PLANNING FOR AND/OR AVOIDING GUARDIANSHIP

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CHAPTER 1
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Biographical Information

Holly Gilman practices with Scott Stebler in the two attorney firm of Gilman & Associates, P.C. The firm’s concentration is in the areas of business formation, estate planning, probate, guardianship, and elder law. Holly’s estate planning practice frequently serves same sex clients with unique and challenging planning needs. Holly is often appointed as attorney ad litem, guardian ad litem, and personal representative in probate and guardianship cases.

Holly received her bachelor of arts with honors in psychology at Northeastern University in Boston, Massachusetts in 1976 and her juris doctor at St. Mary’s University School of Law in San Antonio, Texas in 1985. She is licensed by the State Bar of Texas, the U.S. District Court for the Western District of Texas, and the U.S. Court of Appeals for the Fifth Circuit.

Holly has been a frequent writer and speaker on estate planning, probate and guardianship issues for the State Bar of Texas, University of Texas School of Law, Austin Bar Association, and the Capital Area AIDS Legal Project. She is a member of the American Bar Association; State Bar of Texas; College of the State Bar of Texas; Real Estate, Probate and Trust Law Section of the State Bar of Texas; Austin Bar Association, Austin Bar Association’s Probate & Estate Planning Section, Chair 1999-2000; Texas Guardianship Association; and National Academy of Elder Law Attorneys.

Holly presently serves on the Board of Directors of Family Eldercare (President 2003) and on the Board of the Capital Area AIDS Legal Project, a program of AIDS Services of Austin. She is a Life Fellow of the Texas Bar Foundation and has won several awards including: Scales of Justice Award in 2004 (National Association of Legal Secretaries Foundation); Five Who Care Award in 2002 (KVUE TV Austin, Frost Bank & Slack & Davis); and the Excellence in Public Interest Award in 2001 (Texas Law Fellowships - UT School of Law).
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PLANNING FOR AND/OR AVOIDING GUARDIANSHIP

I. INTRODUCTION

A. Guardianship Policy of the State of Texas

The policy of the State of Texas relating to guardianships is to limit the guardianship to that which is necessary to promote and protect the well-being of the person. The Court is to design the guardianship to encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person. §602 Texas Probate Code (hereinafter “TPC”).

B. What Is An Incapacitated Person

An “Incapacitated person” is defined in the TPC, Section 601(14) as:

1. a minor;
2. an adult individual 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 individual’s own physical health, or to manage the individual’s own financial affairs; or
3. a person who must have a guardian appointed to receive funds due the person from any governmental source.

C. When Do You Need A Guardian

If a person is “incapacitated” as defined by the TPC, the Code directs that a court of competent jurisdiction shall appoint the incapacitated person a guardian of his or her person and/or estate who shall the powers granted by the court to make decisions regarding that person’s health, welfare, and property.

D. How Can One Avoid Guardianship

As an attorney, you will invariably want to advise your client that they should avoid guardianship because of the costs associated with guardianship and the strict limitations placed on the guardian and ward if an order appointing a guardian is signed by a judge. The two methods which I use to advise clients how to avoid guardianship are: (1) planning for disability if a client has capacity and (2) looking for a statutory alternative to guardianship if the person is a minor or an incapacitated adult.

E. Ethical Considerations

Before deciding how you should proceed to avoid a guardianship, the attorney must make some decisions regarding capacity of the person for whom the attorney’s services are sought. A common scenario is for an adult child to bring an elderly parent to the attorney’s office for estate planning purposes. There are a myriad of reasons for this, including: (1) the child knows that no planning has been done by the parent and is concerned as the parent ages, (2) the elderly person does not drive and relies on a child for transportation, or (3) the elderly person desires their child attend so they can help them understand and remember what was said during the consultation with the attorney. If the attorney finds himself or herself the situation with a parent and adult child sitting across the desk from you, you must first confront the question of “Who is my client?” and make a determination of which person sitting in front of you will ultimately be your client.

1. Suspected Incapacity:

If you suspect that the elderly parent is incapacitated, you must first determine whether that person is able to contract for legal services with you.

a. Lawyer’s Obligations under Disciplinary Rules:

“A lawyer shall take reasonable action to secure the appointment of a guardian of other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes the client lacks legal competence and that such action should be taken to protect the client.” Rule 1.02(g) of the Texas Disciplinary Rules of Professional Conduct (hereinafter DR) Comment 12 to Rule 1.02 states in part: “…The usual attorney-client relationship is established and maintained by consenting adults who possess the legal capacity to agree to the relationship. Sometimes the relationship can be established only by a legally effective appointment of the lawyer to represent a person. Unless the lawyer is legally authorized to act for a person under a disability, an attorney-client relationship does not exist for the purposes of this rule.

b. Recommendation for Suspected Incapacity:

If you have a question of capacity, send the potential client to his or her physician for a mental status examination to determine capacity BEFORE entering into an agreement with that person to represent them.

(1) Partial Incapacity of Adult: If the physician concludes that the potential client is partially incapacitated, you still will need to decide whether the potential client has the ability to contract with you and whether they have testamentary capacity. If you are not sure that the potential client has both
capacity to contract and testamentary capacity, it may be safer to represent another family member in seeking to avoid guardianship by methods other than planning by the potential client.

c. Incapacity During Representation: What happens if your client becomes incapacitated while you are in the process of drafting estate and disability planning documents?

