

HARRIS COUNTY, TEXAS

ADVOCATING TO AVOID GUARDIANSHIP

Less Restrictive Alternatives to Guardianship,
Supports and Services

Associate Judge Clarinda Comstock
Harris County Probate Court No. Four
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ADVOCATING TO AVOID GUARDIANSHIP

Less Restrictive Alternatives to Guardianship Supports and Services

Advocates in guardianship proceedings have always been required to consider appropriate, less restrictive alternatives to guardianship. As an ad litem, the first order of business after investigating the current status and immediate needs of a proposed ward is to consider any options that would allow for avoidance of guardianship, or at least limitation of the restrictive nature of a full guardianship of the person and/or estate.

This may seem counter-intuitive because the first consideration is always the best interests and protection of a proposed ward. Often the facts are not clear and we tend to err on the side of over-protection when there is some evidence of harm to, or exploitation of, a proposed ward. Attorneys representing either proposed wards or applicants in guardianship proceedings must be knowledgeable about alternatives to guardianship. While this has always been mandated by Texas law, there are recent changes, mostly effective September 1, 2015, that specify certain duties and require additional reporting and/or language in pleadings, particularly in cases where the proposed ward retains some capacity and a partial or limited guardianship is necessary.

I. The Numbers are Growing

The last of the baby boomers turned 50 in 2014. The 2010 Census shows the

senior age group (65+) will be larger than the younger generations over the next 30 years.¹ Overall population growth, increased numbers of individuals living longer (particularly those with special needs), medical advances allowing people to live longer than ever (often with increased disabilities and need for assistance), and changes in the availability of necessary treatment, all contribute to the reality of more court ordered guardianship proceedings.

Some 70% of US Disposable Income is controlled by baby boomers. While they have seen a decrease in median family net worth, they still have net worth 3 times that of younger generations (Economic Policy Institute).² The trend of wealth concentrated in aging baby boomers and life-style choices of younger generations anticipating an inheritance, as well as increased litigation focused on fiduciary liability, are also creating greater need for court involvement, keeping courts busier than ever and guardianship assistance programs and agencies for the aging overwhelmed.

The National Association of Home Builders (NAHB) predicts the aging in place remodeling market to be \$20-\$25 billion, or

¹ Immersion Active;
<http://www.immersionactive.com/resources/size-wealth-spending-50-consumers/>

² *Id.*

10% of the \$214 billion home improvement industry. The medical industry is able to treat conditions of the aging population, allowing for longer life, often greater independence but increasingly requiring supports and services that are difficult to provide for in the home, by family.³

The legal industry is adapting to these statistics as the economy changes. Attorneys, the legislature and the courts are responding to the needs of our burgeoning aged and disabled population, attempting to provide solutions to complicated needs while meeting our obligation to protect the best interests of the individuals who, often unwillingly, come before our courts for answers and protection.

II. Less Restrictive Alternatives To Guardianship: Resources

The standard, or "go-to", less restrictive alternatives to guardianship have now been codified in Estates Code Section 1002.0015 (*see below, Recent Legislative Changes Related to Alternatives to Guardianship*), which lists several tools that allow an individual to plan for their own incapacity. Judge Steven King, Tarrant County Probate Court 1, has maintained and updated an Ad Litem Manual for use in his court. His comprehensive Manual can be found at:

<http://access.tarrantcounty.com/en/probate-courts/probate-court-1.html>

³ See, "Being Mortal: Medicine and What Matters in the End" by Atul Gawande; Oct., 2014

Follow the link for Ad Litem Manual. There is a wealth of information on Judge King's webpage, which is an excellent resource for attorneys who seek ad litem appointments or practice in the guardianship arena. With his permission, I have attached Appendix "D" of his Manual to this paper (*Exhibit 1*), which lists a multitude of possible alternatives to guardianship to consider with every court appointment or new guardianship client. Judge King has also updated this "Appendix D" with a supplement, "D-1", which contains examples of "Supports and Services" which, starting September 1, 2015, must be considered throughout the guardianship process. There is always room for consideration of new and different alternatives, supports and services as each guardianship application presents a unique set of circumstances. Judge King's list is a wonderful starting point.

III. Recent Legislative Changes Related to Alternatives to Guardianship

The following legislative changes, implemented in the 84th Legislative Session, relate specifically to Alternatives to Guardianship. Most of this year's changes relate to partial guardianships, wherein the medical evidence demonstrates that a proposed ward retains the ability, with or without supports and services, to manage his/her own affairs to some extent. Every application for guardianship must now specifically mention applicable alternatives to guardianship and supports and services that have been considered. The changes to the code are in bold italics, below.

A) Chapter 1001 – Purpose and Construction: The new legislation establishes a presumption in a partial guardianship, that an incapacitated person retains capacity to make residential placement decisions unless found otherwise by the court.

Sec. 1001.001. POLICY; PURPOSE OF GUARDIANSHIP.

(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.*

Effective September 1, 2015. Sec. 24(a) of HB 39 provides: "Except as otherwise provided by this section, the changes in law made by this Act apply to: (1) a guardianship created before, on, or after the effective date of this Act; and (2) an application for a guardianship pending on, or filed on or after, the effective date of this Act."

B) Chapter 1002 – Definitions: The revisions specifically define "Alternatives to Guardianship", "Supports and Services" and modifies the definition of a "guardianship proceeding". See Exhibit 1, Judge King's "Appendix D" – *Less Restrictive Alternatives to Guardianship* for additional information. The language regarding alternatives to guardianship, supports and services and decisions regarding residence is added this year. Estates Code Section 1002.031 generally defines "Supports and Services." Again, refer to Judge King's "Appendix D-1" for a suggested list of

considerations. Often, services which make a person's home more safe, provide for nutrition, medication management and socialization, will help an individual regain sufficient capacity to remain independent.

Sec. 1002.0015. ALTERNATIVES TO GUARDIANSHIP. *"Alternatives to guardianship" includes the: (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.*

This provision is effective September 1, 2015.

Sec. 1002.015. GUARDIANSHIP PROCEEDING.

The term "guardianship proceeding" means a matter or proceeding related to a guardianship or any other matter covered by this title, including:

- (1) the appointment of a guardian of a minor or other incapacitated person, including an incapacitated adult for whom another court obtained continuing, exclusive jurisdiction in a suit affecting the parent-child relationship when the person was a child;
- (2) an application, petition, or motion regarding guardianship or *a substitute for*

[an alternative to] guardianship under this title;

(3) a mental health action; and

(4) an application, petition, or motion regarding a trust created under Chapter 1301.

Effective September 1, 2015.

Sec. 1002.031. SUPPORTS AND SERVICES. *"Supports and services" means 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.*

Effective September 1, 2015.

C) Chapter 1054 – Court Officers and Court-Appointed Persons: This chapter of the Estates Code has been amended to reflect the increased emphasis on the consideration of alternatives to guardianship by court appointed individuals. The recent changes mandate that an attorney ad litem, to the greatest extent possible, discuss with a proposed ward any and all applicable alternatives which could avoid the appointment of, or limit the authority of, a guardian. Greater emphasis must be placed on the specific duties granted to a guardian and those rights retained by the individual. A guardian ad litem, under Sec. 1054.054 is specifically required to investigate alternatives, supports and services that could avoid the need for guardianship and should expect to report the results of that investigation to the court at or prior to a hearing to appoint a guardian. Finally, this chapter of the Estates Code has been

amended to require that not only attorneys ad litem but also any attorney representing an applicant in a guardianship proceeding must be certified by the State Bar as having completed a course of study in guardianship law, which must be a four hour course including one hour on alternatives to guardianship, supports and services available to proposed wards.

Sec. 1054.004. DUTIES. (a) An attorney ad litem appointed under Section 1054.001 shall interview the proposed ward within a reasonable time before the hearing in the proceeding for the appointment of a guardian. To the greatest extent possible, the attorney shall discuss with the proposed ward: (1) the law and facts of the case; (2) the proposed ward's legal options regarding disposition of the case; [and] (3) the grounds on which guardianship is sought; and (4) whether alternatives to guardianship would meet the needs of the proposed ward and avoid the need for the appointment of a guardian.

(b) [No change.]

(c) *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.*

Sec. 1054.054. DUTIES. (a) – (b) [No change.]

(c) *The guardian ad litem 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.*

(d) The information gathered by the guardian ad litem under Subsection (c) is subject to examination by the court.

Effective September 1, 2015. See transitional note following Sec. 1054.004.

Secs. 24(a) and (b) of HB39 provide:

“(a) Except as otherwise provided by this section, the changes in law made by this Act apply to: (1) a guardianship created before, on, or after the effective date of this Act; and (2) an application for a guardianship pending on, or filed on or after, the effective date of this Act.

“(b) Sections 1054.004 and 1054.054, Estates Code, as amended by this Act, apply only to a guardianship proceeding for which a court has appointed a guardian ad litem or attorney ad litem to represent the interests of a proposed ward on or after the effective date of this Act.”

Sec. 1054.201. CERTIFICATION REQUIRED.

(a) An attorney for an applicant for guardianship and a [A] court-appointed attorney in a guardianship proceeding, including an attorney ad litem, must be certified by the State Bar of Texas, or a person or other entity designated by the state bar, as having successfully completed a course of study in guardianship law and procedure sponsored by the state bar or the state bar's designee.

(b) The State Bar of Texas shall require ~~four~~ [three] hours of credit for certification under this subchapter, including one hour on alternatives to guardianship and supports and services available to proposed wards.

Effective September 1, 2015. Secs. 24(a) and (c) of HB 39 provide:“(a) Except as otherwise provided by this section, the changes in law made by this Act apply to: (1) a guardianship created before, on, or after the effective date of this Act; and (2) an

application for a guardianship pending on, or filed on or after, the effective date of this Act.

“(c) Sections 1054.201, 1101.101, 1101.103, 1101.151, 1101.152, and 1101.153, Estates Code, as amended by this Act, apply only to a guardianship proceeding filed on or after the effective date of this Act. A guardianship proceeding filed before the effective date of this Act is governed by the law in effect on the date the proceeding was filed, and the former law is continued in effect for that purpose.”

D) Chapter 1101-General Procedure to Appoint a Guardian: Beginning September 1, 2015, additional information must be contained in Applications and Orders for Guardianship, describing the alternatives, supports and services that have been considered and which are feasible and could avoid or limit the need for guardianship. The burden of proof regarding findings by the court has also been modified. The application must state whether the proposed ward has capacity to retain the right to participate in decisions regarding residence. Likewise, the findings and proof required and contents of Orders Appointing Guardians will require additional information related to alternatives to guardianship and supports and services considered for a proposed ward. The findings must specifically state whether the proposed ward lacks capacity, with or without supports and services, to make decisions regarding residence, voting, operation of a motor vehicle and marriage.

The following is suggested language to be inserted into Orders Appointing Guardian starting September 1, 2015:

“The Court finds by clear and convincing evidence that the proposed ward is an

incapacitated person; that it is in the proposed ward's best interest that _____ be appointed as the guardian; that the proposed ward's rights and property will be protected by the appointment of a guardian; that alternatives to guardianship that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible; that 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.

The Court finds by a preponderance of the evidence that the court has venue of the case; that _____ is eligible to act as guardian and entitled to appointment [or is a proper person to act as guardian]; that the proposed ward is totally without capacity to care for himself and to manage his property [or lacks capacity to do some, but not all, tasks necessary to care for himself or manage his property, or lacks sufficient capacity with or without supports and services to make personal decisions regarding residence, voting, operating a motor vehicle and marriage].

In the case of a partial guardianship, the Order should specifically state the powers and authority that is retained by the Proposed Ward.

The certificate of medical evaluation must now also contain information regarding whether the proposed ward's condition is likely to change and when he/she should be reevaluated for purposes of guardianship modification. The medical certificate should include information about how the guardianship could be limited with the addition of supports and services. Importantly, if there are findings in the certificate of medical evaluation that the

proposed ward may improve over a period of less than one year, the order must include a date by which the guardian must submit an updated evaluation to the court.

Sec. 1101.001. APPLICATION FOR APPOINTMENT OF GUARDIAN; CONTENTS.

(a) [No change.]

