Guardianship Law, Part 1: Investigation & Creation

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Judge Kelly M. Cross graduated from the University of Louisville in 1986 with a Bachelor's in Accounting, followed by a Master's in Business Administration from Xavier University in Cincinnati, Ohio. While obtaining her Master's, Judge Cross taught Bachelor's level Accounting and managed the financial departments of the Cincinnati College of Mortuary Sciences. After receiving her M.B.A., Judge Cross returned to her father's Alma Mater, St. Mary's University in San Antonio, to receive her law degree.

After being admitted to the Texas State Bar in 1992, Judge Cross opened up a general practice in downtown San Antonio. During her early practice years she became involved with families struggling with the issues associated with mental illness and incapacity. Her involvement culminated in becoming certified in 2008 as a National Master Guardian. Judge Cross has served as President of the San Antonio Bar Association's Elder Law Section, following her term as Vice President. She was a founding member of the "Wills Clinic" which has served hundreds of low income citizens. She is a Fellow at the San Antonio Bar Foundation, a member of the National and Texas Guardianship Associations, the San Antonio Bar Association, and the College of the State Bar of Texas, among many other professional and community organizations. Additionally, since 2012, Judge Cross has participated in the forty-hour Crisis Intervention Training Program, which teaches SAPD officers, Bexar County Sheriffs, paramedics, and other first responders how to interact with someone suffering from mental health disturbances, without violence.

For more than twenty-two years, Judge Cross has spoken at many seminars and conferences as an expert in the areas of Elder Law and Guardianship Law, encompassing subjects such as: grey collar crime, emergency guardianships and alternatives to guardianship, ethics of decision making for incapacitated adults, mental health powers of attorney, and many other topics. After twenty-plus years of experience as an advocate for the incapacitated, the elderly, and those suffering with mental illness, in January 2015, Judge Kelly Cross was sworn in as only the third person to serve as judge for Bexar County Probate Court 1.

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I. Scope of Guardianship Law Parts 1 & 2

What used to be one longer paper on guardianship law is now broken down into two parts:

- Guardianship Law Part 1, Investigation and Creation
- Guardianship Law, Part 2, Nuts & Bolts of Judicial Administration.

Both parts discuss guardianship law and its alternatives in the State of Texas, including 2015 statutory changes.

In keeping with the spirit of the current approach to guardianship, i.e., intervening in people's lives in the least-restrictive manner necessary under the circumstances, Part 1 first addresses alternatives to guardianship before engaging the reader in a discussion of guardianship. Although alternatives to court intervention are preferable in most situations because of the social and economic costs of intervention, there are times when these alternatives do not fully protect the person on whose behalf the alternative is used. In those circumstances, guardianship, including a guardianship with full authority, is the least-restrictive manner of intervention available to protect the person.

II. Introduction

With an aging population and increasing numbers of people with dementia and other neurological conditions, and the prevalence of mental illness in society, an understanding of guardianship and the alternatives to guardianship is increasingly important. This paper explores guardianship and seeks to provide a basic understanding of what it is, what the legal requirements are to create and administer one, and what the alternatives are.

As a general rule, it is preferable for a person without capacity to have in place informal supported decision-making arrangements with trusted, supportive and diligent family and/or friends, rather than resorting to guardianship. The reasons for such an arrangement are numerous, including: (1) once an incapacitated individual is under guardianship, it is difficult for the person to have those orders varied or revoked; (2) the evidentiary onus lies with the incapacitated person to prove he or she has re-gained capacity to manage his or her affairs; and (3) and a formally-appointed guardian can draw annual fees from the estate of the person (regardless of how well or diligently he or she attends to his or her duties).

Since guardianship deprives an incapacitated individual of his or her civil liberties, Texas courts will look for a less restrictive alternative before granting a guardianship. Furthermore, Texas law expresses a clear preference for partial guardianship for limited decision-making power rather than full guardianship over all possible life decisions. The thrust of the "least restrictive" perspective is to maintain the autonomy of each potential ward as much as possible and to resist the total disempowerment of those needing assistance. Accordingly, this statutory scheme embodies the goal of permitting each person placed under guardianship to retain as much decision-making authority as the particular circumstances allow.[1]

This approach, coupled with other legislative changes affecting those without capacity, has altered the guardianship system dramatically. Fewer types of guardianships are now available and each type will now be individually adapted to fit the needs of each ward. Additionally, new statutory formulations found outside the Texas Estates Code, such as the "surrogate decision making" process contained in the Texas Health and Safety Code, have decreased the number of temporary guardianships being filed by adding a more narrowly tailored mechanism for overcoming the barriers of inability to consent to necessary medical treatment. Recognizing the applicability of provisions such as these is essential to a proper application of guardianship law.

III. Alternatives to Guardianship[2]

Unless established otherwise, there is no presumption that a person does not have legal capacity to make decisions about his or her life or to look after his or her own affairs. Sometimes, some people need help and support, on an informal or formal basis, to make some decisions in their lives. However, these supported and substitute decision-making arrangements do not always require a formal guardian. They can operate informally with trusted, supportive and diligent family and/or friends.

There are legally-recognized mechanisms and instruments that can assist in creating and structuring informal arrangements for an incapacitated individual and avoid the need for formal orders. Examples of such arrangements include powers of attorney and inter vivos trusts. The use of these alternatives in the estate-planning process has become commonplace in recent

[1] The battle over the "least restrictive" intervention is ongoing in some other states. For example, lawsuits have been filed in some states where everyone under a guardianship loses the right to vote, even if the ward maintains other rights such as the right to drive and to marry. These lawsuits typically allege violation of equal protection as well as violation of the Americans with Disabilities Act and the Voting Rights Act. Texas guardianship statutes are not susceptible to the same challenges because, when appropriate, courts can order limited guardianships in which the ward maintains the right to vote.

[2] Judge Steve M. King of the Tarrant County Probate Court No. 1 has created a checklist of many alternatives to guardianship. His list (at least in part) can be found in Appendix A.

years, and it is the norm for attorneys drafting wills to also prepare various types of decision-making alternatives as part of the necessary package of instruments needed in contemplation of death.[3] Advance preparation for whatever circumstances may occur before death can circumvent the necessity for court intervention in those situations when an individual becomes incapacitated. In this author's opinion, the creation of most guardianships is due to lack of advanced planning.

Below is a list of common alternatives to guardianship. Some of these alternatives affect personal decisions while others affect business decisions. Although a few of these alternatives require court action, most of them require no court intervention.

A. Avoiding Guardianship of the Person

Numerous statutory mechanisms in Texas law serve as alternatives to creating a guardianship of the person of an incapacitated person. These alternatives are often quicker and cheaper than creating a guardianship. In no particular order of importance, the following are most, if not all, of the alternatives to a guardianship of the person:

1. Surrogate Decision-Making under the Consent to Medical Treatment Act

Under the procedure commonly known as surrogate decision-making, certain enumerated individuals are permitted to make medical decisions for individuals in hospitals and nursing homes found incapacitated by a physician without the necessity of seeking a court-created guardianship. Tex. Health & Safety Code §313.001 *et seq.* This procedure has certainly reduced the need for temporary guardianships and reduced the need for permanent guardianships created only for medical-consent purposes. This procedure, however, does not apply in certain grave situations and cannot be delegated. Nor will the procedure apply if there is a guardianship or medical power of attorney in effect.

2. Surrogate Decision-Making for Persons with Intellectual Disabilities

A similar provision exists for patients with intellectual disabilities residing in "Intermediate Care Facilities for People with Mental Retardation." Upon a medical assessment of incapacity, any "adult surrogate," broadly defined to include most relatives, may make "major medical or dental treatment" decisions for the "client" with intellectual disabilities. Tex. Health & Safety Code §597.041 *et seq.* Certain matters, however, including abortion and sterilization, as well as financial decisions, are beyond the power of the "adult surrogate." Tex. Health & Safety Code §597.003.

3. Implied Consent for Emergency Care

When faced with a life-threatening injury or illness, consent to medical treatment is unnecessary for an unconscious adult or for a minor whose parents, managing or possessory conservator, or guardian is not present. Tex. Health & Safety Code §773.008.

4. Advance Directives (formerly Natural Death Act)

An advance directive (a directive to physicians) is another mechanism used to avoid guardianships under Texas law. The provisions allow a person to designate in writing, before the need arises, instructions on the use or withholding of life-sustaining procedures. Tex. Health & Safety Code §166.031 *et seq.* Thus, an individual may specify in advance what kinds of treatment the person wants in case the person is not competent to make decisions when later suffering from a terminal or irreversible condition. In fact, the individual may designate another to make treatment decisions in those instances.[4] In those instances when a person suffering from a terminal or irreversible condition has not issued a directive to physicians and is incompetent or incapable of communicating, the statute sets out a priority list of those individuals empowered to make treatment decisions. Tex. Health & Safety Code §166.039. A relative who wishes to challenge a treatment decision made under this section must apply for temporary guardianship under Texas Estates Code ("EC") Chapter 1251.

Another advanced directive is the Out-of-Hospital Do-Not-Resuscitate Order, whose procedures for executing the directive as well as procedures for a person who has not executed a directive and is not competent or not able to communicate are governed by Tex. Health & Safety Code §166.081 *et seq.* As the name implies, a terminally ill individual or his or her personal representative may direct health care professionals operating in an out-of-hospital setting not to initiate or continue certain designated life sustaining procedures.

5. Medical Power of Attorney

The medical power of attorney is commonly used as a tool of guardianship avoidance. Tex. Health & Safety Code §166.151 *et seq.* Prudent estate planners

[3] Not all of these alternatives transfer decision-making to another. Some limit the decision-making abilities of others in regard to the person creating the alternative by directing that certain things be or not be done. The Texas Living Will is a good example of a method of limiting another's decision-making over the creator of the instrument. See Tex. Health & Safety Code §166.033.

[4] An advance directive may be executed on behalf of a patient younger than 18 years. Tex. Health & Safety Code §166.035.

generally will offer to draft a medical power of attorney for the client needing a will. Since 1987, federal law requires health care providers to notify all incoming patients of these instruments and give them an opportunity to sign one. The Texas Health and Safety Code provides a suggested form. Tex. Health & Safety Code §166.164.

6. Managing Conservatorships

A conservatorship is similar to a guardianship for those families involved in divorce proceedings. While a conservatorship may be used in place of a guardian of the person in the context of divorce, a conservatorship should not be used in lieu of a guardianship of the estate when there are assets belonging to minor children because family law courts do not have monitoring mechanisms available. Ongoing jurisdictional problems exist between family law courts and probate courts as to visitation when a disabled minor under a conservatorship is placed under guardianship after reaching the age of majority. Tex. Fam. Code §154.301 *et seq.*

7. School-Admission Procedures

A guardianship of the person may not be created solely for the purpose of getting a student enrolled in a school or school district other than the one in which the student is a resident. EC §1101.101(a)(2)(C). Sometimes, however, placing a child in another school is clearly in the best interest of the child. To ease the burden for all concerned in such situations, the Texas Legislature authorized the board of trustees of a school district to adopt guidelines for admission to a school without the need for the creation of a guardianship. Tex. Educ. Code §25.001.

8. Commitment Statutes

In Texas, the general rule is that guardians do not have the authority to voluntarily admit an incapacitated person to an inpatient psychiatric facility or to a residential facility operated by the Texas Department of Aging and Disability Services (formerly Texas Department of Mental Health and Mental Retardation). EC §1151.053. Therefore, the statutory schemes for commitment of persons with mental illness, persons with intellectual disabilities, and persons who are chemically dependent can substitute for guardianship if the purpose is to get treatment for an incapacitated person who is chemically dependent, who has a mental illness, or who has intellectual disabilities. Tex. Health & Safety Code §§462.001 *et seq.*, 571.001 *et seq.*, and 591.001 *et seq.* There are even commitment procedures available in very limited circumstances for those with AIDS and tuberculosis.

9. Chapter 48 Intervention (Human Resources Code)

Chapter 48 of the Human Resources Code authorizes a probate court to intervene in an emergency situation when an incapacitated elderly person 65 years or older or a disabled person is suffering from abuse, neglect, or exploitation presenting a threat to life or physical safety. Tex. Hum. Res. Code §48.208. The court's intervention order is based on a Petition of Intervention filed by the Adult Protective Services division of the Texas Department of Family and Protective Services. The County Attorney, or District Attorney if there is no County Attorney, represents the State. The court must find there is reasonable cause to believe that the incapacitated person is being abused, neglected, or exploited to such a degree that it affects the life or physical safety of the incapacitated or disabled person. With such a finding, the court may order the person removed to safer surroundings, may order medical services, or may order other available services. The court must appoint an attorney ad litem before issuing any order. An order lasts 10 days from the date it is rendered or from the date the person was removed, whichever is earlier. The court may extend an emergency order for an additional 30 days from the date when the original emergency order is set to expire, during which time one should be able to obtain a permanent guardianship. The court may grant a second extension of an emergency order of not more than 30 days, after notice and a hearing for good cause shown. The attorney ad litem is paid a reasonable fee from the county treasury. Because these situations may arise in the hours after the courthouse is closed, Texas Human Resources Code §48.208(h) provides a system for emergency detention without an order.

10. Supported Decision-Making Agreements

A new tool that came into existence as of June 19, 2015 – supported decision-making agreements under the Supported Decision-Making Agreement Act – allow an adult with a disability to enter into an agreement with a "supporter" to allow the supporter to provide supported decision-making and to assist in the access to information that would allow the adult to make decisions regarding daily living. EC Chapter 1357. Under this Act, supporters can assist the adult with a disability in making decisions, including obtaining relevant information for the adult, but are not authorized to make the decision themselves. EC §1357.051(1). In the 2017 legislative session, the Act was updated to clarify that the supporter owes a fiduciary duty to the adult with a disability regardless of whether the statutory form is used or not. EC §1357.052(b). Section 1357.003 expressly states the purpose of this Act is to recognize a less restrictive alternative to guardianship for adults with disabilities

"who need assistance with decisions regarding daily living but are not considered incapacitated person for purposes of establishing a guardianship. . . ." Once a guardianship of the person or estate is created for the person with a disability, the agreement is terminated. EC § 1357.053(b)(3).

B. Avoiding Guardianship of the Estate

There are also various alternatives to the creation of a guardianship of an estate. In no particular order of importance, the following are most, if not all, of the alternatives to guardianship of an estate:

1. The Durable Power of Attorney

In executing a written durable power of attorney, the principal appoints and confers on an agent the authority to perform certain acts on behalf of the principal. The statute authorizing the creation of this instrument is known as the Texas Durable Power of Attorney Act. EC §751.001 *et seq.* To be valid, a durable power of attorney must be signed by the principal and acknowledged by a notary. A permanent guardianship terminates the power of attorney; a temporary guardianship suspends it. EC §751.133(a).

The code provides a statutory form and permits the principal to grant broad authority to the agent. An act done by the agent "has the same effect and inures to the benefit of and binds the principal and the principal's successors in interest as if the principal had performed the act." EC §751.051. A person who accepts appointment as an agent is restrained in his or her actions by the duty to inform and account. EC §751.101. The agent "shall maintain records of each action taken or decision made." EC §751.103(a). On request of the principal or the principal's representative, an agent is required to account for all actions taken under the power of attorney. EC §751.104. If the potentially incapacitated person has a power of attorney in effect, there probably is no need to pursue a temporary guardianship to resolve estate matters.

> PRACTICE NOTE
> While some attorneys are including the accounting requirement in their forms, others are not.

2. Trusts – Inter Vivos, Testamentary, and Court-Created Trusts

Traditionally, inter vivos and testamentary trusts as regulated by the provisions of the Texas Property Code have been used to avoid guardianships of the estate. Tex. Prop. Code §112.001 *et seq.* Although there are many benefits to be gained from using trusts as a guardianship-avoidance tool, there are some disadvantages as evidenced by the rise in lawsuits alleging breach of fiduciary duty. One of the major problems lies in the absence of accountability of trustees under the provisions of most trusts. While there may be an added cost to having an incapacitated person's business carried out under a guardianship,[5] it may also be prudent to do so at times. Having a fiduciary's actions publicly monitored by the probate court often will dissipate family mistrust.

A court-created management trust is another tool the probate court has available to devise a less-restrictive alternative to maintaining a guardianship of an estate. This alternative is especially compelling for a large estate to avoid some of the constraints of a guardianship since trustees have broad investment opportunities under the Texas Trust Code. Professional management by a corporate trustee will often inure to the benefit of a ward's estate because of the fiduciary's expertise in investment planning.

