

**THE
AD LITEM MANUAL
FOR
2018**

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

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GUARDIANSHIP
(From the Ad Litem's Perspective)

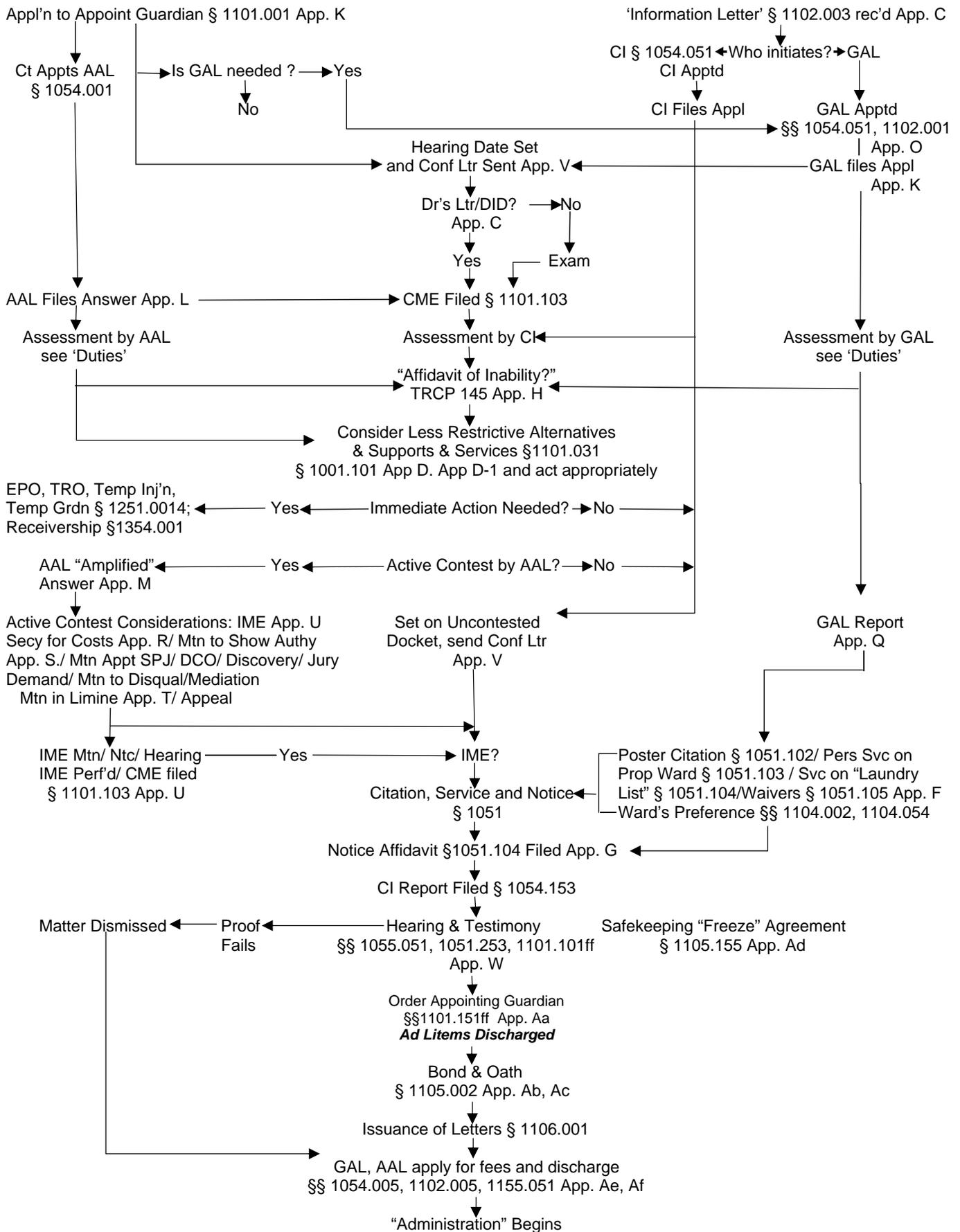


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The Ad Litem Manual 2018

I. INTRODUCTION:

GOALS: To help the reader to become familiar with:

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

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

For more information on guardianship litigation, see:

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

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

A. Initial Query: Why Should the Judge Care?

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

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

Active judicial oversight, requiring guardians to timely account, and employing ad litem to assist the court in enforcing the probate code, are the best defenses the courts have in minimizing loss to the wards and eventual distributees in probate.

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

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

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

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

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

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

B. Certification Requirements:

An Attorney Ad Litem must be certified to obtain appointments in guardianship proceedings. A Guardian Ad Litem need not be so certified. Additionally, the attorney for the Applicant must be so certified. Tex. Est. Code § 1054.201.

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

Once certification is obtained, a copy of the certificate should be forwarded to the appropriate courts. Re-certification is required every two (2) years until the attorney has been certified for four years, and then the certification is effective for a four (4) year period. Tex. Est. Code § 1054.202.

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

The certification requirement applies during administration of the guardianship as well. In *Guardianship of Marburger*, 2010 Tex. App. LEXIS 10255 (Tex. App. Corpus Christi, December 30, 2010, no pet.).

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

A complaint about an attorney ad litem who is not properly certified is not a basis for a writ of mandamus, but could be raised by direct appeal or a statutory bill of review. *In Re: Cunningham*, 2014 Tex. App. LEXIS 13682 (Tex. App. Texarkana December 19, 2014)

A very troubling opinion from the Houston 1st court of appeals, *in re Kelm*, 2018 Tex. App. LEXIS 9481; 2018 WL 6053809 (Tex. App. Houston, 1st District, November 20, 2018, no pet.) held that the State Bar Guardianship Certification of Attorneys did not apply to retained counsel if an attorney ad litem is not discharged. The REPTL section attempted a legislative workaround in the 2019 legislative session, but the bill (SB 667) was vetoed by the Governor.

The better course of action in a similar fact situation might be for the attorney ad litem to file a Rule 12 motion (see below) to better crystalize the issue for the trial judge and the court of appeals.

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

C. Liability and Immunity:

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

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

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

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

2. Guardian Ad Litem - Tex. Est. Code § 1054.056 provides for immunity from civil damages for a Guardian Ad Litem (appointed under §§ 1054.051, 1102.001, or 1202.054) from recommendations made or opinions given as a Guardian Ad Litem. (Except for willfully wrongful, reckless, bad faith, malicious and grossly negligent statements.) Cf: *Kabbani v. Papadopolous* 2009 Tex. App. LEXIS 1320 (Tex. App. Houston 1st Dist, February 26, 2009, pet. denied) (court upheld similar statutory immunity for a Guardian Ad Litem under the Texas Family Code) and *Wilz v. Sanders*, 2005 Tex. App. LEXIS 1503, (Tex. App. - Waco 2005, no pet.) February 23, 2005 (Memorandum) (Immunity of Guardian Ad Litem upheld where appointed under federal statute).

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

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

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

Unlike the immunity conferred for a Guardian Ad Litem in a guardianship proceeding, there is no statutory immunity for a Guardian ad Litem appointed under the non-guardianship provisions of the Texas Estates Code or for a Guardian ad Litem appointed under the Trust Code (Tex. Prop. Code § 115.014). In those cases, the issue of possible derived judicial immunity must be examined. Derived judicial

immunity affords an officer of the court the same immunity as a judge acting in his or her official capacity being absolute immunity for judicial acts performed in the scope of jurisdiction. *Dallas County v. Halsey*, 87 S.W.3d 552, 554 (Tex. 2002). For an extended analysis of the issue of derived judicial immunity for ad litem, see Smith, *op. cit.* at 10.

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

A. Appointment of a Guardian

1. ATTORNEY AD LITEM

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

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

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

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

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

2. GUARDIAN AD LITEM

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

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

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

D. Term of Appointment - Unless the court determines that the continued appointment of the guardian ad litem appointed is in the ward’s best interests, the guardian ad litem’s term of appointment expires, without a court order, upon the appointment

of a guardian or upon the court’s denial of an application for appointment of a guardian. §1054.053.

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

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

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

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

D. Heirship Determinations - Attorney Ad Litem

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

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

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

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

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

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

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

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

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

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

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

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

L. Sports and Entertainment Contracts Entered Into by Minors – Guardian Ad Litem Tex. Est. Code

§§ 1356ff. A Guardian Ad Litem must be appointed to represent the promising minor sports, music or entertainment prodigy for purposes of negotiating a valid sports and entertainment contract.

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

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

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

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

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

R. Judicial Bypass Proceedings – Guardian Ad Litem and Attorney Ad Litem Tex. Fam. Code §33.003(e) In proceedings involving the right of a

minor to an abortion without parental notification (“Judicial Bypass Proceedings”) the appointment of a Guardian Ad Litem and (if the minor is not otherwise represented) an Attorney Ad Litem, is mandatory.

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

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

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

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

III. EMBRACE THE TECHNOLOGY

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

1. **THE AD LITEM MANUAL**: The most current digital version of this manual may be found at: <http://access.tarrantcounty.com/en/probate-courts/probate-court-1.html>
2. **SEARCHABLE/DOWNLOADABLE ESTATES CODE**: courtesy of Richardson attorney Michael Koenecke (includes Professor Beyer’s conversion tables): <http://koeneckelaw.com/public>
3. **TEXAS ESTATES CODE** (html/pdf/Word) (and all other Texas statutes and legislative histories): <http://www.statutes.legis.state.tx.us/>
4. **Professor Beyer’s Website** – Prof. Gerry Beyer’s website has pdf versions of both the Texas Probate

Code and the Texas Estates Code, updated through August 2, 2015, as well as a **conversion table** from the Probate Code to the Estates Code. http://www.professorbeyer.com/Estates_Code/Texas_Estates_Code.html

5. **TEXAS RULES OF CIVIL PROCEDURE**: http://www.txcourts.gov/media/514725/TRCP_2014_01_01.pdf

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

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

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

B. E-Filing & E-Notice

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

In addition, technical standards are periodically updated by the Supreme Court’s Judicial Committee on Information Technology and adopted by the court. <http://www.txcourts.gov/media/1435816/technology-standards.pdf> Ver. 6.0 Updated February 1, 2019.

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

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

The following are not authorized methods of delivering a notice or document by electronic mail: faxes, text messages, videoconferencing, webcams, voice mail and telegrams/telegraphs. Tex. Gov’t. Code §80.005.

3. **New! Substituted Service Through Social Media** – Notwithstanding the above statement, a 2019 amendment to Tex. Civ. Prac. & Rem. Code § 17.033 will allow substituted service through social media in cases where substituted service is authorized under the TRCP pursuant to rules to be adopted by the Supreme Court. Watch for developments.

IV. A to Z FOR AD LITEMS IN GUARDIANSHIP PROCEEDINGS

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

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

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

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

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

Exceptions: persons off-list by agreement of the parties and approval of the court; persons with specialized education, training, certification, skill, language proficiency, or persons with knowledge of the subject matter; or relevant prior involvement; or persons in a relevant geographic location. Tex. Govt Code §§ 25.0022(d)(10), 37.001-37.005, 74.092(11), 74.0893. *Estate of Harris*, 2017 Tex. App. LEXIS 5487 (Tex. App. Fort Worth, June 15, 2017, no pet. h.) (heirship ad litem).