(b) The application must be sworn to by the applicant and state: (1) the proposed ward's name, sex, date of birth, and address; (2) the name, relationship, and address of the person the applicant seeks to have appointed as guardian; (3) whether guardianship of the person or estate, or both, is sought;

(3-a) whether alternatives to guardianship and available supports and services to avoid guardianship were considered;

(3-b) whether any alternatives to guardianship and supports and services available to the proposed ward considered are feasible and would avoid the need for a guardianship;

(4) the nature and degree of the alleged incapacity, the specific areas of protection and assistance requested, and the limitation or termination of rights requested to be included in the court's order of appointment, including a termination of: (A) the right of a proposed ward who is 18 years of age or older to vote in a public election; **[and]**

(B) the proposed ward's eligibility to hold or obtain a license to operate a motor vehicle under Chapter 521, Transportation Code; **and**

(C) the right of a proposed ward to make personal decisions regarding residence;

(5) the facts requiring the appointment of a guardian; (6) the interest of the applicant in the appointment of a guardian; (7) the nature and description of any kind of guardianship existing for the proposed ward in any other

state; (8) the name and address of any person or institution having the care and custody of the proposed ward; (9) the approximate value and description of the proposed ward's property, including any compensation, pension, insurance, or allowance to which the proposed ward may be entitled; (10) the name and address of any person whom the applicant knows to hold a power of attorney signed by the proposed ward and a description of the type of power of attorney; (11) for a proposed ward who is a minor, the following information if known by the applicant: (A) the name of each of the proposed ward's parents and either the parent's address or that the parent is deceased; (B) the name and age of each of the proposed ward's siblings, if any, and either the sibling's address or that the sibling is deceased; and (C) if each of the proposed ward's parents and adult siblings are deceased, the names and addresses of the proposed ward's other living relatives who are related to the proposed ward within the third degree by consanguinity and who are adults; (12) for a proposed ward who is a minor, whether the minor was the subject of a legal or conservatorship proceeding in the preceding two years and, if so: (A) the court involved; (B) the nature of the proceeding; and (C) any final disposition of the proceeding; (13) for a proposed ward who is an adult, the following information if known by the applicant: (A) the name of the proposed ward's spouse, if any, and either the spouse's address or that the spouse is deceased; (B) the name of each of the proposed ward's parents and either the parent's address or that the parent is deceased; (C) the name and age of each of the proposed ward's siblings, if any, and either the sibling's address or that the sibling is deceased; (D) the name and age of each of the proposed ward's children, if any, and either the child's address or that the child is deceased; and (E) if there is no living

spouse, parent, adult sibling, or adult child of the proposed ward, the names and addresses of the proposed ward's other living relatives who are related to the proposed ward within the third degree by consanguinity and who are adults; (14) facts showing that the court has venue of the proceeding; and (15) if applicable, that the person whom the applicant seeks to have appointed as a guardian is a private professional guardian who is certified under Subchapter C, Chapter 155, Government Code, and has complied with the requirements of Subchapter G, Chapter 1104.

Effective September 1, 2015. Secs. 24(a) and (d) of HB 39 provide:

"(a) Except as otherwise provided by this section, the changes in law made by this Act apply to: (1) a guardianship created before, on, or after the effective date of this Act; and (2) an application for a guardianship pending on, or filed on or after, the effective date of this Act.

"(d) Section 1101.001, Estates Code, as amended by this Act, applies only to an application for the appointment of a guardian filed on or after the effective date of this Act. An application for the appointment of a guardian filed before the effective date of this Act is governed by the law in effect on the date the application was filed, and the former law is continued in effect for that purpose."

Sec. 1101.101. FINDINGS AND PROOF REQUIRED.

(a) Before appointing a guardian for a proposed ward, the court must:

(1) find by clear and convincing evidence that:

(A) the proposed ward is an incapacitated person;

(B) it is in the proposed ward's best interest to have the court appoint a person as the proposed ward's guardian; ***[and]***

(C) the proposed ward's rights or property will be protected by the appointment of a guardian;

(D) alternatives to guardianship that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible; and

(E) 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; and

(2) find by a preponderance of the evidence that:

(A) the court has venue of the case; (B) the person to be appointed guardian is eligible to act as guardian and is entitled to appointment, or, if no eligible person entitled to appointment applies, the person appointed is a proper person to act as guardian; (C) if a guardian is appointed for a minor, the guardianship is not created for the primary purpose of enabling the minor to establish residency for enrollment in a school or school district for which the minor is not otherwise eligible for enrollment; and (D) the proposed ward: (i) is totally without capacity as provided by this title to care for himself or herself and to manage his or her property; or (ii) lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself or to manage his or her property.

(b) [No change.]

(c) A finding under Subsection (a)(2)(D)(ii) must specifically state 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.

Effective September 1, 2015. See transitional note following Sec. 1054.201.

Sec. 1101.103. DETERMINATION OF CAPACITY OF CERTAIN ADULTS; RECURRING ACTS OR OCCURRENCES.

(a) [No change.]

(b) The letter or certificate must:

(1) describe the nature, degree, and severity of the proposed ward's incapacity, including any functional deficits regarding the proposed ward's ability to: (A) handle business and managerial matters; (B) manage financial matters; (C) operate a motor vehicle; (D) make personal decisions regarding residence, voting, and marriage; and (E) consent to medical, dental, psychological, or psychiatric treatment;

(2) in providing a description under Subdivision (1) regarding the proposed ward's ability to operate a motor vehicle and make personal decisions regarding voting, state whether in the physician's opinion the proposed ward: (A) has the mental capacity to vote in a public election; and (B) has the ability to safely operate a motor vehicle;

(3) provide an evaluation of the proposed ward's physical condition and mental ***functioning [function]*** and summarize the proposed ward's medical history if reasonably available;

(3-a) in providing an evaluation under Subdivision (3), state whether improvement in the proposed ward's physical condition and mental functioning is possible and, if so, state the period after which the proposed ward should be reevaluated to determine whether a guardianship continues to be necessary;

(4) state how or in what manner the proposed ward's ability to make or communicate responsible decisions concerning himself or herself is affected by the proposed ward's physical or mental health, including the proposed ward's ability to: (A) understand or communicate; (B) recognize familiar objects and individuals; **(C) solve problems [perform simple calculations];** (D) reason logically; and (E) administer to daily life activities **with and without supports and services;**

(5) state whether any current medication affects the proposed ward's demeanor or the proposed ward's ability to participate fully in a court proceeding;

(6) describe the precise physical and mental conditions underlying a diagnosis of a mental disability, and state whether the proposed ward would benefit from supports and services that would allow the individual to live in the least restrictive setting; *[and]*

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

(7) include any other information required by the court.

(c) – (d) [No change.]

Effective September 1, 2015. See transitional note following Sec. 1054.201.

Sec. 1101.151. ORDER APPOINTING GUARDIAN WITH FULL AUTHORITY.

(a) If it is found that the proposed ward is totally without capacity to care for himself or herself, manage his or her property, operate a motor vehicle, **make personal decisions regarding residence**, and vote in a public election, the court may appoint a guardian of the proposed ward's person or

estate, or both, with full authority over the incapacitated person except as provided by law.

(b) An order appointing a guardian under this section must contain findings of fact and specify: (1) the information required by Section 1101.153(a); (2) that the guardian has full authority over the incapacitated person; (3) if necessary, the amount of funds from the corpus of the person's estate the court will allow the guardian to spend for the education and maintenance of the person under Subchapter A, Chapter 1156; (4) whether the person is totally incapacitated because of a mental condition; (5) that the person does not have the capacity to operate a motor vehicle, **make personal decisions regarding residence**, and [to] vote in a public election; and (6) if it is a guardianship of the person of the ward or of both the person and the estate of the ward, the rights of the guardian with respect to the person as specified in Section 1151.051(c)(1).

(c) [No change.]

Effective September 1, 2015. See transitional note following Sec. 1054.201.

Sec. 1101.152. ORDER APPOINTING GUARDIAN WITH LIMITED AUTHORITY.

(a) If it is found that the proposed ward lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself or to manage his or her property **with or without supports and services**, the court may appoint a guardian with limited powers and permit the proposed ward to care for himself or herself, **including making personal decisions regarding residence**, or to manage his or her property commensurate with the proposed ward's ability.

(b) An order appointing a guardian under this section must contain findings of fact and specify: (1) the information required by

Section 1101.153(a); (2) the specific powers, limitations, or duties of the guardian with respect to the person's care or the management of the person's property by the guardian; *(2-a) the specific rights and powers retained by the person (A) with the necessity for supports and services; and (B) without the necessity for supports and services;* (3) if necessary, the amount of funds from the corpus of the person's estate the court will allow the guardian to spend for the education and maintenance of the person under Subchapter A, Chapter 1156; and (4) whether the person is incapacitated because of a mental condition and, if so, whether the person: *(A) retains the right to make personal decisions regarding residence or vote in a public election; or (B) maintains eligibility to hold or obtain a license to operate a motor vehicle under Chapter 521, Transportation Code.*

(c) [No change.]

Effective September 1, 2015. See transitional note following Sec. 1054.201.

Sec. 1101.153. GENERAL CONTENTS OF ORDER APPOINTING GUARDIAN.

(a) [No change.]

(a-1) If the letter or certificate under Section 1101.103(b)(3-a) 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).

(b) – (c) [No change.]

Effective September 1, 2015. See transitional note following Sec. 1054.201.

E) Chapter 1104 – Selection of and Eligibility to Serve as Guardian: While an incapacitated person's preferences regarding who may serve as guardian, should the need arise, has always been mandated for consideration by the court, the revision to this section makes it clear that this preference is not limited to that stated in a formal declaration of guardian. The court should take into consideration any evidence of the proposed ward's preferences, subject, as always, to a determination of best interests.

Sec. 1104.002. PREFERENCE OF INCAPACITATED PERSON.

Before appointing a guardian, the court shall make a reasonable effort to consider the incapacitated person's preference of the person to be appointed guardian and, to the extent consistent with other provisions of this title, shall give due consideration to the preference indicated by the incapacitated person, *regardless of whether the person has designated by declaration a guardian before the need arises under Subchapter E.*

Effective September 1, 2015. See transitional note following Sec. 1001.001.

F) Chapter 1151 – Rights, Powers, and Duties Under Guardianship:

Persons made the subject of a guardianship proceeding have always had rights limited by the authority of an order for guardianship, and now the Texas Legislature has spelled those rights out by adding Section 1151.351. This language below is attached to this paper in the form of a convenient handout (**Exhibit 2**). It is encouraged that this handout be given to the proposed ward/ward in every guardianship proceeding by the ad litem.

SUBCHAPTER H. RIGHTS OF WARDS

Sec. 1151.351. BILL OF RIGHTS FOR WARDS.

(a) A ward has all the rights, benefits, responsibilities, and privileges granted by the constitution and laws of this state and the United States, except where specifically limited by a court-ordered guardianship or where otherwise lawfully restricted.

(b) Unless limited by a court or otherwise restricted by law, a ward is authorized to the following: (1) to have a copy of the guardianship order and letters of guardianship and contact information for the probate court that issued the order and letters; (2) to have a guardianship that encourages the development or maintenance of maximum self-reliance and independence in the ward with the eventual goal, if possible, of self-sufficiency; (3) to be treated with respect, consideration, and recognition of the ward's dignity and individuality; (4) to reside and receive support services in the most integrated setting, including home-based or other community-based settings, as required by Title II of the Americans with Disabilities Act (42 U.S.C. Section 12131 et seq.); (5) to consideration of the ward's current and previously stated personal preferences, desires, medical and psychiatric treatment preferences, religious beliefs, living arrangements, and other preferences and opinions; (6) to financial self-determination for all public benefits after essential living expenses and health needs are met and to have access to a monthly personal allowance; (7) to receive timely and appropriate health care and medical treatment that does not violate the ward's rights granted by the constitution and laws of this state and the United States; (8) to exercise full control of all aspects of life not specifically granted by the court to the guardian; (9) to control the ward's personal environment based on the ward's

preferences; (10) to complain or raise concerns regarding the guardian or guardianship to the court, including living arrangements, retaliation by the guardian, conflicts of interest between the guardian and service providers, or a violation of any rights under this section; (11) to receive notice in the ward's native language, or preferred mode of communication, and in a manner accessible to the ward, of a court proceeding to continue, modify, or terminate the guardianship and the opportunity to appear before the court to express the ward's preferences and concerns regarding whether the guardianship should be continued, modified, or terminated; (12) to have a court investigator, guardian ad litem, or attorney ad litem appointed by the court to investigate a complaint received by the court from the ward or any person about the guardianship; (13) to participate in social, religious, and recreational activities, training, employment, education, habilitation, and rehabilitation of the ward's choice in the most integrated setting; (14) to self-determination in the substantial maintenance, disposition, and management of real and personal property after essential living expenses and health needs are met, including the right to receive notice and object about the substantial maintenance, disposition, or management of clothing, furniture, vehicles, and other personal effects; (15) to personal privacy and confidentiality in personal matters, subject to state and federal law;

(16) to unimpeded, private, and uncensored communication and visitation with persons of the ward's choice, except that if the guardian determines that certain communication or visitation causes substantial harm to the ward: (A) the guardian may limit, supervise, or restrict communication or visitation, but only to

the extent necessary to protect the ward from substantial harm; and (B) the ward may request a hearing to remove any restrictions on communication or visitation imposed by the guardian under Paragraph (A);

(17) to petition the court and retain counsel of the ward's choice who holds a certificate required by Subchapter E, Chapter 1054, to represent the ward's interest for capacity restoration, modification of the guardianship, the appointment of a different guardian, or for other appropriate relief under this subchapter, including a transition to a supported decision-making agreement, except as limited by Section 1054.006;

(18) to vote in a public election, marry, and retain a license to operate a motor vehicle, unless restricted by the court;

(19) to personal visits from the guardian or the guardian's designee at least once every three months, but more often, if necessary, unless the court orders otherwise;

(20) to be informed of the name, address, phone number, and purpose of Disability Rights Texas, an organization whose mission is to protect the rights of, and advocate for, persons with disabilities, and to communicate and meet with representatives of that organization;

(21) to be informed of the name, address, phone number, and purpose of an independent living center, an area agency on aging, an aging and disability resource center, and the local mental health and intellectual and developmental disability center, and to communicate and meet with representatives from these agencies and organizations;

(22) to be informed of the name, address, phone number, and purpose of the Judicial Branch Certification Commission and the

procedure for filing a complaint against a certified guardian;

(23) to contact the Department of Family and Protective Services to report abuse, neglect, exploitation, or violation of personal rights without fear of punishment, interference, coercion, or retaliation; and

(24) to have the guardian, on appointment and on annual renewal of the guardianship, explain the rights delineated in this subsection in the ward's native language, or preferred mode of communication, and in a manner accessible to the ward.