A management trust may be created under provisions of Estates Code Subchapter B, Chapter 1301. A court may create a court-created management trust (a "1301 trust," formerly known as an "867 trust") without first creating a guardianship but the court must be "exercising probate jurisdiction." The court must appoint an attorney ad litem and, if necessary, may appoint a guardian ad litem to represent the interests of the alleged incapacitated person in the proceeding to determine incapacity before creating a 1301 trust. EC §1301.054(c).

In some circumstances, an individual or an entity other than a financial institution (such as a guardianship program) may serve as trustee if the court finds that it is in the best interest of the incapacitated person. EC §1301.057(c)(1). However, if the value of the trust's principal is more than $150,000, the court must appoint a financial institution as trustee unless the court finds that the application for the creation of the trust, after the exercise of due diligence, has been unable to find a financial institution in the geographic area that is willing to serve as trustee. EC §1301.057(c)(2). A bond is required of an individual trustee, but not for a corporate trustee.

Trustees of a 1301 trust are required to account to the probate court, and the fees earned by a trustee are limited to those that a guardian would earn unless the amount earned is unreasonably low under the circumstances. The probate court annually audits the accounting and determines the fees. For 1301 trusts created after September 1, 2003, a guardian of t

[5] Arguably, the claim that guardianship is a more expensive procedure than using the trust process is false when one makes a thorough cost analysis that includes factors such as the higher start-up cost of drafting trust instruments coupled with the typical trustee fee arrangement, and then compares these with the starting cost of a guardianship along with its statutorily regulated guardian's fees and administrative costs.

estate may be discharged after the creation of the trust if the court determines that discharge would be in the ward's best interests. EC §1301.152. Before 2003, §1301.152 did not allow a guardian of the estate to be discharged after creation of a management trust unless a guardian of the person remained in place to monitor the behavior of the trustee. Even then, the guardian of the estate could not be discharged unless the court found that discharge would be in the ward's best interests.

> PRACTICE NOTE
> An exculpatory clause in a 1301 trust is enforceable only if (1) it is limited to specific "facts and circumstances unique to the trust property" (not the trust generally) and (2) the court creating or modifying the trust specifically finds that clear and convincing evidence shows that the exculpatory clause is in the best interest of the trust beneficiary. EC §1301.103. This section was added by the 2001 Legislature in response to *Texas Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240 (Tex. 2002), in which the Court upheld an exculpatory clause relieving the trustee from liability for ordinary negligence.

It is also possible, in limited circumstances, to have a court-created trust under Texas Property Code §142.005. With these trusts, there is no mandatory accounting requirement, and the creating court has no guidelines to determine the management fee that should be awarded the trustee. In response to Grizzle (see Practice Note above), the Legislature also amended Texas Property Code §142.005 to disallow the routine insertion of exculpatory clauses in court-created trusts.

Both of these types of trusts grant the trustee broader authority than a guardian has in the absence of court authority.

If a court with probate jurisdiction determines that it is in the best interests of a ward or incapacitated person, the court may order the transfer of all of the property in a §1301 management trust into a subaccount of a pooled trust. The procedure for this transfer is set forth in Chapter 1302 of the Estates Code and will not interfere with a ward's or incapacitated person's eligibility for medical assistance under Chapter 32 of the Texas Human Resources Code. These changes in the code will allow for the enrollment of wards or incapacitated persons into subaccounts of pooled trusts, such as the ARC of Texas Master Pooled Trust or the Texas Pooled Trust. These trusts combine the relatively limited assets of their beneficiaries for investment purposes, but – like other special needs trusts – allow each beneficiary to remain eligible for government benefits such as Medicaid.

3. Management of Community Property When Spouse Is Declared Incapacitated

If a court has declared one spouse incapacitated, the other spouse, in the capacity of "community administrator," has the power to manage, control and dispose of the entire community estate without the necessity of guardianship upon a finding by the court that it is in the incapacitated spouse's best interest and that the other spouse is not disqualified to be appointed as guardian of the estate under Subchapter H, Chapter 1104. EC §§1353.003–.004. The authority of the community manager is broad and even extends to the re-designation of beneficiaries under insurance plans previously purchased by the incapacitated person with community funds. *Salvato v. Volunteer State Life Ins. Co.*, 424 S.W.2d 1 (Tex. Civ. App. – Houston [1st Dist.] 1968, no writ). The qualification of a guardian of a ward's estate shall be of the ward's separate estate only and does not deprive the ward's spouse of control, management, or disposition of the community estate. A guardian of the estate of a married person must deliver, upon request, all community assets to the spouse.

In 2001, the Legislature substantially revised the community property administration provisions by incorporating some safeguards in a statutory scheme that formerly had none. The appointment of an attorney ad litem to represent the incapacitated spouse at the creation of a community administration or during removal proceedings better protects those subject to community administration. Making it clear that the courts that create community administration can remove the administrator negates the somewhat disingenuous argument that no court has jurisdiction to undo a community administration once the order became final. Granting the court the ability to require the community administrator to file an inventory and accountings are protective devices that reduce incidences of financial abuse. Should the community administrator fail to comply with an order requiring an inventory or accounting, the court may remove the community administrator.

If the spouse acting as community administrator is removed or is found unsuitable to act as community administrator or guardian of the estate of the incapacitated spouse's separate property estate, the court must appoint a guardian of the estate for the incapacitated spouse. The court may order the competent spouse to deliver to the guardian up to one-half of the community property subject to the spouses' joint management, control, and disposition. The guardian is required to administer that property along with (1) the incapacitated spouse's separate property and (2) community property subject to the incapacitated spouse's sole management, control, and disposition.

In addition to incorporating such safeguards in the Estates Code, the Family Code aligns its provisions with the Estates Code. It is no longer possible to have the spouse who is not incapacitated manage or sell the community property under the Family Code. Estates Code §1353.001 clarifies that the division of management between the competent spouse and the guardian of the estate of the incapacitated spouse does not partition community property. Rather, the community property administered by the guardian is considered the incapacitated spouse's sole management community property.

4. Payment of Claims to County Clerk

When an incapacitated person or a minor is entitled to $100,000 or less, the debtor may pay the money to the county clerk in the county of residence of the incapacitated person or minor. The clerk shall bring the payment to the probate court's attention. The probate judge shall order the clerk to invest the funds in either an interest-bearing fund or in savings bonds. There is a provision allowing certain persons to withdraw the funds for the benefit of the incapacitated person on the condition of a bond and an accounting. EC §§1355.102–.103. This provision is usually used to avoid a guardianship created solely for the receipt of insurance proceeds and can be used to avoid a guardianship when an administration having minor heirs is ready to be closed.

5. Sale of Property without Guardianship

Parents and managing conservators of a minor may apply to the court to sell the minor's real or personal property without the necessity of a guardianship when the value of the minor's interest in the property does not exceed $100,000. EC §1351.001(a). If the minor does not have a parent or managing conservator willing or able to file an application, the court may appoint an attorney ad litem or guardian ad litem for the limited purpose of selling the property on the minor's behalf. EC §1351.001(b).

Similarly, the guardian of the person of a ward who does not have a guardian of the estate may apply to the court to sell the ward's real or personal property without the necessity of a guardianship of the estate when the value of the ward's interest in the property does not exceed $100,000. EC §1351.052. In the 2015 legislative session, the statute was expanded to allow a guardian of the person or estate of a ward appointed by a court outside of Texas to apply to sell the ward's property without needing to establish a guardianship of the estate in this state. EC §1351.052.

Proceeds from a sale under these sections shall be placed in the registry of the court and may be withdrawn in accordance with Estates Code Chapter 1355.

> PRACTICE NOTE
> Funds Withdrawn From Clerk – When funds of incapacitated persons having no guardian are deposited into the registry of the court, Chapter 1355 of the Estates Code provides a method of obtaining the money out from the registry for use of the incapacitated person. The father, mother, or spouse may withdraw this money for the benefit of the creditor (the incapacitated person), but no fees or commissions shall be allowed to the custodian for taking care of handling or expending such money so withdrawn by him. A bond and a final accounting are required. EC §§1355.102–.104.

6. Transfers under the Texas Uniform Transfers to Minors Act

Transfers may be made to minors by a donor's appointment of a custodian to receive various types of assets. The custodian has authority without court order to invest and expend the transferred assets for the support, maintenance, education, and benefit of the minor. Tex. Prop. Code §141.001 *et seq.*

7. Receivership

When an incapacitated person's estate is in danger of injury, a guardianship may be avoided by the use of a receivership. The court appoints a receiver to handle the estate until the need for the receivership is over. The Code provisions regarding compensation and bonds apply to receivers. EC Chapter 1354. Since the Legislature repealed all provisions relating to guardianships for missing persons in 1999, receiverships, not guardianships, are set up for missing persons.

8. Appearance by Next Friend

Lawsuits may be brought on behalf of incapacitated persons who have no legal guardian under an entity known as a next friend. Texas Rule of Civil Procedure 44 (hereafter "TRCP"). With court approval, the next friend may take possession of any funds or personal property recovered. Tex. Prop. Code §142.002. To do so, the next friend must file a bond payable to the county judge. The clerk of the court or next friend may invest such funds in an interest-bearing account, and the next friend may safekeep the funds with a bank in order to lower the bond amount. The next friend may also petition the court for the creation of a trust for the benefit of the minor.[6] Tex. Prop. Code §142.005 *et seq.* However, a "142 Trust" cannot be created when there is a guardianship over a

[6] In the 1999 legislative session, Chapter 142 of the Property Code was amended so that an appointed guardian ad litem may also petition the court for these "142 trusts."

minor or incapacitated person. *Rodriguez v. Gonzalez*, 830 S.W.2d 799 (Tex. App. – Corpus Christi 1992, no writ). A court may not restrict the terms of a "142 Trust" beyond the restrictions contained within the statutory provisions. In *Aguilar v. Garcia*, the appellate court found that the trial court abused its discretion in limiting the types of expenditures to be made out of a "142 Trust." *Aguilar v. Garcia*, 880 S.W.2d 279 (Tex. App. – Houston [14th Dist.] 1994, no writ).

> PRACTICE NOTE
> Attorney's fees while proceeding "as next friend" are limited in the same way as are guardian's contingency-fee agreements. *Stern v. Wonzer*, 846 S.W.2d 939 (Tex. App. – Houston [1st Dist.] 1993, no writ). In Stern, the court limited the attorney to a contingency fee of one-third, including expenses, holding that the limitation upon guardians' contingency-fee agreements applied to "next friends."

One can proceed as "next friend" only when there is no legal guardian. *Massey v. Galvan*, 822 S.W.2d 309 (Tex. App. – Houston [14th Dist.] 1992, writ denied). In *Massey*, the court of appeals abrogated an attorney's fee contract allegedly made on behalf of two minors. The court held that the person acting as "next friend" (the wife of the decedent) had no authority to enter into such a contract because there was a legal guardian in existence – the natural guardian (the former wife of the decedent and the mother of the minors). Because the contract in Massey was entered into by someone without authority at the time the contract was made, it was not binding upon the minors' estates. After the filing of the "next friend" lawsuit, the second wife became the guardian of the minors' estates. The court of appeals rejected any suggestion of ratification by this event because the guardian of the estate failed to first obtain probate court permission to file the wrongful death lawsuit on behalf of the minors.

9. ABLE Accounts

Still very new and just now being implemented in Texas, ABLE accounts may allow for the avoidance of a guardianship of the estate for smaller estates.[7] In 2015, the Texas Legislature passed the Texas Achieving a Better Life Experience (ABLE) Act, which established the Texas ABLE Program. Tex. Educ. Code § 54.901 *et seq.* The Texas ABLE Act is based on a federal law (the ABLE Act) that was passed by Congress that went into effect in December 2014. Through the Texas ABLE Program, persons with disabilities will be able to establish an ABLE account – a tax-advantaged investment account, similar to a 529 account, into which they can save money in their own name to pay for disability-related expenses without running the risk of losing their eligibility for means-tested benefits. Tex. Educ. Code § 54.9065. In order to be eligible to open an ABLE account, the individual must have a disability that was diagnosed before the age of 26, and either is currently entitled to SSDI or SSI, has a condition listed on the Social Security Administration's List of Compassionate Allowances Conditions, or has a doctor's certification of a disability and diagnosis. The individual can save up to $14,000 per year and up to $100,000 total before their benefits are suspended. There is no restriction on who can deposit the money. Other than Texas, the author is aware of Ohio and Tennessee as states that have established ABLE accounts that individuals with disabilities can open.[8]

Effective September 1, 2017, a court may order that a guardianship of the estate to be settled and closed if the court finds "that the ward no longer needs a guardian of the estate because all of the ward's assets have been placed in an ABLE account . . . and the ward is the designated beneficiary of the account." EC 1202.003.

IV. Creating a Guardianship

A. Overview

Guardianship is the term given to the court-created structure and regime of control, management and substitute decision-making exercised by a guardian over an incapacitated person. Guardianship orders can be limited temporally and functionally. They do not need to be for every aspect of a person's life, welfare, health, or financial needs. For example, a limited guardianship specifies the extent to which a guardian has custody of the person and which of the functions of a guardian he or she will have. On the other hand, a guardian with full authority has full custody of the person and exercises the full range of functions of a guardian. And, in a temporary guardianship, about which more is written in a subsequent section, the guardianship lasts for no more than sixty days, and the

[7] The program is still relatively new on both the federal and state level. As of August 2017, the board in charge of establishing the Texas ABLE Program is still creating the rules to manage and govern the program. The Texas Comptroller has created a website – www.texasable.org – that you can visit to learn more and to apply once the program is established.

[8] Those ABLE accounts are not limited to residents of Ohio and Tennessee, but are available to residents of all states. The Treasurer of Ohio has created a website - http://www.stableaccount.com/ - at which a person can open an ABLE account. The website is also a very good resource to understand ABLE accounts in greater detail. Tennessee's website is located at www.abletn.gov.

guardian exercises only those powers specifically listed in the order.

B. Jurisdiction, Transfer, and Venue

1. General Guardianship Jurisdiction

In 2011, the Legislature reworked the guardianship jurisdiction statutes just as it did for decedent's estate cases in 2009. The new statutory scheme applies to all actions filed or proceedings commenced on or after September 1, 2011.

Section 1022.001, the general probate court jurisdiction in guardianship proceedings statute, no longer specifically refers to county courts' jurisdiction over guardianship matters and instead requires that guardianship proceedings "must be heard in a court exercising original probate jurisdiction." Under §1002.015, a "guardianship proceeding" means a matter or proceeding related to a guardianship including (A) the appointment of a guardian; (B) an application, petition, or motion regarding guardianship or an alternative to guardianship; (C) a mental health action; and (D) an application, petition, or motion regarding a 1301 trust. Those courts maintain jurisdiction over all matters related to the guardianship, including pendent and ancillary jurisdiction.

In addition, the language describing further jurisdiction changed from the old "appertaining or incident to an estate" language to "matters related to guardianship proceedings" – now enumerated in new §1021.001. The court exercising original probate jurisdiction has jurisdiction of all matters related to the guardianship proceeding as specified in §1021.001 for that type of court.

For <u>all</u> courts exercising original probate jurisdiction, a matter related to a guardianship proceeding includes:

(1) the granting of letters of guardianship;
(2) the settling of an account of a guardian and all other matters relating to the settlement, partition, or distribution of a ward's estate;
(3) a claim brought by or against a guardianship estate;
(4) an action for trial of title to real property that is guardianship estate property, including the enforcement of a lien against the property;
(5) an action for trial of the right of property that is guardianship estate property;
(6) after a guardianship of the estate of a ward is required to be settled as provided by §1204.001 of Estate Code:
  (A) an action brought by or on behalf of the former ward against a former guardian of the ward for alleged misconduct arising from the performance of the person's duties as guardian;
  (B) an action calling on the surety of a guardian or former guardian to perform in place of the guardian or former guardian, which may include the award of a judgment against the guardian or former guardian in favor of the surety;
  (C) an action against a former guardian of the former ward that is brought by a surety that is called on to perform in place of the former guardian;
  (D) a claim for the payment of compensation, expenses, and court costs, and any other matter authorized under Chapter 1155 and Subpart H, Part 2, Subtitle Z of the Estates Code; and
  (E) a matter related to an authorization made or duty performed by a guardian under Chapter 1204 of the Estates Code; and
(7) the appointment of a trustee for a 1301 trust, the settling of an account of the trustee, and all other matters relating to the trust.

In counties where there is a statutory probate court, a matter related to a guardianship proceeding <u>also</u> includes:

(1) all matters and actions described in Subsection (a) of this section;
(2) a suit, action, or application filed against or on behalf of a guardianship or a trustee of a 1301 trust; and
(3) a cause of action in which a guardian in a guardianship pending in the statutory probate court is a party.