(1) If Client has No Existing Incapacity Documents:
You will need to decide whether the family member they wished to appoint as an agent is able to assist them without needing to be appointed as a guardian. If not and you feel that a legal representative should be appointed to protect that client’s interests, follow DR 1.02(g) and §683A of TPC to notify the court with jurisdiction over guardianship cases in the client’s county. Note that Comment 17 to DR 1.05 makes mention of DR 1.02(g) stating that disclosure of confidential information in order to comply with DR 1.02(g) is appropriate.

(2) If Client has Existing Incapacity Documents:
You may be able to continue the representation of the incapacitated client while acting through the legal representative as long as the actions are taken for the benefit of the client.

(a) Comment 13 to DR 1.02 indicates: that if a legal representative has been appointed, the lawyer should ordinarily look to the legal representative for decisions on behalf of the client.

(b) Comment 5 to DR 1.03 provides in part: “In addition to communicating with any legal representative, a lawyer should seek to maintain reasonable communication with a client under a disability, insofar as possible. When a lawyer reasonably believes a client suffers a mental disability or is not legally competent, it may not be possible to maintain the usual attorney-client relationship. Nevertheless, the client may have the ability to understand, deliberate upon, and reach conclusions about some matters affecting the client’s own well being....The fact that a client suffers a disability does not diminish the desirability of treating the client with attention and respect.”

II. PLANNING TO AVOID A GUARDIANSHIP
A. Planning to Avoid Guardian of Person by Adult with Capacity
1. Medical Power of Attorney
A competent adult may execute a medical power of attorney to appoint an agent to make medical decisions on the principal’s behalf of the principal is determined to be incapacitated by his or her physician pursuant to §166.151 et seq., Texas Health & Safety Code (hereinafter “Tex. H&S Code”). The disclosure form which the client must sign is located at §166.163 of the Tex. H&S Code and the actual form for the medical power of attorney is located at §166.164 of the Tex. H&S Code.

2. Directive to Physicians and Family or Surrogates
An advanced directive, commonly known to our clients as a “living will,” which allows a competent adult to give instructions to administer, withhold, or withdraw life-sustaining treatment in the event the adult is in a terminal or irreversible condition. The form for this directive is located at §166.033 of the Tex. H&S Code.

a. Allows Designation of Agent
The form allows the client to designate an agent if he or she has no medical power of attorney.

b. AMA Supplemental Medical Directive
The American Medical Association has developed a Supplemental Medical Directive which can and should be used in conjunction with a Directive to Physicians to further define the client’s wishes. A copy of the Supplemental Medical Directive is included in Appendix “A.”

3. Declaration for Mental Health Treatment
Can only be executed by a person with capacity. See §137.001 et seq., Texas Civil Practice & Remedies Code (hereinafter “Tex. CP&RC”).

a. Limitation
The declaration is only effective upon execution, however, it is valid for only three years from date of execution unless declarant is incapacitated at three year anniversary in which case it stays in effect until incapacity has concluded.

b. What Can Be Included in Declaration
The declaration may include consent to or refusal of mental health treatment. See §137.002 Tex. CP&RC.
c. Form of the Declaration
   See §137.011 Tex. CP&RC for the form of a Declaration for Mental Health Treatment.

4. Other Advanced Directives - Advanced directives other than the Medical Power of Attorney and the Directive to Physicians are set forth in the Advanced Directives Act, §166.001 et seq., Tex. H&S Code. These directives include the following:
   a. Written Out-of-Hospital DNR Order by Competent Patients
      A competent person may execute a written out-of-hospital DNR directive to out-of-hospital health care professionals to withhold cardiopulmonary resuscitation and certain other life sustaining treatment. See §166.082 Tex. H&S Code. This document is to be prepared on a standard form as specified by the Texas Department of Health. The DNR order may be revoked at any time without regard to the Declarant’s mental capacity. See §166.092 Tex. H&S Code.
   b. Nonwritten Directive by Competent Adult
      Under §166.034 Tex. H&S Code, a nonwritten directive must be made by a competent adult declarant in the presence of the attending physician and two witnesses and the physician must then make the existence of the directive part of the declarant’s medical record and record the name of the two witnesses.