New! Exception for State of Disaster - A 2019 amendment allows the court to appoint a person included on the applicable list whose name does not appear first on the list or a person who meets statutory or other requirements to serve and who is not included on the list if, within 30 days preceding the date of appointment, an initial declaration of a state of disaster is made for the area served by the court. Tex. Govt Code § 37.004(d-1).

E. The Language of Guardianship: Less

Restrictive Alternatives & Supports and Services -

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

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

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

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

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

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

Appendix D-1 is a listing of examples of supports and services and the types of agencies or entities which provide them.

In a proceeding for modification or restoration (full or partial), the issue of supports and services must be specifically addressed in the application (Tex. Est. Code § 1202.051), the physician’s certificate of medical examination (Tex. Est. Code § 1201.152(b)), the evidence to be heard (Tex. Est. Code § 1202.151(a)), the findings of the court (Tex. Est. Code § 1202.153(c) and, if modification or partial restoration is granted, the specific supports and services must be enumerated (Tex. Est. Code § 1202.154(a)(4)).

Events necessitating the settlement and closing of a guardianship now include: “... when the ward... is found by the court to have full capacity, or sufficient

capacity with supports and services, to care for himself or herself and to manage the ward's property..." (Tex. Est. Code § 1202.001(b)(2)).

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

In *Guardianship of A. E.*, 2018 Tex. App. LEXIS 4353 (Tex. App. Fort Worth, June 14, 2018), the court, in a textbook-like opinion, categorically reviewed the statutory mandate, carefully discussing the burden of proof required. It essentially held that, where a proposed ward had a total lack of capacity, supports and services are unavailable.

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

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

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

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

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

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

I. Fundamentally Understand Your Role: The biggest problems for an Ad Litem arise from not

understanding the job description and acting outside the scope of the appointment. This invariably causes problems at the end of the proceeding when the ad litem is trying to get paid. (*infra*).

MAJOR CAVEAT: Scope of Appointment - If you act outside the scope of your appointment, it is error for the court to award you any fees for such activity. See discussion below under "fees." The burden is on the ad litem to ensure that the services performed do not exceed the scope of the role assigned. *Ford Motor Co v. Garcia*, 363 S.W.3d 573 (Tex. March 30, 2012); *Ford Motor Co v. Chacon*, 2012 Tex. LEXIS 557 (Tex. 2012); *Ford Motor Company v. Stewart, Cox, and Hatcher*, 2013 Tex. LEXIS 69 (Tex. 2013); *Guardianship of Vavra*, 365 S.W.3d 476 (Tex. App. Eastland 2012, no pet.).

1. THE ROLE OF THE ATTORNEY AD LITEM

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

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

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

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

When he says: "I didn't do it," is it then your job to use every possible procedural avenue in the Penal Code, Code of Criminal Procedure, Rules of Evidence and Rules of

***Appellate Procedure to prevent a conviction?
Manifestly not.***

Your job, either in the criminal arena or in the probate court, is to require the party with the burden of proof to carry that burden as required by the Estates Code. To do otherwise is an abuse of the process.

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

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

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

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

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

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

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

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

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

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

9. Represent and advocate on behalf of the Proposed Ward at the hearing, bearing in mind the requirements of the Texas Disciplinary Rules of Professional Conduct Rule 1.14 and *Franks v. Roades*, 310 S.W.3d 615 (Tex. App. Corpus Christi, April 15, 2010, no pet.) (A lawyer may take reasonably necessary protective action when the lawyer believes the client has diminished capacity, is at risk of substantial physical, financial, or other harm, and cannot adequately act in the client's own interest)

Note: Proposed Change to Disciplinary Rules Regarding Clients with Diminished Capacity. - The State Bar Committee on Disciplinary Rules and Referenda (established as part of the reauthorization of the State Bar Act following the Sunset Review process) has proposed changes to three disciplinary rules affecting lawyers who deal with those with diminished capacity:

- Repeal of current Rule 1.02(g) which requires a lawyer to take reasonable action to secure the appointment of a guardian or other legal representative, or seek other protective orders, for a client the lawyer reasonably believes lacks legal competency.

- Add Rule 1.05(c)(9) to allow a lawyer to reveal confidential information in order to secure legal advice about the lawyer's compliance with the rules.

- Add Rule 1.16 dealing solely with clients with diminished capacity. The text of the proposed rule was published in the August 31, 2018 Texas Register and the September 2018 Texas Bar Journal:

Rule 1.16 Clients with Diminished Capacity

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

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

the client.

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

Proposed Rule 1.16 closely follows the language of Model Rule 1.14 of the American Bar Association. Following a public hearing and comment period, the CDRR forwarded These proposed rule changes have already undergone a public hearing and comment period and have been approved by the State Bar's Board of Directors. Implementation of the changes is pending approval of other proposed changes for a packaged submission to the Texas Supreme Court with a request that the high court hold a referendum on them.

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

2. THE ROLE OF THE GUARDIAN AD LITEM

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

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

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

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

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

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

1) “Quarterback” (Tex. Est. Code § 1102.001) – If there the guardianship proceeding has started because someone filed an information letter (Tex. Est.

Code § 1102.003), sparking a court-initiated investigation into the need for a guardianship, there will be no applicant on the scene. You will have to take the ball and run with it. The minimum statutory duties set forth are

a) to investigate the Proposed Ward's conditions and circumstances to determine whether;

- 1) the Proposed Ward is an incapacitated person; and
- 2) a guardianship is necessary for the Proposed Ward;

b) to personally interview the Proposed Ward; provide a copy of the information letter filed herein pursuant to Tex. Est. Code § 1102.003 and of this order; and discuss with the Proposed Ward the contents of this information letter and this order (including advising the Proposed Ward of their right to petition the Court to have the appointment of the Guardian Ad Litem set aside);

c) to evaluate alternatives to guardianship and supports and services available to the Proposed Ward that would avoid the need for appointment of a Guardian;

d) to file a written report with the Court concerning the best interest of Proposed Ward as soon as possible but no later than one week prior to a hearing date (or within a reasonable time if no Application for the Appointment of a Guardian is filed);

e) to file an Application for the Appointment of a Guardian of the Person and/or Estate of Proposed Ward if such is determined to be in the best interest of Proposed Ward;

f) to obtain a hearing date and Letters of Guardianship in due course and as appropriate.

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

a) protect the Proposed Ward in a manner that will enable the court to determine the action that will be in that person's best interests;

b) to investigate the Proposed Ward's conditions and circumstances to determine whether a guardianship is necessary;

- c) evaluate alternatives to guardianship and supports and services available to the proposed ward that would avoid the need for appointment of a guardian;
- d) to personally interview the Proposed Ward;
- e) to investigate the need for the appointment of a Guardian of the Person and/or Estate for Proposed Ward and obtain a Proposed Guardian if necessary;
- f) to file a written report with the Court (Appendix R) concerning the best interest of Proposed Ward as soon as possible but no later than one week prior to a hearing date.

E. Additional Duties:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19) File an Application for Payment of Fees and Order (Appendices Af, Ag).

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

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

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

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

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

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

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

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

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

9. DO-NOT-RESUSCITATE ORDERS (DNR)
- Out-of-Hospital Tex. Hlth & Saf. Code §166.081.

- In-Hospital Tex. Hlth & Saf. Code §§166.201ff.

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

K. Temporary Guardianships –

1. A Strong Smell of Gas and the Potential for a Spark: A temporary guardianship may only be granted

where it is *immediately* necessary to safeguard either the person or property of the Proposed Ward. TEX. EST. CODE § 1251.001.

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

- inability to get life-saving treatment for a recalcitrant nursing home resident.
- financial exploitation of an elderly or developmentally disabled person.
- casualty loss to property belonging to a person for whom a guardianship has not been opened due to the existence of a less restrictive alternative.

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

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

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

- A. A sworn, written application must be filed (Appendix I).
- B. An Attorney Ad Litem must be appointed;
- C. The clerk must issue notice;
- D. An order setting the hearing ("fiat") must be signed. (Appendix I).
- E. Service of citation must be perfected on the Proposed Ward, the Attorney Ad Litem and the proposed temporary guardian. *In Re Cantu*, 2009 Tex. App. LEXIS 2241 (Tex. App. Corpus Christi, April 2, 2009, pet. filed) In extreme circumstances, substituted service may be warranted. *Guardianship of Bays*, 355 S. W. 3d 715 (Tex. App. Fort Worth 2011 no pet. h.).

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

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

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

CME not mandatory in temporary guardianship - Tex. Est. Code § 1101.103, requiring a Certificate of Medical Exam,

specifically does not apply in a temporary guardianship. *In Re Moreno*, 2010 Tex. App. LEXIS 9799 (Tex. App. Eastland, December 10, 2010, no pet. h.). *Get the doctor's letter if you can, but you don't have to wait on it.*

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

- a. the conclusion of the hearing challenging or contesting the application;
- b. the date of qualification of a permanent guardian; or
- c. the 12-month anniversary of qualification of the temporary guardian, unless the term is extended after, motion, hearing and court order. § 1251.052(b). In *Guardianship of Gibbs*, 253 S.W.3d 866 (Tex. App. Fort Worth, April 17, 2008, pet. dismissed), where a temporary guardianship was allowed to expire, the court lost subject matter jurisdiction for any subsequent proceedings and all subsequent actions of the court were void. *See also Bauer v. State*, 2003 U.S. App. LEXIS 15202 (5th Cir. 2003).

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

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

File at least a general denial to the application to properly join issues. (Appendix M) However, if you are actively contesting the application, it would be even better to file an answer that states whether the Proposed Ward objects to the guardianship, the proposed guardian, or both, and send a copy to the court investigator. (Appendix N)

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

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

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

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

M. INVESTIGATE: FINDING THE BLACK

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

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

Basic Investigative Steps along the path:

1. Thoroughly **examine the filings** in the court's jacket.
 2. Review the **available medical records** (not just the doctor's letter) and note the diagnosis and any underlying anecdotal evidence. From the doctor's letter, determine the diagnosis and educate yourself as to the details and variations of the medical conditions which affect capacity, e.g: information on dementia from the National Institute of Neurological Disorders and Stroke at www.ninds.nih.gov/disorders/dementias/dementia.htm.
- IMPORTANT: Does the Proposed Ward have a urinary tract infection? Major indicator of undiagnosed problems.***
3. **Talk** to as many family members, friends, caregivers, clergy, hairdressers, neighbors, etc. as necessary for you to feel you have a firm grasp of the situation.
 4. Spend some time checking out the extent of the **Proposed Ward's property**. Consult the local tax appraisal district's records to see if the proposed ward is still record title owner of property. Also, the Court Investigators are now authorized to compel production of the financial records of a Proposed Ward. Tex. Fin. Code § 59.006(a)(9).
 5. If you discover there is a **representative payee** for social security funds or if anyone other than the guardian is receiving funds on behalf of the ward, the Court Investigator (or other court official) need to be so advised.
 6. Make an independent determination of the

suitability of the proposed guardian and attempt to ascertain whether any of the items of disqualification are applicable.

