

UNDERSTANDING THE GUARDIANSHIP MULTIVERSE

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GUARDIANSHIP AND ALTERNATIVES TO GUARDIANSHIP

by John W. Caldwell, Jr. and Shekinah Hammonds Davis

I. SCOPE OF ARTICLE

The guardianship universe is comprised of many different key individuals who are subject to various laws that span over several areas of law including the Texas Estates Code, the Texas Government Code, the Texas Property Code, the Texas Health and Human Services Code, and many more. To help understand guardianships, we must consider the various roles that each individual plays in seeking alternatives to guardianships, applying for a guardianship, qualifying guardians in their fiduciary roles, administering a guardianship, and finalizing a guardianship. This article will give an overview of the law in Texas relating to guardians and guardianships. It will also address the role of a guardian and possible alternatives to guardianship.

II. GUARDIANSHIP IN GENERAL

It might be helpful to start by defining the term “guardian.” A guardian has been defined as a person who has been lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property and right of another person, who, for defect of age, understanding, or self-control is considered incapable of administering his own affairs. BLACK’S LAW DICTIONARY, (5th Edition, 1979). The law under which a guardian may be appointed is set out in the Texas Estates Code where it provides that, “a Court may appoint a guardian...over an incapacitated person...only as necessary to promote and protect the well-being of the incapacitated person.” Texas Estates Code § 1001.001(a). This means that guardianships are to be a last resort remedy for persons declared to be incapacitated. An incapacitated person is defined as “a minor, an adult who because of a physical or mental condition, is substantially unable to provide food, clothing, or shelter for himself or herself, to care for the person’s own physical health, or manage the person’s own financial affairs.” Texas Estate Code § 1002.017. The process to obtain a guardianship can be rather complicated and hopefully this paper will provide you with a roadmap to simplify the process.

III. THE APPOINTMENT PROCESS

1. **Who May Apply for Appointment of Guardian:** Any person may file an application with the proper court requesting that a guardian be appointed for a person believed to be incapacitated. Texas Estates Code §1101.001.

Normally, the application seeking the establishment of a guardianship is filed by a family member or friend of the alleged incapacitated person. In other circumstances, upon a referral by the Texas Department of Family and Protective Services, Adult Protective Services ("APS"), the Texas Health and Human Services Commission ("HHSC") will file the application for guardianship. In other circumstances, the application will be filed by a guardian ad litem appointed by the County Court under the procedures for court initiated guardianships.

2. **Court Initiated Guardianships:** If a court has probable cause to believe that a person domiciled or found in the county in which the court is located is an incapacitated person, the person does not have a guardian in Texas, and a guardianship is necessary, the court shall appoint a guardian ad litem or court investigator to investigate and file an application for the appointment of the guardian of the person or estate, or both, of the person believed to be incapacitated. Texas Estates Code §1102.001 et seq.
3. **The Application:** The application for guardianship must state, among other things:
 - a. the nature and degree of the alleged incapacity, the specific areas of protection and assistance requested, and the limitation of rights requested to be included in the court's order;
 - b. whether alternatives to guardianship and available supports and services to avoid guardianship were considered;
 - c. whether any alternatives to guardianship and supports and services available to the proposed ward considered are feasible and would avoid the need for guardianship;
 - d. 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;
 - e. the requested term of the guardianship, if known; and
 - f. the names and addresses of the proposed ward's next of kin. Texas Estates Code §1101.001.
2. **Citation and Notice:** Citation in any guardianship action must be posted at the courthouse. Texas Estates Code §1051.102. Additionally, citation must be personally served on the proposed ward, the proposed ward's parents, and the proposed ward's spouse. Texas Estates Code §1051.101 et seq. Notice must also be given by registered or certified mail on certain other persons (i.e. siblings and children). Texas Estates Code §1051.101.
3. **Attorney Ad Litem.** When an application for guardianship is filed, the Court will appoint an attorney ad litem to represent the interests of the alleged

incapacitated person. The person may also retain his or her own attorney under certain circumstances. Texas Estates Code §1054.001.

4. **Medical Evidence Requirements:** Before a guardianship can be granted, the Court must have sufficient medical evidence that proposed ward is substantially unable to care for themselves or manage their financial affairs. A licensed medical physician, psychiatrist, psychologist, or an advanced practice registered nurse (“NP”) must complete a HealthCare Certificate of Medical Examination (“CME”) which is filed with the Court. Texas Estates Code 1101.103 et seq. Without this form, the Court cannot schedule a guardianship hearing.

A letter from the physician will not suffice as the statute requires that the Court form be completed in its entirety by the physician. It is best practice to attach the CME to the Application for Guardianship on the initial filing to be sure that you have sufficient evidence to support the guardianship on the day of filing.