B. Planning to Avoid Guardian of Estate by Adult with Capacity
   1. Durable Power of Attorney Act
      Allows for Powers of Attorney which will continue in the event of future incapacity of the principal. See §481 Tex. Probate Code.
      a. Statutory Durable Power of Attorney
         The most common form used under the Durable Power of Attorney Act. Can be used by an agent to handle various transactions on behalf of an incapacitated persons. Generally accepted by third parties to allow the agent to handle matters on behalf of an incapacitated adult without the need for a guardianship. Under the current form, the client (principal) can choose to allow the agent to make gifts or not make gifts and the power can be made to be “shifting” (given immediately upon execution) or “springing” (given effect upon the principal’s incapacity).
   b. Practical Problems with Powers of Attorney
      (1) Springing Power Selected:
         Third party wants to know whether incapacity really occurred and physician will not sign a statement declaring under HIPAA? Possible Resolution: If principal truly incapacitated and agent under Medical POA starts acting, he or she should be entitled to get records and instruct physician to complete an incapacity statement.
      (2) Third Party Refusal to Accept:
         What happens if third party refuses to accept the POA? Possible resolutions include: (a) having the agent sign an affidavit that he or she has no knowledge of revocation of POA, and/or (b) including a clause in POA which allows agent to sue any third parties refusing to accept POA. See Appendix “B” for clauses to add to Statutory Durable POAs.
      (3) Principal Refuses to Acknowledge Incapacity:
         If principal refuses to acknowledge that he or she is incapacitated and will not allow agent to act as necessary. Possible resolution: include language in the Special Instructions Section of the POA to allow one or more designated family members or friends or other disinterested parties to make the determination of disability. See Appendix B for possible clause to add to Statutory Durable POAs.
      (4) Agent Abuses Power of Attorney
         What happens when agent turns out to be non-trustworthy and principal is incapacitated and unable to sue? The Durable POA Act now requires an agent submit an annual accounting to the principal. Possible resolutions: (i) POA can appoint same person who will be designated to determine disability as the person to whom the accountings should be provided assuming the principal is incapacitated. (ii) Principal can appoint a corporate trustee to review accountings. Likely resolution: Attorney for principal or family member of principal must file for guardianship over estate to stop financial abuse by an agent.
      (5) Is the Power of Attorney “Stale”?
         Often times the reason for a third party refusing to accept a power of attorney is because of the age of it. While there is no provision in the durable power of attorney act which revokes or terminates a power of attorney due merely to its age, third parties often refuse to accept a power of attorney which is more than ten (10) years old. A solution to this problem is to have the client complete a new power of attorney every three (3) to five (5) years naming the same agents, if appropriate,
to keep it “fresh.” The problem arises when the client becomes incapacitated and can no longer complete a new power of attorney. It is more likely that a third party is willing to take a power of attorney which has been “refreshed” every few years before the principal became incapacitated. Assuming each POA has been filed in the county records where the principal owns real property, the effect will show a history of the principal’s intention to have the power honored by third parties.

2. Revocable Management Trusts

Many practitioners recommend to their clients to consider using the revocable management trust to deal with the client’s assets in they become incapacitated in the future.

a. Benefits of Using Revocable Management Trusts

(1) **Legal Title:**
Trustee hold legal title to the assets in the trust so there is no confusion about who third parties should be dealing with when it comes to the client’s assets. If a third party refuses to deal with the trustee, the trustee may sue.

(2) **Well Established Law:**
There is well-established law regarding administration of the trusts. If the trust document itself does not specify the powers and authority, the Texas Trust Code will fill in the missing provisions.

(3) **All Property Not in Trust:**
If the client has not placed all of his or her property into the trust before incapacity, it is likely that the agent under a Statutory Durable Power of Attorney could transfer the remaining assets into the trust.

b. Problems with Using Revocable Management Trusts

(1) **Obligations under Uniform Prudent Investor Act:**
While a client may not be subject to certain obligations under the Uniform Prudent Investor Act, §117.001 et seq., Texas Property Code (such as the duty to diversify the trust assets) a successor trustee will be subject to the duties set forth in the Act unless specifically excluded by the grantor when creating the trust. The effect of UPIA application to an inexperienced trustee may be either to subject the trustee to unknown liabilities for failure to comply or to discourage the trustee from serving in the first place. Other UPIA provisions which could present problems include: claim of self-dealing by a successor trustee if he or she is also a family member of the grantor-beneficiary and is making gifts to reduce estate taxes or qualify the beneficiary for Medicaid benefits and limitations on exculpatory clauses allowed for trustees under UPIA. Possible resolutions include: (1) allowing the successor trustee to appoint a corporate co-trustee to serve with the inexperienced trustee; (2) including provisions within a trust and the statutory durable POA to allow the trustee to make gifts to himself or herself to the extent of gifting to other family members within the same class.

(2) **Trustee Misconduct or Theft of Assets:**
If a successor trustee takes over management of the trust assets after incapacity of a grantor and misappropriates those assets for his or her own benefit, it may be hard for another interested family member to challenge the actions of the successor trustee. The Texas Trust Code clearly allows for actions against the trustee, but who has standing to bring legal actions on behalf of the incapacitated beneficiary is less clear. Possible resolutions include: (i) the appointment of a trust protector in the trust instrument or (ii) an interested family member bringing a guardianship action on behalf of the incapacitated person with the hope that they will be appointed by the court to bring suit against a “trustee gone bad.”

