

PLANNING FOR  
THE FUTURE  
WILLS, TRUSTS,  
AND  
GUARDIANSHIP

Heidi Angel, Attorney  
Jackson Walker, LLP

Lynn Kelly, Attorney  
The Blum Firm

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GOALS FOR TODAY

To provide an overview of legal issues relevant to the lives of individuals with disabilities and preserving their rights and public benefits:

- Guardianship (and alternatives)
- Estate planning

To update you on developments in the law in these areas, especially those being promoted by self-advocates.

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## PURPOSE

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To help you become more knowledgeable consumers of legal services (the purpose is not to provide you with legal advice particular to your situation).

To help you become more knowledgeable advocates for change in these areas.

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## WHAT IS GUARDIANSHIP?

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A court-supervised procedure where the court gives one person the legal authority to make personal or financial decisions for a person who has been determined to be unable make such decisions.

Title 3 of the Texas Estates Code (state laws)

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## WHY GUARDIANSHIP?

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At the age of majority (18 in Texas), an individual is an adult and is presumed to have legal capacity to consent to medical treatment and to handle their own financial affairs and can also execute a Power of Attorney to name an agent to act for them in the event of their later incapacity.

If an adult is unable to consent to medical treatment due to lack of capacity (as determined by a physician), then a **Guardianship of the Person** may be sought.

If an adult has assets and is determined to lack capacity to handle their assets, then a **Guardianship of the Estate** may be sought.

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## PROS AND CONS OF GUARDIANSHIP

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### Pros

Guardianship provides protection to a vulnerable person from abuse, neglect or exploitation.

A court-appointed guardian can support a ward by helping them handle their personal and/or business affairs.

Court supervision.

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## PROS AND CONS OF GUARDIANSHIP

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### Cons

Guardianship is the most restrictive action taken to protect a vulnerable person and Wards lose many of their basic rights.

Establishing guardianship requires hiring an attorney. Cost is usually several thousand dollars (which includes about \$800 in court fees for filing, criminal background check, etc.).

Court supervision and involvement.

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## THE GUARDIANSHIP APPLICATION PROCESS

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Application for Guardianship filed by an attorney (in certain circumstances, a Suggestion of Need can be filed with the Court).

Must submit a Physician's Certificate (CME) with the Application.

Court appoints an attorney to represent the "Proposed Ward"

All parties attend hearing to present evidence to prove the required elements: **incapacity**, **necessity** and **no alternatives** available to avoid guardianship.

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## LETTERS OF GUARDIANSHIP

If the guardianship is approved, Letters of Guardianship are issued to the guardian(s).

An annual report is due each year.

Notify the court of any changes including residence.

If you move to a different county, you have to transfer the guardianship.

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## ALTERNATIVES TO GUARDIANSHIP

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### GUARDIANSHIP OF THE ESTATE

- Special Needs Trust
- Establishing joint bank accounts
- Designating a Representative Payee for SSI.
- Durable Financial POA

### GUARDIANSHIP OF THE PERSON

- Supported Decision-Making Agreement  
Tex. Estates Code § 1357.056
- Medical Power of Attorney
- Health & Safety Code § 313 and § 597 (surrogate decision-making for an adult or individual with IDD in an ICF)
- Consent to Authorize Advocacy

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## ALTERNATIVE TO GUARDIANSHIP: SUPPORTED DECISION- MAKING AGREEMENTS

- Purpose: to recognize a less restrictive alternative to guardianship for adults with disabilities who need assistance with decisions regarding daily living but who are not considered incapacitated persons for purposes of establishing a guardianship. Tex. Estates Code § 1357.003
- An agreement that enables an adult with a disability to name a supporter to provide assistance with life decisions and to help communicate those decisions to the appropriate persons.

