

PRESENTED AT

21st Annual
Estate Planning, Guardianship
and Elder Law Conference

August 1-2, 2019
Moody Gardens
Galveston, Texas

**ALTERNATIVES TO GUARDIANSHIP
INCLUDING
SUPPORTS AND SERVICES**

STEVE M. KING
SENIOR PROBATE JUDGE
P. O. Box 101871
FORT WORTH, TEXAS 76109
texprob8@att.net
682-233-5301

TABLE OF CONTENTS

I. INTRODUCTION	1
II. AVOIDING GUARDIANSHIP OF THE PERSON	
1. Emergency Protective Order (“EPO”)	1
2. Surrogate Decision-Making (“SDM”)	1
3. Surrogate Decision-Making - Intellectually Disabled	2
4. Surrogate Decision Making for Minors When Parent Unavailable	2
5. Authorization Agreement for Non-Parent Relative	2
6. Temporary Authorization to Consent to Voluntary Inpatient Mental Health Services for a Child	2
7. Supported Decision-Making Agreements	2
8. Emergency Medical Treatment Act	2
Emergency Medical Treatment of Minors	2
9. Managing Conservatorship	2
10. School Admission Procedures	3
11. School Admission Procedures (Grandparents)	3
12. Mental Health Services	3
13. Driving Issues: Katie’s Law and the Re-Test Request	3
14. Mental Illness Diversion Programs (Criminal Courts)	3
15. Release on Bail for Court-Ordered Outpatient Mental Health Services	3
16. Intellectually Disabled Individuals - Release in Lieu of Arrest	3
III. ADVANCED MEDICAL DIRECTIVES	
The Federal Patient Self-Determination Act	4
17. Medical Power of Attorney	4
18. Directive to Physicians and Family or Surrogates ("Living Will")	4
19. Intractable Pain Treatment Act	4
20. Out-of Hospital DNR (“EMT-DNR”)	4
21. In-Hospital DNR	4
22. End-Stage Planning: The Patient’s Intent, If Known	4
IV. AVOIDING GUARDIANSHIP OF THE ESTATE	
23. Durable Power of Attorney	5
24. Convenience Accounts	5
25. Sophisticated Tax Planning	5
26. Inter Vivos (“Living”) Trusts	5
27. §142 Trusts	5
28. Testamentary Trusts	6
29. Guardianship Management Trusts	6
30. Pooled Trust Subaccounts	6
31. Special Needs/ Medicaid Qualification Trusts	6
32. Trusts for Intellectually Disabled Persons	6
33. Texas ABLE (Achieving a Better Life Experience) Program	7
34. Transfer on Death Deed (“TODD”)	7
35. Enhanced Life Estate Deed (“Lady Bird Deed”)	7
36. Community Administrator	7
37. Court Registry	7
38. Payment of Non-Resident Creditor	8
39. Sale of Minor's Interest in Property	8
40. Sale of Adult Ward's Interest in Property	8
41. Mortgage of Minor’s Interest/ Minor Ward's Interest in Property	8
42. Uniform Transfers to Minors Act	8
43. Receivership	8

44. Order of No Administration	8
45. Representative Payee	9
46. Veteran's Benefits Fiduciary	9
47. Payment of Employees Retirement System Funds to Parent of Minor	9
48. International Treaty	9
49. Suit by Next Friend	9
50. Social Service Agencies	9
51. Geriatric Care Manager	10

V. LIMITING THE EFFECT OF THE GUARDIANSHIP

52. Pre-Need Designation of Guardian	10
53. Pre-Need Designation of Guardian by Parent	10
54. Pre-Need Declaration - Mental Health	10
55. Safekeeping ("Freeze") Agreements	11
56. Restoration of Ward	11
57. Guardianship Abuse, Fraud, & Exploitation - Deterrence Program	11
58. Annual Determination	11
59. Emancipation of Minor Ward	12
60. Enumeration of Powers in Guardianship Order	12
61. Interstate Guardianships	12
62. Negligible Estate	12
63. Minor Ward's Estate <\$100,000	12
64. Mediation and Family Settlement Agreements	12
65. Mother Nature and Father Time	12

VI. SUPPORTS AND SERVICES

1. The Origin of the Concept	13
2. Texas Embraces the Concept	13
3. <i>Guardianship of A. E.</i> : Some Guidance	13
4. Clients with Diminished Capacity - Proposed Change to Disciplinary Rules	14
5. Substituted Service Through Social Media	14
6. Person First Respectful Language	14

Appendix

A. More Detail on Supports and Services	16
1. Examples of Entities or Organization providing Supports or Services	16
2. Types of Supports and Services	16
A. Food, Clothing, or Shelter	16
B. Physical or Mental Health	16
C. Manage Financial Affairs	16
D. Personal Decisions: Residence, Voting, Operating a Motor Vehicle, & Marriage	16
B. Statement of Intent	17

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

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 \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Alternatives to Guardianship Including Supports and Services

First appeared as part of the conference materials for the
21st Annual Estate Planning, Guardianship and Elder Law Conference session
"Alternatives to Guardianship Including Supports and Services"