(c) This section does not supersede or abrogate other remedies existing in law.

Amended by Acts 2015, 84th Legislature, Ch. _____ (SB 1882), effective June 19, 2015.

G) Chapter 1202 – Modifications or Termination of Guardianship: The sections of the Estates Code governing restoration or modification of an existing guardianship likewise require consideration of least restrictive alternatives, and supports and services, if such will permit a ward to live more independently. Opinions related to alternatives or available supports and services and how they may allow a ward to live more independently, or justify adjusting the authority of a guardian must be contained within an updated doctor's letter or certificate supporting a modification or termination. Although a revised doctor's letter has not yet been adopted in Harris County, Judge King has proposed modifications to the form included in his Ad Litem Manual. A copy of Judge's King's revised document is attached as **Exhibit 3** for your convenient consideration.

Sec. 1202.051. APPLICATION AUTHORIZED.

A ward or any person interested in the ward's welfare may file a written application with the court for an order:

(1) finding that the ward is no longer an incapacitated person and ordering the settlement and closing of the guardianship;

(2) finding that the ward lacks the capacity, *or lacks sufficient capacity with supports and services*, to do some or all of the tasks necessary to provide food, clothing, or shelter for himself or herself, to care for the ward's own physical health, or to manage the ward's own financial affairs and granting additional powers or duties to the guardian; or

(3) finding that the ward has the capacity, *or sufficient capacity with supports and services*, to do some, but not all, of the tasks necessary to provide food, clothing, or shelter for himself or herself, to care for the ward's own physical health, or to manage the ward's own financial affairs and:

(A) limiting the guardian's powers or duties; and

(B) permitting the ward to care for himself or herself, *make personal decisions regarding residence, or [to] manage the ward's own financial affairs commensurate with the ward's ability, with or without supports and services.*

Effective September 1, 2015. Secs. 24(a) and (e) of HB 39 provide:

"(a) Except as otherwise provided by this section, the changes in law made by this Act apply to: (1) a guardianship created before, on, or after the effective date of this Act; and (2) an application for a guardianship pending on, or filed on or after, the effective date of this Act.

"(e) Section 1202.051, Estates Code, as amended by this Act, applies only to an application for the restoration of a ward's capacity or the modification of a ward's guardianship that is filed on or after the effective date of this Act. An application for the restoration of a ward's capacity or the modification of a ward's guardianship that is filed before the effective date of this Act is governed by the law in effect on the date the application was filed, and the former law is continued in effect for that purpose."

Sec. 1202.151. EVIDENCE AND BURDEN OF PROOF AT HEARING.

(a) Except as provided by Section 1202.201, at a hearing on an application filed under Section 1202.051, the court shall consider only evidence regarding the ward's mental or physical capacity at the time of the hearing that is relevant to the complete restoration of the ward's capacity or modification of the ward's guardianship, *including whether:*

(1) the guardianship is necessary; and

(2) specific powers or duties of the guardian should be limited if the ward receives supports and services.

(b) [No change.]

Effective September 1, 2015. Secs. 24(a) and (f) of HB 39 provide:

"(a) Except as otherwise provided by this section, the changes in law made by this Act apply to: (1) a guardianship created before, on, or after the effective date of this Act; and (2) an application for a guardianship pending on, or filed on or after, the effective date of this Act.

"(f) Sections 1202.151, 1202.152, 1202.153, 1202.154, and 1202.156, Estates Code, as amended by this Act, apply only to a proceeding for the restoration of a ward's

capacity or the modification of a ward's guardianship that is filed on or after the effective date of this Act. An application for the restoration of a ward's capacity or the modification of a ward's guardianship that is filed before the effective date of this Act is governed by the law in effect on the date the application was filed, and the former law is continued in effect for that purpose."

Sec. 1202.152. PHYSICIAN'S LETTER OR CERTIFICATE REQUIRED.

(a) [No change.]

(b) A letter or certificate presented under Subsection (a) must: (1) describe the nature and degree of incapacity, including the medical history if reasonably available, or state that, in the physician's opinion, the ward has the capacity, *or sufficient capacity with supports and services*, to: (A) provide food, clothing, and shelter for himself or herself; (B) care for the ward's own physical health; and (C) manage the ward's financial affairs; (2) provide a medical prognosis specifying the estimated severity of any incapacity; (3) state how or in what manner the ward's ability to make or communicate responsible decisions concerning himself or herself is affected by the ward's physical or mental health; (4) state whether any current medication affects the ward's demeanor or the ward's ability to participate fully in a court proceeding; (5) describe the precise physical and mental conditions underlying a diagnosis of senility, if applicable; and (6) include any other information required by the court.

(c) [No change.]

Effective September 1, 2015. See transitional note following Sec. 1201.151.

Sec. 1202.153. FINDINGS REQUIRED.

(a) – (b) [No change.]

(c) Before limiting the powers granted to or duties required to be performed by the guardian under an application filed under Section 1202.051, the court must find by a preponderance of the evidence that the current nature and degree of the ward's incapacity, *with or without supports and services*, warrants a modification of the guardianship and that some of the ward's rights need to be restored, *with or without supports and services*.

Effective September 1, 2015. See transitional note following Sec. 1201.151.

Sec. 1202.154. GENERAL REQUIREMENTS FOR ORDER.

(a) A court order entered with respect to an application filed under Section 1202.051 to completely restore a ward's capacity or modify a ward's guardianship must state: (1) the guardian's name; (2) the ward's name; *[and]* (3) whether the type of guardianship being addressed at the proceeding is a: (A) guardianship of the person; (B) guardianship of the estate; or (C) guardianship of both the person and the estate; *and (4) if applicable, any necessary supports and services for the restoration of the ward's capacity or modification of the guardianship.*

(b) [No change.]

Effective September 1, 2015. See transitional note following Sec. 1201.151.

Sec. 1202.156. ADDITIONAL REQUIREMENTS FOR ORDER MODIFYING GUARDIANSHIP.

If the court finds that a guardian's powers or duties should be expanded or limited, the order modifying the guardianship must contain findings of fact and specify, in addition to the information required by Section 1202.154: (1) the specific powers, limitations, or duties of the guardian with respect to the care of the ward or the

management of the ward's property, as appropriate; (2) the specific areas of protection and assistance to be provided to the ward; (3) any limitation of the ward's rights; (4) if the ward's incapacity resulted from a mental condition, whether the ward retains the right to vote *and make personal decisions regarding residence*; and (5) that the clerk shall modify the letters of guardianship to the extent applicable to conform to the order.

Effective September 1, 2015. See transitional note following Sec. 1201.151.

H) Chapter 1357 – Supported Decision-Making Agreement Act: The final addition by the 84th Legislature to the Estates Code relative to least restrictive alternatives to guardianship, supports and services which is covered herein is the creation of the "Supportive Decision-Making Agreement Act" to enable a disabled person who has not been declared to be incapacitated by a court or made the subject of a guardianship proceeding to make life decisions and arrangements for care, services and supports with the assistance of another individual. This may be a helpful tool for guardianship avoidance. Attached as **Exhibit 4** is a form which tracks the new code provision.

**CHAPTER 1357. SUPPORTED
DECISION-MAKING AGREEMENT ACT
SUBCHAPTER A. GENERAL
PROVISIONS**

Sec. 1357.001. SHORT TITLE.

This chapter may be cited as the Supported Decision-Making Agreement Act.

Sec. 1357.002. DEFINITIONS.

In this chapter:

(1) "Adult" means an individual 18 years of age or older or an individual under 18

years of age who has had the disabilities of minority removed.

(2) "Disability" means, with respect to an individual, a physical or mental impairment that substantially limits one or more major life activities.

(3) "Supported decision-making" means a process of supporting and accommodating an adult with a disability to enable the adult to make life decisions, including decisions related to where the adult wants to live, the services, supports, and medical care the adult wants to receive, whom the adult wants to live with, and where the adult wants to work, without impeding the self-determination of the adult.

(4) "Supported decision-making agreement" is an agreement between an adult with a disability and a supporter entered into under this chapter.

(5) "Supporter" means an adult who has entered into a supported decision-making agreement with an adult with a disability.

Sec. 1357.003. PURPOSE.

The purpose of this chapter is to recognize a less restrictive substitute for guardianship for adults with disabilities who need assistance with decisions regarding daily living but who are not considered incapacitated persons for purposes of establishing a guardianship under this title.

**SUBCHAPTER B. SCOPE OF
AGREEMENT AND AGREEMENT
REQUIREMENTS**

**Sec. 1357.051. SCOPE OF SUPPORTED
DECISION-MAKING AGREEMENT.**

An adult with a disability may voluntarily, without undue influence or coercion, enter into a supported decision-making agreement with a supporter under which

the adult with a disability authorizes the supporter to do any or all of the following:

(1) provide supported decision-making, including assistance in understanding the options, responsibilities, and consequences of the adult's life decisions, without making those decisions on behalf of the adult with a disability;

(2) subject to Section 1357.054, assist the adult in accessing, collecting, and obtaining information that is relevant to a given life decision, including medical, psychological, financial, educational, or treatment records, from any person;

(3) assist the adult with a disability in understanding the information described by Subdivision (2); and

(4) assist the adult in communicating the adult's decisions to appropriate persons.

Sec. 1357.052. AUTHORITY OF SUPPORTER.

A supporter may exercise the authority granted to the supporter in the supported decision-making agreement.

Sec. 1357.053. TERM OF AGREEMENT.

(a) Except as provided by Subsection (b), the supported decision-making agreement extends until terminated by either party or by the terms of the agreement.

(b) The supported decision-making agreement is terminated if:

(1) the Department of Family and Protective Services finds that the adult with a disability has been abused, neglected, or exploited by the supporter; or

(2) the supporter is found criminally liable for conduct described by Subdivision (1).

Sec. 1357.054. ACCESS TO PERSONAL INFORMATION.

(a) A supporter is only authorized to assist the adult with a disability in accessing, collecting, or obtaining information that is relevant to a decision authorized under the supported decision-making agreement.

(b) If a supporter assists an adult with a disability in accessing, collecting, or obtaining personal information, including protected health information under the Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191) or educational records under the Family Educational Rights and Privacy Act of 1974 (20 U.S.C. Section 1232g), the supporter shall ensure the information is kept privileged and confidential, as applicable, and is not subject to unauthorized access, use, or disclosure.

(c) The existence of a supported decision-making agreement does not preclude an adult with a disability from seeking personal information without the assistance of a supporter.

Sec. 1357.055. AUTHORIZING AND WITNESSING OF SUPPORTED DECISION-MAKING AGREEMENT.

(a) A supported decision-making agreement must be signed voluntarily, without coercion or undue influence, by the adult with a disability and the supporter in the presence of two or more subscribing witnesses or a notary public.

(b) If signed before two witnesses, the attesting witnesses must be at least 14 years of age.

Sec. 1357.056. FORM OF SUPPORTED DECISION-MAKING AGREEMENT.

See Exhibit 4, attached hereto

(b) A supported decision-making agreement may be in any form not inconsistent with Subsection (a) and the other requirements of this chapter.

SUBCHAPTER C. DUTY OF CERTAIN PERSONS WITH RESPECT TO AGREEMENT

Sec. 1357.101. RELIANCE ON AGREEMENT; LIMITATION OF LIABILITY.

(a) A person who receives the original or a copy of a supported decision-making agreement shall rely on the agreement.

(b) A person is not subject to criminal or civil liability and has not engaged in professional misconduct for an act or omission if the act or omission is done in good faith and in reliance on a supported decision-making agreement.

Sec. 1357.102. REPORTING OF SUSPECTED ABUSE, NEGLECT, OR EXPLOITATION.

If a person who receives a copy of a supported decision-making agreement or is aware of the existence of a supported decision-making agreement has cause to believe that the adult with a disability is being abused, neglected, or exploited by the supporter, the person shall report the alleged abuse, neglect, or exploitation to the Department of Family and Protective Services in accordance with Section 48.051, Human Resources Code.

IV. ANALYZE OPTIONS BEFORE YOU FILE!

Again, review "Appendix D: to Judge Steven King's Ad Litem Manual for a detailed list of alternatives to consider.

There are some specific alternatives to guardianship that are discussed here, from the court's perspective. Recent changes in practices of financial institutions and title

companies have increased the filing of guardianship applications for minors and incapacitated persons who have alternatives to guardianship available. Before filing for guardianship, consider what might be done to protect planning efforts by the individual, such as trusts, powers of attorney and convenience accounts. Also, confirm whether there is a less expensive alternative which could wholly avoid the guardianship procedure.

A) Funds due to minors/incapacitated persons who are not under guardianship.

Minors or incapacitated persons who are named as the beneficiary on an insurance policy or who inherit funds after the death of a parent may be unable to accept payment directly. It is often suggested by financial institutions that a guardian must appointed to receive such funds. Rather than file an application for guardianship, consider payment of such funds into the court registry, if the amount is less than \$100,000.00 (Estates Code Chapter 1355), or file for creation of a Section 1301 Management Trust (Estates Code Chap 1301) if greater than \$100,000.00. If the amount is slightly above the \$100,000.00 limit for the court registry, contact the court to discuss options.

Attached as **Exhibit 5** is a basic Application and Order to Deposit Funds into the Court Registry. Once an application is filed, an order will be drafted to fit the circumstances of each case. Often it is necessary for the court to send a letter instructing the financial institution regarding delivery and deposit of funds to the court registry. The filing of an Application for Guardianship of the Person/Estate may be an unnecessary expense and attorney's fees submitted to the court for approval which include the filing of an application for guardianship in such circumstances are subject to being reduced.