(3) **Are Testamentary Goals Thwarted?**
If an agent under a durable power of attorney is given the power to create and fund a revocable management trust on behalf of the incapacitated principal, can the terms of such trust end up thwarting the testamentary goals of the principal? It is well established in the law that a guardian cannot modify a ward’s will to provide for a different disposition of property on the death of the ward. If an agent is allow to create a revocable management trust on behalf of a principal and appoint himself or herself trustee, are there any clear limits over how the trust instrument will distribute assets on the death of the incapacitated principal-beneficiary? What is to prevent a trustee from either selling or using up assets specifically gifted to a particular family member in the principal-beneficiary’s will and thereby modifying the testamentary plan of the principal? Possible resolutions include: (1) making sure that the property reverts back to the estate of the incapacitated beneficiary at the time of death; (2) a trust protector could be beneficial here; and (3) a grantor should consider creating a Standby Revocable Trust.

c. **Using Standby Revocable Trusts**
A “standby revocable trust” is no different than a self-declared revocable trust and is the preferred method
of avoiding guardianship by Professor Stanley Johanson of University of Texas School of Law. Prof. Johanson contends that if a trust is warranted because of the client’s health being poor or there is concern that senility is approaching, but a client is unwilling to relinquish control presently, the standby revocable trust can be put into operation with the client still in control over the assets, but the client’s assets will either be retitled into his or her name as trustee or ready to transfer into the trust by the agent under a durable power of attorney if a change in management is necessary do to incapacity of the client.

(1) Determining Funding of Trust
Determining whether and when to fund or further fund the standby revocable trust is going to be based upon a determination of whether the grantor is incapacitated. Although most practitioners use the physician’s determination that his or her patient is no longer capable of managing his or her financial affairs as the triggering mechanism, Prof. Johanson recommends a trusted family member close to the situation to decide the incapacity. Often times, this will also be the person who is appointed as the agent under a durable POA.

C. Avoiding Unwanted Guardians
1. Declaration of Guardian in the Event of Later Incapacity or Need of Guardian
An adult with capacity is entitled to name who they would like to serve as guardian of their person and/or their estate. Upon incapacity, the court is instructed by the declarant to appoint the designated person to serve as guardian unless that person is disqualified or would not serve the best interest of the ward. The best feature of the Declaration is to allow the declarant to disqualify persons from serving as the guardian of their person and/or their estate. A court cannot appoint the person who is disqualified by the declarant.

a. Section 679(b) TPC provides:
“A declarant may, in the declaration, disqualify named persons from serving as guardian of the declarant’s person or estate, and the persons named may not be appointed guardian under any circumstances.”

(1) The disqualification under the declaration is also recognized in §681(9) TPC as a person who may not be appointed guardian

b. Requirements of Declaration of Guardian
The requirements are similar to the requirements of a will. Person executing declaration must have capacity, it must be either written wholly in the handwriting of the declarant OR attested to by two witnesses which are each 14 year of age or older who are not named in the declarant, may have a self proving affidavit, and it may be revoked in any manner as one can revoke a will under §63 TPC.

III. STATUTES AVOIDING GUARDIANSHIPS FOR ADULT INCAPACITATED PERSONS
A. Avoiding Guardianships Over the Person
1. Consent to Medical Treatment Act
To be used in non-emergency situations for incapacitated adult patients whose medical conditions do NOT involve the withholding or withdrawal of life-sustaining treatment and used only where the patient has NOT executed a medical power of attorney. See §313.001 et seq., Tex. H&S Code.

a. Prerequisites
The prerequisites for consent by a surrogate decision maker is that the adult patient must be in a hospital or nursing home and be comatose, incapacitated, or otherwise mentally or physically incapable of communication and in need of medical treatment. If the surrogate decision maker’s consent to medical treatment is not made in person, the consent must be reduced to writing in the patient’s medical record and signed by the hospital or nursing home staff receiving the consent. See § 313.005 Tex. H&S Code Ann.

b. Priority Order
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 reasonable 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.

NOTE: a surrogate decision maker under the Consent to Medical Treatment Act may not consent to: (1) voluntary inpatient mental health services; (2) electroconvulsive treatment; or (3) the appointment of another surrogate decision-maker.
2. Surrogate Decision Making for Mentally Retarded Persons
   Allows a surrogate decision maker for persons suffering from mental retardation who located in intermediate care facilities and who lack capacity to have medical and dental decisions made for them by a surrogate. The surrogate consent committee requirements as well as who can serve as a surrogate are set forth in §597.041 et seq of Tex. H&S Code.

3. Emergency Medical Treatment
   Consent for emergency medical care of an individual is not required if an individual is unable to communicate because of injury, accident or illness and is suffering from a life-threatening injury. See §773.008 Tex. H&S Code.

4. Nonwritten Out-of-Hospital DNR by Incapacitated Patients
   This Nonwritten DNR is permissible under §166.088 Tex. H&S Code Ann. if the decision is based upon knowledge of what the patient would have desired:
   a. When to Use.
      (1) If no out-of-hospital DNR and patient is incapacitated or incapable of communication, the attending physician and the person’s legal guardian or agent with the medical power of attorney may execute an out-of-hospital DNR order under §166.088(a) Tex. H&S Code.
      (2) If patient is incapacitated or incapable of communication and there is no guardian or agent under a medical power of attorney, the attending physician and a qualified relative may execute an out-of-hospital DNR.
      (3) If patient is incapacitated or incapable of communication and there is no qualified relative available, an out of hospital DNR order may be concurred with by another doctor who is not treating the patient and who is a representative of the ethics or medical committee of the health care facility in which the person is a patient.

   b. Challenges to Out-of-Hospital DNR Orders
      May be made by applying for temporary guardianship under Section 875, Texas Probate Code by any of the following persons: (1) patient’s spouse; (2) patient’s reasonably available adult children; (3) patient’s parents; or (4) patient’s nearest living relative. §§166.088(g) and 166.039(b) Tex. H&S Code

   c. Revocation of Out-of-Hospital DNR Order
      An Out-of-Hospital DNR Order may be revoked by a Declarant at any time WITHOUT regard to a Declarant’s mental capacity. See §166.092, Tex. H&S Code.

