

# **GUARDIANSHIP AD LITEM CERTIFICATION ONE HOUR SPECIAL CLE**

## **GUARDIANSHIP ALTERNATIVES AND SUPPORT SERVICES TO WARDS**

**BELO PAVILION**

**Monday, September 28, 2015, 12:00 p.m. to 1:00 p.m.  
1.0 hour ethics credit**

**Presenters:**

**Hon. Brenda Hull Thompson  
The Probate Court of Dallas County  
and  
Gregory W. Sampson  
Gray Reed & McGraw, P.C.**

**Sponsors:**

**Dallas Volunteer Attorney Program (DVAP)  
and  
Probate, Trusts and Estates Section of the Dallas Bar Association**

*\*This is a special one hour presentation on Guardianship Alternatives and Support Services for Wards which complies with the New Estates Code Section 1054.201(b) (HB39), effective September 1, 2015. If you attended the May 26<sup>th</sup> Ad Litem Attorney Certification Course at the Belo Mansion, you received 3.0 hours for the course. You will need the additional 1.0 hour to qualify for ad litem attorney court appointments.*

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Guardianship Alternatives and Support Services to Wards**

**1. Introduction**

**1.1 Statutory Requirements**

- 1.1.1 New Statutory Requirement for Certification for Ad Litem Estates Code Section 1054.201(b), House Bill 39, effective September 1, 2015
- 1.1.2 Requirement to Consider “less restrictive alternatives”, Estates Code Section 1001.001
- 1.1.3 Statutory list of Alternatives to be considered: Estates Code Section 1002.0015

**1.2 Testamentary Capacity**

- 1.2.1 Determining need for and limitations on Guardian’s authority
- 1.2.2 Determining capacity for alternative planning

*[Bracketed numbers refer to item numbers in Judge King’s LRA list Appendix D]*

**2. Tools for Avoiding Guardianship of the Person**

**2.1 Without Court Action**

- 2.1.1 Surrogate Decision Making by Statute
  - 2.1.1.1 Emergency Medical Decisions, Health & Safety Code Section 773.008 [7]
  - 2.1.1.2 Non-emergency Medical decisions
    - 2.1.1.2.1 Family Members List for Adults, Health & Safety Code Section 313.001-.007 (Limited), 166.039 (Life Support Decisions) [2]
    - 2.1.1.2.2 Minors When Parent Unavailable, Family Code Section 32.001 [4]
    - 2.1.1.2.3 Intellectually Disabled Residents in an Intermediate Care Facility, Health & Safety Code Section 597.041 [3]
    - 2.1.1.2.4 Intractable Pain Treatment Act, Texas Revised Civil Statutes, Article 4495c [15]
- 2.1.2 Surrogate Decision Making by Documents
  - 2.1.2.1 Authorization Agreement for Non-Parent Relative of a Minor, Family Code Chapter 34, Form 2638 from DFPS [5]
  - 2.1.2.2 Managing Conservatorships for Minors (related to a divorce proceeding), Family Code Chapter 153, Section 153.132 (similar to guardian of person) [8]
  - 2.1.2.3 Supported Decision Making Agreements for ADL for adults with capacity, Estates Code Chapter 1357 [6]

- 2.1.2.4 Advanced Directives (requires capacity upon signing)
    - 2.1.2.4.1 Medical Power of Attorney, Health & Safety Code Section 166.151 [14]
    - 2.1.2.4.2 Directive to Physicians and Family or Surrogates, Health & Safety Code Section 166.031 [15]
    - 2.1.2.4.3 Out of Hospital DNR, Health & Safety Code Section 166.081 [16]
    - 2.1.2.4.4 End of Life Decisions – “Five Wishes” impact on Determining Patient’s Intent [17]
    - 2.1.2.4.5 Pre-Need Declaration for Mental Health Treatment, Texas Civil Practice & Remedies Code Section 137.007 [46]
  - 2.1.3 Declarations of Guardian of Person
    - 2.1.3.1 Pre-Need Declaration of Guardian by Parent for Minor Child, Estates Code Section 1104.103, 1104.151 [45]
    - 2.1.3.2 Pre-Need Declaration of Guardian by Self, Estates Code Section 1104.001, .002 [44]
  - 2.1.4 Coordination of Care: Better Medicine / Treatment Management [56]
- 2.2 With Court Action**
- 2.2.1 Emergency Protective Order, Human Resources Code, Section 48.402 [1]
  - 2.2.2 Court-Ordered Mental Health Services, Health & Safety Code Section 462.001, 571.001, and 574.001 [11]
  - 2.2.3 Mental Illness Diversion Programs (related to criminal process) [13]
  - 2.2.4 Actions after Guardianship Established
    - 2.2.4.1 Transfer of Foreign Guardianship, Estates Code Section 1253.001 et seq [52]
    - 2.2.4.2 Annual Determination of Ward’s Condition, Estates Code Section 1201.052 [49]
    - 2.2.4.3 Restoration of Ward Proceeding, Estates Code Section 1202.051 [48]

