

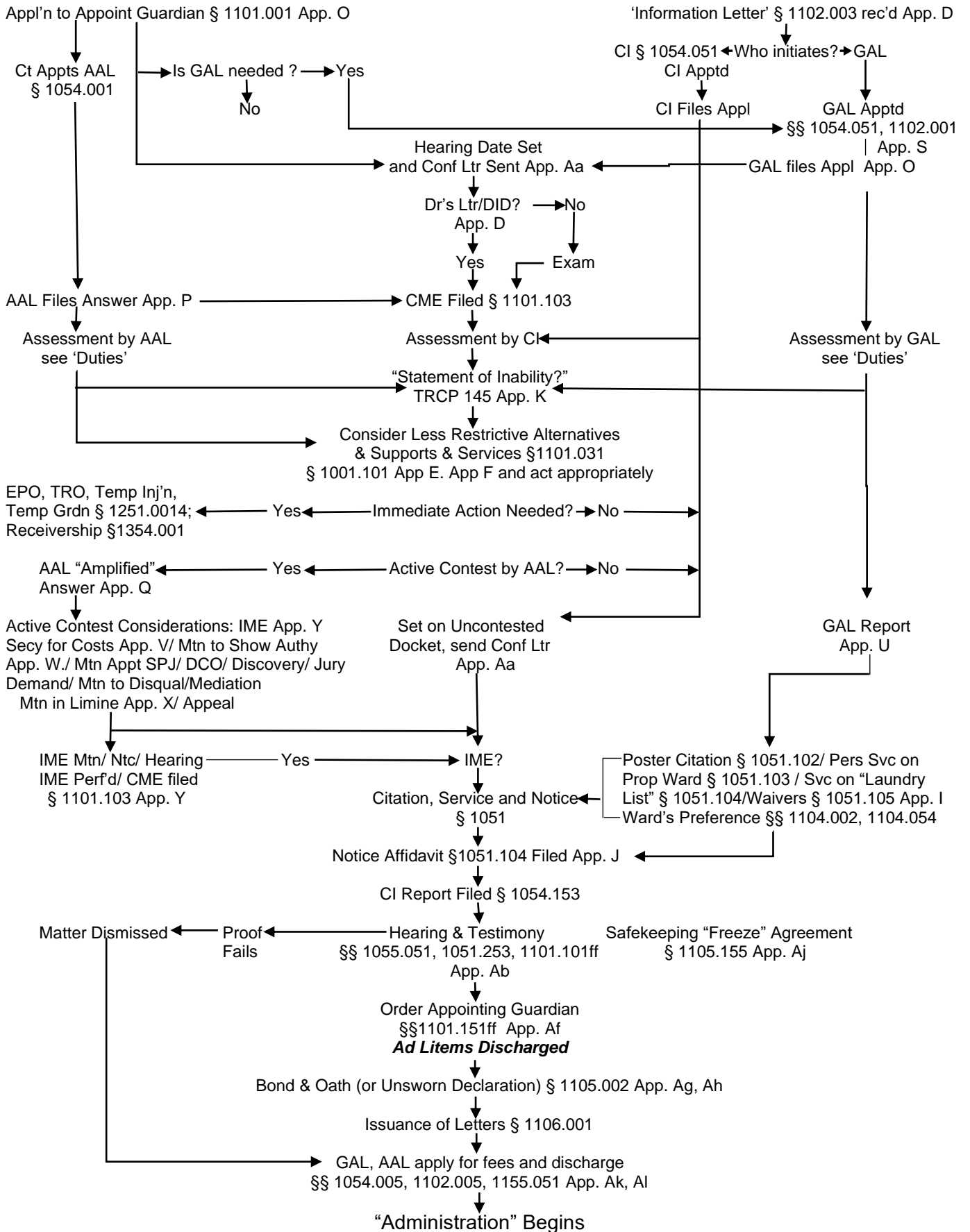
**THE  
AD LITEM MANUAL  
2022**

**FOR  
GUARDIANSHIP & HEIRSHIP PROCEEDINGS  
IN  
TEXAS PROBATE COURTS**

**ANNUAL MEETING  
TEXAS COLLEGE OF PROBATE JUDGES  
MENGER HOTEL  
AUSTIN, TEXAS  
AUGUST 27, 2021**

**STEVE M. KING  
SENIOR PROBATE JUDGE  
FORT WORTH, TEXAS  
REVISION DATE – JULY 2021**

GUARDIANSHIP  
(From the Ad Litem's Perspective)



## TABLE OF CONTENTS

GUARDIANSHIP (From the Ad Litem’s Perspective) .....	<i>Frontispiece</i>
I. INTRODUCTION .....	7
A. Initial Query: Why Should the Judge Care?.....	7
B. Certification Requirements .....	7
C. Liability and Immunity .....	8
D. The Backdrop: Fraud, Abuse and Exploitation of the Elderly and Disabled .....	9
II. AREAS IN WHICH AD LITEMS ARE APPOINTED BY SPECIFIC STATUTE.....	9
A. Appointment of a Guardian.....	9
B. Restoration/Modification of Guardianship- Attorney Ad Litem.....	9
C. Removal of Guardian – Attorney Ad Litem and Guardian Ad Litem.....	9
D. Removal of Community Administrator – Attorney Ad Litem .....	9
E. Heirship Determinations – Attorney Ad Litem.....	10
F. Disclaimers – Guardian Ad Litem .....	10
G. Probate of Will After Four Years – Attorney Ad Litem .....	10
H. Partition Actions – Guardian Ad Litem .....	10
I. Trust Construction or Modification Actions – Guardian Ad Litem .....	10
J. Mental Health Commitments – Attorney Ad Litem.....	10
K. Purchase of Estate Property by Guardian – Attorney Ad Litem .....	10
L. Sale of Minor’s Interest in Property .....	10
M. Sports and Entertainment Contracts Entered Into by Minors– Guardian Ad Litem .....	10
N. Inspection by Guardian of Ward’s Estate Planning Documents – Guardian Ad Litem .....	10
O. Show Cause and Compliance Actions – Guardian Ad Litem and Attorney Ad Litem .....	10
P. Proper Investment by Guardian – Guardian Ad Litem .....	10
Q. Establishment of Pooled Trust Subaccount – Attorney Ad Litem .....	11
R. Final Settlement of Guardianship Estate - Attorney Ad Litem .....	11
S. Judicial Bypass Proceedings– Guardian Ad Litem and Attorney Ad Litem.....	11
T. Family Code Appointments - Guardian Ad Litem and Attorney Ad Litem.....	11
U. “Utility Outfielder” Appointments - Attorney Ad Litem .....	11
V. “Utility Outfielder” Appointments - Guardian Ad Litem .....	11
III. EMBRACE THE TECHNOLOGY .....	11
A. Electronic Resources (Zoom).....	11
B. E-Filing & E-Notice .....	11
IV. A to Z FOR AD LITEMS IN GUARDIANSHIP PROCEEDINGS.....	12
A. Study this Manual .....	12
B. Guardianship Summary .....	12
C. Can You Get There From Where You Are?.....	12
D. Mechanics of Appointment: The Ad Litem Wheel .....	12
E. The Language of Guardianship: Less Restrictive Alternatives & Supports and Services .....	12
F. Local Rules.....	13
G. Standing Orders.....	13
H. What Documents to Expect.....	13
I. Fundamentally Understand Your Role.....	13
<i>MAJOR CAVEAT: Scope of Appointment</i> .....	14
Notes on Medical Records.....	14
1. The Role of the Attorney Ad Litem .....	14
A. Legal Counsel .....	14
B. The Prime Directive .....	14
C. “ <i>But I don’t want a guardian</i> ” .....	14
D. Duties.....	14
2. The Role of the Guardian Ad Litem.....	15
A. Defined .....	15
B. Personal Representative .....	15
C. Assess & Recommend .....	15

D. Duties: Jiminy Cricket or Quarterback? .....	15
E. Additional Duties .....	15
J. Is Immediate Action Required?.....	16
K. Temporary Guardianships .....	16
L. AAL: File an Answer .....	17
M. Investigate: Finding the Black Box .....	18
N. Assess Capacity.....	18
Mandated Abuse Reporting .....	19
O. Independent Medical Exam.....	20
P. The Ad Litem’s Dilemma .....	20
Q. Is the Application Timely Filed?.....	20
R. Who Picks Up the Tab? – Statement of Inability .....	21
First Responder and Veterans Exception.....	21
V. MEDICAL RECORDS .....	21
A. Federal and State Confidentiality Laws .....	21
B. The Physician’s Certificate of Medical Examination.....	22
1. Basics: Incapacitated Proposed Ward .....	22
2. Modification and /or Restoration: CME to consider Supports and Services.....	22
3. Basics: Intellectually Disabled Potential Ward .....	23
4. Independent Medical Exam.....	23
5. Evidentiary Considerations .....	23
6. Maintenance of Guardianship Orders by Care Facilities .....	24
7. Defensive Considerations: The Answer May Depend on Who You Ask .....	24
VII. DEALING WITH THE COURT AND COURT PERSONNEL/ PREPARING FOR HEARING.....	25
A. Your Best Allies .....	25
B. Settings .....	25
C. Working the File .....	26
D. Ad Litem Reports.....	26
E. Citation and Notice: A Jurisdictional Foundation and the Laundry List.....	26
F. Getting Ahead of the Curve: Registration, Background Checks and Training .....	29
G. “Paperwork” to Have on Hand.....	30
H. The Proposed Order: Powers of the Guardian/ Limitations of the Ward .....	32
Digital Assets.....	32
I. Appointment of Resident Agent.....	33
J. Copies.....	33
VIII. HEARING DAY: SOME GENERAL AND PRACTICAL OBSERVATIONS .....	33
A. General Comments and Decorum .....	33
B. The Hearing at the Bench.....	33
C. Burden(s) of Proof.....	34
D. Bench Instructions and Mandatory Training.....	34
E. Contested Hearings (with a Court Reporter).....	34
F. Trainwrecks.....	35
G. Clerk’s Follow-Up Duties .....	35
H. Say the Words, Take the Money, Go Home.....	35
I. Selling the Follow-Through .....	35
IX. ACTIVE CONTEST OF THE APPLICATION .....	36
NEW! <u>Required Disclosures</u> .....	36
Threshold Consideration .....	36
A. File an Answer! .....	36
B. Determine If Immediate Action is Necessary .....	36
C. Set the Hearing on the Contested Docket.....	36
D. Calling for Backup .....	36
E. Retained Counsel .....	36
F. Request a Statutory Probate Judge .....	37
G. Intervention by ‘Interested Person’ .....	37

H.	Consider Seeking Security for Costs.....	38
I.	Jury Demand .....	40
J.	Pursue Adequate Discovery .....	40
K.	Advocate for Mediation .....	40
L.	Shutting the Gate: TROs, Temporary Guardianships, Notices of Lis Pendens & Receivers.....	41
M.	“Interesting Challenge” – Interest for Standing vs. Adverse Interest .....	41
N.	Challenging the Applicant – Disqualification .....	42
	Criminal Background Checks/ Registration & Database .....	43
O.	If Advantageous – Try to Have Your Client Appear at the Hearing.....	43
P.	Consider Requesting a Closed Hearing.....	43
Q.	The Order: Negotiate a Tactical Retreat.....	43
	Disclosure Requirement: Right to Physical Possession of Ward.....	43
R.	An Appealing Thought? .....	43
S.	Potential Ancillary Litigation.....	44
T.	More Practice Pointers .....	44
X.	FEE CONSIDERATIONS .....	44
A.	Introduction .....	44
	Deposit of Funds for Court Costs.....	44
B.	Basic Premise .....	45
C.	Burden of Proof.....	45
D.	Question of Fact .....	45
E.	Reasonableness .....	45
F.	Guidelines, Not Elements.....	46
G.	Evidence Required .....	46
H.	Expert Testimony .....	46
I.	No “Bonus” Factors .....	46
J.	No Prior Objections Required .....	46
K.	Limited Duties.....	46
L.	Non-Compensable Activities .....	46
M.	Going It Alone.....	47
N.	Fee Applications.....	47
O.	County-Pay Cases .....	47
P.	Private Pay Cases .....	47
Q.	Hourly Rates.....	48
R.	Expenses.....	48
S.	Do Not Bill For: .....	48
T.	When to File.....	48
U.	What to Do with the Fee Application.....	48
V.	Separate Order.....	48
W.	Specific Areas of Concern on Fee Applications .....	48
XI.	HEIRSHIP PROCEEDINGS .....	49
XII.	CLOSING THOUGHTS .....	49
A.	Removal of an Ad Litem.....	49
B.	Re-Activation of the Ad Litem.....	49
C.	Changing Hats – Make an Appearance .....	50
D.	(Yet More) Practice Pointers.....	50
E.	<u>Real</u> Continuing Education .....	50
F.	Think About Your Client .....	50
G.	Clients with Diminished Capacity and New Rule 1.16.....	51
	<i>John Stewart: Last Week Tonight June 3, 2018 – Watch it on YouTube!</i> .....	51

APPENDICES:

A.	Instructions for Video Conferences and Hearings .....	52
B.	Guardianship Summary .....	54
C.	Policy for Court-Initiated Guardianships .....	57
D.	Information Letter & Physician’s Certificate of Medical Exam (with DID) .....	59
E.	Less Restrictive Alternatives to Guardianship .....	66
F.	Supports & Services .....	76
G.	Statutory Changes Regarding Fraud Abuse & Exploitation of the Elderly and Disabled .....	77
H.	Investigator’s Checklist .....	78
I.	Waiver of Citation, Consent to Appointment & Request for Notification .....	79
J.	Affidavit Regarding Notice under § 1051.104(b) .....	80
K.	Statement of Inability to Afford Payment of Court Costs or an Appeal Bond .....	81
L.	Application for Temporary Guardianship/ Fiat for Hearing .....	83
M.	Proof of Facts (Temporary Guardianship) .....	87
N.	Order Appointing Temporary Guardian .....	88
O.	Application for Appointment of a Guardian of the Person (and Estate) .....	91
P.	Original Answer (Attorney Ad Litem) .....	93
Q.	Original Answer (“Contest”) .....	94
R.	Application & Order for Authority to Utilize Attorneys and Staff of Appointee’s Law Firm .....	95
S.	Motion for Appointment of Guardian Ad Litem and Order .....	98
T.	Entry of Appearance of Guardian Ad Litem .....	100
U.	Report of Guardian Ad Litem .....	101
V.	Motion for Security for Costs & Order .....	102
W.	Motion to Show Authority, Show Cause Citation & Order .....	104
X.	Motion in Limine and to Dismiss Application .....	107
Y.	Motion for Independent Medical Examination, Fiat & Order .....	108
Z.	Handout: Registration, Criminal History Background Checks and Training .....	110
Aa.	Setting Confirmation .....	111
Ab.	Proof of Facts (Guardianship) .....	112
Ac.	Exhibit: Evidence in Support of Requested Bond .....	113
Ad.	Exhibit: Evidence in Support of Requested Monthly Allowance .....	114
Ae.	Suggested Cross-Examination Questions for the Ad Litem .....	115
Af.	Order Appointing Guardian of the Person (and Estate) .....	116
Ag.	Personal Surety Bond .....	120
Ah.	Oath of Guardian .....	121
Ai.	Unsworn Declaration of Guardian .....	122
Aj.	Safekeeping (“Freeze”) Agreement (Pre-Appointment) .....	123
Ak.	Fee Application & Order - County Pay (“Set Fee”) .....	124
Al.	Fee Application & Order – Private or County Pay in Excess of Set Fee .....	125
Am.	Practice Tips from the Probate Court One Investigators .....	127
Am.	Court Instructions: Guardian of the Person/ Guardian of the Estate (English/Spanish) .....	128
Ao.	Ward’s Bill of Rights (English/Spanish) & Information to Be Furnished .....	138
Ap.	Initial Report of the Guardian of the Person .....	141
Aq.	Final Report of the Temporary Guardian of the Person .....	144
Ar.	Rule 11 Agreement Regarding Initial Disclosures .....	145

# The Ad Litem Manual 2022

## I. INTRODUCTION:

**GOALS:** To help the reader to become familiar with:

1. the types of proceedings in which ad litem may be appointed;
2. the varying roles of the ad litem in different proceedings;
3. fulfilling the responsibilities of an attorney ad litem or guardian ad litem in the different proceedings;
4. how to before the bench and in dealing with court personnel; and
5. some specifics on fee applications.

This manual deal primarily with the uncontested aspects of a guardianship and only briefly with contests.

For more information on guardianship litigation, see:

1. State Bar of Texas Seminars on:
  - Advanced Estate Planning and Probate (Litigation Breakout Section)
  - Advanced Guardianship Course
  - Fiduciary Litigation Course
2. Tarrant County Probate Bar Association Probate Litigation Seminar in Fort Worth (every other fall).

For a very insightful commentary on dealing with ad litem, see Hopper, Craig, *Call in the Sheriff: Handling Overzealous Ad Litem and Other Outlaws*, 2010 Advanced Guardianship Course, State Bar of Texas. For an excellent discussion of the responsibilities of ad litem in areas outside of guardianship, see Smith, Dani D., *Attorney Ad Litem and Guardian ad Litem: An Overview of the Roles and Liabilities in Non-Guardianship Cases*, 2018 Advanced Estate Planning and Probate Course, State Bar of Texas.

### A. Initial Query: Why Should the Judge Care?

Tex. Est. Code § 1201.003 provides that “A judge is liable on the judge’s bond to those damaged if damage or loss results to a guardianship or ward because of the gross neglect of the judge to use reasonable diligence in the performance of the judge’s duty under this subchapter.”

While this is not the same as personal liability (See *Twilligear v. Carrell*, 148 S.W.3d 502 (2004 Tex. App.—Houston [14<sup>th</sup> Dist.] 2004, pet. denied), judges with probate jurisdiction, especially statutory probate judges, do not relish having a target on the back of their robes.

Active judicial oversight, requiring guardians to timely account, and employing ad litem to assist the

court in enforcing the probate code, are the best defenses the courts have in minimizing loss to the wards and eventual distributees in probate.

**Judicial Bonds** – as of November 1, 2017, any county-level judge (Constitutional County Court or County Court at Law) who handles probate or guardianship matters must furnish a surety bond - In counties with a population of 125,000 or less, this bond must be \$100,000.00.

- In counties with a population of more than 125,000, this bond must be \$250,000.00.

- Judges of Statutory Probate Courts must furnish a bond of \$500,000.00, mandated by Tex. Govt Code § 25.00231 .

- The bond is to be conditioned that the judge will perform the duties required by the Texas Estates Code (i.e. follow-up on Inventories and Accountings, monitor guardianships)

- The bond is to provide coverage for losses caused by the gross negligence of county-level judge.

- In lieu of a bond, the county may elect to obtain insurance instead.

### B. Certification Requirements:

Effective September 1, 2021, any attorney representing any person in a guardianship proceeding must have a State Bar Guardianship Education Certification - Tex. Est. Code § 1054.201. The certification requirement no longer applies to just the applicant's attorney and any court-appointed attorneys.

Certification requires completion of a State Bar of Texas-sponsored four hour CLE course on guardianship law and procedure, including one hour on alternatives to guardianship and supports and services available to proposed wards. Tex. Est. Code § 1054.201(b). These courses are available on videotape, in live presentations and via internet.

If an attorney must enter an appearance without the certification, they are required to complete the course requirements within 14 days and prior to the filing of any substantive pleading.

The State Bar is mandated to provide the course at a low cost and throughout the state, including an internet version - Tex Govt Code § 81.114. Tex. Est. Code § 1101.153(a)(2).

Once certification is obtained, a copy of the certificate should be forwarded to the appropriate courts. Re-certification is required every two (2) years

until the attorney has been certified for four years, and then the certification is effective for a four (4) year period. Tex. Est. Code § 1054.202.

When a certificate has expired, a new certificate must be obtained for the attorney to be eligible for appointment as an Attorney Ad Litem. Tex. Est. Code § 1054.203.

The certification requirement applies during administration of the guardianship as well. In *Guardianship of Marburger*, 329 S.W.3d 923 (Tex. App.—Corpus Christi 2010, no pet.).

An uncertified attorney has no authority to represent the Ward and lacks standing to bring an appeal. *Guardianship of Wehe*, 2012 Tex. App. LEXIS 8931 (Tex. App.—Corpus Christi, October 25, 2012, no pet.).

A complaint about an attorney ad litem who is not properly certified is not a basis for a writ of mandamus, but could be raised by direct appeal or a statutory bill of review. In *re Cunningham*, 454 S.W.3d 139 (Tex. App.—Texarkana 2014, orig. proceeding).

No certification is required for Attorneys Ad Litem in other proceedings, such as heirship or trust matters.

### **C. Liability and Immunity:**

1. Attorney Ad Litem - Like any other attorney, an Attorney ad Litem must exercise the same due diligence and vigor and astuteness required of an attorney as in any other representation. *Estate of Tartt*, 531 S.W.2d at 698. Otherwise, there is the potential for a claim for legal malpractice.

In *Ex Parte Parker*, 2014 Tex. App. LEXIS 36 (Tex. App.—Amarillo, January 3, 2014, no pet.), the appeals court noted that allegations of ineffective assistance of an appointed Attorney ad Litem would be reviewed under the same standard as in cases regarding termination of parental rights.

The standard (applied by both the Texas Supreme Court and the U. S. Supreme Court) requires a complainant to demonstrate 1) the counsel's assistance fell below an objective standard of reasonableness and 2) that the ad litem's deficient assistance prejudiced the Ward's case. Such allegations must be firmly founded in, and affirmatively demonstrated by, the court's record.

In *Guardianship of Humphrey*, 2009 Tex. App. LEXIS 1100 (Tex. App.—Tyler, Feb. 18, 2009, pet. denied), the appellants were required to raise the issue of the Attorney ad Litem's ineffective assistance to the trial court.

2. Guardian Ad Litem - Tex. Est. Code § 1054.056 provides for immunity from civil damages for a Guardian Ad Litem (appointed under §§ 1054.051,

1102.001, or 1202.054) from recommendations made or opinions given as a Guardian Ad Litem. (Except for willfully wrongful, reckless, bad faith, malicious and grossly negligent statements.) Cf: *Kabbani v. Papadopolous* 2009 Tex. App. LEXIS 1320 (Tex. App.—Houston [1<sup>st</sup> Dist.] February 26, 2009, pet. denied) (court upheld similar statutory immunity for a Guardian Ad Litem under the Texas Family Code) and *Wilz v. Sanders*, 2005 Tex. App. LEXIS 1503 (Tex. App.—Waco 2005, no pet.) February 23, 2005 (Memorandum) (Immunity of Guardian Ad Litem upheld where appointed under federal statute).

In addition, Tex. R. Civ. Proc. 173 governs ad litem appointments of Guardians Ad Litem other than pursuant to a specific statute, such as the Family Code and the Estates Code, or by other rules, such as the Parental Notification Rules.

The responsibility of the Guardian Ad Litem under these circumstances is very limited, and the Guardian Ad Litem is specifically not to participate in the underlying litigation (even reviewing the discovery or litigation files) except to the limited extent of the division of settlement proceeds. *Jocson v. Crabb*, 133 S. W. 3d 268 (Tex. 2004) (per curiam), *on remand*, 196 S.W.3d 302 (Tex. App.—Houston [1st Dist.] 2006, no pet.). A Guardian Ad Litem may, of course, choose to actively participate in the litigation and discovery, but compensation is not to be awarded for such activity.

Only in extraordinary circumstances does the rule contemplate that a Guardian Ad Litem will have a broader role. Even then, the role is limited to determining whether a party's next friend or guardian has an interest adverse to the party that should be considered by the court under Tex. R. Civ. Proc. 44.

Unlike the immunity conferred for a Guardian ad Litem in a guardianship proceeding, there is no statutory immunity for a Guardian ad Litem appointed under the non-guardianship provisions of the Texas Estates Code or for a Guardian ad Litem appointed under the Trust Code (Tex. Prop. Code § 115.014). In those cases, the issue of possible derived judicial immunity must be examined. Derived judicial immunity affords an officer of the court the same immunity as a judge acting in his or her official capacity being absolute immunity for judicial acts performed in the scope of jurisdiction. *Dallas County v. Halsey*, 87 S.W.3d 552, 554 (Tex. 2002). For an extended analysis of the issue of derived judicial immunity for ad litem, see Smith, *op. cit.* at 10.



#### **D. The Backdrop: Fraud, Abuse & Exploitation**

Behind everything the courts and social service agencies do in this area is the spectre of fraud, abuse and exploitation of the elderly and disabled. It is a largely unseen and vastly underreported problem today. A significant number of statutory changes were enacted in the 2021 regular session of the legislature. Appendix G details many of these new laws. Please study them.

## **II. AREAS IN WHICH AD LITEMS ARE APPOINTED BY SPECIFIC STATUTE**

### **A. Appointment of a Guardian**

#### **1. ATTORNEY AD LITEM**

A. Defined § 1002.002 - “an attorney appointed by a court to represent and advocate on behalf of a proposed ward, an incapacitated person or an unborn person in a guardianship proceeding.”

B. Mandatory - The appointment of an Attorney Ad Litem is mandatory in every application for the appointment of a guardian. §1054.001.

C. Guardianship Management Trust - Also, if a guardianship management trust is to be created, with or without the creation of a guardianship, an Attorney Ad Litem must be appointed. §1304.054(c).

D. Term of Appointment - Unless the court determines that the continued appointment of the attorney ad litem appointed is in the ward’s best interests, the attorney ad litem’s term of appointment expires, without a court order, upon the appointment of a guardian, the appointment of a successor guardian, or upon the court’s denial of an application for appointment of a guardian. §1054.002.

The term of appointment of an attorney ad litem appointed in a temporary guardianship continues after the court appoints a temporary guardian unless an order of the court provides otherwise. § 1054.002(b).

#### **2. GUARDIAN AD LITEM**

A. Defined § 1002.013 - “a person appointed by a court to represent the best interests of an incapacitated person in a guardianship proceeding.”

B. Discretionary - The appointment of a Guardian Litem is within the discretion of the trial court. §1054.051.

C. Dual Appointment Possible - In the interest of judicial economy, the court may appoint the person who has been appointed attorney ad litem (either under in the guardianship proceeding or who is serving as an ad litem for the ward’s benefit in any other proceeding) as guardian ad litem. §1054.052

D. Term of Appointment - Unless the court determines that the continued appointment of the guardian ad litem appointed is in the ward’s best

interests, the guardian ad litem’s term of appointment expires, without a court order, upon the appointment of a guardian or upon the court’s denial of an application for appointment of a guardian. §1054.053.

### **B. Restoration/Modification of Guardianship - Attorney Ad Litem** Tex. Est. Code § 1202ff.

If the ward or any person interested in the ward’s welfare seeks a complete restoration or modification of the guardianship, a Guardian Ad Litem can be appointed under Tex. Est. Code § 1202.054(b) to investigate the possible restoration or modification. The Guardian Ad Litem can later be appointed as Attorney Ad Litem if an application for restoration or modification is filed.

### **C. Removal of Incapacitated Guardian for Cause - Attorney Ad Litem and Guardian Ad Litem** Tex.

Est. Code § 1203.052 – In the context of a proceeding to remove a guardian for cause, if there is probable cause to believe that a guardian is an incapacitated person (an independent cause for removal under Tex. Est. Code §1203.052(a)(5)(A)), the court may, on its own motion or on complaint of an interested person, appoint an attorney ad litem to represent the ward’s interests (under Tex. Est. Code § 1054.007) and a court investigator or guardian ad litem to investigate whether the guardian should be removed (Tex. Est. Code §1203.052 (a)(5)(A)). The court may also appoint physicians to examine the guardian for a capacity determination. Tex. Est. Code §1203.052(c).

### **C. Removal of Community Administrator - Attorney Ad Litem** Tex. Est. Code § 1353.151

In a proceeding to remove a community administrator serving under Tex. Est. Code § 1353, the court shall appoint an Attorney Ad Litem for the incapacitated spouse. The Attorney Ad Litem may demand an inventory or accounting from the community administrator. The community administrator must comply within 60 days of receiving the demand.

### **D. Heirship Determinations - Attorney Ad Litem**

The appointment of an Attorney Ad Litem and citation by publication is mandatory in all heirship determinations. Tex. Est. Code §§ 53.104, 202.009. Additionally, the court is given the discretion to appoint either an Attorney Ad Litem or a Guardian Ad Litem to represent the interests of an heir that is incapacitated. Tex. Est. Code §202.009.

A detailed discussion of the responsibilities of the Attorney Ad Litem in heirship determinations follows *infra* at XII. HEIRSHIP PROCEEDINGS.

**E. Disclaimers – Guardian Ad Litem** Tex. Est. Code § 122.001ff - The court may appoint a Guardian Ad Litem to represent a beneficiary who is unborn or unascertained.

**F. Probate of Will After Four Years – Attorney Ad Litem** Tex. Est. Code § 258.052 - The court shall appoint an Attorney Ad Litem to represent the interests of any heirs whose addresses are unknown in a proceeding to probate a will as a muniment of title after four years under Tex. Est. Code § 256.003(a).

**G. Partition Actions – Guardian Ad Litem** Tex. Est. Code § 360.102(1)(B)&(C) references the Guardian Ad Litem for a minor beneficiary and the “attorney appointed to represent those persons who are unknown or who are not residents of this state.”

**H. Trust Construction or Modification Actions - Guardian Ad Litem** Tex. Prop. Code §115.014

The court may appoint a Guardian Ad Litem to represent the interests of a minor, an incapacitated, unborn or unascertained person, or person whose identity or address is unknown in a proceeding to construe, alter or amend a trust instrument. The Guardian Ad Litem is to seek to protect such person or persons in a manner that will enable the Court to determine what action will be in the best interests of such person or persons.

Tex. Prop. Code §115.014(b) as amended in 2009 however, provides for the *mandatory* appointment of an Attorney Ad Litem to “defend” (represent) the interests of a trust beneficiary who is a minor or “incompetent” (incapacitated) regarding tort claims against a trustee under Tex. Prop. Code (Trust Code) §114.083.

VIRTUAL REPRESENTATION: If a guardian of the estate or a Guardian Ad Litem has been appointed in a trust modification proceeding for minors, the doctrine of virtual representation (that a parent (beneficiary of one generation) may virtually represent beneficiaries of subsequent generations) does **not** apply. Tex. Prop. Code § 115.013(c)(3).

**I. Mental Health Commitments - Attorney Ad Litem** Pursuant to §574.004 of the Mental Health Code (Subchapter G, Texas Health & Safety Code) the court must, within 24 hours of the filing of the application for court-ordered services, appoint an attorney for each proposed patient who does not have an attorney.

**J. Purchase of Estate Property by Guardian – Attorney Ad Litem** Tex. Est. Code § 1158.653 - The court may allow a guardian to purchase property of the estate if it is found to be in the ward’s best interests and

an Attorney Ad Litem has been appointed to represent the ward.

**K. Sale of Minor’s Interest in Property** - Tex. Est. Code § 1351.001(b) - If a minor who is not a ward does not have a parent or managing conservator willing or able to file an application for a court order to sell the minor’s interest in property (under \$100,000), the court may appoint an attorney ad litem or guardian ad litem to act on the minor's behalf for the limited purpose of applying for an order to sell the minor's interest in property. (see below in Less Restrictive Alternatives)

**L. Sports and Entertainment Contracts Entered Into by Minors – Guardian Ad Litem** Tex. Est. Code §§ 1356ff. A Guardian Ad Litem must be appointed to represent the promising minor sports, music or entertainment prodigy for purposes of negotiating a valid sports and entertainment contract.

**M. Inspection by Guardian of Ward’s Estate Planning Documents – Guardian Ad Litem** Tex. Est. Code § 1162.008 A Guardian Ad Litem may be appointed for the ward "or an interested party" when the guardian of the estate applies for an *in camera* inspection of estate planning documents of a ward in order for the guardian to apply for the power to establish an estate plan under Tex. Est. Code § 1162ff.

**N. Show Cause and Compliance Actions – Guardian Ad Litem and Attorney Ad Litem.** When it appears the personal representative may have mismanaged estate funds, it is common to call upon a Guardian Ad Litem to help “backstop” the PR (or investigate what is *really* happening). Not infrequently, the ad litem may end up being appointed the successor PR upon the removal of the errant PR. See generally, Tex. Est. Code §§ 1203ff; Smith, *Show Cause, Contempt, Surcharge*, Advanced Estate Planning and Probate Course 2002, State Bar of Texas; and King, *Compliance Issues: Damage Control*, 43<sup>rd</sup> Annual Program on Wills, Trusts and Estate Planning (2004), Center for American and International Law and, generally, the State Bar of Texas Fiduciary Litigation seminars over the past several years.

**O. Proper Investment by Guardian – Guardian Ad Litem** Tex. Est. Code § 1161.007 - The court may appoint a Guardian Ad Litem for the limited purpose of representing the ward's best interests with respect to the investment of the ward's property at a show cause hearing under this section.

**P. Establishment of Pooled Trust Subaccount –**

**Attorney Ad Litem** Tex. Est. Code § 1302.003 - The court shall appoint an Attorney Ad Litem for a person who is a minor or has a mental disability and who is the subject of an application under Tex. Est. Code § 1302.002.

**Q. Final Settlement of Guardianship Estate - Attorney Ad Litem** Tex. Est. Code §§ 1204.001(e) & 1204.002 - The court may appoint an Attorney Ad Litem to represent the ward's interest in the final settlement with the guardian.

**R. Judicial Bypass Proceedings – Guardian Ad Litem and Attorney Ad Litem** Tex. Fam. Code §33.003(e) In proceedings involving the right of a minor to an abortion without parental notification (“Judicial Bypass Proceedings”) the appointment of a Guardian Ad Litem and (if the minor is not otherwise represented) an Attorney Ad Litem, is mandatory.

**S. Family Code Appointments – Guardian Ad Litem and Attorney Ad Litem** Tex. Fam. Code §§107.001 to 107.016 govern the appointment and certification for both guardians ad litem and attorneys ad litem under the Family Code.

**T. “Utility Outfielder” Appointments - Attorney Ad Litem** Tex. Est. Code § 53.104 permits the judge to appoint an Attorney Ad Litem to represent the interests of a person having a legal disability, a nonresident, an unborn or unascertained person or an unknown heir in the proceeding. This section is most frequently used in dependent administrations, sales of property or declaratory judgment actions, but is sometimes utilized where the court just needs a higher comfort level that all parties and viewpoints are represented. It does not, however, authorize the judge to appoint an ad litem who is not certified pursuant to Tex. Est. Code § 1054.201 in a guardianship proceeding where the guardian seeks to resign. *Guardianship of Marburger, supra*.

In *Estate of Isaacs*, 2012 Tex. App. LEXIS 1173 (Tex. App.—Tyler 2012, pet. denied), guardians ad litem were allowed to file disclaimers on behalf of minor heirs.

**U. “Utility Outfielder” Appointments - Guardian Ad Litem** Tex. Est. Code § 1162.008 authorizes the court to appoint a Guardian Ad Litem for the ward or an interested party at any stage of a guardianship proceeding if it is considered advisable for the protection of the ward or the interested party.

### III. EMBRACE THE TECHNOLOGY

**A. Electronic Resources:** readily available electronic resources (free - or very inexpensive):

1. **THE AD LITEM MANUAL:** The most current digital version of this manual may be found at:

<http://access.tarrantcounty.com/en/probate-courts/probate-court-1.html>

2. **SEARCHABLE/DOWNLOADABLE ESTATES CODE:** courtesy of Richardson attorney Michael Koenecke (includes Professor Beyer’s conversion tables): <http://koeneckelaw.com/public>

3. **TEXAS ESTATES CODE** (html/pdf/Word) (and all other Texas statutes and legislative histories): <http://www.statutes.legis.state.tx.us/>

4. **Professor Beyer’s Website** – Prof. Gerry Beyer’s website has pdf versions of both the Texas Probate Code and the Texas Estates Code, updated through August 2, 2015, as well as a *conversion table* from the Probate Code to the Estates Code. [http://www.professorbeyer.com/Estates\\_Code/Texas\\_Estates\\_Code.html](http://www.professorbeyer.com/Estates_Code/Texas_Estates_Code.html)

5. **TEXAS RULES OF CIVIL PROCEDURE:** <https://www.txcourts.gov/media/1453689/texas-rules-of-civil-procedure.pdf>

6. **Glenn Karisch’s TEXAS PROBATE WEBSITE:** The Best Probate Site Ever. Period. If you are not one of the members of this listserve, you are not serious about probate law. <http://www.texasprobate.com/>

7. **CLERK’S PUBLIC WEB ACCESS:** Check the websites of the probate clerks of the larger counties (Dallas, Harris, Travis, Fort Bend, etc.) for lot of basic information about probate filings.

9. **PROBATE COURT WEBSITES:** Specific information about the policies of the probate courts can be found on the specific court websites. Judge Guy Herman (Travis County) has an astonishing amount of available information. Dallas, Denton and Harris Counties all have excellent websites with detailed information about their staff and court policies.

#### **B. E-Filing & E-Notice**

1. **E-Filing** - E-Filing is governed by Tex. R. Civ. Proc. 21, 21a, 21c, 57 and 502.1.

In addition, technical standards are periodically updated by the Supreme Court’s Judicial Committee on Information Technology and adopted by the court. <http://www.txcourts.gov/media/1435816/technology-standards.pdf> Ver. 4.5. Updated October 20, 2017.

2. **E-Notices** – Courts and clerks are expressly authorized to send any notice or document permitted or required by statute using mail or electronic mail. Tex. Gov’t. Code §80.001. E-notices must be sent to the e-mail address in use with the e-filing system. Tex. Gov’t. Code §80.003.

While the courts and clerks cannot be required to use any method of mail other than ordinary first-class mail (Tex. Gov't. Code §80.004), many have opted to use electronic mail only.

Faxes, text messages, videoconferencing, webcams, voice mail, telegraphs and social media are *not* authorized methods of delivering a notice or document by electronic mail. Tex. Gov't. Code §80.005.

#### **IV. A to Z FOR AD LITEMS IN GUARDIANSHIP PROCEEDINGS**

**A. Study This Manual:** Most of the procedural questions you can come up with are covered somewhere here. Literally hundreds of hours of work have gone into distilling the information found here. This Manual has the answers.

**B. Guardianship Summary:** Appendix B is a short summary, intended for the lay public, explaining the basic process of guardianship. This should help provide an overview of the process. You might also want to consider having a copy handy for the people you deal with to help them understand what a guardianship is and is not.

**C. Can You Get There From Where You Are?:** The flowchart on page 2 is designed to be a map – a visual guide - to the application and appointment process. Study it often to get your bearings.

**D. Mechanics of Appointment: The Ad Litem Wheel** - Appointments by the court of Attorneys Ad Litem, Guardians Ad Litem, mediators and attorneys who are private professional guardians shall, with certain exceptions, be made using a 'next-up' rotation system.

Each local administrative judge is authorized to promulgate administrative rules for the establishment and maintenance of the various lists. The lists are to be posted annually at the courthouse and available on the county's website.

Exceptions: persons off-list by agreement of the parties and approval of the court; persons with specialized education, training, certification, skill, language proficiency, or persons with knowledge of the subject matter; or relevant prior involvement; or persons in a relevant geographic location. Tex. Gov't. Code §§ 25.0022(d)(10), 37.001-37.005, 74.092(11), 74.0893.

*Estate of Harris*, 2017 Tex. App. LEXIS 5487 (Tex. App.—Fort Worth, June 15, 2017, no pet. h.) (heirship ad litem).

**Note: For a fascinating behind-the-scenes look at the judiciary, see *In re Inquiry Concerning Honorable Carl Ginsberg*, 2018 Tex. LEXIS 525, Special Court of Review Appointed by the Supreme Court of Texas (June 11, 2018) where a district judge sua sponte issued a standing order that the whole appointment wheel mechanism was unconstitutional.**

#### **E. The Language of Guardianship: Less Restrictive Alternatives & Supports and Services** -

The entire guardianship process is based on the concept that the court and the officers of the court (that would include you) must seek any less restrictive alternatives to a full guardianship if they exist and are applicable. Tex. Est. Code § 1001.001.

These twin concepts are integrated into every step of the guardianship process: they are required to be considered and addressed in: the application for guardianship (Tex. Est. Code §§ 1101.001(b)(3-a & 3-b); the findings of the court's order granting either a full or limited guardianship (Tex. Est. Code § 1101.101) including specifically finding whether the proposed ward lacks the capacity, or lacks sufficient capacity with supports and services.

As an adjunct to the concept of a Less Restrictive Alternative, the idea of "Supports and Services" is now a part of the mechanism by which we analyze how a protective framework is to be constructed for a proposed ward. As referenced in Tex. Est. Code § 1002.031, Supports and Services are additional types of less restrictive alternatives to a full guardianship, used either to avoid or delay the necessity for a guardianship or, when employed after the appointment of a guardian, to lessen the impact or extent of a full guardianship.

These formal or informal resources serve to directly supplement the functional deficits of the individual and to enhance areas where capacity is limited.

Choices of particular supports or services will, of course, depend on the residual level of capacity of the individual to be benefitted.

Tex. Est. Code § 1002.0015 provides a non-exclusive listing of some of the most commonly-used alternatives (with dozens more discussed at Appendix E).

Appendix F is a listing of examples of supports and services and the types of agencies or entities which provide them.

In a proceeding for modification or restoration (full or partial), the issue of supports and services must be specifically addressed in the application (Tex. Est. Code § 1202.051), the physician's certificate of medical examination (Tex. Est. Code § 1201.152(b)), the evidence to be heard (Tex. Est. Code §

1202.151(a)), the findings of the court (Tex. Est. Code § 1202.153(c) and, if modification or partial restoration is granted, the specific supports and services must be enumerated (Tex. Est. Code § 1202.154(a)(4)).

Events necessitating the settlement and closing of a guardianship now include: "... when the ward... is found by the court to have full capacity, or sufficient capacity with supports and services, to care for himself or herself and to manage the ward's property..." (Tex. Est. Code § 1202.001(b)(2)).

These alternatives and Supports and Services are the basic language of guardianship. Without a thorough understanding of these concepts, it will be virtually impossible to comply with the Estate Code requirements.

As a fundamental part of the trial court's exercise of sound discretion, it is absolutely necessary to consider both less restrictive alternatives as well as supports and services. *In re Guardianship of Laroe*, No. 05-15-01006-CV, 2017 Tex. App. LEXIS 1094 (Tex. App.—Dallas 2017, pet. denied). The Texas Supreme Court has recognized that this exercise of discretion by the trial court, especially in guardianship proceedings, is a heavy responsibility for determining the best resolution of fundamental and emotional issues. *In re Thetford*, 574 S.W.3d 362 (Tex. 2019)

To determine whether a trial court abused its discretion, the appeals courts look to whether the trial court acted without reference to any guiding rules or principles. *Laroe, supra*. In guardianship proceedings, legal and factual sufficiency of the evidence are not independent, reversible grounds of error, but are factors to consider in assessing whether there was an abuse of discretion. *Id.*; *In re Guardianship of A.E.*, 552 S.W.3d 873, 877 (Tex. App.—Fort Worth 2018, no pet.). The appeals courts view the evidence in the light most favorable to the trial court's decision, and an abuse of discretion does not occur when the court's decision is based on conflicting evidence. *Laroe, supra*.

In *Guardianship of Bruner*, 2019 Tex. App. LEXIS 5653 (Tex. App.—Dallas 2019, no pet.), in the face of broadly conflicting evidence, the appeals court affirmed the trial court where the evidence showed the trial court had considered both less restrictive alternatives and potentially available supports and services.

In *Guardianship of A. E., supra*, the court, in a textbook-like opinion, categorically reviewed the statutory mandate, carefully discussing the burden of proof required. It essentially held that, where a proposed ward had a total lack of capacity, supports and services are unavailable.

In *Guardianship of N.P.* 2020 Tex. App. LEXIS 9682, (Tex. App.—Fort Worth, December 10, 2020, pet. den.) the probate court abused its discretion by

failing to appoint the daughter's parents as guardians with full authority under Tex. Estates Code § 1101.151 because the evidence showed that the daughter was totally incapacitated and could not make personal decisions including regarding residence, voting, operating a motor vehicle, and marriage. The trial judge granted only a limited guardianship despite the testimony of the attending physician, the court investigator and the parents of the ward that the ward was totally incapacitated and that no less restrictive alternatives nor supports and services were available or appropriate.

**F. Local Rules:** - All the statutory probate courts (Bexar, Collin, Dallas, Denton, El Paso, Galveston, Harris, Hidalgo, Tarrant and Travis counties), have local rules, approved by the supreme court, that may differ from the local rules for the District Courts in your county. The judges didn't go through all the trouble necessary to get these adopted for nothing. A word to the warned should be sufficient.

**G. Standing Orders** - Also, because the statutory probate courts handle 90%+ of the guardianships in Texas, the statutory probate courts have had to create policies and approaches to fill in the procedural gaps left by the Estates Code to deal with the high volume of work and to ensure uniform results. These standing orders will be available from the court with which you will be dealing.

**H. What Documents To Expect:** When you first review the file, there may be no application for guardianship. Depending on where the case has progressed, you may find one or more of the following:

A. AN INFORMATION LETTER: ("Suggestion of Need for Guardian or Need for Investigation of Circumstances under Tex. Est. Code § 1102.003.") (Appendix D)

B. A "DOCTOR'S LETTER" ("CME" or Certificate of Medical Examination). (Appendix D) See *infra*.

C. AN ORDER APPOINTING GUARDIAN AD LITEM or ORDER APPOINTING ATTORNEY AD LITEM: Study these carefully. Each will set the factual and legal bases of the guardianship. They are not all exactly alike.

**I. Fundamentally Understand Your Role:** The biggest problems for an Ad Litem arise from not understanding the job description and acting outside the scope of the appointment. This invariably causes problems at the end of the proceeding when the ad litem is trying to get paid. (*infra*).

**MAJOR CAVEAT: Scope of Appointment - If you act outside the scope of your appointment, it is error for the court to award you any fees for such activity. See discussion below under “fees.”** The burden is on the ad litem to ensure that the services performed do not exceed the scope of the role assigned. *Ford Motor Co v. Garcia*, 363 S.W.3d 573 (Tex. March 30, 2012); *Ford Motor Co v. Chacon*, 370 S.W.3d 359; *Ford Motor Company v. Stewart, Cox, and Hatcher*, 390 S.W.3d 294 (Tex. 2013); *Guardianship of Vavra*, 365 S.W.3d 476 (Tex. App. Eastland 2012, no pet.).

1. **THE ROLE OF THE ATTORNEY AD LITEM**

A. **Legal Counsel** - The Attorney Ad Litem functions as legal counsel of record and provides the same services as an attorney – giving advice, doing research, and conducting litigation. *Eugene du Pont, III v. Southern Natl Bank of Houston*, 771 F.2d 874 (5<sup>th</sup> Cir. 1985); *Cahill v. Lyda*, 826 S.W.2d 932 (Tex. 1992); *Madero v. Calzado*, 281 S.W.2d 328 (Tex. Civ. App. – San Antonio, 1926, writ dismissed). Ad litem appointments bear no less professional responsibility than representing a client as retained counsel. *Estate of Tartt v. Harpold*, 531 S.W. 2d 696 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1975, writ refused n.r.e.)

B. **The Prime Directive** - Your principal charge is to *advocate* for your client. However, this does not mean you are required to march over a cliff if your client demands it. Consideration of less restrictive alternatives and supports and services, as reflected in Tex. Est. Code § 1001.001, is mandatory.

C. **“But I don’t want a guardian”** – (‘The Ad Litem’s Dilemma’) - Many AALs anguish over their responsibility when the client adamantly opposes a guardianship – even when the anecdotal, medical and factual evidence all indicate clear functional deficits and the need for protection of the person or property of the proposed ward.

***Imagine you were appointed as criminal defense counsel in a bank robbery case. At your first interview, your “hero” still has purple stains on his face and hands. (hint: exploding dye packet in bank money bag).***

***When he says: “I didn’t do it,” is it then your job to use every possible procedural avenue in the Penal Code, Code of Criminal Procedure, Rules of Evidence and Rules of Appellate Procedure to prevent a conviction? Manifestly not.***

Your job, either in the criminal arena or in the probate court, is to require the party with the burden of proof to carry that burden as required by the Estates

Code. To do otherwise is an abuse of the process.

If, in the ethical exercise of your duties, you feel the court cannot get a full picture of the situation (absent your breach of the duty of confidentiality), consider asking the court to appoint a GAL to act in the best interests of the proposed ward. (See Appendix S)

D. **Duties** Tex. Est. Code § 1054.004 and other relevant sections:

1. Review all materials in the court’s file, including (as applicable) the order of appointment, the Application for Letters of Guardianship, the Information Letter, the certificates of physical, medical and intellectual examination and all the relevant financial, medical, psychological and intellectual testing records of the Proposed Ward;

2. Attempt to determine: 1) whether alternatives to guardianship (Appendix EE) are appropriate and available which would meet the needs of the proposed ward and avoid the need for the appointment of a guardian, 2) whether there are supports or services (Appendix F) appropriate and available to the proposed ward to avoid or delay the necessity for a guardianship or, after the appointment of a guardian, to lessen the impact or extent of a full guardianship;

3. Personally interview the Proposed Ward within a reasonable time before the hearing and discuss: 1) the laws and facts of the case, 2) the Proposed Ward’s legal options regarding disposition of the case, 3) the grounds on which a guardianship is sought, 4) whether in the opinion of the attorney ad litem, a guardianship is necessary and, 5) if a guardianship is necessary, the specific powers or duties of the guardian that should be limited if the proposed ward receives supports and services;

4. Ascertain whether the Proposed Ward wishes to oppose the proceedings (if the Proposed Ward is unable to communicate, the Attorney Ad Litem is to act in best interests of the Proposed Ward);

5. File an Answer (Appendices L, M) (for a *fuller discussion, see infra*);

6. Visit with the Applicant’s attorney, the Guardian Ad Litem and/or the Court Investigator concerning the Application;

7. Review the report of the Court Investigator (if there is one);

8. Consider mediation or other appropriate alternate dispute resolution techniques;

9. Represent and advocate on behalf of the Proposed Ward at the hearing, bearing in mind the requirements of the Texas Disciplinary Rules of Professional Conduct Rule 1.14 and *Franks v. Roades*, 310 S.W.3d 615 (Tex. App.—Corpus Christi, April 15, 2010, no pet.) (A lawyer may take reasonably necessary protective action when the lawyer believes the client

has diminished capacity, is at risk of substantial physical, financial, or other harm, and cannot adequately act in the client's own interest); and

10. File a Fee Application and an Order (Appendices Ae, Af).

## 2. THE ROLE OF THE GUARDIAN AD LITEM

A. Defined Tex. Est. Code § 1002.013: “a person who is appointed by the court to represent the best interests of an incapacitated person in a guardianship proceeding.”

The Guardian Ad Litem (who need not be an attorney) may end up being the applicant in the proceeding and must be able to be in a position to act directly against the expressed wishes of the Proposed Ward, if the Guardian Ad Litem determines that course to be in the Proposed Ward's best interest.

- the appointment is discretionary
- Attorney Ad Litem may also be appointed as Guardian Ad Litem (Tex. Est. Code § 1054.051)

B. Personal Representative - In representing the best interests of the Proposed Ward, the appellate courts have made it clear the role of a Guardian Ad Litem is actually that of an interim personal representative for the Proposed Ward, rather than as an attorney. *Goodyear Dunlop Tires N. Am., Ltd. v. Gamez*, 151 S.W.3d 574 at 582-585 (Tex. App.—San Antonio 2004, no pet.). *Byrd v. Woodruff*, 891 S.W.2d 689 at 705 (Tex. App. 1994).

C. Assess & Recommend - The classic function of the Guardian Ad Litem is to analyze the situation and make a recommendation to the court on what action is in the best interests of the client of the Guardian Ad Litem. Tex. Rules Civ. Proc. 173.4.

D. Duties: Jiminy Cricket or Quarterback? The duties of the Guardian Ad Litem vary slightly, depending upon the scenario presented:

1) “Quarterback” (Tex. Est. Code § 1102.001) – If there the guardianship proceeding has started because someone filed an information letter (Tex. Est. Code § 1102.003), sparking a court-initiated investigation into the need for a guardianship, there will be no applicant on the scene. You will have to take the ball and run with it. The minimum statutory duties set forth are

- a) to investigate the Proposed Ward's conditions and circumstances to determine whether;
  - 1) the Proposed Ward is an incapacitated person; and
  - 2) a guardianship is necessary for the Proposed Ward;
- b) to personally interview the Proposed Ward; provide a copy of the information letter filed herein pursuant to Tex. Est. Code § 1102.003

and of this order; and discuss with the Proposed Ward the contents of this information letter and this order (including advising the Proposed Ward of their right to petition the Court to have the appointment of the Guardian Ad Litem set aside);

- c) to evaluate alternatives to guardianship and supports and services available to the Proposed Ward that would avoid the need for appointment of a Guardian;
- d) to file a written report with the Court concerning the best interest of Proposed Ward as soon as possible but no later than one week prior to a hearing date (or within a reasonable time if no Application for the Appointment of a Guardian is filed);
- e) to file an Application for the Appointment of a Guardian of the Person and/or Estate of Proposed Ward if such is determined to be in the best interest of Proposed Ward;
- f) to obtain a hearing date and Letters of Guardianship in due course and as appropriate.

2) “Jiminy Cricket” (Tex. Est. Code § 1054.051) – If, however, your scenario includes an applicant with their own attorney, your role is more that of the traditional Guardian Ad Litem: assess the situation and give an opinion. But it might also be because the Attorney Ad Litem is trying to send a message to the court that all is not what it appears to be and that more investigation is necessary. The minimum statutory duties set forth are

- a) protect the Proposed Ward in a manner that will enable the court to determine the action that will be in that person's best interests;
- b) to investigate the Proposed Ward's conditions and circumstances to determine whether a guardianship is necessary;
- c) evaluate alternatives to guardianship and supports and services available to the proposed ward that would avoid the need for appointment of a guardian;
- d) to personally interview the Proposed Ward;
- e) to investigate the need for the appointment of a Guardian of the Person and/or Estate for Proposed Ward and obtain a Proposed Guardian if necessary;
- f) to file a written report with the Court (Appendix U) concerning the best interest of Proposed Ward as soon as possible but no later than one week prior to a hearing date.