The CME examination must have occurred within 120 days before the application is filed or the CME is considered stale and cannot be used for the purposes of obtaining a guardianship. The statute details several different things the letter must include. The Court may appoint additional physicians to examine the proposed ward if necessary or if the proposed ward refuses to go to a physician for the examination. Texas Estates Code §1101.103.

If the incapacity is due to intellectual disability, the proposed ward generally must be examined by a physician or psychologist licensed in Texas or certified by the Health and Human Services Commission to perform the examination. Texas Estates Code §1101.104.

IV. Types of Guardianships

1. **Limited or Unlimited:** A court may appoint a guardian with full authority over an incapacitated person or may grant a guardian limited authority, as indicated by the incapacitated person’s actual mental or physical limitations and only as necessary to promote and protect the well being of the person. Texas Estates Code §§ 1101.151 and 1101.152. The court may not use age as the sole factor in determining whether to appoint a guardian of the person. In creating a guardianship that gives a guardian limited power or 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. Texas Estates Code § 1101.152.

By appointing a guardian, the court is also limiting or revoking the rights of the incapacitated person. The order appointing a guardian should limit or revoke the

incapacitated person's right to vote, drive, marry, contract, execute estate planning documents, and any other right in the Ward's Bill of Rights that should be addressed by the Court. Texas Estates Code 1151.351.

Before appointing a guardian, the court is required to consider whether less restrictive alternatives to guardianship might avoid the need for guardianship in a particular situation. Less restrictive alternatives include alternative money management, representative payees, a financial power of attorney, a healthcare power of attorney, revocable trusts, and management trusts. For a non-exhaustive list of alternatives to guardianship, please review Section 1002.0015 of the Texas Estates Code.

2. **Guardian of the Person and Guardian of the Estate:** In Texas, there are generally two types of guardianships: guardianships of the person and guardianships of the estate. One person may be appointed as both guardian of the person and guardian of the estate.
 - a. Generally, the guardian of the person has the duty and power to provide the incapacitated person with clothing, food, medical care, and shelter. Specifically, the guardian of the person may have the following rights, duties and powers:
 - i. the right to physical possession of the ward and to establish the ward's legal domicile;
 - ii. the duties of care, supervision, and protection of the ward;
 - iii. the duty to provide the ward with clothing, food, medical care, and shelter; and
 - iv. the duty to consent to medical, psychiatric, and surgical treatment other than the in-patient psychiatric commitment of the ward

The court's order may limit the guardian's duties or powers in any of these areas to allow the ward to make or have input in any of these decisions. Texas Estates Code §1151.051.

The guardian of the person also has a duty, on appointment and on annual renewal of the guardianship, to present the Ward's Bill of Rights to the ward as set forth in the Texas Bill of Rights for Persons under Guardianship in the ward's native language or preferred mode of communication and in a manner accessible to the ward. Texas Estates Code §1151.351(b)(24). (See Appendix A for a copy of the Ward's Bill of Rights). In Bexar County, one Court has translated these rights into picture form of which a copy has been included for your reference.

As set out in the Texas Bill of Rights for Persons Under Guardianship, the guardian of the person should also make personal visits with the ward at least once every three months, but more often if necessary,

unless the court orders otherwise. Texas Estates Code §1151.351(b)(19).

The guardian of the person should select a living environment that provides the level of care needed by the ward while giving the ward as much freedom and independence as possible. Except in cases of emergency, a guardian of the person of a ward may only place the ward in a more restricted care facility if the guardian provides notice of the proposed placement to the court, the ward, and any person who has requested notice. Texas Estates Code § 1151.056. If the ward or a person who has requested notice objects to the move, the court will hold a placement hearing. *Id.* The guardian of the person is responsible for monitoring the ward's care; arranging for appropriate social services and medical care; maintaining contact with doctors, nurses, social workers and other care providers; and intervening on behalf of the ward if care is not appropriate or neglect or abuse is suspected.

The Guardian must also provide notice to the Court when the Guardian's address changes and when the ward passes away.

The general rule is that a guardian of the person may be only one individual or entity. However, a married couple, joint managing conservators, or co-guardians appointed by another state may serve as joint guardians of the person. Texas Estates Code § 1104.001

A parent of a minor child is naturally the guardian of the person of that child. When the child turns eighteen (18) years of age or older, however, the parent loses his or her status as natural guardian of the person of that child. Therefore, in the event the adult child is an incapacitated person, and if the parent wishes to continue to act on the child's behalf, the parent will need to initiate guardianship proceedings.