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**ALTERNATIVE TO GUARDIANSHIP:  
CONSENT TO AUTHORIZE ADVOCACY  
A/K/A: EDUCATION POWER OF ATTORNEY**

FORM CAN BE FOUND ON THE TEXASPROJECTFIRST.ORG WEBSITE AND DALLAS COUNTY  
PROBATE COURTS WEBSITE

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**CONSENT TO AUTHORIZE  
ADVOCACY:**

**CONSENT TO AUTHORIZE ADVOCACY  
AND  
RELEASE OF INFORMATION**

I, \_\_\_\_\_, hereby authorize  
\_\_\_\_\_ Independent School District to release/exchange  
information with my parents, \_\_\_\_\_, which  
pertains to my school program, grades, placement, behavior and/or  
discipline.

I also wish that my parents be invited to any and all meetings about me,  
and I do not want any decisions made without their input. If the schools  
have any documents I need to sign, my parents must sign first, before I  
will sign.

This authorization, unless otherwise revoked by me in writing, is  
intended to remain in effect for the duration of time I receive special  
education services or until my twenty-seventh birthday, which ever  
comes first.

Signature \_\_\_\_\_  
Field \_\_\_\_\_  
Name \_\_\_\_\_  
Date \_\_\_\_\_

State of Texas, County \_\_\_\_\_  
Before me, the undersigned authority, on this day personally appeared  
\_\_\_\_\_, the person whose name is subscribed to the foregoing instrument,  
and acknowledged to me that she executed the same for the purposes and consideration therein  
expressed.

Given under my hand and seal of office on this day \_\_\_\_\_, \_\_\_\_\_ (year),  
Notary Public in and for \_\_\_\_\_ (county), Texas  
My commission expires \_\_\_\_\_

Notary Signature \_\_\_\_\_  
Printed/Stamped Name \_\_\_\_\_

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## TRANSITION AND ARD MEETINGS

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At least one year prior to 18, the student's IEP must include a statement granted to a parent (as legal guardian of a minor child) will transfer to the student upon their 18th birthday unless someone has been granted guardianship of the student (TAC § 89.1049 (a)).

As amended, this law requires a statement in the IEP that alternatives to guardianship such as Supported Decision Making have been discussed with the student.

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## ADVOCACY INITIATIVES

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Important legislative changes in 2015 session:

Less restrictive alternatives to guardianship are required to be considered before applying for a guardianship

Ward's Bill of Rights to protect those under guardianship

Supported Decision-Making Agreement Act

REPTL Guardianship Committee currently seeking input

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## HOW DO WE GET THERE FROM HERE?

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**PERSON-CENTERED PLANNING:**  
A LIFE PLAN FOCUSED ON THE INDIVIDUAL'S PREFERENCES AND CAPACITIES. A SHIFT FROM "FIXING" TO "SUPPORTING" (EMPOWERMENT)