Jurisdiction in guardianship matters can be difficult to grasp because of two factors. One is that court jurisdiction varies according to the relief sought – as shown by the two lists above. The other is that most practitioners' limited knowledge of the several courts making up the Texas legal system in different counties causes many of them to lack an adequate mastery of the nuances of probate court jurisdiction. To determine the court of appropriate jurisdiction in a guardianship matter, one must make two distinct inquiries: First, what is the nature of the case? Second, what is the court system in the county where venue lies?

a. Nature of the Case

The inquiry into the nature of the case is important because some courts have jurisdiction over the creation of a guardianship, but do not have jurisdiction to grant particular relief during a guardianship – and the court that has jurisdiction to grant relief during a guardianship depends on the type of relief sought. It is common for a court to have jurisdiction to create a guardianship, but no jurisdiction over a lawsuit against the guardianship.

Two distinct inquiries concerning the nature of the case must be made to ascertain the court with appropriate jurisdiction:

- First, is a guardianship needed or is there a guardianship already in existence? When a guardianship is needed, an application may be brought only in one of the limited number of courts with jurisdiction to create guardianships.
- Second, if a guardianship is already in existence, what type of matter is now before the court? Even after the 2011 change from the "appertaining or incident to an estate" language to "matters related to guardianship proceedings," the basic question of which matters may be heard by which courts is still essentially whether the matter involves the administration of the guardianship or is instead a cause of action by or against the guardianship that does not involve the administration of a guardianship. Jurisdiction varies depending on the answer. In addition, one must also look at the jurisdictional limits of the several courts of the county.

b. A County's Court System

Although only one type of a county's several courts may have jurisdiction to create a guardianship, a larger number of courts within a county or assigned to a county may have jurisdiction to hear matters surrounding the administration of a guardianship once it has been created. And even a larger number of courts within a county or assigned to a county have the jurisdiction to hear suits against a guardianship that are not concerning the guardianship's administration. That one court may have jurisdiction in one of these areas does not necessarily mean that it has jurisdiction to hear a matter in another of these areas. The jurisdiction to create a guardianship does not necessarily mean the court has jurisdiction to entertain all other guardianship matters.

Which court is in charge of the guardianship docket varies from county to county for several reasons. One is simply that the jurisdictional grant of the numerous types of county courts often differs from one county to the next. Another determinant is workload considerations of the several courts. Four types of courts exist that potentially have some jurisdiction over guardianships and related issues. The nature of the case will determine which the most appropriate court under the circumstances is. These courts are:

1. Constitutional County Court

In counties with no statutory probate court and no county court at law exercising original probate jurisdiction, the constitutional county court has original jurisdiction of guardianship proceedings. EC §1022.002(a).

In these counties, "when a matter in a guardianship proceeding is contested, the judge of the county court may, on the judge's own motion, or shall, on the motion of any party to the proceeding, according to the motion: (1) request the assignment of a statutory probate court judge to hear the contested matter, as provided by Section 25.0022, Government Code; or (2) transfer the contested matter to the district court, which may then hear the contested matter as if originally filed in the district court." EC §1022.003.

"If only the contested matter in a guardianship proceeding is assigned to a statutory probate court judge under this section, or if the contested matter in a guardianship proceeding is transferred to a district court under this section, the county court shall continue to exercise jurisdiction over the management of the guardianship, other than a contested matter, until final disposition of the contested matter is made in accordance with this section. Any matter related to a guardianship proceeding in which a contested matter is transferred to a district court may be brought in the district court. The district court in which a matter related to the proceeding is filed may, on the court's own motion or on the motion of any party, find that the matter is not a contested matter and transfer the matter to the county court with jurisdiction of the management of the guardianship." EC §1022.003(h).

"If a contested matter in a guardianship proceeding is transferred to a district court under this section, the district court has jurisdiction of any contested matter in the proceeding that is subsequently filed, and the county court shall transfer those contested matters to the district court. If a statutory probate court judge is assigned under this section to hear a contested matter in a guardianship proceeding, the statutory probate court judge shall be assigned to hear any contested matter in the proceeding that is subsequently filed." EC §1022.003(i).

"The clerk of a district court to which a contested matter in a guardianship proceeding is transferred under this section may perform in relation to the transferred matter any function a county clerk may perform with respect to that type of matter." EC §1022.003(j).

2. Statutory County Court

In a county in which there is no statutory probate court, but in which there is a county court at law exercising original probate jurisdiction, the county court at law exercising original probate jurisdiction and the county court have concurrent original jurisdiction of guardianship proceedings, unless otherwise provided by law. The judge of a county court may hear guardianship proceedings while

sitting for the judge of any other county court. EC §1022.002(b).

In these counties, "when a matter in a guardianship proceeding is contested, the judge of the county court may, on the judge's own motion, or shall, on the motion of any party to the proceeding, transfer the contested matter to the county court at law. In addition, the judge of the county court, on the judge's own motion or on the motion of a party to the proceeding, may transfer the entire proceeding to the county court at law." EC §1022.004(a).

"A county court at law to which a proceeding is transferred under this section may hear the proceeding as if originally filed in that court. If only a contested matter in the proceeding is transferred, on the resolution of the matter, the matter shall be returned to the county court for further proceedings not inconsistent with the orders of the county court at law." EC §1022.004(b).

In counties having a statutory probate court, the guardianship jurisdiction of statutory county courts is nonexistent. Tex. Gov't. Code §25.0003(f) and EC §1022.002.

3. Statutory Probate Court[9]

In a county in which there is a statutory probate court, the statutory probate court has original jurisdiction of guardianship proceedings. EC §1022.002(c); Tex. Gov't. Code §25.0003(f). In a county in which there is a statutory probate court, the statutory probate court has exclusive jurisdiction of all guardianship proceedings, regardless of whether contested or uncontested. EC §1022.005(a).

A cause of action related to a guardianship proceeding of which the statutory probate court has exclusive jurisdiction as provided by §1022.005(a) must be brought in the statutory probate court unless the jurisdiction of the statutory probate court is concurrent with the jurisdiction of a district court as provided by §1022.005 of the Estates Code or with the jurisdiction of any other court.

If the judge of the county court has not transferred a contested matter to the district court at the time a motion is filed for assignment of a statutory probate judge, the judge shall grant the motion for assignment of a statutory probate judge. EC §1022.003(b).

4. District Court

The original probate jurisdiction of the state's district courts is limited to those situations in which a contested matter is transferred from a constitutional county court in counties with no statutory probate court and no county court at law exercising original probate jurisdiction. In those cases, "[a]ny matter related to a guardianship proceeding in which a contested matter is transferred to a district court may be brought in the district court. The district court in which a matter related to the proceeding is filed may, on the court's own motion or on the motion of any party, find that the matter is not a contested matter and transfer the matter to the county court with jurisdiction of the management of the guardianship." EC §1022.003(h).

"If a contested matter in a guardianship proceeding is transferred to a district court, the district court has jurisdiction of any contested matter in the proceeding that is subsequently filed, and the county court shall transfer those contested matters to the district court." EC §1022.003(i).

"The clerk of a district court to which a contested matter in a guardianship proceeding is transferred under this section may perform in relation to the transferred matter any function a county clerk may perform with respect to that type of matter." EC §1022.003(j).

In counties with a statutory probate court, a statutory probate court has concurrent jurisdiction with the district court in: "(1) a personal injury, survival, or wrongful death action by or against a person in the person's capacity as a guardian; and (2) an action involving a guardian in which each other party aligned with the guardian is not an interested person in the guardianship." EC §1022.005.

2. Jurisdiction upon Death or Restoration of Capacity

Guardianship revisions about two decades ago brought some much-needed clarity to the thorny issue of a probate court's jurisdiction of a guardianship when the ward dies, regains capacity, or attains majority. Much of the confusion in this area of the law stemmed from the appellate court opinion in *Gutierrez v. Gutierrez*, 786 S.W.2d 112 (Tex. App. – San Antonio 1990, no writ). That case held that the probate court loses jurisdiction of the guardianship matter upon the death of the ward, save and except that the guardianship shall be immediately settled and closed, and the guardian discharged. In response, the 1993 Legislature enacted §745 of the Probate Code (now §1204.001 of the Estates Code), Settling Guardianships of the Estate, but this attempt fell short of ameliorating all of the problems created by the appellate court opinion in Gutierrez. In 1995, the Legislature amended Code §606(e) (now §1021.001 of the Estates Code) to overturn *Gutierrez*. Under those 1995 guardianship revisions, the probate court's jurisdiction continues past death, restoration of capacity, or removal of disabilities when there is a claim against a surety.

[9] Bexar County, Collin County, Dallas County, Denton County, El Paso County, Galveston County, Harris County, Hidalgo County, Tarrant County, and Travis County.

Nevertheless, such a change did not end the controversy because there was no consensus among the probate courts as to what the term "settling the estate" meant. Section 745 (now §1204.001 of the Estates Code) suggested that the probate court had the jurisdiction only to "settle and close" the estate of a ward upon the death of the ward or the attainment of majority or capacity by the ward. The Corpus Christi Court of Appeals construed "settle and close" to mean that the court could have approved only a final accounting, even if assets needed to be collected and liquidated, claims needed to be approved or rejected, or litigation needed to be commenced, continued, or brought to an end. *Carroll v. Carroll*, 893 S.W.2d 62 (Tex. App. – Corpus Christi 1994, no writ).[10] Such a construction seemed to fly in the face of other provisions in the Probate Code that authorize a guardian to pay funeral expenses and other debts, to pay taxes and administrative expenses, and to sell property to pay debts, taxes, or distribute proceeds. EC §§1204.051–.052.

The 2001 guardianship revisions addressed these problems in two ways. First, the Legislature amended the Probate Code to describe "settling an estate" and "closing an estate" as processes distinct from one another, rather than as one concept. In the process, several provisions of the Probate Code related to the settling and closing of a ward's estate were changed. For example –

- Section 745 (now §1204.001) enumerates the situations under which a ward's estate requires settling, rather than settling and closing.
- Sections 694G, 747 and 749 (now §§1202.155, 1204.108, 1204.101–.102) refer solely to settling an estate, rather than settling and closing an estate.
- Section 746 (now §1204.051) refers solely to closing.

The second way that the 2001 Legislature addressed the problem was to enumerate the matters that a probate court has jurisdiction to hear after the estate of a ward is settled due to the death, restoration of capacity, or removal of disabilities of the ward. EC §1021.001. After a guardianship of the estate is required to be settled as provided by Estates Code §1204.001, the court exercising jurisdiction over the settling of the former ward's estate has the jurisdiction to hear: (1) lawsuits against former guardians for misconduct; (2) lawsuits against former guardians brought by sureties; (3) claims for the payment of guardian's fees, attorney's fees, and expenses and costs associated with guardianships, among other things; (4) matters related to the final settlement and accounting of wards' estates; and (5) any other matters related or appertaining to guardianship estates.

3. Transfer of Contested Guardianship Matters

In 2005, the Texas Supreme Court held that §608 (now §1022.007 of the Estates Code), "Transfer of Proceeding by Statutory Probate Court," is subject to venue provisions found in the Texas Civil Practice and Remedies Code. *Gonzalez v. Reliant Energy, Inc.*, 159 S.W.3d 615 (Tex. 2005); *see also* Civ. Prac. & Rem. Code §15.007. Before *Reliant Energy*, some appellate courts had held that §608 (now §1022.007) allowed a statutory probate court to transfer to itself from any other court either (1) any cause of action appertaining to an estate pending in the probate court or (2) any cause of action in which one of the parties is a personal representative of an estate pending in the statutory probate court, and to consolidate the transferred cause of action with other proceedings in the probate court. *Henry v. Lagrone*, 842 S.W.2d 324 (Tex. App. – Amarillo 1992, no writ); *Lanier v. Stem*, 931 S.W.2d 1 (Tex. App. – Waco 1996, no writ); *In re Houston Northwest Partners, Ltd.*, 98 S.W.3d 777, 780 (Tex. App. – Austin 2003, pet. dism'd).

In counties having neither a statutory probate court nor a county court at law exercising probate jurisdiction, the county judge may on his own motion transfer a contested guardianship matter to a district court or request the assignment of a statutory probate court judge. However, if the judge of the county court has not transferred a contested probate matter to the district court at the time a party files a motion for assignment of a statutory probate court judge, the county judge shall grant the motion and may not transfer the matter to district court unless the party withdraws the motion. EC §1022.003(b). The statute's language was amended during the 1999 legislative session to clarify the constitutional county court's obligation to transfer contested matters. The clarification was needed because of the confusion sowed by an appellate court decision that found the county judge's, rather than the party's intent, controlled where the case was transferred.[11] That same amendment also clarified that a statutory probate court judge brings her own jurisdiction with her, rather than being limited to the jurisdiction of the court in which she is visiting. While the contested matter is being determined in a district court or statutory probate court, the county court shall continue to exercise jurisdiction and management of all non-contested matters. EC §1022.003(h).

In counties that have a statutory county court at law, the constitutional county court may on its own

[10] Compare the *Gutierrez* and *Carroll* decisions with the duty of a guardian and probate court under EC §1204.202.

[11] *Preston v. Overstreet*, 802 S.W.2d 734 (Tex. App. – Amarillo 1990, no writ).

motion, and shall on a party's motion, transfer a contested guardianship matter to the statutory county court (i.e. county court at law) or other statutory court exercising the jurisdiction of a probate court. EC §1022.004(a).

4. Venue

Section 1023.001 of the Estates Code provides for venue in guardianship actions.

a. Guardianship of Minors

In an application for appointment of a guardian, venue is proper in the county in which the proposed ward resides, or in the county in which the proposed ward is located when the application is filed, or in the county in which the principal estate of the proposed ward is located. Venue may also be proper under the following circumstances:

1. When both parents reside in a county, venue may be in that county.
2. If the parents live in separate counties, venue may be in the county where the sole managing conservator resides or in the county of the parent with greater physical custody when there is a joint managing conservatorship.
3. If one parent is deceased, venue may be in the county of residence of the surviving parent who has custody.
4. If both parents are dead:
   a. If both parents resided in the same county and then died in a common disaster, and there is no evidence that their deaths were other than simultaneous, venue may be in the county in which both deceased parents resided.
   b. If the minor was in the custody of a deceased parent, venue may be in the county in which the last surviving parent having custody of the minor resided.
   c. If a last-surviving parent had by will or other written declaration appointed a person to be guardian of the person of a minor after that parent's death, venue may be in the county where the will is probated or in the county where the appointee resides.

b. Guardianship of Incapacitated Persons Other Than Minors

Venue lies in the county –

1. where the proposed ward resides; or
2. where he is located on the date the application is filed; or
3. where the principal estate of the proposed ward is located. EC 1023.001.

c. Venue in More Than One County

If more than one county has venue, the court in which the application was first filed has exclusive jurisdiction. EC §1023.002(a).

d. Transfer of Venue

If it appears to the probate court that it did not have venue over the guardianship proceeding, absent a motion by an interested person, the court is without authority to transfer venue of a pending guardianship and its administration to another county. EC §1023.002(c). *Robertson v. Gregory*, 663 S.W.2d 4 (Tex. App. – Houston [14th Dist.] 1983, no writ).

e. Evidence Establishing Venue

Testimony that an incapacitated person had been living in a county for a long time is sufficient to establish venue. *Loudd v. Davis*, 650 S.W.2d 556 (Tex. App. – Houston [14th Dist.] 1983).

f. Jurisdiction to Hear Venue Motion

The county court has jurisdiction to determine venue in a guardianship proceeding. EC §1023.002. *See In re Izer*, 693 S.W.2d 481 (Tex. App. – Corpus Christi 1983, writ ref'd n.r.e.).

g. Transfer for Convenience of Guardian or Other Interested Person

When a guardian or any other person desires to transfer the transaction of the business of the guardianship from one county to another, the person shall file a written application in the court in which the guardianship is pending stating the reason for the transfer. EC §1023.003(a).

Effective September 1, 2017, a court may, on its own motion, transfer the guardianship to the county in which the ward resides. EC § 1023.003(b).

The court receiving the transferred guardianship shall hold a hearing within 90 days from the date the transfer takes effect under §1023.010 to consider modifying the rights, duties, and powers of the guardian or any other provisions of the guardianship. After the hearing, the court shall enter an order requiring the guardian to give a new bond or to file a bond rider to the guardian's existing bond noting the court to which the guardianship proceeding was transferred. EC §1023.010(b)(1).

5. Filing Procedure

As of January 1, 2014, the applicant is responsible for the filing fee accompanying the application, including any attorney ad litem deposit, unless the applicant (and not the proposed ward) files an affidavit of inability to pay costs, or is a government or nonprofit agency providing guardianship services. Prior to this change, the filing fee and any attorney ad litem deposit were paid out of the ward's estate unless the ward's estate was insufficient. In that case, the filing fee and attorney ad litem deposit would be paid out of the county treasury.

