

**ESTATE PLANNING, ESTATE ADMINISTRATION, GUARDIANSHIP  
AND MENTAL COMMITMENT--- WITH FIREARMS!:  
WHAT WE KNOW AND WHAT WE DON'T KNOW**

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Darlene Payne Smith is a member of the firm's Fiduciary Litigation Group and the firm's Probate, Trust and Guardianship Administrative Group. She also mediates two cases per month.

Her practice is focused on individuals who have experienced a loss or are facing the issue of a loved one who is becoming incapacitated or suffered a traumatic injury that rendered them incapacitated and individuals and trust companies who serve as fiduciaries. Darlene fights to uphold the wishes of those who have established valid estate plans and she defends fiduciaries wrongfully accused. She also seeks justice against fiduciaries who have wronged their beneficiaries.

As a result, Darlene often appears in courts in Harris, Montgomery, Brazoria, Galveston, Fort Bend, Brazos, San Jacinto, Chambers, Walker, Tarrant, Travis, Dallas and Jefferson Counties, as well as in Hildago and Cameron Counties.

Darlene represents fiduciaries and beneficiaries in trial and appellate courts of those counties, and across the State of Texas, in matters relating to probate, guardianship, trust litigation and administration.

Because of her knowledge and skill, Darlene often is sought to help resolve disputes or to improve the knowledge of fellow attorneys. She

### Practice Areas

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Fiduciary Litigation

Probate, Trust & Guardianship

Arbitration & Mediation

Estate Appeals

Fiduciary Litigation Appeals

Fiduciary Litigation within Estate Planning

Probate Administration & Complex Estate Settlement

Abuse of Fiduciary Responsibilities

Agents Under Power of Attorney & Guardianship

Corporate Trustees

is a frequent writer and speaker for the State Bar and other entities of continuing legal education.

Darlene is an adjunct professor at South Texas College of Law. She is a co-author of the Texas Jury Charge publication for Probate and Trust and a sustaining member of the Pattern Jury Charge Committee. She is also a mediator of probate, trust, guardianship, and related matters.

Darlene has been honored many times over the years for her accomplishments including being selected to the 2006-2011 and 2014-2025 Texas Super Lawyers lists (Thomson Reuters) and the 2024-2026 Best Lawyers in America (BL Rankings) for Litigation – Trusts and Estates and Trusts and Estates in 2026. She was chosen to be on the 2020 Texas Top Women Attorneys List, Super Lawyers (Thomson Reuters). In 2019, she was featured in the inaugural edition of Texas Trailblazers published by *Texas Lawyer*.

Fiduciary Succession

Mediation

Probate, Trust, &  
Guardianship  
Administration

Fiduciary Litigation

Fiduciary Litigation within  
Probate

Guardianship  
Administration

Probate & Estate  
Administration

Trust Administration

## Education

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J.D., University of  
Houston Law Center

B.S. magna cum laude,  
Criminal Justice,  
University of Houston

## Admissions & Certifications

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State Bar of Texas

United States District  
Court for the Southern  
District of Texas

## Publications & Presentations

- *Criminal Remedies for Elder Abuse, Neglect, & Exploitation*, State Bar of Texas, 25<sup>th</sup> Annual Advanced Elder Law Course, 2025
- *Estate Planning, Administrations, Guardianship and Mental Commitment – with Firearms!: What we know and What We Don't Know*, State Bar of Texas, 25<sup>th</sup> Annual Advanced Elder Law Course, 2025
- *Estate Planning, Administrations, Guardianship and Mental Commitment – with Firearms!: What we know and What We Don't Know*, Montgomery County Bar Association, 2025
- *Powers of Attorneys, Guardianships & Mental Commitments – Know the Difference in Their Use*, State Bar of Texas, 25<sup>th</sup> Annual Advanced Elder Law Course, 2024
- *What Every Texas Lawyer Needs to Know: Guardianship, Probate with a Twist*, State Bar of Texas, 25<sup>th</sup> Annual Advanced Elder Law Course, 2024
- *Mental Commitments vs. Guardianship*, NEALA – Texas NEALA Summer Conference, 2024

- *Powers of Attorneys, Guardianships & Mental Commitments – Know the Difference in Their Use*, State Bar of Texas – Paralegal Division, 2024
- *What Every Texas Lawyer Needs to Know: Guardianship, Probate with a Twist*, 13<sup>th</sup> Annual Firearms Law Course, State Bar of Texas, 2024
- *Mental Commitments vs. Guardianship*, NEALA – Texas NEALA Summer Conference, 2024
- *Estate Administration, Guardianship and Mental Commitment – With Firearms!: What We Know and What we Don't Know*, 48<sup>th</sup> Annual Advanced Estate Planning and Probate Course Estate Planning, State Bar of Texas, 2024
- *Restore or Not to Restore: That is the Question*, DELAA – April Monthly Meeting, 2024
- *Probate Trust, Guardianship, and Mental Commitment: What We Know and What We Don't Know*, 12<sup>th</sup> Annual Firearms Law: What Every Texas Lawyer Needs to Know Course, State Bar of Texas, 2023
- *Powers of Attorney, Financial Exploitation, Will and Trust Issues & Avoiding Guardianship*, Heritage Scholarship and Foundation Committees, 2023
- *Error 404: Intent Not Found – Scrivener's Error in the Age of Online Legal Aid*, State Bar of Texas, 17th Annual Fiduciary Litigation, San Antonio, 2022
- *More Powers – More Problems: Who's Burden is it on Undue Influence and What is an Agent to Do?*, State Bar of Texas, 16th Annual Fiduciary Litigation, 2021
- *What's Changed in Powers of Attorney and Guardianships*, 2020 Annual Conference, Texas Aggie Bar Association, College Station, 2020
- *Estates, Trusts, Powers of Attorney, Mental Commitments, and Guardianships: Dealing with Firearms*, speaker/co-author, 8th Annual Firearms Law: What Every Texas Lawyer Needs to Know Course, State Bar of Texas, Austin, 2019
- *Changes in Guardianships and Powers of Attorney – What every Attorney Should Know*, speaker/co-author, 12th Annual Summer School: What Sun, Sand, and CLE for the General Practitioner, State Bar of Texas, Galveston, 2019
- *Guardianships: What Do You Do When Your Client is Not all There?*, speaker/co-author, 44th Annual Advanced Family Law Course, State Bar of Texas, San Antonio, 2018
- *What Every Lawyer Needs to Know 2018*, panelist, 7th Annual Course on Firearms Law, State Bar of Texas, San Antonio, 2018
- *19th Annual Advanced Courses Guardianship Law and Elder Law*, course director, State Bar of Texas, Dallas, 2018
- Course Director, 12th Annual Fiduciary Litigations Course, State Bar of Texas, San Antonio, 2017
- *Elder Abuse, The Criminal Aspects of Estates and Guardianships, and Mental Commitments*, speaker/co-author, The University of Texas School of Law, Galveston, 2017
- *Building Blocks of Wills, Trusts and Estates*, speaker, State Bar of Texas, Live Webcast, Austin, 2017
- *Elder Abuse and the Criminal Aspect of Estates, Guardianships, and Mental Commitments*, speaker/co-author, Montgomery County Bar Association Fall Conference, The Woodlands, 2016
- *Elder Abuse and the Criminal Aspect of Estates, Guardianships, and Mental Commitments*, speaker/co-author, 40th Annual Advanced Estate Planning and Probate Course, San Antonio, 2016
- *Legislative Update of 2015 Session*, speaker/author, Montgomery County Law Day, Conroe, 2016

- *Best Practices in Communication and Supervision on the Legal Team*, speaker/author, State Bar of Texas, 34th Annual Texas Forum Towards a More Perfect Union: Attorney and Paralegal Team, Austin, 2016
- *The Estate Administration Guide*, speaker, State Bar of Texas, 17th Annual Building Blocks of Wills, Estates, and Probate Course, Austin, 2016
- *Ancillary Documents Should Not be an Afterthought*, speaker/author, State Bar of Texas, 10th Annual Fiduciary Litigations Course, San Antonio, 2015
- *Criminal Aspects of Guardianship and Mental Commitment*, speaker/co-author, State Bar of Texas, Handling Your First (or Next) Guardianship Case, Austin, 2015
- *Assessing Competency and Making the Decision to Wind Down – Lessons from the Baseball Diamond*, speaker/co-author, State Bar of Texas, Essentials of Winding Down A Law Practice in Texas, Austin, 2015
- *Using a Paralegal in Your Practice: What they Can and Cannot Do*, speaker, State Bar of Texas, Webcast, Austin, 2015
- *Who's Handling Mama's Money*, speaker/author, State Bar College Summer School, Galveston, 2015
- *Little Known Statutes/Issues Relating to Fiduciary Litigation*, speaker/author, National Board of Trial Advocacy, New Business: Learn New Cause of Action Continuing Legal Education, Houston, 2015
- *Little Known Statutes/Issues Relating to Fiduciary Litigation*, speaker/author, 9th Annual Fiduciary Litigation Course, Horseshoe Bay, 2014
- *What Options Exist when you Recognize a Problem?*, speaker/co-author, Lawyer Competence in the 21st Century, Austin, 2014
- *Estate Administration A to Z*, speaker, 63rd Annual Education Conference and National Forum, 2014
- *Criminal Aspects of Guardianship and Mental Commitment*, speaker/co-author, Advanced Elder Law and Advanced Guardianship Law Course, 2014
- *Powers of Attorney, Common Law Spouses and Guardianships*, speaker/author, Transitional Learning Center, Galveston, 2013
- *Criminal Aspects of Guardianship and Mental Commitment*, speaker/co-author, Advanced Elder Law and Advanced Guardianship Law Course, 2014
- Criminal Justice Symposium and Community Day, speaker, Houston
- *Practical Aspects of Guardianship Law*, speaker, Texas College of Probate Judges, San Antonio, 2012
- *Will and Guardianship Contests (Limine, Voir Dire, Opening, Preserving Errors, Charge and Closing)*, speaker/author, State Bar College, Summer School, Galveston, 2012
- *Handling Insolvent Estates and the Claims Process*, speaker/author, Houston Northwest Bar Association, Houston, 2012
- *Fiduciary Administration (Common Sense Approach)*, speaker/author, Lorman Education Services, Houston, 2012
- *Fiduciary Litigation – Practical Approach*, speaker/author, DELAA, Houston, 2012
- *Trial of a Guardianship*, speaker/author, Wills & Probate Institute, Houston, 2011
- *Probate, Guardianship and Trusts, Where are we Now?*, speaker/author, Advanced Estate Planning and Probate Course, Fort Worth, 2011
- *Trial of a Guardianship*, speaker/author, Advanced Guardianship Law Course, Houston, 2011

- *Divorce and Annulment In the Elderly*, speaker/author, National Academy of Elder Law Attorneys, Inc., Orlando, 2010
- *Estate Planning No Matter How Big or How Small*, speaker, Sharpstown Rotary Club, Houston, 2010
- *Getting to Victory: Winning Techniques in Fiduciary Litigation*, speaker/author, Trial of a Fiduciary Litigation Case, Fredericksburg, 2009
- *Estate Planning No Matter How Big or How Small*, speaker, St. Edward Catholic Church, Spring, 2009
- *Guardian Ad Litem in a Personal Injury Case: Deal or No Deal, Austin, Texas*, speaker, State Bar of Texas Webcast, Austin, 2009
- *Complex Family Matters in Guardianship*, speaker/author, State Bar of Texas Advanced Guardianship Course, Houston, 2009
- *Drafting and Entering Judgments*, speaker/author, Attorneys In Tax & Probate, 2009
- Advisory Committee: Advanced Elder Law and Guardianship Courses, 2009
- *Expert Testimony*, speaker/author, Tarrant County Probate Bar Association – Sixth Probate Litigation Seminar, Ft. Worth, 2008
- *Ask The Experts: Guardianship Topics including Medical Issues in Guardianships*, speaker, Estate Planning, Guardianship and Elder Law Conference, Galveston, 2008
- *Drafting and Entering Judgments*, speaker/author, Advanced Estate Planning and Probate Course, Dallas, 2008
- *The Role of The Ad Litem*, speaker/author, Texas College of Probate Judges Regional Workshop, Corpus Christi, 2008
- *Show Cause, Contempt, Surcharge, and Injunctive Actions*, speaker/author, Texas College of Probate Judges Regional Workshop, Corpus Christi, 2008
- *Medical Experts: Can Yours Withstand Cross?*, speaker/author, State Bar of Texas Advanced Guardianship Course, Dallas, 2008
- *Major Provisions of a Trust*, speaker/author National Business Institute Fundamentals of Trust Administration, Houston, 2007
- *Essential Steps in Trust Termination*, speaker/author, National Business Institute Fundamentals of Trust Administration, Houston, 2007
- *Overcoming Ethical Challenges*, speaker, National Business Institute Fundamentals of Trust Administration, Houston, 2007
- *File Documentation, Retention & Destruction: i.e. Will Your Notes Nail You?*, speaker/co-author, State Bar of Texas Advanced Drafting Course for Estate Planning and Probate, Houston, 2007
- *Fiduciary Litigation*, speaker/co-author, Trust Administration in Texas, Houston, 2007
- *Fiduciary Administration*, speaker/author, Trust Administration in Texas, Houston, 2007
- *Getting to Victory: Special Issues: Jury Charge*, speaker/author, Advanced Estate Planning and Probate Course 2007; San Antonio, 2007
- Texas Guardianship Association Spring Conference, speaker/author, Waco, Ethics Panel, 2007
- National Academy of Elder Law Attorney, Inc., Trust Special Interest Group Steering Committee, advisor, 2006 to present
- *Contested Guardianships*, speaker, State Bar of Texas – Advanced Elder Law & Guardianship Course, Houston, 2007
- *Fiduciary Litigation*, speaker/co-author, DELAA, Houston, 2007
- *Ethical Jeopardy*, speaker/author, HBA All Day Ethics Program; Houston, 2006

- *Navigating the Quagmire of Potential Claims Against Estate Planning, Trust, Probate and Guardianship Practice*, speaker, South Texas College of Law Wills and Probate Institute, Houston, 2006
- *Expert Qualification and Disqualification in Probate and Fiduciary Litigation*, speaker/moderator, Advanced Estate Planning and Probate Course, Houston, 2006
- *Giving Till it Hurts You*, speaker/author, Planned Giving Council of Houston – Monthly Program, Houston, 2006
- *Personal Injury Involving Probate From Beginning to end or Avoiding the Silver Bullets That Can Kill Your Case*, speaker/author, Texas Trial Lawyers Association – Advanced Personal Injury Seminar, Houston, 2006
- *Promoting the Well-Being of the Proposed Ward*, speaker/co-author, State Bar of Texas – Advanced Guardianship Course, Dallas, 2006
- *The Role of the Attorney Ad Litem in a Contested Guardianship Proceeding*, speaker, Houston Bar Association – Guardianship Certification Course For Ad Litem Appointments 2006, Houston, 2006
- *Avoiding The Silver Bullets That Can Kill Your Case*, speaker/author, Jefferson County Bar Association CLE – Avoiding Malpractice, Beaumont, 2005
- *Personal Injury Involving Probate From Beginning to End or Silver Bullets That Can Kill Your Case*, speaker/author, Tarrant County Probate Bar Association – Litigation Seminar, Ft. Worth, 2005
- *Investment Plans and Guardianships*, speaker, South Texas College of Law – Wills and Probate Institute, Houston, 2005
- *Personal Injury Involving Probate From Beginning to End or Silver Bullets That Can Kill Your Case*, speaker/author, State Bar of Texas – Avoiding Malpractice, Houston, 2005
- *Personal Injury Involving Probate From Beginning to End or Silver Bullets That Can Kill Your Case*, speaker/author, State Bar of Texas – Avoiding Malpractice, San Antonio, 2005
- *Personal Injury Involving Probate From Beginning to End or Silver Bullets That Can Kill Your Case*, speaker/author, State Bar of Texas – Avoiding Malpractice, Dallas, 2005
- *Giving Till it Hurts You*, speaker/author, El Paso Planned Giving Counsel, University of Texas at El Paso, El Paso, 2005
- *The Probate Process from Start to Finish*, speaker, National Business Institute, Houston, 2005
- *Guardianship Alternatives and Settling Contested Guardianships*, speaker, H.B.A. Speech to the Elderly, Houston, 2005
- University of Houston Wills and Probate Advisory Committee, adviser, 1995-present
- *The Disability and Elder Law Attorneys Association*, speaker, Case Law Update, Reliant Decision, Houston, 2005
- *Court-Created 867 Trusts Practical Approach*, speaker/author, TBA Trust Financial Services Division, Court Created Trusts Seminar, Dallas, 2005
- *Will Your Notes Nail You? (Notes, Video, Audio, Emails, Comments and Other Faux Paus That Cause Problems)*, speaker/author, Houston Estate and Financial Forum; Houston, 2004
- *Dealing with the Difficult Client and/or Beneficiary*, speaker/author, Texas Bankers Association Personal Trust Seminar; Dallas, 2004
- *Jury Charges In Probate*, speaker/author, Tarrant County Probate Bar Association 3rd Annual Probate Litigation Seminar; Fort Worth, 2004

