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ALTERNATIVES TO GUARDIANSHIP

Texas guardianship laws were revised significantly effective September 1, 2015. Before a guardian can be appointed, we must prove to the court by clear and convincing evidence that less restrictive alternatives were considered and determined not feasible to protect the best interests and rights of the proposed ward, and that supports and services available to the proposed ward that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible.

When determining how to best protect an adult child with disabilities, we must consider the adult child's abilities to make appropriate decisions, to provide for himself, to protect herself, and to tend to the daily functions of independent living. We can tailor, to some extent, the legal documents that families need to assist the person who cannot function with total independence.

A. POWERS OF ATTORNEY (POA): A POA is a directive whereby the Principal grants an agent or attorney in fact the authority to make decisions on the Principal's behalf. There are several different directives; a list of those that are especially useful for an adult with a cognitive impairment, who is high functioning follows below. A POA is valid if executed by an adult (a person over the age of 18 years), who has the mental capacity to understand the document and that he/she is granting the agent or attorney in fact the authority to make decisions on his/her behalf.

1. **Medical POA:** the Principal grants the agent the authority to make health care decisions for the Principal with the health care provider. The health care provider must determine if the Principal is competent to make decisions for himself and if the Principal was or could have been competent when the POA was executed. The Principal always retains the right to refuse or consent to medical treatment even with the Medical POA.
2. **HIPAA Release-** Authorization to Disclose Protected Health Information, given by the Principal to the authorized person.
3. **Statutory Durable POA:** the Principal grants the agent or attorney in fact the authority to make decisions concerning his property and financial matters.
4. **Other directives:** Advance Directive to Physicians, Family, or Surrogates; Do Not Resuscitate; Designation of Guardian in the Event of Later Incapacity or Need of Guardian; Appointment of Agent to Control Disposition of Remains.

POA LIMITATIONS: 1) they can be revoked in writing or orally; 2) they can be declined by the third party to whom they are presented.

B. SUPPORTED DECISION MAKING AGREEMENT ACT (SDMA):

1. Texas is the first state to enact SDMA. Found in Texas Estates Code Chapter 1357.
2. **SDMA Purpose:** to recognize a less restrictive alternative to guardianship for adults with disabilities who need assistance with decisions regarding daily living but are not considered incapacitated persons for purposes of establishing a guardianship.
3. The adult with disability must voluntarily, without coercion or undue influence, enter into a SDMA with a supporter that allows the supporter access to information, including medical, financial, educational, psychological, or treatment records from any source, to assist the adult with disability in understanding the information and consequences of a decision. The supporter may assist the adult in communicating with appropriate persons.
4. The supporter is not authorized to make the decision, only to assist in the decision making process.
5. The SDMA extends until terminated by either party to the agreement. The SDMA can be terminated if the Department of Family and Protective Services finds that the adult with a disability has been abused, neglected, or exploited by the supporter, or the supporter is found criminally liable of such conduct.
6. The SDMA is valid only if in substantially the form found in the Texas Estates Code. (see attachment)
7. The supporter must obtain a HIPAA Release for medical records and FERPA Release for educational records.
8. A person who receives the original or a copy of the SDMA shall rely on the agreement. If the person receiving the SDMA has any reason to believe that the adult with disabilities is being abused, neglected or exploited by the supporter, that person must report the alleged abuse, neglect or exploitation to the Department of Family and Protective Services immediately.
9. The SDMA can be used together with POA's and limited guardianships. Discuss this with a qualified, experienced attorney.
10. SDMA is a useful alternative to guardianship for a person who is not totally incapacitated. It can help promote independence and teach the person skills to promote independent living. It allows the person the right to advocate for himself and make his own decisions, which fosters dignity and right of self-determination.