C. *Appointment and Qualification of the Guardian(s)*[12]

1. Pre-Need Designations and Selection by Minor Ward

In certain instances, the Estates Code allows persons to make pre-need designations of a guardian for themselves, for their minor children, and for their incapacitated adult children. Minors aged 12 and older may be involved in the selection of their guardian.

a. Pre-Need Designation of Guardian

An adult with capacity may, by written declaration, designate a person to serve as guardian in the event the declarant becomes incapacitated. EC §1104.202. The declarant also may specifically disqualify named persons from serving as guardian. A suggested form of declaration is contained in §1104.204, though its use is not mandatory.

To be valid, the declaration must be signed by the declarant and either written wholly in his or her handwriting (i.e., holographic) or attested to by at least two witnesses in the presence of the declarant. EC §1104.203. However, effective September 1, 2017, a declaration that does not expressly disqualify any individual from serving as guardian of the declarant's person or estate can be effective if it is signed by the declarant and acknowledged by a notary public without being attested to by any witnesses. EC §1104.203(a-1). A declaration may also be self-proved, either by attaching a self-proving affidavit or by using an alternative form that combines the declaration and self-proving affidavit. EC §§1104.204–.205. A self-proved declaration is prima facie evidence that the declarant was competent at the time of the execution of the declaration. EC §1104.209.

b. Appointment of Guardian of Minor by Surviving Parent

By will or written declaration, the last surviving parent may direct the appointment of a guardian of a minor upon either the death of the parent or the probate court's finding that the surviving parent is an incapacitated person. EC §1104.053. A declaration that becomes effective due to a parent's incapacity terminates when the probate court enters an order finding that surviving parent is no longer an incapacitated person. EC §1202.002. A suggested form of declaration is contained in §1104.153 of the Estates Code, though its use is not mandatory.

A valid declaration is signed by the declarant and either written wholly in his or her handwriting or attested to by at least two witnesses in the presence of the declarant. A declaration may also be self-proved, either by attaching a self-proving affidavit or by using an alternative form added by the Legislature in 2009 that combines the declaration and self-proving affidavit. EC §§1104.153 –.154. The affidavit or its alternative is optional, not mandatory. EC §§1104.153–.154. However, a self-proved declaration is prima facie evidence that the declarant was competent at the time of the execution of the declaration. EC §1104.158.

c. Appointment of Guardian of Adult Incapacitated Child by Surviving Parent

The surviving parent of an adult incapacitated person may, by will or written declaration, designate a person to serve as guardian of the person of the adult incapacitated child upon the parent's death or in the event of the parent's incapacity. EC §1104.103. A declaration that becomes effective due to a parent's incapacity terminates when the probate court enters an order finding that surviving parent is no longer an incapacitated person. EC §1202.002. If the surviving parent is also the guardian of the adult incapacitated child's estate, the declarant may designate a guardian of the estate. EC §1104.103. A suggested form of declaration is contained in §1104.153 of the Estates Code, though its use is not mandatory.

To be valid, the declaration must be signed by the declarant and either written wholly in his or her handwriting or attested to by at least two witnesses in the presence of the declarant. A declaration may also be self-proved, either by attaching a self-proving affidavit or by using an alternative form added by the Legislature in 2009 that combines the declaration and self-proving affidavit. EC §§1104.153–.154. However, a properly executed and witnessed self-proved declaration and affidavit are prima facie evidence that the declarant was competent at the time of the execution of the declaration. EC §1104.158.

d. Selection by Minor Over 12 Years

A minor 12 years or older may, in writing and with court approval, select the guardian of his person or estate, or both, in a pending guardianship proceeding as long as the court finds that the choice is in the best interest of the minor. EC §1104.054(a). When a guardian has been previously appointed by the probate court, a minor 12 years or older may select a successor guardian, if qualified and suitable, when the

[12] Many statutory probate courts hand out instructions to guardians upon appointment. These handouts help the guardians stay within the bounds of the law and prevent the excuse of "my lawyer never told me that" or "I didn't know." Some courts even have the guardian sign a duplicate copy of the instructions and have these placed in a file. It is helpful if these handouts are available in both English and Spanish. Some of these courts also gather personal information from the guardian at the time of appointment to help the court or attorney ad litem track down the guardian if he or she goes on the lam. For examples of reports and information sheets, please see Appendix D.

previously appointed guardian is removed, resigns, or dies. The minor or the minor's attorney must make the selection in court. EC §1104.054(b). *See Hernandez v. Borjos*, 734 S.W.2d 776 (Tex. App. – Fort Worth 1987, no writ).

2. Priority Right to Serve As Guardian

The concept of the best interest of the ward governs the priority right to serve as guardian. This concept stems from the policy considerations in §1001.001 and §1101.105 of the Estates Code and the necessary findings in §1101.101 of the Estates Code that a court must make before it appoints a guardian. These considerations form the basis for the following rules in Subchapter B, Chapter 1104 of the Estates Code. The rules are subject to the disqualification provisions in Subchapter H, Chapter 1104 of the Estates Code (see Part 5, infra):

a. Guardians of the Estates of Minors

Parents' Priority - If the parents live together, both parents are the natural guardians of the person of the minor children of the marriage, and one of the parents is entitled to be appointed guardian of the children's estate. EC §1104.051. Appointment of a guardian of the estate is necessary because a parent "has no absolute right to act for the minor, and has no authority to manage and control the minor's estate." *Kaplan v. Kaplan*, 373 S.W.2d 271 (Tex. Civ. App. – Houston 1963, no writ); *Silber v. Southern Nat'l Life Ins. Co.*, 326 S.W.2d 715 (Tex. Civ. App. – San Antonio 1959, writ ref'd). If the parents disagree as to which parent should be appointed, the court shall make the appointment based on which parent is better qualified to serve in that capacity. Likewise, if the parents do not live together and a contest arises, the court should assign the guardianship to the parent who the court finds would serve the best interest of the child. EC §1104.051. Finally, if one parent is dead, the survivor is the natural guardian of the person of the minor children and is entitled to be appointed guardian of their estates. EC §1104.051.

b. Guardians of Orphans

If the last surviving parent did not appoint a guardian, the nearest ascendant in the direct line of a minor is entitled to guardianship of both the person and the estate of the minor. EC §1104.052(1). For example, a grandparent has priority over an uncle. *See Penny v. Hampton*, 283 S.W. 599 (Tex. Civ. App. – Texarkana 1926, no writ). If two persons in the same degree of ascendancy apply for guardianship, appointment will be made in the best interest of the minor. EC §1104.052(2). If the minor has no ascendant in the direct line, the nearest of kin shall be appointed, and if there are two or more persons in the same degree of kinship, one shall be appointed, according to the circumstances and considering the best interests of the minor. EC §1104.052(3). If no relative is eligible to be guardian of the minor, or if no qualified person applies to be guardian, the court shall appoint any qualified person.

c. Guardian of Persons Other Than Minors

1. Spouse

If not disqualified, the ward's spouse is entitled to be guardian in preference to any other person. EC §1104.102(1). The spouse of a ward, if the spouse is not disqualified, may have the ward's child removed as guardian. *Novak v. Schellenberg*, 669 S.W.2d 162 (Tex. App. – Corpus Christi 1984, no writ).

2. Nearest of Kin

If there is no qualified spouse, the ward's nearest of kin is entitled to serve. EC §1104.102(2). *See Adcock v. Sherling*, 923 S.W.2d 74 (Tex. App. – San Antonio 1996, no writ) (holding that son, who had no adverse interest in funds belonging to mother's estate, was eligible to serve as guardian, and because he was the ward's son, he had priority over a granddaughter as next of kin to be appointed guardian under §677 of the Probate Code (now Subchapter C, Chapter 1104 of the Estates Code.) Furthermore, a person with a higher priority may have a guardian of lower priority removed if the person did not receive notice of the original proceeding.

3. Eligible Person

Under §1104.102(3), the court may appoint any eligible person if –

(1) the ward's spouse and the person nearest of kin refuse to serve;

(2) two or more persons who are entitled to serve by being the person nearest of kin are related in the same degree of kinship to the ward; or

(3) neither the ward's spouse nor any person related to the ward is an eligible person.

3. Person(s) to be Appointed

Only one person can be appointed as guardian of the person or estate unless the applicants are husband and wife, joint managing conservators, co-guardians appointed under the laws of another state, territory, or country, or are parents of an adult incapacitated child if the child has never been the subject of a SAPCR suit. EC §1104.001. Joint guardians may only be appointed if it is in the best interest of the ward. However, one person may be appointed guardian of the estate and another as guardian of the person. EC §1104.001.

Effective September 1, 2017, a court may not appoint an individual to serve as guardian if the individual has not received training required under §155.204 of the Texas Government Code unless

waived by the court in accordance with rules adopted by the Supreme Court.[13]

4. Waiver of Priority

A person entitled to be guardian may waive that right by express declaration or by conduct. Waiver by conduct occurs when a party knows of another's appointment and makes no objection. *Estate of Morris v. First Int'l Bank*, 664 S.W.2d 132 (Tex. App. – San Antonio 1983, no writ). A written waiver in favor of another may not be withdrawn so long as the guardian has not been removed.

5. Persons Disqualified to be Guardian

Under Subchapter H, Chapter 1104, a person may not be appointed guardian if the person is any of the following:

1. A minor.
2. An incapacitated person.
3. A person whose conduct is notoriously bad. A husband's beating and abandoning his wife has been held sufficient to disqualify him. *Legler v. Legler*, 37 S.W.2d 284 (Tex. Civ. App. – Austin 1931, no writ).
4. A person who is a party to a lawsuit, or whose father or mother is a party to a lawsuit, concerning or affecting the welfare of the proposed ward, unless the court (1) determines that the claim of the person who has applied to be appointed guardian is not in conflict with the claim of the proposed ward, or (2) appoints a guardian ad litem to represent the proposed ward throughout the litigation of the ward's lawsuit claim.

> PRACTICE NOTE
> An ad litem should always inquire into the circumstances causing the incapacity or creating the need for a guardianship, as quite often there is a plan in place to file a personal injury or wrongful death suit by the proposed guardian in the guardian's own individual capacity and as guardian of another.

5. Persons indebted to the proposed ward (unless the debt is paid before appointment). EC §1104.354(2); *see also Phillips v. Phillips*, 511 S.W.2d 748 (Tex. Civ. App. – San Antonio 1974, no writ). A case along these lines is *In re Guardianship of Henson*, in which an uncle named as guardian of minor children in their deceased father's will was disqualified because he was the surviving business partner of the deceased and had drawn upon the partnership account, thus making him indebted to the estate of which the children were devisees. 551 S.W.2d 136 (Tex. Civ. App. – Corpus Christi 1977, writ ref'd n.r.e.). On the opposite end of the spectrum, the 13th Court of Appeals found no abuse of discretion when the trial court permitted the appointed guardian to pay approximately $2000.00 back to the ward within five days of her appointment. *Guardianship of Walzel*, No. 13-08-00509-CV, 2010 WL 335686 (Tex. App. – Corpus Christi- Edinburg, Jan. 28, 2010, no pet. h.) (mem. op.).

6. A person asserting a claim adverse to the proposed ward or the proposed ward's property, real or personal. EC §1104.354(3). In *Penny v. Hampton*, 283 S.W. 599 (Tex. Civ. App. – Texarkana 1926, no writ), the grandfather of minors was held disqualified because his wife, the minors' grandmother, was claiming war risk insurance proceeds on her deceased son to which the minors could also make a claim. In *Dobrowolski v. Wyman*, 397 S.W.2d 930 (Tex. Civ. App. – San Antonio 1965, no writ), an incompetent wife had commingled her separate estate with community assets, and a complete accounting was necessary to determine the status of her separate funds. The court determined that the husband's interest was in conflict; therefore, he was disqualified from serving as guardian. And in *Phillips v. Phillips*, 511 S.W.2d 748 (Tex. Civ. App. – San Antonio 1974, no writ), the mother of two minor children was held to be disqualified from serving as guardian of their estates because as administrator of her husband's estate, she claimed a community interest in 5,700 acres of land that had earlier been designated in an inventory as the husband's separate property.

7. Persons who lack experience or education to properly manage the ward's estate. EC §1104.351(2). The court of appeals analyzed this provision in *Blackburn v. Gantt*, 561 S.W.2d 269, 273 (Tex. Civ. App. – Houston [1st Dist.] 1978, no writ), and stated the following:

> [The provision] does not require that the guardian of an estate of an incompetent be knowledgeable in probate law, be an expert in business management, or be experienced in investing money. The question is whether or not by reason of lack of experience or education or other good reason the applicant is "incapable" of properly and prudently managing the estate with appropriate expert assistance. The question is not whether another applicant is more capable of managing and controlling the estate. The legislative intention that preference be given to the closest relative of the incompetent who has made application for the guardianship is

[13] As of August 2017, the training program has not yet been designed or implemented. The Supreme Court is tasked with establishing the training program, to be designed and provided by the Judicial Branch Certification Commission. When the training program is up and running, the proposed guardian will need to complete the training at least ten days before the hearing to establish the guardianship.

clear. The policy of appointing only those with experience in managing large business affairs or large sums of money, as the guardian of the estates of those having substantial assets would, in large measure, frustrate the intention of the Legislature.

PRACTICE NOTE
In a contest alleging lack of experience or educational disqualification, the proposed guardian's attorney should always ask for an instruction in conformity with the *Blackburn* decision.

8. A person, institution, or corporation found unsuitable by the court. EC §1104.352. In a 2011 case, the court found no abuse of discretion when the trial court found the mother unsuitable based on the mother's failure to pay the proposed ward's medical care and evidence of the proposed ward's physical deterioration under the mother's care. *In re Guardianship of Alabraba*, 341 S.W.3d 577, (Tex. App. – Amarillo 2011, no pet.h.)

9. A person disqualified in a declaration by the ward made under §1104.202(b). EC §1104.355.

10. A nonresident person who has not filed with the court the name of the resident agent to accept service of process in all actions or proceedings relating to the guardianship. EC §1104.357. If a non-resident has appointed a resident agent, he or she is eligible to serve even if he or she resides in another country. *See Ramirez v. Garcia de Bretado*, 547 S.W.2d 717 (Tex. Civ. App. – El Paso 1977, no writ) (holding that maternal grandmother who had priority over a paternal uncle was not disqualified even though she was a resident of Mexico and that the burden of proving the disqualification of a person having a prior right to be guardian is upon the person challenging the qualification).

11. A person who is required by Subchapter F, Chapter 1104 to be certified by the Guardianship Certification Board to serve as guardian, but who is not certified. EC §1104.356 (for example, private professional guardians and public guardians).

6. Presumption Concerning Best Interest

It is presumed not to be in the best interests of a ward to appoint a person as guardian of the ward if the person has been finally convicted of any sexual offense, sexual assault, aggravated assault, aggravated sexual assault, injury to an elderly or disabled person, injury to a child, abandoning or endangering a child, or incest. EC §1104.353(b). Each person proposed to serve as a guardian, except for attorneys[14], is required to have a criminal background check. The check could be obtained by the clerk, may be given to the clerk by the Guardianship Certificate Board, or may be submitted by the applicant within 30 days of the hearing. EC §1104.402. As of September 1, 2017, the clerk is not required to obtain criminal history record information if the Judicial Branch Certification Commission has conducted a criminal background check. EC §1104.404(a)

7. Application for Appointment of Guardian

a. Who May Apply

Any person may apply in writing for the appointment of a guardian. EC §1101.001. The attorney for the applicant for guardianship must have a current guardianship certification issued by the State Bar of Texas for having successfully completed a course of study in guardianship law and procedure. EC §1054.201.

b. Court's Initiation of Guardianship Proceedings

If the 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 court investigator or a guardian ad litem to investigate the situation. If the court investigator or the guardian ad litem believes, after such investigation, that the person is incapacitated, the court investigator or the guardian ad litem will file an application for guardianship. EC §1102.001.

Starting September 1, 2015, if the court appoints a court investigator or guardian ad litem to investigate, it shall include in its order a statement that the person believed to be incapacitated has the right to petition the court to have the appointment set aside. EC §1102.001(b)(1). And at the initial meeting between the court investigator or guardian ad litem and the person believed to be incapacitated, a copy of the information letter required under §1102.003 and the order initiating the investigation shall be given to the proposed ward and discussed. EC §1102.001(b)(2).

c. Minors

If the guardianship is being sought for a minor, the application must state whether the minor has been the subject of a legal or conservatorship proceeding within the preceding two years, and if so, must also indicate the court involved, the nature of the proceeding, and the final disposition, if any, of the proceeding. EC §1101.001(12). An application must also include, if known: (1) the name and address of each parent of the ward or a statement that they are deceased and (2) the same for each sibling, as well as age; or (3) if both parents and all siblings are deceased, the same for the next of kin who are adults. EC §1101.001(11) A-C.