E. Additional Duties:

1) Review all materials in the court's file, including (as applicable) the order of appointment, the Information Letter, the Application for Letters of Guardianship, pertinent certificates of physical, medical and intellectual examination and all the relevant financial, medical, psychological and intellectual testing records of the Proposed Ward (see Note *supra* re: Underlying Medical Records);

2) File an Entry of Appearance (Appendix T);

3) Interview the concerned party who filed the 'Information Letter' concerning the Proposed Ward as well as known relatives and friends of the Proposed Ward;

4) During the interview the Proposed Ward, begin a personal assessment of capacity (see the discussion of capacity assessment, *infra*);

5) Consider the necessity of temporary guardianship or other extraordinary relief (i.e.: EPO, Receivership, etc.);

6) If appropriate, complete and file an Statement of Inability to Afford Court Costs (as applicable) (see Appendix K);

7) Ensure all citations are served and that the return of citation has been on file for a sufficient period to 'ripen;'

8) Send all necessary notices or obtain waivers, per Tex. Est. Code § 1051.104 and file the required affidavit. (Appendix J);

9) Set the case for a hearing and confirm the setting by e-mail to all parties (Appendix Aa);

10) Consider mediation or other appropriate alternate dispute resolution technique;

11) Locate and/or recruit a person to serve as guardian or contact your local guardianship program (amend the Application, if necessary);

12) Determine if a representative payee for Social Security funds or any other government benefits has been designated and relay this information to the Court;

13) Visit with the Attorney Ad Litem concerning the Application (as applicable);

14) Review the report of the Court Investigator (if there is one);

15) Prepare Proof of Facts, Exhibits in Support of Requested Bond and for Allowance, Order, Personal Surety Bond & Oath or Unsworn Declaration (see Appendices X through Ad);

16) Tender Exhibits to the Judge regarding property, income and expenses of the Ward to allow the court to set bond and an allowance (Appendices Y, Z);

17) Attend the hearing on the application and ensure the guardian attends training, or, if the judge uses handouts regarding the duties and responsibilities of the Guardian (Appendix Am), go over the handouts with the guardian;

18) Assist the guardian in obtaining his or her bond and letters; and

19) File an Application for Payment of Fees and Order (Appendices Ak, Al).

**J. Is Immediate Action Required?** If there is an indication of imminent harm to the Proposed Ward, the following actions/procedures should be among your first considerations, all of which are described in more detail in Less Restrictive Alternatives (Appendix E):

1. INJUNCTIVE RELIEF (TRO, Temporary Injunction, Tex. R. Civ. P. 680, 681).

2. EMERGENCY PROTECTIVE ORDER - Tex. Hum. Res. Code § 48.208.

3. TEMPORARY GUARDIANSHIP - Tex. Est. Code § 1251.001 (see *infra*).

4. RECEIVERSHIP - Tex. Est. Code § 885, Tex. Civ. Prac. & Rem. Code §§ 64.001ff

5. COURT-ORDERED MENTAL HEALTH SERVICES - Tex. Health & Safety Code. §462.001, §571.001, §574.001.

6. EMERGENCY MEDICAL TREATMENT ACT - Tex. Health And Safety Code §773.008.

7. SURROGATE DECISION-MAKING ("SDM") – Tex. Health And Safety Code §313.001-.007.

8. MEDICAL POWER OF ATTORNEY - Tex. Health & Safety Code §166.151.

9. OUT-OF HOSPITAL DNR ("EMT-DNR")- Tex. Health And Safety Code §166.081.

10. DIRECTIVE TO PHYSICIANS AND FAMILY OR SURROGATES ("Living Will") –Tex. Health & Safety Code §166.031.

#### **K. Temporary Guardianships –**

1. A Strong Smell of Gas and the Potential for a Spark: A temporary guardianship may only be granted where it is **immediately** necessary to safeguard either the person or property of the Proposed Ward. TEX. EST. CODE § 1251.001.

The scenarios for a temporary guardianship can vary widely, but the common thread is an element of extreme urgency:

- inability to get life-saving treatment for a recalcitrant nursing home resident.

- financial exploitation of an elderly or developmentally disabled person.

- casualty loss to property belonging to a person for whom a guardianship has not been opened due to the existence of a less restrictive alternative.

If it's not really an emergency (or if the applicant really needs to come clean with the judge about their true motivations), perhaps the Applicants should apply for a regular guardianship, seek a less restrictive alternative and consider available supports and



services.

Also, consider a TRO and Temporary Injunction before coming in to ask for a temporary guardian. *Guardianship of Stokley*, 2011 Tex. App. LEXIS 8000 (Tex. App.—Dallas 2011, no pet.).

2. **Prerequisites:** Several things must happen before a temporary guardianship hearing may take place:

A. A sworn, written application must be filed (Appendix L).

B. An Attorney Ad Litem must be appointed;

C. The clerk must issue notice;

D. An order setting the hearing (“fiat”) must be signed. (Appendix L).

E. Service of citation must be perfected on the Proposed Ward, any currently serving guardian and the proposed temporary guardian with notices to be served on the Attorney Ad Litem and Guardian Ad Litem. Tex. Est. Code § 1251.005; *In Re Cantu*, 2009 Tex. App. LEXIS 2241 (Tex. App.—Corpus Christi, April 2, 2009, pet. filed) In extreme circumstances, substituted service may be warranted. *Guardianship of Bays*, 355 S. W. 3d 715 (Tex. App.—Fort Worth 2011 no pet. h.).

The citation issued must also contain a statement notifying a person interested in the estate or welfare of a ward that they may file a request to be notified of filings with regard to the temporary guardianship – Tex. Est. Code § 1251.005(b-1).

3. **Hearing Date:** This is your one shot. Unlike earlier versions of the law, there is no ‘confirmation’ hearing. The hearing must be held within 10 days of the filing of the application unless extended by agreement for not more than 30 days.

4. **Proof:** Substantial evidence of:

A. incapacity or minority, or

B. imminent danger of serious impairment of physical health or safety or serious damage or dissipation to property. *Bosworth v. Bosworth*, 2013 Tex. App. LEXIS 565, (Tex. App.—Austin, January 16, 2013, no pet.)

**CME not mandatory in temporary guardianship** - Tex. Est. Code § 1101.103, requiring a Certificate of Medical Exam, specifically does not apply in a temporary guardianship. *In Re Moreno*, 328 S.W.3d 915 (Tex. App.—Eastland, December 10, 2010, no pet. h.). *Get the doctor’s letter if you can, but you don’t have to wait on it.*

5. **Duration:** If the temporary guardianship is within the context of a contested matter, the term of the temporary guardian expires on the earliest of:

a. the conclusion of the hearing challenging or contesting the application;

b. the date of qualification of a permanent guardian; or

c. the 12-month anniversary of qualification of the temporary guardian, unless the term is extended after, motion, hearing and court order. § 1251.052(b). In *Guardianship of Gibbs*, 253 S.W.3d 866 (Tex. App.—Fort Worth, April 17, 2008, pet. dismissed), where a temporary guardianship was allowed to expire, the court lost subject matter jurisdiction for any subsequent proceedings and all subsequent actions of the court were void. *See also Bauer v. State*, 341 F.3d 352 (5th Cir. 2003).

6. **Order:** Because Tex. Est. Code § 1251.010 does not set forth any “standard powers” for a temporary guardian, the order appointing the temporary guardian must be very specific as to what authority the temporary guardian shall have. (Appendix M) In *Bennett v. Miller*, 137 S.W.3d 894, 897 (Tex. App.—Texarkana, 2004, pet. filed), the appeals court held an order granting the Temporary Guardian *all the powers and duties as stated in the Texas Probate Code* conferred no authority upon the temporary guardian.

7. **NEW! Final Report of Temporary Guardian** Tex. Est. Code § 1251.153(a-1)) A temporary guardian where is no estate is now required to file a final report at the termination of the temporary guardianship describing:

1) each reason the temporary guardianship of the person expired, including a statement of facts regarding whether the temporary guardianship expired because:

(a) the ward was found by the court to have full capacity, or sufficient capacity with supports and services to care for himself or herself;

(b) whether alternatives to guardianship have been established to meet the needs of the ward; or

(c) whether a permanent guardian appointed by the court has qualified to serve as the ward’s guardian; or

(2) if the ward is deceased, stating the date and place of death, if known, in the same form and manner as an annual guardian of the person report.

**L. AAL: FILE AN ANSWER:** It’s generally difficult to convince the court to order payment for a lawyer if no one ever appeared on behalf of the client.

File at least a general denial to the application to properly join issues. (Appendix P) However, if you are actively contesting the application, it would be even better to file an answer that states whether the Proposed Ward objects to the guardianship, the proposed

guardian, or both, and send a copy to the court investigator. (Appendix Q)

*Note: If e-filing, you should set up a “waiver” account with your Electronic Filing Service Provider (EFSP) so that you will not be charged a filing fee. TEX. EST. CODE § 1052.051(e)(2)& (e)(3).*

***e-Service*** – *When you file your answer, make sure everyone gets a copy by adding them to the e-service list. That should include the Court Investigator, if you are in a county that has an investigator.*

If the matter becomes genuinely contested, your amplified answer will probably contain one or more affirmative defenses.

If no answer has been filed at the time of the prove-up, there will be no prove-up.

#### **M. INVESTIGATE: FINDING THE BLACK BOX:**

You are looking for the functional equivalent of the flight data recorder: the real reasons that parties (other than the Proposed Ward) contest matters in guardianship proceedings are rarely what is in the pleadings. Both Ad Litem should be aware of undercurrents and hidden agendas that may work against the best interests of the Proposed Ward.

The need for a guardianship doesn’t just appear out of thin air. Find out what necessitated the application. What was the “Bump in the Road” that finally got someone to notice the Proposed Ward was arguably in need of a guardian? This will help tremendously in determining how any conflicts may be dealt with and resolved.

Basic Investigative Steps along the path:

1. Thoroughly **examine the filings** in the court’s jacket.
2. Review the **available medical records** (not just the doctor’s letter) and note the diagnosis and any underlying anecdotal evidence. From the doctor’s letter, determine the diagnosis and educate yourself as to the details and variations of the medical conditions which affect capacity, e.g: information on dementia from the National Institute of Neurological Disorders and Stroke at [www.ninds.nih.gov/disorders/dementias/dementia.htm](http://www.ninds.nih.gov/disorders/dementias/dementia.htm).
- IMPORTANT: Does the Proposed Ward have a urinary tract infection? Major indicator of undiagnosed problems.**
3. **Talk** to as many family members, friends, caregivers, clergy, hairdressers, neighbors, etc. as necessary for you to feel you have a firm grasp of the situation.
4. Spend some time checking out the extent of the **Proposed Ward’s property**. Consult the local tax appraisal district’s records to see if the proposed

ward is still record title owner of property. Also, the Court Investigators are now authorized to compel production of the financial records of a Proposed Ward. Tex. Fin. Code § 59.006(a)(9).

5. If you discover there is a **representative payee** for social security funds or if anyone other than the guardian is receiving funds on behalf of the ward, the Court Investigator (or other court official) need to be so advised.
6. Make an independent determination of the **suitability of the proposed guardian** and attempt to ascertain whether any of the items of disqualification are applicable.
7. As you **interview the Proposed Ward**, you will necessarily be forming an opinion on whether ward has functional deficits which are the real basis behind the need for a guardianship.

The interview need not be exhaustive, but should be thorough and professional. With practice, you will develop your own style, but you should work off a list, so that you do not forget to cover everything. It is not necessary to be clinical.

It is possible to be conversational and still get the information you need (like any skilled cross-examination).

- N. ASSESS CAPACITY** - Capacity is a **complicated, multi-faceted concept**. One may have to capacity to do everything, many things or only a few things. A proper assessment of capacity looks at a number of areas of functioning in a person’s life, taking into account that functionality for a retired unskilled laborer might be quite different than that of a retired investment banker. See *King, Levels of Incapacity, 2015 Advanced Guardianship Course, State Bar of Texas*. See also *The Capacity Assessment Handbook for Judges – A collaborative effort of the American Bar Association Commission on Law and Aging, the American Psychological Association and the National College of Probate Judges*, this handbook examines capacity from a progressive series of viewpoints. It is available free at [www.apa.org/pi/aging/resources/guides/judges-diminished.pdf](http://www.apa.org/pi/aging/resources/guides/judges-diminished.pdf)

Using the template from the Judicial Capacity Handbook, **consider the various axes of capacity**:

1. **Medical Condition**: Start with what you have gleaned from the medical records and talking to family and friends. Ask the client to tell you why they are in the facility and what their illness/condition is.

*Estate of Robinson*, 140 S.W.3d 782 (Tex. App.—Corpus Christi, 2004, pet. denied)

provides an excellent description of how a history of frequent falling can indicate atrophy of the brain and resulting diminution of capacity. Also see *Estate of Lynch* 350 S.W.3d 130 (Tex. App.—San Antonio 2011), remanded by 395 S.W.3d 215 (Tex. App.—San Antonio, 2012, pet. denied) for some amazing insights into the pathology of dementia (and tips for litigators).

### **This is a Dance and You must Lead:**

*Inexperienced Ad Litem*s will often engage a Proposed Ward in pleasant conversation for an extended period of time, then report back that there is no basis for the doctor's diagnosis of dementia. As long as the Proposed Ward is able to direct the conversation, the coping and compensating mechanisms they have spent years developing will continue to serve them well in masking any deficits.

2. **Cognition:** As you ask your questions, observe how, not just what, your client answers and how well they are processing the information.

**Rule out other Factors** – There might there be reasons or conditions (other than medical) inhibiting the ability of the Proposed Ward to understand: hearing aid batteries /missing or broken glasses /sleeping pill shortly before Doctor's assessment / non-English speaking physician (difficult to understand)/ dehydration, diabetes, malnutrition or other physical condition.

3. **Everyday Functioning:** A series of questions may subtly determine the Proposed Ward's ability to function in a number of areas. (ADLs or "activities of daily living").

- Ask for details of their family: (childrens' birthdays, grandchildrens' names – but ask for them in reverse chronological order)
- **Communication:** ask about the telephone, can they recall important telephone numbers?
- **Grocery Shopping and Meal Preparation:** ask a few questions about what it would take to prepare meals for a day (not "What do you like to eat?")
- **Housekeeping & Laundry:** (do not prompt) What is involved? What can they themselves do?
- **Personal Hygiene:** (casual observation and a look at the bathroom may answer this one).
- **Transportation:** driving self/driven by others/ public transportation. <http://www.npr.org/sections/health-shots/2012/10/08/162392507/>

when-should-seniors-hang-up-the-car-keys.

- **Personal living decisions.** A discussion of politics can help determine the ability to vote. Similar discussions can focus on the ability to determine one's residence. (See below on the new prominence required for decisions regarding residence preference.).
- **Medication Management:** What do you take? What is it for? How often do you take it? How do you get it refilled? (This bears on the issue of whether they have the capacity to consent to medical, dental, psychological and psychiatric treatment – a point on which most doctors are loath to concede.) Observe if the prescription bottles are current or empty.
- **Finances:** Ask them to count some pocket change, whether they know the relationships between the coins and a bit about the use of money. Discuss their bank accounts, any loans they may have at the bank, or any "loans" they may have made to family members or "friends." (This latter area is particularly important if there are allegations of fraud and abuse. Pertinent to ability to contract and incur obligations; to handle a bank account; to apply for, consent to and receive governmental benefits and services; to accept employment; to hire employees; and to sue and defend on lawsuits.) All of these are elements the doctor is asked to address in the CME.

An inability to recognize financial exploitation also goes to other areas, such as whether the Proposed Ward should be allowed to retain the right to marry, since this is one of the most commons avenues of exploitation (after black sheep).

**Mandated Abuse Reporting:** *If, in your interview, you uncover fraud, abuse or neglect, you have an immediate (and affirmative) duty under Tex. Hum. Res. Code §§48.051 & 48.052 to report that abuse to Adult Protective Services (800-252-5400/ [www.txabusehotline.org](http://www.txabusehotline.org)). Banks and Securities dea.er must do the same under Tex. Fin. Code Ch. 280 & Tex . Sec. Act, VTCS Art. 581-1 Even the Court Investigators and judges have the same duty.*

4. **Values and Choices:** Consider how the lifestyle and values of the Proposed Ward may affect the situation. Few people willingly choose to live in squalor, but clutter is not a sole reason for a guardianship. However, a chronic inability to deal

with clutter can be a symptom of something more serious.

5. Risk And Level Of Supervision: – Try to gauge the extent to which the deficits (if any) of your client threaten their ability to “care for himself or to manage his property.” Tex. Est. Code § 1101.151.

6. Means To Enhance Capacity – This is where a thorough understanding of the concept of Supports and Services comes in. Consider the list of both Less Restrictive Alternatives (Appendix E) and Supports and Services (Appendix F) to determine whether you can recommend any of them to avoid or lessen the effect of a guardianship. This is a situation where a better “social safety net” might address the deficits.

**Not Quite There Yet:** In *Techniques for Dealing with Clients Who Are Not Quite Incapacitated* (State Bar of Texas Advanced Guardianship Law 2007), professional care manager Mary K. Koffend categorizes five types of her clients who may have a brush with the guardianship process, but who are not incapacitated (yet). These are clients:

1. With Serious Mental Health Problems,
2. With Increasing Dementia,
3. With Poor Judgment, or Alcohol or Drug Issues,
4. Who are Stubborn, Strong-Willed Individuals on a Disaster Course, and
5. Who are Over- or Under-Medicated.

**O. INDEPENDENT MEDICAL EXAM** Unless you actually have a medical degree, don’t try to outguess the doctor. If you really take serious issue with the doctor’s conclusions, consider requesting an **independent medical exam** pursuant to Tex. Est. Code § 1101.103(c) and request the exam to be conducted by a doctor in a different discipline (gerontology vs. psychiatry vs. neurology, etc.) (Appendix Y).

**P. “THE AD LITEM’S DILEMMA”** - At this point that you must determine whether this will be a case you will *actively contest* the application (see “Actively Contesting the Application,” *infra*), or whether your job is to ensure the Applicant simply carries their burden of proof.

Some of the more common situations fall somewhere along a continuum:

1. THE COMATOSE CLIENT: If the Proposed

Ward is unable to communicate because of either physical or psychological circumstances, the Attorney Ad Litem and Guardian Ad Litem can simply appear at the uncontested guardianship docket and act appropriately.

2. THE BRILLIANT STRATEGIST: If the Proposed Ward tells you that he or she wishes to actively contest the application but is also simultaneously consulting with his invisible field marshals about the next cavalry attack, you may ask the court to set the matter on the contested docket for one hour to allow the Proposed Ward to have their day in court. (the “*pro forma*” contest).
3. TOO CLOSE TO CALL: If you have genuine doubts about which way to jump, and want another set of eyes and ears to assess the situation, ask the court to appoint a Guardian Ad Litem.
4. WINCHESTERS ON THE FENCELINE: You have no doubt your client is getting thrown under the bus. Consider most, if not all, of the strategies under “Actively Contesting the Application,” *infra*. Ask for a docket control conference at the earliest possible time. Make it real clear that you have serious problems with the proceeding going forward.

**Q. IS THE APPLICATION TIMELY FILED?** The Guardian Ad Litem’s application should be filed immediately to ensure the Doctor’s Letter is within the 120-day limitation (date of examination to date of *filing*) or on a *Determination of Intellectual Disability (“DID”)* (twenty-four months from date of examination to date of *hearing*). TEX. EST. CODE §§ 1101.103, 1101.104.

**Covering your Bases:** the Guardian Ad Litem can initially plead as the Applicant and request that “any suitable person be appointed guardian of the person and, if necessary, the estate”. The application can easily be amended without the necessity or re-posting the citation.

**GAL: CME A.S.A.P.** - The most important thing the Guardian Ad Litem can do to expedite the process is to have the Doctor’s Letter in hand before the application is filed.

*Note: If the proposed ward is or was protected by a protective order under the Family Code, the address of the proposed ward may be omitted from the application for guardianship. Tex. Est. Code § 1101.002.*

**R. WHO PICKS UP THE TAB? - Statement of Inability to Afford Payment of Court Costs or an Appeal Bond** –(often referred to as a “Pauper’s Affidavit”) pursuant to Tex. R. Civ. Proc. 145. (Appendix K) is only applicable and available if it is the **Applicant** who has no ability to pay costs or is receiving governmental assistance based on indigency. **It is not the Proposed Ward whose inability to pay is measured.** Tex. Est. Code § 1052.051(e)(4): “a person who files an affidavit of inability...”

The test for determining entitlement to proceed *in forma pauperis* is whether the record shows the appellant would be unable to pay "if he really wanted to and made a good-faith effort to do so." *Pinchback v. Hockless*, 139 Tex., 164 S.W.2d 19 (Tex. 1942). Typically, only the clerk or an ad litem have standing to contest the affidavit. At a hearing on such a contest, the filer of the affidavit has the burden of proof. *Pinchback*, at 20.

An Affidavit of Inability, if accompanied by the attorney’s certificate that the party is being represented either directly or by referral from a program funded by the IOLTA program and that the IOLTA-funded program screened the party for income eligibility under the IOLTA income guidelines, the affidavit of inability may not be contested. Tex. R. Civ. Proc. 145(c).

The affidavit at Appendix K is based on the Supreme Court’s promulgated affidavit, with a check box for “probate” added. (Probate continues to be the Rodney Daingerfield of jurisprudence.)

This form was promulgated because of abuses by some Texas counties in the attempted use of the affidavit. *Report of State Bar of Texas Poverty Law Section Affidavits and Statements of Inability to Pay Committee* <http://www.povertylawsection.com/wp-content/uploads/2015/01/Report-Affidavits-and-Statements-of-Inability-to-Pay-committee-with-Exhibits-Final.pdf>.

### **First Responder and Veterans Fee Exemption**

Filing fees and fees for any service rendered by the court regarding the administration of a guardianship are waived if the ward or proposed ward is incapacitated as a result of a personal injury sustained 1) while in active service as a member of the armed forces in a combat zone (as defined by federal law) or 2) certain law enforcement officers, firefighters, and other first responders (list of types of individuals described in Tex. Govt Code § 615.003) injured in the “line of duty” (per Tex. Govt Code § 615.021(e)).

## **V. MEDICAL RECORDS**

### **A. Federal and State Confidentiality Laws: A**

number of federal and state enactments limit access to records of individuals.

1. **HIPAA** (Health Insurance Portability and Accountability Act (P.L.104-191)) severely limits the ability of health care providers (“covered entities”) to grant public access to patient records (“protected health information”). HIPAA is applied under state law by the Texas Medical Privacy Act, Tex. Hlth. & Saf. Code Chap. 181.

A. **COURT ORDERED DISCLOSURE - AN EXCEPTION TO HIPAA**. The order appointing you as Attorney Ad Litem or Guardian Ad Litem should designate you as an ‘Officer of the Court’ and specifically authorize access to all of the relevant financial, medical, psychological and intellectual testing records of the proposed incapacitated person. The language should look like this:

*This Order is issued pursuant to 45 CFR 164.512(e)(1)(i) Health Insurance Portability and Accountability Act which authorizes covered entities to disclose protected health information in the course of any judicial or administrative proceeding when responding to an order of the Court, as well as the Privacy Act of 1974 pursuant to 5 U.S.C. 552a, and pursuant to 38 U.S.C. 5701 & 7332 regarding Veterans Administration Records.*

Because you, the ad litem, are specifically authorized access to such information, it is actually a violation of HIPAA to deny you that access. Both HIPAA and the Texas Occupations Code provide an exception for information sought pursuant to a court order. Tex. Occ. Code §159.003(12). and 45 CFR 164.512(e)(1)(i). In fact, even an Attorney Ad Litem appointed in a guardianship proceeding has the authority to submit a written consent for release of confidential information. Tex. Occ. Code §159.005. For more on the impact of HIPAA, go to [www.hhs.gov/ocr/hipaa](http://www.hhs.gov/ocr/hipaa) or [www.cdc.gov/mmwr](http://www.cdc.gov/mmwr).

B. **REMEDIAL ACTION**: If you are denied access to medical records, your course of action is simple: ask for the exact spelling of the name of the custodian of the medical records and the correct physical address of the location. That way, the constable can properly serve the records custodian with the *subpoena duces tecum* you then obtain to have the records brought down to the courtroom for your leisurely review and copying (while the records custodian remains in attendance).

2. **THE PRIVACY ACT OF 1974** (5 U.S.C. § 552a(b) prohibits any federal agency from disclosing any records of an individual unless the disclosure is made pursuant to a specific exception, such as the order of a



court of competent jurisdiction.

3. VETERANS ADMINISTRATION RECORDS 38 U.S.C. 5701 & 7332 similarly prohibit disclosure of the records of veterans without a valid court order or upon the request of the veteran or a guardian or other personal representative.

**Note - Underlying Medical Records:**

*In your review, verify there are actually medical records of the physician's examination underlying the Certificate of Medical Exam (CME). It is not unheard of for doctors with a busy nursing home practice to simply sign CMEs filled in by social workers or nurses.*

**B. The Physician's Certificate of Medical Examination (The "Doctor's Letter" or "CME")**

*Note: A standard form of CME (adopted by the Judges of all Texas Statutory Probate Courts (which includes a DID as well) is attached as Appendix D.*

Most of the time, the only medical evidence of incapacity during the process of opening a guardianship will be the statement of the doctor who examined the proposed ward. As a result, it is an extremely important document in the course of the application process.

**See Note re: Underlying medical records, supra.**

1. **BASICS: INCAPACITATED PROPOSED WARD**

A. **Sine Qua Non:** No guardianship of an incapacitated person may be granted without a certificate of medical examination which complies with Tex. Est. Code § 1101.103. This section specifically sets out the requirements of the report the court needs to have before it before it can legally grant a guardianship. *In re Guardianship of McKinzie*, 2020 Tex. App. LEXIS 10353 (Tex. App.—Beaumont, December 30, 2020, no pet.; *In re Guardianship & Estate of Hoffpauir*, 2018 Tex. App. LEXIS 1911 (Tex. App.—Beaumont 2018, pet den.)

B. **Physicians Only:** Only "physicians" may complete a certificate of medical examination. Tex. Est. Code § 1101.103 (a).

C. **Time Constraints:** Based on an examination conducted within 120 days before the application is filed and dated within that same 120-day time period. (Exception for mental retardation: 24 months)

D. **Detailed Contents:** Tex. Est. Code § 1101.103 is very specific as to the contents of the CME to better assess the functional deficits and abilities of the proposed ward. The CME must:

1. Describe the nature, degree, and severity of the proposed ward's incapacity, including deficits, with regard to several specific functional areas (financial and contractual decisions, medical consents) and specifically addressing the proposed ward's ability to safely operate a motor vehicle, vote in a public election, establish residence or decide on marital status;
2. Summarize the proposed ward's medical history (if available);
3. Evaluate and describe the proposed ward's physical and mental condition and functional ability, with and without supports and services available to the ward;
4. Comment on whether the proposed ward's demeanor or ability to participate in a court proceeding might be affected by any current medications;
5. State whether the proposed ward would benefit from supports and services that would allow the individual to live in the least restrictive setting;
6. State whether specific powers or duties of the guardian should be limited if the Proposed Ward receives supports and services and
7. State whether improvement in the Proposed Ward's physical condition and mental functioning is possible and, if so, state the period after which the proposed ward should be reevaluated to determine whether a guardianship continues to be necessary. Tex. Est. Code § 1101.103(b).

If the CME indicates that improvement in the ward's physical condition or mental functioning is possible and specifies that the Ward should be re-evaluated in less than a year, the order appointing the guardian must include the date by which the guardian must submit an updated CME. Tex. Est. Code § 1101.153

2. **MODIFICATION AND /OR RESTORATION: CME TO CONSIDER SUPPORTS AND SERVICES**

After a guardianship is granted, if the ward or a person interested in the Ward's welfare petitions the court for modification or restoration of the Ward under Ch. 1202, the court may not grant relief unless the applicant presents to the court an updated certificate of medical examination which, among other requirements, must describe the nature and degree of incapacity, including the medical history if reasonably available, or state that, in the physician's opinion, the ward has the capacity, or sufficient capacity with supports and services, to:

- A. provide food, clothing, and shelter for himself or herself;
- B. care for the ward's own physical health; and
- C. manage the ward's financial affairs. Tex. Est. Code § 1202.152.

### 3. BASICS: INTELLECTUALLY DISABLED POTENTIAL WARD

A. Determination of Intellectual Disability (“DID”): If the Proposed Ward is intellectually disabled (aka “**MR**”), a Physician’s Certificate alone *will not* be sufficient to appoint a guardian. Instead, the Application must also include documentation regarding intellectual disability. Tex. Est. Code § 1101.104.

B. Physician or Psychologist: Either a physician or a psychologist may complete a DID pursuant to Tex. Est. Code § 1101.104. The current approved form combines the CME with a DID. A traditional DID may also still be submitted. Tex. Est. Code § 1101.104. (Appendix D).

C. Time Constraints: Rather than a 120 day timeframe, the DID must be based on an examination performed within the twenty-four months preceding the hearing. Tex. Est. Code § 1101.104(A)(2). It is not unusual to encounter an intellectually disabled patient who has not been examined in some years, particularly if their physical health is stable.

D. “Booster Shot” Certificate: If no DID has been done within the last two years, the CME/DID form provides that the examining physician or psychologist to specify that they are updating or endorsing in writing a prior determination of an intellectual disability and reflecting that the information contained in the most recent DID is still accurate, true, complete and correct. This “booster shot” approach works well and saves time and money.

E. Dual Diagnosis?: In the event the Proposed Ward is “dually diagnosed,” that is, an intellectual disability diagnosis, but also a medical diagnosis (i. e. autism, static encephalopathy, etc.), then a DID is not required and the regular CME may be used.

### 4. INDEPENDENT MEDICAL EXAM

A. Court’s Own Motion/ Motion of any Party: If the court determines it is necessary, or if the ad litem or a contestant wants a “second opinion,” the court may order an independent medical exam (IME) and appoint the necessary physicians. Tex. Est. Code § 1101.103(C)

*Note: Tex. R. Civ. Proc. 204 (the general civil procedural vehicle to request a medical or psychological examination) does not apply to guardianship proceedings. The Texas Estates Code maintains its own framework for evaluating such issues. Karlen v. Karlen, 209 S.W.3d 841(Tex. App.—Houston [14<sup>th</sup> Dist.] December 5, 2006, no pet.)*

B. Notice/Waiver: The proposed ward and all other parties must be given at least four-day’s notice (which may be waived) before the hearing on the motion for a independent medical examination. *Ibid.* (Appendix Y).

C. Hearing: The court must make its determination

with respect to the necessity for a physician’s examination of the proposed ward at a hearing held for that purpose. *In re Kelm*, 2018 Tex. App. LEXIS 9481 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2018, no pet.)

D. Report: Any CME or other records resulting from the IME must be made available to the Attorney Ad Litem.

E. Practical Pointers:

1. Examine the Records: If the doctor’s letter has not yet been supplied, you might consider reviewing the proposed ward’s medical records at the doctor’s office. Usually, giving the medical provider a copy of your order of appointment is (or should be) sufficient. (If you are refused access to the medical records, see the note concerning HIPAA, *infra.*)

2. The Usual Suspects: Find out whom the court usually appoints. This doctor will likely be familiar with the procedure and the court may already have confidence in him/her.

3. Details, Details: Make sure your order is sufficiently specific as to how soon the Proposed Ward will be examined and how soon the results will be reported. Thought should be given as to whom the results should be made available, if appropriate. The issue of costs should also be addressed.

4. Hands Off: It is also a good idea that no counsel or parties have any contact with the independent examiner so that the doctor will have no expectations regarding the Proposed Ward.

### 5. EVIDENTIARY CONSIDERATIONS

A. Evidentiary Objections May Not Matter: In *Guardianship of Parker*, 275 S.W.3d 623 (Tex. App.—Amarillo 2008, no pet.) the Amarillo Court of Appeals held the CME is not subject to evidentiary objections because Tex. Est. Code § 1101.103 requires: 1. a CME to be in the court’s file, 2. that it be presented to the court, and 3. that it be considered by the court before ruling on an application for guardianship.

Additionally, Tex. R. Evid. 509(e)(4) now provides an exception to the Physician-Patient Privilege in administrative proceedings or in civil proceedings in court “as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party’s claim or defense.”

B. Your Stipulations Could Come Back to Haunt You: In *Robinson v. Willingham*, 2006 Tex. App. LEXIS 2788 (Tex. App.—Austin 2006, no pet.), counsel for the proposed ward objected that the doctor’s letter and accompanying reports as inadmissible because he did not waive physician-patient privilege in writing, citing Tex. R. Evid. 509, 510. However, the court found a

pre-trial stipulation that each parties' experts' records would be admitted without proof of their business-record nature amounted to a waiver of any objection.

C. Applicant's Offensive Medical Evidence: If you are the Guardian Ad Litem (or attorney for the Applicant) and bringing the application for guardianship, strongly consider submitting any nursing home records as business records. In *Guardianship of Parker*, 2007 Tex. App. LEXIS 9428 (Tex. App.—Fort Worth 2007, no pet.), the medical records of the proposed ward's nursing home were admitted into evidence as business records after the Guardian Ad Litem filed the appropriate notice under Tex. R. Civ. Proc. 902(10). The records contained numerous notes by the physicians, nurses, and caseworkers as to the proposed ward's condition and assessments over a period of time. The records also contained a nursing history and physical with detailed notes by the examining physician.

The appeals court rejected the hearsay objections by the Attorney Ad Litem because the business records affidavits accompanying the reports properly tracked the language of Tex. R. Evid. 803(6) and were therefore admissible under the "business records exception" to the hearsay rule. *Ibid*.

D. Non-Physicians as Expert Witnesses - Even though a psychologist or other non-physician cannot furnish a CME, it does not mean that the physician may not rely on testing or reports from these other professionals as a part of the basis for their professional opinion. Indeed, some conditions, such Fronto-Temporal Dementia cannot be diagnosed without neuro-psych evaluations.

It also does not mean that the court cannot hear testimony or reports from other non-physicians (including a nurse or social worker) as long as it passes the *Daubert* tests for helpfulness and reliability. Tex. R. Evid. 702, 703.

## 6. MAINTENANCE OF GUARDIANSHIP ORDERS BY CARE FACILITIES –

A. Convalescent Homes, Nursing Homes and Assisted Living Facilities are required to make a reasonable effort to request a copy of any court order appointing a guardian of a resident or a resident's estate from the resident's nearest relative or the person responsible for the resident's support. Tex. Health & Safety Code §§ 242.019, 247.070.

B. Record Maintenance - Such an institution is required to maintain a copy of the court order in the resident's medical records. *Ibid*.

C. Investigators from the Health and Human Services Commission are authorized, in conducting their investigations regarding reports of abuse, neglect, or exploitation, to inspect any such orders. Tex. Health and Safety Code § 260A.007(e)(6).

## 7. DEFENSIVE CONSIDERATIONS: THE ANSWER MAY DEPEND ON WHO YOU ASK:

A. Truly Expert? Is this doctor best qualified to determine incapacity? The doctor's letter is expert testimony and is measured by the requisites of *E.I. du Pont de Nemours v. Robinson*, 923 S.W.2d 549 (Tex. 1995) which adopted the U.S. Supreme Court's rationale in *Daubert v. Merrell-Dow Pharmaceuticals*, 113 S.Ct. 2786 (1993).

Just because the person providing the certificate is a "licensed physician" does not necessarily mean the doctor is qualified to opine on matters of psychology and neurology. Physicians are not necessarily experts in a field just because they are licensed to practice. *Broders et al v. Heise et al*, 924 S.W.2d 148 (Tex. 1996)

B. Different Disciplines/ Differing Per-Spectives: Different disciplines in the practice of medicine often approach their diagnostic role from different perspectives. It is important to understand these fundamental differences when considering the need for an Independent Medical Exam under Tex. Est. Code § 1101.103.

Psychologists may have a Ph.D. in Psychology, but that does not make them a "physician." for purposes of § 1101.103. A psychologist licensed in this state or certified by the Health and Human Services Commission may, however, perform a Determination of Intellectual Disability under Tex. Est. Code § 1101.104.

### C. Medical Doctors

1. Physicians (whether an M.D. or D.O.) (primary care clinicians or internists) can provide a summary of the proposed ward's major medical conditions. In some cases the physician may have provided care to the proposed ward over many years and can provide a historical perspective on the functioning of the proposed ward (although this cannot be assumed). Of note, a medical specialist such as a cardiologist or orthopedic surgeon may have developed a solid physician-patient relationship over time yet may not have the requisite background to address questions of mental capacity.

2. Geriatricians (MD specialist in aging).

3. Psychiatrists (MD specialist in mental health, especially on treatment with medication) will be able to speak in more depth about how specific psychiatric conditions (e.g., schizophrenia) and related emotional/mental systems may be affecting the respondent and his/her capacity.

4. Geriatric Psychiatrist (MD specialist in mental health and aging).

5. Neurologists (MD specialist in brain and



central nervous system function) can address how specific neurological conditions (e.g., dementia and other related cognitive problems) may be affecting the proposed ward and his/her capacity.

6. Forensic Psychiatrist – MD mental health specialist trained to present findings in the legal arena.  
D. Non-Physician Medical Professionals

1. Psychologists (may have a masters or doctoral level specialization in mental health, especially assessment with testing and on treatment with psychotherapy) tend to utilize standardized testing, useful when the judge wants detailed information about areas of cognitive or behavioral strengths or weaknesses.

2. Geropsychologists receive additional training in problems of aging;

3. Forensic Psychologists receive additional training in mental health and the law and are specially trained to present their findings in the legal arena.

4. Geriatric Assessment Teams, Geriatric Psychologists, are experienced in considering the multiple medical, social, and psychological factors that may impact an older adult's functioning.

5. Neuropsychologists (Psychologist specialist in brain-behavior relationships) can address relationships between neurological conditions, cognitive tests results, and a proposed ward's functional abilities.

6. Nurses have medical expertise and some, such as visiting nurses in Area Agencies on Aging, may have in-depth information on how a person's medical condition is impacting functioning in the home.

7. Social Workers are trained to consider the multiple determinants on an individual's social functioning, and are often knowledgeable about a wide range of social and community services that may assist the individual.

8. Geriatric Care Managers are health and human services professionals, such as a gerontologist, social worker, counselor, or nurse, with a specialized body of knowledge and experience on issues related to aging and elder care issues. See Appendix E, *infra*.

## VII. DEALING WITH THE COURT AND COURT PERSONNEL/ PREPARING FOR HEARING

**A. Your Best Allies:** Making friends with the court clerks and court staff is far more important than trying to get the judge to like you.

1. THE CLERK: The County Clerk in each county serves as the clerk of the court. However, remember, the clerk is a separately-elected public official and is not an employee of the court. Each court usually has a deputy clerk assigned to it for hearings. However, just because you tell something to the clerk, that doesn't

mean the court automatically knows about it (and vice versa). By the same token, when you file something with the clerk (which is the only place you can file it) if you want the court to know about it, you need to make the court aware of whatever it was you filed.

2. COURT STAFF: The staff of a statutory probate court will vary, but is always larger and more varied than other courts. Get to know the personnel and their functions, then you will know where to go to get your problem addressed. (HINT: look on the court's website for details.)

**B. Settings:** Determine when your court hears its guardianship docket and what its setting procedures are.

It may be on the same day as the uncontested estate "prove-ups" or the court may set a docket for just guardianship hearings. If the ward opposes the guardianship and wishes to attend the hearing, even for a 'pro forma' contest, it may be better to have the application specially set to allow a bit more time for everyone.

1. PLAN AHEAD: - Dockets fill up. If you have a dying proposed ward (why get a guardianship?) or an aging out MR minor, you need to think ahead and find some time in advance for your prove-up. The Court Coordinator is usually the place to start.

2. SETTING REQUESTS/CONFIRMATIONS: All settings are to be initiated by a request for a setting (by e-mail). ***Settings should always be confirmed and all parties notified.*** (see Appendix Aa). In *Guardianship of Guerrero*, 2016 Tex. App. LEXIS 6282 (Tex. App.—San Antonio, June 15, 2016, no pet.), the appellate court held that, although the Estates Code does not expressly provide who is entitled to receive notice of the date, time, and place of a hearing on an application for the appointment of a permanent guardian, a party who files an answer in a proceeding is entitled to notice of a dispositive hearing under the due process clause of the United States Constitution.

3. SEPARATE SETTING REQUEST – NOT IN A PLEADING: Settings requested in the prayer of a pleading or in transmittal letters will be ignored. Those documents go to the clerk's office, not the court. There is no mechanism for such a request to be brought to the court's attention.

4. TIME ESTIMATE/RECORD TO BE MADE? Let the Coordinator know how long the hearing will take and whether a court reporter will be required (because the probate courts also hear mental dockets, the reporter is not always immediately available at the courthouse).

5. CALL IF YOU'RE NOT COMING: If the hearing has to be cancelled or postponed, notify the court and all attorneys and ad litem of the cancellation or delay.

### C. Working the File

1. GENERALLY: Because the court reviews all documents prior to the hearing in uncontested matters, it is important that all paperwork be in the file prior to the hearing. This is to ensure that hearings go more smoothly for participants who are already dealing with the stress of someone's death. Attorneys benefit as well from smoother hearings and can avoid having errors pointed out to them in front of their clients.

2. SHOW YOUR WORK: When possible, we recommend that you file all of your documents at the time you file the application. That way, those documents will be in the file when it's pulled for review.

3. FILE IT FIRST: Documents that you have been notified need to be filed (e.g. waivers, designations of resident agent) need to be filed sufficiently ahead of the hearing to get "into the system" and you need to alert the court coordinator that they have been filed (or you may lose your setting).

Hint: Some courts have Standing Orders requiring all hearing documents to be e-filed a certain number of business days before the hearing to allow the staff and/or judge to review the documents.

4. FILE REPORTS EARLY: The Guardian Ad Litem report (or in an heirship, the Attorney Ad Litem report) should be e-filed no later than five days before the hearing. It would be a shame to have to re-schedule the hearing because of a missing report.

***Copy Everyone – When you file your report, make sure everyone gets a copy. That should include the Court Investigator, if you are in a county that has an investigator. That way, the Investigator does not have to keep checking with the clerk to see if you have filed your report.***

5. "AND HERE'S WHAT'S HAPPENING IN YOUR NECK OF THE WOODS:" If there are some documents that you have not gotten to the court in advance of the hearing, determine how your court wants to handle that issue. Some judges will want the remaining paperwork e-filed, others may want you to e-mail editable copies, while others may want hard copies simply brought to the hearing.

6. COURTESY COPY, PLEASE? If you need anticipate the court will 'carve up' your order, find out whom to e-mail an editable copy for the court's use (but not on the hearing day).

7. CORRESPONDENCE regarding interaction between counsel should be sent to other counsel and pro se parties (but not the court).

**D. Ad Litem Reports:** Prepare and file a report if one is expected. (see note above about copies)

1. ATTORNEY AD LITEM: Many judges feel requiring a report of the Attorney Ad Litem: a) violates the attorney-client privilege and b) exposes the Attorney Ad Litem to the potential of being called as a fact witness. However, your judge may well expect one. Find out either way.

2. GUARDIAN AD LITEM: Because the primary duty of the Guardian Ad Litem is to give an opinion, an initial written report should be filed within 30 days of appointment (and supplemented as necessary) so that the court can know what your position is. In any event, the Court must have your report at least 3 days prior to any hearing. If there are several guardianship hearings on the docket that week, it puts the court at a real disadvantage to have to wait until the last minute to react to new information. You might not like the result.

If possible, the Guardian Ad Litem should review the Court Investigator's report (Tex. Est. Code 1054.153) to make sure everyone is on the same page.

### E. Citation and Notice: A Jurisdictional Foundation and the Laundry List

1. FOUNDATIONAL BASIS - The legal basis for service in a probate proceeding is not the same as in a district court proceeding. The general procedural provision, Tex. R. Civ. Proc. 103 provides for service of citation and other notices in all civil cases...(2) *by a person authorized by law or the written order of the court.* However, Tex. R. Civ. Proc. 2 limits the application of the Rules of Civil Procedure to situations where there is no substantive law addressing the same area and which differs from the Rules. As a result, the substantive provisions of the Estates Code control over the Rules of Civil Procedure.

2. ESTATES CODE PROVISIONS ON NOTICE AND SERVICE - The requirements for notice, service and returns (in guardianship proceedings) are found in Tex. Est. Code §§ 51ff and 1051ff. In heirship proceedings, additional considerations are involved. (see *infra* under HEIRSHIP/Citation.)

A. Basic Provision Tex. Est. Code §§ 51.001 and 1051.001 - No notice or citation is necessary unless

1. the Code requires it or
2. The judge requires it.

B. Methods of Service Tex. Est. Code §§ 51.051ff, 1051.051ff.

1. Personal Service
  - a. with lawyer – on lawyer (by e-service)
  - b. without lawyer – on person by Sheriff or constable
  - c. if out of state – by any disinterested person
  - d. if not found – re-issue citation and publication
2. Posting
3. Citation by Publication now requires both the

usual publisher's affidavit to be attached as well as a statement with proof of posting on the Office of Court Administration's public information Internet website with a copy of the published citation or notice attached, stating the date of publication. - Tex. Est. Code § 1051.153(b)(4)

4. Mailing

5. Other - Tex. Est. Code §§ 51.151, 1051.201 – as directed by court order and as authorized by the Estates Code or Rules of Civil Procedure *if*:

a. no specific form of notice, service, or return is prescribed, or

b. the code provisions are insufficient or inadequate, or

c. any interested person asks (upon application and order).

C. How Served Personally

1. Basic Provision - Sheriff or Constable Tex. Est. Code §§ 51.051(b)(1), 1051.051(b)(1).

2. By a Disinterested Person (if person to be served is out of state) Tex. Est. Code §§ 51.051(b)(2), 1051.051(b)(2).

3. By an alternative manner as directed by specific order (only upon application and order) Tex. Est. Code §§ 51.151, 1051.201

- application must be supported by affidavit and order

- order should specify manner of service that will be reasonably effective to give notice.

*Ask First: If you want service by private process or an alternative method, you must do so on application and order. Take some time to adequately describe what you are trying to do, so the judge can understand.*

*See if there is a local rule prescribing a form of the application and order or if the court has a form it prefers.*

3. CITATION AND NOTICE IN GUARDIANSHIPS

A. Poster Citation: Citation must be posted. Tex. Est. Code § 1051.102

B. Personal Service: Citation must be personally served (Tex. Est. Code § 1051.103) on:

1. a proposed ward 12 or older;

**THE ATTORNEY AD LITEM CANNOT ACCEPT SERVICE FOR THE PROPOSED WARD AND THE PROPOSED WARD CANNOT WAIVE PERSONAL SERVICE.** (Pardon the shouting.) Even an agent under a valid power of attorney previously given by the ward cannot accept or waive service on behalf of the ward. *In re Martinez*, 2008 Tex. App. LEXIS 606 (Tex. App.—San Antonio 2008, no pet.) All other persons entitled to personal

service may file waivers. (Tex. Est. Code § 1051.105).

In *Guardianship of Gafford*, 2019 Tex. App. LEXIS 4002 (Tex. App.—Houston [1st Dist.] 2019, no pet.), the trial court was held to lack jurisdiction to enter a guardianship order where the incapacitated person was not served with citation prior to the entry of the order.

**Temporary Guardianships** - On the filing of an application for temporary guardianship, the clerk shall issue notice to be served on the proposed ward, the attorney ad litem and the guardian ad litem and the proposed temporary guardian named in the application, if that person is not the applicant. Tex. Est. Code § 1251.005. In addition, Citations in a temporary guardianship must include a statement notifying a person interested in the estate or welfare of a ward that they may file a request to be notified of filings. *Ibid*.

Failure to personally serve the proposed ward voids any order later signed. *Farr v. Barnes*, 2020 Tex. App. LEXIS 8112 (Tex. App.—San Antonio 2020, no pet.); *In re Mask*, 198 S.W.3d 231 (Tex. App.—San Antonio, 2006, no pet.)

2. the parents, if their whereabouts are known;

3. any court-appointed conservator or person with control of the care and welfare of the proposed ward;

4. the spouse of the proposed ward, if her/his whereabouts is known;

5. the proposed guardian, if not the same as the Applicant. In *Guardianship of Gafford*, 2019 Tex. App. LEXIS 4002 (Tex. App.—Houston [1st Dist.] 2019, no pet.), the trial court was found to lack jurisdiction to order a guardianship, where the proposed guardian and the incapacitated person were not served with citation.

C. The Laundry List: The Applicant **shall** serve the following by Certified Mail or Registered Mail (or UPS or Fed-Ex, if you now so choose – Tex. Est. Code § 1051.104):

1. adult children of the proposed ward;

2. adult siblings of the proposed ward ;

3. the administrator of a nursing home where the proposed ward is located; or

4. the operator of a residential facility in which the proposed ward resides;

5. any known holder of a power of attorney from the proposed ward;

6. any person known to be designated to serve under a designation of guardian under Tex. Est. Code § 1104.202;

7. a person designated to serve as guardian in the probated will of the proposed ward's last surviving parent;

8. any person known to be designated by a deceased parent to serve under a designation of guardian; under Tex. Est. Code § 1104.151ff and
9. Each adult named in the application as an "other living relative" of the proposed ward within the third degree by consanguinity, (if there is no spouse, parent, adult sibling or adult child) as required by Tex. Est. Code § 1101.001(b)(11) or (13).

***In case you just had to know:*** "...[R]elatives within the third degree by consanguinity include the proposed ward's: 1) grandparent or grandchild; and 2) great-grandparent, great-grandchild, aunt who is a sister of a parent of the proposed ward, uncle who is a brother of a parent of the proposed ward, nephew who is a child of a brother or sister of the proposed ward, or niece who is a child of a brother or sister of the proposed ward." Tex. Est. Code § 1101.001

The validity of a guardianship is not affected by the failure of the Applicant to serve any of the laundry list *except the adult children of the proposed ward* (but try to do it anyway). *Guardianship of V.A.*, 390 S.W.3d 414 (Tex. App.—San Antonio 2012, no pet. h.). However, in *Gauci v. Gauci*, 471 S.W.3d 899 (Tex. App—Houston [1<sup>st</sup> Dist.] August 4, 2015, no pet.) the court found the guardianship void where no personal service was had on the Proposed Ward or the Proposed Ward's Father.

**Note: If the Health & Human Services Commission (formerly DADS) is the intended successor guardian, they must be served with personal citation by a sheriff/ constable. Tex. Est. Code § 1203.108(5).**

In *Guardianship of Wooley*, 2016 Tex. App. LEXIS 5921 (Tex. App.—Fort Worth, June 2, 2016, app. dism'd) where the Department of Aging and Disability Services (DADS) (now the Health and Human Services Commission or HHSC) was appointed temporary guardian of the Ward and the court investigator suggested DADS or another person be appointed as permanent guardian, DADS filed a plea to the jurisdiction arguing it could not be appointed as permanent guardian if it neither applied to be appointed guardian nor consented to the appointment. Both the probate court and the court of appeals denied DADS' plea to the jurisdiction, rejecting DADS' argument that it had sovereign immunity.

The appeals court noted that guardianship proceedings are proceedings in rem, and neither DADS nor its employees were defendants and even if Tex. Hum. Res. Code § 161.101 provided that DADS may not be appointed as permanent guardian without its

consent except appointed as successor guardian, any immunity provided would be immunity from *liability*, not immunity from suit. The probate court had jurisdiction to bring DADS into the guardianship proceeding, and § 161.101 does not operate to defeat the court's jurisdiction.

*However, we still do not have a guardian of last resort. The appeal in Wooley was eventually dismissed. No one else has poked the tiger since.*

**D. What to Send:**

1. If personal service is otherwise required, and waivers can be given, (not the proposed ward), obtain a Waiver of Citation. (Appendix I).

***Moving the Ward: §1151.051(e) requires a guardian, before moving a ward to a more restrictive care facility, to provide notice of the proposed placement to the court, the ward, and any person who has requested notice. The most common sense way to determine if a person will request notice is to provide them with that option in the waiver form, so that their choice will be documented.***

2. If the person is on the "Laundry List" Tex. Est. Code § 1051.104, a copy of the front side of the Poster Citation may be sent.

**E. Election to Receive Info re Ward**

1. When the initial citations to be issued and served and the "laundry list" notices to be sent to the proposed ward's relatives by the Applicant/Guardian (possibly the Guardian Ad Litem), the relatives are requested to make an election to receive or not receive future notices from the Guardian in the event of certain changes in the Ward's health or residence. Tex. Est. Code §§ 1051.103, 1051.104. The relatives are as defined in Tex. Est. Code §§ 1101.001(b)(13)(A)-(D).
2. Changes in the Ward's health or residence include:
  - A. if the Ward is moved to a more restrictive care facility (except in case of emergency) Tex. Est. Code § 1151.051(3e);
  - B. if the ward is admitted to a medical facility for acute care for three days or more;
  - C. if the ward's residence has changed;
  - D. if the ward is staying at a location other than the ward's residence for more than one calendar week; or
  - E. if the ward dies; the fact of death, any funeral arrangements and the location of the ward's final resting place. Tex. Est. Code §§ 1151.056 (b)-(c).

3. If a relative entitled to notice elects to not receive notices by a written request to the guardian, the guardian is to file any such request with the court. Tex. Est. Code § 1151.056 (d).

4. A guardian, by filing a motion with the court and providing notice to the affected relative with an opportunity to present evidence, may be relieved of the duty to provide notice about a ward to that relative. Tex. Est. Code § 1151.056 (e).

This does not apply to relatives who:

- A. have elected in writing not to be notified,
- B. have had a protective order issued against them to protect the ward; and
- C. have been found by a court or other state agency to have abused, neglected, or exploited the ward. Tex. Est. Code § 1151.056(a).

**Notice Language:**

*You are hereby notified that, if a guardianship is created for the proposed ward, you must elect in writing in order to receive notice about the ward (under Section 1151.056) in the following situations:*

1. *if the ward's residence has changed;*
2. *if the ward is admitted to a medical facility for acute care for three days or more;*
3. *if the ward is staying at a location other than the ward's residence for more than one calendar week; or*
4. *if the ward dies; the fact of the ward's death, any funeral arrangements and the location of the ward's final resting place.*

F. **Lead Time Requirement:** Be sure, as Guardian Ad Litem, as you are in the process of obtaining the waivers and serving the “laundry list,” that you:

1. Get your waivers/notices and affidavit of service under Tex. Est. Code § 1051.104(b) affidavit processed with enough lead time to comply with the **10-day 'lead-time' requirement** under Tex. Est. Code § 1051.106. (See Appendix J). But see *Guardianship of V.A., supra*.
2. Keep copies of all of your paperwork.
3. Make certain there is a certificate of service on the ad litem report.

G. **Recent Cases** - some appeals courts view the otherwise strict requirements of citation with a dose of reality:

1. *Guardianship of Jordan*, 348 S.W.3d 401 (Tex. App.—Beaumont July 28, 2011, no pet. h.) Lack of personal service on proposed ward did not deprive the court of subject matter jurisdiction where no clear legislative intent to make loss of jurisdiction mandatory and where parties had made appearances in court.
2. *Guardianship of Bays*, 355 S. W. 3d 715 (Tex. App.—Fort Worth 2011, no pet. h.) upheld substituted

service on a proposed ward, pointing out that it was authorized, but only on motion, affidavit and order.

