THE
AD LITEM MANUAL
FOR
2014

FOR
GUARDIANSHIP & HEIRSHIP PROCEEDINGS
IN
TEXAS PROBATE COURTS

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FORT WORTH, TEXAS

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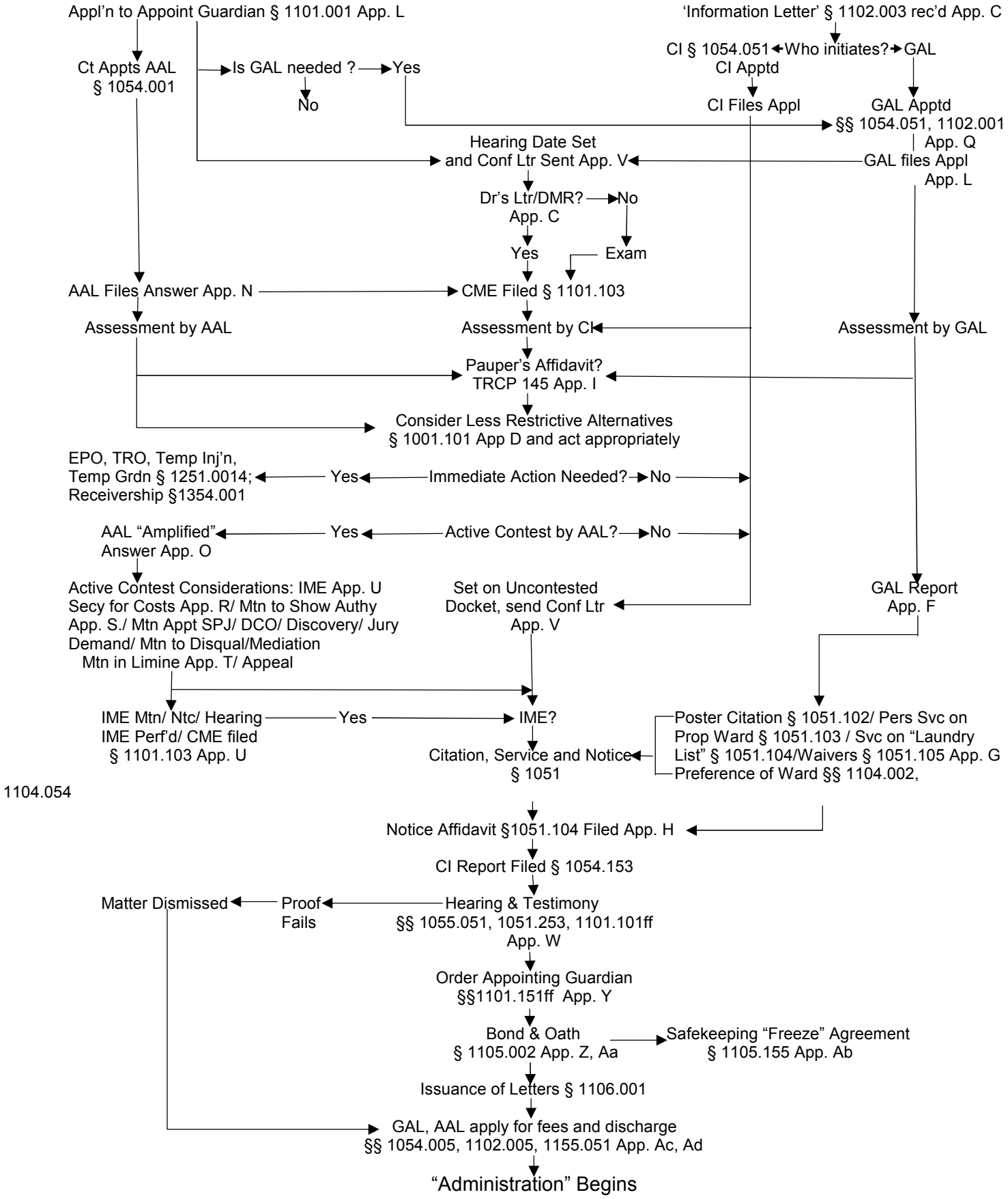
GUARDIANSHIP
(From the Ad Litem's Perspective)



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I. INTRODUCTION

The purpose of this manual is to help the reader to:

1. become familiar with the types of proceedings in which ad litems may be appointed;
2. appreciate the varying roles of the ad litem in each area;
3. understand the requirements of fulfilling the responsibilities of these varying roles in the different proceedings;
4. gain some insight in how to conduct one's self in non-contested hearings and in dealing with court personnel; and
5. learn some specifics on fee applications.

