

Unique Situations for Civil Judges: Independent Fiduciaries (or “Someone Needs to Take Over – What Do We Call It and How Does It Work?”)
 2015 Regional Conference, Texas Center for the Judiciary – April 23, 2015 and May 14, 2015, Dallas, Texas
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	Guardianship	Management Trust	Judicial Modification of Existing Trust	Receivership	Mediation, Arbitration
Statutory authority:	Tex. Estates Code Chapter 1001 et seq.	Tex. Estates Code Chapter 1301 et seq.	Texas Trust Code (Tex. Prop. Code Chapter 112 et seq.) Section 112.054	Tex. Civ. Prac. & Rem. Code Chapter 64 et seq.	Tex. Civ. Prac. & Rem. Code Chapter 154
Appropriate when:	A Guardian of the Person and/or Guardian of the Estate may be appointed for a minor or an incapacitated person through a Guardianship proceeding. Can appoint same person/entity for both roles or different persons/entities for each roles	May be created for minor or incapacitated person who is with or without a guardian. Appropriate in situations of estates of significant size when turning over the estate to a minor ward when he/she reaches 18 would be inappropriate or when the experience and expertise of a professional fiduciary is needed. May be created for person who only has physical disabilities. (compare with Texas Property Code Section 142.005 for Trusts established for minors receiving monetary judgements (next friend/guardian ad litem))	Upon motion of trustee or beneficiary court may modify a trust previously established by settlor. May change trustee, modify terms of trust, and change duties of trustee. Court has discretion but must conform as nearly as possible to the probable intention of settlor.	May be appointed to: 1) vacate a fraudulent purchase of property 2) to subject any property to claim of creditor 3) to take control of jointly owned property or funds in a dispute between partners or joint owners 4) to foreclose and sell mortgaged property 5) to take control of an insolvent corporation 6) under equity 7) for the property of a missing person (see § 64.101) Divorces (Tex. Family Code § 6.502(5))	Intended to facilitate resolution May be mediator, arbitrator, may consider mini-trial, moderated settlement conference, summary jury trial, or mediation following application for expedited foreclosure. Possible non-fiduciary solution for investigation, assessment, assistance with resolution
Who should be appointed:	Shall appoint parent, or nearest kin, designee by will or written instrument, other qualified person (see §§ 1104.051, 1104.052, 1104.103, 1104.251), certain unrelated individuals must be certified under the terms of the Texas Government Code Subchapter C, Chapter 155 (see § 1104.251).	Shall appoint a financial Institution §1301.057(b) OR may appoint an individual if in the best interests of the incapacitated person and value is more than \$150,000 and corporate trustees will not serve §(1301.057(c))	Individual or corporation with trust powers. Beneficiary or Settlor in many situations may serve. (§ 112.008)	Must be citizen, voter of the state, must be disinterested, must have actual residence in the state (§ 64.021)	One or more impartial third parties who have received training as described in Section 154.052, or who have appropriate legal or other professional training or experience

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Duties of appointee:	FIDUCIARY - Guardian of the Estate – manage the ward’s assets, collect debts, bring/defend suits (§ 1151.101 et seq.) petition the court to set up a trust to receive government benefits for the ward (see also 42 U.S.C. Section 1396p(d)(4)(B) Guardian of the Person – physical possession of the ward, establish the ward’s domicile, provide care, supervision and protection, provided clothing, food, medical care and shelter, may also petition the court to set up a trust to receive government benefits for the ward (§ 1151.051, see also 42 U.S.C. Section 1396p(d)(4)(B)	FIDUCIARY - Subject to Texas Trust Code Collect, hold manage trust assets, disburse for health, education, maintenance or support of the ward, file annual accounting	FIDUCIARY - Numerous – Powers and Duties outlined in Subchapter A and B, Chapter 113	FIDUCIARY - Receiver is to take possession and manage the property, construct and file inventory, collect rents, other actions as authorized by the court, <u>Caution: appointment of receiver often triggers default provision in loan documents and can have unintended, negative consequences</u> Oil and gas receiverships, subchapter F, Sections 64.091 – 64.107	NOT a fiduciary role, Customizable by agreement
Continuing Jurisdiction and Duration:	Ongoing court oversight and annual accounting required 1163.002, Shall be settled and closed when the ward is no longer a minor, no longer incapacitated, or dies (§ 1202.001)	Ongoing court oversight and annual accounting required (§ 1301.151-1301.154), terminates when the ward turns 18, or dies, or as ordered (cannot be later than 25 th birthday), or is no longer incapacitated (§ 1301.203)	Generally no duty to report to Court, no ongoing court oversight	Receivership of corporation limited to 3 years, may be extended additional 5 years if in litigation or operating and going concern (§ 64.072)	Court oversight as ordered during pendency of suit