**Note:** The *Bays* decision would seem to indicate a ‘standing order’ for service by private process would not work.

3. *Guardianship of V.A., supra*.

- failure to serve Father not error where parental rights had been terminated.
- failure to notify the Ward’s managing conservator, given notice, but not personally served per TPC § 633(c)(3) (now § 1051.103) (here a *jus tertii* argument).
- savings provision (Tex. Prob. Code § 633(f), now § Tex. Est. Code 1051.104(c)): "The validity of a guardianship created under this chapter is not affected by the failure to comply with the requirements of Subsections (d)(2)-(9) of this section" excused failure to serve adult siblings (Tex. Prob. Code § 633(d)(2), now Tex. Est. Code 1051.104(a)(2)) and Hospital Administrator (Tex. Prob. Code § 633(d)(2), now Tex. Est. Code § 1051.104(a)(3), therefore not error.
- failure of Court to observe “ten day waiting period” imposed by Tex. Prob. Code § 633(f) (now Tex. Est. Code §1051.106), held not to be jurisdictional.

4. *Interest of X.L.S.*, 2012 Tex. App. LEXIS 8756 (Tex. App.—Corpus Christi October 18, 2012, no pet.) Failure to strictly comply with statutory ten-day waiting period following filing of application for guardianship, but granting a permanent guardianship when the active pleadings sought only temporary guardianship deprived parent of notice that applicant sought permanent guardianship.

**F. Getting Ahead of the Curve: Mandatory Registration, Criminal History Background Checks and Training**

A number of enactments passed in the 2017 legislature imposed new mandates on all applicants for appointment as guardian (registration and training) as well as centralizing a previous mandate (criminal history background checks).

The legislature tasked the Texas Supreme Court to establish rules regarding:

1. **REGISTRATION** – The Supreme Court, through the Judicial Branch Certification Commission (JBCC) established a statewide database for registration of all guardianships and a requirement of registration for all guardianships and guardianship programs in the state, Tex. Govt Code §§ 155.151(a), 155.152; Tex. Est. Code § 1104.359.

The database information is confidential and

exclusively for the use of law enforcement personnel. Tex. Govt Code § 155.153. This is necessary to implement the requirement that law enforcement officials notify the court with jurisdiction over a guardianship within one working day of the detention or arrest of a ward. Tex. Code Crim. Proc. §§ 14.055 & 15.171; Tex. Fam. Code § 52.011; Tex. Gov't. Code §§ 155.155, 573.0021.

Unregistered guardianship programs may not provide services to incapacitated persons unless registered with the Judicial Branch Certification Commission (JBCC). Tex. Govt Code § 155.153. This does not apply to services provided by a guardianship program under a contract with the Health and Human Services Commission. Tex. Govt Code § 155.151.

Courts with jurisdiction over a guardianship are required to immediately notify the JBCC of the removal of a guardian. Tex. Govt Code § 155.151(b).

Registration may be done online: <http://www.txcourts.gov/jbcc/register-a-guardianship/> or by mail: JBCC, Attn: Guardianship Registration, P. O. Box 12066, Austin, TX 78711-2066. For questions, use [jbccguardianregistration@txcourts.gov](mailto:jbccguardianregistration@txcourts.gov).

**2. CRIMINAL HISTORY BACKGROUND CHECKS** – Except for attorneys, everyone – **including** family members – who are proposed to serve as guardian, will have to submit to a criminal history background check. Tex. Est. Code §§ 1104.402(a), Tex. Est. Code § 1104.402(a)(5) (attorney exemption), 1104.004 & 1253.0515; Tex. Gov't. Code Ch. 155, Sec. 411.1386. Private Professional Guardians have their checks done as a part of their certification. Tex. Govt. Code § 155.102. Employees, volunteers and service providers of the Texas Health and Human Services Commission will now be subject to criminal history background checks, as well as individuals, including relatives of the Ward, who seek to have unsupervised visits with a Ward for whom HHSC (formerly DADS) is guardian. Tex. Govt. Code §§ 411.1386(a-1), (a-3) & 411.13861.

If the value of the liquid assets of the proposed ward's estate is \$50,000 or less and the proposed guardian is a Texas resident, after the Proposed Guardian begins the registration process, the JBCC will initiate and conduct a name and date of birth criminal history search based on the information provided in the guardianship registration information including the current name and all former names of the proposed guardian. JBCC will send the results to the probate clerk.

If the value of the liquid assets of the proposed ward's estate exceeds \$50,000 or the proposed guardian is not a Texas resident, a digital fingerprint background check must be completed. Once the Proposed Guardian

completes the registration process, the JBCC will send an email to the proposed guardian with a service code and instructions for the proposed guardian to obtain digital fingerprints through Texas Department of Public Safety (DPS). After receiving the email and instructions, the proposed guardian will schedule an appointment to have the digital fingerprints taken with DPS. JBCC will send the results of the DPS digital fingerprint search to the probate clerk. Tex. Govt. Code § 155.205.

**3. TRAINING** – in addition to the registration and criminal background check, all guardians must be undergo training before being appointed. Tex. Est. Code § 1104.003, Tex. Govt. Code § 155.203. Certification of the training will be a part of the new registration process. Tex. Est. Code § 1253.0515. The training is available online, and at no cost, on the JBCC website: <https://guardianship-txcourts.talentlms.com/catalog/info/id:144>

The training requirement does not apply to the initial appointment of a temporary guardian, but does apply to any extension of the temporary guardianship. Tex. Govt. Code § 155.204(b).

The training requirement does not apply to attorneys, corporate fiduciaries or private professional guardians. Tex. Govt. Code § 155.202. The training requirement may only be waived if pursuant to Supreme Court rule. Tex. Est. Code § 1104.003. If a judge chooses to waive the requirement of guardianship training in the order of appointment, the order must contain a finding in accordance with the Texas Supreme Court rules adopted pursuant to Govt Code §155.203. Tex. Est. Code § 1101.153(a)(2).

**Registration and requests for background checks, as well as training, should be completed by the proposed guardian at least two to three weeks prior to any hearing to give the JBCC some lead time to be able to confirm the completion of training and furnish a copy of the person's criminal history background check to the probate court.** This must be accomplished at least ten days before the hearing. Tex. Govt. Code § 155.203(b).

#### **G. “Paperwork” to Have on Hand:**

*(Even with paperless courtrooms, we still need to talk about how to handle the “paperwork.”)*

##### **1. PRELIMINARY CONSIDERATIONS**

**A. Early Paperwork:** Try to get your hearing materials to opposing counsel, the court investigator and the court at least a week (five business days) before the hearing.



B. Blanks? Fill in all the blanks you can, especially the date (or at least provide a date line long enough). If the court has already had to carve up your order with corrections and interlineations, it takes all that much longer to fill in the case number, the court designation, the date of the hearing, the date the application was filed and the date signed. (see comments above re: furnishing electronic copies)

C. Proofread!! Did you remember to change the names and dates from the last time you used that computer form?

D. Social Security Numbers: Due to amendment to the Civil Practice & Remedies Code, statutory probate courts are no longer exempt from the requirement that the applicant furnish the last three numbers of the party's driver's license number (if they have one) and the last three numbers of their social security number (if they have one). Civ. Prac. & Rem. Code § 30.014(a).

Also, please provide the court clerk with the Social Security Numbers for the Ward and Applicant (on a separate sheet for the court's records). Tex. Est. Code § 1201.004.

2. PROOF OF FACTS: If you will be putting on testimony during the hearing, bring a completed Proof of Facts, Appropriate Oath or Unsworn Declaration (to be executed after the testimony is given in open court), appropriate Bond and proposed Order. (Review Tex. Est. Code § 1101.101). Make sure you track the findings required by the appropriate Code Sections. (Appendices W through Ad).

### 3. SURETY BOND

A. Why Have a Bond? The ad litem who asks the judge to set a low bond is not acting in his or her client's best interests. If, for any reason, you should be re-activated because of improper actions of the guardian, the best thing you could have ever done for the ward would have been to make sure the judge required enough bond. Very often, it is the only available financial resource left to a successor guardian.

B. Safekeeping Agreements Prior to Qualification – (Appendix Aj) To save on the amount that has to be bonded (and at risk), Tex. Est. Code § 1101.156 now allows a court, before appointing a guardian to require cash, securities, or other assets of a proposed ward or ward to be deposited pursuant to a safekeeping agreement as described in Tex. Est. Code § 1105.155(b).

After the Applicant has provided an exhibit (Appendix Ac) to assist the judge in determining the amount of the Safekeeping Agreement and the bond, the court can approve the use of the Safekeeping Agreement, (Appendix Aj) and the guardian may deposit the estate cash or other assets in a state or national bank, trust company, savings and loan

association, or other domestic corporate depository, to be held under an agreement that the depository will not allow withdrawal or transfer of the principal of the assets and/or interest on the deposit except on written court order.

**Caveat: Tex. Fin. Code § 201.101** defines the types of financial institutions with whom safekeeping agreements may be executed. Unless chartered as a bank, brokerage houses usually do not qualify as institutions who can enter into valid safekeeping agreements.

C. Types of Sureties Tex. Est. Code §§ 1105.160, 1105.201ff Personal sureties and corporate sureties are both authorized by the Code. With personal sureties (two or more required) each must satisfy the court they own non-exempt property of at least twice the amount of the bond and execute an affidavit to that effect (Tex. Est. Code § 1105.201(a)) or deposit cash or other securities with a qualified corporate depository. Tex. Est. Code § 1105.157. However, cash deposits in lieu of bonds pose an administrative nightmare for the clerk.

It is much more common that the surety is an *authorized corporate surety*: "a domestic or foreign corporation authorized to do business in Texas for the purpose of issuing surety, guaranty or indemnity bonds guaranteeing the fidelity of executors, administrators and guardians" Tex. Est. Code § 1002.003.

D. Advantages of Corporate Sureties over Personal Sureties:

1. Only one corporate surety is generally required rather than two individual sureties (court may require two corporate sureties if the bond is greater than \$50,000 Tex. Est. Code § 1105.161(a)).
2. The bond premium is payable by the Estate. Tex. Est. Code § 1105.161(B).
3. Corporate sureties generally are better able to respond financially, giving the guardian (and court) more comfort.
4. Corporate sureties often come in and aggressively defend the guardian, certainly making the guardian more comfortable.
5. A corporate surety bond is less prone to misinterpretation than the affidavit of a personal surety as to non-exempt assets. ("I agreed to *what?*")
6. The guardian will not have to beg friends and relations to personally guarantee his actions.
7. CAVEAT: Make sure the Power of Attorney on the Bond form is not limited to an amount lower than the Bond amount.

E. Filing Tex. Est. Code § 1105.002, 1105.003, 1105.110. Bonds must approved and filed within twenty (20) days after the order granting letters.

F. Qualifying for a Bond: Be aware that bond underwriting is currently based almost entirely on the credit history of the Principal. If your applicant has any credit problems, you need to be talking to a bonding agent ahead of time. The trend is toward the courts requiring *pre-qualification* for bonds.

1. At the hearing, the testimony should include information about the approximate extent of the ward's estate so the judge can accurately determine an initial amount of the corporate surety bond for the newly-appointed guardian.
2. Arriving at a bond amount is not a big mystery. Ask the court what its guidelines are.
3. Some bonding agents will even come to the hearing with you and have the bond ready to be approved.
4. The court has a minimum bond amount for guardians of the estate, ranging from \$5,000 to \$20,000. Guardians of the person may be required to post either a personal surety bond or corporate surety bond, depending on the court's policies. The guardian's oath or unsworn declaration should not be executed before the bond has been filed with the clerk.

G. Bonding Problems? Plan Ahead! Surety bonds are underwritten on the basis of credit history. Find out ahead of time if the proposed guardian will have a problem. It is not unusual for an experienced attorney or a paid professional guardian to have to step in to serve as guardian of the estate when no family can qualify. However, from the standpoint of the ward, this may be good news. If the initial applicant has credit problems, he/she might not make a good financial manager for the ward.

4. OATH A bench oath is included at Appendix Ah. The statutorily-suggested form of unsworn declaration is included at Appendix Ai.

**H. The Proposed Order: Powers of the Guardian/ Limitations of the Ward** – Consideration should be given whether the order should simply grant plenary authority: “*the guardian is hereby granted all powers authorized by the Texas Estates Code and the rights of the Ward are hereby restricted to the extent not inconsistent therewith*” or whether the order should attempt to specify the powers granted. Compare the order granting a temporary guardianship (where each power must be spelled out (Appendix N) and the order granting a permanent guardianship (Appendix Af)

The listing of powers is problematic. A short form order, granting plenary authority, may provoke an objection from some provider or bank who is looking for a specific power written into the order (if not a line specifying their bank and no other!). A balancing of interests is required. Consideration should be given to

the anecdotal evidence as well as the CME and the results of your investigation and capacity assessment.

Driving (!?), Voting and Decisions Concerning Personal Residence: The application, the CME, and the order appointing the guardian all must specifically address the ability of the ward to operate a motor vehicle and to vote in a public election. Tex. Est. Code §§ 1101.001, 1101.103 and 1101.151ff.

In addition, any order appointing a guardian, whether with full authority or less than full authority, or upon modification of a guardianship, must specifically address the ability of a Ward to make decisions regarding residence. Tex. Est. Code §§ 1101.151(a) & (b), 1101.152(a) & (b) and 1202.156.

Preference of Proposed Ward - The court is required to make a reasonable effort to consider the Proposed Ward's preference of the person to be appointed guardian, regardless of whether the person has designated in a 'pre-need' designation. Tex. Est. Code § 1104.002

“Katie’s Law” and Elder Texas Drivers - Effective September, 1, 2007, Texas drivers aged 79 or older can no longer renew a driver's license by mail or electronic means, but must renew the license in person at an authorized license renewal station. In addition, drivers aged 85 and older will now have to renew every two years, rather than every six years. Tex. Transp. Code §521.2711.

The “Re-Test Request” - A potential ward who refuses to stop driving may be reported to the DPS by a physician, a family member, or even a stranger, if the person's driving capability is impaired. Although physicians are somewhat reticent to report their patients because of the physician-patient privilege and HIPAA, it is possible for the applicant in a guardianship or the ad litem to request the court to make a referral to the Department of Public Safety for the proposed ward to be re-tested under DPS regulations to determine the proposed ward's suitability to continue to drive. See the Probate investigator for an example of a request letter.

*See “Note on Required Disclosures,” infra*

### **Digital Assets**

Each of us has, in the past 10 to 20 years, accumulated various “digital assets.” These include things such as the files on our computers or other electronic devices. It also includes electronic data subject to the control of others, such as e-mail accounts;



social networking accounts; online or cloud storage of computer files, photographs and videos; rewards accounts from hotels or airlines; music accounts (i.e. iTunes), web pages, online purchasing accounts and credits (i.e. Paypal) and virtual currency (i.e. Bitcoins).

Under the Texas Uniform Fiduciary Access to Digital Assets Act (Tex. Est. Code Chap. 2001), a guardian of the estate now has the authority, upon application and order, to access the ward's digital assets. Tex. Est. Code § 1151.101(5). This would include such items as files on our computers or other electronic devices, as well as the password information to access such files. See Appendices K & Ab (Order Appointing Temporary Guardian) (Order Appointing Guardian) for suggested language.

**I. Appointment of Resident Agent:** If your Applicant is not a Texas resident and has not appointed a resident agent for service, they are disqualified by law until such an agent is designated. (Either e-file the completed form or bring a blank form with you to the hearing for the Appointee to execute). Resident agents may resign and a new agent may be appointed Tex. Est. Code § 1057.001. Also, a non-resident guardian may be removed without notice for failure to appoint a new resident agent. Tex. Est. Code § 1203.051(5).

**Important:** Determine if your judge will also require you to file an acknowledgment by the resident agent appointed.

**J. Copies** - If it is your order - it is your responsibility to distribute the copies.

Find out the court's preference on conforming copies. More and more, as courts become paperless, all the copies will be available down the hall in the clerk's office. Some judges will conform a limited number of copies themselves, unless there have been numerous strikeouts and amendments.

## VIII. HEARING DAY: SOME GENERAL AND PRACTICAL OBSERVATIONS

### A. General Comments and Decorum:

1. COME WATCH: If you have never done so, go watch the uncontested hearing docket to get an idea of the flow.

2. PULL THE RABBIT OUT OF THE HAT: The Court would usually rather be relieved than surprised. If you have an unusual fact situation (or the situation is not what it appears), find some way to plead it. Please don't make the court guess at what is going on and have to delay your hearing until we find out.

3. PROBLEMS? It is not always better to get forgiveness than permission – ask first.

4. SPEAK TO THE MAN: Check in with the bailiff - not with the court coordinator.

5. CALL if you're not coming.

6. WHERE'S JUDGE WALDO?: The hearing may now be held in a location convenient and accessible to the individual. TEX. EST. CODE § 1055.053.

7. NOT THE BUS STATION: While this is a public building, it is a court of law, not the bus station.

8. ZERO TOLERANCE: Most courts have written notices posted with regard to the rules of decorum for the court. As a result, you and your clients/witnesses may or may not be given a warning of infractions before the court either asks you to leave or holds someone in contempt.

9. NO! No tobacco/ No gum/ No shorts/ No hats/ No cell phones/ No pagers/ No client conferences in the courtroom.

10. PROPER ATTIRE: If the court has a dress code, observe it. Advise your clients accordingly or re-schedule your hearing.

11. CAN YOU HEAR ME NOW? A telephone going off in the courtroom is usually followed by impoundment of the telephone or an immediate finding of contempt.

12. SSSSH! Talking in the courtroom is not only disrespectful, it is disruptive to the judge trying to hear a witness who is too scared to speak up. If you need to talk to a witness, do so outside. Let the bailiff know you need to speak to a witness and to let you know when the court is ready.

13. TAKE IT OUTSIDE: Talking in the foyer outside the courtroom is no improvement. If you think you have gotten out of earshot, think again. Take it out into the hallway.

14. NOT IN THERE EITHER: Don't use the court's offices as a conference room or for your telephone calls. The court staff have to get their work done, too.

15. WHERE DID YOU GET THAT TIE? If you have a minor emergency or wardrobe malfunction (or non-function) remember: Court staff can usually rustle up emergency supplies (pens, paper, an Estates Code, reading glasses, and a coat and tie, but the tie may be pretty ugly).

**B. The Hearing at the Bench** (“Even a fool is thought wise if he keeps silent.”) Proverbs 17:28 (NIV): Although you are standing at the bench rather than standing to address the court from the counsel table – this is still a formal proceeding and your conduct should reflect such.

**NEW! No Exclusion of Guardian from Hearing** - Tex. Est. Code § 1151.005. Neither the guardian of the person nor the guardian of

the estate of a ward may be excluded from attending a legal proceeding in which the ward is a party or a witness.

1. **ACCESSIBILITY ISSUES:** Advise the court (when you set the hearing) if the applicant or any of the witnesses

- will require a translator (language or signing)
- has any particular disability issues for which the court will need to make accommodation.

2. **PREPARED TESTIMONY:** Unless a record is being made by a court reporter, ***always*** have your testimony reduced to writing (Appendices J, X), in **all** cases, for **all** witnesses, **every time**.

**Hint: See if your court has preferred forms on its website.**

3. **SPEAK UP:** it's your show.

4. **LEAD THE WITNESS** and avoid droning repetition.

5. **BE CONSIDERATE!** If you think you are nervous, imagine how the applicant/ witness/ward feels! Don't make your client grasp for dates, names, etc. Phrase questions to be easy to answer.

6. **PREPARE YOUR WITNESSES:** Discuss the testimony and legal issues outside the presence of the Court and then ask summary questions (e.g.: disqualification, incapacity).

7. **CANDOR TOWARD THE TRIBUNAL:** Even if you do not actively contest the application, make sure the court has a full picture of the situation. Rather than merely saying "No questions," ask questions to highlight any points not covered by the Applicant or Guardian Ad Litem. But use some judgment. Sometime "No questions" is the proper tactic. (See Appendix Ae for suggested cross-examination questions)

8. **BOND TESTIMONY:** Elicit sufficient testimony on the nature and extent of the Estate to enable the court to set the bond: Tex. Est. Code §1105.153.

### C. Burden(s) of Proof: Findings Required.

Be aware that the court is required to make several findings before appointing a guardian. Some of these are specified to be found by clear and convincing evidence, while others may be proven by a preponderance of the evidence. Tex. Est. Code § 1101.101. *see Guardianship of A.E., supra*

1. **CLEAR AND CONVINCING STANDARD:**

- A. a determination of incapacity;
- B. appointment of a guardian would be in the best interest of the proposed ward; and
- 3. appointment of a guardian would protect the proposed ward's rights or property.

2. **PREPONDERANCE STANDARD:**

1. proper venue;
2. person to be appointed guardian is eligible to act as guardian and entitled to appointment, or, if no eligible person entitled to appointment applies, person appointed is a proper person to act;
3. (minors only) guardianship not created for primary purpose of enabling minor to establish residency for school enrollment for which minor is not otherwise eligible; and
4. description of nature and extent of incapacity.

### D. Bench Instructions

1. **GUIDANCE:** Attached as Appendix Am are examples of bench instructions given to the newly-appointed guardian. More than once, counsel for the guardian has asked for an extra copy for his or her own reference. If the appointee is required to sign and return a copy of the instructions to the court, it tends to eliminate the excuse of "But I never knew I was supposed to do that!" In at least one instance, an appellate court noted that the appellant had not only had her responsibilities pointed out to her, but that the judge had given her the instructions IN WRITING, which she had signed to acknowledge receipt. *Theford v. White*, 37 S.W.3d 494 (Tex. App.—Tyler 2000, no pet.)

**BYOH:** (Bring Your Own Handout) If your judge doesn't provide such handouts, make a suggestion or bring your own (for defensive purposes).

### E. Contested Hearings (with a Court Reporter)

1. **KEEP US IN THE LOOP** - Let us know if you settle and no longer need **our** time. Like firemen - we have to be ready to go when you need us. If we don't need to be helping you, there's usually someone else who could use that hearing slot.

2. **NEED A RECORD?** If you are on the record, you are dictating a document for the appellate courts. If you want a record just so you do not have to take notes, let the court reporter know up front and be ready to put down a deposit up front for the transcript.

3. **WHAT WAS THAT?** If the reporter cannot hear what is said, she cannot write it down - **Stay on the microphones.**

4. **YOUR NERVOUS HABITS:** Although they will seldom comment on it (other than to the judge), irritations to the court reporter include:

- nervous habits such as clicking a ball-point pen, jingling change in your pocket, tapping a pen on your paperwork

- talking over someone else. The reporter can write only what one person is saying. If it is the judge, I have it on good authority they will report what the judge is

saying.

- marking exhibits: wait until the reporter gets through marking the exhibit before talking again. (Her hands are busy.)

**F. Trainwrecks:** If something unexpected happens and the order is not going to be signed right then, or the hearing otherwise turns into a trainwreck, try to think fast and see if some of the work can be salvaged.

1. NO PAPERWORK? If you failed to have your testimony reduced to writing, the court may pass your hearing to allow time for your witness and the clerk to complete a form, then take you after the next hearing.
2. “SIGNED IN OPEN COURT” If your witness cannot sign the testimony at that time, they will have to return to sign the testimony before the courtroom clerk who took the hearing.
3. SUBJECT TO: The court will sometimes hear early testimony and rule on the application “subject to” whatever curative matters you still need to get done.
4. ONE PIECE AT A TIME: Maybe the court can grant guardianship of the person and defer ruling on the guardianship of the estate until the facts are better developed.

**G. Clerk’s Follow-Up Duties:** As a result of the court’s findings in the order of appointment, the county clerk has a number of responsibilities

1. BRADY BILL IMPLICATIONS: The probate clerk will now be required to prepare and forward information to DPS within 30 days of a determination by a court that a person is incapacitated or that a person is determined to be mentally ill and involuntarily committed to a mental hospital. DPS will transmit this information to the FBI-run National Instant Criminal Background Check System (commonly known as NICS), a clearinghouse used to prohibit disqualified persons from purchasing firearms. Persons who have been restored to capacity or have been found by a mental health court to no longer be dangerous, could have their right to purchase firearms restored. Tex. Govt. Code §§411.052 and 411.0521.
2. VOTER REGISTRATION: If the order specifies that the ward does not retain the right to vote in a public election, the clerk is required to file an abstract of the guardianship order with the voter registrar. Tex. Elect. Code § 16.002.
3. DRIVER’S LICENSE: Similarly, if the order specifies that the ward does not retain the right to maintain eligibility to hold or obtain a license to operate a motor vehicle, the clerk is required to file DPS Form D-17 with the Texas Department of Public Safety within 10 days of the judgment. Tex. Transp. Code §521.319.

**Practice Tip:** *The guardian should also notify the appropriate authority regarding the ward’s disqualification for jury service (Tex. Govt. Code §62.102(5)). This may vary from the county tax assessor, jury bailiff, district clerk or district judge. Otherwise, the ward might receive a jury summons which, if not responded to, could result in the ordering of a fine or issuance of a bench warrant against the ward.*

## **H. Say the Words, Take the Money, Go Home**

1. DISCHARGED: Unless the court specifies otherwise, both the GAL and AAL are **discharged** as of the signing of the order granting the guardianship or dismissing the application. Tex. Est. Code §§ 1054.002, 1054.053.
2. SEPARATE ORDER REQUIRED FOR FEES: Although the previous orders of the Texas Supreme Court regarding the reporting of fees (Misc. Docket Nos. 94-9134 & 07-9188) were repealed following the enactment of the fee reporting mechanism of Tex. Govt. Code Chap. 34 in 2015, many courts will still want the order awarding fees to be separate and apart from any other pleading to enable the clerk to meet their reporting requirements.

## **I. Selling the Follow-Through**

Be aware that the court is charged by statute (Tex. Est. Code §§ 1054.102, 1201.001, 1201.052, 1163.001 & 1163.101) to annually monitor all guardianships through the use of annual accounts, annual reports and court visits. The judge is charged to annually determine whether the guardianship should be adjusted or the ward’s rights restored. Additionally, statutory probate courts are required to have a program to make and follow-up on annual visits on each ward.

Most of the statutory probate courts actively monitor more than 1,100 wards per court, including sending out Annual Reports of the Guardian of the Person, approving such reports, appointing court visitors for each ward, reviewing and acting on any recommendations made by the court visitors and maintaining the records on the guardianship monitoring, separate and apart from the “public files” in the clerk’s office.

Both the Guardian Ad Litem and Attorney Ad Litem need to help the new guardian-to-be understand that there is a continuing obligation in a guardianship - both to the ward and to the court. It is important that the guardian qualify in a timely manner and that the guardian understands that any reports required to be filed must be treated seriously. “Selling the Follow-Through” is an important part of the job of the ad litem in upholding the integrity of the system.

If the newly appointed guardian has to be removed for failure to qualify within 20 days or removed a year later for failure to stay in touch with the court or file an accounting or report, the result is the same: the ward has suffered some damage because of the inaction of the guardian.

## IX. ACTIVE CONTEST OF THE APPLICATION

**Threshold Consideration:** Even though earlier dicta suggested that an Attorney Ad Litem was to exhaust all remedies available (*Cahill v. Lyda*, 826 S.W.2d 932 (Tex. 1992)), the clear legislative intent of the guardianship statutes, as reflected in Tex. Est. Code §1001.101, is that a less restrictive alternative, if available, or the availability of Supports and Services, is to be considered.

As referenced above (“the ad litem’s dilemma”), often the job of the Attorney Ad Litem is to require that the Applicant meet his burden under the statute. However, there are instances where “all is not well” and the ad litem is compelled to actively contest the proceeding. Most often, but not always, this has more to do with the personalities of the individuals involved and competing desires for control of access to the proposed ward or over the proposed ward’s estate.

In actively contesting a guardianship proceeding, the ad litem should consider among the following:

**A. File An Answer!** In every case, file a general denial to put matters in issue. Beyond that, raise the necessary affirmative defenses (Appendix Q) to give the court and other counsel adequate notice as to what is disputed:

Incapacity/ inability to care for self or protect own rights/ inability to manage property/ applicant not qualified/ applicant not a suitable person/ objection to CME.

**B. Determine If Immediate Action is Appropriate.** Legal triage may be necessary. See discussion *supra* under “Ad Litem Boot Camp.”

**NEW! Sweeping changes to the Texas Rules of Civil Procedure effective 1/1/2021 will materially impact the practice of litigation in Texas.**

Not surprisingly, while these rules make specific reference to suits governed by the Family Code and contains specific exemptions from their provisions for certain types of cases (Rule 194.2(d)), probate and guardianship cases are not specifically referenced. Tex. Est. Code §§ 53.107 & 1053.105 (reproduced below) exempt probate and guardianship proceedings from the interplay of Rules 47 and 169 (the “Expedited

Trial Rules”).

It is currently unclear whether the above-referenced Estates Code sections similarly shelter probate and guardianship proceedings from the initial disclosure requirements under Rule 194, but in any event, this duty may be avoided either by a Rule 11 Agreement between the parties or by court order (Rule 194.1(a)). See Appendix Ar for a suggested form of Rule 11 Agreement.

*Tex. Est. Code § 53.107. INAPPLICABILITY OF CERTAIN RULES OF CIVIL PROCEDURE. The following do not apply to probate proceedings:*

(1) Rules 47(c) and 169, Texas Rules of Civil Procedure; and

(2) the portions of Rule 190.2, Texas Rules of Civil Procedure, concerning expedited actions under Rule 169, Texas Rules of Civil Procedure.

*Tex. Est. Code § 1053.105. INAPPLICABILITY OF CERTAIN RULES OF CIVIL PROCEDURE. The following do not apply to guardianship proceedings:*

(1) Rules 47(c) and 169, Texas Rules of Civil Procedure; and

(2) the portions of Rule 190.2, Texas Rules of Civil Procedure, concerning expedited actions under Rule 169, Texas Rules of Civil Procedure.

**C. Set the Hearing on the Contested Docket.** This should be the first and best notice to the court that you don’t intend to “go along quietly.” Be sure you give the required 45-day notice of hearing under Tex. R. Civ. Proc. 245 or get waivers in writing from all the players. (See the Setting Confirmation form at Appendix Aa.)

**D. Calling for Backup.** In an appropriate case, the attorney ad litem for a proposed ward may be authorized, upon application and order, to enlist the assistance of additional counsel to represent the proposed ward when warranted by the circumstances. *Guardianship of Glasser*, 297 S.W.3d 369 (Tex. App.—San Antonio 2009, no pet.) In *Scally v. Scally*, 351 S.W.3d 434 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2010, no pet.), the ad litem in a SAPCR proceeding retained counsel to collect fees awarded the ad litem.

### E. Retained Counsel

1. **THE FAMILY RETAINER:** It is not unusual for a proposed ward or a family member who objects to the guardianship (or proposed guardian) to seek out an old family friend who is a lawyer and ask them to defeat the guardianship application.

Newly enacted Tex. Est. Code § 1054.006 recognizes the ability of a proposed ward (with

sufficient capacity) to retain counsel.

2. **MOTION TO SHOW AUTHORITY:** The Applicant or Guardian Ad Litem might well consider a Motion to Show Authority pursuant to Tex. R. Civ. Proc. 12. In this sworn motion, the privately-retained attorney is cited to appear and bear the burden show his authority to act on behalf of the proposed ward. (See Appendix W.) A “Rule 12” motion is the exclusive method of questioning an attorney's authority to represent a party, and such a motion must be heard and determined before the parties announce ready for trial. *Price v. Golden*, 2000 Tex. App. LEXIS 5906 (Tex. App.—Austin 2000, no pet.) Such a motion might be a conflict for an Attorney Ad Litem, who may be in a position to defend his client’s capacity.

3. **KEY ISSUE - CONTRACTUAL CAPACITY:** The key issue is whether the proposed ward has sufficient capacity to understand the concept of the contractual relationship between attorney and client. It gives the court an early opportunity to observe the proposed ward and sometimes results in the pursuit of a less restrictive alternative. However, if the attorney cannot sustain his burden to show such authority (and demonstrate the threshold capacity of the proposed ward to be able to retain counsel), he is barred from representing the proposed ward in the proceeding. Tex. R. Civ. Proc. 12. While this is a fairly low burden, it is dispositive on the issue. *Logan v. McDaniel*, 21 S.W.3d 683 (Tex. App.—Austin 2000, pet. denied).

In *Oldham v Calderon*, 1998 Tex. App. Lexis 1539, (Tex. App.—Houston [14th Dist.] 1998, pet. denied), The 14<sup>th</sup> Court of Appeals affirmed the trial court’s substitution of privately-retained counsel in place of the court-appointed Attorney Ad Litem and allowed the private attorney’s fees to be paid out of the ward’s estate. The appellate court recognized that, at times, counsel with whom the ward is familiar can render more effective assistance of counsel than a court-appointed ‘stranger.’ However, in *Guardianship of Benavides*, 403 S.W.3d 370, 377 (Tex. App.—San Antonio 2013), subsequent appeal at *Benavides v. Mathis*, 433 S.W.3d 59 (Tex. App.—San Antonio 2014, pet. denied), following hearing on a Motion to Show Authority, the trial court found retained counsel had no authority to represent the proposed ward in the guardianship proceeding and struck all of retained counsel’s pleadings. The appellate court held the trial court was well within its discretion in finding that retained counsel had no authority to represent the proposed ward in the underlying guardianship proceedings.

4. **CERTIFICATION REQUIRED:** See discussion *supra*.

5. **INEXPERIENCE:** Even if retained counsel does

indeed have the proposed ward's best interest at heart, an inexperienced attorney can end up doing a disservice to his client, often by increasing the costs of the proceeding without realizing that the proposed ward foots the bill.

6. **NO PLAY, NO PAY:** The unpleasant “flip side” of being the privately-retained white knight is that, if your client lacks the capacity to hire an attorney, you are not entitled to recover fees for the legal services in the guardianship contest. *Breaux v. Allied Bank of Texas*, 699 S.W.2d 599 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.), cert. denied, 479 U.S. 1002 (1986).

Also, there is no “fall back” to recover fees based on a theory of *quantum meruit* in such a situation. *Price v. Golden, supra; Breaux, supra*.

**F. Request A Statutory Probate Judge:** If you are in a county without a statutory probate court or county court at law, you may request the judge to have a statutory probate judge appointed pursuant to Tex. Govt Code §25.0022 to hear the contested portion of the guardianship proceeding. If the county judge has not already transferred the proceeding to the district court, it is mandatory that the judge request the assignment. Failure by the county judge to do so is an abuse of discretion. *In re Vorwerk*, 6 S.W.3d 781 (Tex. App. – Austin, 1999, no pet.).

Be sure your motion doesn’t get “lost” or returned for an unpaid filing fee to give the opposition time to request a transfer to the district court. *In re Lewis*, 185 S.W.3d 615 (Tex. App.—Waco 2006, no pet.).

Also, don’t give the judge any excuse to deny your motion on procedural grounds. *In re Routh*, 2005 Tex. App. LEXIS 5562 (Tex. App.—Waco 2005, pet. denied) is an example of the court dodging a motion because the motion referenced the wrong section of the Probate Code.

**G. Intervention by “Interested Persons”** – Just when you thought everything was ready to move forward, a sibling, son-in-law or neighbor of the Ward decides they want to take over the process. Heretofore, they simply jumped in and started litigating and issues of their standing or bona fides were often not addressed. Now, under Tex. Est. Code § 1055.003, notwithstanding the Rules of Civil Procedure, a potential intervenor in a guardianship is required to file a timely motion setting out the purpose for which intervention is sought and serve the parties. The court, in its discretion, may grant or deny the motion, taking into consideration whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights. This does not apply to those persons on

the ‘laundry list’ under Tex. Est. Code § 1051.104. Tex. Est. Code § 1055.003(d).

## H. Consider Seeking Security For Costs:

1. **DO NOT BE CONFUSED BY OLD, BAD LAW:** Until 2013, there was a provision in the Probate Code that allowed for the possibility of obtaining a rule for costs (Tex. Prob. Code § 622). However, it was a right without a remedy because TEX. PROB. CODE §§ 665A & 669 still required the ward’s estate to bear all the costs of the proceeding, if there was one. This basically meant the costs in a guardianship contest could not be taxed against the losing party as in a will contest.

There are a considerable number of decisions under the prior law. If these are cited to you as controlling, make sure of the statutory basis for the decision.

A. **Guardianship Cases:** *In re Brookshire*, 2006 Tex. App. LEXIS 8257 (Tex. App.—Houston [1st Dist.] 2006, orig. proceeding); *Guardianship of Humphrey*, 2008 Tex. App. LEXIS 4429 (Tex. App. Tyler, 2008, no pet.); *Guardianship of Humphrey* 2009 Tex. App. LEXIS 1099, 1100 (Three Opinions) (Tex. App.—Tyler 2009, pet. denied); *Guardianship of Thomas*, 2009 Tex. App. LEXIS 1813 (Tex. App.—Fort Worth, no pet.); *Guardianship of A.M.K. and A.A.K.*, 2009 Tex. App. LEXIS 2551 (Tex. App.—San Antonio 2009, no pet.); *Estate of Frederick*, 2010 Tex. App. LEXIS 2537 (Tex. App.—Fort Worth 2010, no pet.); *Guardianship of Marburger*, 329 S.W.3d 923 (Tex. App.—Corpus Christi 2010, no pet. h.); *Trevino v. Reese*, 2011 Tex. App. LEXIS 4558 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *In Re Mitchell*, 2011 Tex. App. LEXIS 3538 (Tex. App.—El Paso, 2011, no pet.), *Guardianship of Vavra*, 2012 Tex. App. LEXIS 2481 (Tex. App.—Eastland, 2012, no pet. h.).

B. **Decedent’s Estates:** *Ajudani v. Walker*, 232 S.W.3d 219 (Tex. App.—Houston [1st Dist.] 2007, no pet.) which followed Tex. Prob. Code §669(a) to deny taxings the costs in a will contest against the losing party on the ad litem’s motion. The Fort Worth Court of Appeals expressly disapproved *Adujani* in *Estate of Frederick*, 311 S.W.3d 127 (Tex. App.—Fort Worth 2010, no pet.) and **upheld** the taxing of costs (ad litem fees) against the losing party in an enforcement action brought by the ad litem in a decedent’s estate.

C. **Other Reported Decisions on Security for Costs and Taxing of Costs:** *Clanton v. Clark*, 639 S.W.2d 929 (Tex. 1982) (will contest); *Shirley v Montgomery*, 768 S.W.2d 430 (Tex. App.—Houston [14th Dist.] 1989, orig. proc.) (custody battle); *ex parte Hightower*, 877 S.W.2d 17 (Tex. App.—Dallas 1994, wr. dism w.o.j.) (custody battle); *Estate of Stanton*, 202 S.W.3d 205 (Tex. App.—Tyler 2005, pet. denied.); (dependent

administration and heirship); *Overman v. Baker*, 26 S.W.3d 506, 512 (Tex. App.—Tyler 2000, no pet.); *Guardianship of Soberanes*, 100 S.W.3d 405, 408 (Tex. App.—San Antonio 2002, no pet.).

The Estates Code was amended in 2013 to allow the taxing of costs and requiring reimbursement of attorneys fees of persons found to have acted without good faith or just cause. Tex. Est. Code §§ 1155.151.

In addition, Tex. Est. Code § 1053.052(a) was amended in 2015 to allow the clerk to obtain an order from the court to require an applicant, complainant, or contestant (other than a guardian, attorney ad litem, or guardian ad litem) to provide security for the probable costs of the guardianship proceeding before their application, complaint, or contest may be filed.

2. **PUT UP OR SHUT UP!** (Tex. Est. Code § 1053.052). (Appendix V) *The strongest string in the ad litem’s bow*. An applicant or contestant in a guardianship proceeding may be required - on motion, notice and hearing - to give security for the probable costs of the guardianship proceeding within twenty days of the date of the order. Failure to provide security will result in dismissal of the contest or opposition. *Guardianship of Fairley*, 2017 Tex. App. LEXIS 338 (Tex. App.—San Antonio, January 18, 2017, pet. filed).

3. **WHY IS THIS SUCH AN ISSUE?** The proposed ward has little or no control over his or her own estate. Minors and persons *non compos mentis* are *non sui juris* and remain altogether under the court’s protection, even when represented by a next friend or guardian. *Byrd v. Woodruff*, 891 S.W.2d 689, 704 (Tex. App. 1994); *M.K.T. Ry. v. Pluto*, 138 Tex. 1, 156 S.W.2d 265, 268 (1941); *Greathouse v. Ft W. & D. C. Ry. Co.*, 65 S.W.2d 762 (Comm. App. 1933). It is the responsibility of the Court in such an instance to protect the estate of an alleged incapacitated person. Tex. Est. Code § 1201.003.

Also, the required appointment of one or more ad litem, proportionally increases the probable costs of a contest. Contested guardianship proceedings are highly structured and the costs incurred can quickly go far beyond the normal filing fees and discovery items associated with civil cases. (*see discussion infra*)

4. **WHO MAY BE MADE TO GIVE SECURITY?** The laws regulating costs in ordinary civil cases apply to a guardianship matter *unless otherwise expressly provided for*. Tex. Est. Code § 1053.051.

A. **In Ordinary Civil Cases:** Only a party “who seeks affirmative relief” (Tex. R. Civ. Proc. 143) or “who seeks judgment against any other party” (Tex. R. Civ. Proc. 147) may be ruled to give security for costs.

B. **In Guardianship Proceedings:** Because any “interested party” is allowed to contest any portion of a guardianship administration, the vulnerability of the

proposed ward's estate to substantial costs from repeated contests is greatly increased. As a result, in guardianship proceedings, security may be required from persons who are simply complaining about or opposing a guardianship matter, regardless of whether they are seeking affirmative relief. Tex. Est. Code § 1053.052.

C. Exception: As mentioned above, no security for costs may be required of a guardian, Attorney Ad Litem, or Guardian Ad Litem appointed under this chapter in any suit brought by the guardian, Attorney Ad Litem, or Guardian Ad Litem in their respective fiduciary capacities. Tex. Est. Code § 1053.052(c).

5. WHO MAY SEEK SECURITY? The Guardian (or Applicant), the Attorney Ad Litem, the Guardian Ad Litem and now, the Clerk. (*supra*)

6. WHEN? – Such a motion may be filed and heard at any time before the trial. Tex. Est. Code § 1053.052(b).

7. HOW IS THE AMOUNT OF SECURITY DETERMINED?

A. In Ordinary Civil Cases: the party seeking affirmative relief may be ordered to deposit a sum “sufficient to pay the accrued costs”. Tex. R. Civ. Proc. 146.

B. In Guardianship Proceedings: the court is to order security for the “probable costs of the proceeding.” Tex. Est. Code § 1053.052. The court must receive proof as to the probable costs expected to be incurred by any party to the proceeding, which could include items such as compensation for one or more guardians ad litem, Tex. Est. Code § 1054.005; compensation for attorneys (including the Attorney Ad Litem), mental health professionals, and interpreters appointed by the court, Tex. Est. Code § 1155.051; and even the costs associated with a receiver to take control of the proposed ward's property, especially if a going business is involved, Tex. Civ. Prac. & Rem. Code §§ 64.001ff, Tex. Est. Code § 1354.001 or a temporary guardianship pending the contest. Tex. Est. Code § 1251.051.

**Note: The court may also require a party found to have acted in bad faith and without just cause to reimburse the ward's estate for any award of attorney's fees (Tex. Est. Code § 1155.054), but these amounts are not classically considered “costs” and so are not to be included in calculating the “probable costs” under Tex. Est. Code § 1053.052. See “Award of Attorney's Fees, *infra*.**

8. HOW ARE THE COSTS SECURED? A party ordered to provide security for costs has three options:

A. Writ of Attachment - Allowing a *writ of*

*attachment* to be filed on property, real or personal, of the person giving security. Tex. R. Civ. Proc. 146 (regarding attachments, see Tex. R. Civ. Proc. 592ff); Writs of attachment are somewhat arcane and maintenance-intensive procedures which require the person allowing the attachment to have sufficient attachable property in the county and to allow additional attachments if property is sold or values drop. *Ibid*. This is a rarely used option.

B. Surety Bond - Posting a *surety bond* under Tex. R. Civ. Proc. 148. It is to be a bond with sureties (preferably corporate) to secure costs, but the court may not fix a specific amount for anticipated costs. *Johnson v. Smith*, 857 S.W.2d 612, 615 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1993, orig. proceeding); *Smith v. White*, 695 S.W.2d 295 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1985, orig. proceeding). It is, in effect, an open bond to secure payment of whatever costs might accrue. *Mosher v. Tunnel*, 400 S.W.2d 402 (Tex. Civ. App.—Houston [1<sup>st</sup> Dist.] 1966, writ ref d n.r.e.) A bond for a specified amount, rather than an open-ended bond, will not satisfy Rule 143. *Clanton v. Clark*, 639 S.W.2d 929, 930-31 (Tex. 1982). *Hager v. Apollo Paper Corp.*, 856 S.W.2d 512 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1993, no writ).

C. Cash: Depositing *cash* with the clerk of the court in lieu of the bond. Tex. R. Civ. Proc. 146. Like attachments, the cash deposit is a maintenance-intensive option. If the “probable costs” exceed the cash deposit, additional cash deposits would be necessary. However, if either an attachment or bond is furnished, no further security is required. Tex. R. Civ. Proc. 146.

9. WHO CHOOSES THE TYPE OF SECURITY? The option lies with the party ruled for costs, and not the court, as to whether a cost bond shall be furnished or a deposit in lieu of bond. *Buck v Johnson*, 495 S.W.2d 291, 298 (Tex. App - Waco 1973, no writ).

10. ENFORCEMENT: Failure to give security as ordered within twenty days of the order will result in dismissal of the contest or opposition. Tex. R. Civ. Proc. 143; *Guardianship of Thomas*, 2009 Tex. App. LEXIS 1813 (Tex. App.—Fort Worth 2009, no pet.).

11. REVIEW OF ORDER: Mandamus will lie to correct the requirement of payment of a fixed amount of security prior to final judgment. *TransAmerican Natural Gas Corp. v. Mancios*, 877 S.W.2d 840, 844 (Tex. App.—Corpus Christi 1994, orig. proceeding, mand. overruled).

12. THE COURT MAKES ITS DETERMINATION: If the matter goes to its ultimate resolution and the judge or the jury picks a winner and taxes the costs, the payment of costs by the party against whom the costs are taxed is mandatory: Tex. Est. Code §§ 1155.151

“...shall be paid....”

13. AWARD OF ATTORNEY’S FEES - Tex. Est. Code 1155.054 (d) - If the court finds that a party in a guardianship proceeding acted in bad faith or without just cause in prosecuting or objecting to an application in the proceeding, the court may require the party to reimburse the ward's estate for all or part of the attorney's fees awarded under this section and shall issue judgment against the party and in favor of the estate for the amount of attorney's fees required to be reimbursed to the estate.

In *Guardianship of A.B.*, 630 S.W.3d 489 (Tex. App.—Eastland May 13, 2021, no pet.), the reviewing court found the trial court did not abuse its discretion in awarding attorney's fees against father where he contested application for guardianship "without just cause," Tex. Est. Code §§ 1155.054(d), 1155.151(c). The ward was incapacitated and appointing the mother as guardian was in ward's best interest.

#### 14. PRACTICAL CONSIDERATIONS

A. Who Should File? Either the attorney for the applicant, the Guardian Ad Litem or the Attorney Ad Litem may file a motion for security. However, the Attorney Ad Litem does not need to be running up time unnecessarily if other counsel are doing the heavy lifting. The Attorney Ad Litem doesn't have to be the lead sled dog unless there is no attorney for the applicant other than the Guardian Ad Litem and the Guardian Ad Litem chooses not to seek security for costs.

B. When to File? Seek security for costs at the beginning of the contest. There is no point in allowing billable time to stack up on all sides if the contest is a fight for control or not necessarily about the ward.

C. Follow up! Don't expect the court to count the days if security is not furnished. File a motion to dismiss or provide in your order granting security for costs that you may obtain an order of dismissal of the contest without further hearing upon the contestant's failure to provide security within the allotted time.

D. Severance? Consider including a specific provision severing the issue of security for costs upon dismissal of the contest to ensure that it will become a final order. *Crowson v. Wakeham*, 897 S.W.2d 779 (Tex. 1995).

E. Affidavit of Inability - If the contestant files a Pauper's Affidavit (see discussion under III.N. *supra* and Appendix K *infra*) you, as the ad litem, should contest the pauper's affidavit (unless it is an uncontestable affidavit (see *supra* and *Tex. Rules Civ. Proc. 145(c)*). If a contest is not filed, the uncontested affidavit is conclusive as a matter of law. *Guardianship of Humphrey*, (Tex. App.—Tyler,

February 18, 2009, pet. denied).

#### I. **Jury Demand.**

1. AN EASIER TOUCH? Individuals on a jury are usually quicker to deny a guardianship application than a judge, either through sympathy or lack of intimate familiarity with incapacity. Tex. Est. Code. §§ 1055.052, 1101.052.

2. SPECIAL ISSUES: You can 'reverse engineer' your issues from the sample order (Appendix Af) or consult *Texas Pattern Jury Charges 2016: Family Law & Probate, State Bar of Texas*. For an excellent background discussion of the issues, consult Darlene Payne Smith: *Jury Questions and Instructions: No Pattern for Probate & Pattern Jury Charges and Joint Defense Agreements in Probate, Trust and Guardianship Litigation*, both in the 25<sup>th</sup> Annual Advanced Estate Planning and Probate Course (2001), State Bar of Texas and Darlene Payne Smith, *Pattern Jury Charges in Probate, Trust and Guardianship Litigation*, Probate Litigation Seminar (2002), Tarrant County Probate Bar Association.

**Note on jury size:** while generally, statutory probate courts have six person juries, if the case is one in which the district court would otherwise have concurrent jurisdiction (e.g. TEX. EST. CODE § 1022.006, a twelve person jury may be requested. Tex. Govt. Code §25.00261. A specific request for a 12-person jury must be timely made, otherwise, a 6-person jury will be impaneled. *Guardianship of Lynch*, 35 S.W.3d 162 (Tex. App.—Texarkana 2000, no pet.).

Although perhaps not strictly necessary, a 2021 amendment to the Government Code allows the parties to a contested proceeding in a statutory probate court to agree to try a particular case with fewer than 12 jurors. (Gov't Code § 25.0027).

#### J. **Pursue Adequate Discovery.** 'nough said.

*See note on required disclosures. (supra)*

#### K. **Advocate for Mediation** –

1. LEGISLATIVE INTENT: Just because you have a responsibility to advocate does not mean you are to ignore the clear statement of legislative intent found in Tex. Civ. Prac. & Rem. Code §154.002: *It is the policy of this state to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children, and the early settlement of pending litigation through voluntary settlement procedures.*

2. THE REAL ISSUE: Although mediation training



often instructs that guardianship contests are not mediable and that the issue of incapacity is beyond the ability of the parties to resolve, rarely is incapacity the real issue.

3. **UNRESOLVED FAMILY ISSUES:** Most often, decades of unresolved family conflict among the family members of the proposed ward spark the contests. Perceived favoritism, sibling rivalry, jealousy of a step-parent or step-children or step-siblings, unresolved grief, etc. all are manifested in the guardianship arena.

4. **SMOOTHING THE SURFACE ONLY:** While resolution of a guardianship contest might remove the procedural obstruction in granting a guardianship, it rarely resolves the family disputes and wounded relationships which led to the contest. Mediation can provide a level playing field for the family to resolve the issues behind the guardianship fight. The long-standing “burrs under the saddle” that so often give rise to family disputes can be aired and often resolved.

5. **COMING BACK TO HAUNT YOU:** If mediation is not attempted, the underlying issues cannot be addressed. These unresolved deeper, more serious family dynamics will often re-surface after the ward’s death in a will contest or other dispute.

6. **MEDIATION OF CONTESTED GUARDIANSHIP PROCEEDING.** Tex. Est. Code § 1055.151 By agreement or on the court's own motion, a contested guardianship proceeding may be referred to mediation.

*(NEW!) Amendments to the Estates Code in 2021 now allow the issue of incapacity to be mediated, but the applicant still prove up the issue of incapacity to the court in accordance with Tex. Est. Code Chapter 1101.*

*The parties must consider both any less restrictive alternatives and any available and appropriate supports and services in the mediation. The parties are to bear the costs of mediation, but a referral to a local alternate dispute resolution center may be made. Tex. Est. Code § 1055.151.*

*– The Office of Court Administration is to establish a guardianship mediation training course with at least 24 hours of course material. This training will be optional and no certification will be offered. Govt Code 155.301.*

Any mediated settlement agreement (MSA) reached is then binding on the parties, provided the agreement:

A. provides "prominently" (boldface, capital letters, or underlined) that the agreement is not subject to revocation;

B. is signed by

1. each party to the agreement; and
2. by attorneys (if any) who are present at the time the parties sign.

If the MSA meets these requirements, a party is

entitled to judgment on the MSA notwithstanding Tex. R. Civ. Proc. 11 or another rule or law. *Guardianship of Peterson*, 2016 Tex. App. LEXIS 9364 (Tex. App.—Houston [1st Dist.] August 25, 2016, no pet.).

*Trump Card* Nevertheless, the court may decline to enter a judgment on the MSA if the court finds the agreement is not in the ward's or proposed ward's best interests.

### **L. Shutting the Gate: TROs, Temporary Guardianships, Notices of Lis Pendens and Receivers**

Is the real concern the potential for financial abuse of the proposed ward by someone with a power of attorney? You have several options:

1. An **INJUNCTION PROCEEDING**, starting with a Temporary Restraining Order leading to a Temporary Injunction. However, if the potential wrongdoer is elusive, notice and service of citation might make this remedy ineffective.

2. A **TEMPORARY GUARDIANSHIP**, while now more technically difficult, has the benefit of not requiring the “bad guy” to be there and it allows the judge to suspend an abused power of attorney until the dust settles.

3. A **NOTICE OF LIS PENDENS** under Tex. Prop Code §12.007 may be used to effectively “cloud” the Proposed Ward’s title, but should really only be used in conjunction with pleadings seeking affirmative relief regarding the alleged wrongdoer (such as a suit to impose a constructive trust) since a lis pendens notice is properly only used to protect innocent purchasers from buying land subject to litigation. *Kropp v. Prather*, 526 S.W.2d 283 (Tex. Civ. App. – Tyler, 1975, writ ref’d n.r.e.).

4. Appointment of a **RECEIVER** to take control of specific property, especially if a going business is involved, is certainly a less intrusive alternative to a guardianship. Tex. Est. Code § 1354.001; Tex. Civ. Prac. & Rem. Code §§64.001ff.