7. As you **interview the Proposed Ward**, you will necessarily be forming an opinion on whether ward has functional deficits which are the real basis behind the need for a guardianship.

The interview need not be exhaustive, but should be thorough and professional. With practice, you will develop your own style, but you should work off a list, so that you do not forget to cover everything. It is not necessary to be clinical. It is possible to be conversational and still get the information you need (like any skilled cross-examination).

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

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

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

Estate of Robinson, 140 S.W.3d 782 (Tex. App. Corpus Christi, 2004, pet. denied) provides an excellent description of how a history of frequent falling can indicate atrophy of the brain and resulting diminution of capacity. Also see *Estate of Lynch* 2011 Tex. App. LEXIS 2942 (Tex. App. San Antonio 2011), remanded by 395 S.W.3d 215 (Tex. App. San Antonio, 2012, pet. denied) for some amazing insights into the pathology of dementia (and tips for litigators).

This is a Dance and You must Lead:

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

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

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

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

- Ask for details of their family: (children's birthdays, grandchildren's names – but ask for them in reverse chronological order)
- **Communication:** ask about the telephone, can they recall important telephone numbers?
- **Grocery Shopping and Meal Preparation:** ask a few questions about what it would take to prepare meals for a day (not "What do you like to eat?")
- **Housekeeping & Laundry:** (do not prompt) What is involved? What can they themselves do?
- **Personal Hygiene:** (casual observation and a look at the bathroom may answer this one).
- **Transportation:** driving self/driven by others/ public transportation. <http://www.npr.org/sections/health-shots/2012/10/08/162392507/when-should-seniors-hang-up-the-car-keys>.
- **Personal living decisions.** A discussion of politics can help determine the ability to vote. Similar discussions can focus on the ability to determine one's residence. (See below on the new prominence required for decisions regarding residence preference.).

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

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

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

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

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

§ 1101.151.

6. Means To Enhance Capacity – This is where a thorough understanding of the concept of Supports and Services comes in. Consider the list of both Less Restrictive Alternatives (Appendix D) and Supports and Services (Appendix D-1) to determine whether you can recommend any of them to avoid or lessen the effect of a guardianship. This is a situation where a better “social safety net” might address the deficits.

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

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

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

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

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

1. THE COMATOSE CLIENT: If the Proposed Ward is unable to communicate because of either physical or psychological circumstances, the Attorney Ad Litem and Guardian Ad Litem can simply appear at the uncontested guardianship docket and act appropriately.
2. THE BRILLIANT STRATEGIST: If the

Proposed Ward tells you that he or she wishes to actively contest the application but is also simultaneously consulting with his invisible field marshals about the next cavalry attack, you may ask the court to set the matter on the contested docket for one hour to allow the Proposed Ward to have their day in court. (the “*pro forma*” contest).

3. TOO CLOSE TO CALL: If you have genuine doubts about which way to jump, and want another set of eyes and ears to assess the situation, ask the court to appoint a Guardian Ad Litem.
4. WINCHESTERS ON THE FENCELINE: You have no doubt your client is getting thrown under the bus. Consider most, if not all, of the strategies under “Actively Contesting the Application,” *infra*. Ask for a docket control conference at the earliest possible time. Make it real clear that you have serious problems with the proceeding going forward.

Q. IS THE APPLICATION TIMELY FILED?

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

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

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

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

R. WHO PICKS UP THE TAB? - Statement of Inability to Afford Payment of Court Costs or an Appeal Bond –(often referred to as a “Pauper’s

Affidavit”) pursuant to Tex. R. Civ. Proc. 145. (Appendix H) is only applicable and available if it is the **Applicant** who has no ability to pay costs or is receiving governmental assistance based on indigency. **It is not the Proposed Ward whose inability to pay is measured.** Tex. Est. Code § 1052.051(e)(4): “a person who files an affidavit of inability...”

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

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

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

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

First Responder and Veterans Fee Exemption

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

V. MEDICAL RECORDS

A. Federal and State Confidentiality Laws: A number of federal and state enactments limit access to records of individuals.

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

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

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

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

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

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

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

Note - Underlying Medical Records:

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

B. The Physician’s Certificate of Medical Examination (The “Doctor’s Letter” or “CME”)

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

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

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

1. BASICS: INCAPACITATED PROPOSED WARD

A. Sine Qua Non: No guardianship of an incapacitated person may be granted without a certificate of medical examination which complies with Tex. Est. Code § 1101.103. This section specifically sets out the requirements of the report the court needs to have before it before it can legally grant a guardianship.

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

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

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

1. Describe the nature, degree, and severity of the proposed ward’s incapacity, including deficits, with regard to several specific functional areas (financial

and contractual decisions, medical consents) and specifically addressing the proposed ward’s ability to safely operate a motor vehicle, vote in a public election, establish residence or decide on marital status;

2. Summarize the proposed ward’s medical history (if available);

3. Evaluate and describe the proposed ward’s physical and mental condition and functional ability, with and without supports and services available to the ward;

4. Comment on whether the proposed ward’s demeanor or ability to participate in a court proceeding might be affected by any current medications;

5. State whether the proposed ward would benefit from supports and services that would allow the individual to live in the least restrictive setting;

6. State whether specific powers or duties of the guardian should be limited if the Proposed Ward receives supports and services and

7. State whether improvement in the Proposed Ward’s physical condition and mental functioning is possible and, if so, state the period after which the proposed ward should be reevaluated to determine whether a guardianship continues to be necessary. Tex. Est. Code § 1101.103(b).

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

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

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

A. provide food, clothing, and shelter for himself or herself;

B. care for the ward’s own physical health; and

C. manage the ward’s financial affairs. Tex. Est. Code § 1202.152.

3. BASICS: INTELLECTUALLY DISABLED

POTENTIAL WARD

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

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

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

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

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

4. INDEPENDENT MEDICAL EXAM

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

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

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

V).

C. Hearing: The court must make its determination with respect to the necessity for a physician’s examination of the proposed ward at a hearing held for that purpose.

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

E. Practical Pointers:

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

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

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

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

5. EVIDENTIARY CONSIDERATIONS

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

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

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

citing Tex. R. Evid. 509, 510. However, the court found a pre-trial stipulation that each parties' experts' records would be admitted without proof of their business-record nature amounted to a waiver of any objection.

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

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

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

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

6. MAINTENANCE OF GUARDIANSHIP ORDERS BY CARE FACILITIES -

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

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

C. Investigators from the Health and Human Services

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

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

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

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

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

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

C. Medical Doctors

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

2. Geriatricians (MD specialist in aging).

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

respondent and his/her capacity.

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

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

6. Forensic Psychiatrist – MD mental health specialist trained to present findings in the legal arena.

D. Non-Physician Medical Professionals

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

2. Geropsychologists receive additional training in problems of aging;

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

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

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

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

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

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

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

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

1. THE CLERK: The County Clerk in each county serves as the clerk of the court. However, remember, the clerk is a separately-elected public official and is not an employee of the court. Each court usually has a deputy clerk assigned to it for hearings. However, just because you tell something to the clerk, that doesn't mean the court automatically knows about it (and vice versa). By the same token, when you file something with the clerk (which is the only place you can file it) if you want the court to know about it, you need to make the court aware of whatever it was you filed.

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

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

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

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

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

4. TIME ESTIMATE/ RECORD TO BE MADE? Let the Coordinator know how long the hearing will

take and whether a court reporter will be required (because the probate courts also hear mental dockets, the reporter is not always immediately available at the courthouse).

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

C. Working the File

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

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

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

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

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

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

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

6. COURTESY COPY, PLEASE? If you need anticipate the court will 'carve up' your order, find out

whom to e-mail an editable copy for the court's use (but not on the hearing day).

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

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

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

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

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

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

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

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

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

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

B. Methods of Service Tex. Est. Code §§

51.051ff, 1051.051ff.

1. Personal Service
 - a. with lawyer – on lawyer (by e-service)
 - b. without lawyer – on person by Sheriff or constable
 - c. if out of state – by any disinterested person
 - d. if not found – re-issue citation and publication
2. Posting
3. Publication
4. Mailing
5. Other - Tex. Est. Code §§ 51.151, 1051.201 – as directed by court order and as authorized by the Estates Code or Rules of Civil Procedure *if*:
 - a. no specific form of notice, service, or return is prescribed, or
 - b. the code provisions are insufficient or inadequate, or
 - c. any interested person asks (upon application and order).

C. How Served Personally

1. Basic Provision - Sheriff or Constable Tex. Est. Code §§ 51.051(b)(1), 1051.051(b)(1).
2. By a Disinterested Person (if person to be served is out of state) Tex. Est. Code §§ 51.051(b)(2), 1051.051(b)(2).
3. By an alternative manner as directed by specific order (only upon application and order) Tex. Est. Code §§ 51.151, 1051.201
 - application must be supported by affidavit and order
 - order should specify manner of service that will be reasonably effective to give notice.

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

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

3. CITATION AND NOTICE IN GUARDIANSHIPS

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

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

1. a proposed ward 12 or older;

THE ATTORNEY AD LITEM CANNOT ACCEPT SERVICE FOR THE PROPOSED WARD AND THE PROPOSED WARD CANNOT WAIVE PERSONAL SERVICE. (Pardon the shouting.) Even an agent under a valid power of attorney previously given by the ward cannot accept or

waive service on behalf of the ward. *In re Martinez*, 2008 Tex. App. LEXIS 606 (Tex. App. San Antonio 2008, no pet.) All other persons entitled to personal service may file waivers. (Tex. Est. Code § 1051.105).

2. the parents, if their whereabouts are known;
3. any court-appointed conservator or person with control of the care and welfare of the proposed ward;
4. the spouse of the proposed ward, if her/his whereabouts is known;
5. the proposed guardian, if not the same as the Applicant.

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

1. adult children of the proposed ward;
2. adult siblings of the proposed ward ;
3. the administrator of a nursing home where the proposed ward is located; or
4. the operator of a residential facility in which the proposed ward resides;
5. any known holder of a power of attorney from the proposed ward;
6. any person known to be designated to serve under a designation of guardian under Tex. Est. Code § 1104.202;
7. a person designated to serve as guardian in the probated will of the proposed ward’s last surviving parent;
8. any person known to be designated by a deceased parent to serve under a designation of guardian; under Tex. Est. Code § 1104.151ff and
9. Each adult named in the application as an "other living relative" of the proposed ward within the third degree by consanguinity, (if there is no spouse, parent, adult sibling or adult child) as required by Tex. Est. Code § 1101.001(b)(11) or (13).

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

The validity of a guardianship is not affected by the failure of the Applicant to serve any of the laundry list *except the adult children of the proposed ward* (but try to do it anyway). *Guardianship of V.A.*, 2012 Tex. App. LEXIS 3833 (Tex. App. San Antonio 2012, no

pet. h.).

However, in *Gauci v. Gauci*, 2015 Tex. App. LEXIS 8146 (Tex. App Houston 1st Dist., August 4, 2015, no pet.) the court found the guardianship void where no personal service was had on the Proposed Ward or the Proposed Ward's Father.

