physical or mental health;
- (3) manage the individual's financial affairs; or
- (4) make personal decisions regarding residence, voting, operating a motor vehicle, and marriage.

Tex. Estates Code '1002.031 (West 2023). A list of potential supports and services is provided in Appendix 2.

E. Findings at the Hearing

Then, at the time of the trial or hearing, the Court must also make a finding that:

- alternatives to guardianship that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible; and
- supports and services available to the proposed ward that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible;

Tex. Estates Code '1101.101(a)(1)(D) & (E) (West 2023).

Further, the court must make a finding whether the proposed ward lacks the capacity, or lacks sufficient capacity with supports and services, to make personal decisions regarding residence, voting, operating a motor vehicle, and marriage. Tex. Estates Code '1101.101(c) (West 2023).

In addition, if the physician's letter or certificate supporting the guardianship application stated that improvement in the ward's physical condition or mental functioning is possible and specified a period of less than a year after which the ward should be reevaluated to determine continued necessity for the guardianship, an order appointing a guardian must include the date by which the guardian must submit to the court an updated letter or certificate containing the requirements of Section '1101.103(b). Tex. Estates Code '1101.153(a-1) (West 2023).

IV. ALTERNATIVES TO GUARDIANSHIP OF THE PERSON

The following are some potential less-restrictive alternatives to a guardianship of the person:

A. Medical Power of Attorney

Chapter 166 of the Texas Health and Safety Code addresses Advanced Directives, Do Not Resuscitate Orders, and Medical Powers of Attorney. The Medical Power of Attorney is one of the primary methods of avoiding a guardianship of the person because, subject to certain express limitations, the agent may make any health care decision on the principal's behalf that the

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Alternatives to Guardianship including Supports and Services

Also available as part of the eCourse

[Answer Bar: Elder Law and Medicaid Essentials](#)

First appeared as part of the conference materials for the
26th Annual Estate Planning, Guardianship and Elder Law Conference session
"Alternatives to Guardianship including Supports and Services"