- *Giving Till it Hurts You*, speaker/author, Texas State Bar, Charitable Giving Course; San Antonio, 2004
- *How Your Notes Can Get You Into Trouble*, speaker/author, Advanced Estate Planning and Probate Course; San Antonio, 2004
- *Dependent Administrations*, speaker/co-author, Wills and Probate Institute, University of Houston Law Foundation, Houston, 2004
- *Independent Administration*, speaker, El Paso Probate Bar Association, Texas College of Probate Judges, 2004
- *Probate Surcharge and Preliminary Proceedings*, speaker/co-author, El Paso Probate Bar Association, Texas College of Probate Judges, 2004
- Fiduciary Litigation 2004, speaker/author, Texas Bar CLE, Houston, 2004
- *Anniversary of Brown v. Board of Education*, speaker, Klein Forest High School, 2004
- *Will Your Notes Nail You? (Notes, Video, Audio, Emails, Comments and Other Faux Paus)*, speaker/co-author, State Bar of Texas – 14th Annual Advanced Drafting Estate Planning and Probate Course; Dallas, 2003
- *Avoiding Sudden Death or at Least Temporary Incapacitation of your Case in Probate Court – Including Jurisdiction and Probate*, speaker, Tarrant County Probate Bar Association Second Annual Probate Litigation Seminar, 2003
- *Probate Issues in a Personal Injury Case*, speaker, Advanced Personal Injury Law Course, San Antonio, 2003
- *Probate Issues in a Personal Injury Case*, speaker, Advanced Personal Injury Law Course, Houston, 2003
- *Probate Issues in a Personal Injury Case*, speaker, Advanced Personal Injury Law Course, Dallas, 2003
- State Bar of Texas – Texas Guardianship Manual, manual committee, 2003
- *Guardianship Certification Course for Ad Litem Appointments in Probate Court*, speaker, South Texas Collage of Law, 2003
- Victoria Area Estate Planning Counsel, Court Created Section 867 Trusts, speaker, 2002
- State Bar of Texas Advanced Estate Planning and Probate Course, speaker, 2002
- Wills & Probate Institute, University of Houston Law Foundation, advisory committee, 2002
- *Representing the Elderly Client*, speaker, South Texas College of Law, 2002
- *Docket Call in Probate Courts Seminar*, speaker, San Antonio Young Lawyers Association, 2002
- *The Role of The Ad Litem*, speaker, Judge Rory Olsen's Class on Chemical Dependency, 2001
- University of Houston Law Center, Wills and Probate Institute Course, speaker, 2001
- State Bar of Texas Advanced Estate Planning and Probate Course, course director, 2001
- Texas Collection Manual – Third Edition: Probate and Guardianship Section, author, 2001
- South Texas College of Law – Estate Planning & Probate – Creditor Claims, guest lecturer, 2001
- Houston Bar Association – Family/Probate Bench Bar Conference, speaker/facilitator, 2000
- *Show Cause, Contempt, Surcharge, and Injunctive Actions*, speaker/author, Texas College of Probate Judges, 2000
- *Anatomy of a Will*, speaker/author, Tarrant County Bar Association – Probate Section, 2000
- *Ten Unanswered Questions in Probate*, speaker/author, State Bar of Texas – Advanced Estate Planning and Probate, 2000
- *Legal Speaking*, speaker, KSEV Radio Talk Show, 2000

- *Show Cause, Contempt, Surcharge, and Injunctive Actions*, speaker, Disability and Elders Law Attorneys Association, 2000
- *How to Initiate a Guardianship*, speaker, San Antonio Young Lawyers Association, 2000

## **Honors & Awards**

- Best Lawyers in America – Litigation-Trusts and Estates, BL Rankings, 2024-2026
- Best Lawyers in America – Trusts and Estates, BL Rankings, 2026
- Texas Top Women Attorneys, Texas Super Lawyers, Thomson Reuters, 2020
- Texas Super Lawyers, Thomson Reuters, 2006-2011, 2014-2025
- Texas Trailblazers, Texas Lawyers, 2019

## **Affiliations**

- Certified under Texas Estates Code to serve as an appointee and represent persons and entities in guardianships
- Adjunct Professor – South Texas College of Law, 2010 – 2021
- South Texas College of Law, adjunct professor, 2010-2017
- State Bar Pattern Jury Charge Committee, member, 2010-2012
- Houston Bar Association Elder Law Committee, co-chair, 2010
- Texas Bar Association, member
- Texas Bar College, member
- Houston Bar Association, member
- National Association of Elder Law Advisors (NAELA), member
- Women Attorneys in Tax and Probate, past president
- Disability and Elder Law Lawyers Association, past vice president
- NAELA, former trust committee member

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# **ESTATE PLANNING, ESTATE ADMINISTRATION, GUARDIANSHIP AND MENTAL COMMITMENT WITH FIREARMS: WHAT WE KNOW AND WHAT WE DON'T KNOW**

## **INTRODUCTION**

Not all estate planners give thought to firearms in the planning process, any more than they do a detailed inventory of your tools. Much improvement is needed in the education of attorneys to inquire about firearms, firearm supplies, and NFA firearms. Once a person possessing firearms dies, with or without a Will, firearms can be a problem. Are firearms a consideration in the Will? Is there a Gun Trust, fully funded and appropriately drafted? If, does the Decedent own a NFA firearm such as a silencer? Will a Court appointed administrator sell firearms that the Decedent treasured to a stranger? Will anyone know where the Decedent would have left their firearms? Trusts created during life (intervivos) or at death (testamentary) come with their own protections and problems. Finally, mental issues, incapacity, invoking the use of powers of attorney and use of guardianship, is also a focus of this article. These various issues may deprive the incapacitated of all firearms and ammunition, as well as hamper the lives of those with whom the incapacitated resides and their firearms.

## **I. THE ESTATE PLAN:**

Attorneys need a better awareness of firearms. There is no other asset that can cause as much strife as firearms. You can poll one hundred lawyers who do primarily estate planning and maybe five will ever inquire as to the ownership of firearms. Maybe one has seen or drafted a gun trust. Yet, the entire plan could fail, the firearm issue could generate discord, and your executor could get sued, or even indicted. Those who practice in the area of firearms should educate any estate planning attorney they encounter to make the firearm ownership inquiry routine rather than the exception. Some consideration should be given to the fact firearms not left as a specific bequest are sold first to pay debt. The order of sale to pay debts should be considered in any plan but especially with a collector of firearms or any collector.

### **A. Choosing Your Fiduciary**

It is evident that you should always choose your executor wisely and talk to that person about serving. If you asked the average person what they want in an executor, the first words are honest and trustworthy. But what if your executor dislikes firearms? Is afraid of firearms? Fails to understand the value or legacy of firearms? You want to guard your firearms like you guard your other assets. The executor should be familiar with your firearms, as well as your accessories and supplies, such as reloading equipment, ammunition, extra magazines/clips and the like. There should be discussion on the firearms you value most in case debt causes the firearm collection to be diminished. Your executor should also know when your firearms status changes, such as the creation and funding of a Gun Trust, whereby the guns pass outside of probate, or other changes

in the status of the firearms, such as the acquisition of NFA firearms. Just as you would discuss other changes in circumstance, your client should fully educate their fiduciary on their firearms.

1. Prohibited Persons

The Estates Code defines persons disqualified or unsuitable to serve as Executors in Section 304.003. It states:

A person is not qualified to serve as an executor or administrator if the person is:

- (1) incapacitated;
- (2) a felon convicted under the laws of the United States or of any state of the United States unless, in accordance with law, the person has been pardoned or has had the person's civil rights restored;
- (3) a nonresident of this state who:
  - (A) is a natural person or corporation; and
  - (B) has not:
    - (i) appointed a resident agent to accept service of process in all actions or proceedings with respect to the estate; or
    - (ii) had that appointment filed with the court;
- (4) a corporation not authorized to act as a fiduciary in this state; or
- (5) a person whom the court finds unsuitable.**

**(b) A person described by Subsection (a)(2) is not disqualified from serving as an executor of a decedent's estate under Subsection (a)(2) if:**

- (1) the person is named as executor in the decedent's will;**
- (2) the person is otherwise qualified to serve as an executor; and**
- (3) the court approves the person serving as an executor.**

TEX. ESTATES CODE § 304.003. ¶ If firearms are involved, one must also consider a broader list than the above. Another consideration when firearms are involved is the definition of Prohibited Persons if you own firearms. 18 U.S.C. 922(g) defines prohibited persons as:

- a. felons
- b. fugitives from justice
- c. persons addicted or users of illegal drugs**
- d. persons who have been involuntarily committed
- e. illegal aliens and persons with non-immigrant visas
- f. persons who renounced their citizenship
- g. persons the subject of protective orders and similar orders**
- h. persons convicted of crimes of domestic violence**

So, if you represent a firearms owner or collector, you have two different statutes, Federal and State, to consider in drafting. These questions are difficult and delve into divorces, addiction and

other personal issues. If the division, sale and transfer of firearms is a part of the estate plan, the executor cannot be a Prohibited Person.

## 2. Standard Protective Orders in Divorce, Temporary Ex-Parte Protective Orders and Orders of Protection

In the past many courts had adopted Standard Protective Orders in divorce that stated there is a presumption that family violence has been committed or will be committed. The U.S. Supreme Court has now intervened and set aside the automatic creation of a prohibited person. See *United States v. Rahimi*, 602 U.S. 680 (2024). The relevant portion of *Rahimi* reads as follows:

The standing orders utilized by some Texas courts may also situationally fall within the scope of this statute. While the standing order would not initially meet the terms of this statute, as standing orders are rendered without a hearing, if the standing order was continued as a temporary injunction after a hearing and the other elements of the statute are met, then the consequences of this statute may apply.

However, the Temporary Ex-Parte Protective Orders and Protective Orders still exist and courts still validly determine that family violence has occurred. **See Exhibit A.** These orders may suspend all rights to possess firearms. While no client should be subjected to a blanket finding of family violence, a valid Protective Order including a finding of family violence makes you a Prohibited Person. Years later you may discover you are a prohibited person due to a divorce or other family matter if the protective order is not dealt with in the final order.

## 3. Successors.

As estate planners, we always hope the client's first choice for a fiduciary will be able to serve. This is not always the case. They die, become incapacitated, or even refuse. If you are truly concerned about firearms, the successor must be as willing to follow wishes and protect firearms as avidly as your primary choice. So at least one of your backup fiduciaries should be just as informed as the primary fiduciary and none should be Prohibited Persons.

## 4. Education in Advance.

Firearms are not familiar to everyone. Despite the desire to adhere to the wishes of your client, chosen executors need some basic education. The things you need to impress upon clients should include discussions and sharing of the following:

- a. safe locations
- b. safe combinations

- c. keys to gun storage
- d. firearms left out for protection
- e. storage outside the homestead
- f. location and copies of inventory of firearms
- g. basic care of firearms
- h. persons to not handle firearms
- i. insurance and carrier
- j. Gun Trust or not
- k. copy of Gun Trust and how funded
- l. general gun accessories and ammunition location and value
- m. immediate firearms concerns at death.

Keep in mind that passing away with no one knowing how to find keys or knowing combinations can be an extremely expensive situation. There have been several estates where expensive safes were damaged and even destroyed as a personal representative attempted to perform their duties. There have been estates completed and then a friend or fellow collector comes forward stating the list was at Decedent's employer, or at a gun store.

## **B. Choosing Firearm Beneficiaries**

A lawyer cannot tell a client who to leave their estate to or in what form. It should be the duty of a lawyer to at least explain the issues of leaving firearms to those who cannot accept them and explain how decisions can create problems and expense for your estate. No "plan" is perfect but advance planning can help the estate plan remain intact at death.

### **1. Equalization.**

If your client states the desire to leave firearms to certain persons, but realizes that one or more anticipated beneficiaries falls under "Prohibited Persons," it is incumbent to ask if the client is seeking equality in the plan. For example, your client has two children, one a Prohibited Person, and firearms valued at \$100,000.00. If he leaves his or her firearms to one child, does he or she wish to equalize the bequest? If the estate plan says "I leave my estate to my children in equal shares in the plan, your executor is left to figure out the equalization, the value of the firearms and how to make all of the plan work. The Prohibited Person may demand half of the firearms. This can be further complicated by an insolvent estate where the residuary doesn't have enough cash to equalize, and firearms, all or part, must be sold in order to make the equal distribution.

### **2. Later Prohibited Persons.**

Also, the planner should at least consider some attention to the possibility that a beneficiary could become a Prohibited Person after the plan is in place. Should such event occur, the intent may not be to sell that beneficiary's firearms, but to keep them in the family. The bequest should address such contingency, if at all possible. Perhaps a definition of Prohibited Person and sole discretion to the Executor to decide not just how, but if an equalization occurs.

3. Beneficiary Dies Prior to Testator.

There should also be an inquiry into descendants of your primary beneficiaries. As an example, if a primary beneficiary dies before the testator, leaving a felon and a minor as descendants, the estate plan is again faced with the complication of the testator's intent if the firearms were not meant to be sold. The lack of funds, lack of a contingency plan, or agreement of the beneficiaries causes confusion and possible litigation.

**C. Identifying Firearms, Supplies and Accessories.**

If your client is a firearms collector and you are not, you may be puzzled or bored at the detail in which the client describes the collection, the differences in hand guns that sound alike, and the value of accessories, ammunition, reloading equipment and the like. Well maintained collections tend to always increase in value, and a collector takes pride in the increase in value. The planner needs to help the client develop a way to list, describe, group and/or categorize the collection. Even a fellow collector cannot properly handle an ill-defined collection, and will be forced to guess.

1. Executor Has a List.

The easiest way to deal with a changing collection is to add language to the Will that reads similar to the following:

“At my death, I may leave a list addressed to my Executor of collections and other items, excluding cash assets, that I possess and pass by my Will to specific persons. This letter and list is a specific bequest that shall be honored by my Executor.”

This sounds like a simple solution, right? But no. Typically, a person will do a new Will and either forget the letter and list to the executor, fail to update it or re-date it, fail to place it with the Will, or fail to make it identifiable as that list the will references. For example, when the “Last” Will is probated, the letter or list may predate the Will. This leads to questions of a “new” letter or list that has been destroyed or that the “Last” Will revoked the letter or list of a prior date. There is no perfect way to remedy issues with a letter or list. One way to attempt to fix potential problems is as follows:

“The letter or list to my executor may be dated prior to my Last Will and Testament but remains valid unless my Last Will revokes such letter or list, or states the date of a subsequent list or letter.”

The opposite of “fixing” the letter or list problem occurs when the executor is a beneficiary, the Testator tells the executor to tear up the list or the Testator gives the beneficiary/executor a new list and he or she decides not to disclose it as it diminishes the beneficiary/executor's bequests. Thus, if the “listing” is not in the Will, issues can arise.

2. Collection Described in Will.

Collectors of anything valuable are an estate planning nightmare. Firearms are particularly problematic in that there are differences among sellers, buyers, manufacturers, and collectors about description. It can intensify the cost of estate planning to describe each and every firearm by description, year, serial number, etc. It is also impossible to keep up or be correct in the description. If the collection is large, the firearm description is subject to scrivener's error and omitted listings. The collection is further complicated by attempting to group accessories, tools, ammunition and other items so that they reach their intended beneficiary. If a listing is included in the Will, there should be a catch all for ill-described or additional firearms, giving the executor sole and absolute discretion to divide anything in question and releasing the fiduciary for his or her decisions, regardless of how perceived. Listing large collections is not recommended.

3. Later Sales and Acquisitions.

Regardless of the method by which the drafter identifies the collection, most collections of firearms change. The testator gives a gift, trades, buys new firearms, sells them, and the list and/or description in the Will will not match the collection. If the testator is diligent about the letter to the Executor, the estate process works in a more efficient manner. If, however, the collection changes and the Will is never updated, the collection and the Will listing will not match. Thus, again, the administration of the estate plan is more difficult.

**D. Updating Your Estate Questionnaire.**

Most planners have an estate questionnaire. A sample from our office is attached as **Exhibit B**. As you can see, there is very little in the way of focus of details of any collection. If you do Gun Trusts, or if you do not, you should afford any sort of collector a more detailed questionnaire so that the collector realizes or at least considers the need to more closely consider the bequest of firearms or seek an expert and create a gun trust. A suggested addendum to a will questionnaire is attached as **Exhibit C**.

1. Existence of Firearms.

Even if your practice is not geared toward handling large collections of firearms, it is important to bring up the existence of firearms. Even a short discussion of firearms could lead to more specific drafting or the creation of a Gun Trust. Planners are remiss if they have no discussion of items like firearms.

2. Existence of Prohibited Persons as Beneficiaries.

Just as the questionnaire should include an inquiry as to who you intend to leave firearms to, by adding a brief definition of Prohibited Persons, the Testator can examine the beneficiaries and realize that a "share and share alike" or a specific bequest to certain persons of firearms will not work out at the Testator's death. It can be handled to the extent possible prior to death.

3. NFA Firearms.

The National Firearms Act (NFA) is extremely strict. It is not legal for any person to possess a Title II firearm other than the registered owner. These firearms include machine guns, silencers, destructive devices, etc. It is a crime punishable by up to ten (10) years in prison and up to \$250,000.00 in fines. If the NFA firearms are not in a Gun Trust, then your client may put his executor and beneficiaries at risk of committing a crime. The existence of Title II items at death poses its own problems.

4. Existence/Need for Gun Trust.

As a planner, if you learn of the existence of Title II items in the firearms collection, a reasonable inquiry is how they are held. If they are held in a Gun Trust, the next inquiry is if their named executor is a trustee, and if the Gun Trust is correctly funded with all NFA items. If not, there are few options for the transfer of these items at death. The process is discussed in Sean Healey's comprehensive article, Gun Trusts and Firearms Issues In Probate Matters.