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

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

The appeals court noted that guardianship proceedings are proceedings in rem, and neither DADS nor its employees were defendants and even if Tex. Hum. Res. Code § 161.101 provided that DADS may not be appointed as permanent guardian without its consent except appointed as successor guardian, any immunity provided would be immunity from *liability*, not immunity from suit. The probate court had jurisdiction to bring DADS into the guardianship proceeding, and § 161.101 does not operate to defeat the court's jurisdiction.

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

D. What to Send:

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

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

documented.

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

E. Election to Receive Info re Ward

1. When the initial citations to be issued and served and the "laundry list" notices to be sent to the proposed ward's relatives by the Applicant/Guardian (possibly the Guardian Ad Litem), the relatives are requested to make an election to receive or not receive future notices from the Guardian in the event of certain changes in the Ward's health or residence. Tex. Est. Code §§ 1051.103, 1051.104. The relatives are as defined in Tex. Est. Code §§ 1101.001(b)(13)(A)-(D).

2. Changes in the Ward's health or residence include:

- A. if the Ward is moved to a more restrictive care facility (except in case of emergency) Tex. Est. Code § 1151.051(3e);
- B. if the ward is admitted to a medical facility for acute care for three days or more;
- C. if the ward's residence has changed;
- D. if the ward is staying at a location other than the ward's residence for more than one calendar week; or
- E. if the ward dies; the fact of death, any funeral arrangements and the location of the ward's final resting place. Tex. Est. Code §§ 1151.056 (b)-(c).

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

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

This does not apply to relatives who:

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

Notice Language:

You are hereby notified that, if a guardianship is created for the proposed ward, you must elect in

writing in order to receive notice about the ward (under Section 1151.056) in the following situations:

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

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

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

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

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

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

3. *Guardianship of V.A., supra*.
 - failure to serve Father not error where parental rights had been terminated.
 - failure to notify the Ward's managing conservator, given notice, but not personally served per TPC § 633(c)(3) (now § 1051.103) (here a *jus tertii* argument).
 - savings provision (Tex. Prob. Code § 633(f), now § Tex. Est. Code 1051.104(c)): "The validity of a guardianship created under this chapter is not affected by the failure to comply with the requirements of Subsections (d)(2)-(9) of this section" excused failure to serve adult siblings (Tex. Prob. Code § 633(d)(2),

now Tex. Est. Code 1051.104(a)(2)) and Hospital Administrator (Tex. Prob. Code § 633(d)(2), now Tex. Est. Code § 1051.104(a)(3), therefore not error.

- failure of Court to observe "ten day waiting period" imposed by Tex. Prob. Code § 633(f) (now Tex. Est. Code §1051.106), held not to be jurisdictional.

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

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

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

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

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

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

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

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

Registration may be done online:

<http://www.txcourts.gov/jbcc/register-a-guardianship/> or by mail: JBCC, Attn: Guardianship Registration, P. O. Box 12066, Austin, TX 78711-2066. For questions, use jbccguardianregistration@txcourts.gov.

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

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

If the value of the liquid assets of the proposed ward's estate exceeds \$50,000, a digital fingerprint background check must be completed. Once the Proposed Guardian completes the registration process, the JBCC will send an email to the proposed guardian with a service code and instructions for the proposed guardian to obtain digital fingerprints through Texas Department of Public Safety (DPS). After receiving the email and instructions, the proposed guardian will schedule an appointment to have the digital fingerprints taken with DPS. JBCC will send the results of the DPS digital fingerprint search to the probate clerk. Tex. Govt. Code § 155.205.

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

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

The training requirement does not apply to attorneys, corporate fiduciaries or private professional guardians. Tex. Govt. Code § 155.202. The training requirement may only be waived if pursuant to Supreme Court rule. Tex. Est. Code § 1104.003.

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

G. “Paperwork” to Have on Hand:

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

1. **PRELIMINARY CONSIDERATIONS**

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

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

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

D. **Social Security Numbers**: Please provide the court clerk the Social Security Numbers for the Ward and Applicant (on a separate sheet for the court’s records). Tex. Est. Code § 1201.004.

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

3. **SURETY BOND**

A. **Why Have a Bond?** The ad litem who asks the judge to set a low bond is not acting in his or her client’s best interests. If, for any reason, you should be re-activated because of improper actions of the guardian, the best thing you could have ever done for the ward would have been to make sure the judge

required enough bond. Very often, it is the only available financial resource left to a successor guardian.

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

After the Applicant has provided an exhibit (Appendix Y) to assist the judge in determining the amount of the Safekeeping Agreement and the bond, the court can approve the use of the Safekeeping Agreement, (Appendix Ae) and the guardian may deposit the estate cash or other assets in a state or national bank, trust company, savings and loan association, or other domestic corporate depository, to be held under an agreement that the depository will not allow withdrawal or transfer of the principal of the assets and/or interest on the deposit except on written court order.

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

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

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

D. Advantages of Corporate Sureties over Personal Sureties:

1. Only one corporate surety is generally required rather than two individual sureties (court may require two corporate sureties if the bond is greater than

\$50,000 Tex. Est. Code § 1105.161(a)).

2. The bond premium is payable by the Estate. Tex. Est. Code § 1105.161(B).

3. Corporate sureties generally are better able to respond financially, giving the guardian (and court) more comfort.

4. Corporate sureties often come in and aggressively defend the guardian, certainly making the guardian more comfortable.

5. A corporate surety bond is less prone to misinterpretation than the affidavit of a personal surety as to non-exempt assets. ("I agreed to *what?*")

6. The guardian will not have to beg friends and relations to personally guarantee his actions.

7. CAVEAT: Make sure the Power of Attorney on the Bond form is not limited to an amount lower than the Bond amount.

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

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

1. At the hearing, the testimony should include information about the approximate extent of the ward's estate so the judge can accurately determine an initial amount of the corporate surety bond for the newly-appointed guardian.

2. Arriving at a bond amount is not a big mystery. Ask the court what its guidelines are.

3. Some bonding agents will even come to the hearing with you and have the bond ready to be approved.

4. The court has a minimum bond amount for guardians of the estate, ranging from \$5,000 to \$20,000. Guardians of the person may be required to post either a personal surety bond or corporate surety bond, depending on the court's policies. The guardian's oath should not be executed before the bond has been filed with the clerk.

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

4. OATH A bench oath is included at Appendix Ad.

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

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

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

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

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

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

The “Re-Test Request” - A potential ward who refuses to stop driving may be reported to the DPS by a physician, a family member, or even a stranger, if the person’s driving capability is

impaired. Although physicians are somewhat reticent to report their patients because of the physician-patient privilege and HIPAA, it is possible for the applicant in a guardianship or the ad litem to request the court to make a referral to the Department of Public Safety for the proposed ward to be re-tested under DPS regulations to determine the proposed ward’s suitability to continue to drive. See the Probate investigator for an example of a request letter.

See “Note on Required Disclosures,” infra

Digital Assets

Each of us has, in the past 10 to 20 years, accumulated various “digital assets.” These include things such as the files on our computers or other electronic devices. It also includes electronic data subject to the control of others, such as e-mail accounts; social networking accounts; online or cloud storage of computer files, photographs and videos; rewards accounts from hotels or airlines; music accounts (i.e. iTunes), web pages, online purchasing accounts and credits (i.e. Paypal) and virtual currency (i.e. Bitcoins).

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

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

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

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

Find out the court’s preference on conforming copies. More and more, as courts become paperless,

all the copies will be available down the hall in the clerk's office. Some judges will conform a limited number of copies themselves, unless there have been numerous strikeouts and amendments.

VIII. HEARING DAY: SOME GENERAL AND PRACTICAL OBSERVATIONS

A. General Comments and Decorum:

1. COME WATCH: If you have never done so, go watch the uncontested hearing docket to get an idea of the flow.
2. PULL THE RABBIT OUT OF THE HAT: The Court would usually rather be relieved than surprised. If you have an unusual fact situation (or the situation is not what it appears), find some way to plead it. Please don't make the court guess at what is going on and have to delay your hearing until we find out.
3. PROBLEMS? It is not always better to get forgiveness than permission – ask first.
4. SPEAK TO THE MAN: Check in with the bailiff - not with the court coordinator.
5. CALL if you're not coming.
6. WHERE'S JUDGE WALDO?: The hearing may now be held in a location convenient and accessible to the individual. TEX. EST. CODE § 1055.053.
7. NOT THE BUS STATION: While this is a public building, it is a court of law, not the bus station.
8. ZERO TOLERANCE: Most courts have written notices posted with regard to the rules of decorum for the court. As a result, you and your clients/witnesses may or may not be given a warning of infractions before the court either asks you to leave or holds someone in contempt.
9. NO! No tobacco/ No gum/ No shorts/ No hats/ No cell phones/ No pagers/ No client conferences in the courtroom.
10. PROPER ATTIRE: If the court has a dress code, observe it. Advise your clients accordingly or re-schedule your hearing.
11. CAN YOU HEAR ME NOW? A telephone going off in the courtroom is usually followed by impoundment of the telephone or an immediate finding of contempt.
12. SSSSH! Talking in the courtroom is not only disrespectful, it is disruptive to the judge trying to hear a witness who is too scared to speak up. If you need to talk to a witness, do so outside. Let the bailiff know you need to speak to a witness and to let you know when the court is ready.
13. TAKE IT OUTSIDE: Talking in the foyer outside the courtroom is no improvement. If you think you have gotten out of earshot, think again. Take it out into the hallway.

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

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

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

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

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

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

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

3. SPEAK UP: it's your show.

4. LEAD THE WITNESS and avoid droning repetition.

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

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

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

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

Rant: Direct Examination by the Ad Litem
If you are examining multiple witnesses on direct

examination, after you have finished with the first witness, it is fine to ask the second witness:

"If I asked you the same questions that I just asked (1st Witness), would your answers be the same?"

However, it makes little or no sense to listen to a direct examination and then ask the same witness (on cross-examination):

"If I asked you the same questions you were just asked, would your answers be any different?"

How confused must the witness (and opposing counsel and the judge) think you are?

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

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

1. CLEAR AND CONVINCING STANDARD:
 - A. a determination of incapacity;
 - B. appointment of a guardian would be in the best interest of the proposed ward; and
 3. appointment of a guardian would protect the proposed ward's rights or property.
2. PREPONDERANCE STANDARD:
 1. proper venue;
 2. person to be appointed guardian is eligible to act as guardian and entitled to appointment, or, if no eligible person entitled to appointment applies, person appointed is a proper person to act;
 3. (minors only) guardianship not created for primary purpose of enabling minor to establish residency for school enrollment for which minor is not otherwise eligible; and
 4. description of nature and extent of incapacity.