**SELF-DETERMINATION:**  
THE ABILITY TO STEER ONE'S OWN COURSE.



**DIGNITY OF RISK:**  
RESPECTING EACH INDIVIDUAL'S AUTONOMY AND SELF-DETERMINATION TO MAKE CHOICES FOR HIMSELF.



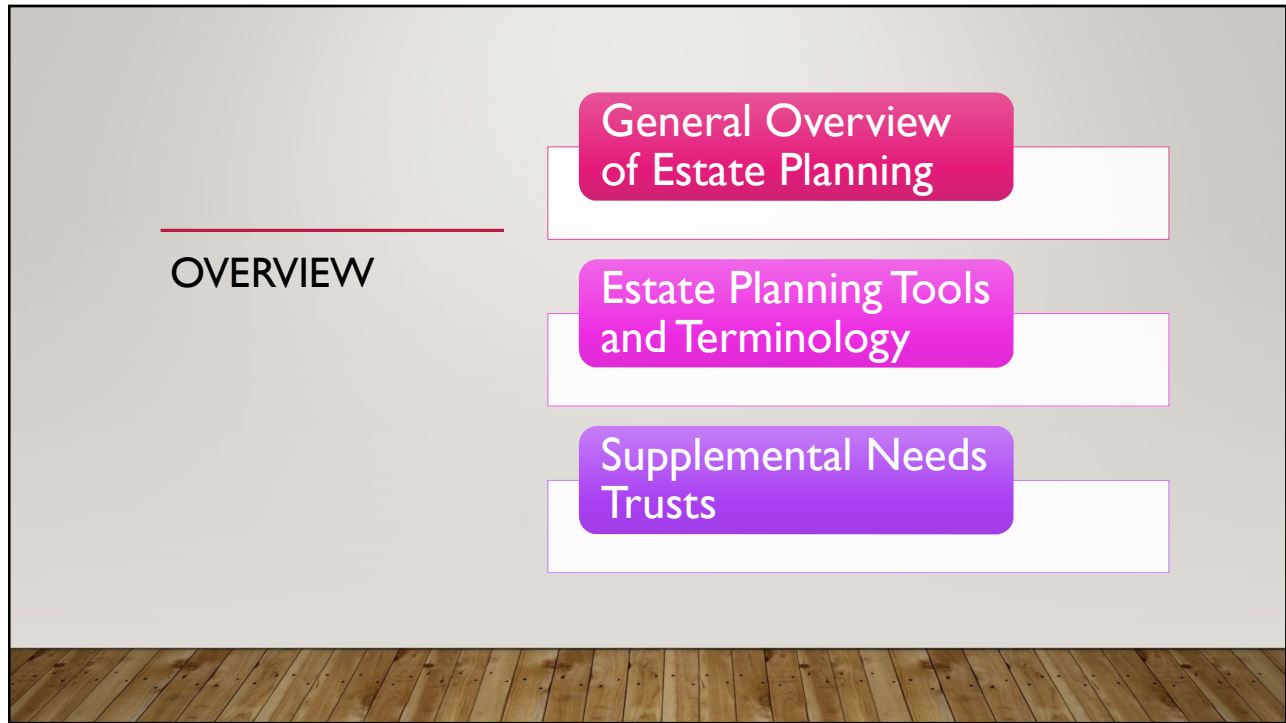
**LETTER OF INTENT:**  
A PLANNING TOOL TO HELP LOVED ONES AND YOUR CHILD MANAGE THE TRANSITION WHEN YOU ARE NO LONGER THE PRIMARY CAREGIVER.

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SWITCHING OVER TO ESTATE PLANNING AND SUPPLEMENTAL NEEDS TRUSTS

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## WHAT IS ESTATE PLANNING?

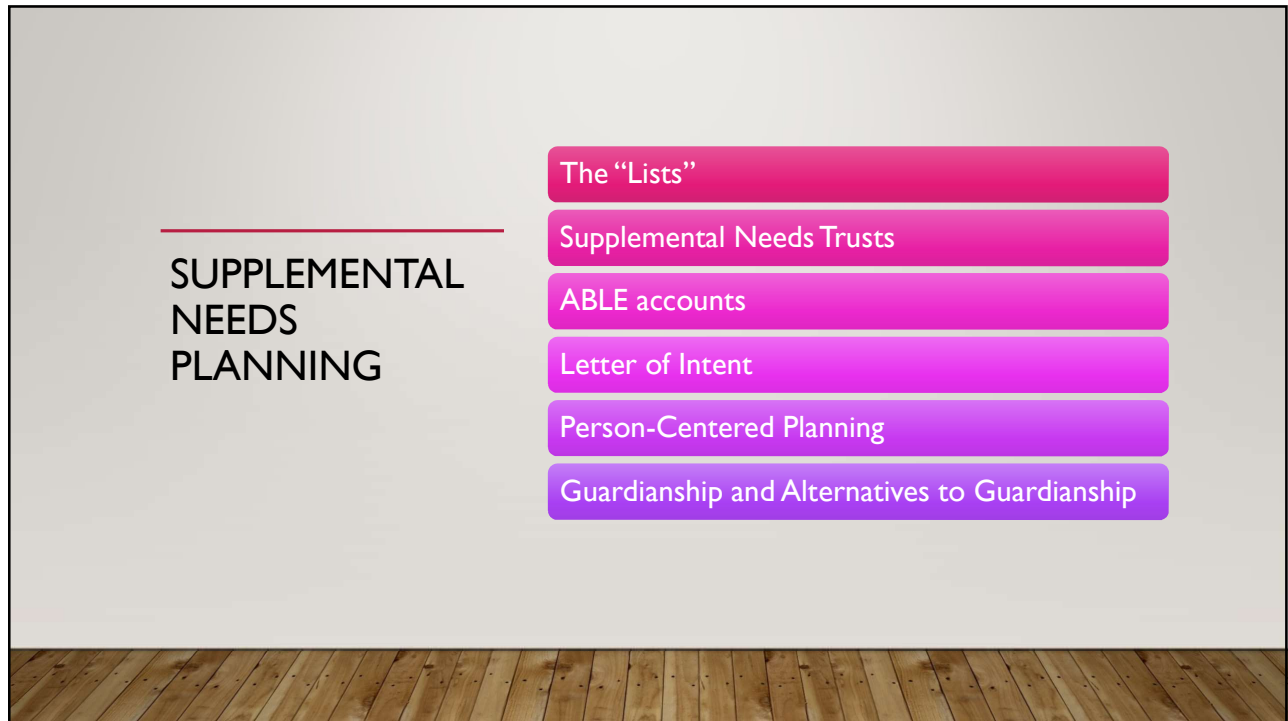
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- Estate Planning is having a plan for how your assets will be controlled when you are unable to do so (both in life and death).

