

### III. Alternatives to Guardianship<sup>1</sup>

Unless established otherwise, there is no presumption that a person does not have legal capacity to make decisions about his or her life or to look after his or her own affairs. Sometimes, some people need help and support, on an informal or formal basis, to make some decisions in their lives. However, these supported and substitute decision-making arrangements do not always require a formal guardian. They can operate informally with trusted, supportive and diligent family and/or friends.

There are legally-recognized mechanisms and instruments that can assist in creating and structuring informal arrangements for an incapacitated individual and avoid the need for formal orders. Examples of such arrangements include powers of attorney and inter vivos trusts. The use of these alternatives in the estate-planning process has become commonplace in recent years, and it is the norm for attorneys drafting wills to also prepare various types of decision-making alternatives as part of the necessary package of instruments needed in contemplation of death.<sup>2</sup> Advance preparation for whatever circumstances may occur before death can circumvent the necessity for court intervention in those situations when an individual becomes incapacitated. In this author's opinion, the creation of most guardianships is due to lack of advanced planning.

Below is a list of common alternatives to guardianship. Some of these alternatives affect personal decisions while others affect business decisions. Although a few of these alternatives require court action, most of them require no court intervention.

#### A. Avoiding Guardianship of the Person

Numerous statutory mechanisms in Texas law serve as alternatives to creating a guardianship of the person of an incapacitated person. These alternatives are often quicker and cheaper than creating a guardianship. In no particular order of importance, the following are most, if not all, of the alternatives to a guardianship of the person:

<sup>1</sup> Judge Steve M. King of the Tarrant County Probate Court No. 1 has created a checklist of many alternatives to guardianship. His list (at least in part) can be found in Appendix A.

<sup>2</sup> Not all of these alternatives transfer decision-making to another. Some limit the decision-making abilities of others in regard to the person creating the alternative by directing that certain things be or not be done. The Texas Living Will is a good example of a method of limiting another's decision-making over the creator of the instrument. See Tex. Health & Safety Code §166.033.

#### 1. Surrogate Decision-Making under the Consent to Medical Treatment Act

Under the procedure commonly known as surrogate decision-making, certain enumerated individuals are permitted to make medical decisions for individuals in hospitals and nursing homes found incapacitated by a physician without the necessity of seeking a court-created guardianship. Tex. Health & Safety Code §313.001 et seq. This procedure has certainly reduced the need for temporary guardianships and reduced the need for permanent guardianships created only for medical-consent purposes. This procedure, however, does not apply in certain grave situations and cannot be delegated. Nor will the procedure apply if there is a guardianship or medical power of attorney in effect.

#### 2. Surrogate Decision-Making for Persons with Intellectual Disabilities

A similar provision exists for patients with intellectual disabilities residing in "Intermediate Care Facilities for People with Mental Retardation." Upon a medical assessment of incapacity, any "adult surrogate," broadly defined to include most relatives, may make "major medical or dental treatment" decisions for the "client" with intellectual disabilities. Tex. Health & Safety Code §597.041 et seq. Certain matters, however, including abortion and sterilization, as well as financial decisions, are beyond the power of the "adult surrogate." Tex. Health & Safety Code §597.003.

#### 3. Implied Consent for Emergency Care

When faced with a life-threatening injury or illness, consent to medical treatment is unnecessary for an unconscious adult or for a minor whose parents, managing or possessory conservator, or guardian is not present. Tex. Health & Safety Code §773.008.

#### 4. Advance Directives (formerly Natural Death Act)

An advance directive (a directive to physicians) is another mechanism used to avoid guardianships under Texas law. The provisions allow a person to designate in writing, before the need arises, instructions on the use or withholding of life-sustaining procedures. Tex. Health & Safety Code §166.031 et seq. Thus, an individual may specify in advance what kinds of treatment the person wants in case the person is not competent to make decisions when later suffering from a terminal or irreversible condition. In fact, the individual may designate another to make treatment decisions in those instances.<sup>3</sup> In those instances when a

<sup>3</sup> An advance directive may be executed on behalf of a patient younger than 18 years. Tex. Health & Safety Code §166.035.