D. Bench Instructions

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

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

E. Contested Hearings (with a Court Reporter)

1. KEEP US IN THE LOOP - Let us know if you settle and no longer need our time. Like firemen - we have to be ready to go when you need us. If we don't need to be helping you, there's usually someone else who could use that hearing slot.
2. NEED A RECORD? If you are on the record, you are dictating a document for the appellate courts. If you want a record just so you do not have to take notes, let the court reporter know up front and be ready to put down a deposit up front for the transcript.
3. WHAT WAS THAT? If the reporter cannot hear what is said, she cannot write it down - Stay on the microphones.
4. YOUR NERVOUS HABITS: Although they will seldom comment on it (other than to the judge), irritations to the court reporter include:
 - nervous habits such as clicking a ball-point pen, jingling change in your pocket, tapping a pen on your paperwork
 - talking over someone else. The reporter can write only what one person is saying. If it is the judge, I have it on good authority they will report what the judge is saying.
 - marking exhibits: wait until the reporter gets through marking the exhibit before talking again. (Her hands are busy.)

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

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

G. Clerk's Follow-Up Duties: As a result of the

court's findings in the order of appointment, the county clerk has a number of responsibilities

1. **BRADY BILL IMPLICATIONS:** The probate clerk will now be required to prepare and forward information to DPS within 30 days of a determination by a court that a person is incapacitated or that a person is determined to be mentally ill and involuntarily committed to a mental hospital. DPS will transmit this information to the FBI-run National Instant Criminal Background Check System (commonly known as NICS), a clearinghouse used to prohibit disqualified persons from purchasing firearms. Persons who have been restored to capacity or have been found by a mental health court to no longer be dangerous, could have their right to purchase firearms restored. Tex. Govt. Code §§411.052 and 411.0521.

2. **VOTER REGISTRATION:** If the order specifies that the ward does not retain the right to vote in a public election, the clerk is required to file an abstract of the guardianship order with the voter registrar. Tex. Elect. Code § 16.002.

3. **DRIVER'S LICENSE:** Similarly, if the order specifies that the ward does not retain the right to maintain eligibility to hold or obtain a license to operate a motor vehicle, the clerk is required to file DPS Form D-17 with the Texas Department of Public Safety within 10 days of the judgment. Tex. Transp. Code §521.319.

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

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

1. **DISCHARGED:** Unless the court specifies otherwise, both the GAL and AAL are **discharged** as of the signing of the order granting the guardianship or dismissing the application. Tex. Est. Code §§ 1054.002, 1054.053.

2. **SEPARATE ORDER REQUIRED FOR FEES:** Although the previous orders of the Texas Supreme Court regarding the reporting of fees (Misc. Docket Nos. 94-9134 & 07-9188) were repealed following the enactment of the fee reporting mechanism of Tex. Govt. Code Chap. 34 in 2015, many courts will still want the order awarding fees to be separate and apart from any other pleading to enable the clerk to meet their reporting requirements.

I. Selling the Follow-Through

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

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

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

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

IX. ACTIVE CONTEST OF THE APPLICATION

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

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

In actively contesting a guardianship proceeding,

the ad litem should consider among the following:

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

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

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

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

D. Calling for Backup. In an appropriate case, the attorney ad litem for a proposed ward may be authorized, upon application and order, to enlist the assistance of additional counsel to represent the proposed ward when warranted by the circumstances. *Guardianship of Glasser*, 2009 Tex. App. LEXIS 2680 (Tex. App. San Antonio 2009, no pet.) In *Scally v. Scally*, 2010 Tex. App. LEXIS 8045 (Tex. App. Houston-14th Dist 2010 no pet.), the ad litem in a SAPCR proceeding retained counsel to collect fees awarded the ad litem.

E. Retained Counsel

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

Newly enacted Tex. Est. Code § 1054.006 recognizes the ability of a proposed ward (with sufficient capacity) to retain counsel.

2. **MOTION TO SHOW AUTHORITY:** The Applicant or Guardian Ad Litem might well consider a Motion to Show Authority pursuant to Tex. R. Civ. Proc. 12. In this sworn motion, the privately-retained attorney is cited to appear and bear the burden show his authority to act on behalf of the proposed ward. (See Appendix T.) A “Rule 12” motion is the exclusive method of questioning an attorney's authority to represent a party, and such a motion must be heard and determined before the parties announce ready for trial.

Price v. Golden, 2000 Tex. App. LEXIS 5906 (Tex. App. Austin 2000, no pet.) Such a motion might be a conflict for an Attorney Ad Litem, who may be in a position to defend his client’s capacity.

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

In *Oldham v Calderon*, 1998 Tex. App. Lexis 1539, (Tex. App. Houston 14th Dist. 1998, pet. denied), The 14th Court of Appeals affirmed the trial court’s substitution of privately-retained counsel in place of the court-appointed Attorney Ad Litem and allowed the private attorney’s fees to be paid out of the ward’s estate. The appellate court recognized that, at times, counsel with whom the ward is familiar can render more effective assistance of counsel than a court-appointed ‘stranger.’ However, in *Guardianship of Benavides*, 403 S.W.3d 370, 377 (Tex. App. San Antonio 2013), subsequent appeal at *Benavides v. Mathis*, 433 S.W.3d 59, 2014 Tex. App. LEXIS 1488 (Tex. App. San Antonio 2014, pet. den.), following hearing on a Motion to Show Authority, the trial court found retained counsel had no authority to represent the proposed ward in the guardianship proceeding and struck all of retained counsel’s pleadings. The appellate court held the trial court was well within its discretion in finding that retained counsel had no authority to represent the proposed ward in the underlying guardianship proceedings.

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

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

6. **NO PLAY, NO PAY:** The unpleasant “flip side” of being the privately-retained white knight is that, if your client lacks the capacity to hire an attorney, you are not entitled to recover fees for the legal services in the guardianship contest. *Breaux v. Allied Bank of Texas*, 699 S.W.2d 599 (Tex. App.-Houston [14th

Dist.] 1985, writ ref'd n.r.e.), cert. denied, 479 U.S. 1002 (1986).

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

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

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

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

G. Intervention by “Interested Persons” – Just when you thought everything was ready to move forward, a sibling, son-in-law or neighbor of the Ward decides they want to take over the process. Heretofore, they simply jumped in and started litigating and issues of their standing or bona fides were often not addressed. Now, under Tex. Est. Code § 1055.003, notwithstanding the Rules of Civil Procedure, a potential intervenor in a guardianship is required to file a timely motion setting out the purpose for which intervention is sought and serve the parties. The court, in its discretion, may grant or deny the motion, taking into consideration whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights. This does not apply to those persons on the ‘laundry list’ under Tex. Est. Code § 1051.104. Tex. Est. Code § 1055.003(d).

H. Consider Seeking Security For Costs:

1. **DO NOT BE CONFUSED BY OLD, BAD LAW:** Until 2013, there was a provision in the Probate Code that allowed for the possibility of obtaining a rule for costs (Tex. Prob. Code § 622). However, it was a right without a remedy because TEX. PROB. CODE §§ 665A & 669 still required the ward's estate to bear all

the costs of the proceeding, if there was one. This basically meant the costs in a guardianship contest could not be taxed against the losing party as in a will contest.

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

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

B. Decedent's Estates: *Ajudani v. Walker*, 232 S.W.3d 219 (Tex. App. Houston 1st Dist, 2007, no pet.) which followed Tex. Prob. Code §669(a) to deny taxings the costs in a will contest against the losing party on the ad litem's motion. The Fort Worth Court of Appeals expressly disapproved *Adujani in Estate of Frederick*, 2010 Tex. App. LEXIS 2537 (Tex. App. Fort Worth 2010, no pet.) and upheld the taxing of costs (ad litem fees) against the losing party in an enforcement action brought by the ad litem in a decedent's estate.

C. Other Reported Decisions on Security for Costs and Taxing of Costs: *Clanton v. Clark*, 639 S.W.2d 929 (Tex. 1982) (will contest); *Shirley v Montgomery*, 768 S.W.2d 430 (Tex. App. Houston 14th Dist., 1989, orig. proc.) (custody battle); *ex parte Hightower*, 877 S.W.2d 17 (Tex. App. Dallas 1994, wr. diss w.o.j.) (custody battle); *Estate of Stanton*, 2005 Tex. App. LEXIS 10901 (Tex. App. Tyler 2005, pet. denied.); (dependent administration and heirship); *Overman v. Baker*, 26 S.W.3d 506, 512 (Tex. App.-Tyler 2000, no pet.); *Guardianship of Soberanes*, 100 S.W.3d 405, 408 (Tex. App. - San Antonio 2002, no pet.).

The Estates Code was amended in 2013 to allow the taxing of costs and requiring reimbursement of attorneys fees of persons found to have acted without

good faith or just cause. Tex. Est. Code §§ 1155.151.

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

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

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

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

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

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

B. In Guardianship Proceedings: Because any “interested party” is allowed to contest any portion of a guardianship administration, the vulnerability of the proposed ward’s estate to substantial costs from repeated contests is greatly increased. As a result, in guardianship proceedings, security may be required from persons who are simply complaining about or opposing a guardianship matter, regardless of whether they are seeking affirmative relief. Tex. Est. Code §

1053.052.

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

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

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

7. HOW IS THE AMOUNT OF SECURITY DETERMINED?

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

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

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

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

A. Writ of Attachment - Allowing a *writ of attachment* to be filed on property, real or personal, of the person giving security. Tex. R. Civ. Proc. 146 (regarding attachments, see Tex. R. Civ. Proc. 592ff); Writs of attachment are somewhat arcane and maintenance-intensive procedures which require the

person allowing the attachment to have sufficient attachable property in the county and to allow additional attachments if property is sold or values drop. *Ibid.* This is a rarely used option.

B. Surety Bond - Posting a *surety bond* under Tex. R. Civ. Proc. 148. It is to be a bond with sureties (preferably corporate) to secure costs, but the court may not fix a specific amount for anticipated costs. *Johnson v. Smith*, 857 S.W.2d 612, 615 (Tex. App. – Houston, 1st Dist., 1993, orig. proceeding); *Smith v. White*, 695 S.W.2d 295 (Tex. App.- Houston, 1st Dist., 1985, orig. proceeding). It is, in effect, an open bond to secure payment of whatever costs might accrue. *Mosher v. Tunnel*, 400 S.W.2d 402 (Tex. Civ. App.-Houston, 1st Dist., 1966, writ ref d n.r.e.) A bond for a specified amount, rather than an open-ended bond, will not satisfy Rule 143. *Clanton v. Clark*, 639 S.W.2d 929, 930-3 1 (Tex. 1982). *Hager v. Apollo Paper Corp.*, 856 S.W.2d 512 (Tex. App. – Houston, 1st Dist., 1993, no writ).

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

9. WHO CHOOSES THE TYPE OF SECURITY?

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

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

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

12. THE COURT MAKES ITS DETERMINATION:

If the matter goes to its ultimate resolution and the judge or the jury picks a winner and taxes the costs, the payment of costs by the party against whom the costs are taxed is mandatory: Tex. Est. Code §§ 1155.151 “...shall be paid....”

13. AWARD OF ATTORNEY’S FEES - Tex. Est. Code 1155.054 (d) - If the court finds that a party in a guardianship proceeding acted in bad faith or without just cause in prosecuting or objecting to an application

in the proceeding, the court may require the party to reimburse the ward's estate for all or part of the attorney's fees awarded under this section and shall issue judgment against the party and in favor of the estate for the amount of attorney's fees required to be reimbursed to the estate.