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## SUPPLEMENTAL NEEDS TRUSTS

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Self-settled versus third-party Supplemental Needs Trusts (including Arc Pooled Trusts)

Will pass property to child as beneficiary of the SNT

SNT funded at death of second parent

Preserves eligibility for SSI and Medicaid

Advocates working to eliminate the need for SNTs

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## ABLE ACCOUNTS

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A tax-advantaged savings account designed for individuals with disabilities.



Can roll over a 529 account into an ABL account (529A)



Special Needs Trust can make distributions to an ABL Account



An ABL account owner who works may also contribute his or her compensation up to \$13,590 (for 2023)

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## ABLE ACCOUNTS

- Current limitations:
  - Age: onset of disability prior to age 26 (but account can be opened at any age) \*age of onset will be 46 in 2026
  - Annual limit: \$18,000 total in 2024 (\$19,000 in 2025). Account balance limit to maintain SSI eligibility: \$100,000
  - Cash only
  - Medicaid payback at beneficiary's death

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## ABLE ACCOUNTS

Distributions: for “qualified disability expenses” IRC § 529A(c)(1) which includes health care, transportation, education, food, related legal fees, and other expenses (housing is unclear but may risk SSI).

[www.ablenrc.org](http://www.ablenrc.org) (resource to compare various state ABLE accounts)

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## HOW AND WHEN ARE ABLE ACCOUNTS USEFUL?

For an employed individual to remain eligible for SSI

In the estate planning context, as a supplement to SSI and a Special Needs Trust

As an alternative to guardianship of the estate in some cases

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## COMPARE AND CONTRAST TRUST VS. ABLE

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### SNT

- Not self-directed
- Managed by Trustee
- Funds cannot pay for medical care, food, clothing or shelter

### ABLE

- Can be self-directed
- Managed by Individual or Designated Manager
- Broad expense categories

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## COMPARE AND CONTRAST TRUST VS. ABLE

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### SNT

- No max limit for funds
- Trust drafted by lawyer
- No Medicaid payback for 3<sup>rd</sup> party SNT, but Medicaid payback applies for 1<sup>st</sup> party SNT

### ABLE

- Deposits of \$18K/yr \$100k limit (for SSI)
- Simple to open an account
- Medicaid payback applies

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ADVOCACY  
EFFORTS OF  
MANY DISABILITY  
ADVOCATES AND  
ORGANIZATIONS  
RESULTED IN  
PASSAGE OF THE  
ABLE ACT IN 2014



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