Similarly, Estates Code Chapter 1351 relates to the sale of property belonging to a minor without guardianship. Recent changes to this provision allow the court to appoint an ad litem to represent the interests of a minor who is not a ward and does not have a parent or managing conservator to represent him/her. Recent changes to the Estate Code provisions are below in bold italics.

Sec. 1351.001. AUTHORITY TO SELL MINOR'S INTEREST IN PROPERTY WITHOUT GUARDIANSHIP.

(a) A parent or managing conservator of a minor who is not a ward may apply to the court under this subchapter for an order to sell an interest of the minor in property without being appointed guardian if the net value of the interest does not exceed \$100,000.

(b) If a minor who is not a ward does not have a parent or managing conservator willing or able to file an application under Subsection (a), the court may appoint an attorney ad litem or guardian ad litem to act on the minor's behalf for the limited purpose of applying for an order to sell the minor's interest in property under this subchapter.

Effective September 1, 2015. Sec. 38(a) and (e) of HB 1438 provide: "(a) Except as otherwise provided by this section, the changes in law made by this Act apply to: (1) a guardianship created before, on, or after the effective date of this Act; and (2) an application for a guardianship pending on, or filed on or after, the effective date of this Act.

(e) The changes in law made by this Act to Sections 1351.001 and 1351.002, Estates Code, apply only to an application for the sale of an interest in property of a minor filed on or after the effective date of this Act. An application for the sale of an

interest in property of a minor that is filed before the effective date of this Act is governed by the law in effect on the date the application was filed, and the former law is continued in effect for that purpose."

Sec. 1351.002. APPLICATION; VENUE.

(a) A parent, *[or] managing conservator, or attorney ad litem or guardian ad litem appointed under Section 1351.001(b)* shall apply to the court under oath for the sale of property under this subchapter.

(b) An application must contain: (1) the minor's name; (2) a legal description of the real property or a description that identifies the personal property, as applicable; (3) the minor's interest in the property; (4) the purchaser's name; (5) a statement that the sale of the minor's interest in the property is for cash; and (6) a statement that all money received *from the sale of the minor's interest in the property [by the parent or managing conservator]* shall be used for the minor's use and benefit.

(c) [No change.]

Effective September 1, 2015. See transitional note following Sec. 1351.001.

Sec. 1351.051. APPLICABILITY OF SUBCHAPTER.

This subchapter applies only to a ward who has:

(1) a guardian of the person but does not have a guardian of the estate; or

(2) a guardian of the person or estate appointed by a foreign court.

Effective September 1, 2015. Sec. 38(a) and (f) of HB 1438 provide: "(a) Except as otherwise provided by this section, the changes in law made by this Act apply to:

(1) a guardianship created before, on, or after the effective date of this Act; and (2) an

application for a guardianship pending on, or filed on or after, the effective date of this Act. (f) The changes in law made by this Act to Sections 1351.051, 1351.052, and 1351.053, Estates Code, apply only to an application for the sale of an interest in property of a ward filed on or after the effective date of this Act. An application for the sale of an interest in property of a ward that is filed before the effective date of this Act is governed by the law in effect on the date the application was filed, and the former law is continued in effect for that purpose."

Sec. 1351.052. AUTHORITY TO SELL WARD'S INTEREST IN PROPERTY WITHOUT APPOINTMENT AS GUARDIAN OF THE ESTATE IN THIS STATE.

A guardian of the person of a ward *or a guardian of the person or estate of a ward appointed by a foreign court* may apply to the court under this subchapter for an order to sell an interest in property in the ward's estate without being appointed guardian of the ward's estate in this state if the net value of the interest does not exceed \$100,000.

Effective September 1, 2015. See transitional note following Sec. 1351.051.

B) Durable Powers of Attorney. In recent years, applications for guardianship have become necessary when title companies or banks refuse to recognize durable powers of attorneys. Some title companies have declared that the power of attorney cannot be utilized when the specific property to be sold is not described within the document. Banks may refuse to honor a power of attorney when an individual becomes incapacitated because they are not familiar with the appointed agent or because they are uncomfortable with the doctor's

opinion letter when a power of attorney is "springing," or becomes effective upon incapacity of the principal. Finally, powers of attorney may be revoked by the incapacitated person due to an insecurity caused by their illness, destroying the planning put in place to protect him/her from incapacity.

- a) When a power of attorney is declined in a real estate transaction, sometimes the most efficient response is to locate another title company.
- b) Planning is the most effective tool for heading off issues related to powers of attorney.
 - i. When drafting, include legal descriptions of real property owned by the principal. Some attorneys attach an exhibit to the power which lists the property, anticipating that the principal could update the exhibit when real property is bought/sold. This could create issues regarding the validity of the document, but the flexibility might be worth that risk.
 - ii. Have your client provide a copy of the power of attorney to the financial institutions and employers. If the bank has long term employees with whom your client has a relationship, introduce the agent. This will create some comfort level with the bank when it becomes necessary to use the power.
 - iii. Revocable living trusts are wonderful tools for managing assets and planning for the incapacity of a family member. Removing many of the risks involved with durable powers of attorney.
- c) A possible solution is to file a Declaratory Judgment action to shore up the power of attorney. A successful declaratory judgment action could result in a court order validating your power,

however there is no means to force the financial institutions to accept either the power or the court's interpretation that it is valid. This is also an expensive option that may not be financially feasible for a modest estate.

C) Temporary Restraining Order/Injunction (TRO/TI):

Temporary Restraining Orders/Injunctions are frequently a preferable option to filing for a Temporary Guardianship in the event of a temporary, emergency situation involving a person of questionable capacity. Consider whether a court order removing a threat, in addition to the provision of supports and services, would permit an individual to continue to live outside of a guardianship setting. When some level of guardianship seems inevitable, best practice is to file for guardianship subject to the TRO/TI. Temporary guardianship often unnecessarily increases the expense of guardianship due to the necessity to duplicate filings when a permanent guardian is later appointed. Keep in mind that no TRO shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result before notice can be served and a hearing had thereon.

D) Guardianship of a Minor: A common occurrence involving minors involves the need for appointment of an adult with authority to care for a minor after the loss of one or both biological parents or in the case of unfit parents.

When a family member desires to assist with care of a minor, a guardianship proceeding

might allow for a relative or other individual to enroll the child in school or obtain health care coverage while the parent is unable to do so. In such cases, it must be pled and proved that the guardianship is not sought simply to change school districts, but is necessary to protect the minor.

Consideration must be given to whether a SAPCR suit might be a better alternative if the goal is to protect the child from interference by an unfit parent who proves not to have the child's best interest at heart. A guardianship of a minor will not limit the parental rights in such situations, making a family law conservatorship the better, more protective, alternative.

On the other hand, a SAPCR or conservatorship may not effectively protect a minor who has an estate. Under a SAPCR, there is no requirement for annual reporting as is required under guardianship.

EXHIBIT 1

“APPENDIX D”

TO JUDGE STEVEN KING’S

AD LITEM MANUAL

**LESS RESTRICTIVE ALTERNATIVES TO
GUARDIANSHIP**

AND

“APPENDIX D-1”

SUPPORTS AND SERVICES

Appendix D:

LESS RESTRICTIVE ALTERNATIVES TO GUARDIANSHIP

In addition to the policy statement contained in TEX. EST. CODE §1001.001 mandating the use of a less restrictive alternative, 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 alternatives suggested herein are, in some instances, designed to provoke further thought. They are certainly not an exclusive list.

Closely allied to the concept of less restrictive alternatives is the idea of Supports and Services, addressed in Appendix D-1.

I. AVOIDING GUARDIANSHIP OF THE PERSON

1. Emergency Protective Order ("EPO") or Emergency Order for Protective Services ("EOP") 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 unless the disabilities of minority have been judicially removed; 3) authorize patient transfers under Chapter 241 of the Health and Safety Code.

Withdrawal of Life Support: for provisions concerning withdrawal of life support where no Directive to Physicians has been executed, and in situations where there is no guardian, see TEX. HLTH. & SAF. CODE § 166.039.

3. Surrogate Decision Making for Intellectually Disabled (MR) - TEX. HLTH. & SAF. CODE § 597.041 – A more specialized form of surrogate decision-making, this statute allows SDM Committees to act for MR persons who reside in an intermediate care facility for the mentally retarded (ICF/MR) – Allows medical and non-medical decisions to be made by the committee.

4. Surrogate Decision Making for Minors When Parent Unavailable TEX. FAM. CODE § 32.001ff - consent to dental, medical, psychological, and surgical treatment of a child by persons authorized in statute.

5. Authorization Agreement for Non-Parent Relative – TEX. FAM. CODE Ch. 34 - A parent may authorize a grandparent, adult sibling or adult aunt or uncle to have decision-making authority for a minor child for: healthcare, insurance coverage, school enrollment, school activities, driver's education, employment and application for public benefits. This essentially authorizes the designee to do anything a guardian of the person could do.

The official form, promulgated by the Texas Department of Family and Protective Services and identified as "Form 2638", can be accessed at: www.dfps.state.tx.us/documents/Child_Protection/2638.pdf

6. Supported Decision-Making Agreements - TEX. EST. CODE Ch. 1357 - Somewhat similar to a Power of Attorney, it is an agreement between 1) an adult with disabilities regarding his or her Activities of Daily Living ("ADLs"), but who is not incapacitated and 2) a "Supporter" who is willing to assist in: 1) understanding the options, responsibilities, and consequences of the life decisions, without actually making those decisions for the disabled adult and without impeding the adult's self-determination; 2) obtaining the relevant information necessary (health, financial, or educational - the adult may execute HIPAA or similar releases to facilitate the information gathering); 3) understanding the information gathered; and 4) communicating those decisions to the appropriate persons.

The “life decisions” could include decisions regarding obtaining food, clothing, and residence and cohabitation choices; the supports, services, and medical care to be received; financial management assistance; and workplace choices.

Such an agreement extends until terminated by either party or by the terms of the agreement or if the Department of Family and Protective Services validates findings of abuse, neglect, or exploitation by the Supporter against the adult or the Supporter is found criminally liable for such actions.

A permissive form is supplied in the statute. The agreement must be signed by both the disabled adult and the Supporter either in the presence of two or more subscribing witnesses (above age 14) or a notary public.

7. Emergency Medical Treatment Act - TEX. HLTH. & SAF. CODE § 773.008 - In certain limited circumstances involving emergency situations, consent to medical treatment does not have to be given, it is implied. Hospital emergency rooms could not function if consent had to be secured beforehand.

Emergency treatment of minors - Consent is also implied for the treatment of a minor who is suffering from what reasonably appears to be a life-threatening injury or illness (even if they can communicate) if the minor's parents, conservator, or guardian is not present. TEX. HEALTH & SAFETY CODE § 773.008(3).

8. Managing Conservatorships TEX. FAM. CODE Ch. 153 - **Functional equivalent to Guardian of the Person** Especially for families involved in a divorce context, a conservatorship may be used in place of a guardianship of the person for a minor, but only when there is no issue of assets belonging to the minor children.

Check the small print - The divorce decree, if there is one, should be carefully examined regarding any management powers granted either spouse regarding property of the children. TEX. FAM. CODE §153.132 grants a parent appointed sole managing conservator essentially the full rights of a guardian of the person and in TEX. FAM. CODE §153.073, the right to manage the property of the child “to the extent that the estate has been created by the parent or the parent’s family.” The Family Code provides no monitoring mechanism for property management.

9. School Admission Procedures - TEX. EDUC. CODE §25.001(d) – Under §25.001(d) of the Education Code, a school district may adopt guidelines to allow admission of non-resident children to school without the need for a guardianship. You may want to find out who in the school district administration possesses this information before you need it.

10. School Admission Procedures (Grandparents) - TEX. EDUC. CODE § 25.001(b)(9) – A school district may adopt guidelines to allow admission of non-resident children to school if a grandparent of the child resides in the school district and the grandparent provides “a substantial amount”

of after-school care for the child. The local school board is to adopt guidelines to implement this provision. No cases yet as to how this might square with TEX. EDUC. CODE § 25.001(d) if there is a guardian, but the child wants to live with the grandparent.

11. Court-Ordered Mental Health Services - TEX. HLTH. & SAF. CODE §§ 462.001, 571.001, 574.001 – In the case of a chronically mentally ill person, a temporary involuntary commitment may well be preferable to a guardianship. A guardianship, with its attendant removal of functional rights, might well be much more restrictive once the patient/ward has become stabilized on medication. Commitment provisions for the chemically dependent, mentally retarded, persons with AIDS and tuberculosis are also available in limited circumstances.

12. Driving Issues: Katie’s Law and the Re-Test Request - Effective September, 1, 2007, Texas drivers aged 79 or older can no longer renew a driver’s license by mail or electronic means, but must renew the license in person at an authorized license renewal station. In addition, drivers aged 85 and older will now have to renew every two years, rather than every six years. TEX. TRANSPORT. CODE § 521.2711

“Re-Test Request” A potential ward who refuses to stop driving may be reported to the DPS by a physician, a family member, or even a stranger, if the person’s driving capability is impaired. Although physicians are somewhat reticent to report their patients because of the physician-patient privilege and HIPAA, it is possible for the applicant in a guardianship or the ad litem to request the court to make a request to the Department of Public Safety for the proposed ward to be re-tested under DPS regulations to determine the proposed ward’s suitability to continue to drive.