5. Commitment Actions for Veterans
   The Department of Veterans’ Affairs provides for commitment actions by the Department on behalf of mentally incompetent veterans. See 38 U.S.C.A. §5501.

B. Avoiding Guardianships Over the Estate
1. Community Administration
   Commonly used where there is an incapacitated spouse. Requires a judicial declaration of incapacity of a spouse and the other spouse with capacity. The spouse with capacity acquires full power to manage, control & dispose of the entire community estate, including sole manage community property of the incapacitated spouse without an administration under §883 TPC. There is no guardianship 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.

2. Sale of Property of Ward without a Guardianship of the Estate
   Applies to a ward who has a guardian over their person, but no guardian over their estate under §890 TPC.
   a. Requirements:
      (1) $100,000 or less in value of property to be sold;
      (2) Guardian of the Person must apply for permission to sell property; and
      (3) Funds must be deposited into the court registry after sale.

3. Court Created Section 867 Management Trust
   Allows a probate court to create a management trust with a Ward’s funds under §867 TPC on application by a guardian of a ward, attorney ad litem or a guardian ad litem. Generally requires a financial institution to serve as trustee, but the trustee may be an individual if the ward’s assets total $50,000 or less or upon proof that a .
   a. Terms Required in the Management Trust.
      Set forth in §868 TPC and include: who is the beneficiary, how trustee may disburse funds from the trust, the annual accounting requirements, and the
determinations the court is required to make in order to establish the trust.

b. Discharge of Guardian of Estate
   The court may discharge a guardian of the estate and continue a trust if it is in the ward’s best interest. §868A TPC.

   While not specifically identified by the statutes relating to 867 Trusts, the court is permitted to authorize that the trust contain provisions as necessary to establish a special needs trust 42 U.S.C. Section 1396p(d)(4)(A).

4. Court Created Section 142 Trust
   Allows for management of property recovered in a suit by a next friend or guardian ad litem in a suit in which a minor or incapacitated person who has no legal guardian is represented by a next friend or an appointed guardian ad litem. The court, on application and hearing, may provide by decree for the investment of funds accruing to the minor or incapacitated person under the judgment in the suit. See §142.005 Tex. Property Code.

   a. Which Courts Use 142 Trusts
      Generally, 142 Trusts are used by district or county courts where judgment is established for a minor or incapacitated person without the need of creating a guardianship. Statutory Probate Courts in Texas generally favor §867 TPC trusts so that the annual accounting requirements must be met.

   b. Special Needs Trust
      If the court finds that it would be in the best interests of the minor or incapacitated person for whom a trust is created, the 142 trust may contain provisions as necessary to establish a special needs trust 42 U.S.C. Section 1396p(d)(4)(A).

5. Payment of Claims Without a Guardianship
   Allows a debtor of an incapacitated person or a minor who owes the incapacitated person or minor $100,000 or less to pay those funds into the registry of the Court without the necessity of creation of a guardianship. §887 TPC.

6. Sale of Property of Ward Without Guardianship of Estate
   Applies only when a guardian of the person has been appointed. A guardian of the person can apply to sell the interest of a Ward in either real or personal property without a guardianship of the estate if the Ward’s net interest in the assets do not exceed $100,000. The sales proceeds are placed into the court registry under §890 TPC. The proceeds may later be removed under §887 TPC.

7. Medicaid Qualification Trust (“Miller Trust”)
   Allows a person needing long-term nursing home care to qualify for Medicaid for such care where the person’s income exceeds the amount required under state sponsored Medicaid programs. See 42 U.S.C. 1396p(1)(d)(4)(B)(i)&(ii). Such trust can be created by the agent under a statutory durable power of attorney. Alternatively, if there is a guardian of the person, such guardian may apply to the court and receive an order granting permission to create a Miller Trust under §767(a)(5) TPC.

8. Receivership
   If an incapacitated person’s estate is in danger of injury, loss or waste section 885, TPC allows for the appointment of a receiver to manage the property until the estate is out of danger.

9. Representative Payee
   Authorizes the appointment of a representative payee for the benefit of an incapacitated adult who is receiving Social Security benefits such as Supplemental Security Income or Social Security Disability payments. 42 U.S.C. §1383(a)(2).

10. Veterans Administration Fiduciary
    Allows an individual to qualify as a fiduciary under the VA rules to manage VA benefits paid to an incapacitated veteran. 38 U.S.C. §5502(a)(1).

IV. AVOIDING GUARDIANSHIPS FOR MINORS

A. Avoiding Guardian Over Person of Minor
1. Parents Are Natural Guardians of Person
   Section 676(b) TPC states that if the parents live together, both parents are the natural guardians of the person of the minor children by marriage, and one of the parents is entitled to be appointed as guardian of the children’s estate.