## **II. INTERVIVOS TRUSTS AND TESTAMENTARY TRUSTS:**

Trusts can be created during life and funded. They are typically accompanied by a pour over Will, which funds any remaining assets into the trust at death. Other trusts, for minors, incapacitateds, or just because you want assets in trust, can be funded by way of a testamentary trust included in your Will. Regardless of the type of trusts, there are many considerations on who to pick as trustee, and what to fund into the trust. If the trust creates multiple trusts at death, there are also restrictions on what should fund the different trusts. Firearms should be transferred into the intervivos trust, or trust during lifetime by Bill of Sale.

### **A. Drafting**

1. Picking a Trustee or Trustees

Unlike an executor, except in limited circumstances, you can pick a trustee who has a criminal record, if you think this is a good idea. There is not a clear statute or caselaw on felons as trustees. If firearms are involved, once again you must consider the Prohibited Persons and the physical location of the trustee in relation to the beneficiary receiving firearms. The Federal and State laws affecting firearms will apply in both possessing the firearms and distributing them to the beneficiaries. If your trustee is a felon, the trustee cannot handle any of firearms and ammunition.

2. Picking Beneficiaries

The pot into which to place trust assets is also important. If the Beneficiary cannot accept the firearms, it leaves the trustee attempting to decide what to do and may involve Court intervention.

3. Minor as a Beneficiary

When you leave firearms to a minor, the bequest will most likely fail. The Settlor may believe a bequest to a minor is actually an "okay idea, and believe these firearms will be held by the parent of a minor". You must specifically state that a parent can hold the firearms as a

natural parent. Are parents of the minor beneficiaries “Prohibited Persons”? If there are no instructions, does the Trustee just sell the firearms and fund the minor’s trust? Does the minor, now an adult, have a cause of action for the loss of valuable firearms? Does the trustee need the Court for protection, and if so, how? Minors, with no other drafting, cannot take possession of the firearms. You must be 21 to own a handgun and/or ammunition exclusively for the handgun. If a minor is 18 or older, he or she can own/possess a rifle and/or shotgun.

4. Incapacitateds as Beneficiaries

There is no way to determine if you will need the trust for an incapacitated person when you die, unless the person is incapacitated as of the drafting. Bad things happen and in the rush to care for a loved one, your client does not think first of their trust, or their will containing the firearms. A catchall provision is useful giving the trustee the absolute discretion to sell or unequally divide firearms should an incapacitated person be a beneficiary. Incapacitated can also be a term of discretion encompassing substance abuse, etc. and have the trustee be the determining factor on incapacity and to have absolute discretion in deciding not to allow the firearms to go to a beneficiary.

5. When to Create a Gun Trust

Sometimes, after careful thought and planning, an intervivos or testamentary trust will not satisfy the client or protect their firearms. If you are not comfortable with Title II weapons, following laws on transfer, shipping, possession and the like, you may wish to steer the client toward a Gun Trust. One caveat is to not undertake such a trust if it is not in your expertise. There are many Gun Trusts that will not withstand scrutiny. Also make sure the Gun Trust coordinates with the entire estate plan.

**B. Statutory Protection and other Trustee Issues**

1. Draft to Protect From Civil Liability

If you are going to draft an estate plan to handle firearms, the drafter should at least familiarize themselves with Chapter 46 of the Texas Penal Code. There is no certain way to draft for total protection from civil liability at all, much less for criminal liability for the mishandling of firearms. You should give your trustee the ability to seek any help they need, indemnify them as much as possible, and instruct your client to talk to his trustee about finding competent counsel.

It is important to consider both state and federal laws in drafting and administering testamentary and intervivos trusts containing firearms. There is a safe passage provision to allow a trustee to transport firearms and ammunition from one state to another **if** the items can be legally possessed. Learn the firearm laws in the state of administration and any other state the trust assets may eventually need to go.

2. NFA Trust Protection

Know that a Gun Trust can allow a Trustee to possess NFA, Title II firearms and weapons it might not otherwise possess. The same protection does not allow a mere trustee of an intervivos or testamentary trust the same protection. The immediate identity of NFA firearms is a

must. If a client has no idea, leave them alone. Putting them in a car, handing them off to a **trusted friend** to hold them are all horrible ideas. Have a professional come look at them.

### 3. Keys, Combinations and Protection

If you want trusts to work as intended, information is essential. If you wish the firearms to remain safe and secure, and eliminate or lower risk to others or lower the risk of theft, you must trust the trustee with combinations, keys, instructions, care, and security for these firearms. An untrusting owner must decide between having his entire collection mistreated, harmed, neglected or destroyed in attempting to locate, catalog and inventory the firearms; or trusting, educating and informing the trustee. Firearms need to be safe now, and at the client's death.

## III. INVENTORYING AND DISTRIBUTING THE ESTATE

### A. Inventory to Beneficiary/Court

Firearms are typically listed separately on an inventory. If possible, an affidavit in lieu of inventory should be filed of public record, but not the inventory. Thieves have access to public data and an inventory gives them a shopping list. It is custom to list each firearm by make, model and serial number. Most gun dealers can assist you in locating the serial number on the firearm. You will not always be able to pinpoint a year of manufacture. Locate any lists, receipts, insurance or any document which can assist in accurate reporting. If you must file a public inventory, the items, including firearms should not be in a vacant house, unprotected, or alone with an elderly person requiring care.

### B. Valuing

Insurance on firearms is a good method for obtaining values. Many gun dealers offer both informal and formal appraisal services. It is wise to get a quote as some do a flat fee appraisal while other appraisals are by the piece. In a taxable estate, the formal appraisal is usually provided to the IRS. If there are expensive pieces of re-loading or repair equipment, you should get a value on these larger pieces. Gun dealers will usually offer to purchase firearms.

## IV. INTESTATE SUCCESSION

An entire article could be written and are written on the difficulties of passing away without a will. Can you imagine a potential client, anti-gun, anti-weapon, who walks into a loved one's home after death? There is a safe full of firearms, massive amounts of ammunition, and reloading equipment. Now, finding no will, he wants to be appointed administrator. His or her first thought is to get rid of all firearms. Or, your potential client is not disqualified, but gets appointed and realizes he or she, or heirs at law are Prohibited Persons

### A. No Will

If the Decedent has no will, the expense of administering the estate can triple or quadruple. Thus, if the anti-gun administrator is appointed, the firearms go quickly, and usually to any

interested buyer. Also, any administrator may be forced to liquidate the firearms to pay debts as no order is left by Decedent as to what is sold first, and firearms are readily marketable.

#### **B. No Chosen Personal Representative**

One reason to promote estate planning and Gun Trusts is to pick your representative. The family where there is no will may meet and pick an administrator based on convenience to estate property, time to spend, family vote or any number of factors. In no way will the Decedent's wishes be fulfilled unless it is by accident. Again, all the firearms go by the way of the advice given to the Court appointee by their chosen counsel.

#### **C. Heirs as Firearm Recipients**

If you die without a will, the Estates Code decides your heirs. See Estates Code §§201.001 and 201.002. A flow chart which may simplify the discussion of heirs at law is attached as **Exhibit D**. The administrator or personal representative has the right to possess firearms and get what could be called a "pass". See 27 CFR 479. This speaks directly to NFA firearms. However, this does not exceed the term of the administration. You also are charged with a duty to not distribute firearms to Prohibited Persons, and a duty to follow all of the transfer rules for NFA firearms.

### **V. POTENTIAL DISABILITIES THAT AFFECT CAPACITY**

#### **A. Assessing a Problem**

There are numerous physical as well as mental issues that can render a client temporarily or permanently incapacitated. As lawyers, we do not possess the tools to "diagnose" our clients. We do, however, possess the insight to realize that something is "off" or that certain responses or a lack of response is more than a client just being difficult. In planning, we should always be alert to possible disorders. This awareness should heighten if the client discusses the use and ownership of firearms.

#### **B. Potential Disabilities**

A disability is generally defined as a limitation on a person's ability to perform socially-defined roles and tasks within a sociocultural and physical environment.<sup>1</sup> Disability is the "gap between the person's capabilities and the environment's demand."<sup>2</sup> While a person's disability will not always result in incapacity, the ability to recognize the most frequently encountered conditions and disorders may be a factor in deciding whether further action, such as invoking a power of attorney or seeking a guardianship, as appropriate. The following is a brief overview of

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<sup>1</sup> See generally Michael Lichtenstein, M.D., M.Sc., *Capacity - The Medical Perspective*, STATE BAR OF TEXAS ELDER LAW COURSE, Ch. 10 (2000) (discussing capacity issues as defined in the medical field).

<sup>2</sup> *Id.* at 3.

potential disorders that may impact a decision to seek help for a client. Specifically, each description details whether the condition is permanent and progressive or if it is treatable.<sup>3</sup>

### 1. Mental Incapacity

Mental capacity relates to the requisite ability to appreciate the effect of a choice and understand the nature and consequences of such choice. The ability to make such choices is contingent on the process used to reach his or her decision. Generally, a person has the requisite mental capacity to contract when they are able to reach their decision as a result of the following four-step process:

- Understanding the relevant information regarding the choice;
- Appreciating the likely consequences of each choice;
- Manipulating the information rationally; and
- Communicating a stable decision.

This four-step process must be applied to each decision, which could be hundreds a day. Thus, when dealing with educated clients (or lawyers), their education may allow them to mask many difficulties. A person may have sufficient mental capacity to make certain decisions, but not others. This is the logical result of the application of this process to choices or decisions that involve varying levels of complexity and consequences.

Potential mental incapacity can result from a number of disorders, diseases, and conditions. Although a thorough discussion is beyond the scope of this Article, common causes of medical incapacity include:

- Dementia disorders, such as Alzheimer's, Leewy Bodies, Picks, etc.;
- Cerebrovascular diseases such as stroke and multi-in-fact dementia;
- Depression;
- Alcohol and drug abuse and addiction;
- Vitamin deficiency such as Vitamin B12, Potassium, or Folic Acid;
- Thyroid imbalances or diseases; and
- Diseases that affect the central nervous system, such as syphilis and AIDS.

### 2. Manic and Bipolar Disorders

Persons with manic or bipolar disorders are particularly difficult because they can interact well in certain settings. A person who is both manic and depressive will have huge mood swings, ranging from irrational fears and hopelessness, to unwarranted giddiness. In mania, the person is expansive, euphoric, and full of good humor. They can sometimes seem happy about bad things. But, when criticized, the person becomes irritable, argumentative, and threatening. In the depressive mode, the person is sad, tearful, hopeless in the extreme, and even suicidal. The client may miss deadlines and meetings with no word or call. At times, they may lack the requisite capacity to handle certain matters, be susceptible to influence, or make poor decisions. However, whether they meet the standard of incapacity that requires a guardianship is often difficult to prove.

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<sup>3</sup> *Supra* note 3; see also Richard C. Simons, M.D., UNDERSTANDING HUMAN BEHAVIOR IN HEALTH AND ILLNESS (3d ed. 1985) (discussing various personality disorders).

This particular disorder is difficult to control, as medications can control the disease temporarily, but then may not control the ups and downs as effectively as time goes on.

### 3. Organic Brain Syndrome

Organic Brain Syndrome (“OBS”) is characterized by a temporary or permanent dysfunction of the brain. The direct cause of the dysfunction is unknown, and this makes treatment with medication a hit or miss proposition. There is a loss of brain function in all OBS cases. The loss of function presents itself opposite from the acquisition of functions during the person’s growth; for example, the first brain function that is lost is the intellectual or cognitive function. The next functions that deteriorate are motor skills and consciousness. A person suffering from OBS may be difficult to identify because he or she may be having a good day when first encountered, and then hours later begin to fade. Only after significant interaction will signs of incapacity become evident. If the attorney spends the day with the person, the loss of the cognitive function may be evident. At first, the loss may seem normal, but the effect on daily work will become apparent.

### 4. Chronic Alcoholism and Drug Dependency

It is estimated that 15 million Americans abuse alcohol.<sup>4</sup> The International Classification of Disorders (ICD-10) uses the following criteria to diagnose alcoholism:

Men: 3 to 7 drinks almost every day or 7 or more drinks at least 3 times a week.

Women: 2 to 5 drinks almost every day or 5 or more drinks at least 3 times a week.

The use of alcohol or drugs does not necessarily correlate to incapacity or need for a guardian. But chronic and prolonged use can lead to permanent impairment or susceptibility to undue influence. It is often very difficult to obtain guardianship when the incapacity is related to drug or alcohol use. The client will enter treatment, get sober, but will need monitoring in order to stay sober. Also, chronic alcoholism can decrease brain function and reasoning and may even become permanent.

### 5. Dementia and Alzheimer Diagnosis

Senile dementia is sometimes referenced as being age-related. References to multi-infarct disease, or mini strokes, may also suggest impairment and can contribute to dementia. From cross-examining psychiatrists, although some forms of memory loss can be treated, it appears that Alzheimer’s or multi-infarct dementia is progressive and irreversible. However, before filing a guardianship proceeding on a client with Alzheimer’s, consideration should be given to a person’s willingness to consider evaluation and treatment. Dementia is also irreversible, and the client should use the time of stabilized mental capacity to handle their affairs. Moreover, lawyers should secure proof of their client’s stabilized capacity in writing at or near estate planning execution.

## C. **Warning Signs**

As with many of these cases, it is often difficult to initially gauge a person’s incapacity or a disability that could lead to bad judgment, exploitation, confusion, and inability to focus. As

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<sup>4</sup> *Alcohol Facts and Statistics*, National Institute of Alcohol Abuse and Alcoholism, <https://www.niaaa.nih.gov/alcohol-health/overview-alcohol-consumption/alcohol-facts-and-statistics> (last visited July 1 2018).

lawyers, we have limited exposure to our clients. But some of the more common warning signs include:

- Memory problems evidenced by excessive reliance on third parties to provide basic information and detail;
- A tendency to avoid answering questions that relate to memory recall, or “masking;”
- “Covering,” which is answering a question with a glib response such as “everyone knows that;”
- Repeated conversations regarding the same issues or concerns that have been previously responded to;
- Unusual reliance on another person for their basic daily needs such as food, shelter, clothing, and communication needs, commonly referred to in medical records as “ADLs” or “activities of daily living;”
- Signs of hypochondria, particularly when faced with a client meeting, or deadline;
- Obsessive/compulsive behavior;
- Victim-like behavior, such as the inability to perceive the contribution of one’s own actions to the current situation, but deflecting the inability to focus onto others;
- Significant mood swings in short periods of time, contributing to difficulties in making rational decisions;
- Unreasonable suspicions, such as believing a friend is an enemy, stealing money, or trying to harm them without any factual or logical basis;
- Manic/depressive or otherwise inappropriate behavior, such as behaving extremely jubilant for no reason at a serious time, or being depressed, sad, and tearful when all is going well and there is no perceived problem (this can even occur in court or in depositions);
- Anxiety disorders or illnesses which prevent the client from leaving his or her home on various days and/or the inability to subject themselves to a group of persons; this can also manifest itself as agoraphobia and other phobias (panic disorder is an example);
- Substance abuse disorders to the degree that the client is incoherent, and communication is limited to days when the client has not abused the substance;
- Major depression to the degree that there are changes in appetite, sleep patterns, energy, concentration, and possibly feelings of hopelessness and suicidal thoughts (note that these are often not shared with their lawyer, friends, or family members);
- Schizophrenia, or schizophrenia-affective disorders which, when not controlled, result in delusions, disorganized speech, and possibly hallucinations (these may not have exhibited themselves on the date of marriage but usually appear before age of forty);
- Amnesic disorders that are difficult to address, such as fluctuating dementia, Alzheimer’s, early-onset dementia, Lewy Bodies, etc.; and
- Psychopharmacological disorders such that the client is non-compliant with medications, over-medicates, or abuses both prescribed over-the-counter medications, and/or illegal drugs.

#### **D. Texas Rules of Disciplinary Conduct Rule 1.17 – Clients with Diminished Capacity**

1. Additional problems arise when you are planning, probating a will, or counseling a client who you fear has diminished capacity. If you add to the possibility of financial exploitation and bad judgment. The existence of firearms, the concern for the client increases rapidly. What does the lawyer do? To whom do you turn? The answer has been somewhat clarified since 2021.

2. Rule 1.17 Clients with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for another reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action. Such action may include, but is not limited to, consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, attorney ad litem, amicus attorney, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client.

(c) When taking protective action pursuant to (b), the lawyer may disclose the client's confidential information to the extent the lawyer reasonably believes is necessary to protect the client's interests.

*Tex. Disc. R. Prof. Cond. 1.17*

The comments on this newly revised disciplinary rule prove insightful:

1. The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. However, maintaining the ordinary client-lawyer relationship may not be possible when the client suffers from a mental impairment, is a minor, or for some other reason has a diminished capacity to make adequately considered decisions regarding representation. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often can understand, deliberate on, and reach conclusions about matters affecting the client's own well-being. For example, some people of advanced age are capable of handling routine financial matters but need special legal protection concerning major transactions. Also, some children are regarded as having opinions entitled to weight in legal proceedings concerning their custody.
2. In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as the client's ability to articulate reasoning leading to a decision, variability of state of mind, and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the lawyer's knowledge of the client's long-term commitments and values.
3. The fact that a client suffers from diminished capacity does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the client

has a guardian or other legal representative, the lawyer should, as far as possible, accord the client with the normal status of a client, particularly in maintaining communication. If a guardian or other legal representative has been appointed for the client, however, the law may require the client's lawyer to look to the representative for decisions on the client's behalf. If the lawyer represents the guardian as distinct from the ward and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct.