### **M. “Interesting” Challenge – Interest for Standing vs. Adverse Interest:**

1. **STATUTORY BAR:** Under Tex. Est. Code § 1055.001(b), a person with an adverse interest to a proposed ward may not:

- A. apply to create a guardianship;
- B. contest the creation of a guardianship;
- C. contest the appointment of a guardian; or
- D. contest an application for complete restoration of a ward's capacity or modification of a ward's guardianship.

2. **CHALLENGE:** The proper challenge is by motion in limine. Tex. Est. Code. § 1055.001(c). Either the

Attorney Ad Litem or Guardian Ad Litem may file such a motion. Such a motion is not to be confused with a pre-trial motion in limine (seeking to exclude evidence of particular testimony). *Estate of Chapman*, 315 S.W.3d 162 (Tex. App.—Beaumont 2010, no pet.). *Burnett v. Lunceford*, 545 S.W.3d 587 (El Paso—December 7, 2016, pet. denied), *Guardianship of Jones*, 2016 Tex. App. LEXIS 9394 (Tex. App.—Fort Worth, August 25, 2016, no pet.).

Also see *Ross v. Sims*, 2017 Tex. App. LEXIS 1264 (Tex. App.—Austin, February 15, 2017, pet. filed) where a Motion to Show Authority was successfully used against an agent under a Power of Attorney whose interest was adverse.

**But Nothing is Forever:** In *Guardianship of Benavides*, 2020 Tex. App. LEXIS 9882 (Tex. App.—San Antonio 2020, no pet.) The appeals court held a ruling on a motion in limine made in 2013 did not determine appellant's standing for every future phase of the guardianship proceeding.

3. **BURDEN:** Where the standing is challenged, the one whose interest is challenged has the burden of proof to present sufficient evidence during an in limine proceeding to prove that he is an interested person. *Womble v. Atkins*, 160 Tex. 363, 369 (Tex. 1960) (will contest); *Elliott v. Green*, 1995 Tex. App. LEXIS 3607 (Tex. App.—Dallas 1995, no pet.) (breach of fiduciary duty); *A & W Indus. v. Day*, 977 S.W.2d 738, 741-742 (Tex. App.—Ft. Worth 1998, no pet.) (contract dispute in decedent's estate); *Betts v. Brown*, 2001 Tex. App. LEXIS 329 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2001, no pet.) (guardianship); *Guardianship of Soberanes*, 100 S.W.3d 405, 406 (Tex. App.—San Antonio 2002, no pet.) (guardianship); and *In Re Miller*, 299 S.W. 3d 179 (Tex. App.—Dallas 2009, no pet.). *Guardianship of Bernsen*, 2019 Tex. App. LEXIS 6854 (Tex. App. Corpus Christi - Edinburg 2019, pet. filed); *Guardianship of Thrash*, 2019 Tex. App. LEXIS 10457 (Tex. App.—San Antonio 2019, pet. filed)

4. **ADVERSE INTEREST:** Although 'adverse interest' is not a defined term, the 14<sup>th</sup> Court of Appeals in *Betts v. Brown*, *supra*, analogized with issues of standing of personal representatives of decedent's estates, concluding that an adverse interest is one that "does not promote the well-being of the ward." The court went on to say that an adverse interest must be something other than the conditions of disqualification under Tex. Est. Code § 1104.351-357, as discussed below. *Ibid*.

The Dallas Court of Appeals, in the case of *In Re Miller*, *supra*, declined to hold that evidence of indebtedness by an applicant to a Proposed Ward automatically rises to the level of an adverse interest sufficient to divest a person of standing under Tex.

Prob. Code §642 (Now Tex. Est. Code § 1055.001), particularly where Tex. Est. Code § 1104.354 9(2) allows for a person indebted to the proposed ward to pay the debt and be appointed as guardian.

In *Guardianship of Bernsen*, 2019 Tex. App. LEXIS 6854 (Tex. App.—Corpus Christi-Edinburg 2019, pet. Den.) The record reflected sufficient evidence that daughter did not have standing under Tex. Estates Code § 1055.001 because of evidence that she was abusing the powers and control that she bestowed on herself after a physician determined the ward was incompetent.

Wife who filed litigation to invalidate premarital and separate property agreements and to classify husband's guardianship estate assets as community property held to have adverse interest in guardianship proceeding. *Guardianship of Benavides*, 2014 Tex. App. LEXIS 1747 (Tex. App.—San Antonio, Feb. 19, 2014, pet. denied).

5. **UNDERLYING FACTS:** Hard facts (and not emotions or suspicions) must be fully developed to show adverse interest. The proposed ward, family members and friends of the ward will be the best sources of information as to any adverse interest of the Applicant.

CAVEAT: Weigh carefully whether other family dynamics are at work and the possible motivation of family members and others willing to 'side' with the proposed Applicant. Those contesting the application are also subject to a standing challenge under Tex. Est. Code § 1055.001. A form of Motion in Limine is attached as Appendix X.

**N. Challenging the Applicant - Disqualification:** Even though the Applicant may have proper standing, he or she may nonetheless be disqualified by statute to serve as guardian. Tex. Est. Code §§ 1104.351-357. The list of persons who are disqualified is detailed in full in the code, including: 1) minors; 2) notoriously bad people; (3) incapacitated persons; (4) parties to lawsuits affecting the proposed ward's welfare (unless the court determines no conflict exists or appoints a Guardian Ad Litem for the proposed ward); 5) persons indebted to the proposed ward (unless the debt is paid before appointment); 6) persons with an adverse claim to the proposed ward or his property; 7) people who lack the experience, education, or judgment (bankruptcy?) to properly manage the ward's estate or control the ward *see Guardianship of Allen*, 2015 Tex. App. LEXIS 11837 (Tex. App.—Tyler, November 18, 2015, no pet.) or 8) (the court's trump card) one found unsuitable by the court; (9) one expressly disqualified by the proposed ward in a prior designation under Tex.

Est. Code § 1104.202(B); or (10) a nonresident who has not designated a resident agent for service.

In *Guardianship of E.M.D.*, 2020 Tex. App. LEXIS 8360 (Tex. App.—Eastland, October 22, 2020, no pet.) the trial court did not err by finding the grandmother was disqualified from serving as children's guardian because the children may have had a claim against grandparents for death of their parents, and grandmother would have inherent conflict in asserting a claim on their behalf against herself or her husband.

**Practice Tip: A negotiated point (or discovery demand) in determining the suitability of an applicant might be to have the would-be guardian order a credit report and undergo a criminal history background report. Criminal history background reports are already required on non-family members under Tex. Est. Code § 1104.401ff. see “Getting Ahead of the Curve,” supra**

SUITABILITY: A finding by the court of unsuitability under Tex. Est. Code § 1104.352 trumps any priority for appointment under Tex. Est. Code §§ 1104.051 & 1104.102. *Guardianship of K.B.*, 2006 Tex. App. LEXIS 5123 (Tex. App.—San Antonio 2006, pet. denied), *Phillips v. Phillips*, 511 S.W.2d 748, 749 (Tex. Civ. App.—San Antonio 1974, no writ). But see *Estate of Gay*, 309 S.W.3d 676 (Tex. App.—Houston [14th Dist.] 2010, no pet.) where the trial judge's finding of unsuitability was held to be an abuse of discretion.

A. Gold Digger Alert: If you have a situation where one of the players in the guardianship is a “newly-acquired” spouse, consider instituting a proceeding under Tex. Fam. Code §6.108 to declare the marriage void based on the lack of mental capacity. It can address a number of issues: 1) The priority claim of a spouse to be appointed guardian, 2) claims for support for the spouse 3) claims of a surviving spouse upon the death of the ward or proposed ward.

Even if the ward or proposed ward then dies, as long as the §6.108 proceeding was pending, the probate court may then declare that marriage void based on a lack of capacity. Tex. Est. Code §§ 123.101, 123.102.

B. Second Chance at the Gold Digger?: If a proceeding pursuant to Tex. Fam. Code §6.108 was not pending at the decedent's death, all is not lost. An interested person may file a declaratory judgment action in the probate court requesting that the court void the marriage, provided the marriage was commenced not earlier than three years before the decedent's death. Tex. Est. Code § 123.102(a)(2). Such a proceeding may not be filed after the first anniversary of the date of the decedent's death. Tex. Est. Code § 123.102(c).

**O. If Advantageous, Try to Have Your Client Appear at the Hearing:** Consider whether the proposed ward can make it to the hearing, alone or with aid. Never underestimate the power of a well-reasoned and dignified personal plea by the proposed ward to the judge. However, it could certainly backfire if he/she gets lost or shows up in a bathrobe and slippers an hour before your first employee arrives in the morning. Then again, you might get lucky - your client might not show up until after the hearing is concluded.

**P. Consider Requesting a Closed Hearing:** Advisable particularly if a sideshow atmosphere is anticipated. A rare ‘private trial’ procedure. Tex. Est. Code § 1101.051(c).

**Q. The Order: Negotiate a Tactical Retreat:** If it is clear a guardianship will be granted, negotiate a possible limitation of the powers of the guardian as set forth in the order (Appendices J, Aa). See discussion *supra* regarding: 1) Supports and Services, 2) Decisions regarding Personal Residence, 3) the Preference of the Ward for a Guardian and 4) any indicated re-evaluation date indicated in the CME

If there are to be joint guardians (particularly if they are no longer married), ask the court to specify in the order whether they may act independently or unanimously in exercising important powers.

**Disclosure Requirement: Right to Physical Possession of Ward: In any order appointing a Guardian (with either limited authority (§ 1101.152) or full authority (Tex. Est. Code § 1101.151), a “prominent” statement (boldfaced, capital letters, or underlined): 1) advising peace officers of their ability to assist a guardian enforcing their right to have physical possession of the ward or to establish the ward's legal domicile, 2) assuring the peace officer of their immunity from prosecution in enforcing the guardian's rights and 3) admonishing the guardian of the criminal penalties for misuse of the order.**

**R. An Appealing Thought?**

1. NOT ON YOUR DIME: Once a guardian is appointed, unless the Attorney Ad Litem or Guardian Ad Litem are specifically “kept on board,” the ad litem(s) are discharged. Tex. Est. Code §§ 1054.002, 1054.0053. As a result, the duties of the Attorney Ad Litem do not extend to filing an appeal. *Bosworth v. Bosworth*, 2011 Tex. App. Lexis 3648 (Tex. App.—Austin, May 11, 2011, no pet.).

However, if you really think there has been a

serious abuse of discretion committed, make the argument to the trial court (prior to the appointment of the guardian) that your appointment should be extended because you have the responsibility to exhaust all remedies available to your client, including representing the proposed ward on an appeal. *Cahill v. Lyda*, 826 S.W.2d 932 (Tex. 1996). This is, of course, subject to the strictures of the *Hahn* decision (*infra*).

2. **STANDARD OF REVIEW:** Orders appointing a guardian are reviewable upon an abuse of discretion standard. *Cox v. Young*, 405 S.W.2d 430 (Tex. Civ. App. – Eastland 1966, writ ref’d n.r.e.); *Trimble v. TDPRS*, 981 S.W.2d 211 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1998, no writ).

3. **NO FRIVOLOUS APPEALS:** If the ward nevertheless demands an appeal, and the ad litem (you) reasonably believes the appeal would be without merit and totally frivolous, the ad litem should advise the court of appeals and request permission to withdraw. The request to withdraw must be accompanied by a brief referring to anything in the record that might arguably support the appeal and a copy of the brief must be furnished to the ward. *Guardianship of Hahn*, 276 S.W.3d 515 (Tex. App.—San Antonio 2008, no pet.); *In re T.R.*, 2018 Tex. App. LEXIS 7920 (Tex. App.—Fort Worth 2018, no pet.)(juvenile proceeding); *In re J.L.C.*, 586 S.W.3d 15 (Tex. App.—Waco 2018, no pet.)(juvenile proceeding) Following *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), accord: *State ex rel L.E.H.* 2007 Tex. App. LEXIS 2754 (Tex. App.—San Antonio 2007, no pet.)(mental health appointment).

**S. Potential Ancillary Litigation:** Often, there is some other litigation involving the Proposed Ward, possibly a personal injury action pending in another forum. Determine if those bases are covered by another ad litem and whether a settlement is pending. Seek to determine the solvency of the defendant and consider a guardianship management trust under Tex. Est. Code § 1301.051 as a less restrictive alternative.

**WATCH YOUR STEP:** If a structured settlement is being offered, unless you are very familiar with this area, consider seeking a discharge (or associating counsel) so that the court can appoint a more experienced advocate. The needs of a gravely injured incapacitated person can greatly exceed what many insurance companies are willing to place outside of the structured portion of a settlement. The ward may not survive until the annuity fully loads. In such cases, failure to negotiate a commutation rider in the annuity could be viewed as MALPRACTICE. Look it up.

#### **T. More Practice Pointers**

- Review the most current State Bar of Texas

Fiduciary Litigation Seminar materials.

- Just because you must advocate doesn’t mean you mustn’t settle.

- Find some way to take the money off the table: get a neutral third party, professional guardian, bank trust department or agency guardian to serve and isolate the dispute to the interpersonal issues.

- Don’t try to be the lead counsel.

- Don’t dig down until you can’t get out of the hole (time-wise).

- Don’t side against your own client/don’t sell your client out.

- In contested matters do not ask court staff for guidance unless all other counsel are present and the judge is in the room. Otherwise it is an *ex parte* discussion.

- Are you in over your head? You can ask procedural questions of court staff, including how to get out of a jam.

## **X. FEE CONSIDERATIONS**

**A. Introduction:** It is the Court’s duty to ensure that estates of decedents and wards pay only for “reasonable attorney’s fees necessarily incurred” Tex. Est. Code § 352.051 (decedent’s estates) and § 1155.101 (guardianships) and “necessary and reasonable” expenses. Tex. Est. Code § 352.051 (decedent’s estates) and Tex. Est. Code § 1155.102 (guardianships). See *Owens-Collins v. Drexler*, 2020 Tex. App. LEXIS 9404 (Tex. App—Houston [1st Dist.] December 3, 2020, pet. den.)

PUBLISHED POLICIES: *The majority of the statutory probate courts have promulgated stated policies regarding attorneys fees. These standards are not absolute rules, and the Court will often make exceptions in particular circumstances. An excellent example is on the Travis County Probate Court website: <http://www.co.travis.tx.us/probate/pdfs/attorneyfees.pdf>.*

### **Deposit of Funds for Court Costs**

Tex. Estates Code § 1155.151(a) sets forth four ways in which fees, including those of the guardian ad litem and attorney ad litem, shall be paid:

1. out of the guardianship estate, § 1155.151(a)(1);
2. out of the management trust, if one has been created for the ward’s benefit and the trial court determines it is in the ward’s best interest, § 1155.151(a)(2).
3. if there is no guardianship estate, no management trust, or the assets of the guardianship estate or management trust are insufficient, by the party to the proceeding who incurred the costs, unless that party

files an affidavit of inability to pay that shows the party is unable to afford costs, § 1155.151(a)(3).

4. out of the county treasury if (1) there is no guardianship estate, no management trust, or the assets of the guardianship estate or management trust are insufficient; and (2) the party to the proceeding who incurred the costs filed an affidavit of inability to pay that shows the party is unable to afford the costs.

In *in re Strban*, 2021 Tex. App. LEXIS 4557 (Tex. App.—Tyler, June 9, 2021, no pet.), the ward's father, by filing a guardianship proceeding, became a party to the proceeding and incurred liability for the costs of the proceeding. Because he did not file an affidavit of inability to pay pursuant to Tex. Rules Civ. Proc. 145, the county was not required to pay the costs. Because the father's pleadings supported the request to order the parties to pay the fees of the attorneys and guardian, father was put on notice of request for fees and the judge's order requiring father to make a deposit for costs was appropriate.

**Tip: Find out what the deposit required is for your county.**

**B. Basic Premise:** Absent specific statutory authorization, the probate court **cannot** award attorney's fees. Fortunately, both Ad Litem's are entitled to reasonable compensation, to be taxed as costs in guardianship (Tex. Est. Code §§ 1155.051 (Attorney Ad Litem), Tex. Est. Code § 1204.002 (Attorney Ad Litem in final account), Tex. Est. Code § 1054.055 (Guardian Ad Litem) Tex. Est. Code §§ 1202.102 (Restoration/Modification)), estate (Tex. Est. Code § 53.104), heirship (Tex. Est. Code § 202.009), and trust (Tex. Prop. Code §115.014) proceedings.

**C. Burden of Proof:** The ad litem has the burden to apply for the fees and to appear and give sufficient evidence that the ad litem has stayed within the statutorily-defined scope of the appointment, and to establish the amount of time spent as an ad litem on behalf of the client, that such time expended was reasonable and necessary, and to establish the appropriate hourly rate. *Goodyear Dunlop v. Gamez*, 151 S.W.3d 574 (Tex. App.—San Antonio 2004, no pet.); *Magna Donnelly v. Deleon*, 267 S.W.3d 108 (Tex. App.—San Antonio 2008, no pet.) *In Re White Inter Vivos Trusts*, 2009 Tex. App. LEXIS 6933 (Tex. App.—San Antonio, August 31, 2009, no pet.); *Ford Motor Company v. Aguilar*, 2017 Tex. App. LEXIS 1113 (Tex. App.—Corpus Christi, February 9, 2017, no pet.).

**D. Question of Fact:** What is a reasonable attorney fee is a question of fact to be determined by the trier of

facts and the award must be supported by competent evidence. *Great American Reserve Insurance Company v. Button*, 406 S.W.2d 901 (Tex. 1966); *Bullock v. Foster Cathead Company*, 631 S.W.2d 208 (Tex. App.—Corpus Christi 1982, no writ); *Mills v. Mills*, 559 S.W.2d 687 (Tex. App.—Ft. Worth 1977, no writ); *Brown & Root U.S.A., Inc. v. Trevino*, 802 S.W.2d 13 (Tex. App.—El Paso 1990, no writ). The amount of the ad litem's fee is left to the trial court's discretion and will not be overturned absent evidence that the trial court abused its discretion. *Garcia v. Martinez*, 988 S.W.2d 219 (Tex. 1999); *Ford Motor Company v. Garcia*, *supra*.

**E. Reasonableness:** In determining the reasonableness of an ad litem's fee, the same factors used to determine the reasonableness of attorney's fees in general are considered. *Land Rover U.K., Ltd. v. Hinojosa*, 210 S.W.3d 604 at 607 (Tex. 2006) (per curiam); *Garcia v. Martinez*, 988 S.W.2d 219 at 222 (Tex. 1999). If these factors form the basis of the trial court's decision, the fee award cannot be successfully challenged for abuse of discretion for not "employing a set of standard guiding principles." These factors include:

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
2. the likelihood...that the acceptance of the particular employment will preclude other employment by the lawyer;
3. the fee customarily charged in the locality for similar legal services;
4. the amount involved and the results obtained;
5. the time limitations imposed by the client or by the circumstances;
6. the nature and length of the professional relationship with the client;
7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and
8. whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered. *Id.* at 607. TEX. EST. CODE § 1155.053(c).

Ad litem fees are subject to the recent Texas Supreme Court case of *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 484 (Tex. 2019). The *Rohrmoos* opinion is a sweeping review of proof of attorneys fees in Texas law, particularly when a claimant seeks to obtain attorney's fees from a party other than their own client. The court uses the term 'fee-shifting' to describe such a situation. To secure such an award of attorney's fees from an opponent, the prevailing party must prove that (1) recovery of

attorney's fees is legally authorized and (2) the requested attorney's fees are reasonable and necessary for the legal representation. *Rohrmoos Venture*, 578 S.W.3d at 487. Because such fee awards are compensatory in nature, fee-shifting is not a mechanism to improve a lawyer's economic situation, and only fees that are reasonable and necessary for the legal representation will be shifted to the nonprevailing party. *Rohrmoos Venture*, 578 S.W.3d at 487–88.

In *Guardianship of Alford*, 596 S.W.3d 352 (Tex. App.—Texarkana 2019, no pet.), the court noted that the awarding of attorney's fees was discretionary, must be reasonable and necessary and that such reasonableness is a question of fact.

**F. Guidelines, Not Elements:** A trial court is not required to consider all of the factors in every case. The factors are guidelines for the trial court to consider, not elements of proof. *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554, 567 (Tex. App.—Austin 2004, no pet.); *Academy Corp. v. Interior Buildout & Turnkey Constr., Inc.*, 21 S.W.3d 732, 742 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Estate of Johnson*, 2010 Tex. App. LEXIS 9473 (Tex. App.—San Antonio 2010, no pet. h.).

To apply these factors, a reviewing court "may draw upon the common knowledge of the justices and their experience as lawyers and judges to view the matter in light of the evidence and the amount in controversy." *Land Rover v Hinojosa*, 210 S.W.3d 604 (Tex. 2006); *Borden, Inc. v. Martinez*, 19 S.W.3d 469, 471 (Tex. App.—San Antonio 2000, no pet.).

Some of the factors may be given more weight than others by the trial court. *Ford Motor Company v. Garcia*, *supra* (short timeframe and complexity of the case).

**G. Evidence Required:** However, the court cannot adjudicate the reasonableness of attorney's fees on judicial knowledge without the benefit of evidence. *Bullock v. Foster Cathead Company*, *supra*; *Mills v. Mills*, *supra*. The detailed billing records supply such evidence. Also see *Guardianship of Alford*, 596 S.W.3d 352 (Tex. App.—Texarkana, 2020, no pet.)

**H. Expert Testimony:** If challenged, evidence on the reasonableness of attorney's fees comes under the definition of expert testimony and is measured by the requisites of *E.I. du Pont de Nemours v. Robinson*, 923 S.W.2d 549 (Tex. 1995) which adopted the U.S. Supreme Court's rationale in *Daubert v. Merrell-Dow Pharmaceuticals*, 113 S. Ct. 2786 (1993).

**I. No "Bonus" Factors:** Absent exceptional circumstances, a court should not enhance the fee calculated by multiplying necessary number of hours expended by a reasonable hourly rate. Additional sums are rarely appropriate, particularly since the Guardian Ad Litem serves, in part, as an advisor to the court and will enjoy the protection of qualified judicial immunity. Tex. R. Civ. Proc. 173, cmt. 5 and Tex. Est. Code § 1054.056. *Land Rover*, *supra*; *Ford Motor Company v. Garcia*, 2010 Tex. App. LEXIS 8129 (Tex. App.—Corpus Christi, October 7, 2010), *supra*.

**J. No Prior Objections Required:** Complaints about the ad litem's services need not be made prior to the fee hearing. *Jocson v. Crabb*, *supra*.

**K. Limited Duties:** A Guardian Ad Litem's duty is to act as the personal representative, rather than as the attorney, for the client (minor or proposed ward), and to participate only to the extent necessary to protect the client's interests. The ad litem's services must not duplicate the work performed by the plaintiff's attorney. A Guardian Ad Litem's participation in depositions, hearings, conferences, strategy sessions and other activities must be tested by what is necessary to protect the client's interests.

If the ad litem engages in work more appropriate for the plaintiff's attorney and beyond the scope of the ad litem's role, such work is non-compensable. *Goodyear*, *supra* at 582-585. The burden is on the ad litem to ensure that the services performed do not exceed the scope of the role assigned. *Ford Motor Co v Garcia*, 363 S.W.3d 573 (Tex. 2012); *Ford Motor Co v Chacon*, 370 S.W.3d 359 (Tex. 2012).

The same is true in guardianships for both the Attorney Ad Litem and the Guardian Ad Litem. Because the work performed must be both reasonable and *necessary*, the trial court may see fit to pare down the requested fee if the ad litem has misapprehended his or her role. To that end, when in doubt, an ad litem should request guidance from the trial court in advance before engaging in the particular activity in question. *Goodyear*, *supra* at 588; *Chacon*, *supra*.

**L. Non-Compensable Activities:** While ad litem's are entitled to be compensated for their time in preparing their ad litem reports, they were not entitled to charge for:

1. **RESEARCH:** If you undertake to practice in this area, you should be familiar with probate and guardianship matters, so the Court will not ordinarily reimburse attorneys for basic legal research in these areas. The contract costs of computerized legal research (Westlaw and Lexis) are a part of overhead, as are the costs of a hard-copy library. *Goodyear-Dunlop*,

*supra*. Reimbursement may be allowed for research to address: 1) novel legal questions raised by opposing counsel or 2) questions posed by the Court.

**2. PREPARATION OF FEE APPLICATION, FEE HEARINGS, APPEALS:** Preparing and defending a fee application at a hearing or on appeal promotes the ad litem's interests, not those of the client. Time expended in such activities are not reimbursable. *Goodyear, supra* at 587-593; *Holt Tex., Ltd. v. Hale*, 144 S.W.3d 620 (Tex. App. San Antonio 2004, no pet.) *Guardianship of Glasser*, 297 S.W.3d 369 (Tex. App. San Antonio, 2009, no pet.).

However, appellate attorney's fees were held proper for an ad litem who successfully appealed a trust termination and had the trust reinstated as to the ad litem's clients. *In Re White Inter Vivos Trusts*, 2009 Tex. App. LEXIS 6933 (Tex. App.—San Antonio, August 31, 2009, no pet.).

**M. Going It Alone:** Only the ad litem is appointed, not the entire law firm of the ad litem: the court's intent is that the appointed attorney act personally as an officer of the court. An ad litem may not be compensated for time expended by other attorneys, unless the court has made a specific finding that the other attorney's services were reasonable and necessary under a particular extenuating circumstance. *Goodyear, supra* at 588; *Jocson, supra* at 271. Appendix R is an application and order to seek such authority.

However, in extenuating circumstances, and with prior permission of the court, additional counsel and/or support staff may be employed. This will still be subject to a subsequent finding by the court that the additional attorney's services were reasonable and necessary. *Goodyear Dunlop v. Gamez, supra*; *Guardianship of Glasser, supra* (Attorney Ad Litem in guardianship allowed to retain litigation counsel); accord *Scally v. Scally*, 2010 Tex. App. LEXIS 8045 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2010, no pet.) (Ad litem in SAPCR proceeding retained counsel to collect awarded fees.) The applicant must show particular, unusual circumstances why it was necessary for persons other than the ad litem to fulfill the ad litem's duties. *Ford Motor Co v Garcia, supra*. Additionally, full narrative detail must be provided for any services performed by anyone other than the ad litem. *Ibid*.

Additionally, legal work performed by legal assistants may be recovered as an element of attorney's fees. *Gill Sav. Ass'n v. Int'l Supply*, 759 S.W.2d 697, 702 (Tex. App.—Dallas 1988, wr. denied). The proof required for billings by legal assistants is set forth in detail in that opinion. *More recently, see Ford Motor Company v. Garcia*, 363 S.W.3d 573 (Tex. 2012) for specific application to ad litem. In *Guardianship of Alford*, 596 S.W.3d 352 (Tex. App.—Texarkana, 2020,

no pet.) the Texarkana appeals court revised an award to a paralegal for only work performed 'traditionally been done by any attorney.' Answering and placing telephone calls and uploading documents did not qualify. *See cases cited therein*.

**N. Fee Applications:** The attorney representing the Applicant, the Guardian Ad Litem and the Attorney Ad Litem must all file an Application for Payment of Fees and Expenses (including a detailed and itemized narrative statement including the dates, description of services, time expended and hourly rate as an exhibit with a separate Order attached. Appendices Ae, Af. Tex. Est. Code §667, *Woollett v. Matyastik*, 23 S.W.3d 48 (Tex. App.—Austin, 2000, pet denied).

It is a good idea to include any time expended but not charged-for to present the reviewer with a complete picture of activities. When appropriate, reflect problems encountered which cause excessive time to be expended.

A trial court abuses its discretion when it awards compensation for a Guardian Ad Litem's non-necessary activities or where the ad litem performs services beyond the scope of the appointment. *Ford Motor Company v. Stewart, Cox, and Hatcher*, 390 S.W.3d 924 (Tex. 2013) In *Guardianship of Vavra*, 365 S.W.3d 476 (Tex. App.—Eastland 2012, no pet.), the appeals court held that, where the ad litem did not even meet with the proposed ward, it was error to award any fees.

**Caveat: A policy of minimum billing (i.e. ten-minute or quarter-hour increments), is legally insufficient to support an application for fees. *Ford Motor Co v Garcia, supra*.**

Similarly, a court cannot "back into" the number of hours necessary by dividing the amount requested by a court-approved maximum rate. Spell it out. *Ibid*.

**O. County-Pay Cases:** If, after examining the proposed ward's assets, the court determines that the proposed ward is unable to pay for the services provided, the county is responsible for the cost of these services. Tex. Est. Code § 1155.051 *Overman v. Baker*, 26 S.W.3d 506 (Tex. App.—Tyler 2000, no pet.) In such cases, the Court approves fees under a budget approved and overseen by the Commissioners Court. Consequently, attorneys cannot be reimbursed at their regular hourly rates. "County-Pay" cases may be on a "capitated fee" (reduced set fee) basis or on a reduced hourly rate (if the case demands exceed the norm - i.e. "the Guardianship from Hell"). Appendices Ae, Af.

**P. Private-Pay Cases:** When an ad litem can be



compensated from a solvent estate, the Court's award of reasonable attorney's fees begins with the Court's determination of whether the representation reasonably required of (and actually provided by the ad litem) is "typical" or "normal." The court's analysis is based on the "Garcia" factors (*supra*) as well any unusual circumstances peculiar to probate and guardianship. These factors determine the extent to which the fee allowed should be more than, equal to, or less than the typical or normal fee. In general, ad litem fees are less than the fee of the applicant's attorney unless special factors are present.

If a Guardianship Management Trust is created, regardless of whether a guardian is also appointed, the Guardian Ad Litem may be compensated from the available funds of the management trust. Tex. Est. Code § 1102.005. Also, the available funds of the management trust are a source for payment or reimbursement of costs under Tex. Est. Code §§ 1052.051(f) & 1155.151(a).

A hotly contested guardianship application can make fees skyrocket, not only for retained counsel, but also for the ad litem. *Guardianship of George v. Garcia*, 2016 Tex. App. LEXIS 12909 (Tex. App.—San Antonio, December 7, 2016, no pet.).

**Q. Hourly Rates:** The hourly rates allowed will vary, depending on the nature of the case and the experience of the attorneys involved. Rates may vary from \$150/hr for no-asset, county-pay cases to \$200+/hr for complex litigation (wrongful death/ malpractice/ fiduciary breach).

Although your local court will most likely have a published policy regarding what can and cannot be charged for, an attorney's hourly rate is expected to cover the office overhead (everything except actual out-of-pocket expenses such as filing fees).

**R. Expenses:** Separate expenses and travel costs should be detailed in attached exhibits. Check your mileage with one of the online map services like *Google Maps* or *Mapquest*. If you don't, the court may.

**S. Do Not Bill For:**

1. CONSULTATIONS WITH COURT STAFF regarding procedural questions unless the court staff has specifically requested information to be provided not ordinarily contained in properly drafted pleadings or if the fee petition reveals special circumstances requiring the attorney to seek guidance from the Court.  
2. TELEPHONE CALLS inquiring about the status/location of paperwork with probate court staff or the Clerk's office. Attaching a self-addressed, stamped envelope to all applications and proposed orders (with copies to be file-marked and conformed) coupled with payment of any required filing and posting fees will

help ensure attorneys receive their conformed copies of submitted orders. This will reduce or eliminate the necessity for calls to the Clerk's office to check on the status of a particular order.

3. PORTAL-TO-PORTAL TIME PLUS MILEAGE!

**T. When to File:** The application and order for fees and expenses should be filed shortly after the hearing on the guardianship. You should be prepared to report to the court at the hearing on any continued need for your appointment or whether you should be discharged. If the Guardian Ad Litem has brought the application, the application for fees should be made after the guardian has qualified.

**CAVEAT: Since your application for fees and expenses is supported by an affidavit, if you file your fee application before the hearing, isn't that perjury if you have sworn that you have already completed or performed all the services required? Think about it.**

In *McIntyre v. McIntyre*, 2019 Tex. App. LEXIS 8437 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2019, no pet.), even though the ward had died, the appeals court recognized the jurisdiction of the probate court continued to enable it to act on a pending application for fees of an attorney ad litem.

**U. What to Do with the Fee Application:** e-File the application (after the hearing) as you would any other pleading and let it be handled through channels.

Because all appointee fees must be reported to the supreme court's Office of Court Administration (Tex. Govt. Code Ch. 36), your court may have additional requirements on how the order is to be submitted. Check your local listings.

**V. Separate Order** – Even though the enactment of Tex. Govt. Code Chap. 36 (Reporting of Fees & Appointments by the Clerk) made massive changes in the reporting requirement of fees awarded to court appointees, there is still a specific requirement that an award of ad litem fees be in a separate order. Texas Supreme Court Order Regarding Mandatory Reports Of Judicial Appointments & Fees, Misc. Docket No. 94-9143, (Sept. 21, 1994) and Misc. Docket No. 07-9188 (Oct. 30, 2007).

**W. Specific Areas of Concern on Fee Applications:**

1. CONTESTS: Contests in guardianships are particularly hard on ad litem because lawyers just want to do the right thing. In a guardianship or heirship contest where the applicant has retained counsel and the contest is by a third party disputing something other than incapacity, neither the Guardian Ad Litem nor the Attorney Ad Litem should confuse their responsibilities with that of privately-retained counsel.



*Pointer 1:* It may not be your fight. If it is, and your client (the proposed ward) has no assets from which you may be paid, strongly consider a motion for Security for Costs and/or a conference with the court as to the scope of your responsibility.

*Pointer 2:* If you, as Attorney Ad Litem, require the Applicant to jump through an inordinate number of hoops before you will consent to a settlement, the court may not share your views as to whether your actions on behalf of your client were both reasonable and necessary.

2. NEVER FILE FEE APPLICATIONS AS CLAIMS: Despite the dicta in the case of *Guardianship of Fortenberry*, 261 S.W.3d 904 (Tex. App.—Dallas 2008, no pet.), fee applications should be filed as separate pleadings. Requests for fees should never be “imbedded” in some other pleading. Fee applications should not be filed *as claims against the estate unless* the estate is insolvent or the Guardian has indicated they will refuse to pay when application is made. Why take the chance that you may be caught in the claims process and have to file suit for your fees when you can simply apply for the fees and meet any questions head-on? In *Guardianship of Macer*, 558 S.W.3d 222 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2018, no pet.) the appellate court voided the trial court’s award of attorney’s fees to the son of the ward because it was a claim under Tex. Est. Code § 1002.005(1), but it did not comply with statutory requirements for presentment of claims, including Tex. Est. Code Ann. §§ 1157.001, 1157.002, 1157.004, 1157.053, and 1157.055. In *re Archer*, 2004 Tex. App. LEXIS 327 (Tex. App.—San Antonio 2004, pet. denied)

In *West Texas LTC Partners, Inc. v. Collier*, 2020 Tex. App. LEXIS 190 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2020, no pet.), the appellate court recognized the 120-day permissive notice to creditors under Tex. Est. Code § 1153.004 acted as an absolute bar if no claim was timely presented in the guardianship and that such a claim cannot later be pursued in the estate of a deceased ward.

## **XII. HEIRSHIP PROCEEDINGS**

For a thorough discussion of the duties and responsibilities of the Attorney Ad Litem in an heirship determination, search for: “*The Intestacy Manual – Tarrant County.*”

## **XI. CLOSING THOUGHTS**

### **A. Removal of an Ad Litem**

1. An ad litem may be removed by the trial court, but only after proper procedures are followed and a sufficient record made showing some principled reason to justify the removal or replacement exists. *Coleson v.*

*Bethan*, 931 S.W.2d 706 (Tex. App.—Fort Worth 1996, no pet.).

For whatever reason, if the removal of an ad litem is sought - disagreement with the conduct of the case, failure or refusal to act, an interest adverse to that of the ward - the decision to appoint or to replace an ad litem must be based upon the best interests of the ward, not the interests of the ad litem, the guardian or the guardian’s attorney. *Urbish v. 127th Judicial Dist. Court*, 708 S.W.2d 429 (Tex. 1986) (orig. proceeding); *Coleson, supra*.

2. STANDARD OF REVIEW: The trial court’s decision to remove is reviewed on an abuse of discretion standard. *Texas Indemnity Ins. Co. v. Hubbard*, 138 S.W.2d 626, 632 (Tex. Civ. App.—1940, writ dismissed judgment. cor.); *Coleson, supra*.

3. PROCEDURE: Where the Estates Code is silent, the Texas Rules of Civil Procedure govern the procedures to be followed in county courts. Tex. R. Civ. Proc. 2.

A. Motion to Show Authority: Where perhaps the Attorney Ad Litem’s duties had been fulfilled but the Attorney Ad Litem continued to act and failed to seek his or her discharge, removal could be sought under Tex. R. Civ. Proc. 12, with a sworn “Motion to Show Authority” challenging the ad litem’s authority to act on behalf of the client. Ten days’ notice to the “challenged” attorney must be given before the hearing date. Tex. R. Civ. Proc. 21a.; *Garner & Goehrs, Guardianship Update Including 1995 Legislation, 1995 State Bar of Texas Advanced Estate Planning and Probate Course*.

B. Temporary Restraining Order: Where a trial court has specifically continued the ad litem’s appointment, the court, on its own motion, or on that of opposing counsel, may seek removal of the ad litem by motion and request a temporary restraining order under Tex. R. Civ. Proc. 680. Like any TRO, it may be granted without notice, but would expire within fourteen days and should be immediately set for hearing at the earliest possible date. *Ibid*.

*Regarding attempts by opposing counsel to “get rid” of an ad litem, see Keith v. Solls*, 256 S.W.3d 912, 919 (Tex. App.—Dallas 2008, no pet.).

### **B. Re-Activation of the Ad Litem**

Some specific instances call for the reactivation of one or the other of the ad litem.

1. RE-ACTIVATION TO INVESTIGATE: When the guardian himself or herself becomes incapacitated, resigns, or is otherwise removed for misfeasance, malfeasance or nonfeasance, the court may either reactivate the ad litem for investigative and monitoring purposes or appoint the ad litem as the successor guardian. (Tex. Est. Code §§ 1203.101ff). This is often

preferable to the immediate appointment of a successor guardian because of the qualified judicial immunity of the Guardian Ad Litem. (Tex. Est. Code §1054.056).

2. GUARDIAN SEEKING TO PURCHASE FROM ESTATE: Under Tex. Est. Code § 1158.653(b), when a guardian seeks to **purchase property** of the estate, an Attorney Ad Litem must be appointed to represent the ward's interests.

3. ESTATE PLANNING, TAX-MOTIVATED, CHARITABLE, NON-PROFIT & PERIODIC GIFTS: When a guardian seeks authority to establish an estate plan for the ward under Tex. Est. Code § 1162ff, a Guardian Ad Litem may be appointed for the benefit of the ward or any interested party. Tex. Est. Code § 1162.008.

4. MODIFICATION OR RESTORATION: When an informal request is made to **modify the guardianship or restore the ward's capacity** in whole or in part under Tex. Est. Code §1202ff, the court may appoint a Guardian Ad Litem to investigate Tex. Est. Code § 1202.054. The court is required to notify the Ward by letter within thirty days that an investigator or guardian ad litem has been appointed and provide contact information. Tex. Est. Code § 1202.054(b-2). If the proceeding goes forward, the court shall appoint an Attorney Ad Litem to represent the ward. Tex. Est. Code §1202.101. Additionally, the ward is authorized to retain counsel in such event. Tex. Est. Code § 1202.103. *Guardianship of Croft*, 2016 Tex. App. LEXIS 13437 (Tex. App.—Houston [14<sup>th</sup> Dist.] December 20, 2016, no pet.). See *supra* for the discussion regarding Supports and Services and the ability of the Ward to make decisions regarding residence.

5. SETTLING AND CLOSING – GUARDIANSHIP: During the process of the **settling and closing** of the guardianship of the estate, an Attorney Ad Litem may be appointed for the ward's interests. Tex. Est. Code § 1204.001(e). Specific provision is now made to allow the ad litem's compensation in this case to be taxed as costs.

6. FINAL SETTLEMENT OF ESTATE: In settling and closing a ward's estate, an Attorney Ad Litem may be appointed under Tex. Est. Code § 1204.002 if:

- the ward is deceased and has **no executor or administrator** or
- the ward is a **non-resident** of the state or
- the ward's **residence is unknown**.

7. ATTORNEY AD LITEM CERTIFICATION STILL REQUIRED: Even after the grant of letters of guardianship, any Attorney Ad Litem appointed must be certified under Tex. Est. Code § 1054.201. *Guardianship of Marburger, supra*.

In *Guardianship of Wehe*, 2012 Tex. App. LEXIS

8931 (Tex. App.—Corpus Christi, October 25, 2012, no pet.), it was held that where counsel lacked certification under Tex. Est. Code § 1054.201, the non-certified attorney lacked standing to appeal the guardianship.

**C. Changing Hats – Make an Appearance** - It is quite common for an experienced ad litem, once a guardianship is granted, to be asked to represent the guardian. This is no problem, since the ad litem has been discharged upon the granting of the guardianship. Tex. Est. Code §§ 1054.002, 1054.053, but you should make an appearance in your new role since you now represent a different party. (Otherwise, the clerks may not get it straight.)

**D. (Yet More) Practice Pointers** - When you think you're through, you're not through. Think through the process and make sure you haven't been counting on someone else to do what you should have done.

- Use the flowchart as starting point for checklist of responsibilities. Develop your own checklists for scheduling the progress in a guardianship matter. Create a memo knowledge bank

- Always listen for the dog that is not barking.

**E. Real Continuing Education** - Traditionally, ad litem certification training ends with the process of appointing the guardian. However, it is not uncommon for an ad litem to be asked by the newly-appointed guardian to represent the guardian to help with the administration of the guardianship.

Occasionally, an ad litem is "pressed" into service to serve as guardian, either because a guardian cannot be found, the appointed guardian cannot qualify, or the guardian must be removed.

In any event, it is vital for the probate attorney to have a basic understanding of the administration of a supervised estate. Learning how a guardianship estate is handled also gets you ready to handle the administration of a decedent's estate.

**F. Think About Your Client** – It's hard not to get a bit jaded in the rush and confusion of this whole process, but it is really, really important to think a bit about who it is that you represent.

It is popular to complain about the relentless political correctness that pervades our lives but, at least look at the following list suggested by several bills filed this last legislative session (which did pass). Although they are intended to guide and constrain legislators in their use of language, they are good lists to review to help us be more careful in our use of language:

**Person First Respectful Language.** Tex. Gov't Code 392.001ff - *The legislature finds that language used in reference to persons with disabilities shapes and reflects society's attitudes toward persons with disabilities. Certain terms and phrases are demeaning and create an invisible barrier to inclusion. It is the intent of the legislature to establish preferred terms and phrases for new and revised laws by requiring the use of language that places the person before the disability.*

<u>Instead of:</u>	<u>Consider:</u>
mentally retarded	intellectual or developmental disabilities
mental retardation	persons with intellectual disabilities
the mentally retarded	persons with disabilities
disabled/ developmentally disabled	persons with developmental disabilities
	persons with mental illness
mentally disabled	persons with intellectual disabilities
mentally ill/ mentally retarded	cripple/ crippled
handicapped	deaf/ audiotologically impaired/
hearing impaired/ hearing loss	persons who are deaf
auditory impairment	hard of hearing

Note that statutes and resolutions aren't invalid for failure to use the preferred terms.

**G. Clients with Diminished Capacity and New Rule 1.16** – Effective July 1, 2021, the Supreme Court adopted several amendments to the Disciplinary Rules of Professional Conduct <https://www.txcourts.gov/rules-forms/rules-standards/>.

New Rule 1.16 concerns what a lawyer may do regarding a client with diminished capacity. Former Rule 1.02(g) basically limited the attorney only to seeking a guardianship or other protective order. Rule 1.16 now gives an attorney a range of options, including informal consultations that current rules may prohibit including “consulting with individuals or entities” to “take action to protect the client,” and, seeking court action where appropriate. The rule and its comments advise the lawyer to consider the totality of the circumstances and then take appropriate action, considering the scope and severity of incapacity and the degree of threatened harm.

The rule change was approved by 9 out of 10 lawyers in the recent State Bar referendum <https://blog.texasbar.com/2021/03/articles/state-bar/texas-lawyers-approve-rule-amendments-in-2021-rules-vote/>.

**On June 3, 2018, John Oliver, on his HBO television show, Last Week Tonight, did a sixteen minute dark-humor-documentary on guardianship abuse and mismanagement. It is well worth seeing what the public is being told about guardianships today.** <https://www.youtube.com/watch?v=nG2pEffLEJo>

## **Instructions for Video Conferences and Hearings**

### **1. Required Equipment**

- A. a telephone, or
- B. a smart/cell phone with camera; or
- C. a computer with camera and microphone and internet access.

### **2. Software**

- A. Texas courts generally use Zoom video conferencing. You do not have to have zoom downloaded on your phone or computer to join, but it is more efficient to do so.
- B. For Smartphones, the Zoom app is available free at the Apple App Store for iPhones and Google Play for Android phones.
- C. For computers and tablets, Zoom software is available free at Zoom.us.
  - 1. Go to [zoom.us](https://zoom.us) and download the *Zoom Client* well in advance of the hearing. Click on the “Resources” tab at the top right and select “Download Zoom Client.”
  - 2. While registration with Zoom is not required for use, it is encouraged and registration is free.
  - 3. Take some time to familiarize yourself with the features of the app or software, particularly the audio and video controls, testing your speakers and microphone, the mute feature and the shared screen feature.

### **3. Setting the Hearing**

- A. Following the procedures of the court or the judge, make arrangements for the time and date of the hearing.
- B. Advise the Judge whether a Court Reporter and/or any translators/interpreters will be required.
- C. Confirm your setting request by e-mail and a confirmation letter e-filed to all attorneys, court personnel and the Judge. In your email and confirming letter, confirm the following to the Court:
  - 1. the date, time and expected length of the hearing,
  - 2. that the attorney(s) and witness(es) have the ability to connect by computer, tablet or cellphone (video and audio) to the Zoom meeting portal,
  - 3. the email addresses to whom the Court should send the Zoom invitation and
  - 4. for an uncontested hearing, whether a Notary will be present with the witnesses.
- D. At least three (3) business days before the hearing date, e-file copies of any exhibits (including the Will) and/or written testimony to be offered (all pre-marked with exhibit stickers) and a Proposed Order in Microsoft Word, ensuring the judge and all counsel are on the e-filing distribution list.
- E. Prior to the time for the hearing, the Judge will send an e-mail containing an “invitation” to “join” the hearing (attorneys only). Attorneys are responsible for forwarding the invitation link to their clients and witnesses if the clients and witnesses will be joining the hearing from a location separate from the attorney. The better practice is to have the applicant and any witnesses present at each of the attorneys’ offices (with Notaries present).
- F. Remote hearings are still official court proceedings. Courtroom decorum and professional demeanor will continue to be observed.
- G. Video and audio recordings (other than by the official court reporter) are prohibited. When a record is requested, the court’s official court reporter/recorder will make the record, and transcripts may be ordered as with any other hearing.

### **4. Conducting the Hearing**

- A. It is strongly recommended that attorneys and witnesses giving testimony appear by video rather than by telephone.
- B. The Court Reporter will appear remotely via Zoom.
- C. Interpreters and translators may appear by audio only through zoom; however, they should have access to a computer screen to be able to review documents for translation.

- D. On the day of the hearing, participants should click the link in the Zoom invitation at least 5 minutes before the scheduled hearing time to test the microphone, speakers, and camera. As the participants join the hearing by the Zoom link, they will be admitted to a ‘waiting room’ until everyone has joined.
- E. At the time for the hearing, the Judge will initiate the session, admitting the participants to the hearing, where each participant will be shown on a shared screen with all participants.
- F. The Judge will call the case and swear all the witnesses.
- G. Application to Probate a Will,
  - 1. Counsel may either ask the court to take judicial notice that the document filed as the Will is an original document or offer testimony to establish the authenticity of the filed Will.
  - 2. A copy of the Will (previously tendered to the court (see 3.D above) will be made available by the judge through a shared screen (NOTE: It is advisable for counsel and all witnesses to be *provided with a copy of the Will for ready reference*).
- H. Guardianship Hearings

A copy of the Certificate of Medical Examination or Determination of Intellectual Disability will previously have been made available to the judge and all counsel.
- I. Counsel may then propound the questions to the witness(es) to establish the other facts necessary to prove the application.
- J. Documentary evidence may be submitted and offered using the “file” upload button on the right side in the “Chat” section or by using “Screen Share”. Copies of all documents should have been provided to the Judge and other counsel in advance
- K. Counsel must wait until questions are completed before announcing an objection. Do not interrupt or talk over one another.
- L. No hearing documents (Proof of Death and Other Facts, Proof of Guardianship Facts, Proof of Signature, Proof by Subscribing Witness, Oath, Unsworn Declaration, etc.) are to be executed before the witness(es) are sworn by the Judge and all testimony is completed.
- M. Once the hearing is concluded and the Judge has announced a decision, the witnesses may execute their testimony which has been reduced to writing and the appointed personal representative may take the oath before the Notary, all of which is then e-filed.

***CAVEAT: Some courts have very specific protocols regarding the signing and filing of hearing documents before an order can be signed and also may not allow an oath or unsworn declaration to be signed before the appropriate Order has been signed and e-filed. Determine the specific protocols for the particular court in which you will be appearing.***

## GUARDIANSHIP SUMMARY

### OVERVIEW

- I. What is a guardianship?
- II. When is a guardianship necessary?
- III. How does one get a guardianship started?
- IV. Who will serve as guardian?
- V. How is the guardianship supervised?

### INTRODUCTION

The laws governing guardianships are principally found in the Texas Estates Code §§ 1001.001 – 1356.056. The Courts are required to customize each guardianship to fit the needs of the Incapacitated Person. The Courts are also required to supervise guardianships more closely and are given three methods to do so:

1. Guardian of the Person Reports (Tex. Est. Code §1163.101);
2. The Court Visitor Program (Tex. Est. Code §1054.102); and
3. Annual Determination (Tex. Est. Code §1201.052)

This supervision is in addition to the auditing process that is mandated if the incapacitated person has an estate.

Statutory Probate Courts also employ Court Investigators who review guardianship applications to determine if less restrictive alternatives to guardianship are available, to investigate complaints about guardianships and, generally, to act as a liaison between the public, social workers, attorneys and the Court.

In conducting their investigation, the Court Investigators are authorized to compel the production of the financial records of the Proposed Ward. Tex. Fin. Code § 59.006(a)(9).

### I. WHAT IS A GUARDIANSHIP?

**A. Basic Definition** A guardianship is a Court supervised procedure where the Court gives one person the legal authority to make personal or financial decisions for a person who can no longer make such decisions for himself or herself.

**B. Incapacitated Person** A person for whom a guardianship is necessary is known as an “Incapacitated Person” which is defined in Tex. Est. Code § 1002.017 as

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.

**C. Policy – Purpose of Guardianship** Unless a Court determines that a guardian with full authority over an IP is necessary, the Court should limit the authority of the guardian so that it is the least restrictive authority possible. Tex. Est. Code § 1001.001 provides that:

1. A court may appoint a guardian with full authority over an Incapacitated Person; or
2. A court may appoint a guardian with limited authority over an Incapacitated Person:
  - a. As indicated by the Incapacitated Person’s actual mental or physical limitations, and
  - b. Only as necessary to promote and protect the well-being of the person.
3. Except for minors, the Court may not use age as the sole factor in determining whether to appoint a guardian for the person.
4. In creating a guardianship that gives a guardian limited power or authority over an Incapacitated Person, the Court shall design the guardianship to encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person.

**D. Guardian** A guardian is the person who accepts the Court’s appointment to be responsible for making decisions for the Incapacitated Person. A guardian has only those powers specified in the Order Appointing Guardian. Generally, two types of guardians exist:

1. Guardian of the Person – A guardian of the person has the:
  - a. right to have physical possession of the Incapacitated Person and to establish the Incapacitated Person’s legal domicile;
  - b. duty of care, control and protection of the Incapacitated Person;
  - c. duty to provide the Incapacitated Person with clothing, food, medical care and shelter; and
  - d. power to consent to medical, psychiatric, and surgical treatment other than the in-patient psychiatric commitment of the Incapacitated Person.

2. Guardian of the Estate – A guardian of the estate of the Incapacitated Person has the following powers and duties:

- a. to possess and manage all property of the Incapacitated Person;
- b. to collect all debts, rentals or claims that are due to the Incapacitated Person;
- c. to enforce all obligations in favor of the Incapacitated Person; and
- d. to bring and defend suits by and against the Incapacitated Person.

## II. WHEN IS A GUARDIANSHIP NECESSARY?

**A. Common Situations** – intellectual disability, Alzheimer’s dementia, multi-infarct dementia, Down’s syndrome, Parkinson’s disease, closed head injuries, chronic mental illness, excessive short term memory loss.

**B. Guardianship Not Appropriate** - treatable mental illness, drug addiction, alcoholism, homelessness, spendthrifts, persons receiving only social security benefits (no Guardian of the Estate is necessary).

**C. Less Restrictive Alternatives – Mandated by Tex. Est. Code § 1001.001.** Court Investigators are to investigate the circumstances of each application to determine if a less restrictive alternative to guardianship is available. In counties without a Court Investigator, the attorney ad litem for the Incapacitated Person should examine these alternatives. A list of some of the most common Less Restrictive Alternatives is attached to this paper.

## III. STARTING A GUARDIANSHIP

**A. Courts** Statutory Probate Courts, County Courts at Law and County Courts (in that order) have jurisdiction of guardianship cases.

**B. Attorneys** Most Courts will allow only attorneys to file a guardianship application. In an ideal situation, a concerned family member will contact an attorney to file an application to be appointed as guardian of an Incapacitated Person.

**C. Court Initiated Guardianships** - The Texas Estates Code provides that “if a Court has probable cause to believe that a person domiciled or found in the county in which the Court is located is an incapacitated person, and the person does not have a guardian in this state, the Court shall appoint a guardian ad litem or a court investigator to investigate and file an application for the appointment of a

guardian of the person or estate, or both, of the person believed to be incapacitated.” Tex. Est. Code § 102.001.

In Tarrant County, the Courts require an information letter and a doctor’s letter to establish probable cause. If the Incapacitated Person’s incapacity is intellectual disability, the Court must be provided with a Determination of Intellectual Disability (DID) pursuant to Tex. Est. Code § 1101.104. This section states that if the basis of the Proposed Ward’s incapacity is intellectual disability, a physician or psychologist shall conduct an examination according to the rules adopted by the Texas Department of Mental Health and Mental Retardation and shall submit written findings and recommendations to the Court. This report must be based upon an examination conducted not earlier than twenty-four months before the date of a hearing to appoint a guardian for the proposed ward. Unless the Incapacitated Person is in imminent danger, Court-Initiated Guardianships take at least 4 to 6 weeks from the date the Court receives the proper letters.