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person suffering from a terminal or irreversible condition has not issued a directive to physicians and is incompetent or incapable of communicating, the statute sets out a priority list of those individuals empowered to make treatment decisions. Tex. Health & Safety Code §166.039. A relative who wishes to challenge a treatment decision made under this section must apply for temporary guardianship under Texas Probate Code (“PC”) §875 [Texas Estates Code (“EC”) Chapter 1251]<sup>4</sup>.

Another advanced directive is the Out-of-Hospital Do-Not-Resuscitate Order, whose procedures for executing the directive as well as procedures for a person who has not executed a directive and is not competent or not able to communicate are governed by Tex. Health & Safety Code §166.081 et seq. As the name implies, a terminally ill individual or his or her personal representative may direct health care professionals operating in an out-of-hospital setting not to initiate or continue certain designated life sustaining procedures.

### **5. Medical Power of Attorney**

The medical power of attorney is commonly used as a tool of guardianship avoidance. Tex. Health & Safety Code §166.151 et seq. Prudent estate planners generally will offer to draft a medical power of attorney for the client needing a will. Since 1987, federal law requires health care providers to notify all incoming patients of these instruments and give them an opportunity to sign one. The Texas Health and Safety Code provides a suggested form. Tex. Health & Safety Code §166.164.

### **6. Managing Conservatorships**

A conservatorship is similar to a guardianship for those families involved in divorce proceedings. While a conservatorship may be used in place of a guardian of the person in the context of divorce, a conservatorship should not be used in lieu of a guardianship of the estate when there are assets belonging to minor children because family law courts do not have monitoring mechanisms available. Ongoing jurisdictional problems exist between family law courts and probate courts as to visitation when a disabled minor under a conservatorship is placed under guardianship after reaching the age of majority. Tex. Fam. Code §154.301 et seq.

### **7. School-Admission Procedures**

A guardianship of the person may not be created solely for the purpose of getting a student enrolled in a school or school district other than the one in which the student is a resident. PC §684(b)(3) [EC

§1101.101(a)(2)(C)]. Sometimes, however, placing a child in another school is clearly in the best interest of the child. To ease the burden for all concerned in such situations, the Texas Legislature authorized the board of trustees of a school district to adopt guidelines for admission to a school without the need for the creation of a guardianship. Tex. Educ. Code §25.001.

### **8. Commitment Statutes**

In Texas, the general rule is that guardians do not have the authority to voluntarily admit an incapacitated person to an inpatient psychiatric facility or to a residential facility operated by the Texas Department of Aging and Disability Services (formerly Texas Department of Mental Health and Mental Retardation). PC §770(b) [EC §1151.053]. Therefore, the statutory schemes for commitment of persons with mental illness, persons with intellectual disabilities, and persons who are chemically dependent can substitute for guardianship if the purpose is to get treatment for an incapacitated person who is chemically dependent, who has a mental illness, or who has intellectual disabilities. Tex. Health & Safety Code §§462.001 et seq., 571.001 et seq., and 591.001 et seq. There are even commitment procedures available in very limited circumstances for those with AIDS and tuberculosis.

### **9. Chapter 48 Intervention (Human Resources Code)**

Chapter 48 of the Human Resources Code authorizes a probate court to intervene in an emergency situation when an incapacitated elderly person 65 years or older or a disabled person is suffering from abuse, neglect, or exploitation presenting a threat to life or physical safety. Tex. Hum. Res. Code §48.208. The court’s intervention order is based on a Petition of Intervention filed by the Adult Protective Services division of the Texas Department of Family and Protective Services. The County Attorney, or District Attorney if there is no County Attorney, represents the State. The court must find there is reasonable cause to believe that the incapacitated person is being abused, neglected, or exploited to such a degree that it affects the life or physical safety of the incapacitated or disabled person. With such a finding, the court may order the person removed to safer surroundings, may order medical services, or may order other available services. The court must appoint an attorney ad litem before issuing any order. An order lasts 10 days from the date it is rendered or from the date the person was removed, whichever is earlier. The court may extend an emergency order for an additional 30 days from the date when the original emergency order is set to expire, during which time one should be able to obtain a permanent guardianship. The court may grant a second extension of an emergency order of not more than 30 days, after notice and a hearing for good cause shown.