- b. The guardian of the estate is entitled to the possession and management of all real and personal property belonging to the ward. The powers of the guardian of the estate must be specifically set out in the order creating a temporary guardianship. It is best practices to include these powers in a permanent guardianship Order as well. A guardian of the estate is required to:
 - i. Notify any creditors of the ward's estate;
 - ii. Allow or reject claims filed by creditors;
 - iii. Collect all debts, rentals, or claims due to the ward;
 - iv. Enforce all obligations in favor of the ward;
 - v. Bring or defend lawsuits by or against the ward.

The guardian of the estate is to manage the ward's estate as a prudent person would manage the person's own property and shall account for all

rents, profits and revenues that the estate would have produced by such prudent management. The guardian of the estate should never commingle the ward's funds with the guardian's personal funds. This will always create a conflict of interest with the Guardian and could warrant a removal of the Guardian without notice. Texas Estates Code 1203.051.

A guardian of the estate should be represented by an attorney who is licensed to practice law in Texas and who has received a guardianship certification approved by the State Bar of Texas. Texas Estates Code § 1054.201. The attorney's fees for representing the guardian of the estate may be paid from the ward's estate but must be previously approved by the court. Texas Estates Code 1155.054. Any attorney's fees paid to the attorney with the Guardian's personal funds in order to be appointed may be reimbursed from the ward's estate once approved by the court. *Id.*

V. Who May Serve as Guardian: The Court will appoint a guardian for an incapacitated person in the following order of priority: (a) the incapacitated person's spouse; (b) the person's next of kin; and (c) an eligible person who is best qualified to serve. Texas Estates Code §§1104.101-103.

A person may not be appointed guardian if the person is a minor, a person with notoriously bad character, an incapacitated person, an unsuitable person, a person who has a conflict of interest, a person who is a party to a lawsuit affecting the proposed ward (with some exceptions), a person who owes the proposed ward money unless it is repaid, a person with adverse claims to the proposed ward of his property, an inexperienced or uneducated person, or a person the court finds unsuitable, a person eliminated in a person's designation of guardian, or a nonresident without a resident agent. See Texas Estates Code §1104.351 et seq.

VI. How Does a Guardian Qualify? The person appointed by the court as guardian must qualify to be Guardian in the following manner:

1. A proposed guardian must:
 - a. register with the Judicial Branch of Certification Commission. Texas Government Code § 155.151 et. seq.
 - b. complete an online guardianship training course to educate proposed guardians of their responsibilities as a Guardian, as to alternatives to guardianship, supports and services available to the proposed Wards, and the Ward's Bill of Rights. Texas Government Code § 155.204.
 - c. obtain a criminal background check and cannot have committed a felony or a crime of moral turpitude (with few exceptions). Texas Government Code § 155.205.

- d. complete a Personal Representative Form which includes the Guardian's contact information. It is important to note that this form becomes public record.
- e. sign a guardian instruction form which outlines the duties of the guardian.
- f. submit an Affidavit to the Court that notifies of Court of certain members of the ward's family member along with contact information. Texas Estates Code § 1101.003.
- g. take an oath of office as Guardian.
- h. obtain a surety bond, which acts as an insurance policy to cover any damages caused by any bad acts of the guardian. The bond must be sufficient to cover all liquid assets of the ward and income due to the ward in the upcoming year. Texas Estates Code §1105.002. It is important to note that prior bankruptcies of the proposed guardian can prevent a proposed guardian from obtaining a bond.

VII. The Hearing: The Applicant must prove a number of things for the court to decide to appoint a guardian for the proposed ward. Before appointing a guardian, the Court must find by clear and convincing evidence, that:

- a. the proposed ward is an incapacitated person;
- b. it is in the best interest of the proposed ward to have the Court appoint a person as guardian of the proposed ward;
- c. the rights of the proposed ward or the proposed ward's 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 have been considered and determined not to be feasible. Texas Estates Code § 1101.001.

The Court must also 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 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 residence 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 in the Code 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.

If the court finds that the proposed ward is partially incapacitated, the court 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. Texas Estates Code §1101.101.

The Court may find the proposed ward to be incapacitated if, due to a mental or physical condition, he or she is substantially unable to:

- (a) provide food, clothing, or shelter for himself or herself;
- (b) care for his or her own physical health; or
- (c) manage his or her own financial affairs. Texas Estates Code §1102.016.

At the hearing, the Applicant must prove that the proposed ward is an incapacitated person through testimony and medical evidence. The alleged incapacitated person has the right to be present and the right to bring his or her own witnesses to court and also the right to speak to the judge. The alleged incapacitated person may also request a jury trial. After hearing the evidence, the court will either dismiss the application, order a full guardianship, or order a limited guardianship. Texas Estates Code §1101.151 and 1101.152.