### **D. Social Worker Involvement**

1. Adult Protective Services If there is concern that an adult is being abused, exploited or neglected, Adult Protect Services should be called (1-800-252-5400). APS sends a worker to investigate. If APS believes a guardianship is necessary, the worker will take a doctor to examine the Incapacitated Person. If no emergency action is necessary, APS should make a referral to the Texas Health and Human Services Commission for a guardianship investigation.

2. Nursing Home and Hospital Social Workers Social Workers at nursing homes and at hospitals have also used the court initiated guardianship procedure to begin the guardianship process for clients or patients who are Incapacitated Person. Hospital discharge planners should determine if the patient is an IP as soon as possible since the procedure may take a while. Stating that the **Incapacitated Person** will be in imminent danger when discharged is not considered imminent danger by most courts.

### **E. Guardian Appointment Process**

1. An Application for Guardianship is filed by a private attorney, guardian ad litem or court investigator. Only attorneys can file applications.

2. The Sheriff or Constable personally serves the Incapacitated Person with a copy of the Application.

3. The Court appoints an Attorney Ad Litem to represent and advocate for the Incapacitated Person.

4. The known relatives of the Incapacitated Person must receive statutory notice of the application.

5. Unless the application is for the appointment of a temporary guardian, the guardianship cannot be

established until the Monday following ten days from the date the Incapacitated Person is personally served.

6. The Attorney ad litem must personally visit the Incapacitated Person and determine if the Incapacitated Person wants to contest the guardianship.

7. The applicant's attorney must file a doctor's letter with the court which states that the Incapacitated Person is incapacitated and generally describes the nature of the incapacity.

8. A hearing date is set with the Court. The Incapacitated Person must attend the hearing unless the Court determines that it is not in the best interests of the Incapacitated Person to attend.

9. The Judge or jury hears testimony and decides if a guardianship is necessary, what powers the guardian should have, how the Incapacitated Person's rights should be limited and whether the person seeking to be appointed guardian is suitable.

10. The Judge then signs an Order Appointing Guardian. The Guardian must file an Oath or sign an Unsworn Declaration and file a Bond in order to qualify. The Clerk then issues Letters of Guardianship to the guardian.

**IV. WHO WILL SERVE AS GUARDIAN? - Tex. Est. Code §§ 1104.051ff & 1104.101** provides guidance for the priority of persons seeking to be appointed guardian.

**A. Guardian of a Minor**

1. If the parents live together, both parents are the natural guardians of the person of the minor children by the marriage. One of the parents is entitled to be appointed guardian of the children's estates. If the parents disagree, the court shall appoint the parent who is better qualified to serve. If the parents do not live together, the court shall appoint a guardian considering only the best interests of the child or children. If one parent is deceased, the surviving parent is the natural guardian and entitled to be appointed guardian of the estate for the children. Tex. Est. Code § 1104.051.

2. If the minor has no parents, or no parent is suitable for appointment,

- a. the court is to appoint a guardian designated by a deceased parent in a will or written declaration. Tex. Est. Code § 104.053
- b. if there is no designation by will or written declaration, and two or more eligible persons are equally entitled to be appointed guardian, the priority of appointment is as follows (Tex. Est. Code § 1104.052):

- 1. the nearest of kin ("ascendant") in the direct line of the minor, considering the minor's best interests; or

- 2. the nearest of kin of the minor, considering the minor's best interests; or
- 3. a qualified person.
- c. If the minor is at least 12, the minor may select a guardian in writing, subject to the court's finding that it is in the best interest of the minor. Tex. Est. Code § 1104.054.

**B. Guardian of an Adult**

The overriding concern of the court is to consider the best interests of the Incapacitated Person. If two or more eligible persons are equally entitled to be appointed guardian, the priority of appointment is as follows (Tex. Est. Code § 1104.102):

- a. the spouse of the Incapacitated Person;
- b. the nearest of kin, considering the minor's best interests; or
- c. an eligible person who is best qualified to serve.

**V. HOW IS A GUARDIANSHIP SUPERVISED?**

**A. Annual Reports** A guardian of the person is required to file a guardian of the person report each year concerning the Incapacitated Person's mental and physical condition and stating any change of the residence of the Incapacitated Person or guardian. A guardian of the estate is required to file an annual account stating all receipts, disbursements, cash on hand, and assets being administered. Failure to file either of these reports may lead to fines and/or removal.

**B. Court Visitor Program** Each statutory probate court is required to establish a Court Visitor Program. As a part of this program a visitor makes an annual visit on each Incapacitated Person who is the subject of a guardianship. The Court Visitor personally visits the Incapacitated Person and the guardian and reports his or her findings and conclusions to the Court concerning the social and intellectual functioning of the Incapacitated Person as well as living conditions. If the Court Visitor recommends an increase or decrease in the guardian's powers or removal of the guardian or guardianship, the Court will appoint a Court Investigator or Guardian ad litem to investigate, and, if necessary, to file a petition to modify the guardianship order or to remove the guardian or guardianship.

**C. Annual Determination** Each Court is required to make an annual review and determination of whether a guardianship should be continued, modified or terminated. In making this annual determination, the Court reviews the Court Visitor report and the guardian of the person report.

*Rev. July 2017*



**COURT INITIATED GUARDIANSHIPS IN  
TARRANT COUNTY PROBATE COURTS**

**If a court has probable cause to believe that a person domiciled or found in the county in which the court is located is an incapacitated person, and the person does not have a guardian in this state, the court shall appoint a Guardian Ad Litem or court investigator to investigate the person's circumstances to determine whether: (1) the person is an incapacitated person; and (2) a guardianship is necessary.** Tex. Est. Code § 1102.001

The Tarrant County Probate Courts have implemented the following procedures to comply with this statute.

1. The court must receive a **fully completed** Information Letter from a concerned party such as Adult Protective Services, a hospital, a nursing home or a relative or friend of the Proposed Ward. This letter is a request for the court to initiate a guardianship proceeding and should not be confused with an Application for Appointment of a Guardian which must be filed by an attorney. **This should be furnished on the form prescribed by the court (included). All issues on the form must be addressed.**

2. The Court must be supplied with a letter or certificate describing the Proposed Ward's incapacity from a physician (M.D. or D.O.) licensed to practice medicine in Texas. This must be furnished on the form prescribed by the court (included). All issues on the form must be addressed. **If the basis for incapacity is Intellectual Disability, a Determination of Intellectual Disability (DID) must be furnished.**

3. Assignment to a Court - The Information Letter and Doctor's Certificate should be mailed to:

Tarrant County Probate Courts  
Tarrant County Courthouse  
100 W. Weatherford  
Fort Worth, Texas 76196

(Requests may be sent to the court by fax at 817/884-3178, but must be followed by originals.)

Once these documents are received, the case will be assigned to either Probate Court One or Two.

4. Upon the motion of the Court Investigator or upon the court's own motion, the court will then either appoint a Guardian Ad Litem or the Court Investigator to investigate and, if necessary, file an Application for the Appointment of a Guardian of the Person or Estate, or both, of the Proposed Ward.

COMPLETION OF COURT-INITIATED GUARDIANSHIPS MAY TAKE 4 TO 6 WEEKS FROM THE DATE COURT RECEIVES THE PROPER DOCUMENTATION. ACTUAL

TIME TO A HEARING REQUIRES AT LEAST 20 TO 45 DAYS

4. The duties of a Guardian Ad Litem or the Court Investigator upon such appointment are as follows:

a. personally interview the Proposed Ward as soon as possible;

b. interview the person who filed the Information Letter concerning the Proposed Ward as well as the known relatives/friends of the Proposed Ward;

c. consider whether less restrictive alternatives to guardianship are advisable;

d. consider the necessity of filing for a temporary guardianship (see 5. below);

e. as soon as possible, file an Application for Appointment of a Guardian (if necessary) and prepare an Order Appointing Attorney Ad Litem;

f. set the case for a hearing and call the Probate Clerk's Office, to ensure that Proposed Ward is properly served and that the citation has been on file for a sufficient amount of time prior to hearing;

g. locate a person to serve as Guardian or contact Guardianship Services, Inc or the Texas Health and Human Services Commission. (amend the Application, if necessary) ;

h. file a Report of Ad Litem with the Court at least a week prior to the hearing date (if the guardianship will *not* be established, file a Final Report by way of explanation);

i. notify family members and file your affidavit as required by Tex. Est. Code § 1051.104;

j. visit with the Attorney Ad Litem concerning the Application;

k. prepare Proof of Facts, Bond, Oath (or Unsworn Declaration) and Order and attend the hearing on the Application;

l. assist the Guardian in obtaining his or her bond and letters, discuss the guardian's statutory duties and responsibilities, and (if necessary) assist in preparation of an Affidavit of Inability to Pay Costs.

5. If the Guardian Ad Litem or Court Investigator

files an Application for Appointment of a Temporary or Permanent Guardian, the Court will appoint an Attorney Ad Litem for the Proposed Ward.

6. The duties of the Attorney Ad Litem are as follows:

a. review the Application, certificates of physical, medical and intellectual examination and all the relevant medical, psychological and intellectual testing records of the Proposed Ward;

b. personally interview the Proposed Ward;

c. discuss with the Proposed Ward the laws and facts of the case, the Proposed Ward's legal options regarding disposition of the case and the grounds on which a guardianship is sought;

d. ascertain whether the Proposed Ward wishes to oppose the proceedings (if the Proposed Ward is unable to communicate, the Attorney Ad Litem is to act in best interest of the Proposed Ward).

e. file an Answer that states whether the Proposed Ward objects to the guardianship or the Proposed Guardian, or both as soon as possible;

f. visit with the Guardian Ad Litem or the Court Investigator concerning the Application;

g. represent and advocate on behalf of Proposed Ward at the hearing, bearing in mind the requirements of the Texas Disciplinary Rules of Professional Conduct 1.02(g) which states:.

"A lawyer shall take reasonable action to secure the appointment of a Guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client."

h. file an Application for Payment of Fees and Order (form included) and report on the need for continuation of the appointment or discharge of the Attorney Ad Litem at the hearing.

***Questions concerning these procedures should be addressed to the following:***

BARRIE ALLEN 817-884-2189

Court Investigator

*ballen@tarrantcounty.com*

MARY CAROE 817-884-1897

*mecaroe@tarrantcounty.com*

Assistant Court Investigator

Probate Court Number One

100 W. Weatherford, Rm. 260A

Fort Worth, TX 76196

Fax: 884-3178

JEFF ARNIER 817-884-3395

Court Investigator

*jarnier@tarrantcounty.com*

ARLENE SHORTER 817-884-2719

*ashorter@tarrantcounty.com*

Assistant Court Investigator

Probate Court Number Two

100 W. Weatherford, Rm. 314A

Fort Worth, TX 76196

Fax: 884-1807

Judge Christopher W. Ponder, Tarrant County Probate Court 1  
Judge Brooke U. Allen, Tarrant County Probate Court 2  
100 West Weatherford Street  
Fort Worth, TX 76196

**Re: Suggestion of Need for Guardian or Need for Investigation  
of Circumstances under § 1102.001, Texas Estates Code**

Dear Judges:

I hereby request the Court to investigate the need for a guardian for or the circumstances of the following person:

Name: \_\_\_\_\_ Phone: \_\_\_\_\_  
Address: \_\_\_\_\_ Birthdate: \_\_\_\_\_  
Race: \_\_\_\_\_ SSN: \_\_\_\_\_  
Driver's License: \_\_\_\_\_

The primary reason I am requesting this investigation is (nature of incapacity):

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

This person is currently located in a:  private residence  nursing home  hospital  
 Other (Address or Name) \_\_\_\_\_

I am: Name (printed) \_\_\_\_\_  
Address: \_\_\_\_\_  
Daytime ph: \_\_\_\_\_ Pager \_\_\_\_\_  
e-mail: \_\_\_\_\_

My relationship to the person for whom the investigation is requested:

- a family member (relationship) \_\_\_\_\_
- a social worker in a:  hospital  nursing home  governmental facility
- a friend  a doctor

YES  NO There is danger to the physical health or safety of this person or to the property or assets of this person unless immediate action is taken. If "YES", explain:

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

YES  NO The danger is imminent. If "YES", explain:

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

YES  NO I have contacted the Texas Department of Family and Protective Services (800-252-5400). If "YES," the name of the caseworker is: \_\_\_\_\_

pager: \_\_\_\_\_  
date contacted: \_\_\_\_\_

To my knowledge, this person:

- YES     NO    is a resident of Tarrant County
- YES     NO    is located in Tarrant County
- YES     NO    has a Guardian in Texas. (Parents are the natural guardians of children under 18.)
- YES     NO    has executed a Power of Attorney. If "YES," to whom was it given?

Name: \_\_\_\_\_ Phone: \_\_\_\_\_  
 Relationship: \_\_\_\_\_ Social Security Number: \_\_\_\_\_  
 Address: \_\_\_\_\_

- is a minor     is an adult
- cannot provide food, clothing, or shelter for him/herself.
- cannot care for the individual's own physical health.
- cannot manage the individual's own financial affairs.

The person has the following property :(include Real Property, Cash, Bank Accounts, Certificates of Deposit, Stocks, Securities, other investments, automobiles, etc.)

Description	Value
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
TOTAL	_____

**MONTHLY INCOME:** (Show sources and amounts per month)

Description	Value
Social Security (amount received per month)	_____
Veterans Benefits (amount received per month)	_____
_____	_____
_____	_____
TOTAL	_____

**Family Members:** All immediate family members, living or deceased, must be listed. Attach additional sheets as needed.

Name: \_\_\_\_\_  Living     Deceased    Age: \_\_\_\_\_  
 Relationship: \_\_\_\_\_  YES     NO Willing to serve as Guardian?  
 Address: \_\_\_\_\_ If "YES," Social Security Number: \_\_\_\_\_  
 \_\_\_\_\_ Phone: \_\_\_\_\_

Name: \_\_\_\_\_  Living     Deceased    Age: \_\_\_\_\_  
 Relationship: \_\_\_\_\_  YES     NO Willing to serve as Guardian?  
 Address: \_\_\_\_\_ If "YES," Social Security Number: \_\_\_\_\_  
 \_\_\_\_\_ Phone: \_\_\_\_\_

Name: \_\_\_\_\_  Living     Deceased    Age: \_\_\_\_\_  
 Relationship: \_\_\_\_\_  YES     NO Willing to serve as Guardian?  
 Address: \_\_\_\_\_ If "YES," Social Security Number: \_\_\_\_\_  
 \_\_\_\_\_ Phone: \_\_\_\_\_

Non-family members who might be willing to serve as guardian. Attach additional sheets as needed.

Name: \_\_\_\_\_ Phone: \_\_\_\_\_  
Relationship: \_\_\_\_\_ Social Security Number: \_\_\_\_\_  
Address: \_\_\_\_\_

Name: \_\_\_\_\_ Phone: \_\_\_\_\_  
Relationship: \_\_\_\_\_ Social Security Number: \_\_\_\_\_  
Address: \_\_\_\_\_

\_\_\_\_\_ Generally, Texas Courts will not appoint a guardian if a “less restrictive alternative”  
(initials) *is* available. In that regard a list of less restrictive alternatives is attached to this form as  
an appendix. This is not intended to be an exclusive list, nor is it intended to substitute  
for the advice of legal counsel. However, you are requested to review this list, and  
indicate that you have done so by initialing the blank above and do not believe a less  
restrictive alternative is available.

Sincerely,

\_\_\_\_\_

**DECLARATION**

"My name is \_\_\_\_\_ and  
(First) (Middle) (Last)

my address is \_\_\_\_\_.  
(Street & Apt #) (City) (State) (Zip Code) (Country)

"I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge."

Executed in \_\_\_\_\_ County, State of \_\_\_\_\_, on \_\_\_\_\_.

\_\_\_\_\_  
Declarant

\_\_\_\_\_  
Printed Name of Declarant

# Physician's Certificate of Medical Examination

Revision October 2016

In the Matter of the Guardianship of \_\_\_\_\_,  
an Alleged Incapacitated Person

For Court Use Only  
Court Assigned: \_\_\_\_\_

## To the Physician

*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

Physician's Name \_\_\_\_\_ Phone: (\_\_\_\_) \_\_\_\_\_  
Office Address \_\_\_\_\_  
\_\_\_\_\_

YES  NO I am a physician currently licensed to practice in the State of Texas.

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

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.

*As a physician, 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?
 

<input type="checkbox"/> Mild (IQ of 50-55 to approx. 70)	<input type="checkbox"/> Moderate (IQ of 35-40 to 50-55)
<input type="checkbox"/> Severe (IQ of 20-25 to 35-40)	<input type="checkbox"/> 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 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(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’s Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Physician’s Name Printed

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

*Revised October 2016*

**LESS RESTRICTIVE ALTERNATIVES  
TO GUARDIANSHIP**

**I. INTRODUCTION**

The very first section of the guardianship law, Tex. Est. Code § 1001.001, sets forth a statement of the purpose of guardianships. A guardianship, whether plenary or limited, is to be granted:

- as indicated by the incapacitated person's actual mental or physical limitations.
- only as necessary to promote and protect the well-being of the incapacitated person.

If the scope of the guardian's authority is to be limited, the guardianship must be designed to encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person.

The primary consideration then, in fashioning a guardianship is 1) determine the actual mental or physical limitations of the proposed ward and 2) ensure the well-being of that person.

In a limited guardianship, careful consideration must be given to craft the guardianship to allow the Ward to function at their highest possible level.

In addition to the policy statement contained in TEX. EST. CODE §1001.001, mandating the use of a less restrictive alternative, as of 2015, there is now a statutory definition of "Alternatives to Guardianship" TEX. EST. CODE §1002.0015, which offers a non-exclusive list of alternatives:

1. medical power of attorney (14 below);
2. durable power of attorney(18 below);
3. declaration for mental health treatment (46 below);
4. representative payee (37, 38 below);
5. joint bank accounts (convenience accounts) (19 below);
6. guardianship management trust (24 below);
7. special needs trust (26 below);
8. pre-need designation of guardian (45 below); and
9. person-centered decision-making (6 below).

The possible alternatives to a full guardianship then, are literally the *vernacular* of guardianships. They are the language we all must learn in order to intelligently converse and be understood as we work in this area.

Some of these alternatives are furnished, in some instances, to provoke further thought. This is certainly not an exclusive list, but all of the suggested alternatives can serve to minimize, if not eliminate, the impact of a full guardianship. Some are applicable before creation of a guardianship and others afterward.

Closely allied to the concept of less restrictive alternatives is the idea of Supports and Services, addressed below.

**II. AVOIDING GUARDIANSHIP OF THE PERSON**

**1. Emergency Protective Order ("EPO")** TEX. HUM. RES. CODE § 48.208 - A procedure to remove a person lacking capacity to consent to medical services from a situation posing an immediate threat to life or physical

safety. Adult Protective Services files a verified petition and an Attorney Ad Litem is appointed. On a finding of probable cause by the probate court of the threat and lack of capacity, the person is removed to treatment and examined within 72 hours. The removal may last no longer than 72 hours unless extended by the court for up to 30 days. An application for temporary and permanent guardianship usually follows.

**2. Surrogate Decision -Making ("SDM")** – TEX. HLTH. & SAF. CODE § 313.001-.007 – For **non-emergency** medical decisions to be made for incapacitated individuals who are either in a hospital or nursing home without the necessity of a guardianship.

**Decision-Maker Priority:** 1) the patient's spouse; 2) an adult child of the patient with the waiver and consent of all other qualified adult children of the patient to act as the sole decision-maker; 3) a majority of the patient's reasonably available adult children; 4) the patient's parents; or 5) the individual clearly identified to act for the patient by the patient before the patient became incapacitated, the patient's nearest living relative, or a member of the clergy.

**Limitations on consent:** Surrogate decision-maker cannot consent to: 1) voluntary inpatient mental health services; 2) electro-convulsive treatment; 3) the appointment of another surrogate decision-maker; 4) emergency decisions; or 5) end-of-life decisions (extending or withdrawing life support).

**SDM does not:** 1) replace the authority of a guardian nor an agent under a medical power of attorney; 2) authorize treatment decisions for a minor unless the disabilities of minority have been judicially removed; 3) authorize patient transfers under Chapter 241 of the Health and Safety Code.

**Withdrawal of Life Support:** for provisions concerning withdrawal of life support where no Directive to Physicians has been executed, and in situations where there is no guardian, see TEX. HLTH. & SAF. CODE § 166.039.

**3. Surrogate Decision Making for Intellectually Disabled**

TEX. HLTH. & SAF. CODE § 597.041 – A more specialized form of surrogate decision-making, this statute allows SDM Committees to act for MR persons who reside in an intermediate care facility for the mentally retarded (ICF/MR) – Allows medical and non-medical decisions to be made by the committee.

**4. Surrogate Decision-Making for Minors When Parent Unavailable** TEX. FAM. CODE § 32.001ff - consent to

dental, medical, psychological, and surgical treatment of a child by persons authorized in statute.

**5. Authorization Agreement for Non-Parent Relative**

TEX. FAM. CODE Ch. 34 - A parent may authorize a grandparent, adult sibling or adult aunt or uncle to have decision-making authority for a minor child for: healthcare, insurance coverage, school enrollment, school activities, driver's education, employment and application for public

benefits. This essentially authorizes the designee to do anything a guardian of the person could do.

The official form, promulgated by the Texas Department of Family and Protective Services and identified as "Form 2638", can be accessed at: [www.dfps.state.tx.us/documents/Child\\_Protection/2638.pdf](http://www.dfps.state.tx.us/documents/Child_Protection/2638.pdf)

**6. Temporary Authorization to Consent to Voluntary Inpatient Mental Health Services for a Child** - TEX. FAM. CODE CHAP 35A; TEX. HLTH. & SAF. CODE § 572.001ff - Allows designated adult non-parent family members (grandparent, adult sibling or adult uncle or aunt) with actual custody of a minor to seek a court order for temporary authorization to consent to voluntary inpatient mental health services for that child. The petition is filed and heard in district court and must be accompanied by a CME for mental. After a hearing and notice as specified in the statute, the court may grant authority for the Applicant to give consent for voluntary inpatient mental health services. The authority expires on the earliest of 10 day, the discharge of the child from the mental health facility or the granting of a temporary managing conservatorship.

**7. Supported Decision-Making Agreements** TEX. EST. CODE Ch. 1357 - Somewhat similar to a Power of Attorney, it is an agreement between 1) an adult with disabilities regarding his or her Activities of Daily Living ("ADLs"), but who is not incapacitated and 2) a "Supporter" who is willing to assist in: 1) understanding the options, responsibilities, and consequences of the life decisions, without actually making those decisions for the disabled adult and without impeding the adult's self-determination; 2) obtaining the relevant information necessary (health, financial, or educational - the adult may execute HIPAA or similar releases to facilitate the information gathering); 3) understanding the information gathered; and 4) communicating those decisions to the appropriate persons.

The "life decisions" could include decisions regarding obtaining food, clothing, and residence and cohabitation choices; the supports, services, and medical care to be received; financial management assistance; and workplace choices.

Such an agreement extends until terminated by either party or by the terms of the agreement or if the Department of Family and Protective Services validates findings of abuse, neglect, or exploitation by the Supporter against the adult or the Supporter is found criminally liable for such actions.

A permissive form is supplied in the statute. The agreement must be signed by both the disabled adult and the Supporter either in the presence of two or more subscribing witnesses (above age 14) or a notary public.

**8. Emergency Medical Treatment Act** TEX. HLTH. & SAF. CODE § 773.008 - In certain limited circumstances involving emergency situations, consent to medical treatment does not have to be given, it is implied. Hospital emergency rooms could not function if consent had to be secured beforehand.

**Emergency treatment of minors** - Consent is also implied for the treatment of a minor who is suffering from what

reasonably appears to be a life-threatening injury or illness (even if they can communicate) if the minor's parents, conservator, or guardian is not present. TEX. HEALTH & SAFETY CODE § 773.008(3).

**9. Managing Conservatorships** TEX. FAM. CODE Ch. 153 - **Functional equivalent to Guardian of the Person** Especially for families involved in a divorce context, a conservatorship may be used in place of a guardianship of the person for a minor, but only when there is no issue of assets belonging to the minor children.

**Check the small print** - The divorce decree, if there is one, should be carefully examined regarding any management powers granted either spouse regarding property of the children. TEX. FAM. CODE §153.132 grants a parent appointed sole managing conservator essentially the full rights of a guardian of the person and in TEX. FAM. CODE §153.073, the right to manage the property of the child "to the extent that the estate has been created by the parent or the parent's family." The Family Code provides no monitoring mechanism for property management.

**10. School Admission Procedures** TEX. EDUC. CODE §25.001(d) – Under §25.001(d) of the Education Code, a school district may adopt guidelines to allow admission of non-resident children to school without the need for a guardianship. You may want to find out who in the school district administration possesses this information before you need it.

**11. School Admission Procedures (Grandparents)** TEX. EDUC. CODE § 25.001(b)(9) – A school district may adopt guidelines to allow admission of non-resident children to school if a grandparent of the child resides in the school district and the grandparent provides "a substantial amount" of after-school care for the child. The local school board is to adopt guidelines to implement this provision. No cases yet as to how this might square with TEX. EDUC. CODE § 25.001(d) if there is a guardian, but the child wants to live with the grandparent.

**12. Court-Ordered Mental Health Services** TEX. HLTH. & SAF. CODE §§ 462.001, 571.001, 574.001 – In the case of a chronically mentally ill person, a temporary involuntary commitment may well be preferable to a guardianship. A guardianship, with its attendant removal of functional rights, might well be much more restrictive once the patient/ward has become stabilized on medication. Commitment provisions for the chemically dependent, mentally retarded, persons with AIDS and tuberculosis are also available in limited circumstances.

**13. Driving Issues: Katie's Law and the Re-Test Request** Effective September, 1, 2007, Texas drivers aged 79 or older can no longer renew a driver's license by mail or electronic means, but must renew the license in person at an authorized license renewal station. In addition, drivers aged 85 and older will now have to renew every two years, rather than every six years. TEX. TRANSPORT. CODE § 521.2711

**“Re-Test Request”** A potential ward who refuses to stop driving may be reported to the DPS by a physician, a family member, or even a stranger, if the person’s driving capability is impaired. Although physicians are somewhat reticent to report their patients because of the physician-patient privilege and HIPAA, it is possible for the applicant in a guardianship or the ad litem to request the court to make a request to the Department of Public Safety for the proposed ward to be re-tested under DPS regulations to determine the proposed ward’s suitability to continue to drive. A relatively new concept is the “Family Driving Agreement” a type of advance directive for driving decisions. The driver agrees in writing to designate someone to advise him or her when it is time to “give up the keys.” For more information, see [keepingussafe.org](http://keepingussafe.org).

**14. Mental Illness Diversion Programs (Criminal Courts)** Persons with mental health issues are often jailed for crimes over which they had little or no control.

In a mental illness diversion program, individuals with a documented mental health problem are treated as patients, not criminals.

In these programs, individuals are placed on a strict, supervised probation with regular court check-in dates to document and receive progress updates. Psychiatrists and other professionals develop a mental health treatment program, customized to meet the specific needs of the participants.

Following completion of the program, the charges are dismissed and may be eligible for expunction.

**15. Release on Bail for Court-Ordered Outpatient Mental Health Services** - Tex. CCP Art. 16.22 - Persons accused of non-violent offenses may be released on bail and transferred for court-ordered outpatient mental health services, with the potential of dismissal of the charges upon successful completion of the outpatient program.

**16. Intellectually Disabled Individuals - Release in Lieu of Arrest** - TEX. CODE OF CRIM. PROC. Art. 14.035 - Allows a peace officer who arrests a resident of a group home or ICF-MR who is arrested by a peace officer may be released at their residence (the facility) if the officer believes confinement in a correctional facility is unnecessary to protect the person and the other persons who reside at the residence and after reasonable efforts to consult with the staff of the facility.

## **II. ADVANCED MEDICAL DIRECTIVES**

**The Federal Patient Self-Determination Act** 42 USCA § 1395cc(f) requires health care providers, to be eligible for Medicare and Medicaid payments, to supply patients with information regarding Medical Powers of Attorney as well as Directives to Physicians. Patients are to be given information regarding their rights under Texas law to make decisions regarding medical care (including the right to accept or refuse treatment) and the right to formulate advance directives. TEX. HLTH. & SAF. CODE Ch. 166 consolidates the location of the law regarding the 1) the

Medical Power of Attorney, 2) and the Directive to Physicians. and 3) the "Out of Hospital Do Not Resuscitate" form. The chapter also provides common definitions to be used among all three documents

**17. Medical Power of Attorney** TEX. HLTH. & SAF. CODE § 166.151 The most commonly used tool to avoid guardianship, the Medical Power of Attorney (formerly the Durable Power of Attorney for Health Care) is a creature of statute and should be prepared and executed with close attention to the statutory scheme set out in the Health & Safety Code. Most prudent estate planners will include the Medical Power of Attorney along with a Will and Durable Power of Attorney in a basic estate plan.

The Medical Power of Attorney is not automatically revoked upon the appointment of a guardian. The court may choose to suspend or revoke the power of the agent or to leave the Medical Power of Attorney in place as a less restrictive alternative.

**CAVEAT:** Nursing homes and hospitals may be reluctant to accept Medical Powers of Attorney which are executed made close to the time they are needed, particularly if the patient's capacity is questionable.

**18. Directive to Physicians and Family or Surrogates ("Living Will")** TEX. HLTH. & SAF. CODE § 166.031 - The form also requires a disclosure statement (much like in the medical power of attorney), a place to indicate a choice between two treatment options, and a place for designation of an agent. The Directive interrelates to the Medical Power of Attorney in that it instructs the principal not to designate an agent on the Directive if a Medical Power has been executed. The Directive form is permissive.

**19. Intractable Pain Treatment Act** - TEX. REV CIV. STATS Art. 4495c. This act, adopted in 1995, was the first state statutes in the nation designed to protect doctors for prescribing morphine to terminal patients for pain management during end-stage treatments without fear of professional disciplinary action for addicting the patients. See [www.medsch.wisc.edu/painpolicy](http://www.medsch.wisc.edu/painpolicy), the website for the Pain & Policy Studies Group of the University of Wisconsin Medical School for additional information and discussion on pain management policy.

**20. Out-of Hospital DNR (“EMT-DNR”)** TEX. HLTH. & SAF. CODE § 166.081 – requires the ambulance personnel to let you die if that is your expressed wish. The tricky thing is having the right document or indicator available. This is one form that you cannot prepare. The forms are actually printed by the Texas Department of Health. Only the officially printed forms (with red ink in the right places) will be honored by the EMTs. The Texas Department of Health has information on ordering the forms and necessary identifying bracelets at <http://www.tdh.state.tx.us/hcqs/ems/index.htm#EMSRESOURCES>.

**21. In-Hospital DNR** - TEX. HLTH. & SAF. CODE § 166.201ff – requires health care professional not to attempt

cardiopulmonary resuscitation on a patient whose circulatory or respiratory function has ceased. The DNR Order must be issued by the patient's attending physician, based on a written or oral expression of intent of a competent patient or pursuant to an Advanced Directive or statement of intent from an agent under a MPOA or a guardian.

If the health care provider does not wish to honor the expression of intent and it is not effectively withdrawn, the facility, after informing the patient, guardian, relatives of the patient, or agent under a medical power of "the benefits and burdens of cardiopulmonary resuscitation" may seek to transfer the patient to another doctor or facility.

The statute is (not surprisingly) incredibly complicated. Even though the changes in the law went into effect April 1, 2018, no final rules implementing the procedure have been adopted as of June, 2019.

## **22. End-Stage Planning: The Patient's Intent, If Known**

With or without legal assistance, a person may express his or her wishes and desires as to treatment decisions as disability or death approach. The oldest and most widespread of these is the "Five Wishes," a pamphlet developed in Florida and used in 33 states. It combines 1) surrogate decision making, 2) a medical power of attorney and 3) palliative care choices, many of which are sufficiently thought-provoking to promote some discussion on the topic with the one considering such choices.

**CAVEAT:** Because of the stringent witnessing requirements under the Advanced Medical Directives Act (TEX. HLTH. & SAF. CODE Ch. 166) and the mandatory nature of the form of the Texas Medical Power of Attorney, the universal *Five Wishes*<sup>TM</sup> pamphlet has not been implemented in Texas, however, Texas law does require that the patient's wishes, if known, are to be followed, (e.g.: TEX. HLTH. & SAF. CODE § 166.152(e)(1)). As a result, the Five Wishes may still function as a statement of the patient's intent. [www.agingwithdignity.com](http://www.agingwithdignity.com). Also see Form 3-7: "Statement of Intent for End-of-Life Planning," State Bar of Texas Guardianship Manual 2014.

## **III. AVOIDING GUARDIANSHIP OF THE ESTATE**

**23. Durable Power of Attorney** TEX. EST. CODE § 751.001ff – provides for all acts done by the attorney in fact (agent) to have the same effect, inure to the benefit of, and bind the principal and the principal's successors in interest as if the principal were not disabled. The statutory form allows the grant of broad authority. **If** the Proposed Ward still has enough capacity to grant the power, this is virtually a "no-brainer".

**Will the Bank accept it?** If you have a client who is planning to use a durable power of attorney and you have some special provisions that have been requested, it is really a good idea to check with your client's banker, stockbroker and other people who are gatekeepers with respect to the client's assets. If they are not prepared to accept those special provisions, you probably want to go a different direction.

**Other drawbacks** – Because there are no real checks-and-balances on the attorney-in-fact, anecdotal evidence of fraud

and abuse often comes "too little, too late" for effective relief. Amendments in 2001 impose a duty on the agent to inform and account to the principal of actions taken under the power and to maintain complete records of actions taken. TEX. EST. CODE § 751.101.

**Patriot Act – Know Your Customer** – A further complication hampering the use of Durable Powers of Attorney comes as a result of the "Know Your Customer" provisions of the "Patriot Act" (Public Law 107-56 – Oct. 26, 2001). Because the bank must aggressively verify identities, if the attorney in fact presents the power of attorney in question after the incapacity of the principal, there will most likely be insurmountable problems.

## **24. Convenience Accounts** TEX. EST. CODE § 113.102

- allows a depositor to name a co-signer on his or her account without giving the co-signer ownership rights before or after the depositor's death.

- creates a straightforward agency relationship for a potential ward to allow a family member or friend to help them pay bills and handle other banking business.

- a Convenience Signer cannot pledge the assets of the account. TEX. EST. CODE § 113.251.

**Convenience Signer on Other Accounts** TEX. EST. CODE § 113.106 – Account owner may designate "Convenience Signers" on other types of multi-party accounts such as joint tenancy with right of survivorship, pay-on-death and trust accounts.

*Beware of unintended consequences.*

## **25. Sophisticated Tax Planning**

This alternative is included by way of issue recognition, rather than as an attempted exposition. Non-tax-planners might consult their tax planning brethren if a situation presents itself where there is a potential to employ tax planning as a part of disability planning/guardianship avoidance.

## **26. Inter Vivos ("Living") Trusts** TEX. PROP. CODE §§

111-115 – Like any tool in the toolbox, a revocable inter vivos trusts has its particular applications. It is an excellent and highly flexible tool when drafted by a knowledgeable, competent estate planning lawyer, working with a full understanding of the client's needs, objectives, and circumstances, and when coordinated with other appropriate estate planning tools and techniques. The trustee can be given much more freedom than a guardian would enjoy, especially in such areas as investments and distributions.

**Scam Trusts - IRS** - The See IRS Pamphlet 2193 for the attempts of the IRS to educate the public about trust scams. It gives consumers some simple ways to help decide if the trust they are contemplating is "too good to be true."

**Irrevocable Trusts** – To protect clients from themselves.

## **27. §142 Trusts** TEX. PROP. CODE § 142.005 - In a suit in

which a minor who has no legal guardian or an incapacitated person is represented by a next friend or an appointed Guardian Ad Litem, the court may, on application by the next friend or the Guardian Ad Litem and on a finding that the creation of a trust would be in the best interests of the



minor or incapacitated person, order the clerk to deliver any funds accruing under the judgment to a trust company or a state or national bank with trust powers. TEX. PROP. CODE § 142.005.

**Drawback:** These trusts generally fail to provide for any accountability on the part of the trustee. A burgeoning number of fiduciary breach suits are being brought as a result.

**Advance Planning:** If the suit in question has not already gone to judgment, consider instituting a guardianship proceeding and requesting that the suit be transferred into the probate court.

If you are not in a statutory probate court, ask for a Statutory Probate Judge to be appointed under TEX. GOVT CODE § 25.0022. The Statutory Probate Judge brings with him or her all of the jurisdiction of a statutory probate court, including the transfer power under TEX. EST. CODE § 1022.007. TEX. GOVT CODE § 25.0022(n).

Once you are in the probate court, a Guardianship Management Trust may be created without the necessity of also creating a guardianship. TEX. EST. CODE § 1301.051.

## **28. Testamentary Trusts**

Testamentary trusts can be used to avoid a guardianship for the Testator's spouse, any family members with special needs and children and grandchildren of the Testator. When combined with traditional disability and tax planning, the potential for avoiding guardianship (and most of probate altogether) is great. As always, getting the client in to start the planning process is the hardest part.

**29. Guardianship Management Trusts** TEX. EST. CODE § 1301.051 - An effective property management tool while protecting the property from malfeasance.

- may be established whether a guardian is ultimately appointed or not.

- Applicants can include a guardian, an Attorney Ad Litem, a Guardian Ad Litem or a person interested in the welfare of the ward.

The ability to continue the administration of the trust until age 25 (TEX. EST. CODE § 1301.203) can be particularly advantageous to provide a few more years of professional money management during an extended "training wheels" period for the ward/beneficiary.

Be aware that amendments enacted in 2021 made changes to the **required provisions** of these trusts.

**30. Pooled Trust Subaccounts** TEX. EST. CODE §§ 1302.001ff - As an alternative to a Guardianship Management Trust, funds otherwise appropriate for a Management Trust to be transferred to a pooled trust, such as that operated by the Association for Retarded Citizens (ARC). It will preserve Medicaid qualification. It requires that an annual report be filed, but not a guardianship-style accounting. The trustee may assess its standard fees against the subaccount.

## **31. Special Needs/ Medicaid Qualification Trusts - 42 USC 1396p (1)(d)(4)(A)**

Medicaid is a federal, means-tested program health program for eligible individuals and families with low incomes and resources. It is jointly funded by the state and federal governments, and is managed by the states. In Texas, an individual whose resources or income exceed certain limits cannot qualify for Medicaid benefits. However, certain resources, or assets, do not count for Medicaid eligibility purposes.

The enabling statute, "OBRA 93", allows the use of very specific trusts which may be established with an individual's own assets, but which will not count against the resource limit for that individual for Medicaid purposes.

Although there are three types of such trusts, it is the trust for disabled persons under age 65, authorized pursuant to 42 U.S.C. § 1396p(d)(4)(A) which typically involves the courts.

These are most often called "Special Needs Trusts" or "Supplemental Needs Trusts."

Personal injury attorneys are only recently appreciating the utility of these trusts in preserving assets for the permanently disabled client who will remain institutionalized.

Be aware of the potential exposure for an Attorney Ad Litem in a P.I. case who fails to consider the appropriate use of the supplemental needs trust, resulting in a much smaller net benefit for the disabled client.

**32. Trusts for Intellectually Disabled (MR) Persons** TEX. HLTH. & SAF. CODE § 593.081 - Up to \$250,000 may be placed in a trust for the benefit of MR individuals in certain residential-care facilities without disqualifying them from receiving state benefits and without the need for a guardianship.

A copy of the trust must be provided to Texas Department of Aging and Disability Services.

DADS may request current financial statements.

**Guardianship funds** - Ch. 142 trusts, patient's trust fund's in a residential-care facility, child support, an interest in a decedent's estate, and funds in the registry of the court are not considered trusts and are not entitled to the exemption.

**33. Texas ABLE (Achieving a Better Life Experience) Program** - Tex. Educ Code § 54.901ff - The Texas ABLE Program allows eligible Texas residents with disabilities to save up to \$15,000 a year in an ABLE account without jeopardizing their eligibility for federally-funded means-tested benefits, such as Supplemental Security Income (SSI) and Medicaid. The funds in the account can be used for disability-related expenses that assist the beneficiary in increasing and/or maintaining his or her health, independence or quality of life.

Under 2019 amendments, a guardian may now exercise signature authority over such an account, in addition to a parent, custodian or other fiduciary. [www.texasable.org/](http://www.texasable.org/).

**34. Transfer on Death Deed ("TODD")** (Tex. Est. Code §§ 113.001ff) - A Transfer on Death Deed, enacted in 2015, allows a person to transfer title to a named beneficiary or beneficiaries at the Grantor's death.

The interest conveyed in the property by TODD is subject to the claims filed against the probate estate for two years after the death of the grantor. The beneficiary of the TODD must

survive the grantor by 120 hours to receive the interest in the property. If the beneficiary predeceases the grantor or dies simultaneously with the grantor, the interest in the property passes through the grantor's estate. A TODD cannot be executed under a Power of Attorney. If the owner lacks the mental capacity to sign a TODD, an agent or other person may not execute such a document. A TODD can avoid real estate recovery in a Medicaid claim.

**35. Enhanced Life Estate Deed** ("Lady Bird Deed") Tex. Prop. Code §5.041 - allows the owner of the real estate to transfer the property upon death to another person outside of the probate process and can avoid MERP claims. However, during his or her lifetime, the grantor retains the right to reside on the property as well as the right to lease, mortgage, or sell the property and retain any proceeds generated from the property. If a grantor wishes to terminate the transfer of the remaining interest in the property to the beneficiary, he can do so at any time.

Unlike a TODD, a Lady Bird Deed may be executed by an agent under a Power of Attorney (with the specific power to do so) so that the issue of capacity of the Grantor may be avoided.

**36. Community Administrator** TEX. EST. CODE § 1353.002 - Upon a declaration of incapacity of one spouse, the other spouse, in the capacity of "community administrator" (no the decedent's estates kind) has the power to manage, control and dispose of the entire community estate without the necessity of a guardianship upon a finding by the Probate Court that: 1) it is in the best interest of the ward for the capacitated spouse to manage the community property, and 2) the capacitated spouse would not be disqualified to be appointed as guardian of the estate under §1104.351ff.

An ad litem may be appointed, the administrator required to return an inventory and accountings and a guardian of the estate may retain management rights over some specified varieties of real and personal property. These matters are considered in the context of a guardianship application and are not freestanding applications.

TEX. FAM. CODE § 3.301ff (the corollary provision to TEX. EST. CODE § 1353.002) was drastically amended in 2001. It is no longer possible to have the capacitated spouse manage or sell the community property under the Family Code, absent highly unusual circumstances.

**37. Court Registry** TEX. EST. CODE § 1355.001 - This provision is often viewed as simply an administrative deposit mechanism and is often overlooked as an opportunity to avoid administration of a minor's or other incapacitated person's guardianship estate. Up to \$100,000 may be deposited into the court's registry during the period of incapacity. The clerk is to bring the matter to the judge's attention and the funds are to be ordered invested in an interest-bearing account.

**"Mini-administration:"** Certain specified persons are permitted to withdraw all or a portion of the funds in the registry under bond to be expended for the benefit of the incapacitated person. After an accounting to the court, the

bond may be released. This provides a very simple alternative to guardianship, particularly in a rural county. Upon attaining majority, minors are able to withdraw the funds upon proof of age and an order of the court. TEX. EST. CODE § 1355.105.

**CAVEAT:** TEX. LOC. GOVT. CODE §§ 117.054 & 117.055 authorize the county clerk to charge investment management fees on funds in the court's registry: a) 10% of any interest earned on interest-bearing accounts and b) 5% (but not to exceed \$50.00) on non interest-bearing accounts. Where funds are interplead because of a settlement but no probate case is pending, make sure the order specifies that the funds are to be deposited in an interest-bearing account. Institutionalized incapacitated individuals: TEX. EST. CODE § 1355.151ff allow funds being held for an incapacitated individual who is institutionalized by the State of Texas to be paid to the institution for a trust account for the benefit of the individual, up to a maximum of \$10,000.

**38. Payment to Non-Resident Creditor** TEX. EST. CODE § 1355.002 Permits money payable to a non-resident minor, a non-resident adult ward or a non-resident former ward of a terminated Texas guardianship ("non-resident creditor") to be paid either to the guardian of the non-resident creditor in the domiciliary jurisdiction or to the county clerk where the non-resident creditor owns property or in the county of the debtor's residence.

**Withdrawal of Funds by Non-Resident Guardian** TEX. EST. CODE § 1355.105. 2021 amendments finally clarify that a "Non-Resident Creditor" is really a non-resident minor ward, a non-resident adult ward or a non-resident former ward of a terminated Texas guardianship. Once the Texas property has been sold by the guardian appointed for that ward in an out-of-state jurisdiction pursuant to Tex. Est. Code § 1355.002 and that money is paid into the registry of the Texas court, then the ward, the ward's heir, personal representative or non-resident guardian may withdraw the funds from the court registry. The court may require the non-resident guardian to give proof of an adequate bond given in the foreign jurisdiction. The order presented must direct the court clerk to deliver the money to one of the above-referenced persons (as appropriate) and that person's identity and credentials must be proved to the court's satisfaction. Exemplified copies of the order of a foreign court appointing the guardian and current letters of guardianship issued in the foreign jurisdiction are required if the guardian is accessing the funds.

**39. Sale of Minor's Interest in Property** TEX. EST. CODE § 1351.001- This relatively simple procedure allows the interest of a minor in realty to be sold and deposited into the court's registry if the minor's interest is less than \$100,000. The minor's interest needs to be cash only, so it sometimes is necessary to do a bit of structuring to "cash out" a minor's undivided interest.

The sworn application, which must contain the name of the minor and a legal description of the property, is filed and then is supposed to sit for five days. Citation is optional with the court. Most courts will want to see some indication of value beyond a contract and tax statement. Venue for this

procedure is the same as for a guardianship. Court approval is subject to a 'best interest' test on behalf of the minor.

Upon approval by the court (check your local practice as to whether a hearing is actually required), the sale is closed and the proceeds deposited into the court's registry. The funds are available for withdrawal as described above.

If the minor is not a ward and does not have a parent or managing conservator willing or able to file the application, the court may appoint an attorney ad litem or guardian ad litem to act on the minor's behalf for the limited purpose of applying for an order to sell the minor's interest in the property.

#### **40. Sale of Adult Incapacitated Ward's Interest in Property** TEX. EST. CODE § 1351.051

Until this section was enacted, adult incapacitated individuals with meager personal property but with undivided interests in real property were often required to have somewhat meaningless guardianships of the estate. This provision allows adult incapacitated individuals to proceed with a guardian of the person only where their interest in real property is valued at less than \$100,000.

This provision is now also available for a ward of a guardian appointed by a foreign court.

#### **41. Mortgage of Minor Interest/ Minor Ward's Interest in Property** TEX. EST. CODE §§ 1352.051, 1352.101

These provisions allow the parents, managing conservator or guardian of the person (as applicable), to obtain a home equity loan secured by the minor's interest in homestead property for the payment of education and medical expenses, for repairs to the homestead property, and for repayment of the loan.

A bond set in twice the amount of the loan amount is required, as well as a hearing on the front end and annual accountings while the loan is being paid off.

**42. Uniform Transfers to Minors Act** TEX. PROP. CODE § 141.001 et. seq. - The ability of a donor to make transfers of various types of assets to a minor by the donor's appointment of a custodian has broad coverage and far-reaching implications. The custodian has authority to invest and expend the transferred assets – without court order – for the support, education, maintenance and benefit of the minor. Again, the lack of supervision may dictate against this as a vehicle of choice unless the custodian is sophisticated enough to really understand fiduciary responsibility.

**43. Receivership** TEX. EST. CODE § 1354.001, TEX. CIV. PRAC. & REM. CODE §§ 64.001ff, - Of particular interest is where the incapacitated person owns an interest in a going business or commercial property which is in danger of injury.

The court may appoint a receiver, who is subject to the same compensation and bonding provisions under the Estates Code as a personal representative. The Receiver administers the property until the need for the receivership is over.

In 1999, the provisions for guardianship for missing persons were repealed. Receivers are now to be appointed for missing persons.

#### **44. Order of No Administration** TEX. EST. CODE §§ 451.001ff

If your object is simply to transfer title to estate assets to a disabled surviving spouse or minor children and your facts meet the criteria specified, this somewhat archaic procedure, sort of an amalgamation of a small estate affidavit and an application for family allowance, may be employed if there is otherwise no necessity for administration. The court may dispense with notice or may prescribe the quality and quantity of notice required. TEX. EST. CODE § 451.002. The court's order reads like the "facilitation of payment" language in a muniment of title proceeding and acts as authority to effect the transfer of the property involved. TEX. EST. CODE § 451.003. Such an order may be "undone" within one year if other information comes to light showing a necessity for administration. TEX. EST. CODE § 451.004.

#### **45. Representative Payee** 42 USC § 1383(a)(2)

A Representative Payee may be appointed by the Social Security Administration to manage Social Security benefits without the appointment of a guardian. Potentially available to all of the 50 million individuals receiving some sort of Social Security benefits, close to 7 million people currently receive Social Security benefits under the representative payee program. This is approximately ten times greater than all active court-supervised guardianships in the United States.

#### **46. Veteran's Benefits Fiduciary** 38 USC § 5502(a)(1)

Very similar to the Social Security rep payee program, the Department of Veteran's Affairs allows the appointment of a person to handle the administration of veteran's pension benefits without the appointment of a guardian. [www.vba.va.gov/bln/21/Fiduciary/index.htm](http://www.vba.va.gov/bln/21/Fiduciary/index.htm)

#### **47. Payment of Employees Retirement System Funds to Parent of Minor** Op. Tex. Att'y Gen. No. H-1214 - a parent may receive and manage a minor child's Texas Employees Retirement System (ERS) benefits without guardianship.

This opinion relies on two propositions:

- a parent has authority to manage the estate of a minor child without court appointment of a guardian. TEX. FAM. CODE § 151.001(a)(4).

- A parent may also receive, hold, and disburse funds for the minor's benefit. TEX. FAM. CODE § 151.001(a)(8).

#### **48. International Treaty**

There is at least one international treaty between Mexico and the United States that provides for judgments benefitting minors who are Mexican Nationals to be paid to the Mexican Government to as trustee. *E-mail from Judge Guy Herman, April 12, 2002 to Texas Probate Listserv* [www.texasprobate.net](http://www.texasprobate.net)

Similarly, Memoranda of Understanding are frequently executed between governmental agencies providing for international cooperation regarding minors in cross-border situations. See Memorandum of Understanding Between the Monterey County Department of Social and Employment Services, Family and Children Services and the Consulate General of México in San José, California Regarding



Consular Involvement in Cases Involving Minors  
[www.f2f.ca.gov/res/pdf/MontereyMOUMexicanconsulate.pdf](http://www.f2f.ca.gov/res/pdf/MontereyMOUMexicanconsulate.pdf)  
f Accessed February 16, 2011

#### **49. Suit by Next Friend** TEX. RULES CIV. PROC. 44

A minor without a legal guardian may sue by next friend. A next friend has the same rights concerning such suits as guardians have. These rights include seeing that the funds or other property recovered is placed in the court's registry, placed in a § 142 Trust under the Property Code or a Guardianship Management Trust under the Estates Code. Under no circumstances should a non-parent next friend be allowed to seek to manage the funds personally, as neither the Property Code nor the Rules of Civil Procedure provide for any oversight mechanism for next friend management of a minor's property.

**CAVEAT #1:** If a person has a guardian, that person may not be represented by a Next Friend. *Guardianship of Thrash*, 610 S.W.3d 74, Tex. App.—San Antonio, July 15, 2020, pet. den.)

**CAVEAT #2:** Next Friends are subject to the same restrictions as guardians re contingent fee agreements. *Massey v. Galvan* 822 S.W.2d 309 (Tex. App.—Houston — [14<sup>th</sup> District] 1992, wr. den.) In *Stern v. Wonzer* 846 S.W.2d 939 (Tex. App. — Houston [1<sup>st</sup> Dist.] 1993, no pet.).

**CAVEAT #3:** When a P.I. case settles and little or no thought is given to the allocation of the award between the survival cause of action and the wrongful death cause of action, some sticky tax issues and angry creditors (and probate judges) may have to be faced. *Texas Health Insurance Risk Pool v. Sigmundik*, 315 S.W.3d 12 (Tex. 2010); *Elliott v. Hollingshead*, 327 S.W.3d 824 (Tex. App.—Eastland, 2010, no pet.).

**50. Social Service Agencies** Many social services agencies provide a variety of services specifically tailored to the needs of children, the disabled and elderly. A quick check of the yellow page listings under “social service agencies,” will reflect literally dozens of organizations existing to this purpose. Many will have a particular emphasis toward a target group: veterans, the elderly, intellectually disabled, etc.

Beyond the Order for Emergency Protection (*supra*) the ability of either Adult Protective Services or Child Protective Services to investigate a potential exploitation or neglect situation is vital. See below for a discussion of “Supports & Services.”

#### **51. Geriatric Care Manager**

A Geriatric Care Manager (GCM) is a health and human services professional, such as a gerontologist, social worker, counselor, or nurse, with a specialized body of knowledge and experience on issues related to aging and elder care issues.

GCMs are able to coordinate and manage eldercare services, which often includes conducting an assessment to identify problems, eligibility for assistance and need for services; coordinating medical services, including physician contacts, home health services and other necessary medical services; screening, arranging and monitoring in-home help or other

services; reviewing financial, legal, or medical issues and offering appropriate referrals to community resources; providing crisis intervention; ensuring everything is going well with an elder person and alerting families to problems; and assisting with moving an older person to or from a retirement complex, care home, or nursing home.

While California has developed a state registry of Geriatric Care Managers, Texas does not yet have any central registry. The National Association of Professional Geriatric Care Managers, the non-profit association of these professional practitioners, has promulgated a Pledge of Ethics and Standards of Practice. Their website has a locator database.  
[www.caremanager.org](http://www.caremanager.org)

### **IV. LIMITING THE EFFECT OF THE GUARDIANSHIP**

#### **52. Pre-Need Designation of Guardian For Self** TEX. EST. CODE § 1104ff

An adult with capacity may, by written declaration designate those persons whom the declarant wishes to serve as guardian of the person or of the estate of the declarant in the event of later incapacity. The declaration may be in any form adequate to clearly indicate the declarant's intention to designate a guardian for the declarant's self in the event of the declarant's incapacity. The designation may be holographic, acknowledged before a notary or attested to by two witnesses, age 14 years of age or older and who are not designees to be guardian. In the case of attestation, a self-proving affidavit should be executed and attached.