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<sup>4</sup> Citation to the Texas Estates Code, effective January 1, 2014, is included for reference.

The attorney ad litem is paid a reasonable fee from the county treasury. Because these situations may arise in the hours after the courthouse is closed, Texas Human Resources Code §48.208(h) provides a system for emergency detention without an order.

## **B. Avoiding Guardianship of the Estate**

There are also various alternatives to the creation of a guardianship of an estate. In no particular order of importance, the following are most, if not all, of the alternatives to guardianship of an estate:

### **1. The Durable Power of Attorney**

In executing a written durable power of attorney, the principal appoints and confers on an agent the authority to perform certain acts on behalf of the principal. The statute authorizing the creation of this instrument is known as the Texas Durable Power of Attorney Act. PC §481 et seq [EC §751.001 et seq.]. To be valid, a durable power of attorney must be signed by the principal and acknowledged by a notary. A permanent guardianship terminates the power of attorney; a temporary guardianship suspends it.

The code provides a statutory form and permits the principal to grant broad authority to the attorney-in-fact. All acts done by the attorney-in-fact “have the same effect and inure to the benefit of and bind the principal and the principal’s successors in interest as if the principal were not disabled or incapacitated.” PC §484 [EC §751.051]. The attorney-in-fact is restrained in his or her actions by the duty to inform and account. PC §489B [EC §751.101]. The attorney-in-fact “shall maintain records of each action taken or decision made.” PC §489(c) [EC §751.103(a)]. On request of the principal or the principal’s representative, an attorney-in-fact is required to account for all actions taken under the power of attorney. PC §489B(d) [EC §751.104]. If the potentially incapacitated person has a power of attorney in effect, there probably is no need to pursue a temporary guardianship to resolve estate matters.

#### **PRACTICE NOTE**

While some attorneys are including the accounting requirement in their forms, others are not.

### **2. Trusts – Inter Vivos, Testamentary, and Court-Created Trusts**

Traditionally, inter vivos and testamentary trusts as regulated by the provisions of the Texas Property Code have been used to avoid guardianships of the estate. Tex. Prop. Code §112.001 et seq. Although there are many benefits to be gained from using trusts as a guardianship-avoidance tool, there are some disadvantages as evidenced by the rise in lawsuits alleging breach of fiduciary duty. One of the major

problems lies in the absence of accountability of trustees under the provisions of most trusts. While there may be an added cost to having an incapacitated person’s business carried out under a guardianship,<sup>5</sup> it may also be prudent to do so at times. Having a fiduciary’s actions publicly monitored by the probate court often will dissipate family mistrust.

A court-created management trust is another tool the probate court has available to devise a less-restrictive alternative to maintaining a guardianship of an estate. This alternative is especially compelling for a large estate to avoid some of the constraints of a guardianship since trustees have broad investment opportunities under the Texas Trust Code. Professional management by a corporate trustee will often inure to the benefit of a ward’s estate because of the fiduciary’s expertise in investment planning.

A management trust may be created under provisions of PC §867 [EC Subchapter B, Chapter 1301]. A court may create a court-created management trust (an “867 trust”) without first creating a guardianship but the court must be “exercising probate jurisdiction.” The court must appoint an attorney ad litem and, if necessary, may appoint a guardian ad litem to represent the interests of the alleged incapacitated person in the proceeding to determine incapacity before creating an 867 trust. PC §867(b-3) (added 2009) [EC §1301.054(c)].