4. The client may wish to have family members or other person, including a previously designated trusted person, participate in discussions with the lawyer; however, paragraph (a) requires the lawyer to keep the client's interest foremost and, except when taking protective action authorized by paragraph (b), to look at the client, not the family members or other person, to make decisions on the client's behalf. As part of the client in-take process, lawyers may wish to give new clients the opportunity to designate trusted persons who may be contacted by a lawyer if special needs arise. Any such procedure should provide sufficient information for the client to understand and confer with the lawyer about the designation of a trusted person. Standardized forms may be available from bar associates and practice groups. Information about trusted person designations should be appropriately safeguarded and periodically updated, as necessary. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor.

3. So, as a lawyer, you may reach out to, by the way of example a named power of attorney. Absent that person, you may write an information letter to the court exercising probate jurisdiction. There are now time frames for them to act on such letters. While you should exercise caution, you may now disclose confidential information.

## **VI. 2017 THROUGH THE PRESENT EXPANSIONS OF RIGHTS UNDER STATUTORY POWER OF ATTORNEY**

After change after change to the Power of Attorney Act, the legislature's 2017 modifications to the statute have hopefully made the statutory durable power of attorney more flexible and acceptable and also scary. In the litigation arena, the flexibility may allow for more logical solutions to divorce, guardianship, corporate, and capacity-related litigation. Unfortunately, the space limitations of this Article preclude a long discussion of these changes; for more detail, see Texas Estates Code Section 751.001 et seq. A summary of the changes in powers under a statutory power of attorney is as follows:

### **A. Expanded Powers of Agent**

1. Create, amend or revoke intervivos trusts; (**this could include Gun Trusts**)
2. Make gifts:
  - a. Generally limited to annual exclusion amount; (could be considered as way to get firearms away from an incapacitated)
  - b. Consistent with principal's intent (if known) or best interest;
3. Create or change rights of survivorship, such as:

- a. Putting limitations on who can be beneficiary;
  - b. Typically, must be related, or someone obligated to support by law;
- 4. Create or change beneficiary designations (life insurance/P.O.D.); and
- 5. Delegate authority under the Power of Attorney.

Additional provisions include:

- 1. The agent is not a fiduciary until he/she accepts appointment, and such fiduciary duty is only imposed while he or she is acting as agent.
- 2. Co-agents can act independently unless Power of Attorney states otherwise.
- 3. An agent has the power to name successor agent after those named by principal.
- 4. After September 1, 2017, compensation and reimbursement are allowed unless stated otherwise.
- 5. Expanded powers after September 1, 2017, also include minerals interests, mail, pets, homestead and digital assets.

#### **B. Acceptance of Statutory Durable Powers of Attorney By Third Parties**

Chapter E of the 2017 act is designed to require reasonable acceptance of powers of attorney. The financial institutions formerly presented a roadblock to using the power of attorney in times of incapacity through their unwillingness to adhere to these documents. These new provisions intend to balance the rights of the principals and the rights of the third parties asked to rely on the instrument. A summary of the acceptance changes are as follows:

- 1. The institution must accept or reject the document in a period of time.
- 2. The institution can rely on certification of agent, letter of counsel and English translation.
- 3. There are only certain reasons to reject and the institution must advise agent in writing.
- 4. There is now protection for acceptance in good faith.
- 5. There is a limited cause of action against the institution for refusal to accept the instrument.

#### **C. Changes in Duties of Agent Under a Power of Attorney**

There is no glamour in acting as an agent. It is a labor of love and the duty to account requires good record keeping, prohibits commingling, and includes other duties not required of handling your own personal funds. The duties have always been there, but some changes to the duties in 2017 include:

- a. A duty to preserve an estate plan done with capacity;
- b. A duty to act when there is knowledge of a breach by a co-agent;
- c. A duty to know when powers are temporarily suspended if the court appoints a temporary guardian and the order does not say otherwise.

### **VII. MENTAL COMMITMENTS**

Mental commitments are covered under the Texas Health & Safety Code, not the Estates Code. The commitment and hospitalization of clients or attorneys suffering from mental illness in Texas is civil and not criminal in nature. The procedure, including the affidavit and warrant, are completely private and confidential. In very limited circumstances, a court order can obtain copies,

usually redacted. Probate Courts, in certain circumstances, have access to these records. There is no public database where you can locate the names of person who have been mentally committed. Sometimes a client or attorney needs the “wake up” call that a commitment can give. It is a chance to get help, medication, therapy, and other options to avoid a guardianship and possibly the loss of a license, in occupations where licenses are required, OR A STATUS OF A Prohibited Person and loss of the ability to own and possess firearms.

#### **A. Definitions**

1. The term “Mental Illness” is defined as an illness, disease, or condition that either (1) substantially impairs a person’s thought, perception of reality, emotional process, or judgment or (2) grossly impairs behavior as demonstrated by recent distributed behavior.<sup>5</sup> This definition does not include a person suffering from epilepsy, senility, alcoholism, or a mental deficiency. However, a person who suffers from a mental illness along with another condition is still subject to commitment under the Code.

2. The term “Mental Health Facility” is defined as a mental health facility that can provide 24-hour residential and psychiatric services and the

- a. Is operated by the Texas Department of State Health Services (DSHS);
- b. Is a private mental hospital licensed by DSHS;
- c. Is a community center, a facility operated by or under contract with a community center, or another entity designated by DSHS to provide mental health services;

#### **B. The Commitment Process**

The commitment process must be broken down into three parts so that it can be better understood: (i) emergency detention; (ii) protective custody; and (iii) commitment. Each serves the purpose of protecting a person who constitutes a danger to themselves or others.

##### **1. Emergency Detention Without a Warrant (Peace Officer) - § 573.001**

A warrantless detention is the preferred method of emergency detention because of the very nature of a situation requiring intervention: The Code requires an officer to have sufficient reason to believe (1) that a person is mentally ill and (2) that because of such illness, a substantial risk of harm to self or others exists unless immediate restraint is employed.<sup>6</sup> If an officer encounters a person who truly meets the criteria for emergency detention, there should never be time to secure a warrant. A peace officer without a warrant may take into custody any such person suffering from mental illness, may transport the person to the nearest appropriate inpatient mental health facility—or a mental health facility deemed suitable by the local mental health authority if an appropriate inpatient mental health facility is not available—and may immediately file an application with the facility for the person’s detention. No detention is permitted in a private facility without the consent of the head of such facility.

##### **2. Emergency Detention with a Warrant - § 573.011**

Any adult may file an Application for the Emergency Detention of another. If the application is granted, a warrant is issued. Before issuance of an emergency warrant is approved, there must be adequate and credible information presented so that a reasonable decision may be formulated to protect the rights of the individual against the rights of society in general. The

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<sup>5</sup> TEX. HEALTH & SAFETY CODE ANN. §571.003(14) (West 2013).

<sup>6</sup> TEX. HEALTH & SAFETY CODE ANN. §571.001(a).

determination of what may be adequate and credible information is very difficult and can be accomplished only on a case-by-case basis. The sole purpose of the issuance of these warrants is to protect the individual or others when a substantial imminent risk of serious harm exists and immediate intervention or restraint is necessary to prevent injury. Thus, both the facts that form the basis for the requested warrant and the person who furnished these facts play a key role in the decision-making process. Therefore, the court can require the applicant to appear and be examined in order to attest the adequacy and credibility of the information furnished.

Peace officers are under similar constraints when exercising their authority under the warrantless detention provision contained in the Code. The same can be said of physicians and psychiatrists when performing their duties during preliminary examinations after emergency detention.

The applicant must have reason to believe and must believe all four of the following: (1) the person evidences mental illness; (2) there exists a substantial risk of serious harm to self or others; (3) such risk of harm is imminent unless the person is restrained; and (4) such belief is based on specific recent behavior, overt acts, attempts, or threats. In the application, the applicant must state and describe the following in detail: (1) the basis for the risk of harm; (2) the behavior, acts, attempts, or threats that form the basis of the applicant's belief; and (3) the relationship of the applicant to the individual. Any other available relevant information may accompany the application.<sup>7</sup>

### 3. Mental Commitment Evidence

#### **a. Elements for Commitment**

Under §§ 574.034(a) and 574.035(a), the necessary elements for involuntary inpatient commitment are that the proposed patient is mentally ill and as a result

(1) The proposed patient is likely to cause serious harm to himself or

(2) The proposed patient is likely to cause serious harm to others; or

(3) The proposed patient

a. Is suffering severe and abnormal mental, emotional, or physical distress; and

b. Is experiencing substantial mental or physical deterioration of the proposed patient's ability to function independently, which is exhibited by the proposed patient's inability, except for reasons of indigence, to provide for the proposed patient's basic needs, including food, clothing, health or safety; and

c. Is unable to make a rational and informed decision as to whether to submit to treatment.

#### **b. Sufficiency of Evidence**

The burden of proof shall be to prove each element of the applicable criterion by "clear and convincing" evidence.<sup>8</sup> Clear and convincing evidence is defined as the measure of proof that produces a firm belief or conviction in the mind of the fact-finder as to the truth of the allegations sought to be established.<sup>9</sup> Clear and convincing evidence is an intermediate evidentiary standard that requires more than a preponderance of

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<sup>7</sup> TEX. HEALTH & SAFETY CODE ANN. § 573.011.

<sup>8</sup> TEX. HEALTH & SAFETY CODE ANN. §§ 574.034(a), 574.035(a); *see also* Addington v. Texas, 441 U.S. 418 (1979).

<sup>9</sup> State v. Addington, 588 S.W.2d 569, 570 (Tex. 1979).

evidence but less than a reasonable-doubt standard.<sup>10</sup> It is the State's burden to meet the elements for commitment.<sup>11</sup> The state defends the commitment and its validity.

The clear and convincing evidence necessary for an order for inpatient mental health services must include expert testimony and, unless waived, must include evidence of a recent overt act or a continuing pattern of behavior that tends to confirm either (a) the likelihood of serious harm to the proposed patient or others; or (b) the proposed patient's distress and the deterioration of ability to function.<sup>12</sup> In a hearing for temporary mental health services, the evidence of the recent overt act or continuing pattern of behavior may be waived.<sup>13</sup>

**c. Order for Temporary Mental Health Services - § 574.034**

An Order for Temporary Mental Health Services shall state that treatment is authorized for not longer than 90 days.<sup>14</sup> The judge may enter an order committing the person to a mental health facility for inpatient care.<sup>15</sup> Alternatively, the judge may enter an order requiring the patient to participate in mental health services in outpatient care, including, but not limited to, programs of community MHA centers or services by private psychiatrists and psychologists.<sup>16</sup> The period of commitment for inpatient or outpatient services is for a period not to exceed 90 days. The court shall not specify any period shorter than 90 days nor more than 90 days upon an Application for Temporary Mental Health Services.

Under a determination for temporary or extended mental health services, a judge may advise, but may not compel, a proposed patient to participate in counseling, to refrain from the use of alcohol or illicit drugs, or to receive treatment with psychoactive medication as specified by an outpatient mental health services plan.<sup>17</sup>

**d. Order for Extended Mental Health Services - § 574.035**

An Order for Extended Mental Health Services shall state that treatment is authorized for not longer than 12 months.<sup>18</sup> The court cannot enter an order for extended commitment unless (1) the clear and convincing burden of proof standard is met for all mental illness elements; (2) findings are made that the condition of the patient will last longer than 90 days; and (3) the patient has been an inpatient under court order pursuant to the Texas Mental Health Code or the Texas Code of Criminal Procedure for at least 60 consecutive days in the last 12 months.<sup>19</sup> The court shall not specify any period shorter than twelve months on an extended commitment. "The court cannot make its

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<sup>10</sup> *Id.*

<sup>11</sup> *In re J.S.C.*, 812 S.W.2d 92, 94 (Tex. App.—San Antonio 1991, no writ).

<sup>12</sup> TEX. HEALTH & SAFETY CODE ANN. §§ 574.034(d), 574.035(e) (West 2017); *see also In re Breedon*, 4 S.W.3d 782 (Tex. App.—San Antonio 1999, no pet).

<sup>13</sup> TEX. HEALTH & SAFETY CODE ANN. § 571.034(f).

<sup>14</sup> TEX. HEALTH & SAFETY CODE ANN. § 574.034(g).

<sup>15</sup> *See* TEX. HEALTH & SAFETY CODE ANN. §§ 571.034, 571.035.

<sup>16</sup> *See* TEX. HEALTH & SAFETY CODE ANN. §§ 571.034(b), 571.035(b), 574.037.

<sup>17</sup> TEX. HEALTH & SAFETY CODE ANN. §§ 574.034(j), 574.035(j).

<sup>18</sup> TEX. HEALTH & SAFETY CODE ANN. § 574.035(h).

<sup>19</sup> TEX. HEALTH & SAFETY CODE ANN. § 574.035(a)–(b).

findings solely from certificates of examination for mental illness but shall hear testimony.”<sup>20</sup>

### C. Effect of Mental Commitment on Firearm Possession

#### 1. Privacy of a Mental Commitment

As discussed supra, a mental commitment is confidential. The records on how, why and where a person was committed is confidential. There are only rare circumstances where anyone can get a court order for even limited information on a mental commitment. The idea of confidentiality is to encourage help and preserve employment, licenses, dignity and the like. The anonymity of the mental commitment process seems to conflict with the definition of Prohibited Persons, and the ownership/possession of firearms by Prohibited Persons.

#### 2. 18 USC 922

The entirety of 18 USC 922(d) and (g) read as follows:

(d)It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person—

(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) is a fugitive from justice;

(3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

**(4) has been adjudicated as a mental defective or has been committed to any mental institution;**

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who [2] has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child, except that this paragraph shall only apply to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and

**(B)**

(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

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<sup>20</sup> House v. State, 222 S.W.3d 497, 500 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such [intimate partner](#) or child that would reasonably be expected to cause bodily injury; or

(9) has been convicted in any court of a misdemeanor crime of domestic violence. This subsection shall not apply with respect to the sale or disposition of a [firearm](#) or ammunition to a [licensed importer](#), [licensed manufacturer](#), licensed dealer, or licensed collector who pursuant to subsection (b) of [section 925 of this chapter](#) is not precluded from dealing in firearms or ammunition, or to a person who has been granted relief from disabilities pursuant to subsection (c) of [section 925 of this chapter](#).

...

(g) It shall be unlawful for any [person](#)—

(1) who has been convicted in any court of, a [crime punishable by imprisonment for a term exceeding one year](#);

(2) who is a [fugitive from justice](#);

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act ([21 U.S.C. 802](#)));

**(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;**

(5) who, being an [alien](#)—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act ([8 U.S.C. 1101\(a\)\(26\)](#)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such [person](#) received actual notice, and at which such [person](#) had an opportunity to participate;

(B) restrains such [person](#) from harassing, stalking, or threatening an [intimate partner](#) of such person or child of such [intimate partner](#) or person, or engaging in other conduct that would place an [intimate partner](#) in reasonable fear of bodily injury to the partner or child; and

(C)

(i) includes a finding that such [person](#) represents a credible threat to the physical safety of such [intimate partner](#) or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such [intimate partner](#) or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in [interstate or foreign commerce](#), or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in [interstate or foreign commerce](#).

The clear wording of both (d) and (g) would indicate that anyone who has been “committed to any mental institution,” cannot be (1) sold a firearm, (2) given a firearm, or (3) possess a firearm. This begs the question “who will know?”. The reporting to appropriate authorities inadequate and many involuntary commitment reportings fall through the cracks. If the firearm is left to a beneficiary who has been committed, the executor/trustee may not be privy to any knowledge of the event. There is no statute in the Texas Estates Code that requires any due diligence to try to discover any involuntary mental commitments. How would anyone make such a sensitive inquiry?

#### **D. Law Enforcement Seizing of Firearms**

A peace officer can seize firearms. Under § 573.001, the firearms can be seized, and the law enforcement officer will issue a receipt for any firearm found in the possession of the person they believe to be mentally ill. The firearm does not have to be used in the commission of a crime, but due to fear of bodily harm to the person taken into emergency detention or fear of harm to others. A copy of the Receipt and Notice of Rights for Seized Firearms is attached as **Exhibit E**. Note that under Art. 18.191, TEX. CODE CRIM. PROC., and § 573.001 Texas Health and Safety Code, certified notice must be given on timeframe and procedure to gain return of the firearm. The reality of this form is a mentally impaired person may give no information or incorrect information on their next of kin, and the firearms may never be returned.

### **VIII. GUARDIANSHIP**

#### **A. Definition**

Guardianship is an extreme step and should be only considered if all other avenues of help fail. If the compromised client is at such a state of mind to be judicially declared incompetent, then his or her career is at an end and firearms ownership is at risk. The same can be said of any employment as few employers will hire on or continue to employ incapacitated persons. A guardianship is a judicial declaration that a person fits the following definition pursuant to the Texas Estates Code §1002.017.

An Incapacitated Person is:

- (1) a minor;
- (2) an adult who, because of a physical or mental condition, is substantially unable to:
  - (A) provide food, clothing, or shelter for himself or herself;
  - (B) care for the person's own physical health; or
  - (C) manage the person's own financial affairs; or
- (3) a person who must have a guardian appointed for the person to receive funds due the person from a governmental source.<sup>21</sup>

With firearms, the existence of a guardianship requires the guardian to take the firearms to the exclusion of the incapacitated. The question of selling the firearms to care for the incapacitated is usually answered with a yes. If the firearms are in a Gun Trust or even an intervivos trust, the

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<sup>21</sup> TEX. EST. CODE ANN. § 1002.017 (West 2013).

firearms may be preserved. A guardianship ends all powers of attorney and the ability to now fund a trust or a gun trust.