[14] In the 2015 legislative session, the Legislature removed the exemption for family members of the proposed ward.

d. Adults

If the guardianship is being sought for an adult, the application must contain, if known: (1) the name and address of the spouse of the ward or a statement that the spouse is deceased; (2) the name and address of each parent of the ward or a statement that they are deceased; (3) the name, age, and address of each sibling of the ward or a statement that they are deceased; and (4) the name, age, and address of each child of the ward or a statement that they are deceased; or (5) if there is no spouse, parent, adult child, or adult sibling, the name and address of the proposed ward's other living relatives who are related to the proposed ward within the third degree by consanguinity who are adults. EC §1101.001(13) A-E; *and see* EC §1101-001(c) (defines which people are the proposed ward's relatives within the third degree by consanguinity).

e. Right to Vote, Drive, and Determine Residence

An application that seeks to terminate the proposed ward's right to vote, right to drive, or right to make decisions regarding residence must specifically state those facts. This requirement, which began in 2007 and was modified in 2015, is intended to afford the proposed ward due process by putting the ward on notice that his or her rights are threatened by the proceeding, including the constitutional right to vote. EC §1101.001(b)(4) A-C.

f. Alternatives to Guardianship

Starting September 1, 2015, the application must state whether the applicant considered alternatives to guardianship and available supports and services to avoid guardianship, and whether any alternatives to guardianship and supports and services available to the proposed ward are feasible and would avoid the need for guardianship. EC §1101.001(b)(3-a) and (3-b).

g. Sworn Application

An applicant must swear to the application for appointment of a guardian. EC §1101.001(b).

8. Notice and Service

a. Posting

In all guardianship cases, the court clerk shall issue a citation that shall be posted for at least 10 days before the date of hearing. EC §§1051.102, 1051.106. If the necessity exists, the court may permit the appointment of a successor guardian immediately, without citation or notice. EC §§1203.102, 1203.002, 1203.006.

The citation must contain a "clear and conspicuous statement" regarding the right provided under §1051.252 of the Estates Code – the right to be notified of future motions, applications, or pleadings.

b. Return of Citation

In *Sublett v. Black*, 617 S.W.2d 754 (Tex. App. – Houston [14th Dist.] 1982, writ dism'd), the court points out that before a default judgment may be entered, the return of citation in the guardianship of an incapacitated person must be on file for 10 days, exclusive of the day of filing and the day of judgment. *See also* TRCP Rule 107. But now that appointment of an attorney ad litem is mandatory, this holding may not still be good law.

c. Personal Service

Notice by personal service of citation must be made to a proposed ward who is 12 years of age or older; to the proposed ward's parents if the parents' whereabouts are known or can be reasonably ascertained; to any court-appointed conservator or person having control of the care and welfare of the proposed ward; to a proposed ward's spouse if the spouse's whereabouts are known or can be reasonably ascertained; and to the person named in the application to be appointed guardian, if that person is not the applicant. EC §1051.103. Any order granting a guardianship where the proposed incapacitated person has not been personally served is void and subject to both direct and collateral attack. *Guardianship of B.A.G.*, 794 S.W.2d 510 (Tex. App. – Corpus Christi 1990, no writ). Furthermore, failure to comply with §1051.103's citation and notice provisions does not invoke the probate court's jurisdiction to appoint a permanent guardian if ten days plus a Monday have not passed since the filing of the application regardless if the court orally pronounces judgment appointing a guardian before then. *In re Peggy Fowler Redding*, No. 12-07-00098-CV, 2007 Tex. App. LEXIS 3329 (Tex. App. – Tyler 2007, orig. proceeding).

The citation must contain a "clear and conspicuous statement" regarding the right provided under §1051.252 of the Estates Code – the right to be notified of future motions, applications, or pleadings. And effective June 15, 2017, the citation must contain a "statement notifying the relative that, if a guardianship is created for the proposed ward, the relative must elect in writing in order to receive notice about the ward under Section 1151.056." EC §1051.103(c).

d. Waiver

Under §1051.105, a person other than the proposed ward may waive personal service or notice in writing; however, a proposed incapacitated person can never waive personal service, and any order granting guardianship without personal service is void even though a waiver is signed. *Dyer v. Wall*, 645 S.W.2d 317 (Tex. App. – Corpus Christi 1982, no writ). Further, the attorney for the proposed incompetent cannot waive personal service on the ward. *Ortiz v.*

Gutierrez, 792 S.W.2d 118 (Tex. App. – San Antonio 1989, no writ).

e. Notice to Interested Persons

The guardianship applicant – not the clerk – is responsible for mailing a copy of the application and notice to the specified persons. EC §1051.104. Proof of delivery is required. The list of recipients, outlined below, has been expanded to include all persons named as an "other living relative" in the application:[15]

a. each adult child of the proposed ward;

b. each adult sibling of the proposed ward;

c. the administrator of a nursing home facility or similar facility in which the proposed ward resides;

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

e. a person whom the applicant knows to hold a power of attorney signed by the proposed ward;

f. a person designated to serve as guardian by written declaration;

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

h. a person designated to serve as guardian by written declaration of the proposed ward's last surviving parent, if the declarant is deceased; and

i. each adult named in the application as "an other living relative" of the proposed ward within the third degree of consanguinity[16] if the proposed ward's spouse and each of the proposed ward's parents, adult siblings, and adult children are deceased or there is no spouse, parent, adult sibling, or adult child.

Effective June 15, 2017, the notice must contain a "statement notifying the relative that, if a guardianship is created for the proposed ward, the relative must elect in writing in order to receive notice about the ward under Section 1151.056." EC §1051.104(d).

The applicant must then file an affidavit stating that notice was mailed to the named persons. EC §1051.104(b).

PRACTICE NOTES

The applicant's attorney should obtain the appropriate waivers under these notice provisions or notify the appropriate persons under the mail requirements.

The court may not act upon an application for a guardianship until all adult children of the proposed ward are notified.

9. Hearing

Guardianship hearings are subject to the Texas Rules of Civil Procedure and the Texas Rules of Evidence. Additionally, hearings should be conducted on the record (i.e., in front of a court reporter) in order to preserve the ward's right to appeal any decision. Statutory requirements related to the hearing are set out below and on the following pages. See Appendix B for some practical nuts-and-bolts suggestions for guardianship hearings.

a. Medical Examination and Report

Except for a minor, a person with intellectual disabilities, or a person for whom it is necessary to have a guardian to receive governmental benefits, no guardianship of an incapacitated person may be created unless there is a medical certificate or letter from a physician filed with the court, based on an examination made within 120 days of filing. EC §§1101.103–.104. The certificate or letter should be filed with the application. If not, the court may, before the hearing, appoint a physician to conduct the medical evaluation. Before appointing a physician, the court must conduct a hearing to determine whether a physician's examination is necessary. The applicant must give written notice of the hearing to the proposed ward and the proposed ward's attorney ad litem not later than the fourth day before the date of the hearing. Because guardianship proceedings necessarily imply physical or psychological issues, the Texas Estates Code maintains its own framework for evaluating such issues, and Rule 204 of the Texas Rules of Civil Procedure is inapplicable. *Karlen v. Karlen*, 209 S.W.3d 841 (Tex. App. – Houston [14th Dist.] 2006, no pet.). The general avenue in guardianship proceedings by which a party may ask the court to require an examination is §1101.103(c), which gives the court discretion to appoint a physician for examination of the proposed ward.

In cases involving persons with intellectual disabilities, a guardianship can also be created if there is a determination of intellectual disability report made by a physician or licensed psychologist. EC §1101.104. The examination must occur not earlier than 24 months before the hearing to appoint a guardian for the proposed ward. And the physician or psychologist shall conduct the examination in accordance with rules of the executive commissioner of the Health and Human Services Commission governing examinations of that kind for a determination of intellectual disability.

[15] By requiring notice on these persons, the new provision necessarily incorporates the old code provision of notice being served by registered or certified mail upon the brother, sister, and all children of a person older than 60 years of age coming under guardianship.

[16] Section 1101.001 defines a relative of the proposed ward within the third degree of consanguinity to include the proposed ward's grandparent, grandchild, 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, and niece or nephew who is a child of a brother or sister of the proposed ward.

In no event may the court conduct a hearing without having a required medical certificate or psychological examination on file. The evaluation or report in and of itself is not evidence of the need for a guardianship unless it is offered and admitted into evidence. This provision has certain minimum standards as to what medical or psychological information must be provided to the court. EC §§1101.103–.104; *see also* Appendix B.

PRACTICE NOTE

An applicant's lawyer should ascertain from the attorney ad litem whether there will be any objection to the medical evaluation. Medical evaluations are subject to hearsay and confidentiality rules. There is an exception to hearsay, but the proper predicate must be laid before admission. *But see In re Guardianship of Parker*, No. 07-07-0101-CV, 2008 WL 5423013 (Tex. App. – Amarillo 2008, no pet.). In Parker the court held that the trial court had not erred by admitting a physician's letter into evidence, over hearsay and confidentiality objections. The court emphasized §1101.103 of the Estates Code, which requires the applicant for a guardianship to present a physician's letter or certificate to the court. The court stated that by requiring presentation to the court, the Legislature intended the court to consider the contents of the letter or certificate, and to say the statute forbids judicial consideration because of evidentiary restraints would be illogical. Additionally, the court noted that §1055.102 of the Estates Code specifies "the record books or individual case files...shall be evidence in any court of this state."

b. Contest

1. Who May Contest?

A person who has an interest that is adverse to the proposed ward may not contest a guardianship. EC §1055.001(b). *See Allison v. Walvoord*, 819 S.W.2d 624 (Tex. App. – El Paso 1991, orig. proceeding [leave denied])); *In re Guardianship of Olivares*, No. 07-07-0275-CV, 2008 WL 5206169 (Tex. App. – Amarillo 2008, no pet.). However, any other person, including a former guardian who has been removed, may contest the appointment of a guardian. See EC §1055.001(a). If an interested person seeks to intervene in a guardianship proceeding, that person must first get the court's permission by filing a motion to intervene in a timely manner. EC §1055.003. This requirement does not apply to persons entitled to receive notice of the guardianship application under §1051.104 in guardianship proceedings that are pending or commenced on or after September 1, 2017. EC §1055.003(d). In reviewing the motion to intervene, the court has discretion to grant or deny the motion, and in doing so, must consider whether the intervention itself or whether the proposed intervenor has such an adverse relationship with the ward or proposed ward that the intervention will unduly delay or prejudice the adjudication of the original parties' rights. EC §1055.003. The procedure to challenge standing to contest is a motion in limine. EC §1055.001(c). The court must hear evidence on any contested fact issues. *Guardianship of Schellenberg*, 694 S.W.2d 50 (Tex. App. – Corpus Christi 1985, no writ). Interestingly, the Estates Code does not define what an adverse interest is, and, until recently, no published opinion had attempted to do so. However, in *Guardianship of Miller*, 299 S.W.3d 179 (Tex. App. – Dallas 2009, no pet.), the appeals court stated the following:

> Without attempting to fully define an adverse interest under section [1055.001], we decline to conclude that evidence of a debt alone automatically rises to the level of an adverse interest sufficient to divest a person of standing under section [1055.001]. [Subchapter H, Chapter 1104] itself allows for a person who is indebted to the proposed ward to pay the debt and be appointed as guardian. [EC §1104.351]. Without evidence of the amount of the debt in relation to the estate of the ward or proposed ward, the ability or inability of the proposed guardian to repay the debt, or some other evidence such as misuse of funds to the detriment of the ward or proposed ward, we cannot conclude evidence of a debt alone automatically creates an interest so adverse to the ward or proposed ward that it would divest a person of standing to file an application to create a guardianship or to contest the creation of a guardianship, the appointment of a person as a guardian, or an application for restoration of a ward's capacity or modification of a ward's guardianship. In reaching this conclusion, we are not suggesting that a debt can never rise to the level of an adverse interest under section [1055.001], only that it does not automatically do so.

PRACTICE NOTE

In reversing and remanding a guardianship proceeding, a Harris County appellate court held that a motion in limine proceeding to question the standing of an applicant for or

contestant to a guardianship could not be used in the circumstances of the case to strike the pleadings of a family member as applicant or contestant. The court held that the family members, while subject to a disqualification, could not be limined out of the case. *Betts v. Brown*, No. 14-99-00619-CV, 2001 WL 40337 (Tex. App. – Houston [14th Dist.] Jan. 18, 2001) (not designated for publication).

2. Jury Trial

A jury trial is not required for an adjudication of incapacity and appointment of a qualified guardian. See EC §1055.052. If requested, however, a jury trial must be granted. EC §55.002; *In re Guardianship of Norman*, 61 S.W.3d 20 (Tex. App. – Amarillo 2001, pet den.); *Fitzgerald v. Bonham*, 247 S.W.2d 265 (Tex. Civ. App. – Galveston 1952, writ ref'd n.r.e.); *Henderson v. Applegate*, 203 S.W.2d 548 (Tex. Civ. App. – Fort Worth 1947, writ ref'd n.r.e.). In fact, as *Norman* makes clear, §1101.155 does not permit the probate court to determine the capacity of a proposed ward if a party to a contested guardianship has requested a jury trial on the issue of capacity. According to the appeals court, §1101.155 cannot abrogate the provisions of §1055.052 because abrogation leads to an absurd result and renders the latter section meaningless. It is absurd to require an applicant to try his or her case two times: once before the court in a §1101.155 motion and, if successful, once before the jury on the same issue. And it is meaningless to have a provision for a jury trial if the court can decide sua sponte to grant final relief, either by dismissing pursuant to §1101.155 or, using the same logic that allows the court to dismiss if incapacity does not exist, by appointing a guardian pursuant to §§1101.151–.153. Sections 1101.155, 1101.151–.153 refer to the authority of the court to take action once capacity is resolved by the appropriate fact-finder: the court or, if requested pursuant to §1055.052, the jury.

If the incapacity issue is submitted to the jury, the court may not suggest in its questions to the jury that the issue has been previously decided. In *Ulrickson v. Hawkins*, the court held it was error to submit the issue, "Do you find from a preponderance of the evidence that Eunice Mae Hawkins remains a person of unsound mind?" *Ulrickson v. Hawkins*, 696 S.W.2d 704 (Tex. App. – Fort Worth 1985, writ ref'd n.r.e.). In that case the ward had been under a temporary guardianship. The appellate court concluded that where "the threshold question is whether the prospective ward is a person of unsound mind, this issue requires submission untainted by a disclosure of temporary rulings on such issue." *Id.*

A jury trial is not available in temporary guardianship proceedings. *In re Kuhler*, 60 S.W.3d 381 (Tex. App. – Amarillo 2001, orig. proceeding). The court in *Kuhler* concluded that §21 of the Probate Code (now §55.002 of the Estates Code), which provides for a jury trial in all contested probate proceedings, did not apply to temporary guardianship proceedings for a number of reasons. First, the specific provisions of §1251.001 govern, which place upon the court, not a jury, the burden of deciding whether a temporary guardian should be appointed. Thus, when an apparent conflict exists, a statute such as Chapter 1251 of the Estates Code that governs specific issues controls over a statute such as §55.002 of the Estates Code that governs general matters regarding matters of statutory construction. Second, a temporary guardianship is analogous to a temporary injunction in that interlocutory, injunctive-like relief is the result. Because a jury trial is unavailable for a temporary injunction, it is unavailable for a temporary guardianship.

A jury of 6 is proper to hear a contested guardianship proceeding in a county court at law. A jury of 12 is proper, if requested, to hear a contested guardianship proceeding in a statutory probate court. *In re Lynch*, 35 S.W.3d 162 (Tex. App. – Texarkana 2000, no pet.)

3. Burden of Proof

In a contest where capacity is an issue, the burden of proof is upon the person so alleging. *Ulrickson v. Hawkins*, 696 S.W.2d 704 (Tex. App. – Fort Worth 1985, writ ref'd n.r.e.). However, if a person is contesting the qualification of a guardian, the burden of proving disqualification is upon the challenger. *Chapa v. Hernandez*, 587 S.W.2d 778 (Tex. Civ. App. – Corpus Christi 1979, no writ); *Ramirez v. Garcia de Bretado*, 547 S.W.2d 717 (Tex. Civ. App. – El Paso 1977, no writ). The burden of proof of incapacity in guardianship proceedings is by "clear and convincing evidence." EC §1101.101(a).

PRACTICE NOTE

The Legislature adopted the "clear and convincing evidence" standard in 1993. This changed standard effectively altered the rulings as to capacity questions in the cases cited above.