In some circumstances, an individual or an entity other than a financial institution (such as a guardianship program) may serve as trustee if the court finds that it is in the best interest of the incapacitated person. PC §867(c) & (e) [EC §1301.057(c)(1)]. However, if the value of the trust’s principal is more than \$150,000, the court must appoint a financial institution as trustee unless the court finds that the application for the creation of the trust, after the exercise of due diligence, has been unable to find a financial institution in the geographic area that is willing to serve as trustee. PC §867(d) [EC §1301.057(c)(2)]. A bond is required of an individual trustee, but not for a corporate trustee.

Trustees of an 867 trust are required to account to the probate court, and the fees earned by a trustee are limited to those that a guardian would earn unless the amount earned is unreasonably low under the circumstances. The probate court annually audits the accounting and determines the fees. For 867 trusts

<sup>5</sup> Arguably, the claim that guardianship is a more expensive procedure than using the trust process is false when one makes a thorough cost analysis that includes factors such as the higher start-up cost of drafting trust instruments coupled with the typical trustee fee arrangement, and then compares these with the starting cost of a guardianship along with its statutorily regulated guardian’s fees and administrative costs.

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created after September 1, 2003, a guardian of the estate may be discharged after the creation of the trust if the court determines that discharge would be in the ward's best interests. PC §868A [EC §1301.152]. Before 2003, §868A [EC §1301.152] did not allow a guardian of the estate to be discharged after creation of a management trust unless a guardian of the person remained in place to monitor the behavior of the trustee. Even then, the guardian of the estate could not be discharged unless the court found that discharge would be in the ward's best interests.

### PRACTICE NOTE

An exculpatory clause in an 867 trust is enforceable only if (1) it is limited to specific "facts and circumstances unique to the trust property" (not the trust generally) and (2) the court creating or modifying the trust specifically finds that clear and convincing evidence shows that the exculpatory clause is in the best interest of the trust beneficiary. PC §868(c) [EC §1301.103]. This section was added by the 2001 Legislature in response to *Texas Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240 (Tex. 2002), in which the Court upheld an exculpatory clause relieving the trustee from liability for ordinary negligence.

It is also possible, in limited circumstances, to have a court-created trust under Texas Property Code §142.005. With these trusts, there is no mandatory accounting requirement, and the creating court has no guidelines to determine the management fee that should be awarded the trustee. In response to *Grizzle* (see Practice Note above), the Legislature also amended Texas Property Code §142.005 to disallow the routine insertion of exculpatory clauses in court-created trusts.

Both of these types of trusts grant the trustee broader authority than a guardian has in the absence of court authority.

If a court with probate jurisdiction determines that it is in the best interests of a ward or incapacitated person, the court may order the transfer of all of the property in a §867 management trust into a subaccount of a pooled trust. The procedure for this transfer is set forth in PC §§910 to 916 [EC Chapter 1302] and will not interfere with a ward's or incapacitated person's eligibility for medical assistance under Chapter 32 of the Texas Human Resources Code. These changes in the code will allow for the enrollment of wards or incapacitated persons into subaccounts of pooled trusts, such as the ARC of Texas Master Pooled Trust or the Texas Pooled Trust. These trusts combine the relatively limited assets of their beneficiaries for investment purposes, but – like other special needs

trusts – allow each beneficiary to remain eligible for government benefits such as Medicaid.

### 3. Management of Community Property When Spouse Is Declared Incapacitated

If a court has declared one spouse incapacitated, the other spouse, in the capacity of "community administrator," has the power to manage, control and dispose of the entire community estate without the necessity of guardianship upon a finding by the court that it is in the incapacitated spouse's best interest and that the other spouse is not disqualified to be appointed as guardian of the estate under §681 [EC Subchapter H, Chapter 1104]. PC §883 [EC §§1353.003–.004]. The authority of the community manager is broad and even extends to the re-designation of beneficiaries under insurance plans previously purchased by the incapacitated person with community funds. *Salvato v. Volunteer State Life Ins. Co.*, 424 S.W.2d 1 (Tex. Civ. App. – Houston [1st Dist.] 1968, no writ). The qualification of a guardian of a ward's estate shall be of the ward's separate estate only and does not deprive the ward's spouse of control, management, or disposition of the community estate. A guardian of the estate of a married person must deliver, upon request, all community assets to the spouse.