## **B. Medical Evaluation**

If a client is impaired, he or she will not submit to a medical evaluation wherein the results are shared with the court and others. A guardianship requires a medical exam and letter by a Texas doctor where the exam is within 120 days of filing. When a guardianship is filed, it may necessitate a request for an Independent Medical Examination. The motion can be filed with the Application for Guardian. It normally will not be heard until the person on which the guardianship is filed is provided an attorney ad litem, who represents them as an appointed attorney. The Estate Code requires four (4) days' notice in order for the Motion for Mental Exam to be heard. A copy of the form doctor's letter is attached as **Exhibit F**, to demonstrate the types of questions the physician is required to answer. Note that no question on the doctor's letter addresses the continued ownership of firearms. This author knows of no physician who would certify the need for a guardian and state the person could possess any form of weapon. This is not going to happen.

## **C. Designations of Guardian**

### **1. Before Need Arises**

Persons who are concerned that they may lose capacity and that their power of attorney will be ignored may designate the person they wish to be guardian and set forth the order of preference of who is appointed. Clients who are reluctant to sign powers of attorney due to fear of their being abused may agree to execute a designation of guardian as some form of protection. *See* TEX. ESTATES CODE § 1104.202.

While competent adults may designate a person to serve as the guardian of their estate and/or person in the event of future incapacity, the declarant may also disqualify named individuals from serving in this capacity. The designation or disqualification must be in writing, signed by the declarant, attested to by two or more witnesses, and a self-proving affidavit must be attached to the document. The designation/disqualification is revocable and any designation favoring a spouse is void should they subsequently divorce.<sup>22</sup>

The Designation of Guardian Before Need Arises is an excellent backup measure to other alternative actions that can be taken to obviate the need for a guardianship, such as a durable power of attorney and/or revocable management trust or even Gun Trust. The clear language of the Texas Estates Code Section 1104.212 can be a settling factor in a contested guardianship if a person other than the person designated files to be guardian, or if the person expressly disqualified by the designation applies to be guardian. The language is as follows:

Unless the Court finds that the person designated in the declaration to serve as guardian is disqualified or would not serve the best interest of the Ward, the Court shall appoint the person as guardian . . . .<sup>23</sup>

This section indicates two things: (1) a strong preference of the proposed incapacitated person, and (2) that the court shall be the deciding factor. As you can see, this section

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<sup>22</sup> TEX. EST. CODE ANN. § 1104.211 (West 2014).

<sup>23</sup> TEX. EST. CODE ANN. § 1104.212 [emphasis added].

makes specific reference to the court as the fact finder. This strong language can assist in settlement of a contested guardianship prior to trial.

2. State Who You Do Not Want as Guardian

The beauty of designation of a guardian is that a person can designate no one, but simply list the persons who they do not want to serve as guardian. It is still called a designation, but is actually an “un”-designation of that person or persons, who, in the client’s incapacity, they might not realize would be the worst choice for care of the ward or their assets.

3. State Specific Instructions

Although there is no provision to add instructions on assets in a designation of guardian, it puts a court and counsel on notice of your strong feelings about various issues, including firearms. You could state that you do not wish any person to be appointed guardian who does not agree your firearms can only be sold as a last resort. (Note, if you have no Will, this will become irrelevant at death). A copy of a Designation of Guardian is attached as **Exhibit G**.

**D. Steps in a Guardianship**

The requisite steps to initiating a guardianship are as follows:

1. The Filing of the Application
  - a. Appointment of attorney ad litem
  - b. Possible visit by court investigator
  - c. Possible appointment of guardian ad litem if warranted (to determine best interest)
2. Service Requirements
  - a. Client who is incapacitated must be personally served always – this cannot be waived
  - b. Parents, spouse, siblings served
  - c. Agent under power of attorney served
3. Medical Evidence
  - a. Gather known medical from home
  - b. Use power of attorney with HIPAA release
  - c. May require Independent Medical Exam and hearing if no medical available
4. Trial or Hearing
  - a. Citation on the proposed incapacitated must be returned for ten days
  - b. Doctor’s letter is hearsay
  - c. Must have agreement for admission of medical without the live physician testimony
5. Burden of Proof
  - a. Is always on Applicant

- b. Must be clear and convincing evidence as to:
    - (1) Incapacity
    - (2) Best interest of person to have guardian
    - (3) The person's rights will be protected by guardianship
    - (4) Least restrictive alternative
    - (5) Supports and services and alternatives will not work
  - c. Must be by Preponderance
    - (1) All other issues
    - (2) Disqualification/eligibility
    - (3) Specific functions can and cannot do
  - d. Must be recurring acts of incapacity over last 120 days
- 6. Order of Guardianship
  - a. Must address voting (§ 11.002 Texas Election Code)
  - b. Must address driving (§ 521.201 Texas Transportation Code)
  - c. Must address possessing firearms (§ 1202.201 Texas Estates Code) (Restoration)
  - d. Must address ammunition (18 U.S.C. § 922(d)(4)) and 922(g)

## **E. Practical Advice**

### **1. Liability of Incapacitated and Guardian**

A Guardianship will not shield the impaired client, attorney, or the law firm (in case of incapacitated lawyer) from being sued over the acts and omissions of the incapacitated person and use or misuse of a firearm. In fact, it may not ever stop a deposition even if the testimony is unreliable. The existence of a guardianship does not render a person unable to testify or to give his deposition.<sup>24</sup> However, there is a rebuttable presumption of incapacity as to what the client says, so the testimony may be precluded. The adjudication also does not protect the attorney or client from standing trial in a criminal proceeding.<sup>25</sup> To stand criminal trial, incapacity is a separate jury trial on competency to stand trial. The person must know (1) right and wrong, and (2) be able to assist their attorney.

Further, there is personal liability on a guardian for allowing an incapacitated to do things the person is adjudicated to do. These include owning or possessing a firearm and driving. So, if your client is a guardian, you cannot “leave grandpa a gun for protection.”

### **2. Disqualification**

The section of the Estates Code relating to disqualification is Section 1104.351 *et seq.* Unlike adverse interest, disqualification is typically a jury issue. It is not a matter of law unless the evidence merits a motion for summary judgment. The following criminal disqualifications are self-evident:

- a. any sexual offense;
- b. aggravated assault;
- c. injury to a child, elderly or disabled;

<sup>24</sup> See *Mobile Oil Corp v. Floyd*, 810 S.W.2d 321 (Tex. App.—Beaumont 1991, no writ).

<sup>25</sup> See *Koehler v. State*, 830 S.W.2d 665 (Tex. App.—San Antonio 1992, no writ).

- d. abandoning or endangering a child;
- e. terroristic threat; or
- f. continuous violence against the family of the incapacitated.

There are many bases for an allegation of disqualification. The Estates Code provides no laundry list of guidance of all disqualifications. However, the Estates Code does list certain “catch all” phrases for disqualification such as “notoriously bad” and “unsuitable”. Some of the more common alleged disqualifications under Estates Code 1104.351 are:

- a. Being a minor;
- b. Being incapacitated;
- c. Being unsuitable;
- d. Being notoriously bad;
- e. Being a party to a lawsuit with incapacitated;
- (1) May be cured by guardian ad litem;
- f. Being a person with an adverse claim;
- g. Being incapable;
- h. Being a non-resident without a resident agent;
- i. Being indebted to the incapacitated;
- j. Being disqualified by a Designation of Guardian; or
- k. Being the subject of a family violence order.<sup>26</sup>

## IX. CONCLUSION

Firearms need to be a question in every estate plan. It is important to be cognizant in every plan to ask about firearms and specifically NFA firearms. It is also important to deal with the distribution of firearms and the careful removal of firearms in mental commitments and guardianships. If clients protect their firearms by trusts and Gun Trusts, put a Statutory Power of Attorney in place that allows that trust to continue to be funded, and if all else fails, designate a guardian who will honor your wishes and protect your firearms. There is hope for firearms to remain in families or as legacies, if a little time is spent choosing wisely.

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<sup>26</sup> TEX. EST. CODE ANN. § 1104.351 (West 2014).

**EXHIBIT A**

Cause No.: \_\_\_\_\_

Applicant: \_\_\_\_\_ § In the \_\_\_\_\_ Court

§

v.

§

of

§

§

Respondent: \_\_\_\_\_ § \_\_\_\_\_ County, Texas

**Temporary Ex Parte Protective Order****Go to the court hearing on:** Date: \_\_\_\_\_ Time: \_\_\_\_\_ a.m. p.m.

Court Address: \_\_\_\_\_

**Findings:** The Court finds from the sworn Affidavit or Declaration attached to the *Application for Protective Order* filed in this case that there is a clear and present danger that the Respondent named below will commit acts of family violence that will cause the Applicant, Children, and/or Other Adults named below immediate and irreparable injury, loss, and damage, for which there is no adequate remedy at law. The Court, therefore, enters this *Temporary Ex Parte Protective Order* without further notice to the Respondent or hearing. No bond is required.

- 1 Respondent:** The person named below is ordered to follow all Orders marked with a check.

Name: \_\_\_\_\_ County of Residence: \_\_\_\_\_

- 2 Protected People:** The following people are protected by the terms of this PROTECTIVE ORDER:

Name:

County of Residence:

☐ **Applicant:** \_\_\_\_\_

☐ **Children:** \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

☐ **Other** \_\_\_\_\_

**Adults:** \_\_\_\_\_

- 3 Temporary Orders** — To prevent family violence, the Court orders the Respondent to obey all orders marked with a check. ✓

**The Respondent (person named in 1) must:**

- a. ☐ Not commit an act against any person named in **2** above that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places those people in fear of imminent physical harm, bodily injury, assault, or sexual assault.
- b. ☐ Not communicate in a threatening or harassing manner with any person named in **2** above.
- c. ☐ Not communicate a threat through any person to any person named in **2** above.

- d. ☐ Not communicate or attempt to communicate in any manner with: (*Check all that apply*)  
☐ Applicant   ☐ Children   ☐ Other Adults named in **2** above. The Respondent may communicate through: \_\_\_\_\_ or other person the Court appoints.  
 Good cause exists for prohibiting the Respondent's direct communications.
- e. ☐ Not go within 200 yards of the (*Check all that apply*):  
☐ Applicant   ☐ Children   ☐ Other Adults named in **2** above. (except to go to court hearings)
- f. ☐ Not go within 200 yards of the Residence, workplace, or school of the: (*Check all that apply*)  
☐ Applicant   ☐ Other Adults named in **2** above.  
 The addresses of the prohibited locations are: (*Check all that apply*)  
☐ Deemed confidential. The Clerk is ordered to strike the information from all public court records and maintain a confidential record of the information for Court use only.  
☐ Disclosed as follows:  
 Applicant's Residence: \_\_\_\_\_  
 Applicant's Workplace/School: \_\_\_\_\_  
 Other: \_\_\_\_\_
- g. ☒ Not possess a firearm or ammunition, unless the Respondent is a peace officer actively engaged in employment as a sworn, full-time paid employee of a state agency or political subdivision.
- h. ☐ Not go within 200 yards of the Children's Residence, child-care facility, or school.  
 The addresses of the prohibited locations are: (*Check all that apply*)  
☐ Deemed confidential. The Clerk is ordered to strike the information from all public court records and maintain a confidential record of the information for Court use only.  
☐ Disclosed as follows:  
 Children's Residence: \_\_\_\_\_  
 Children's Child-care/School: \_\_\_\_\_  
 Other: \_\_\_\_\_
- i. ☐ Not stalk, follow, or engage in conduct directed specifically toward the Applicant, Children, or Other Adults named in **2** above that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass them, including tracking or monitoring a car or other property.
- j. ☐ Not remove the Children from their school, child-care facility, or the Applicant's possession.
- k. ☐ Not remove the Children from the jurisdiction of the Court.
- l. ☐ Not take, harm, or interfere with the care, custody, or control of the following pet, companion animal, or assistance animal: \_\_\_\_\_ (describe the animal).
- m. ☐ Not interfere with the Applicant's use of the Residence located at: \_\_\_\_\_, including, but not limited to, disconnecting utilities or telephone service or causing such services to be disconnected.
- n. ☐ Not interfere with the Applicant's use and possession of the following property:  
 \_\_\_\_\_  
 \_\_\_\_\_
- o. ☐ Not damage, transfer, encumber, or otherwise dispose of any property jointly owned or leased by the Applicant and Respondent, except in the ordinary course of business or for reasonable and necessary living expenses, including, but not limited to, removing or disabling any vehicle owned or possessed by the Applicant or jointly by the parties (whether so titled or not).

**4 ☐ Order: Vacate Residence Immediately**

The Court finds that the Residence located at: \_\_\_\_\_ (Check one):

- ☐ is jointly owned or leased by the Applicant and Respondent;  
☐ is solely owned or leased by the Applicant; or  
☐ is solely owned by the Respondent; and the Respondent is obligated to support the Applicant or a child in the Applicant's possession.

The Court further finds that the Applicant currently resides at the Residence, or has resided there within 30 days prior to the filing of the *Application for Protective Order* in this case, and that the Respondent has committed family violence against a member of the household within 30 days prior to the filing of the *Application for Protective Order* in this case. There is a clear and present danger that the Respondent is likely to commit family violence against a member of the household.

The Respondent is therefore ORDERED to vacate the Residence on or before: \_\_\_\_\_ ☐ a.m. ☐ p.m. on: \_\_\_\_\_ (date) and to remain at least 200 yards away from the Residence until further order of the Court. The Applicant shall have exclusive use and possession of the Residence until further order of the Court.

IT IS FURTHER ORDERED that the sheriff, constable, or chief of police shall provide a law enforcement officer to accompany the Applicant to the Residence, to inform the Respondent that the Court has ordered the Respondent to vacate the Residence, and to provide protection while the Applicant takes possession of the Residence, and if the Respondent refuses to vacate the Residence, provide protection while the Applicant takes possession of the Applicant's necessary personal property.

**5 ☐ Confidentiality of Information**

The Court Clerk is ordered to strike contact information for Protected People, including: addresses, mailing addresses, county of residence, telephone numbers, places of employment, businesses, child-care facilities, and schools from the public records of the Court, and maintain a confidential record of this information. The Clerk of the Court is prohibited from releasing contact information of Protected People except to the Court or to law enforcement for the purpose of entering the information into the Department of Public Safety law enforcement information system. **It is ordered that all contact information for the Protected People is confidential.**

- ☐ It is ordered that the following person is designated as a person to receive any notice or documents filed with the Court related to the application on behalf of the Applicant:

Name: \_\_\_\_\_

Address: \_\_\_\_\_

- ☐ It is ordered that the following person is designated as a person to receive any notice or documents filed with the Court.

**6 ☐ Go to the Court Hearing**

IT IS FURTHER ORDERED that notice issue to the Respondent to appear, and the Respondent is ORDERED to appear in person before this Court at the time and place indicated on page 1 of this form.

The purpose of this hearing is to determine whether the Court should issue the Protective Orders and other relief requested in the *Application for Protective Order* filed in this case.

**7 Duration of Order:** This Order is effective immediately and shall continue in full force and effect until twenty (20) days from the date it is signed, or further order of the Court.

- 8 ☐ **Warning:** A person who violates this order may be punished for contempt of court by a fine of as much as \$500 or by confinement in jail for as long as six months, or both.

No person, including a person who is protected by this order, may give permission to anyone to ignore or violate any provision of this Order. During the time in which this Order is valid, every provision of this Order is in full force and effect unless a court changes the Order.

It is unlawful for any person, other than a peace officer, as defined by Section 1.07, Penal Code, actively engaged in employment as a sworn, full-time paid employee of a state agency or political subdivision, who is subject to a Protective Order to possess a firearm or ammunition.

If a person subject to a protective order is released from confinement or imprisonment following the date the order would have expired, or if the order would have expired not later than the first anniversary of the date the person is released from confinement or imprisonment, the order is automatically extended to expire on: (1) the first anniversary of the date the person is released, if the person was sentenced to confinement or imprisonment for a term of more than five years; or (2) the second anniversary of the date the person is released if the person was sentenced to confinement or imprisonment for a term of five years or less.

A violation of this Order by commission of an act prohibited by the Order may be punishable by a fine of as much as \$4,000 or by confinement in jail for as long as one year, or both. An act that results in family violence may be prosecuted as a separate misdemeanor or felony offense. If the act is prosecuted as a separate felony offense, it is punishable by confinement in prison for at least two years.

This Ex Parte Order signed on (date): \_\_\_\_\_ Time: \_\_\_\_\_ a.m. p.m.

Judge Presiding:  \_\_\_\_\_

**This is a Court Order. No one – except the Court – can change this Order.**

IN THE \_\_\_\_\_ COURT  
 \_\_\_\_\_ COUNTY, TEXAS

## Protective Order

Cause No. \_\_\_\_\_

Judge: \_\_\_\_\_

### Applicant/Petitioner

### Applicant/Petitioner Identifiers

\_\_\_\_\_  
 First Middle Last

Date of Birth of Applicant: \_\_\_\_\_

And/or on behalf of minor family member(s): (list name and DOB):

Other Protected Persons/DOB:

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**VS.**

### Respondent

### Respondent Identifiers

\_\_\_\_\_  
 First Middle Last

Relationship to Petitioner: \_\_\_\_\_

\_\_\_\_\_  
 Respondent's Address

\_\_\_\_\_  
 \_\_\_\_\_

|                                |      |                                |       |          |
|--------------------------------|------|--------------------------------|-------|----------|
| SEX                            | RACE | DOB                            | HT    | WT       |
| EYES                           | HAIR | SOCIAL SECURITY NO. (Last 3 #) |       |          |
|                                |      | _____                          |       |          |
| DRIVERS LICENSE NO.            |      |                                | STATE | EXP DATE |
| _____                          |      |                                | _____ | _____    |
| Distinguishing Features: _____ |      |                                |       |          |
| _____                          |      |                                |       |          |

**A Court hearing was held on:** Date: \_\_\_\_\_ Time: \_\_\_\_\_ a.m. p.m.

### THE COURT HEREBY FINDS:

That it has jurisdiction over the parties and subject matter, and the Respondent has been provided with reasonable notice and opportunity to be heard.