4. Security for Costs

A court can require any party filing an application, complaint, or opposition to a guardianship proceeding to post security for costs, unless that person is a guardian, an attorney ad litem, or a guardian ad litem acting in their respective fiduciary duties. EC §1053.052. Either a person interested in the

guardianship or in the welfare of the ward, or an officer of the court, upon written motion to the court, or the clerk of the court, on his or her own or through court order[17], may seek to have that person give security for the probable costs of the guardianship proceeding. EC §1053.052(a) and (b). This request may arise in situations in which it appears that an application or contest is frivolous. By doing so, it forces the complaining party to decide whether to put up money or withdraw the complaint, and helps ensure that costs against the estate are not unnecessarily increased by persons who have no incentive for helping keep costs down. Note, however, that the ward's estate – not the party –is ultimately responsible for the costs of the guardianship proceeding if it has the funds, or the county if not. *See In re Guardianship of Soberanes*, 100 S.W.3d 405, 408 (Tex. App. – San Antonio 2002, no pet.) and *Overman v. Baker*, 26 S.W.3d 506, 512-13 (Tex. App – Tyler 2000, no pet.).

An El Paso Court of Appeals decision seems to conflict with statutory authority to order costs. *See In re Mitchell*, 342 S.W.3d 186 (Tex. App. – El Paso, May 11, 2011, orig. proceeding, no pet.) (limiting the circumstances in which a court can require a party to post security to only when there is a possibility that the party will ultimately be responsible for costs).

The author believes *Mitchell* is wrongly decided, but no other appellate court has directly addressed the issue. It may be instructive, though, to look at two opinions by the same panel of the Tyler Court of Appeals, decided less than a year apart in the same underlying guardianship case: *In the Guardianship of Luke Forrest Humphrey*, No. 12-06-00222-CV, 2008 Tex. App. LEXIS 4429 (Tex. App. – Tyler, June 18, 2008) (mem. op.) and *In the Guardianship of Luke Forrest Humphrey*, No. 12-07-00118-CV, 2009 Tex. App. LEXIS 1099 (Tex. App. – Tyler, Feb. 18, 2009) (mem. op.). In the first *Humphrey* case, the appellate court held that the trial court erred in assessing attorney ad litem fees against a non-guardian party in a guardianship proceeding, violating Probate Code §665A (now Estates Code §1155.051). The issue being addressed in the second *Humphrey* case was notice, but exactly eight months after the first case, the same three-judge panel held that "[t]he trial court did not abuse its discretion by hearing the application for security of costs" against a party that would not ultimately be responsible for those costs (emphasis added). The appellate court said nothing – even in passing – about the fact that the party could not have been required to pay the eventual costs.

The author urges caution in this area because of the conflicts.

[17] Although a clerk already has this authority, a clerk may now obtain an order to that effect from the court.

5. Motion in Limine

Another approach that might be useful in the frivolous-litigation situation would be for the ad litem or the non-frivolous litigant to bring a motion in limine under Estates Code §1055.001. If the court finds that the alleged frivolous litigator's behavior is an adverse interest to the proposed ward and grants the motion, the effect would be to knock a litigant with an adverse interest out of the guardianship litigation. This approach was upheld in *In the Guardianship of Mary Jane Olivares*, 2008 Tex. App. LEXIS 9232, (Tex. App. – Amarillo, Dec. 12, 2008) (mem. op.).

10. Required Findings

Before appointing a guardian, the court must find the following by clear and convincing evidence under §1101.101:

1. the proposed ward is an incapacitated person;
2. it is in the best interest of the proposed ward to have the court appoint a person as guardian of the proposed ward;
3. the rights of the proposed ward or proposed ward's property will be protected by appointment of a guardian;
4. alternatives to guardianship that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible; and
5. supports and services available to the proposed ward that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible.

In addition, the court must find the following by a preponderance of evidence:

1. that the court has venue;
2. that the person to be appointed guardian is eligible to act as guardian and is entitled to appointment, or, if no eligible person entitled to appointment applies, that the person appointed is a proper person to act as a guardian;
3. in the case of a minor, that the guardianship is not created for the primary purpose of enabling the minor to establish residency for enrollment in a school in which he or she would not otherwise be entitled to attend; and
4. that the incapacitated person is partially or totally incapacitated. If the court finds that the person is partially incapacitated, then the findings must specifically state whether the person lacks the capacity, or lacks sufficient capacity with supports and services, to make personal decisions regarding residence, voting, operating a motor vehicle, and marriage.

11. Order Appointing the Guardian

Totally incapacitated ward: Under §§1101.151 and 1101.153(a), the court's order regarding a totally incapacitated person must specify:

1. the name of the guardian;

2. the name of the ward;
3. that the guardian has full authority over the incapacitated person;
4. any monthly allowance that will be needed;
5. whether the guardian is of the person or estate, or both;
6. whether the incapacity is the result of a mental condition;
7. that the person does not have the capacity to operate a motor vehicle, make personal decisions regarding residence, and to vote in a public election;
8. the bond required, if any (the court's order was reversed for failing to provide for a bond in *Doyle v. Sorrells*, 297 S.W.2d 233 (Tex. Civ. App. – San Antonio 1956, writ ref'd n.r.e.));
9. if it is a guardianship of the estate and the court deems an appraisal is necessary and there is good cause to appoint an appraiser under §1154.001, one or more, but not more than three, disinterested persons to appraise the estate and to return the appraisement to the court;
10. if it is a guardianship of the person or person and estate, the right of the guardian to have physical possession of the ward and to establish the ward's legal domicile.
11. that the clerk will issue letters of guardianship to the person appointed when the person has qualified according to law.

Partially incapacitated ward: Under §1101.152, the court's order regarding a partially incapacitated person must specify:

1. the name of the guardian;
2. the name of the ward;
3. the specific powers, limitations, and duties of the guardian;

> PRACTICE NOTE
> The author believes the court, not the jury, determines the specific powers and limitations placed upon the guardian in a limited guardianship. The jury's province is solely to determine the issue of incapacity and whether the incapacity, if any, is total or partial.

4. the specific rights and powers retained by the person (A) with the necessity for supports and services and (B) without the necessity for supports and services.
5. whether the person is incapacitated because of a mental condition and whether the person retains the right to make personal decisions regarding residence or the right to vote in a public election, or maintains eligibility to hold a driver's license;
6. any monthly allowance that will be needed;
7. whether the guardian is of the person or estate or both;
8. the bond required, if any (*see Doyle v. Sorrells*, 297 S.W.2d 233 (Tex. Civ. App. – San Antonio 1956, writ ref'd n.r.e.));
9. if it is a guardianship of the estate and the court deems an appraisal is necessary and there is good cause to appoint an appraiser under §1154.001, one or more, but not more than three, disinterested persons to appraise the estate and to return the appraisement to the court; and
10. that the clerk will issue letters of guardianship to the person appointed when the person has qualified according to law.

Pursuant to §§1101.151(c) and 1101.152(c), an order appointing a guardian of the person with full authority or with limited authority that includes the right of the guardian to have physical possession of the ward or to establish the ward's legal domicile must contain the following statement prominently displayed statement in boldfaced type, in capital letters, or underlined:

"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."

Starting September 1, 2015, if the physician's written letter or certificate under §1101.103 states that improvement in the ward's physical condition or mental functioning is possible and specifies that the ward should be reevaluated in less than a year to determine whether it is necessary to continue the guardianship, then the order appointing a guardian of the person with full authority or with limited authority must include the date by which the guardian must

submit to the court an updated letter or certificate that meet the requirements of §1101.103(b). EC §1101.153(a-1).

12. Bond

a. Purpose

The requirement of a surety bond is to protect the ward against mismanagement, waste, and fraud by the guardian. *Gabriel v. Snell*, 613 S.W.2d 810 (Tex. Civ. App. – Houston [14th Dist.] 1981, no writ).

b. When No Bond Required

A bond is required unless the Estates Code provides otherwise. The following are the only statutory exemptions from posting bond:

1. Guardian Appointed by Will

If the surviving parent appoints a guardian of a minor child in a will, and the will directs that the guardian of a person be appointed to serve without bond, no bond shall be required. The court may not waive the requirement of bond for a guardian of the estate of a ward, regardless of whether a surviving parent's will directs the court to waive the bond. EC §1105.101(d).

2. Guardian Appointed by Written Declaration

A surviving parent may waive the bond requirement for the person designated as guardian of the person of a minor in a written declaration. Like the will situation described above, the court may not waive bond for the guardian of the estate of the minor even if the written declaration directs such waiver.

3. Corporate Fiduciary as Guardian

If a bank or trust company is the guardian, no bond is required. EC §1105.101(b)(1).

4. Guardianship Program Operated by a County as Guardian

If a guardianship program operated by a county is the guardian, no bond is required. EC §1105.101(b)(2).

c. Guardian of the Person Only

The guardian of the person must obtain a bond in an amount fixed by the court. The court may accept only a corporate surety bond, a personal surety bond, a deposit of money, or a personal bond. In determining the appropriate type and amount of bond to set for the guardian, the court shall consider the familial relationship of the guardian to the ward, the guardian's ties to the community, the guardian's financial condition, the guardian's history of compliance with the court, and any reasons a guardian may have previously been denied a corporate surety bond. Except as outlined in #2 above, there is no provision for the waiver of bond for a guardian of the person. EC §1105.101(a).

d. Guardian of the Estate

1. Amount of Bond

The bond is fixed in an amount equal to the estimated value of all personal property belonging to the ward plus all anticipated revenue for 12 months, exclusive of social security payments and assets placed in safekeeping. EC §1105.154.

In an attempt to reduce the guardian's initial bond amount while simultaneously protecting the ward's estate, the legislature passed a law that goes into effect on September 1, 2015, that allows the court, on the request of a party, to order the safekeeping of the ward's assets after appointing a guardian but prior to the guardian's posting of a bond and qualification. EC §1101.156. Prior to this change, the guardian would need to qualify first with the higher bond amount before being able to access the ward's estate to put it in safekeeping in order to lower the bond amount.

2. Evidence Presented

In deciding on the amount of the bond, the court shall hear evidence on the assets of the estate, including all cash, anticipated revenue for 12 months, value of all personal property, and debts due the estate.

e. Sureties

The sureties on the bond may be either personal sureties or corporate sureties. Most courts in metropolitan counties require a corporate surety bond. Collecting on a personal surety bond is usually difficult, if not impossible.

1. Personal Sureties

If the sureties are natural persons, each personal surety must make an affidavit to the court setting out the surety's non-exempt[18] total worth, which must be at least double the amount of the bond. The affidavit shall be attached to the bond. EC §1105.201.

2. Authorized Corporate Surety

If the surety on the bond is an authorized corporate surety, as defined in §1002.006, only one surety is required; however, the court may require more than one corporate surety if the bond exceeds

[18] The exempt amount is $30,000 for a single adult who is not a member of a family and $60,000 for a family. Among other things, exempt property may include two horses, mules, or donkeys and a saddle, blanket, and bridle for each. See Tex. Prop. Code §§42.001 to 42.0022.

$50,000. The estate shall pay the cost of the bond. EC §1105.161.

g. Approval and Filing of Bond

The bond must be signed by the principal and sureties, approved by the court, and filed with the clerk. EC §§1105.108, 1105.110.

h. Inadequate Bond

As the administration of the guardianship progresses, the bond may prove to be inadequate to protect the estate assets. Inadequacies are usually discovered when the inventory is filed or realty is sold, or when filing the annual account. In such cases, the court may order a new bond filed without a show cause hearing. The guardian may demand a hearing on the order if the guardian believes that the bond should not be increased or that the amount of the new bond is too high. An order requiring a new bond suspends the powers of the guardian until a new bond is given and approved. EC §§1105.252–.254.

QUERY?
How effective is the suspension of power contemplated by §1105.254 of the Estates Code?

i. Excessive Bond

If the bond is greater than necessary to protect the assets of the estate, the guardian may apply to have it decreased. Notice by posting is required. EC §1105.255.

j. Suit on Bond

When a successor guardian sues on the bond of the predecessor, the principal as well as the surety must be joined as a party. TRCP Rule 31.

k. Statute of Limitations

Any suit on the bond of a guardian must be brought within four years after the death, resignation, removal, or discharge of the guardian. Civ. Prac. & Rem. Code §16.004.

PRACTICE NOTE
What is the interplay between the time limits of a bill of review and the limitations period?

13. Qualification

The guardian should take the oath and file the bond within 20 days from the order granting letters of guardianship; however, the oath and bond may be filed later if the order has not been revoked. The oath may be taken before a notary or deputy clerk. EC §1105.003. The county clerk will then issue letters of guardianship. EC §1106.001.

14. Guardianship Certification Advisory Board of the Judicial Branch Certification Commission[19]

a. In General

The 79th Texas Legislature created the Guardianship Certification Board (the Board) in an effort to address perceived problems with child and adult protective services. The Board, governed by Chapter 111 of the Government Code, established a certification process for individuals, other than volunteers, who act as private professional guardians, provide guardianship services to a ward of a guardianship program, or provide guardianship services to a ward of the Department of Aging and Disability Services (DADS). The Board consisted of 11 individuals appointed by the Texas Supreme Court and 4 individuals appointed by the Supreme Court from a list of nominees submitted by the Governor.

However, the 83rd Texas Legislature in 2013, in the name of efficiency, consolidated the Board into the newly-created Judicial Branch Certification Commission, together with the Court Reporters Certification Board and the process server review board. The Board has been renamed the Guardianship Certification Advisory Board. It is no longer an independent body, but will act as an advisory board to the Commission and be governed by Chapter 155 of the Government Code. The advisory board will be composed of at least 5 members appointed by the Supreme Court.

Prior to its consolidation into the Judicial Branch Certification Commission, the Board determined the qualifications for obtaining certification, issues certificates to those who meet the requirements, and adopts minimum standards for guardianship services or other similar but less restrictive types of assistance or services. Effective January 1, 2014, the Commission, and not the Board, will adopt the minimum standards for guardianship services or other similar but less restrictive types of assistance or services.

b. Who must be certified

Attorneys and family members of an incapacitated person do not have to be certified in order to serve as the person's guardian, but all individuals listed below must be certified by the Commision in order to provide guardianship services in Texas:

(1) private professional guardians,

(2) individuals who will represent the interests of a ward on behalf of a private professional guardian,

(3) individuals who will provide guardianship services to a ward on behalf of a guardianship program (except volunteers), and

[19] More information can be obtained at http://www.courts.state.tx.us/gcb/gcbhome.asp.

(4) employees of DADS who will provide guardianship services to a ward of DADS.

c. Certification Requirements

To qualify, an applicant must:

(1) file application on forms provided by the Commission;

(2) pay all required fees;

(3) be at least 21 years of age;

(4) be a high school graduate or have a GED equivalent;

(5) have two years of relevant work experience related to guardianship or meet the following educational or training requirements:

- have a bachelors degree by an accredited organization in a field related to guardianship, including but not limited to medical, mental health and mental retardation, law, business, accounting, social work, sociology, psychology, human services, protective services, and criminal justice fields; or
- have completed a course curriculum or training specifically related to guardianship and approved by the Board;

(6) meet one of the following criteria:

- have successfully completed an examination approved by the Board covering Texas law and procedure related to guardianship, and the National Guardianship Foundation's (NGF) Registered Guardian examination; or
- be currently certified with the NGF and have successfully completed an examination on Texas guardianship law;

(7) attest under penalty of perjury as to the following:

- whether the applicant has been adjudged guilty or pled no contest to a crime of moral turpitude or other enumerated crimes under the Texas Penal Code;
- whether the applicant has ever been relieved of guardian responsibilities by a court, employer, or client for actions involving fraud, moral turpitude, misrepresentation, material omission, misappropriation, theft or conversion; or
- whether the applicant has ever been found civilly liable or settled a claim involving allegations of fraud, moral turpitude, misrepresentation, material omission, misappropriation, theft, or conversion on the applicant's part.

If any of the above are true, the applicant must submit an written explanation of the circumstances and provided and related documentation requested; and

(8) provide the Board with Texas and national criminal history by submitting fingerprints to the Texas Department of Public Safety (DPS).

d. Reporting Requirements

Annually, the clerk of the court must provide the Guardianship Certification Advisory Board with the names and business addresses of all private professional guardians who have applied with them in the previous year and DADS must submit directly to the Commission the name and telephone number of any employee who is or will be providing guardianship services. Each year every private professional guardian or guardianship program must inform the Board of: (1) the total number of wards served; (2) the total amount of money received from the State of Texas for guardianship services; and (3) the total amount of money received from any other public source. Each private professional guardian also must provide: (1) the name of the ward, docket number, and court having jurisdiction for each ward served; (2) the aggregate fair market value of the property of all wards managed; (3) whether the guardian was removed or resigned in a particular case and, if so, description of the circumstances; and (4) reaffirm section "7" above in Certification Requirements.