VIII. Letters of Guardianship: After the Court has approved the guardian's oath and bond, the Clerk of the Court is authorized to issue letters of guardianship to the qualified guardian. These letters serve as evidence to third parties of the guardian's ability and authority to act on the ward's behalf. Texas Estates Code §1106.001, et seq., §1106.005.

Letters of guardianship expire one (1) year and four (4) months after the date of issuance unless renewed. The Clerk of the Court may not renew letters of guardianship relating to the appointment of a guardian of the person until the Court receives and approves the annual report. Texas Estates Code §1106.001 et seq.

IX. Reporting Requirements of Guardians

1. **Inventory and Appraisalment.** A guardian of the estate must file an inventory of the ward's property within 30 days of qualifying as guardian. The inventory must list all assets of the incapacitated person coming into the guardian's hands and all debts owed to the estate. Texas Estates Code §1104.202 et seq.
2. **Notice to Creditors.** The Guardian must publish a notice to creditors in the local newspaper which places all creditors on notice that a guardian has been appointed for a Ward. Texas Estates Code § 1153.001(a)(1).

3. **Monthly Allowance.** The Guardian is required to seek permission to spend any funds in the guardianship by filing an Application for Monthly Allowance. Texas Estates Code § 1156.001. The Monthly Allowance acts as a budget filed with the Court requesting permission in advance to spend a certain amount of funds each month for the ward anticipated expenses (i.e. residence fee, medications, health insurance, mortgage payment). This also includes the amount that the ward is expected to receive in income.

4. **Investment Plan.** The Guardian must also seek permission from the Court to invest the wards funds in Court approved investments that create low to no risk to the ward. Texas Estates Code § 1161.051. The Guardian is given authority to maintain investments not approved by the Court for one (1) year that were owned by the ward at the inception of the guardianship. Texas Estates Code § 1161.006. However, guardians are cautioned in taking this route as the risks associated with loss of market value could be considered impropriety or mismanagement by a guardian. Texas Estates Code § 1161.008. Any further investing outside of the Court's authorized investments will require prior approval.

5. **Applications for Sale of Personal Property and Real Property.** The Guardian must seek permission from the Court for the sale of all personal property and real property in a guardianship prior to the sale. Texas Estates Code §1158.051, 1158.101, and 1158.251. This is a four (4) step process that requires that the Guardian apply to sell personal property, obtain an order to sell property, report to the court when a buyer is identified, and seek permission of the contract for sale of the personal and/or real property. This process also requires that the Guardian specifically identify what property should be sold including year, make, make model and Vehicle Identification Numbers for all vehicles, and other identifying factors of personal property.

6. **Expense Applications.** From time to time, the Guardian may need to spend funds to repair property owned by the ward or pay for unexpected expenses of the guardianship. The Guardian of the Estate must submit an application for payment of expenses to the Court to request permission to spend funds prior to the disbursement of the funds. Texas Estates Code § 1155.101-103.

7. **Annual Reports.** A guardian of the person must file with the court on an annual basis a sworn, written report describing the social, medical and residential conditions of the ward. Texas Estates Code § 1163.101 et seq. Some courts will mail a report form to the guardian each year near the date it is due. Other courts expect the guardian to submit this report without any

reminder from the court. The report covers a 12 month period that begins on the anniversary date and extends every year thereafter from that date unless modified by the court. **The report is due no later than 60 days after the anniversary date. Letters of guardianship of the person expire 16 months after issuance unless extended by the court by approval of the guardian of the person's report.** The report may be completed and filed by the guardian of the person without the assistance of an attorney, and should include the following information:

- a. the guardian's current name, address and phone number;
- b. the ward's current name, age, date of birth, address and phone number;
- c. the type of home in which the ward resides, and if it is a relative's home, the name of the relative and their relationship to the ward;
- d. the length of time the ward has resided in the present home, and if there has been a change in the ward's residence in the past year, the reason for the change;
- e. the date the guardian most recently saw the ward, and how frequently the guardian has seen the ward in the past year;
- f. a statement indicating whether or not the guardian has possession or control of the ward's estate;
- g. whether the ward's mental health has improved, deteriorated or stayed the same during the past year and a description of any change;
- h. whether the ward's physical health has improved, deteriorated or stayed the same during the past year and a description of any change;
- i. a statement concerning whether or not the ward has regular medical care, and the ward's treatment or evaluation by a physician, a psychiatrist or psychologist, a dentist, a social or caseworker, and including the name of the person providing treatment and the treatment involved;
- j. a description of the ward's recreational, educational, social, and occupational activities during the past year or a statement that no activities are available or that the ward refused to participate in activities;
- k. the guardian's evaluation of the ward's living arrangements as excellent, average or below average with an explanation if below average;
- l. the guardian's evaluation of whether the ward is content or unhappy with the ward's living arrangements;

- m. the guardian's evaluation of unmet needs of the ward;
- n. a statement of whether or not the guardian's power should be increased, decreased, or unaltered, including an explanation if a change is recommended;
- o. a statement that the guardian has paid the bond premium for the next reporting period; and
- p. any additional information including whether the guardian has filed for emergency detention of the ward for mental health examination and if so, how many times during the reporting period and the dates of the applications.