A declaration that is not written wholly in the handwriting of the declarant may be signed by another person for the declarant under the direction of and in the presence of the declarant.

The court is required to follow the designations in the declaration, unless the court finds such designee to be disqualified or their appointment not to be in the ward's best interest.

A new form to allow simultaneous execution, attestation, and making the designation self-proving is available Tex. Est. Code § 1104.205(a).

**Pre-Need Disqualification** - Perhaps more importantly, the declarant may also indicate those persons who are to be specifically disqualified from serving as guardian, either of the person or estate. Such a disqualification is binding on the court and is among the listed reasons for disqualification under TEX. EST. CODE § 1104.202.

**Revocation/Nullification** - The designation may be revoked by execution of another designation or by following the same formalities as revoking a will. Divorce will serve to nullify a designation of a former spouse.

#### **53. Pre-Need Designation of Guardian by Parent** TEX. EST. CODE §§ 1104.103, 1104.151

Similarly, a parent may designate, either in by separate written declaration or in the parent's will, those persons (in preferential order) whom they desire to be guardian of the person and/or estate of their child or children. The designation may specify that the court waive bond as to a guardian of the person, but not as to a guardian of the estate.

This designation may be for either minor children or for adult incapacitated children.

Like the designation for one's self, the designation for a child may be in any form adequate to clearly indicate the declarant's intention to designate a guardian for the declarant's child in the event of the declarant's death or incapacity.

Unlike the Pre-Need Designation for Self, the Pre-Need Designation of Guardian by Parent does not contain the provision to expressly disqualify others as guardian.

A new form to allow simultaneous execution, attestation, and making the designation self-proving is available Tex. Est. Code § 1104.154(a).

#### **54. Pre-Need Declaration for Mental Health Treatment**

TEX. CIV. PRAC & REM. CODE § 137.007

A capacitated adult may, by written declaration, indicate his or her preferences or instructions for mental health treatment, including the right to refuse such treatment. Such a declaration is effective on execution and expires on the third anniversary of its execution or when revoked, whichever is earlier.

**Witnesses** - The declaration is to be witnessed by two qualified witnesses (similar to other advanced directives). Physicians or other health care provider are to follow such declaration, however, as long as the declarant is capable for giving informed consent, such informed consent is to be sought.

**Does not apply** – The declaration is ineffective if the declarant, at the time of making the designation, is under a temporary or extended commitment and treatment is authorized under the Mental Health Code or in the case of an emergency when the declarant's instructions have not been effective in reducing the severity of the behavior that has caused the emergency.

#### **55. Safekeeping ("Freeze") Agreements**

TEX. EST. CODE § 1105.155 - Where the personal representative deposits estate cash or other assets in a state or national bank, trust company, savings and loan association, or other domestic corporate depository, to be held under an agreement that the depository will not allow withdrawal or transfer of the principal of the assets and/or interest on the deposit except on written court order. (See example in Appendix Aj.) The amount of the bond of the personal representative may then be reduced in proportion to the cash or other assets placed in safekeeping.

#### **56. Restoration of Ward**

TEX. EST. CODE § 1202.051 - A Guardian Ad Litem must be appointed and everyone noticed similar to the original grant of guardianship.

#### **57. Guardianship Abuse, Fraud, & Exploitation - Deterrence Program**

Tex. Govt Code Subchapter G - This 2019 amendment creates a program, to be administered by the Office of Court Administration, regarding guardianship abuse, fraud, and exploitation which will provide additional resources and assistance to courts with guardianship jurisdiction.

1. the program will engage guardianship compliance specialists to review guardianships and identify reporting deficiencies by guardians;

2. monitor and audit annual accountings by guardians of the estate (and potentially by federal fiduciaries under Social Security or Veteran's benefits) or other law and report their findings to the appropriate courts;

3. develop best practices in managing guardianship case management in conjunction with the courts; and

4. report concerns of potential abuse, fraud, or exploitation discovered as a result of the compliance review to the appropriate courts; and

5. The program will maintain an electronic database (similar to a longstanding program in Minnesota "My Minnesota Conservator – [http://www.mncourts.gov/Help-Topics/MyMN\\_Conservator.aspx](http://www.mncourts.gov/Help-Topics/MyMN_Conservator.aspx)) to monitor filings of:

A. Inventories, Appraisements, and Lists of Claims in decedent's estate and guardianships of the estate;

B. Guardian of the Person Reports; and

C. Any other required reports and accounts under Tex. Est. Code Chap. 1163 (initial annual account and subsequent accounts) or other law.

6. Courts may either apply to participate or may be selected by the program for participation. Participation upon selection is not optional.

7. The director of the OCA "may notify" the SCJC of potential judicial misconduct arising from failure to properly oversee compliance with reporting requirements.

8. The OCA will be required to submit an annual report to the legislature by January 1 of each year regarding the performance of the program.

This is in line with programs such as in use in Minnesota for many years to monitor guardianship compliance. See Karp & Wood, *Guardianship Monitoring: A National Survey of Court Practices*, 37 Stetson Law Review 143 (2007); King, *Guardianship Monitoring: A Demographic Imperative*, *Future Trends in State Courts 2007*, National Center for State Courts.

#### **58. Visitation Rights: Designation of Essential Caregiver**

H&SCode Chap 260B - Because of the horror stories of denial of any visitors to residential care facilities during the lockdowns of the early days of the Covid-19 pandemic residents of long-term care facilities including ICF-MRs and state supported living centers, a new chapter to the Health and Safety Code gives those residents or their guardian or other legally authorized representative the right to designate an essential caregiver for visitation. The designation will be made in the same manner as designating a power of attorney.

It will ensure visits of at least two hours each day and allow for procedures to enable physical contact. A facility will have the right to revoke an individual's designation if the caregiver violates the facility's safety protocols or poses a serious community health risk.

#### **59. Annual Determination**

TEX. EST. CODE § 1201.052 - Each year, the probate judge is required to review each guardianship file created after September 1, 1993, and may review annually any other guardianship files to determine

whether the guardianship should be continued, modified, or terminated. This provision appears fairly innocuous, but is in reality very powerful. It was recently used in a very large guardianship with massive pending litigation to restore the ward's capacity and terminate the guardianship. Because the standards for the court are somewhat of a blank slate (i.e. discretionary), especially in courts other than statutory probate courts, this provision could be employed in a number of creative ways. Even though the procedure and standards for modification under § 1202.051 are fairly restrictive (see above), the annual determination under § 1201.052 contains no such procedural requirements.

**60. Emancipation of Minor Ward** TEX. FAM. CODE § 31.01ff - Where a minor who is over 16, self-supporting (or married) and living apart from parents, a conservator or guardian may ask the court to legally remove the disabilities of minority for either limited or general purposes. The petition is decided on a "best interest" standard and the order is to specify whether the removal of disabilities is limited or general in scope and the purposes for which disabilities are removed.

**61. Enumeration of Powers in Guardianship Order** TEX. EST. CODE § 1101.151ff - If the guardianship is to be a plenary guardianship, it is perhaps best to simply reflect in the order that "*The guardian is to be granted all power and authority allowed under Texas law and the rights of the ward are limited to the extent not inconsistent therewith.*" Otherwise, attempting to cover everything by an exhaustive listing may leave the guardian with specific deficits. Some attorneys feel that a listing of eight or ten powers is complete, while others can go on for pages. However, if the ward is partially capacitated, a careful enumeration of those areas in which the ward's rights are not to be limited can have a great effect on the ward's functioning ability and self-esteem.

**62. Interstate Guardianships** TEX. EST. CODE § 1253.001ff - Where a guardianship exists in another state and the ward has been moved to this state, it can be advisable to allow a part of the guardianship to remain in the other state until affairs (pending litigation, etc) are resolved before all of the remnant is transferred.

**63. Negligible Estate** TEX. EST. CODE §§ 1204.001 - When the ward's estate is exhausted or when the foreseeable income accruing to a ward or his estate is so negligible that maintaining the guardianship would be a burden, the court may authorize the income to be paid to a parent or other person acting as guardian, to assist as far as possible in the maintenance of the ward, and without any liability for future accountings as to the income.

**64. Minor Ward's Estate <\$100,000** TEX. EST. CODE §§ 1204.001(d) & 1355.102 - Unlike the adult ward's estate, which is needed for the upkeep and maintenance of the ward, a minor ward's guardianship estate is less likely to be called upon for day-to-day living expenses. If the guardian of the estate is a parent of the ward, the court is usually going to want to see some proof that the guardian/parent cannot make the expenditures out of his/her own pocket rather than out of guardianship assets. The mindset here is more of asset preservation and maybe some college planning, assuming of course that the minor ward has no special needs to deplete the estate. If the estate cash falls below \$100,000 (up from \$50,000 in 2001), the guardianship of the estate may be closed and the remaining funds paid into the court registry. Withdrawals are then possible under the procedure set out under TEX. EST. CODE § 1355.102 above.

**65. Mediation and Family Settlement Agreements** TEX. EST. CODE § 1055.151 - Rarely on a guardianship contest is issue of incapacity the real issue. Most often, decades of unresolved conflict among the family members of the proposed ward spark the contests. Perceived favoritism, sibling rivalry, jealousy of a stepparent or step-children or step-siblings, unresolved grief, etc. are all manifested in the guardianship arena.

While resolution of a guardianship contest might remove the procedural obstruction in granting a guardianship, it rarely resolves the family disputes and wounded relationships which led to the contest. Mediation can provide a level playing field for the family to resolve those issues behind the guardianship fight. The long-standing "burrs under the saddle" that so often give rise to fights in the probate arena can be aired and often resolved. TEX. EST. CODE § 1055.151 allows those settlements to be made irrevocable. "A family settlement agreement is a favorite of the law." *Shepherd v Ledford*, 962 S.W.2d 28 (Tex. 1998).

#### **66. Mother Nature and Father Time**

**Spontaneous Remission** - It is not unusual - once a person gets adequate nutrition/ hydration/ socialization / therapy/ medication for a few weeks or months - for many symptoms of delirium/ confusion/ diabetic conditions to clear up. In some instances, it is a question of employing successive alternatives in an effort to forestay the inevitable, whether a guardianship or death.

It is rarely in the best interest of a terminally-ill proposed ward to go through successive independent medical examinations and for extensive litigation to exhaust an already beleaguered estate, only to have the ward die the day after letters are granted.

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**Examples of Entities or Organization providing Supports or Services:**

- Adult Protective Services
- Agency Guardianship Providers:
  - Family Eldercare
  - Friends for Life
  - Guardianship Services
- Area Agency on Aging
- Area food banks
- Association of Retarded Citizens of Texas
- HHSC (Health & Human Services Commission - formerly DADS)
- Ombudsman programs
- Mental Health Association
- Mental Health Mental Retardation Centers

- Network of Care (“Tarrant Cares”)
- Organizations/ Support groups regarding specific diseases or conditions
  - Alzheimer’s Association
  - Goodrich Center for the Deaf
  - Lighthouse for the Blind
- Public Charities
  - United Way
- Resource Connection
- Religiously-Affiliated Charities
  - Buckner International
  - Catholic Charities
  - Lutheran Social Services
- The Service Connection
- Volunteers of America

**Food, Clothing, or Shelter TEX. EST. CODE § 1002.031(1)**

- Adult Day Care
- Adult Foster Care
- Assisted Living Facilities / Apartment-Like Settings or Private Residences
- Case Management
- Church Groups – Organized Provision of Food
- Dietary Services/ Meals (Noon Meal and Snacks)
- Home Management: Housekeeping Activities to Support Health & Safety
  - Cleaning
  - Laundry
  - Shopping
  - Other Household Tasks.
- In-Home Attendant Services - Assistance in ADLs
- Meals on Wheels
- Residential Assistance
- Respite Care

- Medical Services
  - Audiology
  - Dental
  - Nursing
  - Physicians
  - Speech & Language Pathology
- Medical Supplies/ Prescription Drug Assistance
- Therapy
  - Occupational
  - Physical
  - Speech
  - Hearing
  - Language

**Manage Financial Affairs TEX. EST. CODE § 1002.031(3)**

- Bill Paying Programs
- Employment Assistance
- Homebound School Instruction
- Supported Employment
- Utility Bill Assistance

**Physical or Mental Health; TEX. EST. CODE § 1002.031(2)**

- Adaptive Aids (Eye Glasses, Hearing Aids, Orthotics)
- Behavioral Support Services
- Rehabilitation Therapy (Cognitive, Occupational, Physical)
- Dental Treatment
- Health-Related Tasks Prescribed by a Physician
- Personal Care: Physical Health
  - Bathing
  - Dressing
  - Grooming
  - Hair & Skin Care
  - Feeding
  - Exercising
  - Self-Administered Meal Preparation Assistance
  - Medication
  - Toileting
  - Transferring/Ambulating

**Personal Decisions: Residence, Voting, Operating a Motor Vehicle, & Marriage TEX. EST. CODE § 1002.031(4)**

- Assisted Living (licensed up to six beds)
- Benefits Counseling/Legal Assistance
- Chore Provider
- Court Visitor Programs
- Day Care Services
- Orientation & Mobility /Assisted Transportation & Escort
- Mobility Impaired Transportation Services
- Minor Home Modifications
- Intervention/ Ombudsman Program
- Social, Educational & Recreational Activities
- Transition Assistance Services
- Organized Friendly Visits

**Statutory Changes Regarding Fraud Abuse &  
Exploitation of the Elderly and Disabled**

1. Financial Abuse of an Elderly Individual - Penal Code § 32.55 - One who knowingly engages in financial abuse of an elderly individual, including those with a relationship of trust or confidence, including dealings under a financial power of attorney, by any relative by blood or marriage, a joint tenant, a financial planner, a paid or unpaid caregiver or abuse by a guardian that results in unauthorized appropriation, sale, or transfer of another person's property. Offenses range from a Class B misdemeanor (value of property less than \$100) to a 1<sup>st</sup> degree felony (value of property \$150,000 or more).
2. Securing Execution of a Document by Fraud or Deception - Penal Code § 32.46 - A revision of the existing criminal statute to make it a criminal transaction to fraudulently secure the execution of a document, if the document executed affects the property, a service, or a pecuniary interest of that person without that person's effective consent. Consent is not effective if it is: a) induced by deception or coercion; (B) given by a person who because of youth, mental disease or defect, or intoxication is known to be unable to make reasonable property dispositions; or (C) given by a person who by reason of advanced age is known to have a diminished capacity to make informed and rational decisions about the reasonable disposition of property. The offense also includes causing a clerk ('public servant') to file or record a purported judgment of or other document purporting to memorialize or evidence an act, order, directive or process of a purported court, judicial entity or judicial officer without the public servant's effective consent. Punishable as a Class A misdemeanor or a felony.
3. Continuous Sexual Abuse of a Disabled Person - Penal Code § 21.02 *et seq* - This revision to the Penal Code creates the offense of continuous sexual abuse of a disabled individual, defined as two or more acts of sexual abuse during a period of 30 or more days in duration, regardless of whether the acts are committed against one or more victims. The offense is a 1<sup>st</sup> degree felony punishable by imprisonment for life or for a minimum of 25 years or maximum of 99 years.
4. Access to Financial Records by the Guardianship Abuse, Fraud, and Exploitation Program - Govt Code § 72.1221 - grants access to the Guardianship Abuse, Fraud, and Exploitation Program of the Office of Court Administration of the records of a financial institution, accounting records, and other financial records concerning a ward or the ward's estate, including receipts, records of deposits and withdrawals, invoices, bills, and any other records of transactions involving the money or assets of a ward or the ward's estate. These are to be provided upon request by the program, but the statute allows the program to seek an order of the court in which the guardianship is pending to compel production of the documents.
5. Financial Hold on Account of Vulnerable Adult Upon Suspicion of Financial Exploitation - Fin. Code §§ 281.001(5), 281.004(a)&(b), 4004.355(a)&(b); Govt Code, Subsecs. G&H; §45, The Securities Act (Art. 581-45, VTCS) - Under these amendments to the Finance Code, Government Code and Securities Act, a financial institution or a securities dealer or investment adviser may place a hold on any transaction in a vulnerable adult's account for up to 10 days if there is reason to believe the transaction involves financial exploitation and the institution has submitted a report of the suspected exploitation to DFPS or Securities Commissioner, as applicable. A "vulnerable adult" is defined as an elderly person, a person with a disability (as further defined in the statute) or an individual receiving protective services.

## Appendix H: Investigator's Checklist

**1. Basic Identification:** - Get as complete a name as possible (court records, Government ID, SS Card, etc.)

**Build a Dossier:** - Gather any available documents: Birth Certificate, Social Security Number, School Records, Old Driver's License

**2. Telephone Number:** - Call and see who answers. Is the telephone number contained in the court records?

- A. Check current phone listings for ward & guardian.
- B. 411 operator for directory assistance
- C. Internet listings: [beenverified.com](http://beenverified.com); [peoplesmart.com](http://peoplesmart.com); [anywho.com](http://anywho.com); [intelius.com](http://intelius.com); [inter800.com/switchboard/](http://inter800.com/switchboard/); and [yellowpages.com/](http://yellowpages.com/)

### 3. Address

- A. Current telephone directory
  - B. City directory or criss-cross directory
    - 1. See how long subject was at that address (look back every 4 to 5 years until they are no longer listed, then come forward year by year until they appear again).
    - 2. When subject disappears from listings, check the Death Certificate Index (see below) for the year previous to the last directory listing and succeeding years.
    - 3. See if the neighbors listed in the old directories are currently listed in the telephone directory. They might have kept up with your subject. (Same with ex-in-laws.)
- The Portal to Texas History has online access to many historical city directories. [texashistory.unt.edu/explore/collections/CIT/](http://texashistory.unt.edu/explore/collections/CIT/)

### 4. Government Records: A Potpourri

**A. Municipal:** Birth & death records (also county & state)/ court records, citations, tickets / medical examiner, autopsy records/ doctor's records/ funeral home records / police accident reports / dog, cat, exotic animal licenses/ health dept. food handling records/ public library [worthlib.org](http://worthlib.org) - "Online Databases"/ U.S. Census Records: [census.gov/history](http://census.gov/history)

**B. County:** JP court: (especially citations and returns)/ Co.Clerk: deed records (including heirship affidavits); birth and death records (unincorporated areas); marriage records, assumed name records; power of attorney filings; UCC filings; court registry records; voter registration records / ad valorem tax records/ appraisal district website / / County Court: (citations and returns, especially) / County Court at Law & Probate Court (ditto); District Clerk: civil and criminal court records (citations and returns); child support decrees; District Attorney's office, District Attorney's Investigator

**C. School Districts:** alumni associations and directories / school records / relatives / former neighbors/ classmates / school clubs

**D. State:** 1. Birth and death records – <https://www.deathindexes.com/texas/> 2. Abandoned property records: Tex Comp of Public Accounts: <https://claimitexas.org/> 3. State-Licensed Occupational Agencies 4. State Associations (legal/medical/ banker/ pest

control/ barber/etc.) 5. TX Sec of State: Corporate records/ Unincorp'd Assocs/ Notary Public records 6. Vehicle-related: Car/Boat/Trailer/ Airplane Registration / Auto Body Histories 7. Driver's License/Driving Record [dps.texas.gov/](http://dps.texas.gov/) 8. Worker's Comp records 9. Concealed Handgun permits 10. TP&W/ Hunting licenses 11. Texas State Library: Confederate Pension Index: [tsl.state.tx.us/arc/pensions/](http://tsl.state.tx.us/arc/pensions/)

**E. Federal:** 1. *Social Security Death Index:* <https://www.familysearch.org/search/collection/1202535> (free to search with registration); 2. *Federal Court records, Bankruptcy records* 3. *Peace Corps* 4. *FAA:* pilot's licenses/ medical records 5. *ICC* (truckers) 6. *Passport applications* 7. *Civil Service* records on govt personnel 8. USPO business address (physical address FOIA request – USPS Publication 549) 9. *Military/ Armed Services Child Support Locator* / military records / active duty locator 10. VA locator service 11. *National Archives* [nara.gov](http://nara.gov) free help on Genealogy/ Native Americans/ land records/ naturalization records/ immigrant ship passenger lists/ Passport records/ Fed personnel records before 1940/ National Cemetery System 12. *Fed Empl Child Support Enforcement* (fed and state) IRS will assist) 13. *Foreign Consular Offices*

### 5. Private Records

- A. Newspapers – Articles about the subject individual, Obituary Index card file, Obituaries (watch for several days after death date to pick up info on survivors) [legacy.com/obituaries/local/texas](http://legacy.com/obituaries/local/texas).
- B. Salvation Army (\$10.00)
- C. Credit Bureaus: order a credit history
- D. Historical/Genealogical Societies.
- E. Service clubs/Fraternal Associations
- F. Funeral Homes/Cemeteries – Who made the arrangements for Mama when she died?

### 6. The Web

- A. Social Networking Sites [www.facebook.com](http://www.facebook.com); [www.linkedin.com](http://www.linkedin.com); [www.myspace.com](http://www.myspace.com); etc.
- B. Genealogy Sites: [www.cyndislist.com](http://www.cyndislist.com) (over 300,000 links); [www.familysearch.org](http://www.familysearch.org); etc.
- C. Search Sites (may be a fee): [courthousedirect.com](http://courthousedirect.com); [heirsearch.com](http://heirsearch.com); [publicdata.com](http://publicdata.com); [peoplesearch.com](http://peoplesearch.com); [adoption.com/reunion](http://adoption.com/reunion); [genlookups.com](http://genlookups.com); [accurint.com](http://accurint.com); [heirfinder.com](http://heirfinder.com); Heritage Quest Online (public library)

### 6. Call in the Professionals

- A. Ask Your Court if they have a recommended person.
- B. Credentialed Forensic Genealogists: Board for Certification of Genealogists: [www.bcgcertification.org/](http://www.bcgcertification.org/); Association of Professional Genealogists [apgen.org](http://apgen.org)

STEVE M. KING Rev 2/17/20



Appendix J: NO. \_\_\_\_\_

Guardianship of \_\_\_\_\_, § Probate Court  
§  
§ Number One of  
§  
An Incapacitated Person § Tarrant County, Texas

**Affidavit Regarding Notice Under Section 1051.104**

BEFORE ME, the undersigned authority, personally appeared \_\_\_\_\_, who, after being duly sworn, declared the following:

“I am the Applicant in the above entitled and numbered cause. I have personal knowledge of the material facts set forth in this affidavit, and they are true and correct. I am filing this affidavit to comply with the requirements of Texas Estates Code Section 1051.104.”

“I sent notice of this proceeding to the individuals/institutions listed below. Attached to this affidavit is a copy of the notice sent and proof of delivery or attempted delivery of same.”

***LIST OF PERSONS TO WHOM NOTICE SENT***

“Further, Affiant sayeth not.”

\_\_\_\_\_  
AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME by \_\_\_\_\_ on \_\_\_\_\_.

\_\_\_\_\_  
Notary





**4. What is your monthly income and income sources?**

“I get this monthly income:

\$ \_\_\_\_\_ in monthly wages. I work as a \_\_\_\_\_ for \_\_\_\_\_.  
Your job title Your employer

\$ \_\_\_\_\_ in monthly unemployment. I have been unemployed since (date) \_\_\_\_\_.

\$ \_\_\_\_\_ in public benefits per month.

\$ \_\_\_\_\_ from other people in my household each month: (List only if other members contribute to your household income.)

\$ \_\_\_\_\_ from  Retirement/Pension  Tips, bonuses  Disability  Worker’s Comp  
 Social Security  Military Housing  Dividends, interest, royalties  
 Child/spousal support

My spouse’s income or income from another member of my household (If available)

\$ \_\_\_\_\_ from other jobs/sources of income. (Describe) \_\_\_\_\_

\$ \_\_\_\_\_ is my total monthly income.

**5. What is the value of your property?**

“My property includes:

	Value*
Cash	\$ _____
Bank accounts, other financial assets	\$ _____
_____	\$ _____
_____	\$ _____
Vehicles (cars, boats) (make and year)	\$ _____
_____	\$ _____
_____	\$ _____
Other property (like jewelry, stocks, land, another house, etc.)	\$ _____

**6. What are your monthly expenses?**

“My monthly expenses are:

	Amount
Rent/house payments/maintenance	\$ _____
Food and household supplies	\$ _____
Utilities and telephone	\$ _____
Clothing and laundry	\$ _____
Medical and dental expenses	\$ _____
Insurance (life, health, auto, etc.)	\$ _____
School and child care	\$ _____
Transportation, auto repair, gas	\$ _____
Child / spousal support	\$ _____
Wages withheld by court order	\$ _____

\_\_\_\_\_ \$ \_\_\_\_\_  
 \_\_\_\_\_ \$ \_\_\_\_\_  
 \_\_\_\_\_ \$ \_\_\_\_\_

Debt payments paid to: (List) \$ \_\_\_\_\_  
 \_\_\_\_\_ \$ \_\_\_\_\_  
 \_\_\_\_\_ \$ \_\_\_\_\_

Total value of property --+ \$ \_\_\_\_\_

Total Monthly Expenses --+ \$ \_\_\_\_\_

\*The value is the amount the item would sell for less the amount you still owe on it, if anything.

**7. Are there debts or other facts explaining your financial situation?**

“My debts include: (List debt and amount owed) \_\_\_\_\_

(If you want the court to consider other facts, such as unusual medical expenses, family emergencies, etc., attach another page to this form labeled “Exhibit: Additional Supporting Facts.”) Check here if you attach another page.


**8. Declaration**

I declare under penalty of perjury that the foregoing is true and correct. I further swear: I cannot afford to pay court costs.

I cannot furnish an appeal bond or pay a cash deposit to appeal a justice court decision.

My name is \_\_\_\_\_, My date of birth is: \_\_\_\_/\_\_\_\_/\_\_\_\_. My

address is \_\_\_\_\_  
Street City State Zip Code Country

 signed on \_\_\_\_/\_\_\_\_/\_\_\_\_ in \_\_\_\_\_ County, \_\_\_\_\_  
Signature Month/Day/Year county name State



party be appointed as temporary guardian.

10. VENUE. This Court has venue of this proceeding because Proposed Ward resides in this county.

11. DUTIES AND POWERS OF GUARDIAN. Applicant requests that the Temporary Guardian with powers over the Estate of the Proposed Ward be granted the following powers: (*List only as applicable*)

- A. To possess and manage the properties of the Proposed Ward, including all bank accounts, securities accounts, annuities, and other investments of the Proposed Ward, and to have possession and management of the Proposed Ward's home, Proposed Ward's personal possessions, and any other property owned by the Proposed Ward. To have total access to all records and past transactions of Proposed Ward and her attorney-in-fact with respect to such properties.
- B. To take possession of the Proposed Ward's cash on hand or on deposit, the Proposed Ward's stocks, bonds or other securities, and the Proposed Ward's accounts at financial institutions or at stock or brokerage firms and to open new accounts and to be the authorized signatory on such accounts.
- C. To collect debts, rentals, wages or other claims due the Proposed Ward.
- D. To pay, compromise, or defend claims against the Proposed Ward, subject to court approval.
- E. To represent the Proposed Ward in any legal action, subject to court approval.
- F. To contract and to incur other obligations on the Proposed Ward's behalf and to renew and extend any obligations, subject to court approval.
- G. To collect and give receipt for any monies, rents, dividends, interest, trust proceeds, and any and all other types of income payable to or receivable by the Proposed Ward.
- H. To apply for and to receive funds from governmental sources for the Proposed Ward, including: Social Security, Medicare, Supplemental Security Income Benefits (SSI), HUD Section 8 Rent Subsidies, Childhood Disability Benefits under the Old-Age Survivors and Disability, Insurance Program, Aid to Families with Dependent Children (AFDC), and Veteran's benefits.
- I. To apply for and to consent to governmental services on the Proposed Ward's behalf including: Vocational Rehabilitation Programs, Medicaid Services, Food Stamps, Veteran's benefits.
- J. To apply for and to secure insurance on the Proposed Ward's behalf for the Proposed Ward's property and the Proposed Ward's person.
- K. To file a federal income tax return on the Proposed Ward's behalf and to pay federal, state and local taxes of the Proposed Ward.
- L. To review, to take possession of and to consent to the disclosure of the Proposed Ward's legal, financial or other confidential books, documents or other records, including the power to enter into the Proposed Ward's safe deposit box.
- M. To meet the Proposed Ward's housing needs by renting real property for the Proposed Ward's residence.
- N. To employ and to discharge from employment attorneys, accountants, appraisers and other persons necessary in the administration of the estate of the Proposed Ward.
- O. To employ and to discharge from employment nurses, sitters, caregivers, tutors, therapists and other persons engaged to assist the Proposed Ward.
- P. To do such other and further acts concerning the property and interests of the ward and the Proposed Ward's estate as the Court may from time to time direct by express authorization through written order of the Court.

Applicant requests that the Temporary Guardian with powers over the Person of the Proposed Ward be granted the following specific powers and duties:

- A. To review, to take possession of and to consent to the disclosure of the Proposed Ward's medical or dental records.
- B. To apply for, arrange for, and consent to any and all psychological, psychiatric or medical examinations, tests or evaluations for the Proposed Ward.
- C. To consent to or object to medical and dental treatment for the ward, including surgery, but not the power or authority to consent to a sterilization or abortion for the Proposed Ward.
- D. To apply for, to consent to, and to enroll the Proposed Ward in non-residential aging or Alzheimer's programs and services which are reasonably required and needed by the ward and which are operated by public and private agencies and facilities.
- E. The duty to live with the Proposed Ward or, alternatively, the power and authority to make application for, to consent to, and to enroll the Proposed Ward in private and public residential care facilities.
- F. To make application for, to consent to, and to place the Proposed Ward in private and public 24 hour care facilities or nursing home facilities.

- G. To apply for and to secure an identification card, social security card or other identification documents for the Proposed Ward.
- H. To apply for, to consent to, and to enroll the Proposed Ward in appropriate educational, vocational, and recreational services.
- I. To have possession and control of the Proposed Ward and to deny anyone access to the Proposed Ward if such is in the best interest of Proposed Ward, and including the power and authority to obtain the services of the \_\_\_\_\_ County Sheriff s Department, a Constable, a municipal Police Department or any peace officer, and/or \_\_\_\_\_ Ambulance Service or other similar ambulance service, to forcibly, if necessary, remove Proposed Ward from Proposed Ward's place of residence or wherever Proposed Ward may be found, restrain, and transport Proposed Ward to a private home, group home, hospital, residential care facility, nursing home or such other place as the Temporary Guardian directs, with or without Ward's consent
- J. To do such other and further acts concerning the Proposed Ward as the Court may from time to time direct by express authorization through written order of the Court.
- K. For such other and further powers which the Court may deem necessary for the Protection of the Proposed Ward.

12. PROPERTY OF PROPOSED WARD. The Proposed Ward receives the following monthly compensation and income: \$ \_\_\_\_\_ per month for \_\_\_\_\_. Proposed Ward’s estate consists of real property, cash, and cash equivalents in excess of \$ \_\_\_\_\_. Applicant knows of no other assets of the Proposed Ward.

**WHEREFORE**, Applicant requests that notice of this Application be given as required by law; that after hearing on this Application, a suitable person or entity be appointed Temporary Guardian with powers over the Person of the Propose Ward and Temporary Guardian with powers over the Estate of Proposed Ward with the powers and duties set forth herein; and that Applicant have such other and further relief to which she may be entitled.

Respectfully submitted,

\_\_\_\_\_

\_\_\_\_\_

State Bar No. \_\_\_\_\_

Address Block

GUARDIAN AD LITEM

STATE OF TEXAS §  
 COUNTY OF TARRANT §

\_\_\_\_\_, being first duly sworn, upon her oath, deposes and says that: "I am the Applicant in the above entitled and numbered cause. I have read and examined the foregoing Application for Appointment of Temporary Guardian which is to be filed in this cause and all the allegations contained therein are true and correct."

\_\_\_\_\_

SWORN TO AND SUBSCRIBED BEFORE ME by \_\_\_\_\_  
 on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

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

**Certificate of Service**

I hereby certify that a true and correct copy of the foregoing instrument was served upon the following counsel by electronic transmission on this \_\_\_\_\_.

Name e-mail Address  
 (Repeat as Necessary)

\_\_\_\_\_  
 [Attorney Name]

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

Guardianship of

§  
§  
§  
§  
§

Probate Court

\_\_\_\_\_ ,

Number One of

An Incapacitated Person

Tarrant County, Texas

Order Setting Hearing on Application for Temporary Guardianship  
(Fiat)

A hearing on the Motion for Appointment of a Temporary Guardian filed herein by \_\_\_\_\_,  
Attorney Ad Litem for Proposed Ward, is scheduled to be heard before the Court on the \_\_\_\_ day of \_\_\_\_\_,  
20\_\_ at \_\_\_\_ o'clock \_\_ m.

Signed on this \_\_\_\_\_

\_\_\_\_\_  
JUDGE PRESIDING

Appendix M:

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

Guardianship of

§

Probate Court

§

\_\_\_\_\_

§

Number One of

§

An Incapacitated Person

§

Tarrant County, Texas

Proof of Facts  
(Temporary Guardianship)

On this day, the undersigned Affiant (“Affiant”), appeared personally in open court and, after being duly sworn, upon oath deposes and says that:

1. “My name and residence address are: \_\_\_\_\_  
\_\_\_\_\_
2. “Proposed Ward, \_\_\_\_\_ is a(n):
  - a.  adult  minor       male  female      aged \_\_\_ years and
  - b.  resident of this County; or     has an estate located principally in this county; or  
      located in this county at the time of the filing of the Guardianship Application.
3. “Proposed Ward is an incapacitated person as defined by Tex. Est. Code § 1002.017:
  - as evidenced by the Certificate of Medical Examination attached to the Application for Temporary Guardian filed herein, or
  - substantial evidence of incapacity is shown by the following facts: (*state details*):  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
  - incapacitated by virtue of minority only.
4. “Proposed Ward is:  present in open court; or  not present in open court as it is not in Proposed Ward’s best interest to require attendance and Proposed Ward is not able to materially participate in the hearing if present.
5. “Alternatives to guardianship and available supports and services to avoid guardianship have been considered. No alternatives to guardianship or supports and services are available to the Proposed Ward or are feasible to avoid the need for a temporary guardianship;
6. “\_\_\_\_\_, Proposed Temporary Guardian is a suitable person to be appointed Temporary Guardian, is not disqualified by law from serving in that capacity or from accepting Letters of Temporary Guardianship, is entitled to Letters of Temporary Guardianship, and it is in Proposed Ward’s best interest and is necessary to promote and protect Proposed Ward’s well-being for Proposed Temporary Guardian to be appointed to assist Proposed Ward in managing his/her estate.
7. “There are no guardianships of any kind existing for Proposed Ward in this, or any other, state.
8. (Minors only) “This guardianship is not sought for the primary purpose of enabling minor Proposed Ward to establish residency for enrollment in a school.

Signed \_\_\_\_\_.

\_\_\_\_\_  
Affiant

SWORN TO AND SUBSCRIBED before me by Affiant on \_\_\_\_\_.

\_\_\_\_\_

Appendix N:

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

Guardianship of

§

Probate Court

§

\_\_\_\_\_

§

Number \_\_\_\_\_ of

§

An Incapacitated Person

§

\_\_\_\_\_ County, Texas

Order Appointing Temporary Guardian

On this date, the Court heard and considered the Application for Appointment of Temporary Guardian filed in this cause. The Court, having heard the evidence and arguments of counsel makes the following findings and orders:

1. This Court has jurisdiction over the subject matter and parties herein and venue of this proceeding is proper in this court;
2. There is substantial evidence that \_\_\_\_\_ is an incapacitated person;
3. There exists an imminent danger that the physical health or safety of the Proposed Ward will be seriously impaired and that the Proposed Ward’s estate will be seriously damaged or dissipated unless immediate action is taken;
4. There is an immediate need for the appointment of a temporary guardian;
5. Alternatives to guardianship that would avoid the need for the appointment of a Temporary Guardian have been considered and determined not to be feasible;
6. The Proposed Ward has been personally served with notice of this proceeding prior to the entry of this Order;
7. All prerequisites of law have been met;
8. It would be in the best interest of the Proposed Ward that a temporary guardian be appointed to protect the Proposed Ward; and
9. \_\_\_\_\_ is a suitable person/entity to act as Temporary Guardian and is not disqualified by law from acting as such.

The Court further finds by substantial evidence:

10. Supports and services available to the Proposed Ward that would avoid the need for the appointment of a temporary guardian have been considered and determined not to be feasible;
11. There is an imminent danger and likelihood the Proposed Ward will resist by force any attempt to remove him from wherever he may be found.
12. It will be necessary in order to give effect to the powers and authority of the Temporary Guardian and that it would be in the best interest of the Proposed Ward, and for the protection of the Proposed Ward and others, that the Tarrant County Sheriffs Department, any other peace officer, and/or MedStar Ambulance Service be ordered to remove the Proposed Ward from wherever he may be found and transport the Proposed Ward to such place as the Temporary Guardian directs.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that \_\_\_\_\_ is appointed Temporary Guardian of \_\_\_\_\_ for a period of sixty (60) days from the date of this appointment.

IT IS FURTHER ORDERED that Temporary Guardian shall have the following specific powers over the estate:

1. To possess and manage the properties of the Proposed Ward, including all cash on hand, bank accounts, stocks, bonds, securities accounts, annuities, and other investments of the Proposed Ward and to open new accounts and to be the authorized signatory on such accounts; to have possession and management of the Proposed Ward’s home, Proposed Ward’s personal possessions, and any other real or personal property owned by the Proposed Ward and to take reasonable measures to safeguard the same pending the appointment of a permanent guardian; and to have total access to all records and past transactions of Proposed Ward and his attorney-in-fact with respect to such properties;
2. To collect debts, rentals, wages or other claims due the Proposed Ward;
3. To pay, compromise, or defend claims against the Proposed Ward, subject to court approval;
4. To represent the Proposed Ward in any legal action, subject to court approval;



5. To contract and to incur other obligations on the Proposed Ward's behalf and to renew and extend any obligations, subject to court approval;
6. To collect and give receipt for any monies, rents, dividends, interest, trust proceeds, and any and all other types of income payable to or receivable by the Proposed Ward;
7. To apply for and to receive funds from governmental sources for the Proposed Ward, including: Childhood Disability Benefits under the Old-Age Survivors and Disability Insurance Program Aid to Families with Dependent Children (AFDC), Federal Pensions received from the Office of Personnel Management, HUD Section 8 Rent Subsidies, Medicare, Railroad Retirement Pension Benefits received from the Railroad Retirement Board, Social Security Benefits, Supplemental Security Income Benefits (SSI), and Veteran's Benefits;
8. To apply for and to consent to governmental services on the Proposed Ward's behalf including: Vocational Rehabilitation Programs, Medicaid Services, Food Stamps, and Veteran's benefits;
9. To apply for and to secure insurance on the Proposed Ward's behalf for the Proposed Ward's property and the Proposed Ward's person;
10. To file a federal income tax return on the Proposed Ward's behalf and to pay federal, state and local taxes of the Proposed Ward;
11. To review, to take possession of and to consent to the disclosure of the Proposed Ward's legal, financial or other confidential books, documents or other records/including the power to enter into the Proposed Ward's safe deposit box;
12. To access, handle, distribute, and dispose of the digital assets of the ward, and the power to obtain, access, modify, delete, and control any passwords and other electronic credentials associated with any digital devices and digital assets of the ward pursuant to Texas Estates Code Chap 2001;”
13. To meet the Proposed Ward's housing needs by renting real property for the Proposed Ward's residence;
14. To employ and to discharge from employment attorneys, accountants, appraisers and other persons necessary in the administration of the estate of the Proposed Ward, upon application and order of the court;
15. To employ and to discharge from employment nurses, sitters, caregivers, tutors, therapists and other persons engaged to assist the Proposed Ward, upon application and order of the court; and
16. To do such other and further acts concerning the property and interests of the ward and the Proposed Ward's estate as the Court may from time to time direct by express authorization through written order of the Court.

IT IS FURTHER ORDERED that Temporary Guardian shall have the following specific powers over the person:

1. The power and authority to take charge and control of the person of the Ward, including having physical possession of the Ward, and to establish Ward's legal domicile and place of residence, and including the power and authority to obtain the services of the \_\_\_\_\_ County Sheriff's Department, a Constable, a municipal Police Department or any peace officer, and/or \_\_\_\_\_ Ambulance Service or other similar ambulance service, to forcibly, if necessary, remove Ward from Ward's place of residence or wherever Ward may be found, restrain, and transport Ward to a private home, group home, hospital, residential care facility, nursing home or such other place as the Guardian of the Person directs, with or without Ward's consent;
2. To review, to take possession of and to consent to the disclosure of the Proposed Ward's medical, psychological and intellectual testing records pursuant to 45 CFR 164.512(e)(1)(i), Health Insurance Portability and Accountability Act;
3. To apply for, arrange for, and consent to any and all psychological, psychiatric or medical examinations, tests or evaluations for the Proposed Ward, but not the power or authority to consent to a voluntary placement in a mental health facility.
4. To consent to or object to medical and dental treatment for the Proposed Ward, including surgery, but not the power or authority to consent to a sterilization or abortion for the Proposed Ward;
5. To apply for, to consent to, and to enroll the Proposed Ward in nonresidential aging or Alzheimer's programs and services which are reasonably required and needed by the Proposed Ward and which are operated by public and private agencies and facilities;
6. The duty to live with the Proposed Ward or, alternatively, the power and authority to make application for, to consent to, and to enroll the Proposed Ward in private and public residential care facilities;
7. To make application for, to consent to, and to place the Proposed Ward in private and public 24 hour care facilities or nursing home facilities;
8. To apply for and to secure an identification card, social security card or other identification documents for the Proposed Ward;

9. To have possession and control of the Proposed Ward and to deny anyone access to the Proposed Ward if such is in the best interest of Proposed Ward; and
10. To do such other and further acts concerning the Proposed Ward as the Court may from time to time direct by express authorization through written order of the Court.

IT IS FURTHER ORDERED that the following legal and civil rights and powers are removed from the Proposed Ward:

- a. the right to vote;
- b. the right to travel;
- c. the right to make any gifts of real or personal property;
- d. the power to drive and obtain a driver's license;
- e. the power to execute a Directive to Physicians (Living Will);
- f. the power to execute a power of attorney,
- g. the power to execute any and all legal documents or contracts; and
- h. the power to marry.

IT IS FURTHER ORDERED that Temporary Guardian shall execute and file with the Court a corporate surety bond in the amount of \$\_\_\_\_\_, conditioned and approved as required by law and that upon filing the bond and oath or unsworn declaration, the Clerk of this Court shall issue Letters of Temporary Guardianship to \_\_\_\_\_ as Temporary Guardian of \_\_\_\_\_;

IT IS FURTHER ORDERED that the Temporary Guardian is authorized to expend up to and including the amount of \$\_\_\_\_\_ per month, out of the income and, if necessary, corpus of the estate for the care, support, and maintenance of the ward and the ward's property, without further order of this Court;

IT IS FURTHER ORDERED that the \_\_\_\_\_ County Sheriff's Department, any other peace officer, and/or \_\_\_\_\_ Ambulance Service is authorized, empowered, and directed to remove the Proposed Ward from wherever he or she may be found, and transport him immediately to such place as the Temporary Guardian shall direct.

IT IS FURTHER ORDERED that the powers of any agent under all powers of attorney in effect for the Proposed Ward are hereby suspended.

SIGNED \_\_\_\_\_.

\_\_\_\_\_  
JUDGE PRESIDING

"Notice to any peace officer of the State of Texas: you may use reasonable efforts to enforce the right of a guardian of the person of a ward to have physical possession of the ward or to establish the ward's legal domicile as specified in this order. A peace officer who relies on the terms of a court order and the officer's agency are entitled to the applicable immunity against any civil or other claim regarding the officer's good faith acts performed in the scope of the officer's duties in enforcing the terms of this order that relate to the above-mentioned rights of the court-appointed guardian of the person of the ward. Any person who knowingly presents for enforcement an order that is invalid or no longer in effect commits an offense that may be punishable by confinement in jail for as long as two years and a fine of as much as \$10,000."

*Revised June 26, 2017*

Appendix O: No. \_\_\_\_\_

Guardianship of	§	Probate Court
	§	
_____ ,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

Application for the Appointment  
of a Guardian of the Person (And Estate)

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES \_\_\_\_\_, Applicant and Guardian Ad Litem, and pursuant to Tex. Est. Code § 1102.004, files this Application for the appointment of a suitable person to serve as Guardian of the person (and estate) of \_\_\_\_\_, Proposed Ward, and, in support thereof, represents to the Court as follows:

1. APPLICANT. Applicant’s full name is \_\_\_\_\_. Applicant has formerly used the name of \_\_\_\_\_. The last three digits of Applicant’s Social Security number are: \_\_\_\_\_ and the last three digits of Applicant’s driver’s license issued by the State of \_\_\_\_\_ are: \_\_\_\_\_.

2. PROPOSED INCAPACITATED PERSON. Proposed Ward is a \_\_\_\_\_ year old, (race), adult/minor (fe)male whose date of birth is \_\_\_\_\_. The last three digits of Proposed Ward’s Social Security number are: \_\_\_\_\_ and the last three digits of Proposed Ward’s driver’s license issued by the State of \_\_\_\_\_ are: \_\_\_\_\_. (S)he is an incapacitated person as defined in Tex. Est. Code § 1002.017. Proposed Ward is located at \_\_\_\_\_, Tarrant County, Texas, \_\_\_\_\_ where (s)he can be served. Proposed Ward is in the care and custody of \_\_\_\_\_ whose address is \_\_\_\_\_ and to whom Applicant has mailed a copy of this Application by certified mail, return receipt requested.

3. PROPOSED GUARDIAN. Applicant requests that the Court appoint a suitable person to serve as Guardian of the person (and estate) of Proposed Ward. The names, addresses and telephone numbers of the Proposed Ward’s adult relatives, if any, are listed immediately below:

<u>Name</u>	<u>Relationship to Proposed Ward</u>	<u>Address</u>	<u>Telephone number</u>
-------------	--------------------------------------	----------------	-------------------------

Applicant recommends that \_\_\_\_\_, Proposed Guardian, as a suitable person to be appointed Guardian for the Proposed Ward. (*Proposed Guardian’s relationship to Proposed Ward, address and telephone number are to be provided here.*)

4. NATURE OF THE INCAPACITY. The Physician’s Certificate of Dr. \_\_\_\_\_ is attached to the Motion to Appoint Guardian Ad Litem filed previously in this cause, is dated within 120 days of the filing of this Application and is based upon an examination the physician performed not earlier than 120 days from the date this Application was filed. A developmental disability is (not) the basis, at least in part, of the physician’s diagnosis of incapacity. (*If a developmental disability such as intellectual disability or autism forms the basis for the physician’s diagnosis, then Determination of Intellectual Disability, conducted in accordance with MHMR guidelines, must be attached to the Physician’s Certificate.*)

5. ALTERNATIVES CONSIDERED. Alternatives to guardianship and available supports and services to avoid guardianship were considered. No alternatives to guardianship or supports and services are available to the Proposed Ward or are feasible to avoid the need for a guardianship;

6. SPECIFIC AREAS OF PROTECTION AND ASSISTANCE REQUESTED. Applicant requests Proposed Guardian be granted the full powers allowed under the Texas Estates Code. (*If a Limited Guardianship is sought, list only those powers which are appropriate and indicate those specific powers or duties of the guardian that should be limited if the Proposed Ward does not receive supports and services and those that should be limited if the Proposed Ward does receive supports and services.*)

7. LIMITATION OF RIGHTS REQUESTED. Applicant requests the rights of Proposed Ward be fully limited. In addition, the Applicant herein seeks to take away the right of the Proposed Ward to vote in a public election, to hold or obtain a license to operate a motor vehicle and to make personal decisions regarding residence; (*If a Limited Guardianship is sought, limit only those rights which are appropriate. If the Proposed Ward’s right to drive is being removed, provide the Proposed Ward’s Driver’s License number to the Court Investigator*)

and provide the redacted number here.)

8. **PROPOSED WARD’S PROPERTY.** Proposed Ward owns the following real and personal property: *(state the approximate value and provide a detailed description of the proposed ward's property, including: (A) liquid assets, including any compensation, pension, insurance, or allowance to which the proposed ward may be entitled: (Include income from social security here, however, if social security benefits are the sole source of revenue, then a guardianship of the estate is unnecessary. If there is a representative payee or fiduciary for Veteran’s benefits, set forth the name and address.)*

Liquid Asset Description \$ Value

---

*(B) non-liquid assets, including real property:*

Property % Interest Owned \$ Value

---

9. **MISCELLANEOUS.** Applicant requests the term of the guardianship to be not less than one year. To the Applicant’s knowledge, there is no guardianship established for Proposed Ward in this or any other state. (If the Proposed Ward is a minor, inform the Court of any legal or conservatorship proceedings within a 2-year period and state “the guardianship is not created for the purpose of enabling the Ward to establish residency for enrollment in a school or school district for which the Ward is not otherwise eligible for enrollment”.) To the Applicant’s knowledge, (no one)/ \_\_\_\_\_ holds a Power of Attorney signed by Proposed Ward. (If a Power of Attorney exists, provide the agent’s address and telephone number, the type of Power of Attorney and the date on which it was executed.) Venue is proper in this county because Proposed Ward was located (resided/had his principal estate) here at the time this Application was filed.

10 **OTHER RELEVANT FACTS.** *(Report how you came to the conclusion that a guardianship was necessary and any other information you deem important. Do not include a request for attorney’s fees with this Application. Attorney’s fees are to be requested in a separate Application which is presented to the Court at the hearing.)*

WHEREFORE, Applicant respectfully requests the Court to issue notice of this Application as required by law and, following a hearing, appoint a suitable person to serve as Guardian of the Person (and Estate) of Proposed Ward with all of the duties and powers as set forth herein and for such further relief as the Court may deem appropriate.

Respectfully submitted,

\_\_\_\_\_  
Applicant and Guardian Ad Litem  
(Attorney Information)

STATE OF TEXAS                   §  
COUNTY OF TARRANT       §

\_\_\_\_\_, Applicant and Guardian Ad Litem, first being duly sworn, upon his (her) oath, deposes and says:

“My name is \_\_\_\_\_, and I am the Applicant and Court-appointed Guardian Ad Litem in the above styled and numbered cause. I have read and examined the foregoing Application for the Appointment of Guardian which is to be filed in this cause and all allegations contained therein are true and correct to the best of my knowledge.”

\_\_\_\_\_  
Applicant/Guardian Ad Litem

SWORN TO AND SUBSCRIBED BEFORE ME on \_\_\_\_\_.

\_\_\_\_\_  
Notary

**Insert Certificate of Service**

Appendix P:

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

Guardianship of

§

Probate Court

§

\_\_\_\_\_,

§

Number One of

§

An Incapacitated Person

§

Tarrant County, Texas

Original Answer of Proposed Ward

TO THE HONORABLE JUDGE OF THIS COURT:

\_\_\_\_\_, proposed ward, by and through \_\_\_\_\_, a practicing attorney in Tarrant County, Texas, having been appointed by this Court as Attorney Ad Litem pursuant to § 1054.001 of the Texas Estates Code and makes and files this his Original Answer to the Application for Guardianship of the Person/and Estate and respectfully shows the Court the following:

1. Proposed Ward asserts a general denial and respectfully requests that the Court require the Applicant to prove all claims, charges and allegations by clear and convincing evidence as required by the laws of the State of Texas.

2. Proposed Ward reserves the right to amend and answer further in this proceeding in the manner authorized by the Texas Rules of Civil Procedure.

WHEREFORE, PREMISES CONSIDERED, Proposed Ward prays that the Applicant take nothing, that costs be adjudged against the Applicant; and that he go hence without day.

Dated: \_\_\_\_\_

Respectfully submitted,

[Attorney Information]

Attorney Ad Litem for  
Proposed Ward

**Certificate of Service**

I hereby certify that a true and correct copy of the foregoing instrument was served upon the following counsel by electronic transmission on this \_\_\_\_\_.

Name                      e-mail Address  
(Repeat as Necessary)

\_\_\_\_\_  
[Attorney Name]

Appendix Q:

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

Guardianship of

§

Probate Court

§

\_\_\_\_\_,

§

Number One of

§

An Incapacitated Person

§

Tarrant County, Texas

Original Answer of Proposed Ward  
(Contest)

TO THE HONORABLE JUDGE OF THIS COURT:

Proposed Ward, proposed ward, (“P. W.”) by and through her Attorney Ad Litem, files this Original Answer to the application for appointment of permanent guardianship filed by Applicant and respectfully shows the Court the following:

1. Proposed Ward asserts a general denial, denying each allegation set forth in the application and demanding strict proof thereof by clear and convincing evidence as required by the laws of the State of Texas.
2. P.W. would show that she is not an “incapacitated person” under § 1002.017 of the Texas Estates Code in that she has the ability to care for herself and to manage her property. P.W. currently resides with G. Golow, her friend and companion. P.W. is able to meet her day to day needs and to provide for her person and estate.
3. P.W. would further show that it is not in her best interest for the court to appoint Applicant as her guardian.
4. P.W. would further show that she has the ability to protect her own rights and does not require the appointment of a guardian to act on her behalf.
5. P.W. hereby objects to the certificate of medical examination of Dr. \_\_\_\_\_, filed herein on or about \_\_\_\_\_, and specifically objects to his finding of incapacity.

WHEREFORE, PREMISES CONSIDERED, Proposed Ward prays that the application be denied and she be granted any other relief to which she is entitled.

Respectfully submitted,

[Attorney Information]

Attorney Ad Litem for  
Proposed Ward

**Certificate of Service**

I hereby certify that a true and correct copy of the foregoing instrument was served upon the following counsel by electronic transmission on this \_\_\_\_\_.