V. Temporary Guardianships

A temporary guardianship is a limited guardianship for a short duration to be created in rare situations. Temporary guardianships are useful in theory, but as a practical matter, they are an overbroad remedy used all too frequently. A wide variety of specific statutory measures better addresses most situations in which temporary guardianships are otherwise sought.

A. The Hazards of Temporary Guardianships

1. Potential for Abuse

Lawyers will often encounter an urgency involving a potentially incapacitated person or that person's estate. Looming debts, dissipating assets, time-sensitive causes of action, unanticipated windfalls for minors, and emergency medical procedures are a few such contingencies. Because there is a misconception that fast action with court approval is often impossible in permanent guardianship cases, a desire for an immediate, even ex parte, proceeding is often tempting. But in these instances, is a temporary guardianship appropriate? The answer is, perhaps surprisingly, "No."

Although temporary guardianships are superficially convenient, they are seldom if ever an appropriate remedy. In fact, they are far more often abused than properly effected. The law offers a variety of remedies that will solve most emergencies without

the attendant loss of liberty and waste of resources that a temporary guardianship requires.

Chapter 1251 of the Estates Code provides for temporary guardianships. Basically, the court may appoint a temporary guardian if there is "substantial evidence" that a person is an incapacitated person or a minor and "probable cause to believe" that a person or his estate requires the immediate appointment of a guardian. EC §1251.001. Although temporary guardianships hearings do not require either a physical exam or medical report, medical reports are helpful in establishing the person is an incapacitated person. *See In re Moreno*, No. 11-10-00353-CV, 2010 WL 5059519 at *2 (Tex. App. – Eastland Dec. 10, 2010, no pet.) (mem. op.) (the court rejected appellants' argument that the evidence offered to show incapacity in a temporary guardianship hearing was insufficient because it was based upon a stale and incomplete physician's report, stating a medical report was not required under §875 of the Probate Code [now known as Chapter 1251 of the Estates Code] and that the trial court could use the report as evidence in determining whether the proposed ward was incapacitated).

The catch, for courts, is that this procedure leaves room for abuse that can unacceptably abridge a respondent-ward's rights. First, it is somewhat confusing to have two different evidentiary standards in play when determining the need for a temporary guardianship. Second, the thresholds of the evidentiary standards themselves are somewhat low given the invasion of self-determination that occurs when a temporary guardianship is created. Finally, there is a tendency for lawyers and courts to engage in overkill when creating temporary guardianships.

Using both a "substantial evidence" standard and a "probable cause" standard to determine the need for a temporary guardianship tends to cause both lawyers and courts to apply only one of the two standards rather than applying each standard to the appropriate inquiry set forth in §1251.001. While this erroneous application would not be harmful if the "substantial evidence" standard were applied to both lines of inquiry, it would be harmful error for the court to apply the "probable cause" standard to both considerations.

The potential for confusion in applying the appropriate standard is compounded by the direction of §1251.010 that "the court determines that the applicant has established that there is substantial evidence that the person is a minor or other incapacitated person, that there is imminent danger that the physical health or safety of the respondent will be seriously impaired, or that the respondent's estate will be seriously damaged or dissipated unless immediate action is taken." This language suggests that all of the court's findings are to be by "substantial evidence," despite the provision in §1251.001 that the latter findings are to be determined under a "probable cause" standard.

Both the "substantial evidence" and the "probable cause" standards are too low to impose a guardianship prudently, especially since a permanent guardianship cannot be created on less than "clear and convincing evidence." §1101.101. "Substantial evidence" does not even have to rise to the level of the "preponderance of the evidence" burden of proof for general civil trials. "Substantial evidence" merely has to be more than a scintilla of evidence that would lead persons of reasonable minds to conclude a particular matter. *Railroad Comm'n of Texas v. Torch Operating Co.*, 912 S.W.2d 790 (Tex. 1995). "Probable cause" also raises issues in temporary guardianships because it is based on an accumulation of evidence rather than the quality of the evidence. The very nature of temporary-guardianship proceedings usually places the applicant in the driver's seat because the respondent and the respondent's attorney have not had as much time as the applicant to marshal evidence.

Although §1251.010 indicates the court must find that the applicant established the existence of an "imminent danger that the physical health or safety of the respondent will be seriously impaired, or that the respondent's estate will be seriously damaged or dissipated . . . ," the reality is that lawyers rarely produce much "substantial evidence" at all at hearings on temporary guardianship applications – yet temporary guardianships are granted nonetheless.

Additionally, the written proof supporting the application for temporary guardianship often lacks any allegation as to imminent need and necessity. Even when sufficient proof is offered, there is no record of the proceeding since most probate courts operate without court reporters. However, §1251.010 requires the court to give its "reasons for the temporary guardianship and the powers and duties of the temporary guardian . . . ." Although this provision emphasizes to courts the need to sign orders that specify the limited authority of the temporary guardian, it is not uncommon to find temporary guardianships that grant full authority over a person despite the statutory admonition that the court "appoint a temporary guardian with limited powers as the circumstances of the case require." §1251.001; *see also* §1251.010. Granting a full guardianship on a temporary basis clearly goes beyond the scope and purpose of the temporary-guardianship provision enacted by the Texas Legislature.

2. Persistent Problems

Despite legislative overhaul, problems endemic to a temporary system remain. One example is the level of preparation that the attorney ad litem is allowed before the hearing. Section §1251.004 requires the appointment of an attorney ad litem on the filing of an

application for temporary guardianship. But this requirement may produce a freshly appointed attorney, who, however skilled, will have the facts thrust upon him on short notice, thereby considerably handicapping his or her client.

Another reason to avoid temporary guardianships is that they involve potentially wasteful and redundant procedures. All of the essentials – and the associated costs – that apply to a temporary guardianship procedure must be repeated upon conversion to a permanent guardianship. A temporary guardianship requires notice, an application, a hearing, a bond, and an accounting. To make the same temporary guardianship permanent will require notice to more people, another hearing, another bond, and ultimately another accounting. If a permanent guardianship is the ultimate goal, this duplication is an unnecessary – and an expensive – repetition of essentially identical procedures.

Finally, the notice required under §1251.005 can cause problems when the time comes to convert from a temporary to a permanent guardianship. Notice of a temporary guardianship requires only that the respondent-ward, his attorney, and the proposed temporary guardian receive personal service – fewer people than the litany of relatives required for a permanent guardianship under §1051.104. Additionally, the temporary-guardianship notice requires stating "the rights of the parties . . . and possible consequences of a hearing"; permanent guardianship notice does not. §1251.005(b); *cf.* §1051.102. The notice requirements thus differ in which individuals must be notified and in the content of the notice. Notice for a temporary guardianship, if not served on the spouse or children, may not suffice for permanent guardianship. Likewise, a clerk who uses the permanent guardianship notice-guidelines when issuing notice for a temporary guardianship (hoping, as some do, to cover one's bases more thoroughly) may miss the additional content required for temporary guardianship notice.

B. *Temporary Restraining Orders: The Better Solution*

A temporary restraining order ("TRO") usually offers the same results as a temporary guardianship with minimized costs for both petitioner and respondent. The Texas Rules of Civil Procedure provide for the granting of equitable relief – any equitable relief – pending a hearing on a temporary injunction. Tex. R. Civ. P. 680 *et seq.* A TRO is a broad power available for a broad variety of situations.

The practical effect of a TRO is to grant immediate ex parte relief; that is, relief without notice or an opportunity for the other party to be heard. *Ex Parte Rodriguez*, 568 S.W.2d 894, 897 (Tex. Civ. App. – Fort Worth 1978, no writ). The TRO lasts 14 days or until the hearing on the permanent injunction, whichever is earlier. Although a TRO may be extended for an additional 14 days, this extension is the longest period that the original order may endure without the other party's consent. *In re Tex. Nat. Res. Comm'n.*, 85 S.W.3d 201, 203 (Tex. 2002).

Most urgent guardianship-type situations can be solved with a TRO. A court may issue a TRO without notice if irreparable injury would result before notice can be issued and a hearing held. Tex. R. Civ. P. 680. An application should demonstrate the following:

1. a specific cause of action against the respondent;
2. the specific relief sought;
3. a probable right of recovery;
4. a likelihood of imminent harm causing irreparable injury if the relief is not granted;
5. willingness to post bond;
6. verification (in the form of and supported by a sworn affidavit).

See Judge Mike Wood, *How to Get a "Yes" in Probate Court*, Houston Bar Ass'n Wills & Probate Institute 11-12 (Feb. 2000).

Notice to the respondent in a TRO, while not explicitly required by Rule 684, is "strongly recommended." *Tower Contracting Co. v. Cent. States, S.E. & S.W. Areas Pension Fund*, 581 S.W.2d 724 (Tex. Civ. App. – Dallas 1979, writ ref'd n.r.e.). Additionally, some security payable to the respondent is necessary under Rule 684, or the TRO is void. *See* R. Civ. P. 684; *Ex Parte Lesher*, 651 S.W.2d 734, 736 (Tex. 1983). A bond for a TRO is generally set lower because a TRO does not pose as significant a risk of fiduciary wrongdoing as a temporary guardianship. TRO bonds are therefore easier to obtain. Moreover, no inventory is necessary as is required in a temporary guardianship.

The TRO is an often-overlooked remedy in probate court that is cheaper, more efficient, and more conducive to judicial economy than a temporary guardianship.

C. *Other Alternatives to a Temporary Guardianship*

The following alternatives to temporary guardianship are described at the beginning of the paper.

1. Of the Person

a. Surrogate decision-making under the Consent to Medical Treatment Act

b. Surrogate decision-making for persons with intellectual disabilities

c. Implied consent for emergency care

d. Advance directives (including procedures when a person has not executed a directive and is incompetent or incapable of communication)

e. Medical Power of Attorney

f. Mental-health and chemical-dependency commitments

c. Chapter 48 Human Resources Code interventions

2. Of the Estate

a. Durable power of attorney

b. Management of community property when spouse is declared incapacitated

c. Payment of claims to county clerk (§§1355.001-.002)

d. Sale of property without guardianship (§§1351.001-.006] (minor) and §§1351.051-.057] (ward without guardianship of the estate)

D. Is a Temporary Guardianship Ever Appropriate?

The answer is seldom, if ever. But if a set of circumstances involving an incapacitated person or minor cannot be resolved by any of the above means, a temporary guardianship may be appropriate.

For example, several situations demand the legitimate use of temporary guardianship proceedings. When the relief needed is truly the power to act positively on behalf of the allegedly incapacitated person, not as a measure to prevent the actions of others (as befits a TRO), a temporary guardianship can be appropriate. An example, not addressed by a specific statutory provision, might be the need to make an employment-benefit election on behalf of a person in a coma. Also, on occasion, a temporary guardianship is appropriate pending the contest of an existing guardianship.

One particular instance in which a temporary guardianship is the proper statutory remedy is to challenge a treatment decision made in the absence of an advance directive by the patient. Tex. Health & Safety Code §166.039. In this instance, the statute authorizes certain relatives to make a treatment decision, including a life-sustaining decision, for an incapacitated patient if there is no medical power of attorney or guardianship in place. §166.039(b). However, should one relative decide to contest another's decision under this statute, §166.039(g) states that such a contestant "must apply for temporary guardianship under [Chapter 1251 of the Texas Estates Code]. . . ."

E. If a Temporary Guardianship is Appropriate, What's the Process?

1. Application

If a temporary guardianship is the only option, a word of caution: the requisites for an application for temporary guardianship and an application for permanent guardianship differ. Section 1251.003 specifies that the application for a temporary guardianship must –

a. be a sworn, written application;

b. state the name and address of the proposed ward;

c. state the danger to the person or property alleged to be imminent;

d. state the type of appointment and particular protection and assistance being requested;

e. state the supporting facts and reasons;

f. state the name, address, and qualification of the proposed temporary guardian;

g. state the name, address, and interest of the applicant, and;

h. if applicable, state that the proposed guardian is a private professional who complies with Chapter 1104, Subchapter G of the Estates Code.

2. Appointment of Attorney ad Litem

On the filing of an application for temporary guardianship, the court shall appoint an attorney to represent the proposed ward, unless independent counsel has been retained. EC §1251.004. The term of the attorney ad litem's appointment in a temporary guardianship proceeding does not expire after the court appoints a temporary guardian, but continues unless a court order provides for the termination or expiration of the attorney ad litem's appointment, such as when the court appoints a permanent guardian. EC §1054.002(b).

3. Notice

Notice of hearing must describe the rights of the parties and contain a copy of the application and order, if applicable. Notice shall be served by personal service upon the proposed ward, the appointed attorney, and the proposed temporary guardian if that person is not the applicant. EC §1251.005. Section 1251.008 states that the notice must describe the rights of the proposed ward, including all of the following:

a. the right to notice of the hearing;

b. the right to representation by counsel;

c. the right to be present at the hearing;

d. the right to present evidence and confront and cross-examine witnesses;

e. the right to a closed hearing, if requested by the proposed ward or his attorney.

4. Hearing

A hearing on the merits shall be set not later than the tenth day after the date of the filing. EC §1251.008. The respondent may consent to postpone the hearing for a period no more than 30 days after the filing. EC §1251.006.

5. Presence in Court

The Corpus Christi Court of Appeals has determined that the proposed ward must be present at the hearing, or the court must take evidence and make a finding that it is not in the best interest of the ward to attend the hearing. *Guardianship of B.A.G.*, 794 S.W.2d 510 (Tex. App. – Corpus Christi 1990, no writ).

6. Order

The order granting the temporary guardianship must assign only those duties and responsibilities necessary to protect against the imminent danger shown, and the temporary guardianship remains in effect no longer than 60 days unless there is a contest. If there is a contest of the temporary guardianship or a contest to making the temporary guardianship permanent, the court may extend the temporary guardianship for a period beyond 60 days, but at the most 9 months from the date of the temporary guardian's qualification date unless extended by court order. EC §§1251.151, 1251.051–.052.

7. Certificate for Temporary Guardianship

Letters of temporary guardianship are no longer issued. "When the temporary guardian files the oath and bond required under this chapter, the court order appointing the temporary guardian takes effect without the necessity for issuance of letters of guardianship. The clerk shall note compliance with oath and bond requirements by the appointed guardian on a certificate attached to the order. The order shall be evidence of the temporary guardian's authority to act within the scope of the powers and duties set forth in the order. The clerk may not issue certified copies of the order until the oath and bond requirements are satisfied." EC §1251.101.

8. Bond

The bond for the temporary guardian shall be in a sum set by the court. EC §1105.154.

9. Qualification of Permanent Guardian

The qualification of a permanent guardian terminates a temporary guardianship. *Blackburn v. Gantt*, 561 S.W.2d 269 (Tex. Civ. App. – Houston [1st Dist.] 1978, no writ).

VI. Interstate Guardianships

Until 2001, guardianships established in another jurisdiction were generally not transferable to Texas, and guardianships established in Texas were generally not transferable to another jurisdiction. However, the Estates Code now has a statutory mechanism to facilitate the transfer of guardianships from one jurisdiction to another and to legitimize the transferred guardianship in the new jurisdiction without undue interference. The Estates Code permits the transfer of guardianships to foreign jurisdiction (EC §§1253.001-.003) and the receipt and acceptance of a transferred guardianships (EC §§1253.051-.056).

Under §§1253.001-.003, a Texas court is required to transfer a guardianship to a foreign jurisdiction upon proper application, notice, and hearing to determine if a transfer is in the best interest of the ward, and upon acceptance by the foreign jurisdiction.

Under §§1253.053, the requirements concerning the receipt and acceptance of a transferred guardianship to a Texas court having proper jurisdiction and venue are similar to those requirements for the transfer of a guardianship to another state. *Cf.* EC §1253.003. To accept a guardianship from another state, there must be an application, notice, and a hearing. A certified copy of all papers of the guardianship filed and recorded in the foreign court must be attached to the application.

The court holds one hearing to (1) consider the application for receipt and acceptance of the foreign guardianship and (2) consider modifying the administrative procedures or requirements of the transferred guardianship in accordance with state and local law. EC §1253.053.

In considering the application, the court reviews the propriety of the application and determines if the transfer is in the best interests of the ward. If the transfer is in the best interest of the ward, the court accepts the transfer. However, the court need not grant the application if it is not in the best interests of the ward. The court could reject the transfer and have the applicant file a proceeding to create a guardianship under Texas law. This is an important safeguard because it allays any fears that a Texas court has to legitimize a foreign guardianship without inquiry into whether the foreign jurisdiction's prerequisites for the creation and establishment of a guardianship meet due process standards.