Please check the county website where the guardianship is to determine if the Court has a mandatory Annual Report form that must be used. The court is to review and approve or reject the annual guardian of the person's report as part of its **annual determination** on whether the guardianship should be continued, modified or terminated. Upon the filing and approval of the report, the clerk of the court is authorized to issue new letters of guardianship to the guardian with an extended expiration date. **Upon the death of a ward**, the guardian is to file a **final guardian of the person's report** that states the date and place of death, if known, in lieu of the information required in the annual report.

8. **Annual Accountings.** A guardian of the estate must file with the Court on an annual basis a complete and comprehensive accounting which reflects all income and all disbursements of the guardianship during the annual accounting period. A guardian must hire an attorney to assist filing this report with the court as the annual accounting must be in a specific format when filed.

X. Modification of Guardianships

A ward or any person interested in the ward's welfare may file an application with the Court to terminate or modify the terms of the guardianship annually, unless modified by the Court. Texas Estates Code §1202.001 et seq.

XI. Closing of Guardianships

The guardian of an incapacitated person may institute the procedure to close the guardianship when the ward's capacity has been restored by the Court or when the ward dies. A guardianship of the estate may be earlier closed when the estate funds become exhausted. Texas Estates Code §1204.001.

The first step in closing the estate is the filing of the final account. The account must show all property that has come into the guardian's hands since the last annual account, as well as the disposition that has been made of such property. The guardian must show the debts that have been paid and any debts that remain outstanding, as well as the reason for the non-payment. If any property remains in the guardian's possession, it should be fully reported and verified in the same manner as for annual accounts. After the Court has audited the final account and entered an order approving it, the guardian may deliver the assets to the former ward or whomever the Court has determined is legally entitled to it. After all the property has been accounted for and the receipts of delivery approved, the Court will enter an order closing the guardianship and relieving the guardian of any future responsibility in connection with the guardianship. Texas Estates Code §1204.001 et seq.

XII. Court Monitoring of the Guardianship

1. **Court Visitor Programs:** Each Statutory Probate Court is required by law to operate a court visitor program to assess the condition of wards under guardianship. Texas Estates Code § 1054.101 et seq. Some courts in counties without a Statutory Probate Court have started court visitor programs.

The court usually sends a court-appointed visitor each year to personally visit with each ward and guardian. The court visitor will then file a written report with the court that assesses the ward's mental, residential, social, intellectual, physical and educational conditions. Such reports are to include the following:

- a description of the nature and degree of the ward's capacity and incapacity, including a description of the ward's medical history, if reasonably available and not waived by the court;
- a medical prognosis and list of the ward's treating physicians, when appropriate;
- a description of the ward's living conditions and circumstances;
- a description of the ward's social, intellectual, physical, and educational conditions;
- a statement that the court visitor has personally visited or observed the ward;
- a statement of the date of the guardian's most recent visit;
- a recommendation as to any modification needed in the guardianship, including removal of the guardianship; and
- any other information required by the court. Texas Estates Code §1054.104.

2. **Court Review:** Courts are required to review the court visitor report and guardian of the person report and make an **annual determination** of whether each guardianship should be continued, modified or terminated. The court may send a court visitor to obtain more information from the guardian or ward when it becomes aware of a problem mentioned in the guardian of the person report or through other means. The court visitor may assist the guardian in locating necessary services. If the court has reason to believe that the guardian is not performing his or her duties, the court may set a hearing and require the guardian to give an explanation for their actions or inaction.

If there is evidence that the ward no longer needs a guardian, the court may appoint the court investigator or GAL to investigate whether a **restoration of the ward's capacity** and rights is merited. **A ward is also allowed to write an informal letter** to the court requesting that the ward's rights and capacity be restored. A person, including a guardian, who interferes with the transmission of this letter to the court may be adjudged guilty of contempt of court. Upon receiving a letter from a ward requesting restoration, the court is to appoint a court investigator or GAL to file an application for the ward's restoration. Courts that receive such letters are only required to investigate the need for restoration once a year. Texas Estates Code § 1202.054.