A relatively new concept is the “Family Driving Agreement” a type of advance directive for driving decisions. The driver agrees in writing to designate someone to advise him or her when it is time to “give up the keys.” For more information, see keepingussafe.org.

13. Mental Illness Diversion Programs (Criminal Courts)

Persons with mental health issues are often jailed for crimes over which they had little or no control.

In a mental illness diversion program, individuals with a documented mental health problem are treated as patients, not criminals.

In the program, individuals are placed on a strict, supervised probation with regular court check-in dates to document and receive progress updates. Psychiatrists and other professionals develop a mental health treatment program, customized to meet the specific needs of the participants.

Following completion of the program, the charges are dismissed and may be eligible for expunction.

II. ADVANCED MEDICAL DIRECTIVES

The Federal Patient Self-Determination Act 42 USCA § 1395cc(f) requires health care providers, to be eligible for Medicare and Medicaid payments, to supply patients with

information regarding Medical Powers of Attorney as well as Directives to Physicians. Patients are to be given information regarding their rights under Texas law to make decisions regarding medical care (including the right to accept or refuse treatment) and the right to formulate advance directives. TEX. HLTH. & SAF. CODE Ch. 166 consolidates the location of the law regarding the 1) the Medical Power of Attorney, 2) and the Directive to Physicians, and 3) the "Out of Hospital Do Not Resuscitate" form. The chapter also provides common definitions to be used among all three documents

14. Medical Power of Attorney - TEX. HLTH. & SAF. CODE § 166.151 The most commonly used tool to avoid guardianship, the Medical Power of Attorney (formerly the Durable Power of Attorney for Health Care) is a creature of statute and should be prepared and executed with close attention to the statutory scheme set out in the Health & Safety Code. Most prudent estate planners will include the Medical Power of Attorney along with a Will and Durable Power of Attorney in a basic estate plan.

The Medical Power of Attorney is not automatically revoked upon the appointment of a guardian. The court may choose to suspend or revoke the power of the agent or to leave the Medical Power of Attorney in place as a less restrictive alternative.

CAVEAT: Nursing homes and hospitals may be reluctant to accept Medical Powers of Attorney which are executed made close to the time they are needed, particularly if the patient's capacity is questionable.

15. Directive to Physicians and Family or Surrogates ("Living Will") - TEX. HLTH. & SAF. CODE § 166.031

The newly revised and renamed form also now requires a disclosure statement (much like in the medical power of attorney), a place to indicate a choice between two treatment options, and a place for designation of an agent. The Directive interrelates to the Medical Power of Attorney in that it instructs the principal not to designate an agent on the Directive if a Medical Power has been executed. The new Directive form is **permissive**.

Intractable Pain Treatment Act. - TEX. REV CIV. STATS Art. 4495c. This act, adopted in 1995, was the first state statute in the nation designed to protect doctors for prescribing morphine to terminal patients for pain management during end-stage treatments without fear of professional disciplinary action for addicting the patients. See www.medsch.wisc.edu/painpolicy, the website for the Pain & Policy Studies Group of the University of Wisconsin Medical School for additional information and discussion on pain management policy.

16. Out-of-Hospital DNR ("EMT-DNR")- TEX. HLTH. & SAF. CODE § 166.081 – requires the ambulance personnel to let you die if that is your expressed wish. The tricky thing is having the right document or indicator available. This is one form that you cannot prepare. The forms are actually

printed by the Texas Department of Health. Only the officially printed forms (with red ink in the right places) will be honored by the EMTs. The Texas Department of Health has information on ordering the forms and necessary identifying bracelets at

<http://www.tdh.state.tx.us/hcqs/ems/index.htm#EMSRESOURCES>.

17. End-Stage Planning: The Patient's Intent, If Known

With or without legal assistance, a person may express his or her wishes and desires as to treatment decisions as disability or death approach. The oldest and most widespread of these is the "Five Wishes," a pamphlet developed in Florida and used in 33 states. It combines 1) surrogate decision making, 2) a medical power of attorney and 3) palliative care choices, many of which are sufficiently thought-provoking to promote some discussion on the topic with the one considering such choices.

CAVEAT: Because of the stringent witnessing requirements under the Advanced Medical Directives Act (TEX. HLTH. & SAF. CODE Ch. 166) and the mandatory nature of the form of the Texas Medical Power of Attorney, the universal *Five Wishes*™ pamphlet has not been implemented in Texas, however, Texas law does require that the patient's wishes, if known, are to be followed, (e.g.: TEX. HLTH. & SAF. CODE § 166.152(e)(1)). As a result, the Five Wishes may still function as a statement of the patient's intent. www.agingwithdignity.com

III. AVOIDING GUARDIANSHIP OF THE ESTATE

18. Durable Power of Attorney - TEX. EST. CODE § 751.001ff – provides for all acts done by the attorney in fact (agent) to have the same effect, inure to the benefit of, and bind the principal and the principal's successors in interest as if the principal were not disabled. The statutory form allows the grant of broad authority. **If** the Proposed Ward still has enough capacity to grant the power, this is virtually a "no-brainer".

Will the Bank accept it? If you have a client who is planning to use a durable power of attorney and you have some special provisions that have been requested, it is really a good idea to check with your client's banker, stockbroker and other people who are gatekeepers with respect to the client's assets. If they are not prepared to accept those special provisions, you probably want to go a different direction.

Other drawbacks – Because there are no real checks-and-balances on the attorney-in-fact, anecdotal evidence of fraud and abuse often comes "too little, too late" for effective relief. Amendments in 2001 impose a duty on the agent to inform and account to the principal of actions taken under the power and to maintain complete records of actions taken. TEX. EST. CODE § 751.101.

Patriot Act – Know Your Customer – A further complication hampering the use of Durable Powers of Attorney comes as a result of the "Know Your Customer" provisions of the "Patriot Act" (Public Law 107-56 – Oct. 26, 2001). Because the bank must aggressively verify identities,

if the attorney in fact presents the power of attorney in question after the incapacity of the principal, there will most likely be insurmountable problems.

19. Convenience Accounts - TEX. EST. CODE § 113.102

- allows a depositor to name a co-signer on his or her account without giving the co-signer ownership rights before or after the depositor's death.

- creates a straightforward agency relationship for a potential ward to allow a family member or friend to help them pay bills and handle other banking business.

- a Convenience Signer cannot pledge the assets of the account. TEX. EST. CODE § 113.251.

Convenience Signer On Other Accounts TEX. EST. CODE § 113.106 – Account owner may designate “Convenience Signers” on other types of multi-party accounts such as joint tenancy with right of survivorship, pay-on-death and trust accounts.

Beware of unintended consequences.

20. Sophisticated Tax Planning

This alternative is included by way of issue recognition, rather than as an attempted exposition. Non-tax-planners might consult their tax planning brethren if a situation presents itself where there is a potential to employ tax planning as a part of disability planning/guardianship avoidance.

21. Inter Vivos (“Living”) Trusts - TEX. PROP. CODE §§ 111-115 – Like any tool in the toolbox, a revocable inter vivos trusts has its particular applications. It is an excellent and highly flexible tool when drafted by a knowledgeable, competent estate planning lawyer, working with a full understanding of the client's needs, objectives, and circumstances, and when coordinated with other appropriate estate planning tools and techniques. The trustee can be given much more freedom that a guardian would enjoy, especially in such areas as investments and distributions.

Scam Trusts - IRS - The See IRS Pamphlet 2193 for the attempts of the IRS to educate the public about trust scams. It gives consumers some simple ways to help decide if the trust they are contemplating is “too good to be true.”

Irrevocable Trusts – To protect clients from themselves.

22. §142 Trusts – TEX. PROP. CODE § 142.005

In a suit in which a minor who has no legal guardian or an incapacitated person is represented by a next friend or an appointed Guardian Ad Litem, the court may, on application by the next friend or the Guardian Ad Litem and on a finding that the creation of a trust would be in the best interests of the minor or incapacitated person, order the clerk to deliver any funds accruing under the judgment to a trust company or a state or national bank with trust powers. TEX. PROP. CODE § 142.005.

Drawback: These trusts generally fail to provide for any accountability on the part of the trustee. A burgeoning number of fiduciary breach suits are being brought as a result.

Advance Planning: If the suit in question has not already

gone to judgment, consider instituting a guardianship proceeding and requesting that the suit be transferred into the probate court.

If you are not in a statutory probate court, ask for a Statutory Probate Judge to be appointed under TEX. GOVT CODE § 25.0022. The Statutory Probate Judge brings with him or her all of the jurisdiction of a statutory probate court, including the transfer power under TEX. EST. CODE § 1022.007. TEX. GOVT CODE § 25.0022(n).

Once you are in the probate court, a Guardianship Management Trust may be created without the necessity of also creating a guardianship. TEX. EST. CODE § 1301.051.

23. Testamentary Trusts

Testamentary trusts can be used to avoid a guardianship for the Testator's spouse, any family members with special needs and children and grandchildren of the Testator. When combined with traditional disability and tax planning, the potential for avoiding guardianship (and most of probate altogether) is great. As always, getting the client in to start the planning process is the hardest part.

24. Guardianship Management Trusts – TEX. EST. CODE § 1301.051 - An effective property management tool while protecting the property from malfeasance.

- may be established whether a guardian is ultimately appointed or not.

- Applicants can include a guardian, an Attorney Ad Litem, a Guardian Ad Litem or a person interested in the welfare of the ward.

The ability to continue the administration of the trust until age 25 (TEX. EST. CODE § 1301.203) can be particularly advantageous to provide a few more years of professional money management during an extended “training wheels” period for the ward/beneficiary.

- **Distribution to Pooled Trust Subaccount** – In light of the global economic downturn since 2008, the Guardianship Management Trust assets can be transferred to a subaccount of a Master Pooled Trust for more economic management of assets that might otherwise be too modest for a bank trust department. TEX. EST. CODE §§ 1302.001ff. See *infra*.

25. Pooled Trust Subaccounts TEX. EST. CODE §§ 1302.001ff - As an alternative to a Guardianship Management Trust, funds otherwise appropriate for a Management Trust to be transferred to a pooled trust, such as that operated by the Association for Retarded Citizens (ARC). It will preserve Medicaid qualification. It requires that an annual report be filed, but not a guardianship-style accounting. The trustee may assess its standard fees against the subaccount.

26. Special Needs/ Medicaid Qualification Trusts - 42 USC 1396p (1)(d)(4)(A)

Medicaid is a federal, means-tested program health program for eligible individuals and families with low incomes and resources. It is jointly funded by the state and federal governments, and is managed by the states. In Texas, an individual whose resources or income exceed certain

limits cannot qualify for Medicaid benefits. However, certain resources, or assets, do not count for Medicaid eligibility purposes.

The enabling statute, "OBRA 93", allows the use of very specific trusts which may be established with an individual's own assets, but which will not count against the resource limit for that individual for Medicaid purposes.

Although there are three types of such trusts, it is the trust for disabled persons under age 65, authorized pursuant to 42 U.S.C. § 1396p(d)(4)(A) which typically involves the courts. These are most often called "Special Needs Trusts" or "Supplemental Needs Trusts."

Personal injury attorneys are only recently appreciating the utility of these trusts in preserving assets for the permanently disabled client who will remain institutionalized.

Be aware of the potential exposure for an Attorney Ad Litem in a P.I. case who fails to consider the appropriate use of the supplemental needs trust, resulting in a much smaller net benefit for the disabled client.

27. Trusts for Intellectually Disabled (MR) Persons TEX. HLTH. & SAF. CODE § 593.081 - Up to \$250,000 may be placed in a trust for the benefit of MR individuals in certain residential-care facilities without disqualifying them from receiving state benefits and without the need for a guardianship.

A copy of the trust must be provided to Texas Department of Aging and Disability Services.

DADS may request current financial statements.

Guardianship funds - Ch. 142 trusts, patient's trust fund's in a residential-care facility, child support, an interest in a decedent's estate, and funds in the registry of the court are not considered trusts and are not entitled to the exemption.

28. Community Administrator - TEX. EST. CODE § 1353.002 - Upon a declaration of incapacity of one spouse, the other spouse, in the capacity of "community administrator" (no the decedent's estates kind) has the power to manage, control and dispose of the entire community estate without the necessity of a guardianship upon a finding by the Probate Court that: 1) it is in the best interest of the ward for the capacitated spouse to manage the community property, and 2) the capacitated spouse would not be disqualified to be appointed as guardian of the estate under §1104.351ff.

An ad litem may be appointed, the administrator required to return an inventory and accountings and a guardian of the estate may retain management rights over some specified varieties of real and personal property. These matters are considered in the context of a guardianship application and are not freestanding applications.

TEX. FAM. CODE § 3.301ff (the corollary provision to TEX. EST. CODE § 1353.002) was drastically amended in 2001. It is no longer possible to have the capacitated spouse manage or sell the community property under the Family Code, absent highly unusual circumstances.

29. Court Registry - TEX. EST. CODE § 1355.001 - This

provision is often viewed as simply an administrative deposit mechanism and is often overlooked as an opportunity to avoid administration of a minor's or other incapacitated person's guardianship estate. Up to \$100,000 may be deposited into the court's registry during the period of incapacity. The clerk is to bring the matter to the judge's attention and the funds are to be ordered invested in an interest-bearing account.