2. Managing Conservatorship
   Section 153.005 of the Tex. Family Code, authorizes the court to appoint either joint managing conservators or a sole managing conservator in a suit involving a child.
a. Who Can Serve as Managing Conservator
   Parents, a competent adult, an authorized agency, or a licensed child-placing agency. (See § 153.005(b) Tex. Family Code).

b. Rights and Duties of Sole Managing Conservator
   Section 153.132 outlines the rights and duties of a sole managing conservator, which may also be limited or broadened by a court. The rights of a sole managing conservator which exist regardless of other rights and duties are imposed or provided by the court are:

   (1) the right to designate the primary residence of the child;
   (2) the right to consent to medical, dental, and surgical treatment involving invasive procedures, and to consent to psychiatric and psychological treatment;
   (3) the right to receive and give receipt for periodic payments for the support of the child and to hold or disburse these funds for the benefit of the child;
   (4) the right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;
   (5) the right to consent to marriage and to enlistment in the armed forces of the United States; and
   (6) the right to make decisions concerning the child's education

3. Medical Consent by Non-Parent
   Section 32.001 of the Tex. Family Code provides that the following persons may consent to medical, dental, psychological, and surgical treatment of a child when the person having the right to consent as otherwise provided by law cannot be contacted and that person has not given actual notice to the contrary:

   (1) a grandparent of the child;
   (2) an adult brother or sister of the child;
   (3) an adult aunt or uncle of the child;
   (4) an educational institution in which the child is enrolled that has received written authorization to consent from a person having the right to consent;
   (5) an adult who has actual care, control, and possession of the child and has written authorization to consent from a person having the right to consent;
   (6) a court having jurisdiction over a suit affecting the parent-child relationship of which the child is the subject;
   (7) an adult responsible for the actual care, control, and possession of a child under the jurisdiction of a juvenile court or committed by a juvenile court to the care of an agency of the state or county; or
   (8) a peace officer who has lawfully taken custody of a minor, if the peace officer has reasonable grounds to believe the minor is in need of immediate medical treatment.

4. Advanced Directives For Minors
   A Directive to Physicians for a minor may be executed on behalf of the minor by: (i) the patient’s spouse, if an adult; (ii) the patient’s parents; or (iii) the patient’s legal guardian pursuant to §166.035 of the H&S Code.

5. Emergency Medical Treatment
   Consent for emergency medical care of minor is not required if a parent or other qualified individual is not available and the minor is suffering from an injury, accident or illness and is suffering from a life-threatening injury. See §773.008 Tex. H&S Code.

6. School Admission
   Section 25.001 Tex. Education Code provides a method for a non-parent, but one who has custody of a child to seek admission and enroll a minor child in the school district.

7. Abortion for Minor
   Chapter 33 Tex. Family Code deals with notice required if a minor wishes to have an abortion. Section 33.003 of the Family Code sets forth a method for a minor to secure judicial approval of an abortion without notice to a parent, managing conservator or guardian.

8. B. Avoiding Guardian Over Estate of Minor
   1. Parent Not Guardian of Estate Without Appointment by Court
      Section 676 TPC indicates that parents are not the legal guardians of their children’s estates unless they are so appointed by a court of competent jurisdiction. Therefore, parents do not have the legal authority to independently control or possess any property that belongs to their children unless that authority is granted elsewhere.
2 Rights of Sole Managing Conservator
Section 153.132 Tex. Family Code also outlines some rights a sole managing conservator which are financial in nature. Those rights are:

a. the right to the services and earnings of the child; and

b. except when a guardian of the child's estate or a guardian or attorney ad litem has been appointed for the child, the right to act as an agent of the child in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government.

3. Payment of Claims Without Guardianship
Allows a debtor of a minor who owes the minor $100,000 or less to pay those funds into the registry of the Court without the necessity of creation of a guardianship. See §887, TPC.

4. Sale of Property of Ward Without Guardianship of Estate
Applies only when a guardian of the person has been appointed. A guardian of the person can apply to sell the interest of a Ward in either real or personal property without a guardianship of the estate if the Ward’s net interest in the assets do not exceed $100,000. The sales proceeds are placed into the court registry under §890 TPC. The proceeds may later be removed under the methods set forth in §887 TPC.

5. Texas Uniform Transfers To Minors Act
Allows the transfer of assets to an account established for the benefit of the minor with the appointment of a custodian of the account on the minor’s behalf. See Chapter 141, Tex. Property Code.

6. Representative Payee
Authorizes the appointment of a representative payee for the benefit of a minor who is receiving Social Security benefits such as payments for a deceased or incapacitated parent. 42 U.S.C. §1383(a)(2).

7. Suits by Next Friend
The Texas Rules of Civil Procedure provide for civil suit to be brought on behalf of minors and incapacitated persons (identified in rule as: “lunatics, idiots, or persons non-compos mentis”) without the need of a guardianship. See Rule 44, Tex. Rules of Civil Procedure.