### **3. Tools for Avoiding Guardianship of the Estate**

- 3.1 Without Court Action**
- 3.1.1 Advanced Planning Prior to Incapacity
    - 3.1.1.1 Convenience Accounts [19]
      - 3.1.1.1.1 Without Co-Ownership, Estates Code Section 113.102
      - 3.1.1.1.2 With Co-Ownership, Multiparty Accounts, Estates Code Section 113.106
    - 3.1.1.2 Durable Power of Attorney, Estates Code Section 751.001 et seq [18]
    - 3.1.1.3 Individually Created Trusts, Trust Code Section 111 - 115
      - 3.1.1.3.1 Revocable (Living) Trusts [21]

- 3.1.1.3.2 Irrevocable Trusts [21]
- 3.1.1.3.3 Testamentary Trusts [23]
- 3.1.1.3.4 Supplemental (Special) Needs Trusts for Medicaid Qualification, 42 USC 1392p(1)(d)(4)(A) [26]
- 3.1.1.4 Declarations of Guardian of Estate
  - 3.1.1.4.1 Pre-Need Declaration of Guardian by Parent for Minor Child, Estates Code Section 1104.103, 1104.151 [45]
  - 3.1.1.4.2 Pre-Need Declaration of Guardian by Self, Estates Code Section 1104.001, .002 [44]
- 3.1.2 Planning After Incapacity or During Minority
  - 3.1.2.1 Community Property Administrator (after judicial declaration of incapacity), Estates Code Section 1353.002 [28]
  - 3.1.2.2 Managing Conservatorship of Minors (related to divorce case), Section 153.073 (similar to guardian of estate) [8]
  - 3.1.2.3 Trusts for Intellectually Disabled Persons in a Residential Care Facility, Health & Safety Code Section 593.081 [27]
  - 3.1.2.4 Third Party Created Uniform Transfers to Minors Act Custodian Held Property or Accounts, Property Code Section 141.001 et seq [34]
  - 3.1.2.5 Representative Payee for Government Benefits
    - 3.1.2.5.1 Social Security Benefits, 42 USC Section 1383(a)(2) [37]
    - 3.1.2.5.2 Veteran's Benefits, 38 USC Section 5502(a)(1) [38]
    - 3.1.2.5.3 Texas Employees Retirement System Funds payable to a Minor per Family Code, Op. Tex. Att'y Gen. No. h-1214, applying Family Code Sections 151.001(a)(4) and (8) [39]
- 3.2 With Court Action**
  - 3.2.1 Payment of Funds <\$100,000 to Court Registry, Estates Code Section 1355.001; Withdrawals per 1355.105. [29]
  - 3.2.2 Emancipation of Minor >16 years, Fam. Code Sect. 31.01 et seq [50]
  - 3.2.3 Directed Sales of Interest in Real Property and deposit in to Court Registry, Estate Code Sections 1351.001 (Minors), and 1351.051 (Adults) [31] [32]
  - 3.2.4 Mortgage of Minor's Interest in Real Property, Estates Code Section 1352.051, 101 [33]
  - 3.2.5 Payment to Non-Resident Creditor, Est. Code Section 1355.002 [30]
  - 3.2.6 Suit by Next Friend, Texas Rules of Civil Procedure, Rule 44 [41]
  - 3.2.7 Appointment of Receiver, Texas Estates Code Section 1354.001 and Texas Civil Practice & Remedies Code Section 64.001 et seq [35]
  - 3.2.8 Order of No Administration, Est. Code Section 451.001 et seq [36]
  - 3.2.9 Court-ordered deposits into Pooled Trust Sub-Accounts, Estates Code Chapter 1302 [25]