☒ Additional findings of this order are as set forth below.

### THE COURT HEREBY ORDERS:

☐ That the above named Respondent be prohibited from committing further acts of abuse or threats of abuse.

☐ That the above named Respondent be prohibited from any contact with the Applicant/Petitioner.

☒ Additional terms of this order as set forth below.

**The terms of this Order shall be effective until \_\_\_\_\_, 20\_\_\_\_\_, or as otherwise provided for in Section 15 Duration located on page 6 of this Order.**

### WARNINGS TO RESPONDENT:

This order shall be enforced, even without registration, by the courts of any state, the District of Columbia, any U. S. Territory, and may be enforced by Tribal Lands (18 U.S.C. Section 2265). Crossing state, territorial, or tribal boundaries to violate this order may result in federal imprisonment (18 U.S.C. Section 2262).

Federal law provides penalties for possessing, transporting, shipping, or receiving any firearm or ammunition (18 U.S.C. Section 922(g)(8)).

Only the Court can change this order.

**Findings:** All legal requirements have been met, and the Court has jurisdiction over the parties and this case. This Order is in the best interests of the Protected Person(s) and is necessary to prevent future family violence.

- ☐ The Applicant and Respondent are spouses, former spouses, parents of the same child, live-in partners, or former live-in partners, and are thus "intimate partners" as defined by 18 U.S.C. § 921(a)(32); or the applicant is dating or married to a person who was married to or dating the Respondent.
- ☐ The parties have agreed to the terms of this Protective Order.

Statutory grounds for the Protective Order have been established. (*Check one or both*):

- ☐ The Respondent has committed family violence against the Applicant or Children named below.
- ☐ Under Texas Family Code Section 81.0015, there is a presumption that the Respondent has committed family violence.
- ☐ The Respondent has violated a prior Protective Order that expired or will expire within 30 days.

**1 Appearances:** (*Check any that apply*):

Applicant      Respondent

- |                          |                          |                                                                                         |
|--------------------------|--------------------------|-----------------------------------------------------------------------------------------|
| <input type="checkbox"/> | <input type="checkbox"/> | Appeared in person and announced ready.                                                 |
| <input type="checkbox"/> | <input type="checkbox"/> | Appeared in person and by attorney, _____, and announced ready.                         |
| <input type="checkbox"/> | <input type="checkbox"/> | Appeared by signature below evidencing agreement to the entry of this Protective Order. |
|                          | <input type="checkbox"/> | Although duly cited, did not appear and wholly made default.                            |

**2 Protected People:** The following people are protected by the terms of this Protective Order:

Name:

County of Residence:

- |                                     |       |       |
|-------------------------------------|-------|-------|
| <input type="checkbox"/> Applicant: | _____ | _____ |
| <input type="checkbox"/> Children:  | _____ | _____ |
|                                     | _____ | _____ |
|                                     | _____ | _____ |
| <input type="checkbox"/> Other      | _____ | _____ |
| Adults:                             | _____ | _____ |

**3 A Record of Testimony** (*Check one*) ☐ was made by: \_\_\_\_\_  
☐ was waived by the parties.

**4 Protective Orders** — To prevent family violence, the Court orders the Respondent to obey all Orders marked with a check. ✓

**The Respondent must:**

- a. ☐ Not commit an act against any person named in **2** above that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places those people in fear of imminent physical harm, bodily injury, assault, or sexual assault.
- b. ☐ Not communicate in a threatening or harassing manner with any person named in **2** above.
- c. ☐ Not communicate a threat through any person to anyone named in **2** above.
- d. ☐ Not communicate or attempt to communicate in any manner with: (*Check all that apply*)  
☐ Applicant   ☐ Children   ☐ Other Adults named in **2** above. (except through: \_\_\_\_\_)  
 Good cause exists for prohibiting the Respondent's direct communications.

- e. ☐ Not go within 200 yards of the: (*Check all that apply*)  
☐ Applicant ☐ Children ☐ Other Adults named in **2** above.  
 (Except to go to court hearings or to exchange Children as authorized by a court order)
- f. ☐ Not go within 200 yards of the Residence, workplace or school of the: (*Check all that apply*)  
☐ Applicant ☐ Other Adults named in **2** above.  
 The addresses of the prohibited locations are: (*Check all that apply*)  
☐ Deemed confidential. The clerk is ordered to strike the information from all public court records and maintain a confidential record of the information for Court use only.  
☐ Disclosed as follows:  
 Applicant's Residence: \_\_\_\_\_  
 Applicant's Workplace/School: \_\_\_\_\_  
 Other: \_\_\_\_\_
- g. ☐ Not go within 200 yards of the Children's Residence, child-care facility, or school, except as authorized by a court order. The addresses of the prohibited locations are: (*Check all that apply*)  
☐ Deemed confidential. The clerk is ordered to strike the information from all public court records and maintain a confidential record of the information for Court use only.  
☐ Disclosed as follows:  
 Children's Residence: \_\_\_\_\_  
 Children's Child-care/School: \_\_\_\_\_  
 Other: \_\_\_\_\_
- h. ☐ Not stalk, follow, or engage in conduct directed specifically to any person named in **2** above that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass them, including tracking or monitoring a car or other property.
- i. ☐ Not take, harm, threaten, or interfere with the care, custody or control of the following pet, companion animal, or assistance animal: \_\_\_\_\_ (*describe the animal*).
- j. ☒ Not possess a firearm or ammunition, unless the Respondent is a peace officer actively engaged in employment as a sworn, full-time paid employee of a state agency or political subdivision. Any license to carry a handgun issued to the Respondent by the State of Texas is hereby **SUSPENDED**.

## 5 Family Violence Prevention Program

- ☐ The Respondent is ordered to enroll in, pay costs for, and enter the program checked below no later than \_\_\_\_/\_\_\_\_/\_\_\_\_, and to complete the program by \_\_\_\_/\_\_\_\_/\_\_\_\_. (*Check one*):
- ☐ The local Battering Intervention and Prevention Program that meets the guidelines adopted by the community justice assistance division of the Texas Department of Criminal Justice:
- \_\_\_\_\_

Or if no such Battering Intervention and Prevention Program is available, then:

- ☐ A counseling program recommended and conducted by the following social worker, family service agency, physician, psychologist, licensed therapist, or licensed professional counselor:
- \_\_\_\_\_
- ☐ The Respondent is ordered to comply with any recommendation or referral for additional or alternate counseling within seven (7) days of the recommendation, and ordered to complete any additional or alternate program recommended. The Respondent is ordered to sign a waiver for release of information upon enrollment so that participation in the program may be monitored by the Applicant and/or the Court.
- \_\_\_\_\_
- ☐ The Respondent must also follow these provisions to prevent family violence:
- \_\_\_\_\_
- \_\_\_\_\_

## 6 Property Orders

- ☐ The Court finds that the Residence located at: \_\_\_\_\_  
(Check one):
- ☐ is jointly owned or leased by the Applicant and Respondent;
  - ☐ is solely owned or leased by the Applicant; or
  - ☐ is solely owned or leased by the Respondent; and the Respondent is obligated to support the Applicant or a child in the Applicant's possession.
- ☐ IT IS ORDERED that the Applicant shall have exclusive use of the Residence identified above, and the Respondent must vacate the Residence no later than: \_\_\_\_\_ a.m. p.m. on: \_\_\_\_\_ (date).
- ☐ IT IS FURTHER ORDERED that the sheriff, constable, or chief of police shall provide a law enforcement officer to accompany the Applicant to the Residence, to inform the Respondent that the Court has ordered the Respondent to be excluded from the Residence, to provide protection while the Applicant takes possession of the Residence and the Respondent removes any necessary personal property, and, if the Respondent refuses to vacate the Residence, to remove the Respondent from the Residence and arrest the Respondent for violating the Court's Order.

## 7 Other Property Orders

- ☐ The Court finds that the Applicant and Respondent jointly own or lease the following Additional Property, and awards the Applicant the exclusive use of:
- \_\_\_\_\_
- \_\_\_\_\_

The Respondent must not damage, transfer, encumber, or otherwise dispose of the Additional Property identified above or any other property jointly owned or leased by the parties, except in the ordinary course of business or for reasonable and necessary living expenses, including, but not limited to, removing or disabling any vehicle owned or possessed by the Applicant or jointly by the parties (whether so titled or not).

## 8 Spousal Support Order

- ☐ IT IS ORDERED that the Respondent pay the Applicant support in the amount of \$\_\_\_\_\_ per month, with the first payment due and payable on \_\_\_\_ / \_\_\_\_ / \_\_\_\_ and a like payment due and payable on the \_\_\_\_ day of each following month until further Order of this Court. IT IS ORDERED that all payments be sent to the Applicant at the address listed below and postmarked on or before the due date for each payment:
- \_\_\_\_\_

## 9 Orders Related to Removal, Possession and Support of Children

The Court finds that the Respondent is a parent of the Children. The Protective Order below is in the best interests of the Applicant, Children, and/or Other Adults named in **2** above.

- ☐ **Removal** — Check one or both:

The Respondent must:

- ☐ Not remove the Children from the Applicant's possession or from their child-care facility or school, except as specifically authorized in a possession schedule ordered by the Court.
- ☐ Not remove the Children from the jurisdiction of the Court.

- ☐ **Possession** — Check one:

- ☐ The Applicant is granted exclusive possession of the Children, and the Respondent shall have no possession or access to the Children, unless and until further Orders are entered by the Court. This Order supersedes any previous order granting the Respondent possession or access to the Children.
- ☐ The Applicant is granted primary possession of the Children, and the Respondent may have possession of the Children pursuant to the possession schedule attached to this Protective Order as Exhibit A, subject to the terms and conditions stated herein as necessary for the safety of the Applicant and the Children. The possession

schedule hereby ordered supersedes any previous order granting the Respondent possession and access to the Children.

- ☐ The possession schedule previously entered on \_\_\_\_/\_\_\_\_/\_\_\_\_, in cause number \_\_\_\_\_, styled \_\_\_\_\_, shall continue to govern the Respondent's possession and access to the Children, except that no exchanges of the Children shall occur at a prohibited location described in this Protective Order.

☐ **Child Support — Nothing in this Protective Order shall be construed as relieving the Respondent of any past or future obligation to pay child support as previously ordered. — Check one:**

- ☐ The Respondent is ordered to pay child support to the Applicant in the amount of \$\_\_\_\_\_ per month, with the first such payment due and payable on \_\_\_\_/\_\_\_\_/\_\_\_\_, and a like payment due and payable on the \_\_\_\_\_ day of each month thereafter for the term of this Protective Order or until further Order of the Court, whichever occurs first.

The Respondent is ordered to make all child support payments payable to the Applicant, and must mail all payments to:

**Texas Child Support Disbursement Unit, P.O. Box 659791, San Antonio, TX 78265-9791**

That agency will send the payment to the Applicant for the support of the Children. The Respondent must keep the child support registry informed of the Respondent's Residence and work addresses.

On this date, the Court signed an Income Withholding Order, ordering the employer and any subsequent employer of the Respondent to withhold court-ordered child support from the Respondent's earnings. **The existence of the Order for withholding from earnings for child support does not excuse the Respondent from personally making any child support payment herein, except to the extent the Respondent's employer actually makes the payment on behalf of the Respondent.**

- ☐ The Child Support Order previously entered on \_\_\_\_/\_\_\_\_/\_\_\_\_, in cause number \_\_\_\_\_, styled \_\_\_\_\_, shall continue to govern the Respondent's child support obligations with respect to the children.

**10 ☐ Confidentiality of Information**

The Court Clerk is ordered to strike contact information for Protected People, including: addresses, mailing addresses, county of residence, telephone numbers, places of employment, businesses, child-care facilities, and schools from the public records of the Court, and maintain a confidential record of this information. The Clerk of the Court is prohibited from releasing contact information of Protected People except to the Court or to law enforcement for the purpose of entering the information into the Department of Public Safety law enforcement information system. **It is ordered that all contact information for the Protected People is confidential.**

- ☐ It is ordered that the following person is designated as a person to receive any notice or documents filed with the Court related to the application on behalf of the Applicant:

Name: \_\_\_\_\_

Address: \_\_\_\_\_

- ☐ It is ordered that the Applicant's mailing address is confidential and shall only be disclosed to the Court.

**11 ☐ Fees and Costs**

Within 60 days after this Order is signed, the Respondent must pay the Total Fees and Costs as follows:

Total to be paid: \$ \_\_\_\_\_ \$

(This includes fees for service: \$ \_\_\_\_\_ + all other Court fees and costs: \$ \_\_\_\_\_) \$

Address where Respondent must pay the Clerk of the Court with cash, cashier's check, or money order:

\_\_\_\_\_

**12 ☐ Attorney's Fees**

Within 60 days after this Order is signed, the Respondent must pay the attorney who helped enter this Protective Order the Attorney Fees listed below. Pay with cash, cashier's check, or money order.

Attorney Fees awarded by the Court: \$ \_\_\_\_\_

Attorney's name: \_\_\_\_\_

Attorney's address: \_\_\_\_\_

Attorney (*name*) \_\_\_\_\_ shall have and recover judgment against the Respondent (*name*) \_\_\_\_\_ for \$ \_\_\_\_\_, such judgment bearing interest at \_\_\_\_\_ percent per annum compounded annually from the date this judgment and Order is signed until paid, for which let execution issue if it is not paid.

**13 Service**

This Protective Order (*Check all that apply*):

- |                                                                                                            |                                                                                                                                                                                                                                    |
|------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <input type="checkbox"/> Was served on the Respondent in open court.                                       | <input type="checkbox"/> Shall be delivered to the Respondent by certified mail, return receipt requested, or by fax, to the Respondent's last known address or fax number, or in any other manner allowed by Tex. R. Civ. P. 21a. |
| <input type="checkbox"/> Shall be personally served on the Respondent.                                     |                                                                                                                                                                                                                                    |
| <input type="checkbox"/> Shall be mailed by the Clerk of the Court to the Respondent's last known address. |                                                                                                                                                                                                                                    |

**14 Copies Forwarded**

Not later than the next business day, the Clerk is ORDERED to forward copies of this Protective Order and accompanying Respondent Information Form to (*Check all that apply*):

- ☐ Sheriff and Constable of \_\_\_\_\_ County, Texas.
- ☐ Police Chief of the City of \_\_\_\_\_.
- ☐ Children's child-care facility/schools listed above.
- ☐ The Title IV-D agency
- ☐ The staff judge advocate at Joint Force Headquarters or the provost marshal of the military installation to which Respondent is assigned whose address is as follows: \_\_\_\_\_.

Any law enforcement agency receiving a copy of this Protective Order MUST immediately, but not later than the 3rd business day, enter all required information into the Department of Public Safety's statewide law enforcement information system.

**15 Duration of Order**

This Protective Order is in full force and effect until:

- ☐ \_\_\_\_\_ (*this date must be no more than two years from the date this Order is signed.*)
- ☐ \_\_\_\_\_ (*duration*) This date is more than two years from the date this Protective Order is signed.
  - ☐ The Court finds that the Respondent caused serious bodily injury to the Applicant or a member of the Applicant's family or household; or
  - ☐ The Respondent was the subject of two or more previous Protective Orders protecting the Applicant and both of those Protective Orders contained findings that Respondent has committed family violence.
  - ☐ The Court finds that the Respondent committed an act constituting a felony offense involving family violence against the Applicant or a member of the Applicant's family or household regardless of whether the Respondent has been charged with or convicted of the offense.

**WARNING: A person who violates this Order may be punished for contempt of court by a fine of as much as \$500 or by confinement in jail for as long as six months, or both.**

No person, including a person who is protected by this Order, may give permission to anyone to ignore or violate any provision of this Order. During the time in which this Order is valid, every provision of this Order is in full force and effect unless a court changes the Order.

It is unlawful for any person, other than a peace officer, as defined by Section 1.07, Penal Code, actively engaged in employment as a sworn, full-time paid employee of a state agency or political subdivision, who is subject to a Protective Order to possess a firearm or ammunition.

If a person subject to a protective order is released from confinement or imprisonment following the date the order would have expired, or if the order would have expired not later than the first anniversary of the date the person is released from confinement or imprisonment, the order is automatically extended to expire on: (1) the first anniversary of the date the person is released, if the person was sentenced to confinement or imprisonment for a term of more than five years; or (2) the second anniversary of the date the person is released if the person was sentenced to confinement or imprisonment for a term of five years or less.

A violation of this Order by commission of an act prohibited by the Order may be punishable by a fine of as much as \$4,000 or by confinement in jail for as long as one year, or both. An act that results in family violence may be prosecuted as a separate misdemeanor or felony offense. If the act is prosecuted as a separate felony offense, it is punishable by confinement in prison for at least two years.

Possession of a firearm or ammunition while this Protective Order is in effect may subject respondent to federal criminal penalties. It is unlawful for any person who is subject to a Protective Order to knowingly purchase, rent, lease, or receive as a loan or gift from another, a handgun for the duration of this Order.

Interstate violation of this Protective Order may subject the Respondent to federal criminal penalties. This Protective Order is enforceable in all fifty states, the District of Columbia, tribal lands, and U.S. territories.

This Protective Order signed on (date): \_\_\_\_\_ Time: \_\_\_\_\_ a.m. p.m.