V. WHEN NOT TO AVOID A GUARDIANSHIP

A. Medical Treatment Not Permitted by Alternative Means
Agents under a Medical Power of Attorney or a surrogate under the Consent to Medical Treatment Act are not entitled to make certain medical decisions on behalf of incapacitated persons. Those decisions are: voluntary in-patient mental health services, convulsive treatment, psychosurgery, abortion, or the appointment of another surrogate decision-maker. See §§ 313.004 and 166.163 Tex. H&S Code. In these circumstances, a guardian will need to be appointed and a court order authorizing the treatment secured by the guardian; provided however, a guardian of the person under §767(b) TPC is granted the power to transport the ward to an inpatient mental health facility for a preliminary examination in accordance with §573.003 of Tex. H&S Code.

B. Ward in Another State Owns Real Property Interest in Texas Which Needs To Be Sold
An out-of-state guardian serving by appointment from a court in another state who desires to sell the Ward’s interest in real property located in Texas will required an ancillary guardianship of the estate under §881 TPC. This is true even if the guardian has an order authorizing the sale of the Ward’s real property. Ancillary guardianships are somewhat less expensive than a full guardianship over the estate since they do not require the appointment of an attorney ad litem and evidence to determine capacity of the ward. In all other respects, the out-of-state guardian wishing to sell property for the Ward will need to follow the same procedure to sell real property as if they were appointed in Texas.

C. Agent Under Durable Power of Attorney Misappropriates Principal's Assets, Will Not Account Nor Make Restitution
Do not try to avoid a guardianship when an agent under a Durable Power of Attorney has misappropriated or stolen the principal’s assets. While you can opt to get Adult Protective Services involved, they will likely have no recourse other than to seek the appointment of a guardian for the estate by giving notice to the court under §683A TPC.

VI. CONCLUSION
As well as being the policy of the State of Texas to use the least restrictive alternative when it comes to imposing guardianship on the citizens of the state, it is a lawyer’s duty to look for options that protect the
incapacitated while allowing them as much independence and autonomy as possible given the circumstances of their incapacity. We are all aware of the enormous financial burden a guardianship of the person and estate with full authority has on the estate of the Ward. An equally difficult yet different burden rests on the shoulders of the person serving as guardian to the incapacitated adult or minor child.

Planning to avoid incapacity is one of the best services we can provide to our clients as part of their estate planning. In the unfortunate event we were not able to do estate planning for a person before they became incapacitated, looking for alternatives to a full blown guardianship of the person and estate is the next best thing we can provide to those who will be caring for them.
SUPPLEMENTAL MEDICAL DIRECTIVE

I attach this supplemental Medical Directive (form promulgated by the American Medical Association) to my “Directive to Physicians” to provide guidance to my healthcare providers and my special attorney-in fact appointed in the Medical Power of Attorney executed on even date herewith. I understand that the wishes expressed in these six cases may not cover all possible aspects of my care if I become incompetent.

This supplemental Medical Directive should not be executed without first executing a statutory Directive to Physicians authorized by the Texas Health and Safety Code.

____________________________________
“Client Name”, Declarant

Dated: _____________________________

The declarant has been personally known to me and I believe the declarant to be of sound mind. I am not related to the declarant by blood or marriage. I would not be entitled to any portion of the declarant’s estate on the declarant’s death. I am not the attending physician of the declarant or an employee of the attending physician or a health facility in which the declarant is a patient. I am not a patient in the health care facility in which the declarant is a patient. I have no claim against any portion of the declarant’s estate on the declarant’s death.

____________________________________
Witness

____________________________________
Witness
**MY MEDICAL DIRECTIVE**

This Medical Directive expresses, and shall stand for, my wishes regarding medical treatments in the event that illness should make me unable to communicate them directly. I make this Directive, being 18 years or more of age, of sound mind, and appreciating the consequences of my decision.

---

### SITUATION A

If I am in a coma or persistent vegetative state and, in the opinion of my physician and several consultants, have no known hope of regaining awareness and higher mental functions no matter what is done, then my wishes regarding use of the following, if considered medically reasonable, would be:

<table>
<thead>
<tr>
<th></th>
<th>I want</th>
<th>I want treatment tried. If no clear improvement, stop.</th>
<th>I am undecided</th>
<th>I do not want</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cardiopulmonary Resuscitation:</td>
<td>Not Applicable</td>
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</tbody>
</table>

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### SITUATION B

If I am in a coma and, in the opinion of my physician and several consultants, have a small likelihood of surviving with permanent brain damage, and a much larger likelihood of dying, then my wishes regarding the use of the following, if considered medically reasonable, would be:

<table>
<thead>
<tr>
<th></th>
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This Medical Directive expresses, and shall stand for, my wishes regarding medical treatments in the event that illness should make me unable to communicate them directly. I make this Directive, being 18 years or more of age, of sound mind, and appreciating the consequences of my decision.

### Signature

______________________________  ________________________________
Signature                         Printed Name

### Cardiopulmonary Resuscitation:
if at the point of death, using drugs and electric shock to keep the heart beating, artificial breathing.

