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AMERICAN BAR ASSOCIATION
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May 8, 2009

The Honorable Elliott Naishtat
Texas House of Representatives
Room CAP GW.16
PO Box 2910
Austin, TX 78768

Re: HB 889 on Determination of Capacity in Guardianship
Proceedings

Dear Representative Naishtat:

I am writing to you on behalf of the American Bar Association to support the goals of HB 889, the legislation you introduced outlining elements to be considered by a clinician in assessing adult capacity in a guardianship proceeding. Judge Steve M. King of Tarrant County Probate Court #1 let the ABA Commission on Law and Aging staff know that the views and materials of the ABA have been helpful to him and might also be helpful to you. The Commission has played a leadership role in adult guardianship reform for over 20 years, and regularly tracks state guardianship legislation.

American Bar Association policy emphasizes the need for a thorough and refined clinical assessment to provide guidance to judges in determining an individual's capacity and the need for a guardian. Association policy specifies that "a finding of incapacity should be supported by evidence of functional impairment over time" and should "include a determination that the person is likely to suffer substantial harm by reason of an inability to provide adequate personal care or management of property or financial affairs" (1989). Association policy also provides that "capacity is not a matter of one-time global assessment. Measures of capacity should reflect the fact that individuals vary enormously in functional ability, and situations demand different levels of capacity. Individuals should be assessed to determine their functional ability for specific tasks, i.e., decision-specific capacity" (1991).

In 2006, the ABA Commission on Law and Aging worked with the American Psychological Association and the National College of Probate Judges to create *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings: A Handbook for Judges*. The Handbook includes a clinical evaluation form used since 2005 by Judge King and that served as a model for the elements of assessment set out in HB 889.

Full information on the individual's functional and cognitive abilities, as well as medical condition, in light of the person's values and the risks involved, can assist judges in crafting more specific, limited orders, and also may be useful in the development of guardianship plans and in court oversight of the guardian.

I hope this is helpful, and would be pleased to provide further information at your request.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a long horizontal flourish extending to the right.

Thomas M. Susman