Name                    e-mail Address  
(Repeat as Necessary)

\_\_\_\_\_  
[Attorney Name]

Appendix R:

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

Guardianship of

§

Probate Court

§

\_\_\_\_\_

§

Number One of

§

An Incapacitated Person

§

Tarrant County, Texas

Application for Authority to Utilize Attorneys  
And Staff of Appointee’s Law Firm for Legal Services

To the Honorable Judge of Said Court:

\_\_\_\_\_ (referred to as “Applicant” herein), duly appointed Attorney Ad Litem for \_\_\_\_\_ (“Proposed Ward”), makes this Application for Authority to Utilize Attorneys and Staff of Appointee’s Law Firm for Legal Services and respectfully shows the following:

1. Applicant was appointed Attorney Ad Litem for Proposed Ward by Order of this Court dated \_\_\_\_\_, 2010, to represent Proposed Ward in this guardianship proceeding.
2. Applicant requests authority to utilize attorneys and staff of Applicant’s law firm to assist Applicant in performing legal services related to Applicant’s duties as Attorney Ad Litem for Proposed Ward, pursuant to *Goodyear Dunlop v. Gamez*, 151 S.W.3d 574 (Tex. App.—San Antonio 2004, no pet.) Applicant believes that it is in the best interest of Proposed Ward for Applicant to utilize attorneys and staff of Applicant’s law firm, including legal assistants and paralegals under the direction and supervision of your appointee, in providing legal services. In particular, Applicant’s use of legal assistants and paralegals to provide some legal services will reduce the overall cost of Applicant’s services as appointee representing Proposed Ward and will result in more timely services.
3. The following special circumstances justify the use of additional personnel to assist the Attorney Ad Litem: (*provide details of special circumstances justifying additional persons billing to file on ad litem’s appointment*).
4. Applicant is familiar with the reasonable rates charged by attorneys, paralegals, and legal assistants in Tarrant County, Texas, for work in guardianship cases. Applicant requests authority to utilize attorneys and staff at the rates set forth below, which are reasonable for each person based upon the services expected to be performed and each person’s respective experience and qualifications.
5. Applicant requests that the Court authorize the use of the following persons by Applicant;
  - a) \_\_\_\_\_ was admitted to the bar and licensed as an attorney in Texas in \_\_\_\_\_. He joined the firm in \_\_\_\_\_ and was Board Certified in Estate Planning and Probate Law by the Texas Board of Legal Specialization in \_\_\_\_\_. Requested Rate: \$ \_\_\_\_\_ per hour.
  - b. The Legal assistants and paralegals of the law firm and a brief summary of their qualifications, as required by *Gill Sav. Ass’n v. Int’l Supply*, 759 S.W.2d 697, 702 (Tex. App.—Dallas 1988, wr. denied) are listed below. Request is hereby made for approval for billing at the following rates, subject to review and approval by the Court upon actual application for payment.
    - 1) \_\_\_\_\_ is a litigation/trial paralegal with an Associate Degree in \_\_\_\_\_ from \_\_\_\_\_ College. She is certified by the Texas Board of Legal Specialization in Personal Injury Trial Law (“inactive” due to change in specialty field) and has been employed as a litigation/trial paralegal with Applicant’s law firm since \_\_\_\_\_, working in the areas of guardianship, probate, estate planning, and probate litigation. She has a total of 25 years of litigation and trial experience as a paralegal. She

is a member of the Paralegal Division of the State Bar of Texas and the Fort Worth Paralegal Association Requested Rate: \$\_\_\_\_\_ per hour.

- 2) \_\_\_\_\_ has been employed as a paralegal with Applicant's law firm since \_\_\_\_\_, working in the areas of guardianship, probate, estate planning, and probate litigation. She has 25 years' experience as a legal secretary, including experience in estate planning. She has taken several paralegal courses, including a Probate Law course at \_\_\_\_\_. She is also a member of the Fort Worth Paralegal Association. Requested Rate: \$\_\_\_\_\_ per hour.

WHEREFORE, Applicant respectfully requests that the Court authorize Applicant's use of attorneys, legal assistants, and paralegals of Applicant's law firm as described above to assist Applicant in his/her appointed duties as Attorney Ad Litem for Proposed Ward, that the Court approve the hourly rates for each legal assistant or paralegal as set forth above, subject to review by the Court upon actual application for payment, and that Applicant have such other and further relief to which Applicant may be justly entitled.

Dated: \_\_\_\_\_

Respectfully submitted,

[Attorney Information]

Attorney Ad Litem for  
Proposed Ward

**Insert Certificate of Conference**

**Certificate of Service**

I hereby certify that a true and correct copy of the foregoing instrument was served upon the following counsel by electronic transmission on this \_\_\_\_\_.

Name                      e-mail Address  
(Repeat as Necessary)

\_\_\_\_\_  
[Attorney Name]



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

Guardianship of \_\_\_\_\_,  
\_\_\_\_\_

§  
§  
§  
§  
§

Probate Court  
Number One of  
Tarrant County, Texas

An Incapacitated Person

Order Authorizing Utilization of Attorneys  
And Staff of Appointee's Law Firm for Legal Services

On this day, the Court considered the Application for Authority to Utilize Attorneys and Staff of Appointee's Law Firm for Legal Services (the "Application") filed by \_\_\_\_\_ ("Applicant"), duly appointed Attorney Ad Litem for \_\_\_\_\_ ("Proposed Ward"), and the Court finds

1. The special circumstances which justify the use of additional personnel to assist the Attorney Ad Litem are: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
2. Applicant's use of legal assistants and paralegals to provide some legal services may reduce the overall cost of Applicant's services as appointee representing Proposed Ward and will result in more timely services.
3. It is in the best interest of Proposed Ward to authorize the utilization of additional personnel of Applicant's law firm in providing legal services.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Applicant is authorized to utilize attorneys and staff members of Applicant's law firm to assist Applicant in her duties as Attorney Ad Litem for Proposed Ward, as follows:

1. Attorneys of Applicant's law firm, as set forth below, at reasonable rates to be reviewed and approved by separate order of the Court upon application for payment.
  - a. \_\_\_\_\_.
  - b. \_\_\_\_\_.
2. Legal assistants and paralegals of Applicant's law firm as set forth below, at reasonable rates to be reviewed and approved by separate order of the Court upon application for payment.
  - a. \_\_\_\_\_.
  - b. \_\_\_\_\_.

SIGNED \_\_\_\_\_

\_\_\_\_\_  
JUDGE PRESIDING

Appendix S: Motion for Appointment of Guardian Ad Litem and Order

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

Guardianship of

§  
§  
§  
§  
§

Probate Court

\_\_\_\_\_

Number One of

An Incapacitated Person

Tarrant County, Texas

Motion for Appointment of Guardian Ad Litem

TO THE HONORABLE JUDGE OF SAID COURT:

\_\_\_\_\_, Attorney Ad Litem for \_\_\_\_\_ (“Movant”), files this Motion for Appointment of Guardian Ad Litem herein, and in support thereof would show this Court as follows:

1. Movant is the court-appointed Attorney Ad Litem for \_\_\_\_\_, Proposed Ward herein.
2. Movant respectfully requests that the court appoint a Guardian Ad Litem for the Proposed Ward pursuant to TEX. EST. CODE § 1054.051 to represent and act in the best interests of the Proposed Ward in this matter.
3. Good cause exists for the appointment of a Guardian Ad Litem.

WHEREFORE, Movant prays that the Court take up and act upon this Motion, and for such other and further relief in law and in equity to which Movant may be entitled.

Dated: \_\_\_\_\_

Respectfully submitted,

[Attorney Information]

Attorney Ad Litem for  
Proposed Ward

**Certificate of Service**

I hereby certify that a true and correct copy of the foregoing instrument was served upon the following counsel by electronic transmission on this \_\_\_\_\_.

Name                      e-mail Address  
(Repeat as Necessary)

\_\_\_\_\_  
[Attorney Name]

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

Guardianship of \_\_\_\_\_,  
An Incapacitated Person

§  
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§  
§

Probate Court  
Number One of  
Tarrant County, Texas

ORDER APPOINTING GUARDIAN AD LITEM  
PURSUANT TO § 1054.051  
OF THE TEXAS ESTATES CODE  
(Following Application for Guardianship)

On this day, the Court finds it necessary to appoint a Guardian Ad Litem to represent the interests of the proposed incapacitated person in this guardianship proceeding pursuant to § 1054.051 of the Texas Estates Code.

IT IS THEREFORE ORDERED that \_\_\_\_\_, Ph # (817) \_\_\_\_\_, who is an Attorney licensed to practice law in the State of Texas, is appointed as Guardian Ad Litem of Proposed Ward to perform with due diligence the following duties:

1. protect the Proposed Ward in a manner that will enable the court to determine the action that will be in that person’s best interests;
2. to investigate the Proposed Ward’s conditions and circumstances to determine whether a guardianship is necessary;
3. evaluate alternatives to guardianship and supports and services available to the proposed ward that would avoid the need for appointment of a guardian;
4. to personally interview the Proposed Ward;
5. to investigate the need for the appointment of a Guardian of the Person and/or Estate for Proposed Ward and obtain a Proposed Guardian if necessary;
6. to file a written report with the Court concerning the best interest of Proposed Ward as soon as possible but no later than one week prior to a hearing date.

IT IS ORDERED that the Guardian Ad Litem is to be considered an officer of the Court and is to be given access to all of the Proposed Ward’s financial, medical, psychological and intellectual testing records. *This Order is issued pursuant to 45 CFR 164.512(e)(1)(i) Health Insurance Portability and Accountability Act which authorizes covered entities to disclose protected health information in the course of any judicial or administrative proceeding when responding to an order of the Court, as well as the Privacy Act of 1974 pursuant to 5 U.S.C. 552a, and pursuant to 38 U.S.C. 5701 & 7332 regarding Veterans Administration Records.*

IT IS FURTHER ORDERED that a hearing pursuant to Texas Estates Code § 1101.051 is scheduled in the above entitled and numbered case on \_\_\_\_\_ at \_\_\_\_\_ o’clock \_\_\_\_m.

SIGNED \_\_\_\_\_

\_\_\_\_\_  
JUDGE PRESIDING

Appendix T:

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

Guardianship of

§

Probate Court

§

\_\_\_\_\_,

§

Number One of

§

An Incapacitated Person

§

Tarrant County, Texas

Entry of Appearance

TO THE HONORABLE JUDGE OF THIS COURT:

The Undersigned, having been appointed by this Court pursuant to § 1054.051 of the Texas Estates Code as Guardian Ad Litem to represent and to act in the best interests of the Proposed Ward in this proceeding, makes and files this Entry of Appearance on behalf of the Proposed Ward in this proceeding and requests that copies of all orders, notices and pleadings be served on him/her at the address set forth below.

Signed \_\_\_\_\_

Respectfully Submitted

\_\_\_\_\_  
(Attorney Block)

**Certificate of Service**

I hereby certify that a true and correct copy of the foregoing instrument was served upon the following counsel by electronic transmission on this \_\_\_\_\_.

Name                      e-mail Address  
(Repeat as Necessary)

\_\_\_\_\_  
[Attorney Name]

Appendix U: No. \_\_\_\_\_

Guardianship of \_\_\_\_\_, § Probate Court  
§  
§ Number One of  
§  
An Incapacitated Person § Tarrant County, Texas

Report of Guardian Ad Litem

TO THE HONORABLE JUDGE OF SAID COURT:

The Undersigned, having been appointed by this Court pursuant to § 1054.051 of the Texas Estates Code as Guardian Ad Litem to represent the Proposed Ward, to investigate the need for establishing a regular, permanent guardian, and to act in the best interests of the Proposed Ward in this proceeding, makes and files this report to the Court as follows:

- I concur with the position of Applicant that the Proposed Ward cannot manage his/her financial affairs nor meet his/her personal needs and is in need of a Guardian of the Person/Estate.
- (or)
- I disagree with the position of Applicant and believe that the Proposed Ward can manage his/her financial affairs and meet his/her personal needs and is NOT in need of a Guardian of the Person/Estate.

1. Review of Documents on File: Upon notice of my appointment, I reviewed copies of the documents on file furnished by the Court and any available medical information and contacted Counsel(s) for the Applicant/Proposed Guardian/Contestant, requesting further information concerning the Proposed Ward's personal history, family background and estate.
2. Investigation: During my investigation regarding the mental and physical condition of the Proposed Ward, the need for a guardianship or other less restrictive alternative and the best interests of the Proposed Ward, I spoke with:
  - A. The Proposed Ward: On \_\_\_\_\_, at his/her current place of residence or other \_\_\_\_\_.
  - B. Treating Physician: Dr. \_\_\_\_\_, on \_\_\_\_\_.
  - C. Proposed Guardian: \_\_\_\_\_, on \_\_\_\_\_.
  - D. Other Persons:
    1. \_\_\_\_\_, on \_\_\_\_\_.
    2. \_\_\_\_\_, on \_\_\_\_\_.
    3. \_\_\_\_\_, on \_\_\_\_\_.
3. Estate of Proposed Ward: The ward owns  no property (or)  the following described property: (describe).  
 The ward receives the following income: (describe monthly and annual)
4. Conclusion and Recommendations:
  - In my opinion, the following actions would be in the best interest of the Proposed Ward:
    1. \_\_\_\_\_.
    2. \_\_\_\_\_.
    3. \_\_\_\_\_.

Signed \_\_\_\_\_

Respectfully Submitted

\_\_\_\_\_  
(Attorney Block)

**Insert Certificate of Service**

Appendix V: Motion for Security for Costs & Order: No. \_\_\_\_\_

Guardianship of	§	Probate Court
	§	
_____ ,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

Motion for Security for Costs

TO THE HONORABLE JUDGE OF SAID COURT:

\_\_\_\_\_, Guardian Ad Litem for \_\_\_\_\_ (“Movant”), files this Motion for Security for Costs, and in support thereof would show this Court as follows:

1. Movant is the court-appointed Guardian Ad Litem for \_\_\_\_\_, Proposed Ward herein.
2. \_\_\_\_\_ (“Respondent”) has filed a contest to the application of \_\_\_\_\_ seeking appointment as Guardian of the Person and Estate of Proposed Ward. Movant has answered the contest, and denies the allegations made in such contest.

3. In accordance with Texas Estates Code § 1053.051 and Rule 143 of the Texas Rules of Civil Procedure, Movant requests that Respondent be ordered to give security for the probable costs of this proceeding.

WHEREFORE, Movant prays that a hearing is scheduled for this Motion for Security Costs and that, after a hearing, the Court order Respondent to give security for the probable costs of this proceeding in accordance with Texas Probate Code § 1053.051 and Rule 143 of the Texas Rules of Civil Procedure, and for such other and further relief in law and in equity to which Movant may be entitled.

Dated: \_\_\_\_\_

Respectfully submitted,

[Attorney Information]

Guardian Ad Litem for  
Proposed Ward

**Insert Certificate of Conference**

**Certificate of Service**

I hereby certify that a true and correct copy of the foregoing instrument was served upon the following counsel by electronic transmission on this \_\_\_\_\_.

Name	e-mail Address
(Repeat as Necessary)	

\_\_\_\_\_  
[Attorney Name]

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

Guardianship of

§

Probate Court

§

\_\_\_\_\_ ,

§

Number One of

§

An Incapacitated Person

§

Tarrant County, Texas

Order Granting Security for Costs

On the date shown below, the court considered the Motion for Security for Costs filed by \_\_\_\_\_, Guardian Ad Litem for \_\_\_\_\_, Proposed Ward.

The Court, having examined the pleadings and having heard the evidence presented and arguments of counsel, makes the following findings and orders as follows:

1. Citation and notice have issued as required by law;
2. Movant is the duly appointed and qualified Guardian of the ward in this estate; and
3. The Motion is well taken and should be granted.

It is, therefore, ORDERED, ADJUDGED, and DECREED that \_\_\_\_\_, (“Respondent”) be and hereby is ordered to give security for the probable costs of this proceeding, which is hereby determined to be \$ \_\_\_\_\_, on or before \_\_:00 \_\_.m., \_\_\_\_\_, \_\_\_\_\_ (which date is 20 days after the date of this Order), and that such security be given pursuant to Rule 146 of the Texas Rules of Civil Procedure, by, at Respondent’s option,

1) a deposit of cash in the aforesaid sum with the Clerk of this Court and such security will be accepted as compliance with this order on the condition that Applicant will deposit any additional sum as the Court from time to time may designate as sufficient to pay the probable costs in this proceeding;

2) an attachment on appropriate property of Respondent, pursuant to Rule 592ff of the Texas Rules of Civil Procedure, or

3) an open bond to secure payment of the probable costs of this proceeding, made payable to the Judge of this Court, conditioned that Respondent as principal and his sureties will pay all such costs as may be adjudged against Respondent in this proceeding.

It is, further, ORDERED, ADJUDGED, and DECREED that should such security in form acceptable to this Court fail to be deposited with the Clerk of this Court on or before the date stated above, Respondent’s Application/Contest is dismissed as of the time and date of said deadline aforesaid, and that costs of the proceedings as determined by the Court, including compensation for Movant in an amount to be set by further order of this Court, shall be taxed against Respondent, said costs to be paid by Respondent within thirty (30) days of the date of said further order.

SIGNED \_\_\_\_\_.

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

Appendix W: Motion to Show Authority

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

Guardianship of

§  
§  
§  
§  
§

Probate Court

\_\_\_\_\_

Number One of

An Incapacitated Person

Tarrant County, Texas

Motion to Show Authority

TO THE HONORABLE JUDGE OF SAID COURT:

\_\_\_\_\_, Attorney Ad Litem for \_\_\_\_\_ (“Movant”), files this Verified Motion to Show Authority, and in support thereof, under oath, does swear or affirm as follows:

1. Movant is the court-appointed Attorney Ad Litem for \_\_\_\_\_, Proposed Ward herein.
2. \_\_\_\_\_ (“Respondent”) has entered an appearance on behalf of Proposed Ward as privately-retained counsel and filed a contest to the application of \_\_\_\_\_ seeking appointment as Guardian of the Person and Estate of Proposed Ward. Movant has answered the contest, and denies the allegations made in such contest.
3. Movant believes that such contest is being prosecuted without authority in that Proposed Ward lacks the capacity sufficient to retain counsel.
4. In accordance with Rule 12 of the Texas Rules of Civil Procedure and TEX. EST. CODE 1054.006, Movant requests that Respondent be caused to appear and show his authority to act on behalf of Proposed Ward.

WHEREFORE, Movant prays that a hearing be scheduled on this Motion and that Respondent be cited to appear and show his authority to act on behalf of Proposed Ward in this proceeding, in accordance with Rule 12 of the Texas Rules of Civil Procedure, and that upon hearing hereof, Respondent not be permitted to further appear on behalf of Proposed Ward herein, that any pleadings filed on behalf of Proposed Ward by Respondent be stricken, and for such other and further relief in law and in equity to which Movant may be entitled.

Dated: \_\_\_\_\_

[Attorney Information,  
Address Block and Signature]  
Attorney Ad Litem for  
Proposed Ward

STATE OF TEXAS §  
COUNTY OF TARRANT §

Before me, the undersigned notary, on this day personally appeared \_\_\_\_\_, the affiant and Movant herein, a person whose identity is known to me. After I administered an oath to affiant, affiant testified:

“My name is \_\_\_\_\_. I am capable of making this verification. I read the Motion to Show Authority. The facts stated in it are within my personal knowledge and are true and correct.”

\_\_\_\_\_  
*Name of affiant*

SWORN TO AND SUBSCRIBED before me by Affiant on \_\_\_\_\_.

\_\_\_\_\_  
Notary

**Insert Certificate of Conference**

**Insert Certificate of Service**





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

Guardianship of

§  
§  
§  
§  
§

Probate Court

\_\_\_\_\_

Number One of

An Incapacitated Person

Tarrant County, Texas

Order [Granting/Denying] Motion to Show Authority

On this date, the Court, considered the Motion filed herein by \_\_\_\_\_, Attorney Ad Litem for the Proposed Ward in this matter, requiring \_\_\_\_\_ to appear and show his authority to act on behalf of Proposed Ward in this proceeding, in accordance with Rule 12 of the Texas Rules of Civil Procedure and TEX. EST. CODE 1054.006;

*Option A* and it appearing to the Court that Respondent has failed to show such authority;

It is, therefore, ORDERED that the pleadings filed by Respondent on behalf of Proposed Ward be STRICKEN and that Respondent is hereby refused permission to appear on half of and represent Proposed Ward in this matter.

*Option B* and it appearing to the Court that Respondent has adequately demonstrated such authority,

It is, therefore, ORDERED that Respondent be permitted to appear on half of and represent Proposed Ward in this matter and that \_\_\_\_\_, Attorney Ad Litem herein, be, and he is hereby DISCHARGED from further responsibility in this matter.

SIGNED \_\_\_\_\_

\_\_\_\_\_  
JUDGE PRESIDING

Appendix X:

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

Guardianship of

§

Probate Court

§

\_\_\_\_\_,

§

Number One of

§

An Incapacitated Person

§

Tarrant County, Texas

Motion in Limine and to Dismiss Application

TO THE HONORABLE JUDGE OF SAID COURT:

Interested Person (“Movant”) files this motion in limine and to dismiss the application for appointment of a permanent guardian of the person and estate of Proposed Ward filed by Applicant and would how the court as follows:

1. Applicant has filed an application for appointment of a permanent guardian of the person and estate of Proposed Ward. Interested Person has filed a contest to this application and has filed his own application for appointment of a permanent guardian of the person and estate of Proposed Ward.

2. Applicant has an interest adverse to that of Proposed Ward, in violation of § 1055.001 of the Texas Estates Code. Applicant is therefore prohibited from filing an application to create a guardianship for the proposed ward or contesting the appointment of a person as guardian of the person or estate, or both, of the proposed ward.

3. Further, Applicant is disqualified and ineligible to serve as guardian of the person or estate of Proposed Ward pursuant to TEX. EST. CODE § 1055.001. Movant would show Applicant is one whom the proposed ward has expressly disqualified by prior designation under TEX. EST. CODE § 1104.202(b) and attached hereto as Exhibit “A.”

4. Applicant lacks standing to either prosecute his application for appointment of a permanent guardian of the person and estate of Proposed Ward or to contest the application filed by Movant herein.

WHEREFORE, PREMISES CONSIDERED, Movant prays that the Court dismiss Applicant’s application and for such other relief to which Movant may be entitled.

Dated: \_\_\_\_\_

Respectfully submitted,

[Attorney Information]

Attorney Ad Litem for  
Proposed Ward

**Insert Certificate of Conference**

**Certificate of Service**

I hereby certify that a true and correct copy of the foregoing instrument was served upon the following counsel by electronic transmission on this \_\_\_\_\_.

Name                    e-mail Address  
(Repeat as Necessary)

\_\_\_\_\_  
[Attorney Name]

Appendix Y:

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

Guardianship of

§

Probate Court

§

\_\_\_\_\_

§

Number One of

§

An Incapacitated Person

§

Tarrant County, Texas

Motion for Independent Medical Examination

TO THE HONORABLE JUDGE OF SAID COURT:

Movant, Attorney Ad Litem for Proposed Ward, files this Motion for Independent Medical Examination and in support respectfully shows the court as follows:

1. Movant believes it is in the best interests of Proposed Ward pursuant to § 1101.103 of the Texas Estates Code and Rule 167a of the Texas Rules of Civil Procedure for the Court to order a complete independent medical examination of Proposed Ward, to be conducted by a court-appointed psychiatrist, for the purpose of determining the present mental state of Proposed Ward and for assessment of her current care needs.

2. Movant has filed a contest to the application to create a guardianship for the proposed ward, denying that Proposed Ward is incapacitated. Based on these facts, Movant believes it would be in the best interest of Proposed Ward to have an independent medical examination.

3. Movant therefore moves the Court to designate the time, place, manner, conditions, and scope of the examination to be conducted by the psychiatrist named by the Court to make such examination of Proposed Ward. It is further requested that the report of the examining psychiatrist be provided to the Court and all counsel of record.

4. Movant requests that the expenses of said examination be paid out the estate of Proposed Ward as it is beneficial to the ward and her estate to have the facts of her mental status determined.

WHEREFORE, PREMISES CONSIDERED, Movant prays that the Court order Proposed Ward to appear before a psychiatrist to be designated by the Court for the purpose of undergoing an independent medical examination pursuant to § 1101.103 of the Texas Estates Code and Rule 167a of the Texas Rules of Civil Procedure to determine her mental status and that the Court order such examination to be paid out the estate of Proposed Ward; and for such other and further relief to which Movant may show himself to be justly entitled..

Dated: \_\_\_\_\_

Respectfully submitted,

[Attorney Information]

Attorney Ad Litem for  
Proposed Ward

**Insert Certificate of Conference**

**Certificate of Service**

I hereby certify that a true and correct copy of the foregoing instrument was served upon the following counsel by electronic transmission on this \_\_\_\_\_.

Name                      e-mail Address  
(Repeat as Necessary)

\_\_\_\_\_  
[Attorney Name]

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

Guardianship of	§	Probate Court
_____	§	Number One of
An Incapacitated Person	§	Tarrant County, Texas

Order Setting Hearing on Application for Independent Medical Examination  
(Fiat)

A hearing on the Motion for Independent Medical Examination, filed herein by \_\_\_\_\_  
\_\_\_\_\_, Attorney Ad Litem for Proposed Ward, is scheduled to be heard before the  
Court on \_\_\_\_\_ at \_\_\_\_\_ o'clock \_\_\_\_ m.

Signed \_\_\_\_\_

\_\_\_\_\_  
JUDGE PRESIDING

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

Guardianship of	§	Probate Court
_____	§	Number One of
An Incapacitated Person	§	Tarrant County, Texas

Order Granting Independent Medical Examination

On this day, the Court considered the Motion for Independent Medical Examination filed herein by \_\_\_\_\_, Attorney Ad Litem for Proposed Ward, and the Court, after having considered the motion and the applicable law and having heard the evidence and arguments of counsel, is of the opinion and finds that good cause has been shown for the granting of such motion.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that \_\_\_\_\_ is hereby appointed by the Court to make a medical examination of Proposed Ward pursuant to § 1101.103 of the Texas Estates Code, to determine the present mental state and to assess her current care needs.

IT IS FURTHER ORDERED that such psychiatrist shall render his or her findings in a written report to this Court and all counsel of record.

IT IS FURTHER ORDERED that such examination shall be conducted on or before \_\_\_\_\_, that the report of the psychiatrist be filed with the court within \_\_\_\_\_ days of the examination, and that the expenses of said examination and report be paid out the estate of Proposed Ward.

Dated: \_\_\_\_\_

\_\_\_\_\_  
JUDGE PRESIDING

To the Proposed Guardian

Registration, Background Checks and Training

At least **three weeks** prior to any hearing on an application to appoint you as guardian, you must:

1. **Register:** Go to the website of the Judicial Branch Certification Commission (JBCC): <http://www.txcourts.gov/jbcc/register-a-guardianship/> and complete the registration process.
  - If you do not have computer access, ask your attorney or the Guardian Ad Litem to apply to register you by mail: JBCC, Attn: Guardianship Registration, P. O. Box 12066, Austin, TX 78711-2066.
  - Attorneys may make inquiries to: [jbccguardianregistration@txcourts.gov](mailto:jbccguardianregistration@txcourts.gov)
2. **Criminal History Background Check:** All proposed guardians who are not an attorney or a professional guardian must undergo a criminal history background check.

If the value of the liquid assets of the proposed ward's estate is \$50,000 or less and the proposed guardian is a Texas resident, after the Proposed Guardian begins the registration process, then the JBCC will initiate and conduct a name and date of birth criminal history search based on the information provided in the guardianship registration information including the current name and all former names of the proposed guardian. JBCC will send the results to the probate clerk.

If the value of the liquid assets of the proposed ward's estate exceeds \$50,000 or the proposed guardian is not a Texas resident, a digital fingerprint background check must be completed.

Once the Proposed Guardian completes the registration process, the JBCC will send an email to the proposed guardian with a service code and instructions for the proposed guardian to submit digital fingerprints through Texas Department of Public Safety (DPS).

After receiving the email and instructions, the proposed guardian will schedule an appointment to have the digital fingerprints taken with DPS.

JBCC will send the results of the DPS digital fingerprint search to the probate clerk. Tex. Govt. Code § 155.205.

3. **Training:** As a part of the registration process, all guardians must be undergo training before being appointed. The training is available free online on the JBCC website: <https://guardianship-txcourts.talentlms.com/catalog/info/id:144>

**This process must be started at least three weeks before any hearing date to give the JBCC sufficient lead time to confirm registration, the completion of training and to furnish a copy of the person's criminal history background check to the probate court at least ten days before the hearing.**

Appendix Aa: Setting Confirmation

From: H. Louis Dewey [hugheylouiedewey@pmail.com]  
Sent: Friday, January 24, 2014 4:23 PM  
To: Heather Beyer  
Cc: Marge Inovera; Atticus Finch, Esq.  
Subject: Re: Setting Confirmation: # No. 2013-GD00210-1; Guardianship of Natalie Attired

This is to confirm the above-referenced matter is set for hearing on the Application for Letters of Guardianship on Monday, April 1, 2014 at 3:00 p.m.

By copy of this e-mail, all counsel of record and pro se parties, if any, are being notified of this hearing.

Please let me know if you have any questions. Thank you for your assistance in this matter.

Sincerely,

H. Louis Dewey  
Dewey, Cheatham & Howe  
(817) 000-0000 fax: (817) 000-0000  
[hugheylouiedewey@pmail.com]

---

From: Heather Beyer  
Sent: Friday, January 24, 2014 4:15 PM  
To: H. Louis Dewey  
Subject: Setting Confirmation: # No. 2013-GD00210-1; Guardianship of Natalie Attired

I have Monday, April 1, 2014 at 3:00 p.m. available for a hearing on letters of guardianship.

Heather Beyer, Coordinator,  
Tarrant County Probate Court One

Appendix Ab:

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

Guardianship of

§

Probate Court

§

\_\_\_\_\_

§

Number One of

§

An Incapacitated Person

§

Tarrant County, Texas

Proof of Facts  
(Guardianship)

On this day, the undersigned Affiant (“Affiant”), appeared personally in open court and, after being duly sworn, upon oath deposes and says that:

1. “My name and residence address are: \_\_\_\_\_  
\_\_\_\_\_.

2. “Proposed Ward, \_\_\_\_\_  
is an incapacitated person as defined by § 1002.017 of the Texas Estates Code and is a(n):

- a.  adult  minor       male  female      aged \_\_\_ years and.
- b.  resident of this County; or     has an estate located principally in this county; or  
 located in this county at the time of the filing of the Guardianship Application.
- c.  totally incapacitated; or       partially incapacitated as reflected in the Physician’s Certificate  
filed herein in accordance with § 1101.103 of the Texas Estates Code; or  
 incapacitated by virtue of minority only.

3. “Proposed Ward is:  present in open court; or  not present in open court as it is not in Proposed Ward’s best interest to require attendance and Proposed Ward is not able to materially participate in the hearing if present.

*(Possible testimony regarding Supports and Services.)*

4. “Proposed Guardian, \_\_\_\_\_, is a suitable person to be appointed Guardian, is not disqualified by law from serving in that capacity or from accepting Letters of Guardianship, is entitled to Letters of Guardianship, and it is in Proposed Ward’s best interest and is necessary to promote and protect Proposed Ward’s well-being for Proposed Guardian to be appointed to assist Proposed Ward in managing his/her estate.

5. “There are no guardianships of any kind existing for Proposed Ward in this, or any other, state.

6. (Minors only) “This guardianship is not sought for the primary purpose of enabling minor Proposed Ward to establish residency for enrollment in a school.

Signed \_\_\_\_\_.

\_\_\_\_\_  
Affiant

SWORN TO AND SUBSCRIBED before me by Affiant on \_\_\_\_\_.

\_\_\_\_\_



Appendix Ac: No. \_\_\_\_\_

Guardianship of \_\_\_\_\_,  
An Incapacitated Person

§  
§  
§  
§  
§

Probate Court  
Number One of  
Tarrant County, Texas

Evidence in Support of Requested Bond

	Monthly Income	Annualized Income
<b><u>Income</u></b>		
Social Security	\$ _____	\$ _____
_____ Annuity	_____	_____
_____ Pension	_____ (after taxes)	_____
Total Income	_____	\$ _____
<b><u>Bondable Property</u></b>		
Checking Account (approximate balance)		\$ _____
Credit Union Account (approximate balance)		_____
2006 Chrysler 300		_____
Total Bondable Property		\$ _____
<b><u>Debts (Unsecured)</u></b>		
Unsecured Demand Note		\$ _____
Credit Card Accounts		_____
Total Debts		\$ _____
Total Annual Income, Bondable Property & Debts		\$ _____
plus 10% of the above total		_____
Indicated Bond Amount (Rounded Up to Next Thousand)		\$ _____

Appendix Ad:

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

Guardianship of

§  
§  
§  
§  
§

Probate Court

\_\_\_\_\_

Number One of

An Incapacitated Person

Tarrant County, Texas

Evidence in Support of Requested Monthly Allowance

- A. Care Facility: \_\_\_\_\_ \$ \_\_\_\_\_
  - B. Storage Facility: (personal property from residence: \_\_\_\_\_
  - C. Residence
    - Utilities \_\_\_\_\_
    - Lawn Maintenance \_\_\_\_\_
    - Tax & Insurance (prorated) \_\_\_\_\_
  - D. Medical Expenses and Prescriptions \_\_\_\_\_
  - E. Water for \_\_\_\_\_ Property \_\_\_\_\_
  - F. Miscellaneous items \_\_\_\_\_
- including, but not limited to, newspaper subscription,  
taxi fare, medical, personal care items and dining out
- TOTAL: \$ \_\_\_\_\_

**Guardianship**

**DON'T DO THIS:**     *"If I asked you the same questions that you were just asked, would your answers be any different?"*

If you are directly examining a corroborative (second) witness, then it saves time to ask:

*"You have just heard the questions that were asked of the other witness. If I asked you the same questions that I just asked the first witness, would your answers be the same?"*

Unless you are doing a comedy routine (see Abbott & Costello, "Who's on First?" [www.baseball-almanac.com/humor4.shtml](http://www.baseball-almanac.com/humor4.shtml)), it makes *little or no sense* to listen to a direct examination by another attorney and then ask the witness if they could manage to answer the same questions the same way a second time.

Appropriate Topics:

1. Do you remember when I spoke with you about the guardianship for \_\_\_\_\_?
2. Do you remember when we discussed – suitability/ incapacity/ living arrangements
3. Ward's presence in courtroom would not be of any assistance to court.
4. This guardianship for minor not just for qualification for school
5. Explanation of family dynamics that judge needs to know about
  - discuss any sore spots that might be a problem later
  - visitation money management by spouse/sibling
  - medication issues / driving / voting / marriage
  - property disputes you anticipate will crop up

*Have you fully disclosed all of the assets of the ward?*
6. Standing (adverse interest) "a position that does not promote the well-being of the ward."
7. Disqualification issues of other family members ("driving nails in the coffin lid")
  - minors / notoriously bad conduct / incapacity / party to a lawsuit affecting proposed ward's welfare / indebted to proposed ward / having a claim adverse to the property or person of the proposed ward / incapable of prudently managing estate (lack of experience, education, or other good reason) / one found unsuitable by the court / one expressly disqualified under §679 / a nonresident without a designation of resident agent.

*Sometimes an oblique question will get a more nearly honest answer:*  
 Instead of asking: *Have you ever been convicted of a felony involving moral turpitude?*  
 Ask: *Have you ever been in trouble with the law?*
8. Cross-examination of proposed Guardian when you still have doubts that money or property will be managed correctly - **commit future guardian to course of action** while under oath and in front of judge.
9. Less Restrictive Alternatives & Supports and Services (Appendices D, D-1)- *Have you considered?*
10. Changed Circumstances: Is there anything that has changed since I last spoke to you?

**Heirship**     See **DON'T DO THIS:** (*supra*)

Appropriate Topics:

1. Are you aware of any relationships the Deceased had for more than one year?
2. Do you know if any of these relationships resulted in the birth of a child?
3. Are you aware of any claims of paternity or paternity actions brought in court against the Deceased?
4. Are you aware of any legitimization claims / court proceedings for legitimization brought against the Deceased?
5. Do you have any direct knowledge of paternity / of marriage / of children?
6. Do you recall any discussions/ have any direct knowledge regarding deceased siblings / nieces / nephews?
7. Do you recall any discussions/ have any direct knowledge of the Deceased admitting to being the father of \_\_\_\_\_
8. Since we last spoke, is there anything that you recall regarding the Decedent that you did not tell me at that time?

Appendix Af:

	No. _____	
Guardianship of _____,	§	Probate Court
	§	
	§	Number ____ of
An Incapacitated Person	§	_____ County, Texas

Order Appointing Guardian of the Person and Estate

(Do not reproduce and use this form "as is."  
It must be edited as appropriate for a given set of facts.)

On this day, came on to be heard the Application for Letters of Guardianship of the Person and Estate of \_\_\_\_\_, an Incapacitated Person (hereinafter "Ward") filed by \_\_\_\_\_.

At the hearing, the Court:

1. Read and considered the Application and the Physician's Certificate of Medical Examination produced pursuant to § 1101.103 or § 1101.104 of the Texas Estates Code;
2. Heard the testimony, evidence, testimony of witnesses and arguments of counsel in support of such Application; and being fully advised in the premises, no contest or opposition thereto being asserted;
3. Inquired into the ability of the Ward to feed, clothe and shelter himself or herself, to care for his or her physical health, and to manage his or her property and financial affairs; and
4. Inquired into the qualifications, abilities, and capabilities of the person seeking to be appointed as Guardian.

The Court hereby finds by a preponderance of the evidence:

5. This Court has jurisdiction and venue of this cause;
6. Due notice of said Application has been given to those persons as required by the Texas Estates Code;
7. Citation has been personally served upon the Ward in accordance with the law;
8. The Ward *did/did not* appear in person at the hearing, *and/but* was represented by the Attorney Ad Litem; *the personal appearance of the Ward at the hearing was not necessary or advisable because such appearance would not have been in the Ward's best interest;* and
9. \_\_\_\_\_, ("Guardian") is eligible to be appointed, is entitled to be appointed, or is a proper person to act as Guardian of the Person and Estate of the Ward.
10. *The guardianship is not created for the primary purpose of enabling the Ward to establish residency for enrollment in a school or school district for which the Ward is not otherwise eligible for enrollment.*

Further, the Court finds by clear and convincing evidence that:

11. Pursuant to § 1101.151 of the Texas Estates Code, the Ward is totally without capacity to care for *himself* or manage *his* property; *or Pursuant to §§ 1101.101(c) & 1101.152 of the Texas Estates Code, the Ward lacks the capacity to do some, but not all, of the tasks necessary to care for himself or manage his property; specifically, [edit as appropriate] the proposed ward lacks the capacity, or lacks sufficient capacity with supports and services, to make personal decisions regarding residence, voting, operating a motor vehicle, and marriage; or The Ward is without capacity solely by virtue of his minority;*
12. The determination of Ward's incapacity was evidenced by recurring acts or occurrences within the preceding six-month period and not by isolated instances of negligence or bad judgment;
13. It is in the best interest of the Ward to have the court appoint a person as Guardian;
14. The Ward's rights and property will be protected by the appointment of a Guardian;
15. Alternatives to guardianship that would avoid the need for the appointment of a Guardian have been considered and determined not to be feasible; and
16. Supports and services available to the Ward that would avoid the need for the appointment of a Guardian have been considered and determined not to be feasible.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

Choose only one:

(Guardianship with Limited Authority) \_\_\_\_\_ is hereby appointed Guardian of

the Person (*and Estate*) of \_\_\_\_\_, the Ward, and is hereby granted authority over the Ward with the following powers to act on the Ward's behalf as authorized under the Texas Estates Code: (*specify powers of the Guardian*)

The following powers or duties of the Guardian shall be limited if the Ward does not receive supports and services: \_\_\_\_\_.

The following powers or duties of the Guardian shall be limited if the Ward does receive supports and services: \_\_\_\_\_.

The rights of the Ward are limited to the extent not inconsistent herewith, including the right to hold or obtain a license to operate a motor vehicle, the right to vote in a public election and the right to make personal decisions regarding residence.

(Plenary Guardianship - short description of rights) \_\_\_\_\_ is hereby appointed Guardian of the Person and Estate of \_\_\_\_\_, the Ward, and is hereby granted full authority over the Ward with *all* powers to act on the Ward's behalf as authorized under the Texas Estates Code.

IT IS FURTHER ORDERED that the Guardian shall have the following specific powers over the person:

1. The power to take charge and control of the person of the Ward, including having physical possession of the Ward;
2. The power and right to determine who may and who may not visit the Ward, and to deny access to the Ward to anyone whose visits are not in the Ward's best interest as determined by the Guardian subject to Section 1151.351(b)(16) of the Texas Estates Code;
3. The power to establish the Ward's legal domicile and apply for, consent to, and enroll the Ward in private or public residential care facilities, including 24-hour facilities, group home facilities or nursing home facilities subject to Section 1151.051(e) of the Texas Estates Code;
4. The duty to live with the Ward or, alternatively, the power to meet the Ward's housing needs by renting real property for the Ward's residence; the power and authority to make application for, consent to, and enroll the Ward in nonresidential aging or Alzheimer's programs and services which are reasonably required and needed by the Ward and which are operated by public or private agencies and facilities;
5. The power to apply for and secure an identification card, social security card, passport, or other identification documents for the Ward and obtain health care insurance for the Ward;
6. The power to apply for, consent to, receive, and manage funds or governmental services on the Ward's behalf including: Vocational Rehabilitation Programs, Medicaid Services, Food Stamps, and Veteran's benefits and monthly Social Security benefits including Supplemental Security Income and Social Security Disability Insurance income subject to § 1151.351 (b)(6) of the Texas Estate Code;
7. The power to apply for, consent to, and enroll the Ward in appropriate educational, vocational, and recreational services;
8. The power to review, take possession of, and consent to the disclosure of the Ward's medical, health, psychological and intellectual testing records and any other protected health information pursuant to 45 CFR 164.512(e)(1)(i), Health Insurance Portability and Accountability Act;
9. The power to apply for, arrange for, and consent to any and all medical, psychological, or psychiatric examinations, treatment, tests or evaluations for Ward, but not the power or authority to consent to inpatient psychiatric commitment of Ward;
10. The power and authority to obtain the services of the Tarrant County Sheriff's Department, or any county's Sheriff's Department, a constable, a municipal police department or any peace officer, and/ or MedStar Ambulance Service or other similar ambulance service, to remove, including against the Ward's will, the Ward from his or her place of residence or wherever he or she may be found, restrain, and transport the Ward to a private home, group home, hospital, residential care facility, nursing home, or to an inpatient mental health facility and file for emergency detention, or such other place as the Guardian directs, with or without Ward's consent;
11. The power to consent to or object to medical, dental, and healthcare treatment for Ward, including surgery, but not the power or authority to consent to a sterilization or abortion for Ward;
12. The authority to consent to the administration of all psychoactive medications for the benefit of the Ward;
13. The authority to sign a Do Not Resuscitate Order on behalf of the Ward; and

14. To do such other and further acts concerning the property and interests of the Ward and the Ward's estate as the Court may from time to time direct by express authorization through written order of the Court.

IT IS FURTHER ORDERED that the Guardian shall have the following specific powers over the estate:

1. To possess and manage the properties of the Ward, including all cash on hand, bank accounts, stocks, bonds, securities accounts, annuities, and other investments of the Ward and to open new accounts and to be the authorized signatory on such accounts; to have possession and management of the Ward's home, Ward's personal possessions, and any other real or personal property owned by the Ward, and to have total access to all records and past transactions of Ward and his or her attorney-in-fact with respect to such properties;
2. To access, handle, distribute, and dispose of the digital assets of the Ward, and the power to obtain, access, modify, delete, and control any passwords and other electronic credentials associated with any digital devices and digital assets of the Ward pursuant to Texas Estates Code Chap 2001;
3. To collect debts, rentals, wages or other claims due the Ward;
4. To pay, compromise, or defend claims against the Ward, subject to court approval;
5. To represent the Ward in any legal action, subject to court approval;
6. To contract and to incur other obligations on the Ward's behalf and to renew and extend any obligations, subject to court approval appointment;
7. To collect and give receipt for any monies, rents, dividends, interest, trust proceeds, and any and all other types of income payable to or receivable by the Ward;
8. To apply for and to receive funds from governmental sources for the Ward including, but not limited to: Childhood Disability Benefits under the Old-Age Survivors and Disability Insurance Program Aid to Families with Dependent Children (AFDC), Federal Pensions received from the Office of Personnel Management, HUD Section 8 Rent Subsidies, Medicare, Railroad Retirement Pension Benefits received from the Railroad Retirement Board, Social Security Benefits, Supplemental Security Income Benefits (SSI), and Veteran's Benefits;
9. To apply for and consent to governmental services on the Ward's behalf including: Vocational Rehabilitation Programs, Medicaid Services, Food Stamps, and Veteran's benefits;
10. To apply for and secure insurance on the Ward's behalf for the Ward's property and the Ward's person;
11. To file a federal income tax return on the Ward's behalf and to pay federal, state and local taxes of the Ward;
12. To review, take possession of and consent to the disclosure of the Ward's legal, financial or other confidential books, documents or other records/including the power to enter into the Ward's safe deposit box;
13. To meet the Ward's housing needs by renting real property for the Ward's residence;
14. To employ and to discharge from employment attorneys, accountants, appraisers and other persons necessary in the administration of the estate of the Ward; upon application and order of the court;
15. To employ and discharge from employment nurses, sitters, caregivers, tutors, therapists and other persons engaged to assist the Ward; upon application and order of the court; and
16. To do such other and further acts concerning the property and interests of the Ward and the Ward's estate as the Court may from time to time direct by express authorization through written order of the Court.

*Alternative:*

*IT IS FURTHER ORDERED that the following legal and civil rights and powers are RETAINED by the Ward:*

1. *The right to operate a motor vehicle or hold or obtain a license to operate a motor vehicle;*
2. *The right to make decisions involving marital status;*
3. *The right to vote in a public election;*
4. *The right to choose the Ward's domicile or residence; etc.*

IT IS FURTHER ORDERED that the following legal and civil rights and powers are REMOVED from the Ward:

1. The right to vote;
2. The right to travel;
3. The right to make any gifts of real or personal property;

4. The right to make personal decisions regarding residence;
5. The power to drive and obtain a driver's license;
6. The power to execute a Directive to Physicians (Living Will);
7. The power to execute a power of attorney;
8. The power to execute any and all legal documents or contracts, other than a will or codicil; and
9. The power to marry.

IT IS FURTHER ORDERED that:

10. The Guardian appointed is hereby ordered to swear and subscribe to an oath or unsworn declaration that the Guardian will faithfully discharge the duties of Guardian of the Person and Estate of the Ward;
11. The Guardian shall give good and adequate bond in the amount of \$\_\_\_\_\_, conditioned as required by law;
12. Upon the filing of the Guardian's oath or unsworn declaration and approval of the Guardian's Bond as required herein, the Clerk of the Court shall issue Letters of Guardianship to the Guardian;
13. The Guardian is authorized to expend up to and including the amount of \$\_\_\_\_\_ per month out of the income and, if necessary, corpus of the estate, for the care, support, maintenance of the Ward and the Ward's property, without further order of this Court;
14. The Tarrant County Sheriff's Department, any other peace officer, and/or Medstar Ambulance Service is authorized, empowered, and directed to remove the Ward from wherever he or she may be found, and transport him or her immediately to such place as the Guardian shall direct;
15. The powers of any agent under any powers of attorney given by the Ward are hereby revoked;
16. The appointment of the Attorney Ad Litem herein shall continue until further order of the Court; and
17. *Choose only one:*
  - A petition for adjudication that a guardianship is no longer needed by the Ward may not be filed within a period of one (1) year from the date of the signing of this order without special leave of the Court, *or*
  - The Physician's Certificate of Medical Examination submitted herein has stated that improvement in the Ward's physical condition or mental functioning is possible and has specified a period of less than a year after which the Ward should be reevaluated to determine continued necessity for the guardianship. The Guardian is hereby ORDERED to submit to the Court an updated Physician's Certificate of Medical Examination by \_\_\_\_\_.

SIGNED \_\_\_\_\_.

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

"Notice to any peace officer of the State of Texas: you may use reasonable efforts to enforce the right of a guardian of the person of a ward to have physical possession of the ward or to establish the ward's legal domicile as specified in this order. A peace officer who relies on the terms of a court order and the officer's agency are entitled to the applicable immunity against any civil or other claim regarding the officer's good faith acts performed in the scope of the officer's duties in enforcing the terms of this order that relate to the above-mentioned rights of the court-appointed guardian of the person of the ward. Any person who knowingly presents for enforcement an order that is invalid or no longer in effect commits an offense that may be punishable by confinement in jail for as long as two years and a fine of as much as \$10,000."

Appendix Ag:

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

Guardianship of

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§  
§

Probate Court

\_\_\_\_\_

Number One of

An Incapacitated Person

Tarrant County, Texas

PERSONAL SURETY BOND  
GUARDIAN OF THE PERSON

STATE OF TEXAS }  
COUNTY OF \_\_\_\_\_ }

**KNOW ALL PERSONS BY THESE PRESENTS**, that we, as Guardian of the Person of the above-named Ward and Principal herein and as Sureties (all as shown below), **DO HEREBY BIND OURSELVES**, jointly and severally, and our heirs and successors, to the Judge of Probate Court Number \_\_\_\_\_, \_\_\_\_\_ County, Texas, and his/her successors in office, **IN THE SUM OF \$100.00**, conditioned that said Guardian shall well and truly perform all the duties required of him or her as Guardian of the Person herein.

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

PRINCIPAL

PRINTED NAME: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

CITY, STATE, ZIP \_\_\_\_\_

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

SURETY

PRINTED NAME: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

CITY, STATE, ZIP \_\_\_\_\_

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

SURETY

PRINTED NAME: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

CITY, STATE, ZIP \_\_\_\_\_

APPROVED on \_\_\_\_\_.

\_\_\_\_\_  
JUDGE PRESIDING



Appendix Ah:

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

Guardianship of

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Probate Court

\_\_\_\_\_ ,

Number One of

An Incapacitated Person

Tarrant County, Texas

OATH OF GUARDIAN

That I, \_\_\_\_\_, do solemnly swear that I will faithfully perform and discharge the duties of Guardian of the Person of \_\_\_\_\_, an Incapacitated Person, according to law.

\_\_\_\_\_  
Guardian

SUBSCRIBED AND SWORN TO BEFORE ME on \_\_\_\_\_.

\_\_\_\_\_

Appendix Ai:

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

Guardianship of

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Probate Court

\_\_\_\_\_,

Number One of

An Incapacitated Person

Tarrant County, Texas

UNSWORN DECLARATION OF GUARDIAN

My name is \_\_\_\_\_, my date of birth is \_\_\_\_\_, and my address is \_\_\_\_\_.

I declare under penalty of perjury that the information in this declaration is true and correct. I solemnly declare that I will discharge faithfully the duties of guardian of the \_\_\_\_\_ of \_\_\_\_\_, an incapacitated person, according to law.

SIGNED ON \_\_\_\_\_.

\_\_\_\_\_  
Guardian

Appendix Aj:

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

Guardianship of

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Probate Court

\_\_\_\_\_

Number One of

An Incapacitated Person

Tarrant County, Texas

Safekeeping ("Freeze") Agreement  
(Pre-Appointment)

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES \_\_\_\_\_(BANK) by and through an officer of such institution, whose signature is duly affixed below, and does hereby certify that \_\_\_\_\_, Applicant to be appointed Guardian of the above-captioned Estate ("Guardian"), has deposited with such institution in \_\_\_\_\_ Account No. \_\_\_\_\_, funds belonging to said Estate with a balance as of this date of \$\_\_\_\_\_.

Further, BANK certifies that it will not deliver to the said Guardian or any other person, any of said funds so deposited, including any subsequent deposits to the account or any interest or dividends credited to such account, except upon the written authority of the Judge of Probate Court Number One of Tarrant County, Texas, in accordance with § 1105.155 of the Texas Estates Code, as amended.

Witness the signature and seal of \_\_\_\_\_ (Bank), on \_\_\_\_\_.

\_\_\_\_\_ BANK  
By \_\_\_\_\_  
Its \_\_\_\_\_

APPROVED on \_\_\_\_\_.

\_\_\_\_\_  
JUDGE PRESIDING

Appendix Ak:  
Guardianship of \_\_\_\_\_,  
An Incapacitated Person

No. \_\_\_\_\_  
§  
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§

Probate Court  
Number One of  
Tarrant County, Texas

Sworn Statement of Services and Expenses by Appointee in Court-Initiated Guardianship  
(Do Not File Prior to Hearing)

On this day personally appeared \_\_\_\_\_ ("Appointee"), known to me, who first being duly sworn upon oath to tell the truth, deposed and stated:

"I am an attorney licensed to practice law in the State of Texas and appointed by the Court in this cause. The nature of services rendered in this action on behalf of my client by myself or someone in my employ is as follows:

Guardian Ad Litem

- a. personally interviewed Proposed Ward;
- b. interviewed party who filed the letter concerning Proposed Ward and known relatives of Proposed Ward;
- c. filed Application for Guardianship and a written report prior to hearing and ensured proper service and return of citation on Proposed Ward;
- d. located a person to serve as Guardian or coordinated with Guardianship Services, Inc. and notified family members as required by Texas Estates Code § 1051.104;
- e. consulted with Attorney Ad Litem concerning Application;
- f. set and attended hearing on Application;
- g. assisted Guardian in obtaining his or her bond and letters.

Attorney Ad Litem

- a. reviewed application for guardianship, certificates of physical, medical and intellectual examination and relevant medical, psychological and intellectual testing records of Proposed Ward;
- b. personally interviewed Proposed Ward and discussed the laws and facts of the case, Proposed Ward's legal options and grounds on which guardianship is sought;
- c. ascertained whether the Proposed Ward wishes to oppose the proceedings and filed appropriate Answer, with copy of the report to the Court Investigator;
- d. consulted with Guardian Ad Litem or Court Investigator concerning Application;
- e. appeared on behalf of Proposed Ward at the hearing;
- f. reported on the need for continuation of the appointment or discharge of the Attorney Ad Litem at the hearing.

I therefore request the following fees and expenses for my representation of the Proposed Ward: (check one)

- Guardian Ad Litem fee \$ 1,000.00       Attorney Ad Litem fee \$ 500.00
- Expenses and reimbursement requested. (Please check appropriate line and attach proof and explanation)
- parking charges, long distance calls or other expense \$ \_\_\_\_\_
- TOTAL OF ATTORNEY'S FEES AND EXPENSES REQUESTED: \$ \_\_\_\_\_

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

Bar Card #: \_\_\_\_\_  
Phone Number \_\_\_\_\_  
e-Mail: \_\_\_\_\_

SUBSCRIBED AND SWORN TO before me by the aforesaid attorney on \_\_\_\_\_

\_\_\_\_\_  
Notary

**ORDER**

On this day, the Court considered foregoing, and finds that said Appointee has rendered necessary services on behalf of the Proposed Ward, that such fees and expenses are reasonable and just, and should be paid.

It is therefore ORDERED that \_\_\_\_\_ be immediately paid the total sum of \$ \_\_\_\_\_ from from funds held in the registry of this Court for such purpose [or by the Applicant or out of the funds of Tarrant County] within thirty (30) days of the date hereof.

It is further ORDERED that the appointment of Appointee is terminated and that the Appointee named herein is discharged as ad litem in this cause.

Signed this \_\_\_\_\_.