Judge Presiding:  \_\_\_\_\_

**This is a Court Order. No one – except the Court – can change this Order.**

### **Agreed Order**

By their signatures below, the Applicant and Respondent agree to the entry of the foregoing Protective Order and approve all terms stated in the Order:

\_\_\_\_\_  
Applicant

\_\_\_\_\_  
Respondent

**Receipt Acknowledged** . The Respondent hereby acknowledges receipt of a copy of this Protective Order.

\_\_\_\_\_  
Respondent

# EXHIBIT B

## WILL FACT SHEET

Date: \_\_\_\_\_

### **I. GENERAL INFORMATION.**

Name: \_\_\_\_\_ Social Security #: \_\_\_\_\_

Home address: \_\_\_\_\_

Home phone: \_\_\_\_\_ Date established residence in Texas: \_\_\_\_\_

Date of birth: \_\_\_\_\_ U.S. citizen? \_\_\_\_\_ Place of birth: \_\_\_\_\_

Employer: \_\_\_\_\_ Business phone: \_\_\_\_\_

Business address: \_\_\_\_\_

Email address: \_\_\_\_\_ Cell phone: \_\_\_\_\_

Marital status: \_\_\_\_\_ Year married: \_\_\_\_\_ Place (state) married: \_\_\_\_\_

Do you have a Will? \_\_\_\_\_ *(if so, please attach a copy)*

Are you the trustee of any trusts? \_\_\_\_\_

### **Children**

Name (print full name)

Birth Date

|  |  |
|--|--|
|  |  |
|  |  |
|  |  |

### **Advanced Reproductive Matters:**

Have you placed any reproductive material in storage? \_\_\_\_\_ Yes \_\_\_\_\_ No

### **II. PRIOR MARRIAGE(S):**

To whom: \_\_\_\_\_ Date terminated: \_\_\_\_\_

Residence at date of termination: \_\_\_\_\_

### **III. FIDUCIARIES.**

**Appointments:**

**LAST WILL AND TESTAMENT**

**Executor:** \_\_\_\_\_ **Relationship:** \_\_\_\_\_

**Address:** \_\_\_\_\_ **Phone:** \_\_\_\_\_

*Second Choice:* \_\_\_\_\_ *Relationship:* \_\_\_\_\_

**Address:** \_\_\_\_\_ **Phone:** \_\_\_\_\_

*Third Choice:* \_\_\_\_\_ *Relationship:* \_\_\_\_\_

**Address:** \_\_\_\_\_ **Phone:** \_\_\_\_\_

**Trustee:** \_\_\_\_\_ **Relationship:** \_\_\_\_\_

**Address:** \_\_\_\_\_ **Phone:** \_\_\_\_\_

*Second Choice:* \_\_\_\_\_ *Relationship:* \_\_\_\_\_

**Address:** \_\_\_\_\_ **Phone:** \_\_\_\_\_

*Third Choice:* \_\_\_\_\_ *Relationship:* \_\_\_\_\_

**Address:** \_\_\_\_\_ **Phone:** \_\_\_\_\_

**Guardian of Minor(s):** \_\_\_\_\_ **Relationship:** \_\_\_\_\_

**Address:** \_\_\_\_\_ **Phone:** \_\_\_\_\_

*Second Choice:* \_\_\_\_\_ *Relationship:* \_\_\_\_\_

**Address:** \_\_\_\_\_ **Phone:** \_\_\_\_\_

*Third Choice:* \_\_\_\_\_ *Relationship:* \_\_\_\_\_

**Address:** \_\_\_\_\_ **Phone:** \_\_\_\_\_

Have you inherited property in the last ten years? \_\_\_\_\_

Amount Inherited

Person from  
whom inherited

Date

***Attach copy of estate tax return (if available)***

### **STATUTORY DURABLE POWER OF ATTORNEY**

Gives the person named broad power and authority to deal with your property

First Choice: \_\_\_\_\_ Relationship: \_\_\_\_\_

Address: \_\_\_\_\_ Phone: \_\_\_\_\_

*Second Choice:* \_\_\_\_\_ *Relationship:* \_\_\_\_\_

*Address:* \_\_\_\_\_ *Phone:* \_\_\_\_\_

*Third Choice:* \_\_\_\_\_ *Relationship:* \_\_\_\_\_

*Address:* \_\_\_\_\_ *Phone:* \_\_\_\_\_

### **MEDICAL POWER OF ATTORNEY**

Gives the person named the authority to make health care decisions for you if you are incapacitated and unable to make the decisions yourself

First Choice: \_\_\_\_\_ Relationship: \_\_\_\_\_

Address: \_\_\_\_\_ Phone: \_\_\_\_\_

*Second Choice:* \_\_\_\_\_ *Relationship:* \_\_\_\_\_

*Address:* \_\_\_\_\_ *Phone:* \_\_\_\_\_

*Third Choice:* \_\_\_\_\_ *Relationship:* \_\_\_\_\_

*Address:* \_\_\_\_\_ *Phone:* \_\_\_\_\_

### **DIRECTIVE TO PHYSICIANS**

Indicates your wishes regarding medical treatment in the event of a terminable illness (a/k/a a “living will”); gives the person named the authority to make treatment decisions for you if you are unable to do so for yourself

First Choice: \_\_\_\_\_ Relationship: \_\_\_\_\_

Address: \_\_\_\_\_ Phone: \_\_\_\_\_

*Second Choice:* \_\_\_\_\_ *Relationship:* \_\_\_\_\_

*Address:* \_\_\_\_\_ *Phone:* \_\_\_\_\_

*Third Choice:* \_\_\_\_\_ *Relationship:* \_\_\_\_\_

*Address:* \_\_\_\_\_ *Phone:* \_\_\_\_\_

### **HIPAA AUTHORIZATION FORM**

Intended to comply with the Health Insurance Portability and Accountability Act of 1996”  
and gives the person named to have access to all of your medical information

First Choice: \_\_\_\_\_ Relationship: \_\_\_\_\_

Address: \_\_\_\_\_ Phone: \_\_\_\_\_

*Second Choice:* \_\_\_\_\_ *Relationship:* \_\_\_\_\_

*Address:* \_\_\_\_\_ *Phone:* \_\_\_\_\_

*Third Choice:* \_\_\_\_\_ *Relationship:* \_\_\_\_\_

*Address:* \_\_\_\_\_ *Phone:* \_\_\_\_\_

***(With regard to the Medical Power of Attorney, the Directive to Physicians, and  
HIPAA Authorization Form, the appointees need to be the same in all three documents)***

### **DECLARATION OF GUARDIAN**

Gives the person named authority to manage your assets and be in charge of  
your personal wellbeing should you ever need a court appointed guardian

First Choice: \_\_\_\_\_ Relationship: \_\_\_\_\_

Address: \_\_\_\_\_ Phone: \_\_\_\_\_

*Second Choice:* \_\_\_\_\_ *Relationship:* \_\_\_\_\_

*Address:* \_\_\_\_\_ *Phone:* \_\_\_\_\_

*Third Choice:* \_\_\_\_\_ *Relationship:* \_\_\_\_\_

*Address:* \_\_\_\_\_ *Phone:* \_\_\_\_\_

#### IV. PRIOR TAXABLE TRANSFERS.

List all gifts made by you during your lifetime in excess of \$14,000 per year per person.

| <u>Party to whom<br/>gift was made</u> | <u>Date</u> | <u>Value of gift<br/>at time of transfer</u> |
|----------------------------------------|-------------|----------------------------------------------|
|                                        |             |                                              |
|                                        |             |                                              |
|                                        |             |                                              |
|                                        |             |                                              |

*Attach copies of gift tax returns (if available)*

#### V. GROSS TAXABLE ESTATE\* (use approximate values).

| TESTAMENTARY ASSETS                                    | <u>Separate<br/>Property</u> | <u>Community<br/>Property</u> |
|--------------------------------------------------------|------------------------------|-------------------------------|
| Bank Accounts                                          | \$ _____                     | \$ _____                      |
| Real Property                                          | \$ _____                     | \$ _____                      |
| Business Interests                                     | \$ _____                     | \$ _____                      |
| Stocks                                                 | \$ _____                     | \$ _____                      |
| Bonds                                                  | \$ _____                     | \$ _____                      |
| Notes and Mortgages                                    | \$ _____                     | \$ _____                      |
| Furniture and Personal Effects                         | \$ _____                     | \$ _____                      |
| Automobiles                                            | \$ _____                     | \$ _____                      |
| NFA Licensed Firearms                                  | \$ _____                     | \$ _____                      |
| Other                                                  | \$ _____                     | \$ _____                      |
| TOTAL                                                  | \$ _____                     | \$ _____                      |
|                                                        |                              |                               |
| NON-TESTAMENTARY<br>ASSETS                             | <u>Separate<br/>Property</u> | <u>Community<br/>Property</u> |
| Life Insurance                                         | \$ _____                     | \$ _____                      |
| Value of Pension Benefits                              | \$ _____                     | \$ _____                      |
| Value of Profit Sharing Plan                           | \$ _____                     | \$ _____                      |
| Annuities                                              | \$ _____                     | \$ _____                      |
| Jointly Owned Property (with<br>right of survivorship) | \$ _____                     | \$ _____                      |
| Trust Assets                                           | \$ _____                     | \$ _____                      |
| Powers of Appointment                                  | \$ _____                     | \$ _____                      |
| Other                                                  | \$ _____                     | \$ _____                      |
| TOTAL                                                  | \$ _____                     | \$ _____                      |

\*If you have a detailed financial statement that is current, attach it instead of completing this chart. Please distinguish between separate and community property on your financial statement.

#### VI. DEBTS.

| <u>Debts</u> | <u>Amount</u> | <u>Collateral Pledged</u> |
|--------------|---------------|---------------------------|
|              | \$ _____      |                           |

|       |          |       |
|-------|----------|-------|
| _____ | \$ _____ | _____ |
| _____ | \$ _____ | _____ |
| _____ |          | _____ |

**VII. DISPOSITION OF PROPERTY.**

**A. Special Bequests**

Special Gifts you desire to make in your will:

|                |              |                      |
|----------------|--------------|----------------------|
| Name of Person | Relationship | Property to be Given |
| _____          | _____        | _____                |

*Alternate:* \_\_\_\_\_

*Alternate:* \_\_\_\_\_

*Alternate:* \_\_\_\_\_

**B. Residuary Estate.**

In your own words, describe the way you want the balance of your property to pass under your will in each of the following circumstances. (Use back of sheet if necessary):

- (a) If your spouse and children survive you.
- (b) If your children survive you, but your spouse does not survive you.
- (c) If neither your spouse nor children survive you.
- (d) If your spouse survives you, but your children do not survive you.
- (e) Favorite charity:

**VIII. LIST OF DOCUMENTS TO BRING TO INTERVIEW.**

- \_\_\_\_\_ Existing Wills
- \_\_\_\_\_ Existing Trust Instruments
- \_\_\_\_\_ Existing Powers of Attorney
- \_\_\_\_\_ Prenuptial or Postnuptial Agreements
- \_\_\_\_\_ Divorce Decree/Settlement Agreement
- \_\_\_\_\_ Prior filed Gift Tax Returns
- \_\_\_\_\_ Current Financial Statement
- \_\_\_\_\_ Buy-Sell or other Stock Transfer Restriction Agreements
- \_\_\_\_\_ Partnership Agreements

# EXHIBIT C

## FIREARMS ADDENDUM WILL FACT SHEET

|                                           | NUMBER        | DESCRIPTION  | VALUE                          |
|-------------------------------------------|---------------|--------------|--------------------------------|
| <b>FIREARMS</b>                           |               |              |                                |
| 1. Title II Firearms                      |               |              |                                |
| 2. Handguns                               |               |              |                                |
| 3. Rifles                                 |               |              |                                |
| 4. Shotguns                               |               |              |                                |
| (Attach List If Necessary)                |               |              |                                |
| <b>INSURANCE ON FIREARMS</b>              | <b>POLICY</b> | <b>AGENT</b> | <b>AMOUNT OF COVERAGE</b>      |
|                                           |               |              |                                |
|                                           |               |              |                                |
| <b>INVENTORY OF FIREARMS</b>              |               | <b>YES</b>   | <b>NO</b>                      |
| 1. Up to Date Inventory                   |               |              |                                |
| 2. Wish to Leave by List                  |               |              |                                |
| 3. Wish to Include in Will                |               |              |                                |
|                                           |               |              |                                |
| <b>ACCESSORIES, RELOADING, AMMUNITION</b> |               |              |                                |
| 1. TOTAL VALUE (APPROX.)                  |               |              |                                |
| 2. APPROXIMATE AMOUNT OF AMMUNITION       |               |              |                                |
| 3. VALUE OF ACCESSORIES                   |               |              |                                |
| 4. VALUE OF RELOADING EQUIPMENT           |               |              |                                |
|                                           |               |              |                                |
| <b>GUN TRUST</b>                          |               | <b>YES</b>   | <b>NO</b>                      |
| 1. HAVE ONE?                              |               |              |                                |
| 2. CORRECTLY FUNDED?                      |               |              |                                |
| 3. DO YOU BELIEVE ONE IS NECESSARY?       |               |              |                                |
|                                           |               |              |                                |
| <b>NFA FIREARMS</b>                       |               | <b>YES</b>   | <b>NO</b>                      |
| 1. LEGALLY PURCHASED                      |               |              |                                |
| 2. SUPPRESSORS                            |               |              |                                |
| 3. LIST OF NFA FIREARMS                   |               |              |                                |
| (ATTACH LIST IF NECESSARY)                |               |              |                                |
|                                           |               |              |                                |
| <b>PROHIBITED PERSONS</b>                 |               | <b>YES</b>   | <b>NO</b>                      |
| 1. EQUALIZE THEIR SHARE OF FIREARMS       |               |              |                                |
| 2. IF YES, HOW TO EQUALIZE                |               | <b>CASH</b>  | <b>OTHER PERSONAL PROPERTY</b> |
|                                           |               |              |                                |
| 3. IDENTIFY SO AS NOT TO RECEIVE FIREARMS |               |              |                                |
|                                           |               |              |                                |

|                                                             |                 |                             |                |
|-------------------------------------------------------------|-----------------|-----------------------------|----------------|
| <b>4. IDENTIFY SO AS NOT TO APPOINT AS EXECUTOR/TRUSTEE</b> | <b>NAME</b>     | <b>ADDRESS</b>              |                |
|                                                             |                 |                             |                |
|                                                             |                 |                             |                |
|                                                             |                 |                             |                |
| <b>STORAGE</b>                                              | <b>LOCATION</b> | <b>COMBINATION LOCK/KEY</b> | <b>WHO HAS</b> |
| <b>1. SAFE(S)</b>                                           |                 |                             |                |
| <b>2. OTHER STORAGE</b>                                     |                 |                             |                |
| <b>3. OFFSITE STORAGE</b>                                   |                 |                             |                |
| <b>4. OUT FOR PROTECTION</b>                                |                 |                             |                |

## EXHIBIT D

# TEXAS DESCENT AND DISTRIBUTION

(THE LEGAL EFFECT OF NOT HAVING A WILL)

### MARRIED PERSON

#### A. SEPARATE PROPERTY

##### REAL ESTATE



ALL REALTY IS OWNED BY DECEDENT'S CHILD[REN] WHEN SURVIVING SPOUSE DIES.

##### ALL OTHER PROPERTY



#### B. COMMUNITY PROPERTY

##### REAL ESTATE



#### ONLY APPLIES IF

ALL SURVIVING CHILD[REN] AND DESCENDANTS OF DECEDENT ARE ALSO CHILD[REN] OR DESCENDANTS OF SURVIVING SPOUSE.

##### ALL OTHER PROPERTY



#### B. COMMUNITY PROPERTY

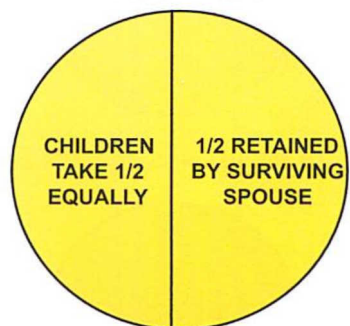
##### REAL ESTATE



#### ONLY APPLIES IF

THERE ARE CHILDREN FROM OUTSIDE OF THE EXISTING MARRIAGE ON THE DATE OF DEATH OF THE DECEASED. CHILD[REN] OF DECEASED CHILD[REN] TAKE THEIR PARENT'S SHARE SUBJECT TO ADVANCEMENTS.

##### ALL OTHER PROPERTY



## SINGLE OR WIDOWED PERSON

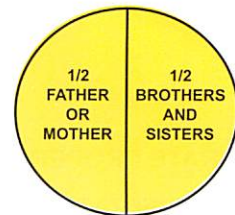
### FATHER AND MOTHER SURVIVING ONLY



### WITH NO CHILD[REN]

ENTIRE ESTATE GOES TO PARENT IF  
NO SIBLINGS OR THEIR DESCENDANTS  
SURVIVE DECEDENT.

### PARENT AND SIBLINGS SURVIVE



---

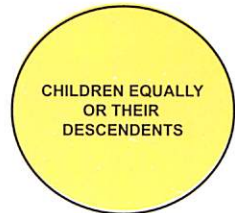
#### REAL ESTATE



### WIDOW[ER] WITH CHILD[REN]

ANY CHILD[REN] TAKE THEIR SHARE  
SUBJECT TO ADVANCEMENTS.