#### **4. Tools for Minimizing or Shortening Guardianships**

- 4.1** Appropriate Limitation of Scope of Guardian Authority, Estates Code Section 1101.152 (Compare Full Authority in 1101.151) [51]
- 4.2** Use of Trusts
  - 4.2.1 Section 142 Trusts for Litigation Recovery for Minors, Property Code Section 142.005 [22]
  - 4.2.2 Chapter 1301 (f/k/a 867 Trusts) Guardianship Management Trusts, Estates Code Section 1301.001 et seq [24]
  - 4.2.3 Pooled Trust Sub-Accounts, Estates Code Chapter 1302 [25] (e.g. ARC of Texas Master Pooled Trust, [www.thearcoftexas.org/trust](http://www.thearcoftexas.org/trust))
  - 4.2.4 Use of existing Trusts for the benefit of a proposed Ward [21] [23]
- 4.3** Payment to Terminate when Estate size diminished
  - 4.3.1 Negligible Estate payable to family, Estate Code Sect. 1204.001 [53]
  - 4.3.2 Payment to Court Registry when Minor's Cash Estate below \$100,000, Estate Code Section 1204.001(d) and 1355.102 [54]
- 4.4** Safekeeping ("Freeze") Agreements with Financial Institution, Estates Code Section 1105.155 [47]
- 4.5** Family Settlement Agreements or Mediated Settlements, Estates Code Section 1055.151 [55]
- 4.6** Geriatric Care Managers to recommend and coordinate less restrictive alternatives and care needs [43](See Aging Life Care Association f/k/a National Association of Professional Geriatric Care Managers, [www.aginglifecare.org](http://www.aginglifecare.org))

#### **5. Tools for Special Circumstances**

- 5.1** Social Services Agencies, Department of Family and Protective Services and others [42]
- 5.2** Driving Concerns – Katie's Law and Re-Test Requests, Transportation Code Section 521.2711 [12]
- 5.3** School Admission Matters– Transfers to Non-resident School Districts (not requiring guardianship), Education Code Section 25.001 [9] [10]
- 5.4** International Treaties related to cooperation on treatment of minors crossing borders [40]

## 6. Supports and Services Requirements

- 6.1 Statutory emphasis on utilizing supports and services, Estates Code Section 1002.031
- 6.2 Types of Supports and Services (See Appendices A.2 and A.3)
  - 6.2.1 Intellectual and Developmental Disabilities (IDD)
  - 6.2.2 Traumatic Brain Injuries
  - 6.2.3 Aging Brain (Dementia and Alzheimer's)
- 6.3 Examples of Agencies providing Supports and Services (See Appendix A.4, Dallas County Probate Courts Resources List).
- 6.4 Suggested Resources for Forms
  - 6.4.1 Dallas County Probate Courts Website,  
<http://www.dallascounty.org/department/courts/probate/guardianshipattorneyinfo.php>
  - 6.4.2 Dallas Bar Association Probate, Trusts and Estates Section, Dallas County Probate Manual,  
<http://www.dallasbar.org/content/probate-trusts-estates-section>
  - 6.4.3 State Bar of Texas, Texas Guardianship Manual,  
<http://texasbarbooks.net/books/texas-guardianship-manual/>

### **APPENDICES (Available online at: <http://www.dallasbar.org/content/probate-trusts-estates-section>)**

- A.1 The Fourth Hour: Less Restrictive Alternatives & Supports and Services, Steve M. King, Judge, Tarrant County Probate Court Number One, State Bar of Texas Webcast, August 19, 2015, (with Judge King's Permission).
- A.2 Explanation of IDD Services and Supports, Texas Department of Aging and Disability Services.
- A.3 Dallas County Court Investigators' "Senior Adults" Services List.
- A.4 Guardianship – Sources of Assistance, Probate Courts of Dallas County.
- A.5 211 Texas Website ([www.211texas.org](http://www.211texas.org))
- A.6 ABA A Handbook for Lawyers, Assessment of Older Adults with Diminished Capacity, Appendix I. Useful Web Sites.
- A.7 Ad Litem Manual, Judge Steve M. King (with permission).
- A.8 The ARC of Texas Master Pooled Trust Pamphlet.
- A.9 ABA A Handbook for Lawyers, Assessment of Older Adults with Diminished Capacity.
- A.10 Advocating to Avoid Guardianship, Less Restrictive Alternatives to Guardianship, Supports and Services, Assoc. Judge Clarinda Comstock, Harris County Probate Court No. 4 (8/11/15) (With Judge Comstock's permission)