In 2001, the Legislature substantially revised the community property administration provisions by incorporating some safeguards in a statutory scheme that formerly had none. The appointment of an attorney ad litem to represent the incapacitated spouse at the creation of a community administration or during removal proceedings better protects those subject to community administration. Making it clear that the courts that create community administration can remove the administrator negates the somewhat disingenuous argument that no court has jurisdiction to undo a community administration once the order became final. Granting the court the ability to require the community administrator to file an inventory and accountings are protective devices that reduce incidences of financial abuse. Should the community administrator fail to comply with an order requiring an inventory or accounting, the court may remove the community administrator.

If the spouse acting as community administrator is removed or is found unsuitable to act as community administrator or guardian of the estate of the incapacitated spouse's separate property estate, the court must appoint a guardian of the estate for the incapacitated spouse. The court may order the competent spouse to deliver to the guardian up to one-half of the community property subject to the spouses' joint management, control, and disposition. The guardian is required to administer that property along with (1) the incapacitated spouse's separate property and (2) community property subject to the

incapacitated spouse's sole management, control, and disposition.

In addition to incorporating such safeguards in the Probate Code, the Legislature amended the Family Code to align its provisions with the Probate Code. Thus, it is no longer possible to have the spouse who is not incapacitated manage or sell the community property under the Family Code. As of 2003, PC §883(f) [EC §1353.001] clarifies that the division of management between the competent spouse and the guardian of the estate of the incapacitated spouse does not partition community property. Rather, the community property administered by the guardian is considered the incapacitated spouse's sole management community property.

#### 4. Payment of Claims to County Clerk

When an incapacitated person or a minor is entitled to \$100,000 or less, the debtor may pay the money to the county clerk in the county of residence of the incapacitated person or minor. The clerk shall bring the payment to the probate court's attention. The probate judge shall order the clerk to invest the funds in either an interest-bearing fund or in savings bonds. There is a provision allowing certain persons to withdraw the funds for the benefit of the incapacitated person on the condition of a bond and an accounting. PC §887 [EC §§1355.102–.103]. This provision is usually used to avoid a guardianship created solely for the receipt of insurance proceeds and can be used to avoid a guardianship when an administration having minor heirs is ready to be closed.

#### 5. Sale of Property without Guardianship

Parents and managing conservators of a minor may apply to the court to sell the minor's real or personal property without the necessity of a guardianship when the value of the minor's interest in the property does not exceed \$100,000. PC §889(a) [EC §1351.001].

Similarly, the guardian of the person of a ward who does not have a guardian of the estate may apply to the court to sell the ward's real or personal property without the necessity of a guardianship of the estate when the value of the ward's interest in the property does not exceed \$100,000. PC §890 [EC §1351.052].

Proceeds from a sale under these sections shall be placed in the registry of the court and may be withdrawn in accordance with PC §887 [EC Chapter 1355].

#### PRACTICE NOTE

Funds Withdrawn From Clerk – When funds of incapacitated persons having no guardian are deposited into the registry of the court, PC §887 [EC Chapter 1355] provides a method of obtaining the money out from the

registry for use of the incapacitated person. The father, mother, or spouse may withdraw this money for the benefit of the creditor (the incapacitated person), but no fees or commissions shall be allowed to the custodian for taking care of handling or expending such money so withdrawn by him. A bond and a final accounting are required. PC §887(c) & (d) [EC §§1355.102–.104].

#### 6. Transfers under the Texas Uniform Transfers to Minors Act

Transfers may be made to minors by a donor's appointment of a custodian to receive various types of assets. The custodian has authority without court order to invest and expend the transferred assets for the support, maintenance, education, and benefit of the minor. Tex. Prop. Code §141.001 et seq.