#### ALL OTHER PROPERTY

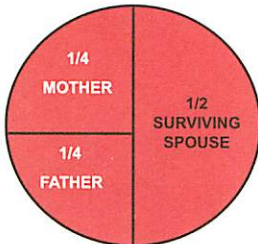


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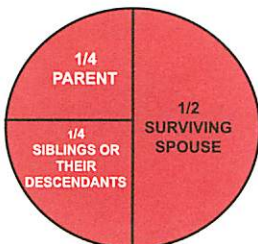
#### A. SEPARATE PROPERTY

##### REAL ESTATE

###### 1. PARENTS SURVIVE



###### 2. ONE PARENT SURVIVES

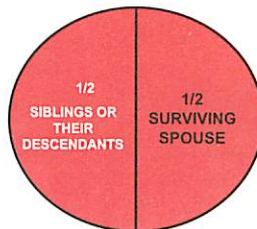


###### 3. NO SIBLINGS OR THEIR DESCENDANTS



##### MARRIED PERSON WITH NO CHILD[REN]

###### 4. NO SURVIVING PARENT



###### 5. NO SIBLINGS [DESCENDANTS] OR PARENTS



##### ALL OTHER PROPERTY



---

#### B. COMMUNITY PROPERTY: ALL REAL AND PERSONAL PROPERTY IS TAKEN BY SURVIVING SPOUSE

---

Caveat: See, Texas Probate Code §42, Inheritance Rights of Illegitimate Children; and, §47(a), Heirs Required Survival by 120 Hours.



# EXHIBIT E

## RECEIPT AND NOTICE OF RIGHTS FOR SEIZED FIREARMS

1 of \_\_\_\_

Incident# \_\_\_\_\_

Section 573.001, Health and Safety Code, Emergency Detention, authorizes a peace officer, without a warrant, to take a person into custody if the officer has a reason to believe and does believe that the person is mentally ill and because of that mental illness there is a substantial risk of serious harm to the person or to others unless the person is immediately restrained and believes that there is not sufficient time to obtain a warrant before taking the person into custody. A peace officer who takes a person into custody may immediately seize any firearm found in possession of the person. After seizing a firearm the peace officer shall comply with the requirements of Article 18.191, Code of Criminal Procedure.

Pursuant to the Texas Health and Safety Code, Chapter 573.001, Emergency Detention, the firearms listed below were seized from you on \_\_\_\_\_ (date).

List make, model, caliber, serial number and ammunition:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

NOTE: \*Use Receipt and Notice of Rights – Additional Items” if extra fields are needed.\*

Code of Criminal Procedure, Article 18.191., Disposition of Firearm seized from certain persons with Mental Illness, authorizes a law enforcement officer who seizes a firearm from a person taken into custody under Section 573.001, Health and Safety Code, and not in connection with an offense involving the use of a weapon or an offense under Chapter 46, Penal Code, shall immediately provide the person a written copy of the receipt for the firearm and a written notice of the procedure for the return of a firearm under this article. The law enforcement agency holding a firearm subject to disposition under this article shall, as soon as possible, but not later than the 15th day after the date the person is taken into custody under Section 573.001, Health and Safety Code, provide written notice of the procedure for the return of a firearm under this article to the last known address of the person's closest immediate family member as identified by the person or reasonably identifiable by the law enforcement agency, sent by certified mail, return receipt requested. The written notice must state the date by which a request for the return of the firearm must be submitted to the law enforcement agency.

List an address of an immediate family member or point of contact:

1. \_\_\_\_\_  
Last, First M. Address  
  
( ) \_\_\_\_\_  
Phone number City, State Zip

Once approved for release according to the Code of Criminal Procedure, Article 18.191, all property will be available at:

The Houston Police Department Property Division  
1201 Washington Avenue  
Houston, Texas 77002  
(832) 394-4000

I acknowledge receipt of a copy of this notice

Date \_\_\_\_\_

Signature of Person Notified \_\_\_\_\_

Mailing Address \_\_\_\_\_

I, \_\_\_\_\_  
(Officer's Name/Title) declare under penalty of perjury  
under the laws of the State of Texas, that I served the above  
named person with a copy of the above notice, and this  
declaration is executed on \_\_\_\_\_ (Date)  
at \_\_\_\_\_ (City), Texas.

Signature of Officer Serving Notice \_\_\_\_\_

Badge # \_\_\_\_\_

THIS RECEIPT DOES NOT CONSTITUTE RECOGNITION OF LEGAL TITLE TO ABOVE PROPERTY

# EXHIBIT F

## Health Care Provider's Certificate of Medical Examination

Revision September 2023

In the Matter of the Guardianship of \_\_\_\_\_,

For Court Use Only

an Alleged Incapacitated Person

Court Assigned: \_\_\_\_\_

### **To the Physician, Psychologist, or Advanced Practice Registered Nurse**

*This form is to enable the Court to determine whether the individual identified above is incapacitated according to the legal definition (on page 3), and whether that person should have a guardian appointed.*

#### **1. General Information**

Examining Health Care Provider's Name \_\_\_\_\_ Phone: (\_\_\_\_) \_\_\_\_\_

Office Address \_\_\_\_\_

Select one: ☐ I am a physician currently licensed to practice in the State of Texas;  
☐ I am a psychologist currently licensed in the State of Texas or certified by HHSC; or  
☐ I am an advanced practice registered nurse acting under a physician's delegation authority and supervision in accordance with Chapter 157, Occupations Code.

☐ YES ☐ NO I have experience examining individuals with the physical or mental condition resulting in the Proposed Ward's incapacity; or

☐ YES ☐ NO I have an established patient-provider relationship with the Proposed Ward

Proposed Ward's Name \_\_\_\_\_

Date of Birth \_\_\_\_\_ Age \_\_\_\_\_ Gender ☐ M ☐ F

Proposed Ward's Current Residence: \_\_\_\_\_

**I last examined the Proposed Ward on \_\_\_\_\_, 20\_\_\_\_ at:**

☐ a Medical facility ☐ the Proposed Ward's residence ☐ Other: \_\_\_\_\_

☐ YES ☐ NO The Proposed Ward is under my continuing treatment.

☐ YES ☐ NO Before the examination, I informed the Proposed Ward that communications with me would not be privileged.

☐ YES ☐ NO A mini-mental status exam was given. If "YES," please attach a copy.

#### **2. Evaluation of the Proposed Ward's Physical Condition** *(required to be completed by physician or APRN only, not psychologist)*

Physical Diagnosis: \_\_\_\_\_

a. Severity: ☐ Mild ☐ Moderate ☐ Severe

b. Prognosis: \_\_\_\_\_

c. Treatment/Medical History: \_\_\_\_\_

#### **3. Evaluation of the Proposed Ward's Mental Functioning**

Mental Diagnosis: \_\_\_\_\_

a. Severity: ☐ Mild ☐ Moderate ☐ Severe

b. Prognosis: \_\_\_\_\_

c. Treatment/Medical History: \_\_\_\_\_

If the mental diagnosis includes dementia, answer the following:

☐ YES ☐ NO ---- It would be in the Proposed Ward's best interest to be placed in a secured facility for the elderly or a secured nursing facility that specializes in the care and treatment of people with dementia.

☐ YES ☐ NO ---- It would be in the Proposed Ward's best interest to be administered medications appropriate for the care and treatment of dementia.

☐ YES ☐ NO ---- The Proposed Ward currently has sufficient capacity to give informed consent to the administration of dementia medications.

d. Possibility for Improvement:

- ☐ YES ☐ NO ---- Is improvement in the Proposed Ward's physical condition and mental functioning possible?  
If "YES," after what period should the Proposed Ward be reevaluated to determine whether a guardianship continues to be necessary? \_\_\_\_\_

#### 4. Cognitive Deficits

- a. The Proposed Ward is oriented to the following (check all that apply):  
☐ Person ☐ Time ☐ Place ☐ Situation
- b. The Proposed Ward has a deficit in the following areas (check all areas in which Proposed Ward has a deficit):  
☐ --- Short-term memory  
☐ --- Long-term memory  
☐ --- Immediate recall  
☐ --- Understanding and communicating (verbally or otherwise)  
☐ --- Recognizing familiar objects and persons  
☐ --- Solve problems  
☐ --- Reasoning logically  
☐ --- Grasping abstract aspects of his or her situation  
☐ --- Interpreting idiomatic expressions or proverbs  
☐ --- Breaking down complex tasks down into simple steps and carrying them out
- c. ☐ YES ☐ NO -- The Proposed Ward's periods of impairment from the deficits indicated above (if any) vary substantially in frequency, severity, or duration.

#### 5. Ability to Make Responsible Decisions

Is the Proposed Ward able to initiate and make responsible decisions concerning himself or herself regarding the following:

- ☐ YES ☐ NO ---- Make complex business, managerial, and financial decisions  
☐ YES ☐ NO ---- Manage a personal bank account  
If "YES," should amount deposited in any such bank account be limited? ☐ YES ☐ NO  
☐ YES ☐ NO ---- Safely operate a motor vehicle  
☐ YES ☐ NO ---- Vote in a public election  
☐ YES ☐ NO ---- Make decisions regarding marriage  
☐ YES ☐ NO ---- Determine the Proposed Ward's own residence  
☐ YES ☐ NO ---- Administer own medications on a daily basis  
☐ YES ☐ NO ---- Attend to basic activities of daily living (ADLs) (e.g., bathing, grooming, dressing, walking, toileting) without supports and services  
☐ YES ☐ NO ---- Attend to basic activities of daily living (ADLs) (e.g., bathing, grooming, dressing, walking, toileting) with supports and services  
☐ YES ☐ NO ---- Attend to instrumental activities of daily living (e.g., shopping, cooking, traveling, cleaning)  
☐ YES ☐ NO ---- Consent to medical and dental treatment at this point going forward  
☐ YES ☐ NO ---- Consent to psychological and psychiatric treatment at this point going forward

#### 6. Developmental Disability

- ☐ YES ☐ NO ---- Does the Proposed Ward have developmental disability?

If "NO," skip to number 7 below.

If "YES," answer the following question and look at the next page.

Is the disability a result of the following? (Check all that apply)

- ☐ YES ☐ NO ---- Intellectual Disability?  
☐ YES ☐ NO ---- Autism?  
☐ YES ☐ NO ---- Static Encephalopathy?  
☐ YES ☐ NO ---- Cerebral Palsy?  
☐ YES ☐ NO ---- Down Syndrome?  
☐ YES ☐ NO ---- Other? Please explain \_\_\_\_\_

Answer the questions in the “Determination of Intellectual Disability” box below only if both of the following are true:

- (1) The basis of a proposed ward’s alleged incapacity is intellectual disability.  
**and**
- (2) **You are making a “Determination of Intellectual Disability” in accordance with rules of the executive commissioner of the Health and Human Services Commission governing examinations of that kind.**

If you are not making such a determination, please skip to number 7 below.

#### **DETERMINATION OF INTELLECTUAL DISABILITY**

Among other requirements, a Determination of Intellectual Disability must be based on an interview with the Proposed Ward and on a professional assessment that includes the following:

- 1) a measure of the Proposed Ward’s intellectual functioning;
- 2) a determination of the Proposed Ward’s adaptive behavior level; and
- 3) evidence of origination during the Proposed Ward’s developmental period.

*You may use a previous assessment, social history, or relevant record from a school district, another physician, a psychologist, an authorized provider, a public agency, or a private agency if you determine that the previous assessment, social history, or record is valid.*

1. Check the appropriate statement below. If neither statement is true, skip to number 7 below.
  - ☐ **I examined the proposed ward in accordance with rules of the executive commissioner of the Health and Human Services Commission governing Intellectual Disability examinations**, and my written findings and recommendations include a determination of an intellectual disability.
  - ☐ **I am updating or endorsing in writing a prior determination of an intellectual disability** for the proposed ward made in accordance with rules of the executive commissioner of the Health and Human Services Commission by a physician or psychologist licensed in this state or an authorized provider certified by the Health and Human Services Commission to perform the examination.
2. What is your assessment of the Proposed Ward’s level of intellectual functioning and adaptive behavior?
  - ☐ Mild (IQ of 50-55 to approx. 70)
  - ☐ Moderate (IQ of 35-40 to 50-55)
  - ☐ Severe (IQ of 20-25 to 35-40)
  - ☐ Profound (IQ below 20-25)
3. ☐ Yes ☐ No ---- Is there evidence that the intellectual disability originated during the Proposed Ward’s developmental period?

**Note to attorneys:** *If the above box is filled out because a determination of intellectual disability has been made in accordance with rules of the executive commissioner of the Health and Human Services Commission governing examinations of that kind, a Court may grant a guardianship application if (1) the examination is made not earlier than 24 months before the date of the hearing or (2) a prior determination of an intellectual disability was updated or endorsed in writing not earlier than 24 months before the hearing date. If a physician’s or NPRN’s diagnosis of intellectual disability is not made in accordance with rules of the executive commissioner — and the above box is not filled out — the court may grant a guardianship application only if the Physician’s Certificate of Medical Examination is based on an examination the physician performed within 120 days of the date the application for guardianship was filed. See Texas Estates Code § 1101.104(a)(1).*

#### **7. Definition of Incapacity**

**For purposes of this certificate of medical examination, the following definition of incapacity applies:**

An “**Incapacitated Person**” is an adult who, because of a physical or mental condition, is substantially unable to:  
(a) provide food, clothing, or shelter for himself or herself; (b) care for the person’s own physical health; or  
(c) manage the person’s own financial affairs. Texas Estates Code § 1002.017.

#### **8. Evaluation of Capacity**

- ☐ YES ☐ NO ---- Based upon my last examination and observations of the Proposed Ward, it is my opinion that the Proposed Ward is incapacitated **according to the legal definition in section 1002.017 of the Texas Estates Code, set out in the box above.**

If you indicated that the Proposed Ward is incapacitated, indicate the level of incapacity:

- ☐ **Total** ----- The Proposed Ward is totally without capacity (1) to care for himself or herself and (2) to manage his or her property.
- ☐ **Partial** ----- The Proposed Ward lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself or to manage his or her property.

**Evaluation of Capacity (continued)**

If you indicated the Proposed Ward's incapacity is partial, what specific powers or duties of the guardian should be limited if the Proposed Ward receives supports and services? \_\_\_\_\_

If you answered "NO" to all of the questions regarding decision-making in Section 5 (on page 2) and yet still believe the Proposed Ward is **partially** incapacitated, please explain: \_\_\_\_\_

If you answered "YES" to any of the questions regarding decision-making in Section 5 (on page 2) and yet still believe the Proposed Ward is **totally** incapacitated, please explain: \_\_\_\_\_

**9. Ability to Attend Court Hearing**

- ☐ YES ☐ NO ---- The Proposed Ward would be able to attend, understand, and participate in the hearing.
- ☐ YES ☐ NO ---- Because of the Proposed Ward's incapacities, I recommend that the Proposed Ward not appear at a Court hearing.
- ☐ YES ☐ NO ---- Does any current medication taken by the Proposed Ward affect the demeanor of the Proposed Ward or his or her ability to participate fully in a court proceeding?

**10. What is the least restrictive placement that you consider is appropriate for the Proposed Ward:**

- ☐ ----- Nursing home level of care ☐ --- Assisted Living Facility
- ☐ ----- Group Home ☐ --- Memory care unit
- ☐ ----- Own Home or with family ☐ --- Other \_\_\_\_\_

**11. Additional Information of Benefit to the Court:** If you have additional information concerning the Proposed Ward that you believe the Court should be aware of or other concerns about the Proposed Ward that are not included above, please explain on an additional page.

\_\_\_\_\_  
Physician/Psychologist/Advanced Practice Registered  
Nurse's Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Physician/Psychologist/Advanced Practice Registered  
Nurse's Name Printed

\_\_\_\_\_  
License Number

If the examination was conducted by an Advanced Practicing Registered Nurse, the supervising physician shall sign below:

\_\_\_\_\_  
Supervising Physician's Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Supervising Physician's Name Printed

\_\_\_\_\_  
License Number

## EXHIBIT G

### DECLARATION OF GUARDIAN IN THE EVENT OF LATER INCAPACITY OR NEED OF GUARDIAN

I, \_\_\_\_\_, make this Declaration of Guardian, to operate if the need for a guardian for me later arises.

1. I designate \_\_\_\_\_ to serve as guardian of my person, \_\_\_\_\_, as first alternative guardian of my person, and \_\_\_\_\_ as second alternative guardian of my person should a less restrictive alternative not be found.

2. I designate \_\_\_\_\_ to serve as guardian of my estate, \_\_\_\_\_ as first alternative guardian of my estate, and \_\_\_\_\_ as second alternative guardian of my estate should a less restrictive alternative not be found;

3. If any guardian or alternate guardian dies, does not qualify, or resigns, the next named alternate guardian becomes by guardian.

4. I expressly disqualify the following persons from serving as guardian of my person: \_\_\_\_\_ and my son-in-law \_\_\_\_\_.

5. I expressly disqualify the following persons from serving as guardian of my estate: \_\_\_\_\_.

Signed this \_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_.

\_\_\_\_\_

\_\_\_\_\_  
Witness Signature

\_\_\_\_\_  
Witness Signature

Before me the undersigned authority, on this date personally appeared, \_\_\_\_\_  
the declarant, and \_\_\_\_\_ and \_\_\_\_\_ as witnesses, and all  
being duly sworn, the declarant said the above instrument was their Declaration of Guardian and  
that the declarant had made and executed it for the purposes expressed in the declaration. The  
witnesses declared to me that they are each being 14 years of age or older, that they saw the  
declarant sign the declaration, that they signed the declaration as witnesses, and that the declarant  
appeared to them to be of sound mind.

\_\_\_\_\_  
Witness Signature

\_\_\_\_\_  
Witness Signature

Subscribed and sworn to before me by the above named declarant and affiants on this  
\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_.

\_\_\_\_\_  
Notary Public, State of Texas