This manual only briefly addresses the contested aspects of a guardianship. Excellent treatments of this topic may be found in the State Bar of Texas Seminars on

- Advanced Estate Planning and Probate (Litigation Breakout Section)
- Advanced Guardianship Course
- Fiduciary Litigation Course

Additionally, every other fall, the Tarrant County Probate Bar Association sponsors a Probate Litigation Seminar in Fort Worth.

For a very insightful commentary on dealing with ad litems, see Hopper, Craig, *Call in the Sheriff: Handling Overzealous Ad Litems and Other Outlaws*, State Bar of Texas Advanced Guardianship Course 2010.

A. Initial Query:

Why does it seem that Judges handling probate matters are so concerned about how the guardianship is conducted?

By definition, probate courts are where people seek authority to handle the affairs of others who cannot act for themselves. Personal Representatives, even when bonded, and represented by good counsel, still sometimes commit acts of misfeasance, malfeasance or nonfeasance. (They steal.)

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 litems 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.

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. Certification is by the State Bar of Texas of successful completion of a State Bar of Texas-sponsored three hour CLE course on guardianship law and procedure. TEX. EST. CODE § 1054.201. These 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. If a certificate has expired, a new certificate must be obtained for an attorney to be eligible for appointment as an Attorney Ad Litem. TEX. EST. CODE § 1054.203. 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.

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. hist.), it was held to be error for the trial court to appoint an uncertified attorney under Tex. Prob. Code § 647A (now TEX. EST. CODE §1054.201) to ensure that the ward's interests were protected. In *Guardianship of Wehe,* 2012 Tex. App. LEXIS 8931 (Tex. App. Corpus Christi, October 25, 2012, no pet.), an attorney lacking the Attorney Ad Litem certification pursuant to TEX. PROB. CODE §§ 646A & 647A (now TEX. EST. CODE §1054.201ff), had no authority to represent the Ward and lacked standing to bring an appeal.

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

C. Liability and Immunity:

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) where the court upheld similar statutory immunity for a Guardian Ad Litem under the Texas Family Code.

In addition, TEX. RULES 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. RULE CIV. PROC. 44.

II. AREAS IN WHICH AD LITEMS ARE APPOINTED

NOTE: ***Disregard*** *Government Code §74.092, establishing a requirement for a master Attorney Ad Litem list for the county. By it own terms, this provision does not apply to appointments made pursuant to the Texas Probate (now Estates) Code. Acts 2009, 81st Leg., R.S., Ch. 1224, Sec. 1, eff. September 1, 2009.*

Also Note: There is no particular right to an appointed counsel in a probate or guardianship proceeding based merely on indigency. *In Re: Logan*, 2003 Tex. App. LEXIS 4499 (Tex. App Texarkana, May 28, 2003)(wr. denied)

A. Appointment of a Guardian

1. ATTORNEY AD LITEM

A. Defined TEX. EST. CODE § 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."

The appointment of an Attorney Ad Litem is mandatory in every application for the appointment of a guardian.

Also, if a guardianship management trust under TEX. EST. CODE § 1301 is to be created, with or without the creation of a guardianship, an Attorney Ad Litem must be appointed. *Ibid.*

B. Role: 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 dism'd). 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, wr. ref'd n.r.e.)

1. 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. The legislative intent of the guardianship statutes, as reflected in TEX. EST. CODE § 1001.001, is that *a less restrictive alternative, if available, is to be followed.*

2. "*But I don't want a guardian*" – (Who does?) - 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 had the purple stains on his face and hands. (Think: exploding dye packet/ 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)

C. Duties TEX. EST. CODE § 1054.004 and other relevant sections:

1. Review the Application for Letters of Guardianship, the certificates of physical, medical and intellectual examination and all the relevant financial, medical, psychological and intellectual testing records of the

Proposed Ward;

Note: Try to make sure there are some medical records 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.

2. Personally interview the Proposed Ward within a reasonable time before the hearing;

3. 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;

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 that states whether the Proposed Ward objects to the guardianship, the proposed guardian, or both, as soon as possible (Appendices M, N) (*see below regarding e-filing*);

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 suggesting mediation or other appropriate ADR technique;

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 which states:

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, conservator, or guardian.

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, unless otherwise prohibited by law.