"Mini-administration:" Certain specified persons are permitted to withdraw all or a portion of the funds in the registry under bond to be expended for the benefit of the incapacitated person. After an accounting to the court, the bond may be released. This provides a very simple alternative to guardianship, particularly in a rural county. Upon attaining majority, minors are able to withdraw the funds upon proof of age and an order of the court. TEX. EST. CODE § 1355.105.

CAVEAT: TEX. LOC. GOVT. CODE §§ 117.054 & 117.055 authorize the county clerk to charge investment management fees on funds in the court's registry: a) 10% of any interest earned on interest-bearing accounts and b) 5% (but not to exceed \$50.00) on non interest bearing accounts.

Where funds are interplead because of a settlement but no probate case is pending, make sure the order specifies that the funds are to be deposited in an interest-bearing account.

Institutionalized incapacitated individuals: TEX. EST. CODE § 1355.151ff allow funds being held for an incapacitated individual who is institutionalized by the State of Texas to be paid to the institution for a trust account for the benefit of the individual, up to a maximum of \$10,000.

30. Payment to Non-Resident Creditor TEX. EST. CODE § 1355.002 Permits money payable to a non-resident minor, a non-resident adult ward or a non-resident former ward of a terminated Texas guardianship ("non-resident creditor") to be paid either to the guardian of the non-resident creditor in the domiciliary jurisdiction or to the county clerk where the non-resident creditor owns property or in the county of the debtor's residence.

31. Sale of Minor's Interest in Property - TEX. EST. CODE § 1351.001- This relatively simple procedure allows the interest of a minor in realty to be sold and deposited into the court's registry if the minor's interest is less than \$100,000. The minor's interest needs to be cash only, so it sometimes is necessary to do a bit of structuring to "cash out" a minor's undivided interest.

The sworn application, which must contain the name of the minor and a legal description of the property, is filed and then is supposed to sit for five days. Citation is optional with the court. Most courts will want to see some indication of value beyond a contract and tax statement. Venue for this procedure is the same as for a guardianship. Court approval is subject to a 'best interest' test on behalf of the minor.

Upon approval by the court (check your local practice as to whether a hearing is actually required), the sale is closed and the proceeds deposited into the court's registry. The funds are available for withdrawal as described above.

If the minor is not a ward and does not have a parent or managing conservator willing or able to file the application, the court may appoint an attorney ad litem or guardian ad litem to act on the minor's behalf for the limited purpose of applying for an order to sell the minor's interest in the property.

32. Sale of Adult Incapacitated Ward's Interest in Property - TEX. EST. CODE § 1351.051

Until this section was enacted, adult incapacitated individuals with meager personal property but with undivided interests in real property were often required to have somewhat meaningless guardianships of the estate. This provision allows adult incapacitated individuals to proceed with a guardian of the person only where their interest in real property is valued at less than \$100,000.

This provision is now also available for a ward of a guardian appointed by a foreign court.

33. Mortgage of Minor Interest/ Minor Ward's Interest in Property - TEX. EST. CODE §§ 1352.051, 1352.101

These provisions allow the parents, managing conservator or guardian of the person (as applicable), to obtain a home equity loan secured by the minor's interest in homestead property for the payment of education and medical expenses, for repairs to the homestead property, and for repayment of the loan.

A bond set in twice the amount of the loan amount is required, as well as a hearing on the front end and annual accountings while the loan is being paid off.

34. Uniform Transfers to Minors Act - TEX. PROP. CODE § 141.001 et. seq. - The ability of a donor to make transfers of various types of assets to a minor by the donor's appointment of a custodian has broad coverage and far-reaching implications. The custodian has authority to invest and expend the transferred assets – without court order – for the support, education, maintenance and benefit of the minor.

Again, the lack of supervision may dictate against this as a vehicle of choice unless the custodian is sophisticated enough to really understand fiduciary responsibility.

35. Receivership TEX. EST. CODE § 1354.001, TEX. CIV. PRAC. & REM. CODE §§ 64.001ff. - Of particular interest is where the incapacitated person owns an interest in a going business or commercial property which is in danger of injury.

The court may appoint a receiver, who is subject to the same compensation and bonding provisions under the Estates Code as a personal representative. The Receiver administers the property until the need for the receivership is over.

In 1999, the provisions for guardianship for missing persons were repealed. Receivers are now to be appointed for missing persons.

36. Order of No Administration TEX. EST. CODE §§ 451.001ff

If your object is simply to transfer title to estate assets to a disabled surviving spouse or minor children and your facts

meet the criteria specified, this somewhat archaic procedure, sort of an amalgamation of a small estate affidavit and an application for family allowance, may be employed if there is otherwise no necessity for administration. The court may dispense with notice or may prescribe the quality and quantity of notice required. TEX. EST. CODE § 451.002.

The court's order reads like the "facilitation of payment" language in a muniment of title proceeding and acts as authority to effect the transfer of the property involved. TEX. EST. CODE § 451.003. Such an order may be "undone" within one year if other information comes to light showing a necessity for administration. TEX. EST. CODE § 451.004.

37. Representative Payee 42 USC § 1383(a)(2)

A Representative Payee may be appointed by the Social Security Administration to manage Social Security benefits without the appointment of a guardian. Potentially available to all of the 50 million individuals receiving some sort of Social Security benefits, close to 7 million people currently receive Social Security benefits under the representative payee program. This is approximately ten times greater than all active court-supervised guardianships in the United States.

38. Veteran's Benefits Fiduciary - 38 USC § 5502(a)(1) Very similar to the Social Security rep payee program, the Department of Veteran's Affairs allows the appointment of a person to handle the administration of veteran's pension benefits without the appointment of a guardian. www.vba.va.gov/bln/21/Fiduciary/index.htm

39. Payment of Employees Retirement System Funds to Parent of Minor - Op. Tex. Att'y Gen. No. H-1214 - a parent may receive and manage a minor child's Texas Employees Retirement System (ERS) benefits without guardianship. This opinion relies on two propositions:

- a parent has authority to manage the estate of a minor child without court appointment of a guardian. TEX. FAM. CODE § 151.001(a)(4).

- A parent may also receive, hold, and disburse funds for the minor's benefit. TEX. FAM. CODE § 151.001(a)(8).

40. International Treaty

There is at least one international treaty between Mexico and the United States that provides for judgments benefitting minors who are Mexican Nationals to be paid to the Mexican Government to as trustee. E-mail from Judge Guy Herman, April 12, 2002 to Texas Probate Listserv www.texasprobate.net

Similarly, Memoranda of Understanding are frequently executed between governmental agencies providing for international cooperation regarding minors in cross-border situations. See Memorandum of Understanding Between the Monterey County Department of Social and Employment Services, Family and Children Services and the Consulate General of México in San José, California Regarding Consular Involvement in Cases Involving Minors www.f2f.ca.gov/res/pdf/MontereyMOUMexicanconsulate.pdf Accessed February 16, 2011

41. Suit by Next Friend - TEX. RULES CIV. PROC. 44

A minor without a legal guardian may sue by next friend. A next friend has the same rights concerning such suits as guardians have. These rights include seeing that the funds or other property recovered is placed in the court's registry, placed in a § 142 Trust under the Property Code or a Guardianship Management Trust under the Estates Code.

Under no circumstances should a non-parent next friend be allowed to seek to manage the funds personally, as neither the Property Code nor the Rules of Civil Procedure provide for any oversight mechanism for next friend management of a minor's property.

CAVEAT: Next Friends are subject to the same restrictions as guardians re contingent fee agreements. *Massey v. Galvan* 822 S.W.2d 309 (Tex. App. – Houston – [14th District] 1992, wr. den.) In *Stern v. Wonzer* 846 S.W.2d 939 (Tex. App. – Houston – [1st District] 1993, no pet.).

CAVEAT #2: When a P.I. case settles and little or no thought is given to the allocation of the award between the survival cause of action and the wrongful death cause of action, some sticky tax issues and angry creditors (and probate judges) may have to be faced. *Texas Health Insurance Risk Pool v. Sigmundik*, 315 S.W.3d 12 (Tex. 2010); *Elliott v. Hollingshead*, 327 S.W.3d 824 (Tex. App. Eastland, 2010, no pet.).

42. Social Service Agencies - Many social services agencies provide a variety of services specifically tailored to the needs of children, the disabled and elderly. A quick check of the yellow page listings under "social service agencies," will reflect literally dozens of organizations existing to this purpose. Many will have a particular emphasis toward a target group: veterans, the elderly, intellectually disabled, etc.

Beyond the Order for Emergency Protection (*supra*) the ability of either Adult Protective Services or Child Protective Services to investigate a potential exploitation or neglect situation is vital.

43. Geriatric Care Manager

A Geriatric Care Manager (GCM) is a health and human services professional, such as a gerontologist, social worker, counselor, or nurse, with a specialized body of knowledge and experience on issues related to aging and elder care issues.

GCMs are able to coordinate and manage eldercare services, which often includes conducting an assessment to identify problems, eligibility for assistance and need for services; coordinating medical services, including physician contacts, home health services and other necessary medical services; screening, arranging and monitoring in-home help or other services; reviewing financial, legal, or medical issues and offering appropriate referrals to community resources; providing crisis intervention; ensuring everything is going well with an elder person and alerting families to problems; and assisting with moving an older person to or from a retirement complex, care home, or nursing home.

While California has developed a state registry of Geriatric Care Managers, Texas does not yet have any central registry. The National Association of Professional Geriatric

Care Managers, the non-profit association of these professional practitioners, has promulgated a Pledge of Ethics and Standards of Practice. Their website has a locator database. www.caremanager.org

IV. LIMITING THE EFFECT OF THE GUARDIANSHIP

44. Pre-Need Designation of Guardian For Self – TEX. EST. CODE § 1104ff

An adult with capacity may, by written declaration designate those persons whom the declarant wishes to serve as guardian of the person or of the estate of the declarant in the event of later incapacity. The declaration may be in any form adequate to clearly indicate the declarant's intention to designate a guardian for the declarant's self in the event of the declarant's incapacity. The designation may be holographic, acknowledged before a notary or attested to by two witnesses, age 14 years of age or older and who are not designees to be guardian. In the case of attestation, a self-proving affidavit should be executed and attached.

A declaration that is not written wholly in the handwriting of the declarant may be signed by another person for the declarant under the direction of and in the presence of the declarant.

The court is required to follow the designations in the declaration, unless the court finds such designee to be disqualified or their appointment not to be in the ward's best interest.

A new form to allow simultaneous execution, attestation, and making the designation self-proving is available Tex. Est. Code § 1104.205(a).

Pre-Need Disqualification - Perhaps more importantly, the declarant may also indicate those persons who are to be specifically disqualified from serving as guardian, either of the person or estate. Such a disqualification is binding on the court and is among the listed reasons for disqualification under TEX. EST. CODE § 1104.202.

Revocation/Nullification - The designation may be revoked by execution of another designation or by following the same formalities as revoking a will. Divorce will serve to nullify a designation of a former spouse.

45. Pre-Need Designation of Guardian by Parent - TEX. EST. CODE §§ 1104.103, 1104.151

Similarly, a parent may designate, either in by separate written declaration or in the parent's will, those persons (in preferential order) whom they desire to be guardian of the person and/or estate of their child or children. The designation may specify that the court waive bond as to a guardian of the person, but not as to a guardian of the estate. This designation may be for either minor children or for adult incapacitated children.

Like the designation for one's self, the designation for a child may be in any form adequate to clearly indicate the declarant's intention to designate a guardian for the declarant's child in the event of the declarant's death or incapacity.

Unlike the Pre-Need Designation for Self, the Pre-Need Designation of Guardian by Parent does not contain the provision to expressly disqualify others as guardian.

A new form to allow simultaneous execution, attestation, and making the designation self-proving is available Tex. Est. Code § 1104.154(a).

46. Pre-Need Declaration for Mental Health Treatment - TEX. CIV. PRAC & REM. CODE § 137.007

A capacitated adult may, by written declaration, indicate his or her preferences or instructions for mental health treatment, including the right to refuse such treatment. Such a declaration is effective on execution and expires on the third anniversary of its execution or when revoked, whichever is earlier.

Witnesses - The declaration is to be witnessed by two qualified witnesses (similar to other advanced directives). Physicians or other health care provider are to follow such declaration, however, as long as the declarant is capable for giving informed consent, such informed consent is to be sought.

Does not apply - The declaration is ineffective if the declarant, at the time of making the designation, is under a temporary or extended commitment and treatment is authorized under the Mental Health Code or in the case of an emergency when the declarant's instructions have not been effective in reducing the severity of the behavior that has caused the emergency.

47. Safekeeping or "Freeze" Agreements - TEX. EST. CODE § 1105.155 - Where the personal representative deposits estate cash or other assets in a state or national bank, trust company, savings and loan association, or other domestic corporate depository, to be held under an agreement that the depository will not allow withdrawal or transfer of the principal of the assets and/or interest on the deposit except on written court order. (See example in Appendix Ad.) The amount of the bond of the personal representative may then be reduced in proportion to the cash or other assets placed in safekeeping.

48. Restoration of Ward - TEX. EST. CODE § 1202.051 - A Guardian Ad Litem must be appointed and everyone noticed similar to the original grant of guardianship.