XIII. Roles of Guardians

1. The Roles of Guardians in General

Guardians have three basic roles:

- Advocate
- Coordinator and Monitor of Services, and
- Decision Maker

2. Guardian as Advocate: The role of the guardian is first and foremost to be a strong advocate for the individual with whom he or she is working.

Therefore, it is important to understand who an advocate is and what an advocate does.

Webster's New 20th Century Dictionary defines an advocate as one who defends; vindicates; or espouses a cause by argument; one who is friendly to; an upholder; a defender; as, an advocate of peace, or the oppressed. The same dictionary defines advocacy as the act of pleading for or supporting; an advocating (of something).

The term advocacy takes on a special meaning when the advocacy is associated with persons who are incapacitated and are unable to intercede on their own behalf.

Individuals with disabilities have the same constitutional rights as all other citizens. When because of disabilities those rights must be abridged, the individual has the right to the least restrictive alternatives possible. It is the guardian, as advocate, who arranges for the support, care, comfort, and health care of the ward. The guardian also secures and monitors the appropriate mix of services and entitlement due the ward and assists the ward in achieving the maximum self-reliance and independence possible.

- 3. Guardian as Coordinator and Monitor of Services:** The guardian serves as advocate and surrogate decision-maker in conjunction with the role of coordinator and monitor of services. These activities are not performed in a vacuum. The guardian should be in control of the overall plan of medical and personal care for the incapacitated person. To perform the role of coordinator of services effectively and efficiently, it is essential that the guardian develop and maintain a working knowledge of the services, providers, and facilities available in the community.

It is also important to stay abreast of changes in these community resources, as the guardian is often faced with balancing multiple providers who may be serving a number of clients who are located in a variety of community settings.

Each ward is a person with his/her own unique problems, needs and wants. Each ward is entitled to have an individualized plan of care designed by the guardian to meet those needs. To accomplish this, the guardian must: conduct an assessment of the ward's needs and strengths; determine the ward's wishes; identify appropriate resources and service providers to meet those needs; arrange for delivery of service; and continually monitor the ward's progress and the effectiveness of those services.

A guardian should establish a written plan of care for the ward that includes: baseline data, goals with time frames, and how the guardian expects to achieve these goals. The guardian may utilize a number of resources to develop this plan, including: the ward's attending physician, therapists, home health care providers, facility staff members, caregivers, family members, friends and any special consultants called in to evaluate the ward.

Monitoring visits made by the guardian on a periodic basis will provide the opportunity to measure the ward's progress and to insure the adequacy of the plan. During the monitoring visit, the guardian should:

- a. Interview the ward;
- b. Evaluate the ward's living environment;
- c. Discuss the ward's condition with staff; and
- d. Review records or charts.

4. **Guardian as Decision Maker:** The fundamental responsibility of the guardian is to make decisions about the ward's personal affairs. Each decision made by the guardian should be an informed decision based on the principle of informed consent. The guardian should always exercise the utmost care and diligence, always with the idea of protecting the ward's self-reliance, autonomy, and independence.

5. **Informed Consent:** The guardian should enable the ward to exercise his or her right to make informed consent decisions to the greatest extent of the ward's capacity and ability. The guardian, standing in the place of the ward who lacks capacity, should access the same information that would have been given to the ward if the client had capacity in order to make informed substituted judgments on behalf of the ward. The guardian should make a good faith effort to determine whether the ward has previously stated any preferences before making any decision on the ward's behalf and then follow those preferences unless doing so would adversely affect the ward. The guardian should only make decisions that are contrary to the known preferences of the ward when following those wishes of the ward would adversely affect the ward. *Texas Code of Ethics and Minimum Standards for Guardianship Services, Standard 6.* (See Appendix B for a copy of the Texas Code of Ethics and Minimum Standards for Guardianship Services).

6. **Surrogate Decision Making:** The currently expressed wishes or spoken choices of the ward should be given careful consideration by the guardian when making any decision involving the ward. When the ward is unable to express his or her own desires or choices, the guardian should employ either the principle of substituted judgment or the principle of best interest.
 - a. **Substituted Judgment:** The most accepted guiding principle for guardian to use when making decisions for others is the principle of substituted judgment. This principle is thought to be the manner in which the autonomy, guardian, beliefs and preferences of the ward are best protected. See *Texas Code of Ethics and Minimum Standards for Guardianship Services, Standard 7.*

Utilizing this principle, the guardian should attempt to learn as much as possible about the lifestyle, behaviors, preferences, and decisions made by the ward prior to incapacity. Taking these factors into careful consideration, the guardian should then make a decision that would, as closely as possible, reflect what the ward would have decided if he/she were capable of making the decision.

To do this properly, the guardian must become a detective, carefully unraveling the ward's history by consulting anyone, including the

ward, his relatives, friends, caretakers, or clergy, who may be able to provide information on the ward's preferences and past history of decision-making.