#### 7. Receivership

When an incapacitated person's estate is in danger of injury, a guardianship may be avoided by the use of a receivership. The court appoints a receiver to handle the estate until the need for the receivership is over. The Code provisions regarding compensation and bonds apply to receivers. PC §885 [EC Chapter 1354]. Since the Legislature repealed all provisions relating to guardianships for missing persons in 1999, receiverships, not guardianships, are set up for missing persons.

#### 8. Appearance by Next Friend

Lawsuits may be brought on behalf of incapacitated persons who have no legal guardian under an entity known as a next friend. Texas Rule of Civil Procedure 44 (hereafter "TRCP"). With court approval, the next friend may take possession of any funds or personal property recovered. Tex. Prop. Code §142.002. To do so, the next friend must file a bond payable to the county judge. The clerk of the court or next friend may invest such funds in an interest-bearing account, and the next friend may safekeep the funds with a bank in order to lower the bond amount. The next friend may also petition the court for the creation of a trust for the benefit of the minor.<sup>6</sup> Tex. Prop. Code §142.005 et seq. However, a "142 Trust" cannot be created when there is a guardianship over a minor or incapacitated person. *Rodriguez v. Gonzalez*, 830 S.W.2d 799 (Tex. App. – Corpus Christi 1992, no writ). A court may not restrict the terms of a "142 Trust" beyond the restrictions contained within the statutory provisions. In *Aguilar v. Garcia*, the appellate court found that the trial court abused its

<sup>6</sup> In the 1999 legislative session, Chapter 142 of the Property Code was amended so that an appointed guardian ad litem may also petition the court for these "142 trusts."

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discretion in limiting the types of expenditures to be made out of a “142 Trust.” *Aguilar v. Garcia*, 880 S.W.2d 279 (Tex. App. – Houston [14th Dist.] 1994, no writ).

### PRACTICE NOTE

Attorney’s fees while proceeding “as next friend” are limited in the same way as are guardian’s contingency-fee agreements. *Stern v. Wonzer*, 846 S.W.2d 939 (Tex. App. – Houston [1st Dist.] 1993, no writ). In *Stern*, the court limited the attorney to a contingency fee of one-third, including expenses, holding that the limitation upon guardians’ contingency-fee agreements applied to “next friends.”

One can proceed as “next friend” only when there is no legal guardian. *Massey v. Galvan*, 822 S.W.2d 309 (Tex. App. – Houston [14th Dist.] 1992, writ denied). In *Massey*, the court of appeals abrogated an attorney’s fee contract allegedly made on behalf of two minors. The court held that the person acting as “next friend” (the wife of the decedent) had no authority to enter into such a contract because there was a legal guardian in existence – the natural guardian (the former wife of the decedent and the mother of the minors). Because the contract in *Massey* was entered into by someone without authority at the time the contract was made, it was not binding upon the minors’ estates. After the filing of the “next friend” lawsuit, the second wife became the guardian of the minors’ estates. The court of appeals rejected any suggestion of ratification by this event because the guardian of the estate failed to first obtain probate court permission to file the wrongful death lawsuit on behalf of the minors.

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## Appendix A: Less-restrictive alternatives to Guardianship<sup>7</sup>

Section 602 of the Texas Probate Code [EC §1001.001] mandates the use of less-restrictive alternatives to guardianship if less-restrictive alternatives are available and appropriate. The following list is designed to provoke constructive thought and is illustrative, but not exhaustive:

### Avoiding Guardianship of the Person

1. Surrogate Decision Making – Consent to Medical Treatment Act – Ch. 313, Texas Health and Safety Code – Applies only in case of non-emergencies. Does not cover placement and living arrangement decisions.
2. Surrogate Decision Making for Persons with Intellectual Disabilities – §597.041, Health & Safety Code – Allows Surrogate Decision Making Committees to act for persons with intellectual disabilities who are housed in an intermediate care facility for persons with intellectual disabilities (ICF/MR) – Allows medical and non-medical decisions to be made by the committee.
3. Emergency Medical Treatment Act – §773.008, Texas Health and Safety Code – covers emergencies; consent is implied in life-threatening situations.
4. Medical Power of Attorney – §166.151 to §166.164, Texas Health and Safety Code – Note, nursing homes and hospitals are reluctant to accept health care powers made close to the time it is needed. There is no enforcement mechanism to require acceptance of health care powers.
5. Directive to Physicians (“Living Will”) – §166.031et seq., Texas Health and Safety Code (“The Texas Natural Death Act”) – Be sure you know the issues.
6. Managing Conservatorships – §154.301 *et seq.*, Texas Family Code – used in a divorce context, but no monitoring mechanism exists for property management. More suitable for person-only type minor guardianships.
7. School Admission Procedures – §25.001, Texas Education Code – School districts may adopt guidelines to allow admission of non-resident children to school without the need for a guardianship.
8. Court-Ordered Mental Health Services – §462.001, §571.001, §591.001, Mental Health

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<sup>7</sup> Adapted from the checklist prepared by Judge Steve M. King of the Tarrant County Probate Court No. 1.

Code – In the case of a chronically mentally ill person, temporary commitment may well be preferable to a guardianship which might impact the ability of the person to function once they are stabilized on medication. Commitment persons with intellectual disabilities, persons who are chemically-dependent, and persons with AIDS or tuberculosis are also available in limited circumstances.

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9. Durable Power of Attorney – §481, Texas Probate Code [EC §751.001] – If the proposed ward still has enough capacity to grant the power. CAVEAT: the principal is not otherwise limited in ability to act. Also, no real check and balance on agent under a power of attorney.
10. Trusts (“Living Trust”) – §112.001 et seq., Texas Property Code – If ward has capacity.
11. Probate Management Trust – §867, Texas Probate Code [EC Subchapter B, Chapter 1301] – After creation of guardianship to obtain cost-effective property management. Mostly for large estates (\$100,000 or more), but can be created for small estates managed by an individual trustee.
12. §142 Trust – §142, Texas Property Code – Where no guardianship exists and a “next friend” suit has been brought. Cannot be created by probate court.
13. Medicaid Qualification Trust – 42 USC 1396p (1)(d)(4)(B)(i) & (ii) – Such a trust allows a patient/ward to qualify for Medicaid in a nursing home where available income is otherwise too high for qualification.
14. Management of Community Property by Capacitated Spouse – §883, Texas Probate Code [EC Subchapter A, Chapter 1353] – If spouse available and no separate property in need of management, but spouse may have to account to court. As of 2003, Tex. Prob. Code §883(f) [EC §1353.001] makes clear that the division of management between the competent spouse and the guardian of the estate of the incapacitated spouse does not partition community property. Rather, the community property administered by the guardian is considered to be the incapacitated spouse’s sole management community property.
15. Payment of Claims Without Guardianship (Payment into Court Registry) – §887, Texas Probate Code [EC Subchapter A, Chapter 1355] – Good alternative for minors (limited to \$100,000).
16. Sale of Minor’s Interest in Property – §889, Texas Probate Code [EC Subchapter A, Chapter 1351] – Simple Procedure. Limited to \$100,000.
17. Sale of Adult Incapacitated Ward’s Interest in Property – §890, Texas Probate Code [EC Subchapter B, Chapter 1351] – Available for adults with guardian of the person only. Limited to \$100,000.
18. Uniform Transfers to Minors Act – §141.001 *et seq.*, Texas Property Code – broad coverage and far-reaching implications.
19. Receivership – §885, Texas Probate Code [EC Chapter 1354]. If incapacitated person’s estate is in danger of injury, receiver can manage it until danger subsides.
20. 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.
21. Veteran’s Benefits Fiduciary – 38 USC §5502(a)(1) – 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.
22. Suit by Next of Friend – Rule 44, Texas Rules of Civil Procedure – for minors without a guardian to maintain a civil suit.
23. Social Service Agencies – Many social services agencies provide a variety of services specifically tailored to the needs of children, the disabled and the elderly.