10. File an application for payment of fees and an order (Appendices Ab, Ac).

D. Access to Medical Records: The order appointing the Attorney Ad Litem should specifically authorize the Attorney Ad Litem to be given access to all of the relevant financial, medical, psychological and intellectual testing records of the proposed incapacitated person. (See notes on Underlying Medical Records, *supra*, and HIPAA *infra*)

2. GUARDIAN AD LITEM

A. Role: Assess & Recommend - The classic role 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.

Role: 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 a 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.).

B. Basic Optons: Jiminy Cricket or Quarterback?

1. § 1101.001 situation – "Jiminy Cricket" - If 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.

2. § 1102.001 situation – "The Quarterback" - If there is no other applicant on the scene, you will most likely have to take the ball and run with it: act as the applicant (if that is in the proposed ward's best interest) and consider all the possibilities available.

MAJOR CAVEAT: 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.).

B. 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.

TEX. EST. CODE § 1054.051, provides 1) for the discretionary appointment of a Guardian Ad Litem to represent the best interests of an incapacitated person in a guardianship proceeding, 2) that they shall receive reasonable compensation for their services, 3) that the Guardian Ad Litem is an officer of the court, 4) that the fees and expenses of the Guardian Ad Litem are costs of court and 5) if the court has to appoint a Guardian Ad Litem under § 1104.354 to keep a person who has brought a suit affecting the proposed ward's welfare from being otherwise disqualified, the Attorney Ad Litem may also serve as that Guardian Ad Litem.

Under TEX. EST. CODE § 1102.001, when it comes to the attention of the court that a person in the county is probably incapacitated and potentially in need of a guardian, the court shall appoint either its Court Investigator or a Guardian Ad Litem to investigate the need for the appointment of a guardian of the person and/or estate as necessary and then to file an application for the appointment of a guardian either of the person and/or estate as indicated.

C. Duties TEX. EST. CODE §§ 1054.054, 1102 and various other sections relating to the role of the Applicant in a guardianship proceeding:

1. Review all 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 above re: underlying medical records.

2. Personally interview the proposed ward as soon as possible;
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. Consider whether less restrictive alternatives to guardianship are appropriate (Appendix D);
5. Consider the necessity of temporary guardianship or other extraordinary relief (EPO, Receivership);
6. As soon as possible, file an application for appointment of a guardian (if necessary) and prepare an order to appoint an Attorney Ad Litem (as applicable);
7. Set the case for a hearing, send a letter confirming the hearing to all parties (Appendix U) and ensure that proposed ward is properly served and that the return of citation has been on file for a sufficient period to 'ripen';
8. If appropriate, complete and file an Affidavit of Inability to Pay Costs (as applicable) (see Appendix I);
9. Consider suggesting mediation or some other appropriate alternate dispute resolution technique;
10. Locate and/or recruit a person to serve as guardian or contact your local guardianship program (amend the Application, if necessary);
11. File a Report of Guardian Ad Litem (Appendix F) 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) (*see below regarding e-filing*);
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. Notify 'laundry list' as required by TEX. EST. CODE § 1051.104 and file the required affidavit. (Appendix H);
14. Visit with the Attorney Ad Litem concerning the Application (as applicable);
15. Set a hearing on application;
16. Review the report of the Court Investigator (if there is one);
17. Prepare Proof of Facts, Order, Personal Surety Bond & Oath (see Appendices W, Y, Z & Aa).
18. Attend the hearing on application and, if the judge uses handouts regarding the responsibilities of the Guardian (Appendix Ag), go over the duties and responsibilities;
19. Assist the guardian in obtaining his or her bond and letters; and
20. File an Application for Payment of Fees and Order (Appendices Ad, Ae).

D. Access to Medical Records: The order appointing the Guardian Ad Litem should specifically authorize the Guardian Ad Litem to be given access to all of the relevant financial, medical, psychological and intellectual testing records of the proposed incapacitated person. (See notes on Underlying Medical Records, *supra*, and HIPAA *infra*)

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 TPC § 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 § 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 § 360ff 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. Trust 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. 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.

L. 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.

M. 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, §§ 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.

N. 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.

O. 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.

P. 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.

Q. Judicial Bypass Proceedings – Guardian Ad Litem and Attorney Ad Litem TEX. FAMILY 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.

R. Family Code Appointments – Guardian Ad Litem and Attorney Ad Litem TEX. FAMILY CODE §§107.001 to 107.016 govern the appointment and certification for both guardians ad litem and attorneys ad litem under the Family Code.

S. "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.

T. "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. ELECTRONIC RESOURCES - Learn the Law/Embrace the Technology

Effective January 1, 2014, a program of mandatory electronic filing of court documents began. By July 1, 2016, it will be in effect throughout Texas.