49. Annual Determination - TEX. EST. CODE § 1201.052 - Each year, the probate judge is required to review each guardianship file created after September 1, 1993, and may review annually any other guardianship files to determine whether the guardianship should be continued, modified, or terminated. This provision appears fairly innocuous, but is in reality very powerful. It was recently used in a very large guardianship with massive pending litigation to restore the ward's capacity and terminate the guardianship. Because the standards for the court are somewhat of a blank slate (i.e. discretionary), especially in courts other than statutory probate courts, this provision could be employed in a number of creative ways. Even though the procedure and standards

for modification under § 1202.051 are fairly restrictive (see above), the annual determination under § 1201.052 contains no such procedural requirements.

50. Emancipation of Minor Ward - TEX. FAM. CODE § 31.01ff - Where a minor who is over 16, self-supporting (or married) and living apart from parents, a conservator or guardian may ask the court to legally remove the disabilities of minority for either limited or general purposes. The petition is decided on a "best interest" standard and the order is to specify whether the removal of disabilities is limited or general in scope and the purposes for which disabilities are removed.

51. Enumeration of Powers in Guardianship Order TEX. EST. CODE § 1101.151ff - If the guardianship is to be a plenary guardianship, it is perhaps best to simply reflect in the order that *"The guardian is to be granted all power and authority allowed under Texas law and the rights of the ward are limited to the extent not inconsistent therewith."* Otherwise, attempting to cover everything by an exhaustive listing may leave the guardian with specific deficits. Some attorneys feel that a listing of eight or ten powers is complete, while others can go on for pages.

However, if the ward is partially capacitated, a careful enumeration of those areas in which the ward's rights are not to be limited can have a great effect on the ward's functioning ability and self-esteem.

52. Interstate Guardianships TEX. EST. CODE § 1253.001ff - Where a guardianship exists in another state and the ward has been moved to this state, it can be advisable to allow a part of the guardianship to remain in the other state until affairs (pending litigation, etc) are resolved before all of the remnant is transferred.

53. Negligible Estate TEX. EST. CODE §§ 1204.001 - When the ward's estate is exhausted or when the foreseeable income accruing to a ward or his estate is so negligible that maintaining the guardianship would be a burden, the court may authorize the income to be paid to a parent or other person acting as guardian, to assist as far as possible in the maintenance of the ward, and without any liability for future accountings as to the income.

54. Minor Ward's Estate <\$100,000 TEX. EST. CODE §§ 1204.001(d) & 1355.102 - Unlike the adult ward's estate, which is needed for the upkeep and maintenance of the ward, a minor ward's guardianship estate is less likely to be called upon for day-to-day living expenses. If the guardian of the estate is a parent of the ward, the court is usually going to want to see some proof that the guardian/parent cannot make the expenditures out of his/her own pocket rather than out of guardianship assets. The mindset here is more of asset preservation and maybe some college planning, assuming of course that the minor ward has no special needs to deplete the estate. If the estate cash falls below \$100,000 (up from \$50,000 in 2001), the guardianship of the estate may be

closed and the remaining funds paid into the court registry. Withdrawals are then possible under the procedure set out under TEX. EST. CODE § 1355.102 above.

55. Mediation and Family Settlement Agreements TEX. EST. CODE § 1055.151 - Rarely on a guardianship contest is issue of incapacity the real issue. Most often, decades of unresolved conflict among the family members of the proposed ward spark the contests. Perceived favoritism, sibling rivalry, jealousy of a stepparent or step-children or step-siblings, unresolved grief, etc. are all manifested in the guardianship arena.

While resolution of a guardianship contest might remove the procedural obstruction in granting a guardianship, it rarely resolves the family disputes and wounded relationships which led to the contest. Mediation can provide a level playing field for the family to resolve those issues behind the guardianship fight. The long-standing “burrs under the saddle” that so often give rise to fights in the probate arena

can be aired and often resolved. TEX. EST. CODE § 1055.151 allows those settlements to be made irrevocable.

“A family settlement agreement is a favorite of the law.” *Shepherd v Ledford*, 962 S.W.2d 28 (Tex. 1998).

56. Mother Nature and Father Time -

Spontaneous Remission - It is not unusual - once a person gets adequate nutrition/ hydration/ socialization / therapy/ medication for a few weeks or months - for many symptoms of delirium/ confusion/ diabetic conditions to clear up. In some instances, it is a question of employing successive alternatives in an effort to forestay the inevitable, whether a guardianship or death.

It is rarely in the best interest of a terminally-ill proposed ward to go through successive independent medical examinations and for extensive litigation to exhaust an already beleaguered estate, only to have the ward die the day after letters are granted.

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Examples of Entities or Organization providing Supports or Services:

Adult Protective Services
 Agency Guardianship Providers:
 Family Eldercare
 Friends for Life
 Guardianship Services
 Area Agency on Aging
 Area food banks
 Association of Retarded Citizens of Texas
 DADS (Texas Department of Aging and Disability Services)
 Ombudsman programs
 Mental Health Association
 Mental Health Mental Retardation Centers

Network of Care ("Tarrant Cares")
 Organizations/ Support groups regarding specific diseases or conditions
 Alzheimer's Association
 Goodrich Center for the Deaf
 Lighthouse for the Blind
 Public Charities
 United Way
 Resource Connection
 Religiously-Affiliated Charities
 Buckner International
 Catholic Charities
 Lutheran Social Services
 The Service Connection
 Volunteers of America

Food, Clothing, or Shelter TEX. EST. CODE § 1002.031(1)

Adult Day Care
 Adult Foster Care
 Assisted Living Facilities / Apartment-Like Settings or Private Residences
 Case Management
 Church Groups – Organized Provision of Food
 Dietary Services/ Meals (Noon Meal and Snacks)
 Home Management: Housekeeping Activities to Support Health & Safety
 Cleaning
 Laundry
 Shopping
 Other Household Tasks.
 In-Home Attendant Services - Assistance in ADLs
 Meals on Wheels
 Residential Assistance
 Respite Care

Physical or Mental Health; TEX. EST. CODE § 1002.031(2)

Adaptive Aids (Eye Glasses, Hearing Aids, Orthotics)
 Behavioral Support Services
 Rehabilitation Therapy (Cognitive, Occupational, Physical)
 Dental Treatment
 Health-Related Tasks Prescribed by a Physician
 Personal Care: Physical Health
 Bathing
 Dressing
 Grooming
 Hair & Skin Care
 Feeding
 Exercising
 Self-Administered Meal Preparation Assistance
 Medication
 Toileting
 Transferring/Ambulating

Medical Services

Audiology
 Dental
 Nursing
 Physicians
 Speech & Language Pathology
 Medical Supplies/ Prescription Drug Assistance
 Therapy
 Occupational
 Physical
 Speech
 Hearing
 Language

Manage Financial Affairs TEX. EST. CODE § 1002.031(3)

Bill Paying Programs
 Employment Assistance
 Homebound School Instruction
 Supported Employment
 Utility Bill Assistance

Personal Decisions: Residence, Voting, Operating a Motor Vehicle, & Marriage TEX. EST. CODE § 1002.031(4)

Assisted Living (licensed up to six beds)
 Benefits Counseling/Legal Assistance
 Chore Provider
 Court Visitor Programs
 Day Care Services
 Orientation & Mobility /Assisted Transportation & Escort
 Mobility Impaired Transportation Services
 Minor Home Modifications
 Intervention/ Ombudsman Program
 Social, Educational & Recreational Activities
 Transition Assistance Services
 Organized Friendly Visits

EXHIBIT 2

**SUBCHAPTER H. RIGHTS OF WARDS
TEXAS ESTATES CODE, SEC. 1151.351.
BILL OF RIGHTS FOR WARDS.**

**SUBCHAPTER H. RIGHTS OF WARDS
TEXAS ESTATES CODE, SEC. 1151.351.**

BILL OF RIGHTS FOR WARDS.

- (a) A ward has all the rights, benefits, responsibilities, and privileges granted by the constitution and laws of this state and the United States, except where specifically limited by a court-ordered guardianship or where otherwise lawfully restricted.
- (b) Unless limited by a court or otherwise restricted by law, a ward is authorized to the following:
- (1) to have a copy of the guardianship order and letters of guardianship and contact information for the probate court that issued the order and letters;
 - (2) to have a guardianship that encourages the development or maintenance of maximum self-reliance and independence in the ward with the eventual goal, if possible, of self-sufficiency;
 - (3) to be treated with respect, consideration, and recognition of the ward's dignity and individuality;
 - (4) to reside and receive support services in the most integrated setting, including home-based or other community-based settings, as required by Title II of the Americans with Disabilities Act (42 U.S.C. Section 12131 et seq.);
 - (5) to consideration of the ward's current and previously stated personal preferences, desires, medical and psychiatric treatment preferences, religious beliefs, living arrangements, and other preferences and opinions;
 - (6) to financial self-determination for all public benefits after essential living expenses and health needs are met and to have access to a monthly personal allowance;
 - (7) to receive timely and appropriate health care and medical treatment that does not violate the ward's rights granted by the constitution and laws of this state and the United States;
 - (8) to exercise full control of all aspects of life not specifically granted by the court to the guardian;
 - (9) to control the ward's personal environment based on the ward's preferences;
 - (10) to complain or raise concerns regarding the guardian or guardianship to the court, including living arrangements, retaliation by the guardian, conflicts of interest between the guardian and service providers, or a violation of any rights under this section;
 - (11) to receive notice in the ward's native language, or preferred mode of communication, and in a manner accessible to the ward, of a court proceeding to continue, modify, or terminate the guardianship and the opportunity to appear before the court to express the ward's preferences and concerns regarding whether the guardianship should be continued, modified, or terminated;
 - (12) to have a court investigator, guardian ad litem, or attorney ad litem appointed by the court to investigate a complaint received by the court from the ward or any person about the guardianship;
 - (13) to participate in social, religious, and recreational activities, training, employment, education, habilitation, and rehabilitation of the ward's choice in the most integrated setting;

(14) to self-determination in the substantial maintenance, disposition, and management of real and personal property after essential living expenses and health needs are met, including the right to receive notice and object about the substantial maintenance, disposition, or management of clothing, furniture, vehicles, and other personal effects;

(15) to personal privacy and confidentiality in personal matters, subject to state and federal law;

(16) to unimpeded, private, and uncensored communication and visitation with persons of the ward's choice, except that if the guardian determines that certain communication or visitation causes substantial harm to the ward: (A) the guardian may limit, supervise, or restrict communication or visitation, but only to the extent necessary to protect the ward from substantial harm; and (B) the ward may request a hearing to remove any restrictions on communication or visitation imposed by the guardian under Paragraph (A);

(17) to petition the court and retain counsel of the ward's choice who holds a certificate required by Subchapter E, Chapter 1054, to represent the ward's interest for capacity restoration, modification of the guardianship, the appointment of a different guardian, or for other appropriate relief under this subchapter, including a transition to a supported decision-making agreement, except as limited by Section 1054.006;

(18) to vote in a public election, marry, and retain a license to operate a motor vehicle, unless restricted by the court;

(19) to personal visits from the guardian or the guardian's designee at least once every three months, but more often, if necessary, unless the court orders otherwise;

(20) to be informed of the name, address, phone number, and purpose of Disability Rights Texas, an organization whose mission is to protect the rights of, and advocate for, persons with disabilities, and to communicate and meet with representatives of that organization;

(21) to be informed of the name, address, phone number, and purpose of an independent living center, an area agency on aging, an aging and disability resource center, and the local mental health and intellectual and developmental disability center, and to communicate and meet with representatives from these agencies and organizations;

(22) to be informed of the name, address, phone number, and purpose of the Judicial Branch Certification Commission and the procedure for filing a complaint against a certified guardian;

(23) to contact the Department of Family and Protective Services to report abuse, neglect, exploitation, or violation of personal rights without fear of punishment, interference, coercion, or retaliation; and

(24) to have the guardian, on appointment and on annual renewal of the guardianship, explain the rights delineated in this subsection in the ward's native language, or preferred mode of communication, and in a manner accessible to the ward.

(c) This section does not supersede or abrogate other remedies existing in law.

Effective June 19, 2015.

EXHIBIT 3
PROPOSED
PHYSICIAN'S CERTIFICATE OF MEDICAL
EXAMINATION

REVISED SEPTEMBER, 2015

JUDGE STEVE M. KING'S
AD LITEM MANUAL 2016

Physician's Certificate of Medical Examination

Revision September 2015

In the Matter of the Guardianship of _____

For Court Use Only

Court Assigned: _____

an Alleged Incapacitated Person

To the Physician

This form is to enable the Court to determine whether the individual identified above is incapacitated according to the legal definition (on page 4), and whether that person should have a guardian appointed.

1. General Information

Physician's Name _____ Phone: (____) _____

Office Address _____

☐ YES ☐ NO I am a physician currently licensed to practice in the State of Texas.

Proposed Ward's Name _____

Date of Birth _____ Age _____ Gender ☐ M ☐ F

Proposed Ward's Current Residence: _____

I last examined the Proposed Ward on _____, 20____ at a

☐ a Medical facility ☐ the Proposed Ward's residence ☐ Other: _____

☐ YES ☐ NO The Proposed Ward is under my continuing treatment.

☐ YES ☐ NO Before the examination, I informed the Proposed Ward that communications with me would not be privileged.

☐ YES ☐ NO A mini-mental status exam was given. If "YES," please attach a copy.

2. Evaluation of the Proposed Ward's Physical Condition

Physical Diagnosis: _____

a. Severity: ☐ Mild ☐ Moderate ☐ Severe

b. Prognosis: _____

c. Treatment/Medical History: _____

3. Evaluation of the Proposed Ward's Mental Functioning

Mental Diagnosis: _____

a. Severity: ☐ Mild ☐ Moderate ☐ Severe

b. Prognosis: _____

c. Treatment/Medical History: _____

If the mental diagnosis includes dementia, answer the following:

☐ YES ☐ NO ---- It would be in the Proposed Ward's best interest to be placed in a secured facility for the elderly or a secured nursing facility that specializes in the care and treatment of people with dementia.