The guardian should not use substituted judgment when following the ward's wishes would cause substantial harm to the ward, or when the guardian cannot establish the ward's prior wishes. *Texas Code of Ethics and Minimum Standards for Guardianship Services, Standard 7.*

- b. **Best Interest:** In some instances, the guardian may not be able to determine what the ward would have done or chosen on a particular issue. This can occur for several reasons: there is no history of decision-making because the ward had never been competent, perhaps due to severe mental retardation; or because the ward can no longer communicate his/her wishes; or because the guardian has been unsuccessful in locating anyone who would have information on the ward's previous history.

In these situations, the guardian should make decisions based on the best interest of the ward. This principle of best interest is based not on the individual's history or desires, but on what an imaginary reasonable person would do. Although best interest standard is more objective and many factors are weighed in making the decision, it offers the least involvement of the individual ward and the ward's preferences in the decision making process. The evaluation process for best interest includes: consideration of intrusiveness, normalization, harmfulness, and least restrictiveness in order to come to a decision for the ward. When making a decision based on best interest, the guardian should seek expert advice before making the decision. See *Texas Code of Ethics and Minimum Standards for Guardianship Services, Standard 7.*

The best interest standard should be used when following the ward's wishes would cause substantial harm to the ward, or when the guardian is unable to establish the ward's prior or current wishes. Best interest decisions should include consideration of the ward's current and previously expressed wishes. *Texas Minimum Standards for Guardianship Services, Standard 7.*

7. **Least Restrictive Alternative:** The guardian should carefully evaluate the alternatives that are available and choose the one that best meets with needs of the ward while placing the least restrictions on the ward's freedom, rights, and ability to control his or her environment. The guardian should weigh the risks and benefits and develop a balance between maximizing the independence and self-determination of the ward and maintaining the ward's protection and safety.

XIV. Alternatives to Guardianship of the Estate

1. **Statutory Durable Power of Attorney:** If a person has certain disabilities, but is not mentally incapacitated, it is possible for them to choose a trusted friend or family member to have the legal authority to manage his or her financial affairs without incurring the expense of guardianship. A Statutory Durable Power of Attorney is a legal document in which a person appoints another person to manage the person's financial affairs. Such a durable power of attorney will not terminate if the person signing it subsequently becomes mentally incapacitated. A Statutory Durable Power of Attorney can be found in Chapter 752 of the Texas Estates Code.
2. **Revocable or Management Trusts:** The Texas Estates Code allows a person to create a "living" trust if the person has capacity to create the trust. Tex. Property Code §12.001 et seq. These revocable trusts allow a person to place his or her property into a trust and allow a trustee to manage the property for the person.
3. **Community Administration:** The community administration provisions of the Texas Estates Code are commonly used where there is an incapacitated spouse and a spouse that has maintained capacity. Tex. Estates Code Chapter 1353. This provision does require a judicial determination of incapacity of the spouse. The spouse with capacity acquires full power to manage, control and dispose of the entire community estate, including the sole management community property of the incapacitated spouse without an administration. In such situations no guardianship is necessary unless the incapacitated spouse owns separate property. Even if a guardian is appointed, the spouse who has capacity has the right to manage the community property.
4. **Court Created Management Trusts:** Chapter 1301 of the Texas Estates Code allows an Estates court to create a management trust with a Ward's funds. Such a trust will normally save costs to a Ward's estate over a guardianship of the estate. A corporate trustee is required, however. This will generally require an estate over \$100,000 to find a corporate trustee willing to handle it.
5. **Court Registry:** Whenever an incapacitated person without a guardian of the estate is owed money of \$100,000 or less, the funds owed to incapacitated person may be deposited in the registry of the court pursuant to Chapter 1355 of the *Texas Estates Code*. The guardian of the person may then apply to the court to withdraw funds as needed to pay for expenses of the ward. The guardian must however post a bond of twice the amount withdrawn which is

released upon the guardian's report to the court that the funds were used as promised for the ward's benefit. If an incapacitated person without a guardian of the estate owns an interest in real property, the guardian of the estate may apply to the court pursuant to Section 1351.051 et seq. of the *Texas Estates Code*, and the proceeds from the sale will be deposited into the court registry.

6. **Money Management:** Money management by a local guardianship program is a less restrictive alternative to guardianship of the estate for individuals who are not able to pay their bills and need assistance handling their finances. Money management programs use volunteers and paid staff to assist the individual with diminished capacity with bill payment services under what are known as bill payer programs which are voluntarily entered into by the individual. Money management programs also offer representative payee programs where the program is appointed as representative payee for an individual's federal benefit payments, such as Social Security, VA, Civil Service or Railroad Retirement; the program is required to account to the federal agency that pays the benefits. Many un-befriended incapacitated individuals have a guardianship program appointed as their representative payee as an alternative to a guardianship of the estate. Many family member guardians of the person are also named as representative payees rather than being appointed as guardians of the estate.