A. Electronic Resources: There is no longer any excuse to be without the technology and with it, the information you need. Most of the resources are free (or very inexpensive) if you have internet access. These resources include:

1. THE AD LITEM MANUAL: The most current digital version of this manual may be found at: http://tcweb.tarrantcounty.com/epc01/lib/epc01/Ad_Litem_Manual_2014.pdf
2. DIGITAL ESTATES CODE: The latest version of the Texas Estates Code (December 2013) is now available from Michael Koenecke's website - complete with the Thumb-tabbed Index included in this paper. (Appendix Am)) http://koeneckelaw.com/public
3. An ONLINE VERSION of the Texas Estates Code is also available (along with all other Texas statutes) at the Texas Legislature Online website: 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 November 3, 2013, as well as an excellent ***conversion table*** from the Probate Code to the Estate Code. http://www.professorbeyer.com/Estates_Code/Texas_Estates_Code.html
Watch for updates. www.professorbeyer.com
5. TEXAS LEGISLATURE ONLINE: also has analyses of the bills for the last several legislative sessions which often show quite a bit of the legislative intent. http://www.legis.state.tx.us/
6. TEXAS RULES OF CIVIL PROCEDURE: at http://www.supreme.courts.state.tx.us/rules/trcphome.asp.
7. Glenn Karisch's TEXAS PROBATE WEBSITE:

The Best Probate Site Ever. Period. If you are not one of the 1,300+ members of the Texas Probate listserve, you are not serious about probate law. http://www.texasprobate.com/

8. CLERK'S PUBLIC WEB ACCESS: Much basic information about probate filings may be found on the Web Browsers of the county clerks of the larger counties: Dallas, Harris, Travis, Fort Bend.

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

B. It's All Geek To Me!: With the advent of the iPhone4 and iPad, lawyers have the world and their office at their fingertips. A very short list of important apps and sites (not probate-specific, but valuable):

1. THE TEXAS LEGAL APP: the State Bar of Texas Computer and Technology Section has a "killer app" for every Texas lawyer. It gives you handheld access to selected state and federal statutes and regulations and rules. Computer Section membership is required to download the app. You can access the details at http://www.sbot.org/blog/membership-2/

2. APPS: Goodreader/ Evernote/ Dropbox/ Pages/ Fastcase/ Penultimate/ PDFpen/ Dragon Dictation/ Trialpad/ Motion-X GPS Drive/ Google Earth/ Scanner Pro/ Redlaser/ Tripit

3. LEGAL BLOGS: iphonejd.com; technolawyer.com; walkingoffice.com; attorneyatwork.com; ipad4lawyers.

4. VIDEOTELECONFERENCE!: The courts now recognize the use of videoteleconferencing for remote depositions and court appearances. Oovoo.com allows up to 12 people at a time on the screen. www.oovoo.com/ tango.me/ skype.com/ gotomeeting.com/ Adobe Connect (secure)/ Webex (secure).

Note on Sensitive Data: On December 13. 2013, that the Texas Supreme Court promulgated rules imposing restrictions on filers to remove ("redact") "sensitive data" (as defined in the rules) from all documents filed with the clerk. This will involve eliminating the specified identifying number from all forms of identification, including social security or other taxpayer-identification numbers; all forms of financial accounts, including credit cards; and identification numbers on all government issued personal identification (driver's licenses, passports, etc.).

Expect the individual courts to develop and promulgate standing orders for their courts to further restrict access to additional data, such as Certificates of Medical Examination, Court Visitor Reports, etc.

IV. AD LITEM BOOT CAMP – PRACTICAL POINTERS

1. READ THIS MANUAL COVER TO COVER: 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.

2. GUARDIANSHIP SUMMARY: Take a minute and read Appendix A: It is a short summary, intended for the lay public, explaining the basic process of guardianship. This should help give you 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 the process.

3. KNOW WHERE YOU ARE: On page 2 is a flowchart. It is designed to be a map – a visual guide to the application and appointment process. Study it often to get your bearings.

4. FUNDAMENTALLY UNDERSTAND YOUR ROLE: Before you can be any good to anybody, you need to understand what you are there to do. The biggest problems that arise for an Ad Litem is to misapprehend the job description and then to act outside the scope of the appointment. This invariably leads to problems at the end of the proceeding when payment for services is sought. (*infra*).

Consider again the basic role of each type of appointment and the responsibilities set forth by statute or court rule.

5. LESS RESTRICTIVE ALTERNATIVES: LEARNING THE ROPES - The court and the officers of the court (that would include you) are mandated to seek any less restrictive alternatives to a full guardianship if they exist and are applicable.