14. PRACTICAL CONSIDERATIONS

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

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

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

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

E. Affidavit of Inability - If the contestant files a Pauper's Affidavit (see discussion under III.N. *supra* and Appendix H *infra*) you, as the ad litem, should contest the pauper's affidavit (unless it is an uncontestable affidavit (*see supra* and *Tex. Rules Civ. Proc. 145(c)*). If a contest is not filed, the uncontested affidavit is conclusive as a matter of law. *Guardianship of Humphrey*, (Tex. App. Tyler, February 18, 2009, pet. denied).

I. Jury Demand.

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

2. SPECIAL ISSUES: You can ‘reverse engineer’ your issues from the sample order (Appendix Ab) or consult *Texas Pattern Jury Charges 2016: Family Law & Probate, State Bar of Texas*. For an excellent background discussion of the issues, consult Darlene Payne Smith: *Jury Questions and Instructions: No*

Pattern for Probate & Pattern Jury Charges and Joint Defense Agreements in Probate, Trust and Guardianship Litigation, both in the 25th Annual Advanced Estate Planning and Probate Course (2001), State Bar of Texas and Darlene Payne Smith, *Pattern Jury Charges in Probate, Trust and Guardianship Litigation*, Probate Litigation Seminar (2002), Tarrant County Probate Bar Association.

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

J. Pursue Adequate Discovery. ‘nough said.

K. Advocate for Mediation –

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

2. **THE REAL ISSUE:** Although mediation training often instructs that guardianship contests are not mediable and that the issue of incapacity is beyond the ability of the parties to resolve, rarely is incapacity the real issue.

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

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

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

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

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

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

B. is signed by

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

If the MSA meets these requirements, a party is entitled to judgment on the MSA notwithstanding Tex. R. Civ. Proc. 11 or another rule or law. *Guardianship of Peterson*, 2016 Tex. App. LEXIS 9364 (Tex. App. Houston 1st Dist., August 25, 2016, no pet.).

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

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

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

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

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

3. A **NOTICE OF LIS PENDENS** under Tex. Prop Code §12.007 may be used to effectively “cloud” the Proposed Ward’s title, but should really only be used in conjunction with pleadings seeking affirmative relief regarding the alleged wrongdoer (such as a suit to impose a constructive trust) since a lis pendens notice is properly only used to protect innocent purchasers from buying land subject to litigation.

Kropp v. Prather, 526 S.W.2d 283 (Tex. Civ. App. – Tyler, 1975, writ ref’d n.r.e.).

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

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

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

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

2. CHALLENGE: The proper challenge is by motion in limine. Tex. Est. Code. § 1055.001(c). Either the Attorney Ad Litem or Guardian Ad Litem may file such a motion. Such a motion is not to be confused with a pre-trial motion in limine (seeking to exclude evidence of particular testimony). *Estate of Chapman*, 2010 Tex. App. LEXIS 4127 (Tex. App. Beaumont 2010, no pet.). *Burnett v. Luncelford*, 2016 Tex. App. LEXIS 12952 (El Paso, December 7, 2016, pet. denied), *Guardianship of Jones*, 2016 Tex. App. LEXIS 9394 (Tex. App. Fort Worth, August 25, 2016, no pet.).

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

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

4. ADVERSE INTEREST: Although ‘adverse interest’ is not a defined term, the 14th Court of Appeals in *Betts v. Brown*, *supra*, analogized with

issues of standing of personal representatives of decedent’s estates, concluding that an adverse interest is one that “does not promote the well-being of the ward.” The court went on to say that an adverse interest must be something other than the conditions of disqualification under Tex. Est. Code § 1104.351-357, as discussed below. *Ibid*.

The Dallas Court of Appeals, in the case of *In Re Miller*, *supra*, declined to hold that evidence of indebtedness by an applicant to a Proposed Ward automatically rises to the level of an adverse interest sufficient to divest a person of standing under Tex. Prob. Code §642 (Now Tex. Est. Code § 1055.001), particularly where Tex. Est. Code § 1104.354 9(2) allows for a person indebted to the proposed ward to pay the debt and be appointed as guardian.

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

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

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

N. Challenging the Applicant - Disqualification:

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

App. LEXIS 11837 (Tex. App. Tyler, November 18, 2015, no pet.) or 8) (the court's trump card) one found unsuitable by the court; (9) one expressly disqualified by the proposed ward in a prior designation under Tex. Est. Code § 1104.202(B); or (10) a nonresident who has not designated a resident agent for service.

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

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

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

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

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

O. If Advantageous, Try to Have Your Client Appear at the Hearing: Consider whether the proposed ward can make it to the hearing, alone or

with aid. Never underestimate the power of a well-reasoned and dignified personal plea by the proposed ward to the judge. However, it could certainly backfire if he/she gets lost or shows up in a bathrobe and slippers an hour before your first employee arrives in the morning. Then again, you might get lucky - your client might not show up until after the hearing is concluded.

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

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

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

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

R. An Appealing Thought?

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

However, if you really think there has been a serious abuse of discretion committed, make the argument to the trial court (prior to the appointment of

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

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

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

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

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

T. More Practical Pointers

- Review the most current State Bar of Texas Fiduciary Litigation Seminar materials.
- Just because you must advocate doesn’t mean you mustn’t settle.

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

- Don’t try to be the lead counsel.
- Don’t dig down until you can’t get out of the hole (time-wise).

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

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

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

- When you think you’re through, you’re not through. Think through the process and make sure you haven’t been counting on someone else to do what you should have done.

- Use the flowchart on page 2 as starting point for a checklist of responsibilities. Develop your own checklists/timelines for scheduling the progress in a guardianship matter.

- Create a memo knowledge bank.
- Always listen for the dog that is not barking. (With apologies to A. Conan Doyle.)

X. FEE CONSIDERATIONS

A. Introduction: It is the Court’s duty to ensure that estates of decedents and wards pay only for “reasonable attorney’s fees necessarily incurred” Tex. Est. Code § 352.051 (decedent’s estates) and § 1155.101 (guardianships) and “necessary and reasonable” expenses. Tex. Est. Code § 352.051 (decedent’s estates) and Tex. Est. Code § 1155.102 (guardianships).

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

B. Basic Premise: Absent specific statutory authorization, the probate court **cannot** award attorney’s fees. Fortunately, both Ad Litem are entitled to reasonable compensation, to be taxed as costs in guardianship (Tex. Est. Code §§ 1155.051 (Attorney Ad Litem), Tex. Est. Code § 1204.002 (Attorney Ad Litem in final account), Tex. Est. Code

§ 1054.055 (Guardian Ad Litem) Tex. Est. Code §§ 1202.102 (Restoration/Modification)), estate (Tex. Est. Code § 53.104), heirship (Tex. Est. Code § 202.009), and trust (Tex. Prop. Code §115.014) proceedings.

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

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

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

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;

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

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

To apply these factors, a reviewing court "may draw upon the common knowledge of the justices and their experience as lawyers and judges to view the matter in light of the evidence and the amount in controversy." *Land Rover v Hinojosa*, 2006 Tex Lexis 1264 (Tex. 2006); *Borden, Inc. v. Martinez*, 19 S.W.3d 469, 471 (Tex. App.-San Antonio 2000, no pet.).

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

G. Evidence Required: However, the court cannot adjudicate the reasonableness of attorney's fees on judicial knowledge without the benefit of evidence. *Bullock v. Foster Cathead Company*, *supra*; *Mills v. Mills*, *supra*. The detailed billing records supply such evidence.

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

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

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

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

If the ad litem engages in work more appropriate for the plaintiff's attorney and beyond the scope of the ad litem's role, such work is non-compensable. *Goodyear, supra* at 582-585. The burden is on the ad litem to ensure that the services performed do not exceed the scope of the role assigned. *Ford Motor Co v Garcia*, 363 S.W.3d 573 (Tex. 2012); *Ford Motor Co v Chacon*, 2012 Tex. LEXIS 557 (Tex. 2012).

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

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

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

Dunlop, supra. Reimbursement may be allowed for research to address: 1) novel legal questions raised by opposing counsel or 2) questions posed by the Court. 2. **PREPARATION OF FEE APPLICATION, FEE HEARINGS, APPEALS:** Preparing and defending a fee application at a hearing or on appeal promotes the ad litem's interests, not those of the client. Time expended in such activities are not reimbursable. *Goodyear, supra* at 587-593; *Holt Tex., Ltd. v. Hale*, 144 S.W.3d 620 (Tex. App. San Antonio 2004, no pet.) *Guardianship of Glasser*, 297 S.W.3d 369 (Tex. App. San Antonio, 2009, no pet.).

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

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

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

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

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

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

A trial court abuses its discretion when it awards compensation for a Guardian Ad Litem's non-necessary activities or where the ad litem performs services beyond the scope of the appointment. *Ford Motor Company v. Stewart, Cox, and Hatcher*, 2013 Tex. LEXIS 69 (Tex. 2013) In *Guardianship of Vavra*, 365 S.W.3d 476 (Tex. App. Eastland 2012, no pet.), the appeals court held that, where the ad litem did not even meet with the proposed ward, it was error to award any fees.

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

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

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

P. Private-Pay Cases: When an ad litem can be compensated from a solvent estate, the Court’s award of reasonable attorney’s fees begins with the Court’s determination of whether the representation reasonably required of (and actually provided by the ad litem) is “typical” or “normal.” The court’s analysis is based on the “Garcia” factors (*supra*) as well any unusual circumstances peculiar to probate

and guardianship. These factors determine the extent to which the fee allowed should be more than, equal to, or less than the typical or normal fee. In general, ad litem fees are less than the fee of the applicant’s attorney unless special factors are present.

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

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

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

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

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

S. Do Not Bill For:

1. CONSULTATIONS WITH COURT STAFF regarding procedural questions unless the court staff has specifically requested information to be provided not ordinarily contained in properly drafted pleadings or if the fee petition reveals special circumstances requiring the attorney to seek guidance from the Court.

2. TELEPHONE CALLS inquiring about the status/location of paperwork with probate court staff or the Clerk’s office. Attaching a self-addressed, stamped envelope to all applications and proposed orders (with copies to be file-marked and conformed) coupled with payment of any required filing and posting fees will help ensure attorneys receive heir conformed copies of submitted orders. This will reduce or eliminate the necessity for calls to the Clerk’s office to check on the status of a particular order.

3. PORTAL-TO-PORTAL TIME PLUS MILEAGE!

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

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

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

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

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

W. Specific Areas of Concern on Fee Applications:

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

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

Pointer 2: If you, as Attorney Ad Litem, require the Applicant to jump through an inordinate number of hoops before you will consent to a settlement, the court may not share your views as to whether your

actions on behalf of your client were both reasonable and necessary.