7. **Sale of Property of Incapacitated Person without Guardianship.** Someone seeking to sell an interest in property owned by an incapacitated person may find it quicker and less cumbersome to apply to the Court for permission to sell only that interest in real property. Texas Estates Code §§1351.001 and 1351.051. This Application could prevent someone from applying to be Guardian to sell a very minor share in an interest in property and is likely more cost effective than seeking a full guardianship to only sell a small fractional share of real property.

8. **Access and Management of Ward's Funds by Guardian of the Person.** Recently, the Texas legislature has created an opportunity for a Guardian of the Person to manage up to \$20,000.00 without the need to open a guardianship of the estate. Texas Estates Code § 1151.0525. The Guardian of the Person would still need to report back to the court on how funds were spent. However, this provides an alternative to a guardianship of the Estate as the Guardian of the Person could manage these without the need to file a full annual accounting. This section does require a Guardian of the Person to obtain Court permission on how funds will be spent prior to acquiring those funds.

XV. Alternatives to Guardianship of the Person

- 1. Durable Power of Attorney for Health Care:** If a person is not mentally incapacitated, he or she can also sign a Durable Power of Attorney for Health Care and appoint one or more persons that he or she trusts to make medical decisions for him or her if he or she cannot do so. A form for the Medical Power of Attorney can be found in Section 166.164 of the Texas Health and Safety Code.
- 2. Consent to Medical Treatment Act:** The legislature has passed the Consent to Medical Treatment Act which is to be used in non-emergency situations for incapacitated adult patients whose medical conditions do not involve life-sustaining treatment. Texas Health & Safety Code Ann.
 - a.** §313.001 et seq. The Act is to be used only where the patient has not executed a medical power of attorney.

The following adult persons in the following order of priority may make a medical decision for an incapacitated adult patient:

1. the patient's spouse;
2. an adult child of the patient who has the waiver and consent of all other qualified adult children of the patient to act as 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 before the patient became incapacitated, the patient's nearest living relative, or a member of the clergy.

A surrogate decision maker under the Consent to Medical Treatment Act may not consent to: (1) voluntary inpatient mental health services; (2) electro-convulsive treatment; or (3) the appointment of another surrogate decision maker.

- 3. Emergency Medical Treatment.** The Texas Health & Safety Code provides that consent for emergency medical care of an individual is not required if the individual is unable to communicate because of injury, accident, or illness,

and is suffering from a life-threatening injury. Texas Health & Safety Code Ann. §773.008.

4. **Directive to Physicians:** A person who is not mentally incapacitated may also sign a Directive to Physicians. Such a directive allows the person to direct that life sustaining procedures, such as use of a respirator, be withheld or withdrawn if two doctors certify in writing that the person has an incurable condition and that death is imminent. A form for the Directive may be found in Chapter 166 of the Texas Health and Safety Code.
5. **Out of Hospital DNR Orders.** The Texas Health & Safety Code also provides that a competent person may execute a written out-of-hospital DNR (Do Not Resuscitate) directive to out-of-hospital health care professionals to withhold cardiopulmonary resuscitation and certain other life sustaining treatment. Texas Health & Safety Code Ann. §166.092. The order may be revoked at any time without regard to the Declarant's mental capacity.

XVI. Other Information

1. **Designation of Guardian before Need Arises.** An adult with capacity is entitled to name whom they would like to serve as guardian of their person and/or their estate and to disqualify a person from serving as the guardian of their person and/or their estate.
2. **Representative Payee:** A representative payee may be appointed by the Social Security Administration to handle the social security benefits of a minor or other incapacitated person. See 42 U.S.C.A. §1382(a)(2). Social Security benefits are not considered part of the Ward's estate; therefore, guardianship is not required to receive these benefits.
3. **Veteran's Benefits Fiduciary:** The Department of Veteran's Affairs allows the appointment of a fiduciary to handle the administration of a veteran's benefits without the appointment of a guardian. See 38 U.S.C.A. §5502 (a)(1).
4. **Supported Decision Making Agreement.** An adult with a disability may enter into a supported decision making agreement with a supporter. Texas Estates Code § 1357.051 et seq. The adult must have the capacity to execute such an agreement.

The adult with a disability may authorize the supporter to do any or all of the following:

- i. 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;

- ii. 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;
- iii. assist the adult in communicating the adult's decision to appropriate persons. Texas Estates Code § 1357.051