### Mechanical Breathing:
breathing by machine.

### Artificial Nutrition and Hydration:
giving nutrition and fluid through a tube in the veins nose or stomach.

### Major Surgery:
such as removing the gall bladder or part of the intestines.

### Kidney Dialysis:
cleaning the blood by machine or by fluid passed through the belly.

### Chemotherapy:
using drugs to fight cancer.

### Minor Surgery:
such as removing some tissue from an infected toe.

### Invasive Diagnostic Tests:
such as using a flexible tube to look into the stomach.

### Blood or Blood Products:
such as giving transfusions.

### Antibiotics:
using drugs to fight infection.

### Simple Diagnostic Tests:
such as performing blood tests or x-rays.

### Pain Medications, even if they dull consciousness and indirectly shorten my life.

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**SITUATION C**

If I have brain damage or some brain disease that in the opinion of my physician and several consultants cannot be reversed and that makes me unable to recognize people or to speak understandably, and I also have a terminal illness, such as incurable cancer, that will likely be the cause of my death, then my wishes regarding use of the following, if considered medically reasonable, would be:

<table>
<thead>
<tr>
<th>I want</th>
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</table>

**SITUATION D**

If I have brain damage or some brain disease that in the opinion of my physician and several consultants cannot be reversed and then that makes me unable to recognize people or to speak understandably, but I have no terminal illness, and I can live in this condition for a long time, then my wishes regarding use of the following, if considered medically reasonable, would be:

<table>
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<tr>
<th>I want</th>
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Not Applicable
**MY MEDICAL DIRECTIVE**

This Medical Directive expresses, and shall stand for, my wishes regarding medical treatments in the event that illness should make me unable to communicate them directly. I make this Directive, being 18 years or more of age, of sound mind, and appreciating the consequences of my decision.

---

**SITUATION E**

If I have an incurable chronic illness that causes physical suffering or minor mental disability and will ultimately cause death, and then I develop a life-threatening but reversible illness:

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<tr>
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**SITUATION F**

If I am in my current state of health (describe briefly) ___________________________________________ and then develop a life-threatening but reversible illness:

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**Signature**

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**Printed Name**

Cardiopulmonary Resuscitation:
if at the point of death, using drugs and electric shock to keep the heart beating, artificial breathing.

Mechanical Breathing:
breathing by machine.

Artificial Nutrition and Hydration:
giving nutrition and fluid through a tube in the veins, nose or stomach.

Major Surgery:
such as removing the gall bladder or part of the intestines.

Kidney Dialysis:
cleaning the blood by machine or by fluid passed through the belly.

Chemotherapy:
using drugs to fight cancer.

Minor Surgery:
such as removing some tissue from an infected toe.

Invasive Diagnostic Tests:
such as using a flexible tube to look into the stomach.

Blood or Blood Products:
such as giving transfusions.

Antibiotics:
using drugs to fight infection .

Simple Diagnostic Tests:
such as performing blood tests or x-rays.

Pain Medications, even if they dull consciousness and indirectly shorten my life.
APPENDIX B

HELPFUL CLAUSES TO CONSIDER
ADDING TO A CLIENT’S STATUTORY DURABLE POWER OF ATTORNEY

Power to Create and Transfer Assets Into Revocable Trust. My agent shall have the power and authority to create a trust for my benefit, naming my agent as trustee or, if my agent so chooses, naming a bank or trust company with assets under management of $100 million or more as trustee, which trust may also benefit ________________ (e.g. my spouse and descendants), and to transfer all or any part of my property or estate to the trust so created. My trustee shall have no authority to modify the disposition of my estate as provided in my last will and testament.

Power to Transfer Assets Into Revocable Trust. My agent shall have the power and authority to transfer into to any existing revocable trust of which I am a grantor, a beneficiary, or both, even though my agent may be the trustee or successor trustee.

Power to Make Gifts for Medicaid Planning. My agent shall have the power to make gifts for the purposes of qualifying me for Medicaid benefits for long-term nursing home care or other in-home care program which requires a resource limitation. Such gift power shall extend to the following persons: _____________ (list names here).

Power to Create and Transfer Assets Into a Special Needs Trust. If appropriate under state and federal law, my agent shall have the power and authority to create a Special Needs Trust place my assets into the Trust which may allow me to become eligible for public benefits if I become incapacitated or disabled. My agent may appoint himself or herself as Trustee of any Special Needs Trust created for my benefit and may appoint my successor agents or a bank or trust company as successor trustees in the creation of such trust.

Power to Create a Medicaid Qualifying Trust. If appropriate under state and federal law, my agent shall have the power and authority to create a Medicaid Qualifying Trust a/k/a “Miller Trust” so that I may receive Medicaid benefits for long-term nursing home care or other in-home care program.

Authorization to Sue Third Parties Who Fail to Act Pursuant to Power of Attorney. If any third party (including but without limitation: stock transfer agents, title insurance companies, banks, credit unions, and savings and loan associations) with whom my agent seeks to transact business refuses to recognize my agent’s authority to act on my behalf pursuant to this power of attorney, I authorize my agent to sue and recover from such third party all resulting damages, costs, expenses and attorney’s fees that are incurred because of such failure to act. The costs, expenses, and attorney’s fees incurred in bringing such action shall be charged against my general assets, to the extent that they are not recovered from said third party.