2. NEVER FILE FEE APPLICATIONS AS CLAIMS: Despite the dicta in the case of *Guardianship of Fortenberry*, 261 S.W.3d 904 (Tex. App. Dallas 2008, no pet.), fee applications should be filed as separate pleadings. Requests for fees should never be "imbedded" in some other pleading. Fee applications should not be filed *as claims against the estate unless* the estate is insolvent or the Guardian has indicated they will refuse to pay when application is made. Why take the chance that you may be caught in the claims process and have to file suit for your fees when you can simply apply for the fees and meet any questions head-on? *In re Archer*, 2004 Tex. App. LEXIS 327 (Tex. App. San Antonio 2004, pet. denied)

XII. HEIRSHIP PROCEEDINGS

For a thorough discussion of the duties and responsibilities of the Attorney Ad Litem in an heirship determination, see *the Intestacy Manual* https://www.tarrantcounty.com/content/dam/main/probate-courts/probate-court-1/Documents/The_Intestacy_Manual_2016.pdf?linklocation=Button%20List&linkname=The%20Intestacy%20Manual

XI. CLOSING THOUGHTS

A. Removal of an Ad Litem

1. An ad litem may be removed by the trial court, but only after proper procedures are followed and a sufficient record made showing some principled reason to justify the removal or replacement exists. *Coleson v. Bethan*, 931 S.W.2d 706 (Tex. App. Fort Worth 1996, no pet.).

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

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

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

A. **Motion to Show Authority:** Where perhaps the

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

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

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

B. Re-Activation of the Ad Litem

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

1. RE-ACTIVATION TO INVESTIGATE: When the guardian himself or herself becomes incapacitated, resigns, or is otherwise removed for misfeasance, malfeasance or nonfeasance, the court may either reactivate the ad litem for investigative and monitoring purposes or appoint the ad litem as the successor guardian. (Tex. Est. Code §§ 1203.101ff). This is often preferable to the immediate appointment of a successor guardian because of the qualified judicial immunity of the Guardian Ad Litem. (Tex. Est. Code §1054.056).

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

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

4. MODIFICATION OR RESTORATION: When an informal request is made to **modify the guardianship or restore the ward's capacity** in whole or in part under Tex. Est. Code §1202ff, the court may appoint a

Guardian Ad Litem to investigate Tex. Est. Code § 1202.054. The court is required to notify the Ward by letter within thirty days that an investigator or guardian ad litem has been appointed and provide contact information. Tex. Est. Code § 1202.054(b-2). If the proceeding goes forward, the court shall appoint an Attorney Ad Litem to represent the ward. Tex. Est. Code §1202.101. Additionally, the ward is authorized to retain counsel in such event. Tex. Est. Code § 1202.103. *Guardianship of Croft*, 2016 Tex. App. LEXIS 13437 (Tex. App. Houston- 14th, December 20, 2016, no pet.). See *supra* for the discussion regarding Supports and Services and the ability of the Ward to make decisions regarding residence.

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

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

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

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

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

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

D. Real Continuing Education - Traditionally, ad litem certification training ends with the process of appointing the guardian. However, it is not uncommon for an ad litem to be asked by the newly-

appointed guardian to represent the guardian to help with the administration of the guardianship.

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

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

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

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

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

<u>Instead of:</u> mentally retarded mental retardation the mentally retarded disabled/ developmentally disabled mentally disabled mentally ill/ mentally retarded handicapped cripple/ crippled hearing impaired/ hearing loss audiologically impaired auditory impairment speech impaired	<u>Consider:</u> intellectual or developmental disabilities persons with intellectual disabilities persons with disabilities persons with developmental disabilities persons with mental illness persons with intellectual disabilities deaf/ persons who are deaf hard of hearing persons who are hard of hearing
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Note that statutes and resolutions aren't invalid for failure to use the

preferred terms.

John Oliver’s Guardianship Rant:

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

GUARDIANSHIP SUMMARY

OVERVIEW

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

INTRODUCTION

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

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

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

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

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

I. WHAT IS A GUARDIANSHIP?

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

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

1. a minor;
2. an adult who, because of a physical or mental condition, is substantially unable to:
 - a. provide food, clothing, or shelter for himself or herself;

- b. care for the person’s own physical health; or
- c. manage the person’s own financial affairs; or
3. a person who must have a guardian appointed for the person to receive funds due the person from a governmental source.

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

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

D. Guardian A guardian is the person who accepts the Court’s appointment to be responsible for making decisions for the Incapacitated Person. A guardian has only those powers specified in the Order Appointing Guardian. Generally, two types of guardians exist:

1. Guardian of the Person – A guardian of the person has the:
 - a. right to have physical possession of the Incapacitated Person and to establish the Incapacitated Person’s legal domicile;
 - b. duty of care, control and protection of the Incapacitated Person;
 - c. duty to provide the Incapacitated Person with clothing, food, medical care and shelter; and
 - d. power to consent to medical, psychiatric, and surgical treatment other than the in-patient psychiatric commitment of the Incapacitated Person.

2. Guardian of the Estate – A guardian of the estate of the Incapacitated Person has the following powers and duties:

- a. to possess and manage all property of the Incapacitated Person;
- b. to collect all debts, rentals or claims that are due to the Incapacitated Person;
- c. to enforce all obligations in favor of the Incapacitated Person; and
- d. to bring and defend suits by and against the Incapacitated Person.

II. WHEN IS A GUARDIANSHIP NECESSARY?

A. Common Situations – intellectual disability, Alzheimer’s dementia, multi-infarct dementia, Down’s syndrome, Parkinson’s disease, closed head injuries, chronic mental illness, excessive short term memory loss.

B. Guardianship Not Appropriate - treatable mental illness, drug addiction, alcoholism, homelessness, spendthrifts, persons receiving only social security benefits (no Guardian of the Estate is necessary).

C. Less Restrictive Alternatives – Mandated by Tex. Est. Code § 1001.001. Court Investigators are to investigate the circumstances of each application to determine if a less restrictive alternative to guardianship is available. In counties without a Court Investigator, the attorney ad litem for the Incapacitated Person should examine these alternatives. A list of some of the most common Less Restrictive Alternatives is attached to this paper.

III. STARTING A GUARDIANSHIP

A. Courts Statutory Probate Courts, County Courts at Law and County Courts (in that order) have jurisdiction of guardianship cases.

B. Attorneys Most Courts will allow only attorneys to file a guardianship application. In an ideal situation, a concerned family member will contact an attorney to file an application to be appointed as guardian of an Incapacitated Person.

C. Court Initiated Guardianships - The Texas Estates Code provides that “if a Court has probable cause to believe that a person domiciled or found in the county in which the Court is located is an incapacitated person, and the person does not have a guardian in this state, the Court shall appoint a guardian ad litem or a court investigator to investigate and

file an application for the appointment of a guardian of the person or estate, or both, of the person believed to be incapacitated.” Tex. Est. Code § 102.001.

In Tarrant County, the Courts require an information letter and a doctor’s letter to establish probable cause. If the Incapacitated Person’s incapacity is intellectual disability, the Court must be provided with a Determination of Intellectual Disability (DID) pursuant to Tex. Est. Code § 1101.104. This section states that if the basis of the Proposed Ward’s incapacity is intellectual disability, a physician or psychologist shall conduct an examination according to the rules adopted by the Texas Department of Mental Health and Mental Retardation and shall submit written findings and recommendations to the Court. This report must be based upon an examination conducted not earlier than twenty-four months before the date of a hearing to appoint a guardian for the proposed ward. Unless the Incapacitated Person is in imminent danger, Court-Initiated Guardianships take at least 4 to 6 weeks from the date the Court receives the proper letters.

D. Social Worker Involvement

1. Adult Protective Services If there is concern that an adult is being abused, exploited or neglected, Adult Protect Services should be called (1-800-252-5400). APS sends a worker to investigate. If APS believes a guardianship is necessary, the worker will take a doctor to examine the Incapacitated Person. If no emergency action is necessary, APS should make a referral to the Texas Health and Human Services Commission for a guardianship investigation.

2. Nursing Home and Hospital Social Workers Social Workers at nursing homes and at hospitals have also used the court initiated guardianship procedure to begin the guardianship process for clients or patients who are Incapacitated Person. Hospital discharge planners should determine if the patient is an IP as soon as possible since the procedure may take a while. Stating that the **Incapacitated Person** will be in imminent danger when discharged is not considered imminent danger by most courts.

E. Guardian Appointment Process

1. An Application for Guardianship is filed by a private attorney, guardian ad litem or court investigator. Only attorneys can file applications.

2. The Sheriff or Constable personally serves the Incapacitated Person with a copy of the Application.

3. The Court appoints an Attorney Ad Litem to represent and advocate for the Incapacitated Person.

4. The known relatives of the Incapacitated Person must receive statutory notice of the application.

5. Unless the application is for the appointment of a temporary guardian, the guardianship cannot be established until the Monday following ten days from the date the Incapacitated Person is personally served.

6. The Attorney ad litem must personally visit the Incapacitated Person and determine if the Incapacitated Person wants to contest the guardianship.

7. The applicant's attorney must file a doctor's letter with the court which states that the Incapacitated Person is incapacitated and generally describes the nature of the incapacity.

8. A hearing date is set with the Court. The Incapacitated Person must attend the hearing unless the Court determines that it is not in the best interests of the Incapacitated Person to attend.

9. The Judge or jury hears testimony and decides if a guardianship is necessary, what powers the guardian should have, how the Incapacitated Person's rights should be limited and whether the person seeking to be appointed guardian is suitable.

10. The Judge then signs an Order Appointing Guardian. The Guardian must file an Oath and Bond in order to qualify. The Clerk then issues Letters of Guardianship to the guardian.

IV. WHO WILL SERVE AS GUARDIAN? - Tex. Est. Code §§ 1104.051ff & 1104.101 provides guidance for the priority of persons seeking to be appointed guardian.

A. Guardian of a Minor

1. If the parents live together, both parents are the natural guardians of the person of the minor children by the marriage. One of the parents is entitled to be appointed guardian of the children's estates. If the parents disagree, the court shall appoint the parent who is better qualified to serve. If the parents do not live together, the court shall appoint a guardian considering only the best interests of the child or children. If one parent is deceased, the surviving parent is the natural guardian and entitled to be appointed guardian of the estate for the children. Tex. Est. Code § 1104.051.

2. If the minor has no parents, or no parent is suitable for appointment,

- a. the court is to appoint a guardian designated by a deceased parent in a will or written declaration. Tex. Est. Code § 104.053
- b. if there is no designation by will or written declaration, and two or more eligible persons are equally entitled to be appointed guardian, the priority of

appointment is as follows (Tex. Est. Code § 1104.052):

1. the nearest of kin ("ascendant") in the direct line of the minor, considering the minor's best interests; or
 2. the nearest of kin of the minor, considering the minor's best interests; or
 3. a qualified person.
- c. If the minor is at least 12, the minor may select a guardian in writing, subject to the court's finding that it is in the best interest of the minor. Tex. Est. Code § 1104.054.

B. Guardian of an Adult

The overriding concern of the court is to consider the best interests of the Incapacitated Person. If two or more eligible persons are equally entitled to be appointed guardian, the priority of appointment is as follows (Tex. Est. Code § 1104.102):

- a. the spouse of the Incapacitated Person;
- b. the nearest of kin, considering the minor's best interests; or
- c. an eligible person who is best qualified to serve.