☐ YES ☐ NO ---- It would be in the Proposed Ward's best interest to be administered medications appropriate for the care and treatment of dementia.

☐ YES ☐ NO ---- The Proposed Ward currently has sufficient capacity to give informed consent to the administration of dementia medications.

d. Possibility for Improvement:

☐ YES ☐ NO ---- Is improvement in the Proposed Ward's physical condition and mental functioning possible?

If "YES," after what period should the Proposed Ward be reevaluated to determine whether a guardianship continues to be necessary? _____

4. Cognitive Deficits

a. The Proposed Ward is oriented to the following (check all that apply):

☐ Person ☐ Time ☐ Place ☐ Situation

b. The Proposed Ward has a deficit in the following areas (check all areas in which Proposed Ward has a deficit):

- ☐ --- Short-term memory
- ☐ --- Long-term memory
- ☐ --- Immediate recall
- ☐ --- Understanding and communicating (verbally or otherwise)
- ☐ --- Recognizing familiar objects and persons
- ☐ --- Solve problems
- ☐ --- Reasoning logically
- ☐ --- Grasping abstract aspects of his or her situation
- ☐ --- Interpreting idiomatic expressions or proverbs
- ☐ --- Breaking down complex tasks down into simple steps and carrying them out

c. ☐ YES ☐ NO -- The Proposed Ward's periods of impairment from the deficits indicated above (if any) vary substantially in frequency, severity, or duration.

5. Ability to Make Responsible Decisions

Is the Proposed Ward able to initiate and make responsible decisions concerning himself or herself regarding the following:

- ☐ YES ☐ NO ---- Make complex business, managerial, and financial decisions
- ☐ YES ☐ NO ---- Manage a personal bank account
If "YES," should amount deposited in any such bank account be limited? ☐ YES ☐ NO
- ☐ YES ☐ NO ---- Safely operate a motor vehicle
- ☐ YES ☐ NO ---- Vote in a public election
- ☐ YES ☐ NO ---- Make decisions regarding marriage
- ☐ YES ☐ NO ---- Determine the Proposed Ward's own residence
- ☐ YES ☐ NO ---- Administer own medications on a daily basis
- ☐ YES ☐ NO ---- Attend to basic activities of daily living (ADLs) (e.g., bathing, grooming, dressing, walking, toileting) without supports and services
- ☐ YES ☐ NO ---- Attend to basic activities of daily living (ADLs) (e.g., bathing, grooming, dressing, walking, toileting) with supports and services
- ☐ YES ☐ NO ---- Attend to instrumental activities of daily living (e.g., shopping, cooking, traveling, cleaning)
- ☐ YES ☐ NO ---- Consent to medical and dental treatment at this point going forward
- ☐ YES ☐ NO ---- Consent to psychological and psychiatric treatment at this point going forward

6. Developmental Disability

☐ YES ☐ NO ---- Does the Proposed Ward have developmental disability?

If "NO," skip to number 7 on page 4.

If "YES," answer the following question and look at the next page.

Is the disability a result of the following? (Check all that apply)

- ☐ YES ☐ NO ---- Intellectual Disability?
- ☐ YES ☐ NO ---- Autism?
- ☐ YES ☐ NO ---- Static Encephalopathy?
- ☐ YES ☐ NO ---- Cerebral Palsy?
- ☐ YES ☐ NO ---- Down Syndrome?
- ☐ YES ☐ NO ---- Other? Please explain _____

Please answer the questions in the box below only if both of the following are true:

- (1) The basis of a proposed ward's alleged incapacity is intellectual disability.
and
- (2) You are making a "Determination of Intellectual Disability" in accordance with rules of the executive commissioner of the Health and Human Services Commission governing examinations of that kind.

If you are not making such a determination, please skip to number 7 on the next page.

"DETERMINATION OF INTELLECTUAL DISABILITY"

Among other requirements, a Determination of Intellectual Disability must be based on an interview with the Proposed Ward and on a professional assessment that includes the following:

- 1) a measure of the Proposed Ward's intellectual functioning;
- 2) a determination of the Proposed Ward's adaptive behavior level; and
- 3) evidence of origination during the Proposed Ward's developmental period.

As a physician, you may use a previous assessment, social history, or relevant record from a school district, another physician, a psychologist, a public agency, or a private agency if you determine that the previous assessment, social history, or record is valid.

1. Check the appropriate statement below. If neither statement is true, skip to number 7 on the next page.

- ☐ I examined the proposed ward in accordance with rules of the executive commissioner of the Health and Human Services Commission governing Intellectual Disability examinations, and my written findings and recommendations include a determination of an intellectual disability.
- ☐ I am updating or endorsing in writing a prior determination of an intellectual disability for the proposed ward made in accordance with rules of the executive commissioner of the Health and Human Services Commission by a physician or psychologist licensed in this state or certified by the Department of Aging and Disability Services to perform the examination.

2. What is your assessment of the Proposed Ward's level of intellectual functioning and adaptive behavior?

- ☐ Mild (IQ of 50-55 to approx. 70) ☐ Moderate (IQ of 35-40 to 50-55)
- ☐ Severe (IQ of 20-25 to 35-40) ☐ Profound (IQ below 20-25)

3. ☐ Yes ☐ No ----- Is there evidence that the intellectual disability originated during the Proposed Ward's developmental period?

Note to attorneys: If the above box is filled out because a determination of intellectual disability has been made in accordance with rules of the executive commissioner of the Health and Human Services Commission governing examinations of that kind, a Court may grant a guardianship application if (1) the examination is made not earlier than 24 months before the date of the hearing or (2) a prior determination of an intellectual disability was updated or endorsed in writing not earlier than 24 months before the hearing date. If a physician's diagnosis of intellectual disability is not made in accordance with rules of the executive commissioner — and the above box is not filled out — the court may grant a guardianship application only if the Physician's Certificate of Medical Examination is based on an examination the physician performed within 120 days of the date the application for guardianship was filed. See Texas Estates Code § 1101.104(1).

7. Definition of Incapacity

For purposes of this certificate of medical examination, the following definition of incapacity applies:

An "Incapacitated Person" is an adult who, because of a physical or mental condition, is substantially unable to: (a) provide food, clothing, or shelter for himself or herself; (b) care for the person's own physical health; or (c) manage the person's own financial affairs. Texas Estates Code § 1002.017.

8. Evaluation of Capacity

☐ YES ☐ NO ----- Based upon my last examination and observations of the Proposed Ward, it is my opinion that the Proposed Ward is incapacitated according to the legal definition in section 1002.017 of the Texas Estates Code, set out in the box above.

If you indicated that the Proposed Ward is incapacitated, indicate the level of incapacity:

- ☐ **Total** ----- The Proposed Ward is totally without capacity (1) to care for himself or herself and (2) to manage his or her property.
- ☐ **Partial** ----- The Proposed Ward lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself or to manage his or her property.

If you indicated the Proposed Ward's incapacity is partial, what specific powers or duties of the guardian should be limited if the Proposed Ward receives supports and services? _____

If you answered "NO" to all of the questions regarding decision-making in Section 5 (on page 2) and yet still believe the Proposed Ward is partially incapacitated, please explain: _____

If you answered "YES" to any of the questions regarding decision-making in Section 5 (on page 2) and yet still believe the Proposed Ward is totally incapacitated, please explain: _____

9. Ability to Attend Court Hearing

- ☐ YES ☐ NO ---- The Proposed Ward would be able to attend, understand, and participate in the hearing.
☐ YES ☐ NO ---- Because of the Proposed Ward's incapacities, I recommend that the Proposed Ward not appear at a Court hearing.
☐ YES ☐ NO ---- Does any current medication taken by the Proposed Ward affect the demeanor of the Proposed Ward or his or her ability to participate fully in a court proceeding?

10. What is the least restrictive placement that you consider is appropriate for the Proposed Ward:

- ☐ --- Nursing home level of care
☐ --- Memory care unit
☐ --- Other _____

11. Additional Information of Benefit to the Court: If you have additional information concerning the Proposed Ward that you believe the Court should be aware of or other concerns about the Proposed Ward that are not included above, please explain on an additional page.

Physician's Signature

Date

Physician's Name Printed

License Number

EXHIBIT 4

CHAPTER 1357.

***SUPPORTED DECISION-MAKING AGREEMENT
ACT***

***Sec. 1357.056. FORM OF SUPPORTED DECISION-
MAKING AGREEMENT***

SUPPORTED DECISION-MAKING AGREEMENT

Appointment of Supporter:

I, (insert your name) _____, make this agreement of my own free will. I agree and designate that:

Name:

Address:

Phone Number:

E-mail Address:

is my supporter. My supporter may help me with making everyday life decisions relating to the following:

Y/N obtaining food, clothing, and shelter

Y/N taking care of my physical health

Y/N managing my financial affairs.

My supporter is not allowed to make decisions for me. To help me with my decisions, my supporter may:

1. Help me access, collect, or obtain information that is relevant to a decision, including medical, psychological, financial, educational, or treatment records;
2. Help me understand my options so I can make an informed decision; or
3. Help me communicate my decision to appropriate persons.

Y/N A release allowing my supporter to see protected health information under the Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191) is attached.

Y/N A release allowing my supporter to see educational records under the Family Educational Rights and Privacy Act of 1974 (20 U.S.C. Section 1232g) is attached.

Effective Date of Supported Decision-Making Agreement:

This supported decision-making agreement is effective immediately and will continue until (insert date) or until the agreement is terminated by my supporter or me or by operation of law.

Signed this _____ day of _____, 20__

Consent of Supporter

I, (name of supporter) _____, consent to act as a supporter under this agreement.

(signature of supporter)

(printed name of supporter)

Signature: _____
(my signature)

(my printed name)

witness 1 signature: _____

(printed name of witness 1)

witness 1 signature: _____

(printed name of witness 1)

State of _____

County of _____

This document was acknowledged before me on _____ (date) by
_____ and _____ (name of adult with a
disability)(name of supporter)

Signature of notarial officer: _____
Printed Name: _____
My commission expires: _____
Seal, if any, of notary

WARNING: PROTECTION FOR THE ADULT WITH A DISABILITY

IF A PERSON WHO RECEIVES A COPY OF THIS AGREEMENT OR IS AWARE OF THE EXISTENCE OF THIS AGREEMENT HAS CAUSE TO BELIEVE THAT THE ADULT WITH A DISABILITY IS BEING ABUSED, NEGLECTED, OR EXPLOITED BY THE SUPPORTER, THE PERSON SHALL REPORT THE ALLEGED ABUSE, NEGLECT, OR EXPLOITATION TO THE DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES BY CALLING THE ABUSE HOTLINE AT 1-800-252-5400 OR ONLINE AT WWW.TXABUSEHOTLINE.ORG.

EXHIBIT 5

Form Application and Order to Deposit Funds into the Court Registry

CAUSE NO. _____

IN THE ESTATE OF

§

IN THE PROBATE COURT

§

§

NUMBER _____ () OF

§

A MINOR

§

HARRIS COUNTY, TEXAS

**APPLICATION TO DEPOSIT FUNDS BELONGING TO A MINOR INTO THE COURT
REGISTRY PURSUANT TO EST \$1355.001**

TO THE HONORABLE JUDGE:

NOW COMES, _____, and would respectfully show the Court as follows:

1. _____, is a _____ year old male/female who resides at _____. [Insert facts regarding estate of parent or other source of funds.]
2. _____ is entitled to life insurance policy proceeds on the life of his _____. Two checks exist made payable to _____, dated _____ from _____ Insurance Company totaling \$_____. True and correct copies of such instruments are attached hereto as Exhibit _____.
3. Applicant seeks authority to deposit the checks/funds totaling \$_____ into the Court Registry for the use and benefit of _____, a minor/incapacitated person, pending further orders of the Court. The deposit of such funds into the court registry is in the best interest of _____.

WHEREFORE, PREMISES CONSIDERED, _____, on behalf of _____, a minor/incapacitated person, prays that the Court enter an order authorizing the deposit of check no. _____, in the amount of \$_____ in the Court Registry for the use and benefit of _____, a minor/incapacitated person, pending further orders of the Court, and for such other relief to which the Applicant may be entitled.

Respectfully submitted,

CAUSE NO. _____

IN THE ESTATE OF

§

IN THE PROBATE

§

COURT NO. _____ ()

A MINOR

§

HARRIS COUNTY, TEXAS

**ORDER TO PAY FUNDS INTO THE
REGISTRY OF THE COURT**

On this day the Court finds that funds are being held by _____ LIFE CO., Group Policy Number: _____; Insured/Deceased: _____ not to exceed an approximate amount of \$ _____ plus accrued interest; that said funds are due and owing to _____, A Minor, and that the funds should be deposited into the Registry of the Court for the use and benefit of _____, a Minor, Cause No. _____.

Therefore, it is ORDERED that the _____ Life Co., shall make check payable to Stan Stanart, Harris County Clerk for the use and benefit of _____, A Minor, CAUSE NO. _____ not to exceed an approximate amount of \$ _____, plus any accrued interest into the Registry of the Court.

Further, it is ORDERED that all cost incident to this order be hereby waived.

Signed this _____ day of _____, 20____.

Judge Presiding