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

Appendix A1: No. \_\_\_\_\_

Guardianship of \_\_\_\_\_, § Probate Court  
§  
§ Number One of  
§  
An Incapacitated Person § Tarrant County, Texas

Application for Payment of Fees and Expenses of Ad Litem  
("Private Pay or County Pay in Excess of Set Fee")

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, \_\_\_\_\_, Applicant (and duly-appointed \_\_\_\_\_ Ad Litem for \_\_\_\_\_, "Ward"), and respectfully shows the Court as follows:

1. Applicant was appointed \_\_\_\_\_ Ad Litem by Order of this Court dated \_\_\_\_\_.
2. Applicant is an attorney licensed to practice law in the State of Texas. As \_\_\_\_\_ Ad Litem in the above-referenced matter, Applicant has spent \_\_\_ hours on this matter and incurred expenses in the amount of \$\_\_\_\_\_ as set forth in the itemized statement attached hereto as Exhibit A and incorporated herein for all purposes.
3. A Guardian was appointed for the Ward/ The Application for Guardianship was denied.
4. Applicant is familiar with the reasonable and customary fees charged by attorneys serving as \_\_\_\_\_ Ad Litem in Probate Court proceedings in Tarrant County, Texas. In my opinion, which is based upon my experience, education and training, the amount of \$ \_\_\_\_\_ is a reasonable and customary fee for the services I have provided in this matter and such fee is necessary and was incurred while representing the best interest of the Ward.

WHEREFORE, Applicant respectfully requests that this Court award attorney's fees and expenses in the amount of \$\_\_\_\_\_ and order that such fees be paid from funds held in the registry of this Court for such purpose, with any balance due to be paid from the funds available in the Ward's estate; *[or by the Applicant or out of the funds of Tarrant County]* within thirty (30) days of the date hereof.

Submitted this \_\_\_\_\_

\_\_\_\_\_ Bar Card # \_\_\_\_\_  
Applicant/Ad Litem  
Address \_\_\_\_\_  
Phone \_\_\_\_\_ Fax \_\_\_\_\_  
e-Mail: \_\_\_\_\_

**Certificate of Service**

I hereby certify that a true and correct copy of the foregoing instrument was served upon the following counsel by electronic transmission on this \_\_\_\_\_.

Name e-mail Address  
(Repeat as Necessary)

\_\_\_\_\_  
[Attorney Name]

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

Guardianship of

§

Probate Court

§

\_\_\_\_\_,

§

Number One of

§

An Incapacitated Person

§

Tarrant County, Texas

Order Approving Ad Litem Fees and Authorizing Payment  
(Private Pay)

On this day, the Court considered the Application for Payment of Attorney's Fees filed by \_\_\_\_\_, Guardian/Attorney Ad Litem in this cause, and finds as follows:

1. the time expended and expenses advanced are reasonable and just and should be paid as ordered below.
2. the Court finds that such fees and expenses shall be paid out of the guardianship estate  
  
(or)
3. *based upon the recommendation of the Court Investigator, the Application for Guardianship filed herein should be and has been denied and the Applicant shall pay all costs of this proceeding.*

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the attorney's fees and expenses should be immediately paid to \_\_\_\_\_ in the amount of \$ \_\_\_\_\_ and that such fees and expenses shall be taxed as costs in this case to be paid from from funds held in the registry of this Court for such purpose, with any balance due to be paid from the funds available in the Ward's estate; [or by the Applicant] within thirty (30) days of the date hereof.

SIGNED this \_\_\_\_\_.

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

**Practice Tips from The Court Investigators of Probate Court Number One**

1. Read the Ad Litem Manual.
2. Read the Texas Estates Code.
3. If you are notified of an appointment, promptly pick up your paperwork.
4. Check the Order Appointing Ad Litem for a hearing date.
5. Review the Physician's Certificate to verify that it meets the requirements of Tex. Est. Code § 1101.103.
6. If you are a Guardian Ad Litem, either file a report or an Application for Guardianship within 14 days of your appointment.
7. Check the physician's evaluation - is it still timely?
8. If you are an Attorney Ad Litem, file an answer. It's hard to convince the judge to appoint a guardian when the proposed ward has not been represented by counsel.
9. Calling the Court Investigator is not a substitute for action (and you don't get paid for it).
10. If you have a contested case, please do not call the Court Investigator to talk about facts or for advice as to how to proceed. Ex parte communications are prohibited.
11. All Guardian Ad Litem and Tex. Est. Code § 1101.001 applicants must comply with all of the requirements of § 1051. Make sure the affidavit is filed at least 1 week prior to the scheduled hearing, and any necessary waivers, etc. are obtained.
12. An affidavit pursuant to Tex. Est. Code § 1051.104 is still required even if there was no one on the "laundry list." The affidavit provides the court with information to that effect.
13. Make sure your application contains an itemized listing of income and assets of the proposed ward, including the value of the assets, (and any trust accounts for the ward at a nursing home) sufficient to allow the court to set a bond and a monthly allowance beneficial interest in trusts?
14. If the description or value of income or assets are unknown, let the investigator know they are unknown.
15. The Court Investigator's office is open during regular Court hours; however, the Court Investigator may be out of the office conducting an investigation, attending meetings, etc.... You are always welcome to stop by, but you might want to make sure the Court Investigator will be in the office before making a special trip to the courthouse.
16. Turn your fee application in to the clerk - not at the bench
17. Don't bother to 'cc' the Judge on everything.

BARRIE ALLEN 817-884-2189  
Court Investigator  
[ballen@tarrantcounty.com](mailto:ballen@tarrantcounty.com)

MARY CAROE 817-884-1897  
Assistant Court Investigator  
[mecaroe@tarrantcounty.com](mailto:mecaroe@tarrantcounty.com)

Probate Court Number One  
100 W. Weatherford, Rm. 260A  
Fort Worth, TX 76196  
Fax: 884-3178

**COURT INSTRUCTIONS: GUARDIAN OF THE PERSON  
INSTRUCCIONES DE LA CORTE PARA EL GUARDIAN DE LA PERSONA**

*(Revised November 2018 / Revisado November 2018)*

As a duly-appointed Guardian of the Person, you are hereby advised by the Court that you **must** do the following: (All section references are to the Texas Estates Code unless otherwise indicated.)

Como El Guardián designado con la responsabilidad de la persona, La Corte se le notifica que usted **debe** hacer lo siguiente: (Todas las referencias a las secciones son del Código Estates de Texas [Texas Estates Code] a menos que hay otras indicaciones al contrario.)

Steve M. King, Judge/ Juez  
Probate Court #1/ Corte Testamentaria #1  
Tarrant County, Texas/Condado de Tarrant, Texas

I acknowledge receipt of a copy of these instructions.

Yo, guardián de la persona de esta tutela, afirmo que he leído y entiendo lo anterior y he recibido una copia de estas instrucciones.

**SIGN AND DATE HERE →**

\_\_\_\_\_  
Guardian/ Guardián

\_\_\_\_\_  
Date/ Fecha

**PRINT NAME HERE →**

**A. Qualify as Guardian:** Within twenty (20) days of receiving the order appointing you as guardian:

1. Take and file an *oath or unsworn declaration*;
2. File the required *bond*, and
3. Obtain *Letters of Guardianship* from the probate clerk’s office.

**A. Para Calificar Como Guardián:** Dentro de (20) días de recibir la orden que le designa como guardián usted debe:

1. *Juramentarse* y registrar el *juramento*;
2. Registrar la *fianza* designada, y
3. Obtener *Las Cartas de Custodia* en la oficina de la secretaria de la corte testamentaria.

**B. Expectations of the Guardian of the Person: (§ 1163.101)**

1. See that the ward is **appropriately housed**,
2. Have frequent and meaningful personal visits with the Ward.
3. Make every effort to insure the Ward is receiving all available benefits for which he/she may be eligible and entitled.
4. Obtain psychological, social services, training, educational, social and vocational opportunities for the Ward as needed and appropriate.

**B. Expectativas del Guardián de la Persona: (§ 1163.101)**

1. Asegurar que el sujeto de la custodia tiene **alojamiento apropiado**.
2. Tener visitas personales con el sujeto de la tutela que son frecuentes y significantes.
3. Hacer todo lo posible para asegurar que el sujeto de la tutela recibe todos los beneficios que tiene el derecho de recibir.
4. Obtener oportunidades para el sujeto de la tutela cuando es necesario y apropiado de: la psicología, servicios sociales, la capacitación; obtener atención psicológica, servicios sociales, entrenamiento educacional y oportunidades



5. Authorize and arrange any needed medical, dental, ophthalmological and surgical treatment.

**C. Powers: Guardian of the Person (§ 1151.051)**

1. The right to have physical possession of the ward and to establish the ward's legal domicile.
2. The right to have visitation privileges of an inmate ward.
3. The power to consent to medical, psychiatric, and surgical treatment other than the in-patient psychiatric commitment of the ward, but including the right to make end-of-life decisions regarding the withdrawing of life support, hydration and nutrition (§166.039 Texas Health & Safety Code).
4. The power, on application and order, to establish a Special Needs Trust for the ward.
5. The power to transport the ward for a preliminary psychiatric examination pursuant to TEX. HLTH & SAF. CODE Ch. 573.
6. Any other powers specified granted in the order appointing the guardian.

**D. Duties: Guardian of the Person (§ 1151.051)**

1. The duty of care, control, and protection of the ward;
2. The duty to provide the ward with clothing, food, medical care, and shelter;
3. The duty to provide access to the Ward by relatives of the Ward. If such access is denied, it shall be provided upon order of the court.
4. The duty to advise the court immediately:
  - of any address changes of the guardian or the ward,
  - of the filing for an emergency detention of the Ward,
  - if the ward is detained or arrested, or
  - if the ward is a party to a legal matter (divorce, eviction foreclosure bankruptcy, etc.)

5. Autorizar y arreglar cualquier necesidad medica, dental, oftalmologica y tratamiento quirurgico

**C. Los Poderes del Guardián de la Persona (§ 1151.051)**

1. El derecho de tener posesión física del sujeto de la custodia y stablecer el domicilio legal del sujeto de la custodia;
2. El derecho a tener privilegios de visita de una sala de recluso.
3. El poder de aprobar el tratamiento medico, psiquiátrico y quirúrgico, pero no incluye el poder de ingresar el sujeto de la tutela a tratamiento psiquiátrico. Este poder incluye el derecho de tomar decisiones de fin de vida que se tratan de quitar aparatos que prolongan la vida, la hidratación y la nutrición (§166.039 Texas Health & Safety Code).
4. El poder, después de la aplicación y el orden, a establecer un Fideicomiso para Necesidades Especiales para el pupilo.
5. El poder para el transporte el sujeto para un examen psiquiátrico preliminar. TEX. HLTH & SAF. CODE Ch. 573.
6. Cualquier otro poder especificado en la orden designando el guardián.

**D. Los Deberes del Guardián de la Persona (§ 1151.051)**

1. La obligación del cuidado, control y la protección del sujeto de la tutela;
2. La obligación de proveer la ropa, la comida, el cuidado medico y el albergue al sujeto de la tutela;
3. La obligación de facilitar el acceso a la sala de los familiares del sujeto de la tutela. Si se le niega el acceso, que será suministrada a orden de la corte.
4. La obligación de informar al juzgado inmediatamente:
  - de cualquier cambio de dirección del guardián o del sujeto de la custodia,
  - de la presentación de una detención de emergencia de la Sala,
  - si el sujeto de la tutela está detenido o arrestado, o
  - si el sujeto de la tutela es parte en un asunto sociales y vocacionales legal (divorcio, desalojo, ejecución hipotecaria,

etc.)

**Failure to do so is cause for removal of the guardian and cancellation of all Letters of Guardianship;** (Tex. Est. Code § 1203.051)

5. The duty to immediately advise the Court and any relatives of the Ward who have elected to receive notice if:

- a) the ward dies, any funeral arrangements and the ward's final resting place;
- b) the ward turns eighteen;
- c) the ward is admitted to an acute care medical facility for three days or more;
- d) the ward's residence has changed; or the ward is staying at a location other than the ward's residence for a period that exceeds one calendar week.
- e) if you or any other person or entity has been appointed the conservator of the ward or if adoption has occurred.

6. The duty, except in cases of emergency, to provide notice to the court, the ward, and any person who has requested notice of the proposed placement of the ward in a more restrictive care facility

7. The duty to cooperate with the Court Visitor assigned annually, or at more frequent intervals, to assess the condition of the Ward.

8. The duty, upon appointment and annually, to explain to the Ward the "Ward's Bill of Rights" (attached) in the Ward's native language or preferred mode of communication and in a manner accessible to the ward.

9. The duty to file an **annual report** setting forth specific information regarding the condition of the ward from a medical and social standpoint. It should be filed within 30 days after receipt. (TEX. EST. CODE § 1163.101)

**La falta de actuar así es razón para remover el guardián y cancelar todas Las Cartas de La Custodia;** (TEX. EST. CODE § 1203.051)

5. La obligación de informar inmediatamente a la Corte y los familiares del sujeto de la tutela, que hayan optado por recibir aviso si:

- a) el sujeto de la tutela muere, los arreglos funerarios y lugar de descanso final de la sala;
- b) el sujeto de la tutela cumpla dieciocho años;
- c) el sujeto de la tutela es admitido en un centro médico de atención aguda durante tres días o más;
- d) la residencia del sujeto de la tutela ha cambiado; o el sujeto de la tutela se queda en un lugar distinto de la residencia de la tutela por un período que exceda de una semana calendario.
- e) si usted o cualquier otra persona o entidad ha sido nombrado el conservador del tutela o si se ha producido la adopción.

6. El deber, excepto en casos de emergencia, para dar aviso a la corte, la tutela, y cualquier persona que haya solicitado la notificación de la propuesta de colocación de la tutela en un centro de atención más restrictiva

7. El deber de cooperar con el Visitador Corte asignado anualmente, o con mayor frecuencia, para evaluar la condición del tutela.

8. El deber, al nombramiento y al año, para explicar a la sala de la "Carta de Derechos de Tutela" (que se anexo) en el idioma nativo de la sala o en el modo preferido de comunicación y de una manera accesible para el tutela.

9. La obligación de registrar un **reportaje anual** estipulando información específica de la condición del sujeto de la custodia del punto de vista médica y social. Se debe registrar el reportaje dentro de 30 días después de recibirlo. (TEX. EST. CODE § 1163.101)

**WARNING: Letters of Guardianship EXPIRE one year and four months after the date of issuance unless renewed. (§ 1106.002) The clerk cannot renew the letters until the guardian has filed the required annual report for the guardian of the person (TEX. EST. CODE § 1106.003(b).**

**AVISO: Las Cartas de la Custodia SE VENCEN un año y cuatro meses después de la fecha de emisión a menos que las cartas estén renovadas. (§ 1106.002) La secretaria del juzgado no puede renovar las cartas hasta que el guardián registre los reportes anuales necesarios para el guardián de la persona. (TEX. EST. CODE § 1106.003(b).**

**COURT INSTRUCTIONS: GUARDIAN OF THE ESTATE  
INSTRUCCIONES DE LA CORTE PARA EL GUARDIAN DE LA HEREDAD**

*(Revised November 2018/ Revisado November 2018)*

As a duly-appointed Guardian of the Estate, you are hereby advised by the Court that you **must** do the following: (All section references are to the Texas Estates Code unless otherwise indicated.)

Como El Guardián designado con la responsabilidad de la heredad, La Corte se le notifica que usted **debe** hacer lo siguiente: (Todas las referencias a las secciones son del Código Estates de Texas [Texas Estates Code] a menos que hay otras indicaciones al contrario.)

\_\_\_\_\_, **Judge / Juez**  
\_\_\_\_\_, **Court #1**  
\_\_\_\_\_, **County, Texas**

I acknowledge receipt of a copy of these instructions.

Yo, guardián del sujeto de esta custodia, afirmo que he leído y entiendo lo anterior y he recibido una copia de estas instrucciones.

**SIGN AND DATE HERE →**

\_\_\_\_\_  
Guardian/ Guardián    Date/ Fecha

**PRINT NAME HERE →**

\_\_\_\_\_

**A. Fiduciary Responsibility: (§§ 1151ff)** As a guardian, you are a **fiduciary**, a position of the highest trust and responsibility with respect to the ward, keeping all affairs confidential; maintaining accurate and complete financial records and ensuring that all dealings undertaken on behalf of the ward, such as the purchase of goods and services, are properly completed.

**A. Responsabilidad Fiduciaria: (§§ 1151ff)** Como guardián usted esta en una **fiduciaria**. Es una posición que lleva un alto grado de confianza y responsabilidad al sujeto de la tutela. Los deberes del guardián incluyen: mantener todos los asuntos confidenciales; mantener los archivos financieros en una forma completa y precisa; asegurar que todos los tratos hechos por parte del sujeto de la tutela como la compra de bienes y servicios, se completan en una forma apropiada.

Avoid **conflicts of interest** (and potential removal and personal liability) by: 1) **not** commingling your personal funds with the funds of the ward; 2) **not** borrowing money from or lending money to the ward; 3) **not** selling or encumbering real or personal property, or any interest therein, to yourself, a relative, friend or business acquaintance.

Para evitar **conflictos de interés** (y deposición y riesgo personal potencial): 1) **no** se mezcla sus fondos personales con los fondos del sujeto de la pupilo; 2) **no** pide prestado ni prestar dinero a el sujeto de la pupilo; 3) **no** vende ni endeuda bienes o propiedad personal o cualquier interés similar a usted mismo, un pariente, un amigo o un conocido de negocios.

As a fiduciary, you and your bond surety may be held **liable** for any breach of your fiduciary duties. The requirements of the Estates Code are clear regarding your responsibilities.

**B. Qualify as Guardian:** Within twenty (20) days of receiving the order appointing you as guardian (§1105.002):

1. Take and file an *oath or unsworn declaratrion* (§ 1105.051);
2. File the required *bond*, (§ 1105.101), and
3. Obtain *Letters of Guardianship* from the probate clerk's office (§ 1106.001).

**C. Limited Power of Guardian to Act Without Court Authority (§ 1151.103)** Without prior authorization by the court, the guardian may only: 1. Purchase liability and property insurance; 2. Pay taxes, court costs, & bond premiums; 3. Release liens upon final payment; 4. Vote stocks; 5. Pay calls and assessments.

**You are not authorized or empowered** to do any other actions without **prior approval** of the court or **ratification** by the court upon your application. You and your bond surety can be held liable for failure to get court approval before taking action or spending estate money. If in doubt, ask your attorney.

**D. Take Possession of all Property** of the Ward Immediately upon receiving Letters of Guardianship, collect and take possession of all personal property and business records of the estate. (§ 1151.152) This may include, as necessary:

1. **Security** Change the locks on real property;
2. **Storage** Place non-perishable personal property in insured storage;
3. **Perishable Property** Obtain permission to sell perishable personal property (§ 1158.051) after the Inventory has been filed and approved;

Con el poder fiduciario usted y su fianza pueden ser **responsables** por cualquier violación de sus deberes fiduciarios. Los requisitos del Código Testamentario son claros en cuanto a sus responsabilidades.

**B. Calificarse como Guardián:** Dentro de veinte (20) días de recibir la orden que se le designa a usted (§1105.002):  
como guardián usted debe (§ 1105.002):

1. *Juramentarse* y archivar el *juramento* (§ 1105.051);
2. Archivar la *fianza* designada, (§ 1105.101), y
3. Obtener *Cartas de Custodia* de la oficina de la secretaria de la corte testamentaria (§ 1106.001).

**C. El Poder del Guardián Limitado para Actuar sin Autoridad de la Corte (§ 1151.103)** Sin autorización previo de la corte el guardián solo puede: 1. Comprar seguro de riesgo y de propiedad; 2. Pagar impuestos, costos de corte y primas de fianza; 3. Liberar deudas al hacer el pago final; 4. Acciones de votar; 5. Visitar y opinar sobre el sujeto de la custodia.

**Cualquier otra acción** del guardián debe ser con la **autorización previa** de la corte o ser **ratificado** por la corte. Usted y su fianza pueden ser responsables por la falta de conseguir aprobación de la corte antes de actuar o gastar el dinero de la heredad. Si usted tiene dudas pregúntele a su abogado.

**D. Poseer Toda La Propiedad** del sujeto de la custodia inmediatamente después de recibir Cartas de la Custodia, reunir y poseer toda la propiedad personal y documentos de negocio de la heredad. (§ 1151.152) Este puede incluir cuando sea necesario:

1. **Seguridad** Cambie las cerraduras en los bienes;
2. **Almacenaje** Ponga propiedad personal no corruptible en almacenaje asegurado;
3. **Propiedad Perecedero** Obtenga permiso para vender propiedad personal corruptible (§ 1158.051) después de que el inventario ha sido archivado y aprobado;

**4. Accounts and Investments** Set up appropriate accounts for the Guardianship funds. (All Guardianship funds must be deposited in insured accounts in the name of the Guardianship. Retain in a checking account only such funds reasonably necessary for the current support and maintenance of the Ward. You are required to invest all additional funds in insured, interest-bearing accounts. *(Do not commingle Social Security Benefits with other estate accounts and non-probate assets. You need only to account to the Social Security Administration for the use of these funds);*

**5. Cancel Credit Cards** issued in the Ward's name and send written notice to credit reporting agencies that the Ward has been declared incapacitated and will not be making any loans or accepting "pre-approved" credit cards.

**E. Manage the Property** of the Ward as a "prudent person would manage one's own property." (§ 1151.151)

**1. Spending Money** - Obtain a written order of this Court authorizing any expenditure of Guardianship funds **before** any such expenditure is made. Get an order for a monthly allowance for the maintenance and support of the Ward.

**2. Expenditures for Support** - A parent of a minor ward has a legal duty to support the child from his own resources. Absent a showing that the parent is unable to support the child, the parent has no authority as guardian to invade either the income or corpus of the child's estate. (§ 1156.051)

### **3. Digital Assets**

Obtain access, handle, distribute, and dispose of the digital assets of the ward, including any passwords and other electronic credentials associated with any digital devices and digital assets of the ward, together with any electronic files and assets of the ward pursuant to Texas Estates Code Chap. 2001.

**4. Cuentas e Inversiones** Establezca cuentas apropiadas para los fondos de la tutela. (Todos los fondos de la tutela deben ser depositados en cuentas aseguradas con el nombre de la sujeto de la tutela. Conserve en una cuenta de cheques solamente los fondos necesarios para el apoyo y mantenimiento actual del sujeto de la pupilo. Debe invertir todos los fondos adicionales en cuentas aseguradas que ganan interés. *(No se mezcla los beneficios de Seguridad Social con otras cuentas de la heredad y posesiones no testamentarias. Su responsabilidad es a la Administración de Seguro Social para el uso de estos fondos);*

**5. Cancela Tarjetas de Crédito** distribuidas con el nombre del sujeto de la pupilo. Envíe notificación escrita a las agencias de reportaje de crédito que ha sido declarado que el sujeto de la custodia esta incapacitado y no pedirá prestamos ni aceptara tarjetas de crédito "pre-aprobadas."

**E. Administra la Propiedad** del pupilo en la misma manera que "una persona prudente administraría su propia propiedad." (§ 1151.151)

**1. Desembolsar Dinero** – Obtenga una orden escrita de esta Corte autorizando cualquier desembolso de fondos de la Custodia **antes** de realizar tal desembolso. Obtenga una orden para la concesión mensual para el mantenimiento y apoyo del pupilo.

**2. Desembolsos de Apoyo** – Un padre de un sujeto de la custodia menor de edad tiene el deber legal para apoyar el menor de los recursos del padre. El padre no tiene la autoridad como guardián para invadir a los ingresos o el valor principal de la heredad del menor a menos que el padre muestra que no es capaz de apoyar al menor. (§ 1156.051)

### **3. Activos Digitales**

Obtener acceso, manejar, distribuir y disponer de los activos digitales de la sala, incluyendo cualquier contraseña y otras credenciales electrónicas asociadas con cualquier dispositivo digital y activos digitales de la sala, junto con los archivos y activos electrónicos de la sala de acuerdo con Texas Estates Código Chap. 2001.

**4. Sales and Leases** - Obtain a written order of this Court before attempting to sell, lease, transfer or otherwise dispose of any non-cash asset of the Guardianship;

**5. Insurance** - Obtain adequate health for the ward, if possible; obtain adequate property insurance on all non-cash assets and, when funds are available, make appropriate funeral and burial arrangements.

**6. Collect** all debts, rentals, or claims due to the ward, and, if necessary, with court permission, litigate on behalf of the ward.

**7. Creditor's Claims** must be very carefully handled. Consult your attorney. Your improper approval of a claim or your failure to timely act on a claim can result in your personal liability.

**8. Loans** Under certain circumstances, the court may authorize a guardian to mortgage or pledge estate property as security on a loan: (§ 1161.051) or sale of estate property (§ 1158)

**9. Gifts** The guardian has no authority to make a gift, absent specific authorization

**F. Filing an Inventory** Within 30 days after qualification, the guardian must file a sworn inventory, appraisal and list of claims due the estate of the ward. (§ 1154.001)

**G. Notice to Creditors** Within one month after qualification, the guardian (through an attorney) must publish a notice to creditors in a newspaper of general circulation in the county and file a copy of the notice and the publisher's affidavit. (§ 1153.001) Within four months after qualification, the guardian must give notice by certified or registered mail, return receipt requested, to all secured creditors (§ 1153.003) and any general claimants if the guardian has actual knowledge of the debt or claim.

**4. Venta y Contratos de Arrendamiento** – Obtenga una orden escrita de esta Corte antes de intentar vender, arrendar, transferir o disponer de cualquier posesión no al contado de la Custodia.;

**5. Seguro** – Obtenga seguro de salud adecuado para el pupilo cuando posible; obtenga seguro de propiedad adecuado en todas las posesiones no al contado y realiza planes apropiados para el funeral y entierro cuando los fondos estén disponibles.

**6. Cobra** todas las deudas, alquileres, o peticiones que se debe pagar al sujeto de la custodia y cuando es necesario litiga por parte del sujeto de la custodia con permiso de la corte.

**7. Peticiones de Acreedores** se debe manejar con mucho cuidado. Consulte a su abogado. Su aprobación no apropiada de la petición o su falta de actuar a tiempo con una petición puede resultar en su responsabilidad personal.

**8. Prestamos** En ciertas circunstancias la corte puede autorizar a un guardián para hipotecar o comprometer propiedad de la heredad como fianza de una persona: (§ 1161.051) o venta de la propiedad de la heredad (§ 1158)

**9. Donaciones** El guardián no tiene la autoridad para hacer una donación sin autorización específica.

**F. Registrar un Inventario** Dentro de 30 días de calificar, el guardián debe registrar un inventario, valoración y una lista de las peticiones que se deben entregar a la heredad del sujeto de la custodia bajo juramento. (§ 1154.001)

**G. Notificación a Acreedores** Dentro de un mes de calificar el guardián (a través de un abogado) debe publicar una notificación a los acreedores en un periódico de circulación general en el condado y registrar una copia de la notificación y la declaración del editor. (§ 1153.001) Dentro de cuatro meses después de calificar el guardián debe dar una notificación por correo certificado o registrado y pedir el regreso del recibo de todos los acreedores asegurados (§ 1153.003) y cualquier otra persona con quien el sujeto de la custodia tiene una deuda y tiene conocimiento actual de la deuda.

## **H. Accountings**

1. Maintain an accurate record of all expenditures and receipts of Guardianship funds.
2. Within 60 days of the anniversary of your qualification, file your Annual Account in the form prescribed by the Court.

**WARNING: Your Letters of Guardianship will EXPIRE one year and four months after the date of issuance unless they are renewed. The Probate Clerk cannot renew the letters until you have filed the required annual account for the guardian of the estate (§ 1106.002, 1106.003(b)).**

3. File your Final Account when the Guardianship is ready to be closed due to the death of the Ward, the Ward regaining capacity or (if Guardian of a Minor) the Ward reaches 18 years of age;

**I. Address Changes** - Notify the Court **at once** if your address or the address of the Ward changes. Failure to do so is a cause for your removal. (§ 1203.051)

**J. Attorney's Fees** - Attorney's fees and expenses may be paid upon application and order, as any other expenditure, subject to the guidelines of the court for billing procedures

**K. Additional Rights and Obligations:** the Guardian of the Estate has:

1. the right to have visitation privileges of an inmate ward.
2. The duty to immediately advise the Court and any relatives of the Ward who have elected to receive notice if:
  - a) the ward dies, any funeral arrangements and the ward's final resting place;
  - b) the ward turns eighteen;
  - c) the ward is admitted to an acute care medical facility for three days or more;
  - d) the ward's residence has changed; or the ward is staying at a location other than the ward's

## **H. Contabilidad**

1. Mantenga un archivo preciso de todos los desembolsos y recibos de los fondos de la Custodia.
2. Dentro de 60 días del aniversario de su calificación registre su Contabilidad Anual en la forma designada por la Corte.

**AVISO: Sus Cartas de Custodia SE VENCERAN en un año y cuatro meses después de la fecha de emisión a menos que sean renovadas. La Secretaria de la Corte Testamentaria no puede renovar las cartas hasta que usted ha registrado la contabilidad anual designada para el guardián de la heredad (§ 1106.002, 1106.003(b)).**

3. Registre su Contabilidad Final cuando La Custodia este lista para cerrar debido a la muerte del sujeto de la custodia, cuando el pupilo recobra la capacidad o (si El Guardián de un Menor) el sujeto de la custodia cumple 18 años;

**I. Cambios de Dirección** – Notifique a la Corte inmediatamente si su dirección o la dirección del pupilo cambien. La falta de notificar es causa para su disposición. (§ 1203.051)

**J. Gastos para el Abogado** – Los gastos y desembolsos para el abogado se deben pagar a solicitud y orden como cualquier otro desembolso, según las reglas de la corte por procedimientos de facturación.

**K. Derechos y Obligaciones Adicionales:** el Guardián de la heredad tiene:

1. El derecho a tener privilegios de visita de un pupilo de recluso.
2. La obligación de informar inmediatamente a la Corte y los familiares de los pupilo, que hayan optado por recibir aviso si:
  - a) el pupilo muere, los arreglos funerarios y lugar de descanso final de la sala;
  - b) el pupilo cumpla dieciocho años;
  - c) el pupilo es admitido en un centro médico de atención aguda durante tres días o más;
  - d) la residencia del tutela ha cambiado; o la sala se queda en un lugar distinto de la residencia de



residence for a period that exceeds one calendar week; and  
e) if you or any other person or entity has been appointed the conservator of the ward or if adoption has occurred.

**L. Questions?** Consult with your attorney (not the Court) on any matter regarding this Guardianship that you do not understand.

la tutela por un período que exceda de una semana calendario; y  
e) si usted o cualquier otra persona o entidad ha sido nombrado el conservador del tutela o si se ha producido la adopción.

**L. Preguntas?** Consulta su abogado (no con la Corte) por cualquier asunto de esta Custodia que usted no entiende.

A ward has all the rights, benefits, responsibilities, and privileges granted by the constitution and laws of this state and the United States, except where specifically limited by a court-ordered guardianship or where otherwise lawfully restricted. Unless a right is limited by a court or otherwise restricted by law, a ward has the right:

1. to have a copy of the guardianship order and letters of guardianship and contact information for the probate court that issued the order and letters;
2. to have a guardianship that encourages the development or maintenance of maximum self-reliance and independence in the ward with the eventual goal, if possible, of self-sufficiency;
3. to be treated with respect, consideration, and recognition of the ward's dignity and individuality;
4. to reside and receive support services in the most integrated setting, including home-based or other community-based settings, as required by Title II of the Americans with Disabilities Act (42 U.S.C. Section 12131 et seq.);
5. to consideration of the ward's current and previously stated personal preferences, desires, medical and psychiatric treatment preferences, religious beliefs, living arrangements, and other preferences and opinions;
6. to financial self-determination for all public benefits after essential living expenses and health needs are met and to have access to a monthly personal allowance;
7. to receive timely and appropriate health care and medical treatment that does not violate the ward's rights granted by the constitution and laws of this state and the United States;
8. to exercise full control of all aspects of life not specifically granted by the court to the guardian;
9. to control the ward's personal environment based on the ward's preferences;
10. to complain or raise concerns regarding the guardian or guardianship to the court, including living arrangements, retaliation by the guardian, conflicts of interest between the guardian and service providers, or a violation of any rights under this section;
11. to receive notice in the ward's native language, or preferred mode of communication, and in a manner accessible to the ward, of a court proceeding to continue, modify, or terminate the guardianship and the opportunity to appear before the court to express the ward's preferences and concerns regarding whether the guardianship should be continued, modified, or terminated;
12. to have a court investigator or guardian ad litem appointed by the court to investigate a complaint received by the court from the ward or any person about the guardianship;
13. to participate in social, religious, and recreational activities, training, employment, education, habilitation, and rehabilitation of the ward's choice in the most integrated setting;
14. to self-determination in the substantial maintenance, disposition, and management of real and personal property after essential living expenses and health needs are met, including the right to receive notice and object about the substantial maintenance, disposition, or management of clothing, furniture, vehicles, and other personal effects;
15. to personal privacy and confidentiality in personal matters, subject to state and federal law;
16. to unimpeded, private, and uncensored communication and visitation with persons of the ward's choice, except that if the guardian determines that certain communication or visitation causes substantial harm to the ward:
  - A. the guardian may limit, supervise, or restrict communication or visitation, but only to the extent necessary to protect the ward from substantial harm; and
  - B. the ward may request a hearing to remove any restrictions on communication or visitation imposed by the guardian under Paragraph (A);
17. to petition the court and retain counsel of the ward's choice who holds a certificate required by Subchapter E, Chapter 1054, to represent the ward's interest for capacity restoration, modification of the guardianship, the appointment of a different guardian, or for other appropriate relief under this subchapter, including a transition to a supported decision-making agreement, except as limited by Section 1054.006;
18. to vote in a public election, marry, and retain a license to operate a motor vehicle, unless restricted by the court;
19. to personal visits from the guardian or the guardian's designee at least once every three months, but more often, if necessary, unless the court orders otherwise;
20. to be informed of the name, address, phone number, and purpose of Disability Rights Texas, an organization whose mission is to protect the rights of, and advocate for, persons with disabilities, and to communicate and meet with representatives of that organization;
21. to be informed of the name, address, phone number, and purpose of an independent living center, an area agency on aging, an aging and disability resource center, and the local mental health and intellectual and developmental disability center, and to communicate and meet with representatives from these agencies and organizations;
22. to be informed of the name, address, phone number, and purpose of the Judicial Branch Certification Commission and the procedure for filing a complaint against a certified guardian;
23. to contact the Department of Family and Protective Services to report abuse, neglect, exploitation, or violation of personal rights without fear of punishment, interference, coercion, or retaliation; and
24. to have the guardian, on appointment and on annual renewal of the guardianship, explain the rights delineated in this subsection in the ward's native language, or preferred mode of communication, and in a manner accessible to the ward.

## Declaración de Derechos de Pupilo

Tejas Estates Código § 1151.351

Un pupilo cuenta con todos los derechos, beneficios, responsabilidades y privilegios otorgados por la Constitución y las leyes de este estado y los Estados Unidos, excepto en los casos específicamente limitado por una tutela ordenada por la corte, o cuando de otro modo legalmente restringido.

A menos que el derecho está limitado por un tribunal o de otra manera restringido por la ley, bajo la tutela tiene derecho a:

1. para tener una copia de la orden de tutela y cartas de tutela y la información de la corte testamentaria que emitió la orden y en contacto con las cartas;

2. tener una tutela que fomenta el desarrollo o mantenimiento de la máxima autonomía e independencia en la sala con el objetivo final, si es posible, de la autosuficiencia;

3. a ser tratado con respeto, consideración y el reconocimiento de la dignidad y la individualidad del pupilo;

4. para residir y recibir servicios de apoyo en el entorno más integrado, incluyendo el hogar o basado en otros entornos basados en la comunidad, como lo requiere el Título II de la Americans with Disabilities Act (42 USC Sección 12131 y ss.);

5. a la consideración de actuales y anteriormente indicadas las preferencias personales del pupilo, deseos, preferencias de tratamiento médico y psiquiátrico, creencias religiosas, arreglos de vivienda, y otras preferencias y opiniones;

6. a la autodeterminación financiera para se cumplan todos los beneficios públicos después de gastos de vida esenciales y las necesidades de salud y de tener acceso a un subsidio personal mensual;

7. para recibir atención de salud oportuna y apropiada y el tratamiento médico que no se violan los derechos del pupilo reconocidos por la constitución y las leyes de este estado y los Estados Unidos;

8. para ejercer un control total de todos los aspectos de la vida no específicamente otorgada por el tribunal para el tutor;

9. para controlar entorno personal del pupilo en base a las preferencias del pupilo;

10. para quejarse o plantean preocupaciones con respecto a la guarda o pupilo de la corte, incluyendo arreglos de vivienda, las represalias por el tutor, los conflictos de intereses entre el tutor y los proveedores de servicios, o una violación de ningún derecho bajo esta sección;

11. para recibir un aviso en el idioma nativo del pupilo, o el modo preferido de comunicación, y de una manera accesible para el pupilo, de un procedimiento judicial para continuar, modificar o terminar el pupilo y la oportunidad de comparecer ante el tribunal para expresar preferencias e intereses del pupilo con respecto a si la tutela debe continuar, modificar o cancelar;

12. para tener un investigador de la corte, tutor ad litem o abogado ad litem designado por el tribunal para investigar una denuncia recibida por el tribunal de la sala o cualquier persona acerca de la tutela;

13. para participar en actividades sociales, religiosas y recreativas, la formación, el empleo, la educación, la rehabilitación y la rehabilitación de la elección de la sala en el entorno más integrado;

14. a la libre determinación en el mantenimiento sustancial, disposición y gestión de los bienes muebles e inmuebles después

de los gastos de vida esenciales y necesidades de salud se cumplan, incluido el derecho a recibir una notificación y el objeto sobre el mantenimiento sustancial, la disposición, o la gestión de ropa, muebles, vehículos, y otros efectos personales;

15. a la intimidad personal y la confidencialidad en asuntos personales, con sujeción a la ley estatal y federal;

16. para la comunicación sin impedimento, privado y sin censura y las visitas con las personas de la elección de la sala, a excepción de que si el tutor determina que cierta comunicación o visitas provoca un daño sustancial a la sala:

A. el tutor puede limitar, supervisar o restringir la comunicación o de visita, pero sólo en la medida necesaria para proteger la sala de daño sustancial; y

B. la sala puede solicitar una audiencia para eliminar cualquier restricción de la comunicación o visitas impuesto por el tutor en virtud del párrafo (A);

17. para solicitar a la corte y contratar a un abogado de la elección del pupilo que tiene un certificado requerido por el Subcapítulo E, Capítulo 1054, para representar los intereses del pupilo para la restauración de la capacidad, la modificación de la tutela, el nombramiento de un tutor diferente, o para otros alivio apropiado bajo este subcapítulo, incluyendo una transición a un acuerdo de la toma de decisiones con el apoyo, con excepción de lo limitado por la Sección 1054.006;

18. para votar en una elección pública, casarse, y mantener una licencia para operar un vehículo de motor, a no ser restringido por el tribunal;

19. a las visitas personales del tutor o persona designada por el tutor al menos una vez cada tres meses, pero con más frecuencia, si es necesario, a menos que el tribunal ordene lo contrario;

20. a ser informado del nombre, dirección, número de teléfono, y el propósito de Disability Rights Texas, una organización cuya misión es proteger los derechos de los y abogar por las personas con discapacidad, y para comunicarse y reunirse con representantes de esa organización;

21. para ser informado sobre el nombre, dirección, número de teléfono, y el propósito de un centro de vida independiente, una agencia de envejecimiento, un centro de recursos envejecimiento y la discapacidad, y la salud mental local y centro de discapacidad intelectual y del desarrollo, y para comunicar y conocer con representantes de estas agencias y organizaciones;

22. a ser informado del nombre, dirección, número de teléfono, y el propósito de la Comisión de Certificación Poder Judicial y el procedimiento para presentar una queja en contra de un tutor certificado;

23. en contacto con el Departamento de Familia y Servicios de Protección reportar abuso, negligencia, explotación o violación de los derechos personales sin temor al castigo, interferencia, coacción o represalia; y

24. Para que el tutor, el nombramiento y la renovación anual de la tutela, explican los derechos delineados en este inciso en el idioma nativo del pupilo, o el modo preferido de comunicación, y de una manera accesible para el pupilo.

**Ward's Bill of Rights**  
Information to be furnished to the Ward  
Información a facilitar a la pupilo:

**Disability Rights Texas**

**Headquarters**

2222 West Braker Lane  
Austin, Texas 78758  
1 (512) 454-4816(Voice)  
1 (512) 323-0902(Fax)  
1 (866) 362-2851(Video Phone)

**Central Texas Regional Office**

2222 West Braker Lane  
Austin, TX 78758  
1 (512) 454-4816(Voice)  
1 (512) 302-4936(Fax)  
1 (866) 362-2851(Video Phone)

**East Texas Regional Office**

1500 McGowen, Suite 100  
Houston, TX 77004  
1 (713) 974-7691(Voice)  
1 (713) 974-7695(Fax)  
1 (866) 362-2851(Video Phone)

**El Paso Regional Office**

300 E. Main, Suite 205  
El Paso, TX 79901  
1 (915) 542-0585 (Voice)  
1 (915) 542-2676(Fax)  
1 (866) 362-2851(Video Phone)

**North Texas Regional Office**

1420 West Mockingbird Lane, Suite 450  
Dallas, TX 75247-4932  
1 (214) 630-0916 (Voice)  
1 (214) 630-3472 (Fax)  
1 (866) 362-2851(Video Phone)

**South Texas Regional Office**

6800 Park Ten Blvd., Suite 208-N  
San Antonio, TX 78213  
1 (210) 737-0499(Voice)  
1 (210) 737-2403(Fax)  
1 (866) 362-2851(Video Phone)

**West Texas Regional Office**

4747 South Loop 289, Suite 120  
Lubbock, TX 79424  
1 (806) 765-7794(Voice)  
1 (806) 765-0496(Fax)  
1 (866) 362-2851(Video Phone)

**Judicial Branch Certification Commission**

205 W. 14th, Ste. 600  
Austin, TX 78701  
512-475-4368

Purpose: established to oversee the certification, registration, and licensing of court reporters and court reporting firms, guardians, process servers, and licensed court interpreters.

**Department of Family and Protective Services**

701 W. 51st St.  
Austin, Texas 78751  
Ph: (512) 438-4800

Report Abuse Hotline: 1-800-252-5400 to report abuse, neglect, exploitation, or violation of personal rights

Information on regional offices available at [www.dfps.state.tx.us/](http://www.dfps.state.tx.us/)

Local independent living center (name, address, phone number, and purpose)

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Local area agency on aging name, address, phone number, and purpose)

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Local aging and disability resource center (name, address, phone number, and purpose)

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Local mental health and intellectual and developmental disability center (name, address, phone number, and purpose)

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Appendix Ap: No. \_\_\_\_\_

Guardianship of \_\_\_\_\_ § \_\_\_\_\_ Court  
\_\_\_\_\_ § \_\_\_\_\_ of  
An Incapacitated Person § \_\_\_\_\_ County, Texas

**INITIAL REPORT OF GUARDIAN OF THE PERSON  
TO BE FILED BY THE GUARDIAN OF THE PERSON WITHIN THIRTY DAYS OF APPOINTMENT**

*Please fill out this form completely, answering every question, except when directed otherwise.  
“Not applicable” is not a proper response and can delay processing and approval.*

On this day, the Guardian in this matter stated the following under penalty of perjury, declaring that each statement is true and correct:

1. GUARDIAN(S): Name \_\_\_\_\_  
*If Joint Guardians, both must be listed*  
Address \_\_\_\_\_  
City, State, Zip \_\_\_\_\_  
Home Phone(s): \_\_\_\_\_ Work Phone(s): \_\_\_\_\_ Cell(s): \_\_\_\_\_  
Email address(es) \_\_\_\_\_ Relation to Ward: \_\_\_\_\_  
Social Security Number(s): \_\_\_\_\_ Drivers' Lic(s)-State \_\_\_\_\_ # \_\_\_\_\_  
Employer(s): \_\_\_\_\_  
Occupation(s): \_\_\_\_\_  
Bus. Address(es): \_\_\_\_\_  
(Street) (City) (State) (Zip Code)

2. SPOUSE OF GUARDIAN: Name \_\_\_\_\_ (If listed above as Joint Guardian, check here  and go to #3.)  
Address \_\_\_\_\_  
City, State, Zip \_\_\_\_\_  
Home Phone: \_\_\_\_\_ Work Phone: \_\_\_\_\_ Cell: \_\_\_\_\_  
Email address \_\_\_\_\_ Relation to Ward: \_\_\_\_\_  
Social Security Number: \_\_\_\_\_ Drivers' Lic-State \_\_\_\_\_ # \_\_\_\_\_  
Employer: \_\_\_\_\_  
Occupation: \_\_\_\_\_  
Bus. Address: \_\_\_\_\_  
(Street) (City) (State) (Zip Code)

3. EMERGENCY CONTACT INFORMATION: GUARDIAN OF THE PERSON:  
Name \_\_\_\_\_  
Address \_\_\_\_\_  
City, State, Zip \_\_\_\_\_  
Phone \_\_\_\_\_ Relationship \_\_\_\_\_

4. WARD: Name \_\_\_\_\_  
Address (no P.O. Box) \_\_\_\_\_  
City, State, Zip \_\_\_\_\_ Phone \_\_\_\_\_  
Date of Birth \_\_\_\_\_ Age: \_\_\_\_\_ Soc Sec Number: \_\_\_\_\_

5. WARD RESIDES AT:  Ward's home  Nursing Home  
 Guardian's home  Foster/ Boarding/Group home  
 Hospital/ Medical Facility  Relative's home (explain below)  
 Assisted Living Facility  Other: \_\_\_\_\_

Name of Facility: \_\_\_\_\_ Manager \_\_\_\_\_ Ph: \_\_\_\_\_  
How long has the Ward lived here? \_\_\_\_\_

YOU MUST IMMEDIATELY INFORM THE COURT OF ANY CHANGE IN YOUR ADDRESS OR THE WARD'S.

FAILURE TO DO SO CAN RESULT IN YOUR REMOVAL.

6. BASIS FOR INCAPACITY:  Intellectual Disability:  Mild  Moderate  Profound/Severe  
 Chronic Mental Illness  Stroke  Head Injury  Alzheimer's Dementia  
 Other: \_\_\_\_\_ Other Medical Conditions: \_\_\_\_\_

7. WARD'S MEDICAL HISTORY AND CURRENT TREATMENT INFORMATION:

A. Give a brief medical history of the Ward, including any recent hospitalizations or surgeries: \_\_\_\_\_  
\_\_\_\_\_

B. Prognosis for the Ward:  GOOD  STABLE  POOR

C. Ward's medical team: (Medical providers seen regularly)

Specialty	Doctor's name	Phone
Primary Care	_____	_____
_____	_____	_____
_____	_____	_____

8. WARD'S PHYSICAL CONDITION:

A. Generally describe the Ward's physical condition: \_\_\_\_\_  
\_\_\_\_\_

B. On-going medical services the Ward receives (such as home health care, etc) \_\_\_\_\_  
\_\_\_\_\_

C. Does the Ward have unmet physical needs? (dentures, hearing aid, glasses, surgery, therapy) \_\_\_\_\_  
\_\_\_\_\_

D. Guardian's Plan for meeting Ward's unmet physical needs: \_\_\_\_\_  
\_\_\_\_\_

9. PROPERTY MANAGEMENT

I have possession and control of the Ward's estate.  YES  NO

(If "YES") I was appointed Guardian of the Estate.  YES  NO

(If "NO", mark below as applicable to Ward's estate)

The Ward is a minor and I am the Parent (Natural Guardian)  YES  NO

Managing Conservator (a copy of Court Order is attached)  YES  NO

The Ward is a beneficiary of a Chap. 1301 Guardianship Management Trust  YES  NO

(If 'YES,' give details under #11, below.)

10. MHMR CASE MANAGER: Name: \_\_\_\_\_

Phone: \_\_\_\_\_ Pager: (\_\_\_\_) \_\_\_\_\_

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

11. FINANCIAL CONDITION of the Ward:

Indicate any Government/Social Programs in which the Ward participates, including funds payable to the Ward or to others for the benefit of the Ward

Source	Amount Received Per Month	or	Per Year
<input type="checkbox"/> Social Security Representative Payee _____	\$ _____		\$ _____
<input type="checkbox"/> Veterans Administration Representative Payee _____	\$ _____		\$ _____
<input type="checkbox"/> SSI Disability Representative Payee _____	\$ _____		\$ _____
<input type="checkbox"/> Government Pension (Specify) _____			\$ _____
<input type="checkbox"/> Railroad Retirement (Specify) _____			\$ _____
<input type="checkbox"/> Military Retirement (Specify) _____			\$ _____
<input type="checkbox"/> Trust Income (Trust name & name of Trustee) _____			\$ _____
<input type="checkbox"/> Other (Specify) _____			\$ _____

12. ACTIVITIES of the Ward:

A. The Ward "works."  YES  NO

If "YES", give name of employer or workshop and describe employment. \_\_\_\_\_

- B. The Ward is able to participate in planned activities such as outings.  YES  NO  
If "YES", describe: \_\_\_\_\_
- C. Transportation to activities is being provided for the Ward.  YES  NO
- D. The Ward goes to a senior citizen facility or adult care facility.  YES  NO
- E. Ward's unmet social needs: \_\_\_\_\_
- F. Guardian's Plan for meeting Ward's unmet social needs: \_\_\_\_\_

13. INTELLECTUAL/EDUCATIONAL CONDITION of the Ward:

- A. The Ward responds to his/her name.  YES  NO
- B. The Ward can communicate verbally.  YES  NO  
If "NO", how does the Ward communicate? \_\_\_\_\_
- C. The Ward is able to read.  YES  NO
- D. The Ward is able to write.  YES  NO
- E. The Ward is attending school.  YES  NO  
If "YES", name the school and the program of study: \_\_\_\_\_
- F. The Ward participates in the following programs: \_\_\_\_\_
- G. Ward's unmet intellectual needs: \_\_\_\_\_
- H. Guardian's Plan for meeting Ward's unmet intellectual needs: \_\_\_\_\_

14. ADDITIONAL CONCERNS, recommendations and/or comments concerning the Ward which I wish to share with the Court: \_\_\_\_\_

15. PHOTOGRAPH: If possible, please attach a current photograph of the Ward.

***Complete the following. The signature below does not require a notary.***

I, \_\_\_\_\_, the guardian of the person for \_\_\_\_\_,  
(insert name of Guardian of the Person) (insert name of Ward)  
in Tarrant County Texas, declare under penalty of perjury that the foregoing is true and correct.

Executed on \_\_\_\_\_ 20\_\_\_\_\_ \_\_\_\_\_  
Guardian's signature

***If this report is for Joint Guardians, also complete the following:***

I, \_\_\_\_\_, the guardian of the person for \_\_\_\_\_,  
(insert name of Joint Guardian of the Person) (insert name of Ward)  
in Tarrant County Texas, declare under penalty of perjury that the foregoing is true and correct.

Executed on \_\_\_\_\_ 20\_\_\_\_\_ \_\_\_\_\_  
Joint Guardian's signature

**Mail or deliver to:** Clerk's Office, Probate Division  
\_\_\_\_\_  
\_\_\_\_\_

Appendix Aq:

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

Guardianship of \_\_\_\_\_ § \_\_\_\_\_ Court  
\_\_\_\_\_ § \_\_\_\_\_ of  
\_\_\_\_\_ § \_\_\_\_\_  
An Incapacitated Person § \_\_\_\_\_ County, Texas

**FINAL REPORT OF TEMPORARY GUARDIAN OF THE PERSON**

On this day, the Temporary Guardian in this matter stated the following under penalty of perjury, declaring that each statement is true and correct:

1. **TEMPORARY:** Name \_\_\_\_\_  
**GUARDIAN** Address \_\_\_\_\_  
City, State, Zip \_\_\_\_\_  
Home Phone(s): \_\_\_\_\_ Work Phone(s): \_\_\_\_\_ Cell(s): \_\_\_\_\_  
Email address(es) \_\_\_\_\_ Relation to Ward: \_\_\_\_\_  
Social Security Number(s): \_\_\_\_\_ Drivers' Lic(s)-State \_\_\_\_ # \_\_\_\_\_

2. **WARD:** Name \_\_\_\_\_

3. **IS THE WARD LIVING?**  Yes  No

If **"Yes,"** describe each reason the temporary guardianship of the person expired, including a statement of facts regarding whether the temporary guardianship expired because:

(A) the ward was found by the court to have full capacity, or sufficient capacity with supports and services, to care for himself or herself; \_\_\_\_\_;

(B) alternatives to guardianship have been established to meet the needs of the ward \_\_\_\_\_; \_\_\_\_\_ or

(C) a permanent guardian appointed by the court has qualified to serve as the ward's guardian: \_\_\_\_\_

(D) Other Reasons \_\_\_\_\_.

If **"No,"** state the date and place of death, if known:

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

I, \_\_\_\_\_, the Temporary Guardian of the Person for \_\_\_\_\_,  
in \_\_\_\_\_ County Texas, declare under penalty of perjury that the foregoing is true and correct.

Executed on \_\_\_\_\_

\_\_\_\_\_  
Signature of Temporary Guardian

*Revised 07/12/21*



Appendix Ar:

NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA.

Guardianship of \_\_\_\_\_ No. \_\_\_\_\_ § \_\_\_\_\_ Court  
 \_\_\_\_\_ § \_\_\_\_\_ of  
 An Incapacitated Person § \_\_\_\_\_ County, Texas

RULE 11 AGREEMENT REGARDING INITIAL DISCLOSURES

Pursuant to Texas Rules of Civil Procedure, Rule 11, the parties in this case agree to be bound by the following terms during the pendency of this litigation to the same extent as if these terms were entered by the Court. The parties agree and acknowledge that this Rule 11 Agreement will be filed and made a part of the record in this case. This agreement is effective when it is signed by all parties and filed with the \_\_\_\_\_ County Clerk’s Office.

We are the parties in this guardianship application. We understand the parties must usually exchange “Initial Disclosures” of the information and material described in Texas Rules of Civil Procedure, Rule 194.2.

By signing this Rule 11 Agreement:

We agree to waive the exchange of Initial Disclosures.

or

We agree to waive the exchange of some but not all information and material.

Disclosure of information required:

From Whom:

Nature of Information to be Disclosed

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

The due date for this information and material is: \_\_\_\_\_.

AGREED:

\_\_\_\_\_  
Date Signed

\_\_\_\_\_  
Attorney for Applicant

\_\_\_\_\_  
Date Signed

\_\_\_\_\_  
Attorney Ad Litem

\_\_\_\_\_  
Date Signed

\_\_\_\_\_  
Guardian Ad Litem