V. HOW IS A GUARDIANSHIP SUPERVISED?

A. Annual Reports A guardian of the person is required to file a guardian of the person report each year concerning the Incapacitated Person's mental and physical condition and stating any change of the residence of the Incapacitated Person or guardian. A guardian of the estate is required to file an annual account stating all receipts, disbursements, cash on hand, and assets being administered. Failure to file either of these reports may lead to fines and/or removal.

B. Court Visitor Program Each statutory probate court is required to establish a Court Visitor Program. As a part of this program a visitor makes an annual visit on each Incapacitated Person who is the subject of a guardianship. The Court Visitor personally visits the Incapacitated Person and the guardian and reports his or her findings and conclusions to the Court concerning the social and intellectual functioning of the Incapacitated Person as well as living conditions. If the Court Visitor recommends an increase or decrease in the guardian's powers or removal of the guardian or guardianship, the Court will appoint a Court Investigator or Guardian ad litem to investigate, and, if necessary, to file a petition to modify the guardianship order or to remove the guardian or guardianship.

C. Annual Determination Each Court is required to make an annual review and determination of whether a guardianship should be continued, modified or terminated. In making this annual

determination, the Court reviews the Court Visitor report and the guardian of the person report.

Rev. July 2017

POLICY FOR COURT INITIATED GUARDIANSHIPS

If a court has probable cause to believe that a person domiciled or found in the county in which the court is located is an incapacitated person, and the person does not have a guardian in this state, the court shall appoint a Guardian Ad Litem or court investigator to investigate the person’s circumstances to determine whether: (1) the person is an incapacitated person; and (2) a guardianship is necessary. Tex. Est. Code § 1102.001

1. The court must receive a **fully completed** Information Letter from a concerned party such as Adult Protective Services, a hospital, a nursing home or a relative or friend of the Proposed Ward. This letter is a request for the court to initiate a guardianship proceeding and should not be confused with an Application for Appointment of a Guardian which must be filed by an attorney. **This should be furnished on the form prescribed by the court (included). All issues on the form must be addressed.**

2. The Court must be supplied with a letter or certificate describing the Proposed Ward’s incapacity from a physician (M.D. or D.O.) licensed to practice medicine in Texas. This must be furnished on the form prescribed by the court (included). All issues on the form must be addressed. **If the basis for incapacity is Intellectual Disability, a Determination of Intellectual Disability (DID) must be furnished.**

3. Assignment to a Court - The Information Letter and Doctor’s Certificate should be mailed to:

_____ Court

(Requests may be sent to the court by fax at ___/___-____, but must be followed by originals.)

Once these documents are received, the case will be assigned to _____.

4. Upon the motion of the Court Investigator or upon the court's own motion, the court will then either appoint a Guardian Ad Litem or the Court Investigator to investigate and, if necessary, file an Application for the Appointment of a Guardian of the Person or Estate, or both, of the Proposed Ward.

COMPLETION OF COURT-INITIATED GUARDIANSHIPS MAY TAKE 4 TO 6 WEEKS FROM THE DATE COURT RECEIVES THE PROPER DOCUMENTATION. ACTUAL TIME TO A HEARING REQUIRES AT LEAST 20 TO 45 DAYS

4. The duties of a Guardian Ad Litem or the Court Investigator upon such appointment are as follows:

- a. personally interview the Proposed Ward as soon as possible;
- b. interview the person who filed the Information Letter concerning the Proposed Ward as well as the known relatives/friends of the Proposed Ward;
- c. consider whether less restrictive alternatives to guardianship are advisable;
- d. consider the necessity of filing for a temporary guardianship (see 5. below);
- e. as soon as possible, file an Application for Appointment of a Guardian (if necessary) and prepare an Order Appointing Attorney Ad Litem;
- f. set the case for a hearing and call the Probate Clerk’s Office, to ensure that Proposed Ward is properly served and that the citation has been on file for a sufficient amount of time prior to hearing;
- g. locate a person to serve as Guardian or contact _____ or the Texas Health and Human Services Commission. (amend the Application, if necessary) ;
- h. file a Report of Ad Litem with the Court at least a week prior to the hearing date (if the guardianship will *not* be established, file a Final Report by way of explanation);
- i. notify family members and file your affidavit as required by Tex. Est. Code § 1051.104;
- j. visit with the Attorney Ad Litem concerning the Application;
- k. prepare Proof of Facts, Bond, Oath and Order and attend the hearing on the Application;
- l. assist the Guardian in obtaining his or her bond and letters, discuss the guardian’s statutory duties and responsibilities, and (if necessary) assist in preparation of an Affidavit of Inability to Pay Costs.

5. If the Guardian Ad Litem or Court Investigator files an Application for Appointment of a Temporary or Permanent Guardian, the Court will appoint an Attorney Ad Litem for the Proposed Ward.

6. The duties of the Attorney Ad Litem are as

follows:

- a. review the Application, certificates of physical, medical and intellectual examination and all the relevant medical, psychological and intellectual testing records of the Proposed Ward;
- b. personally interview the Proposed Ward;
- c. discuss with the Proposed Ward the laws and facts of the case, the Proposed Ward's legal options regarding disposition of the case and the grounds on which a guardianship is sought;
- d. ascertain whether the Proposed Ward wishes to oppose the proceedings (if the Proposed Ward is unable to communicate, the Attorney Ad Litem is to act in best interest of the Proposed Ward).
- e. file an Answer that states whether the Proposed Ward objects to the guardianship or the Proposed Guardian, or both as soon as possible;
- f. visit with the Guardian Ad Litem or the Court Investigator concerning the Application;

g. represent and advocate on behalf of Proposed Ward at the hearing, bearing in mind the requirements of the Texas Disciplinary Rules of Professional Conduct 1.02(g) which states:

"A lawyer shall take reasonable action to secure the appointment of a Guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client."

h. file an Application for Payment of Fees and Order (form included) and report on the need for continuation of the appointment or discharge of the Attorney Ad Litem at the hearing.

Questions concerning these procedures should be addressed to the following:

Judge _____
_____ Court

**Re: Suggestion of Need for Guardian or Need for Investigation
of Circumstances under § 1102.001, Texas Estates Code**

Dear Judge:

I hereby request the Court to investigate the need for a guardian for or the circumstances of the following person:

Name: _____ Phone: _____
Address: _____ Birthdate: _____
_____ SSN: _____
Race: _____ Driver's License: _____

The primary reason I am requesting this investigation is (nature of incapacity):

This person is currently located in a: private residence nursing home hospital
 Other (Address or Name) _____

I am: Name (printed) _____
Address: _____
Daytime ph: _____ Pager _____
e-mail: _____

My relationship to the person for whom the investigation is requested:
 a family member (relationship) _____
 a social worker in a: hospital nursing home governmental facility
 a friend a doctor

YES NO There is danger to the physical health or safety of this person or to the property or
assets of this person unless immediate action is taken. If "YES", explain:

YES NO The danger is imminent. If "YES", explain:

YES NO I have contacted the Texas Department of Family and Protective Services (800-
252-5400). If "YES," the name of the caseworker is: _____
pager: _____
date contacted: _____

To my knowledge, this person:

- YES NO is a resident of _____ County, Texas
- YES NO is located in _____ County, Texas
- YES NO has a Guardian in Texas. (Parents are the natural guardians of children under 18.)
- YES NO has executed a Power of Attorney. If "YES," to whom was it given?

Name: _____ Phone: _____
 Relationship: _____ Social Security Number: _____
 Address: _____

- is a minor is an adult
- cannot provide food, clothing, or shelter for him/herself.
- cannot care for the individual's own physical health.
- cannot manage the individual's own financial affairs.

The person has the following property :(include Real Property, Cash, Bank Accounts, Certificates of Deposit, Stocks, Securities, other investments, automobiles, etc.)

Description	Value
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
TOTAL	_____

MONTHLY INCOME: (Show sources and amounts per month)

Description	Value
Social Security (amount received per month)	_____
Veterans Benefits (amount received per month)	_____
_____	_____
_____	_____
TOTAL	_____

Family Members: All immediate family members, living or deceased, must be listed. Attach additional sheets as needed.

Name: _____ Living Deceased Age: _____
 Relationship: _____ YES NO Willing to serve as Guardian?
 Address: _____ If "YES," Social Security Number: _____
 Phone: _____

Name: _____ Living Deceased Age: _____
 Relationship: _____ YES NO Willing to serve as Guardian?
 Address: _____ If "YES," Social Security Number: _____
 Phone: _____

Name: _____ Living Deceased Age: _____
 Relationship: _____ YES NO Willing to serve as Guardian?
 Address: _____ If "YES," Social Security Number: _____

Physician's Certificate of Medical Examination

Revision October 2016

In the Matter of the Guardianship of _____,
an Alleged Incapacitated Person

For Court Use Only
Court Assigned: _____

To the Physician

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

1. General Information

Physician's Name _____ Phone: (____) _____
Office Address _____

YES NO I am a physician currently licensed to practice in the State of Texas.

Proposed Ward's Name _____
Date of Birth _____ Age _____ Gender M F
Proposed Ward's Current Residence: _____

I last examined the Proposed Ward on _____, 20____ at:

a Medical facility the Proposed Ward's residence Other: _____

YES NO The Proposed Ward is under my continuing treatment.

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

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

2. Evaluation of the Proposed Ward's Physical Condition

Physical Diagnosis: _____

a. Severity: Mild Moderate Severe

b. Prognosis: _____

c. Treatment/Medical History: _____

3. Evaluation of the Proposed Ward's Mental Functioning

Mental Diagnosis: _____

a. Severity: Mild Moderate Severe

b. Prognosis: _____

c. Treatment/Medical History: _____

If the mental diagnosis includes dementia, answer the following:

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

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

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

d. Possibility for Improvement:

YES NO ---- Is **improvement in the Proposed Ward's physical condition and mental functioning possible?**

If "YES," after what period should the Proposed Ward be reevaluated to determine whether a guardianship continues to be necessary? _____

4. Cognitive Deficits

a. The Proposed Ward is oriented to the following (check all that apply):

- Person Time Place Situation

b. The Proposed Ward has a deficit in the following areas (check all areas in which Proposed Ward has a deficit):

- Short-term memory
- Long-term memory
- Immediate recall
- Understanding and communicating (verbally or otherwise)
- Recognizing familiar objects and persons
- Solve problems
- Reasoning logically
- Grasping abstract aspects of his or her situation
- Interpreting idiomatic expressions or proverbs
- Breaking down complex tasks down into simple steps and carrying them out

c. YES NO -- The Proposed Ward's periods of impairment from the deficits indicated above (if any) vary substantially in frequency, severity, or duration.

5. Ability to Make Responsible Decisions

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

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

6. Developmental Disability

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

If "NO," skip to number 7 below.

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

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

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

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

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

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

“DETERMINATION OF INTELLECTUAL DISABILITY”

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

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

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

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

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

7. Definition of Incapacity

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

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

8. Evaluation of Capacity

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

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

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