The review for possible modifications allows a Texas court to modify the foreign jurisdiction's guardianship order to conform to Texas law should the court find the sister state's requirements deficient in any respect (some states have no bonding requirement or limited reporting requirements). Such a safeguard ensures that a foreign guardianship meets the requirements of Texas law.

If the court grants the transfer application, the foreign guardianship order is to be given full faith and credit by the Texas court as to the necessity of the guardianship and the qualification of the guardian. The Texas court must coordinate with the foreign court to ensure a smooth transfer of the guardianship.

Section 1253.101 gives probate courts a basis for resolving interstate venue disputes. The statute permits the Texas court to delay further action if another guardianship application is filed in a foreign jurisdiction. The court must determine whether venue is more suitable in Texas or in the foreign jurisdiction by considering, among other things, the interests of justice, the best interests of the ward, the convenience of the parties, and the preference of a ward or proposed ward who is 12 years of age or older. EC §1253.102. The court may enter orders protecting the ward or the ward's property during this delay. EC §1253.103.

VII. Miscellaneous Guardianships

A. Non Resident as Guardian of the Estate

1. General

A non-resident may be appointed as guardian of a non-resident ward's estate located in this state under the same procedures provided for appointment of a permanent resident guardian with few additional requirements. EC §1252.051.

2. Additional Requirements for Appointment

In addition to the normal requirements:

1. The applicant must show that he has been duly appointed and remains as guardian of the ward in another jurisdiction.

2. Application shall be filed in the county where all or part of ward's estate is located. *Henderson v. Shell Oil Co.*, 208 S.W.2d 863 (Tex. 1948).

3. The applicant shall file a full and complete transcript of the appointment proceedings in the other state. EC §1252.051(a)(3). Such transcript must be certified and attested to by the clerk of the court and cross-exemplified by the judge of the court. EC §1252.051(b).

4. And the applicant must file a power of attorney appointing a resident agent. EC §1252.052.

3. Removal of Property from State

A nonresident guardian, whether or not qualified under the Texas Estates Code, is authorized to remove the ward's personal property from Texas if there are no debts against the estate, or the debts are secured by bond, or removal would not conflict with the tenure of the property. EC §1252.055. *See Bradford v. Lincoln Bank & Trust Co. of Louisville*, 96 S.W.2d 821 (Tex. Civ. App. – El Paso 1936, writ dism'd).

B. Resident Guardian of the Estate of a Non - Resident

A resident guardian may be appointed guardian of the estate of a non-resident minor or incompetent if a necessity exists. The appointment must be made as if the ward were a resident; however, if a non-resident guardian later qualifies in Texas, he may displace the resident guardian, and the resident guardianship is closed. EC §§1252.001–.003. A resident guardian of an estate may be ordered by a court to deliver the estate to a duly qualified and acting guardian of the ward. EC §1252.054.

VIII. Conclusion

Guardianship proceedings have become such a major part of probate-court dockets nationwide that the National College of Probate Judges, the National Center for State Courts, the State Justice Institute, and the American College of Trust and Estate Counsel Foundation created the Commission on National Probate Court Standards to promulgate minimum national standards. Known as the National Probate Court Standards, these standards are the experts' ideas of best practices in the area of guardianship.

Texas law is considered a national model of guardianship law because it meets most of these best-practice recommendations. The legislative revisions throughout the years ensure: (1) that attorneys for applicants for proposed wards or incapacitated persons, as well as attorneys ad litem appointed to represent proposed wards, are well informed of the applicable guardianship laws and procedures; (2) that state agencies adopt a uniform assessment tool for determining levels of incapacity; and (3) that courts undertake ongoing monitoring responsibilities with respect to existing guardianships and regularly ascertain the continued need for the guardianship. However, the hope remains that the number of full guardianships obtained declines while the corresponding autonomy preserved to proposed wards increases.

Appendix A: Less-restrictive alternatives to Guardianship[20]

Section 1001.001 of the Texas Estates Code mandates the use of less-restrictive alternatives to guardianship if less-restrictive alternatives are available and appropriate. The following list is designed to provoke constructive thought and is illustrative, but not exhaustive:

Avoiding Guardianship of the Person

1. Surrogate Decision Making – Consent to Medical Treatment Act – Ch. 313, Texas Health and Safety Code – Applies only in case of non-emergencies. Does not cover placement and living arrangement decisions.
2. Surrogate Decision Making for Persons with Intellectual Disabilities – §597.041, Health & Safety Code – Allows Surrogate Decision Making Committees to act for persons with intellectual disabilities who are housed in an intermediate care facility for persons with intellectual disabilities (ICF/MR) – Allows medical and non-medical decisions to be made by the committee.
3. Emergency Medical Treatment Act – §773.008, Texas Health and Safety Code – covers emergencies; consent is implied in life-threatening situations.
4. Medical Power of Attorney – §166.151 to §166.164, Texas Health and Safety Code – Note, nursing homes and hospitals are reluctant to accept health care powers made close to the time it is needed. There is no enforcement mechanism to require acceptance of health care powers.
5. Directive to Physicians ("Living Will") – §166.031 *et seq.*, Texas Health and Safety Code ("The Texas Natural Death Act") – Be sure you know the issues.
6. Managing Conservatorships – §154.301 *et seq.*, Texas Family Code – used in a divorce context, but no monitoring mechanism exists for property management. More suitable for person-only type minor guardianships.
7. School Admission Procedures – §25.001, Texas Education Code – School districts may adopt guidelines to allow admission of non-resident children to school without the need for a guardianship.
8. Court-Ordered Mental Health Services – §462.001, §571.001, §591.001, Mental Health Code – In the case of a chronically mentally ill person, temporary commitment may well be preferable to a guardianship which might impact the ability of the person to function once they are stabilized on medication. Commitment persons with intellectual disabilities, persons who are chemically-dependent, and persons with AIDS or tuberculosis are also available in limited circumstances.

Avoiding Guardianship of the Estate

9. Durable Power of Attorney – §751.001, Texas Estates Code – If the proposed ward still has enough capacity to grant the power. CAVEAT: the principal is not otherwise limited in ability to act. Also, no real check and balance on agent under a power of attorney.
10. Trusts ("Living Trust") – §112.001 *et seq.*, Texas Property Code – If ward has capacity.
11. Probate Management Trust – Chapter 1301, Texas Estates Code – After creation of guardianship to obtain cost-effective property management. Mostly for large estates ($100,000 or more), but can be created for small estates managed by an individual trustee.
12. §142 Trust – §142, Texas Property Code – Where no guardianship exists and a "next friend" suit has been brought. Cannot be created by probate court.
13. Medicaid Qualification Trust – 42 USC 1396p (1)(d)(4)(B)(i) & (ii) – Such a trust allows a patient/ward to qualify for Medicaid in a nursing home where available income is otherwise too high for qualification.
14. Management of Community Property by Capacitated Spouse – Chapter 1353, Subchapter A, Texas Estates Code – If spouse available and no separate property in need of management, but spouse may have to account to court. As of 2003, §1353.001 of the Estates Code makes clear that the division of management between the competent spouse and the guardian of the estate of the incapacitated spouse does not partition community property. Rather, the community property administered by the guardian is considered to be the incapacitated spouse's sole management community property.
15. Payment of Claims Without Guardianship (Payment into Court Registry) – Chapter 1355, Texas Estates Code – Good alternative for minors (limited to $100,000).
16. Sale of Minor's Interest in Property – Chapter 1351, Texas Estates Code – Simple Procedure. Limited to $100,000.

[20] Adapted from the checklist prepared by Judge Steve M. King of the Tarrant County Probate Court No. 1.

17. Sale of Adult Incapacitated Ward's Interest in Property – Chapter 1351, Texas Estates Code – Available for adults with guardian of the person only. Limited to $100,000.
18. Uniform Transfers to Minors Act – §141.001 *et seq.*, Texas Property Code – broad coverage and far-reaching implications.
19. Receivership – Chapter 1354, Texas Estates Code. If incapacitated person's estate is in danger of injury, receiver can manage it until danger subsides.
20. 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.
21. Veteran's Benefits Fiduciary – 38 USC §5502(a)(1) – 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.
22. Suit by Next of Friend – Rule 44, Texas Rules of Civil Procedure – for minors without a guardian to maintain a civil suit.
23. Social Service Agencies – Many social services agencies provide a variety of services specifically tailored to the needs of children, the disabled and the elderly.

Appendix B: Some Nuts & Bolts for the Hearing Day

The following is from a paper by Judge Claudia Laird, County Court at Law 2, Montgomery County.

DAY ONE...

Try to set a special time for your guardianship docket where there are only guardianship cases on the docket. Remember special needs adults will be in the courtroom. They may interrupt the docket and can be intimidated by the courtroom surroundings. It is important to cater to the ward's needs by scheduling these hearings apart from your criminal, civil, and even other probate cases. Remember the courtroom is designed to emphasize your position of authority, and the setting is often downright frightening to an incapacitated adult.

This may be the only time you get to talk to the guardian. Use this time wisely! Mistakes repeatedly made by guardians are the ones that I always mention to guardians before they leave the courtroom:

1. *A parent establishing a minor's estate:* It is legally the parents' responsibility to provide for the health, maintenance, and welfare of the child. Do not use estate money to pay for education, health care or living expenses of the child. If the parent simply cannot afford a necessity they are invited to come back to have a hearing if any such need arises. Texas Estates Code §1156.051.
2. *One spouse establishing a guardianship over the other:* Advise the guardian that although they probably have had joint accounts with the spouse in the past, it is now necessary to set up a separate account for the guardianship estate so as not to comingle funds.
3. *Parents establishing a co-guardianship:* Advise them that they must BOTH sign the report of the person each year.
4. *Guardianship of an estate:* Find out whether the ward may obtain income from a lawsuit.
5. Advise guardians to always get permission before spending any guardianship funds.
6. Invite all guardians to use the court website to download guardianship handbooks and to contact court staff for guidance.
7. THANK the guardians for taking the time to care for their loved one.

Appendix C: Physicians Certificate of Medical Examination

In an effort to make this book less bulky, we have done two things with Appendixes. We have tried not to duplicate Appendixes that are available in another paper in the book, and we have not printed some Appendixes that can be found easily on other websites.

The Physicians Certificate of Medical Examination (PCME) can be found on pages 61-64 of Judge King's Ad Litem Manual, which is the second paper for this afternoon's sessions.

You can also find the PCME on the Travis County Probate Court website's guardianship page under the "Miscellaneous documents" heading. The URL for the guardianship page is https://www.traviscountytx.gov/probate/guardianship, but you can get there more easily if you simply search for "Travis County Probate Court guardianship."

Appendix D: Handouts for Guardians

Travis County Probate Court website's guardianship page (see above) also has many handouts for guardians, including Court Instructions for guardians of the person, guardians of the estate, and guardians of the person an estate, all available at the top of the guardianship page of the Court's website.

The Court Instructions are detailed. Every guardian must read and sign the appropriate instructions before being appointed, affirming that they understand the instructions. They are required to put their initials next to key points in the document and specifically affirm that they understand the italicized points made in the text next to where they initialed. The original notarized Court Instructions are placed in the files, and copies are given to the guardians.

Following the Court Instructions on the website's guardianship page are the two documents that summarize the guardian's duties. Those summary sheets are also set out on the next two pages.

Your Duties as Guardian of the Person

#1: Be the Ward's Advocate

You are often required to speak on behalf of your Ward. You should protect your Ward by:

- **Meeting the Ward's Needs.** Make **all final decisions** for the Ward in residential, medical, and other matters. (As a Guardian, you **cannot** place the Ward in an in-patient psychiatric hospital.) By statute, you have a duty to provide care, supervision, and protection for your Ward and to provide your Ward with clothing, food, medical care, and shelter as completely as the Ward's resources permit.
- **Visiting Regularly.** The Court expects guardians to visit their wards **at least** once a month.

#2: Submit Annual Report*

The Guardian of the Person's Annual Report reports the Ward's condition to the Court. When completing the report, remember:

- **The Annual Report is required by law.**
- Failure to file this report can result in your removal as Guardian.
- **Provide as many details as possible,** using the form provided by the Court.
- **Complete, sign under penalty of perjury, and mail to Travis County Clerk's Office.** Address is on the form.
- Texas law requires a $25.00 fee for the processing of each Annual Report to determine whether the Guardianship continues to be appropriate, unless an affidavit of inability to pay costs is on file.

Annually ↔

#3: Cooperate with the Court Visitor

The Court's goal is to have a Court Visitor visit the Ward once a year to assess the Ward's physical condition & living conditions. The Ward may be visited more or less frequently.

- **The Court Visitor will want to speak with the Guardian, too.**
- If you can't meet with the Court Visitor during the Court visit, the Court Visitor will attempt to contact you by phone.

#4: Report Address Change

The Court needs the current address and phone number for the Ward & the Guardian.

If the you or the Ward moves, call the Court at 512-854-9359 to report the address change, or mail the information to

Travis County Probate Court No. 1
P.O. Box 1748, Austin, TX 78767

You cannot move the ward into a more restrictive care facility unless you first give at least 7 business days' notice to the Court except in case of emergency.

You may not move to another state or be absent from this state for more than three months without Court permission. If the Ward moves from this County, consult with the Court about whether the guardianship should be transferred.

#5: Submit Final Report*

A Final Report must be filed:

- **when the Ward dies** (include a copy of the death certificate);
- **when a minor Ward turns 18 years old;**
- if the Court accepts your **resignation as Guardian.**

Complete, sign under penalty of perjury, and mail a Final Report to the Travis County Clerk's Office. The address is on the Report form. Use the same Court-provided form as for the Annual Report, but check the "Final" Report box near the top of the first page.

* You may complete and file your Annual or Final Report without the assistance of an attorney. Forms for your Annual or Final Report of the Person are available on the Court's website, https://www.traviscountytx.gov/probate/guardianship or at the Court's office. If you have questions, call the Guardianship Legal Assistant at 512-854-9359. If you are also Guardian of the Estate, note that Texas law requires that you work with your attorney to prepare your Annual or Final *Accounts*.

Your Ongoing Duties as Guardian of the Estate

#1. In general, you have the duty to take care of, manage, & invest the ward's estate

- As Guardian of the Estate, you have been appointed by the Court to handle the **estate** of the ward, which includes everything the ward owns or has a right to receive: land, money, bank accounts, furniture, cars, houses, clothes . . . **everything**.
- As Guardian of the Estate, it is your duty (once you have qualified) to take possession of all of the ward's property; to manage all of this property; to collect all debts, rentals, or claims that are due to the ward; to enforce all obligations that are due to the ward; and to bring and defend suits by or against the ward.
- **Your duties and your responsibility over the ward's property are defined by Texas law and may be limited by the order appointing you as Guardian. Please read this Court order carefully. Also refer to the detailed Court-ordered instructions that you signed before a notary.**

#2. Take care of the ward's estate even more carefully than you would your own

You must be frugal, conservative, and cautious. As a guardian, you are a "fiduciary" – *someone who has a legal responsibility to act for the benefit of another.* You must always act in good faith and in the ward's best interests, while also considering the interest of others who have a stake in or claim to the assets under your management. At times, this may mean acting in a manner contrary to your own interests.

#3. You cannot treat the ward's property as your own!

- You must keep your money separate from that of your ward. Place all guardianship funds in one or more separate, insured accounts in the name of the guardianship (for example, "Jane Doe, as guardian of the estate of John Doe").
- **You may not spend any guardianship funds without authorization from the Court.** For more information, see the instructions you received from the Court.

#4. Every year, you & your attorney will prepare a detailed Annual Account

- Failure to file this detailed Annual Account may result in your removal as Guardian and may result in the assessment of fees against you individually and not the guardianship estate.
- As part of the Account, you are required to swear or affirm that the Annual Account is true and correct.
- Texas law requires that your attorney must review and sign this accounting. *Therefore, your attorney will need to get information from you for the Annual Account before the deadline for filing the Account. Consult with your attorney about what needs to be done for the Annual Account and when it needs to be done.*

#5. Keep complete and precise records

To be prepared for your Annual Accounts, you must maintain an accurate record of all guardianship income and all expenditures of guardianship funds. You will need to keep and organize all bank records as well as receipts for all purchases and all expenditures.

#6. Remember the following:

- Notify your attorney of any change in the mailing address of either you or the ward, and your attorney should notify the Court. If the ward moves from this county, consult with your attorney about whether the guardianship should be transferred. You may not move from this state or be absent from this state for more than three months without Court permission.
- Consult with your attorney on any matter regarding this guardianship that you do not understand.
- Consult with your attorney when the guardianship of the estate is ready to be closed.