At Appendix D is a listing of a few dozen alternatives to guardianship with which you should become very familiar. This list is as important to you as basic anatomy is to a medical student, intern or doctor. Consult the list often to consider if anything less than a full guardianship is appropriate and to minimize, if not eliminate, the impact of a full guardianship. Some are applicable before the creation of a guardianship and others, afterward.

6. LOCAL RULES: - All the statutory probate courts (Bexar, Collin, Dallas, Denton, El Paso, Galveston, Harris, Hidalgo, Tarrant and Travis counties), have local rules 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.

Also, because the statutory probate court 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. Most of the courts will have internal operating procedures. Check the website of the court with which you will be dealing.

7. SECRETS FOR GETTING MORE APPOINTMENTS**:**

A. Answer the Telephone. When the Court Investigator is looking for a candidate for the judge to appoint as an ad litem, he or she will attempt to call you first. If you won't take the call or return the call, the chances of your being appointed go way down.

B. Pick Up the Paperwork: You will get a copy of the order appointing you and the opportunity to review the file. Read the order carefully. Make sure you are clear on what you have been appointed to do.

C. Give us a Rain Check: Let the court know if your time is not available. It is far better for you to pass on an appointment when you really don't have the time to devote to it than to have us hound you. Just let us know when you get caught up and are available.

8. 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 (Appendix P) 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.

9. 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):

A. Injunctive Relief (TRO, Temporary Injunction, TEX. R. CIV. P. 680, 681).

B. Emergency Protective Order - TEX. HUM. RES. CODE § 48.208.

C. Temporary Guardianship - TEX. EST. CODE § 1251.001 (see *infra*).

D. Receivership - TEX. EST. CODE § 885, TEX. CIV. PRAC. & REM. CODE §§ 64.001ff

E. Court-Ordered Mental Health Services - TEX. HEALTH & SAFETY CODE. §462.001, §571.001, §574.001.

F. Emergency Medical Treatment Act - TEX. HEALTH AND SAFETY CODE §773.008.

G. Surrogate Decision-Making ("SDM") –TEX. HEALTH AND SAFETY CODE §313.001-.007.

H. Medical Power of Attorney - TEX. HEALTH & SAFETY CODE §166.151.

I. Out-of Hospital DNR ("EMT-DNR")- TEX. HEALTH AND SAFETY CODE §166.081.

J. Directive to Physicians and Family or Surrogates ("Living Will") –TEX. HEALTH & SAFETY CODE §166.031.

10. TEMPORARY GUARDIANSHIPS –

A. 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 or seek a less restrictive alternative.

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.).

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

1. A sworn, written application must be filed (Appendix J).
2. An Attorney Ad Litem must be appointed;
3. The clerk must issue notice;
4. An order setting the hearing ("fiat") must be signed. (Appendix J).
5. Service of citation on the proposed ward, the Attorney Ad Litem and the proposed temporary guardian must be perfected. *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.).

C. Hearing Date: This is your one shot. 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.

D. Proof: Substantial evidence of:

1. incapacity or minority, and

2. imminent danger of serious impairment of physical health or safety or serious damage or dissipation to property.

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.

E. Duration: A temporary guardianship may not last more than 60 days unless the appointment is contested, in which case the appointment is until resolution of the contest. TEX. EST. CODE §§ 1251.052, 1251.102.

In *Guardianship of Gibbs*, 253 S.W.3d 866 (Tex. App. Fort Worth, April 17, 2008, pet. dism'd), 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).

F. Adjudication of Incapacity: The findings in the order granting a temporary guardianship are admissible as evidence on the issue of incapacity. See *Ulrickson v. Hawkins*, 696 S.W. 2d 704 (Tex. App. – Fort Worth 1985, writ ref'd n.r.e.).

G. 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.

11. 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.

12. INVESTIGATE: "WHAT'S THE STUFF?" Experienced trial lawyers know that the sooner they can determine what the real issues in a case are, the sooner they can win/settle/resolve the case.

The real reason parties (other than the Proposed Ward) contest matters in guardianship proceedings is rarely what is in the pleadings. Both the Guardian Ad Litem and the Attorney 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.

Few things will help as much as knowing all of the relevant facts. ASSUME NOTHING.

- Was the application due to an emergent medical condition or accident or possible abuse, fraud or neglect?
- Verify all facts.
- If at all possible, go to the clerk's office and review the original file.
- Review the application (does it comply fully with the statute?);
- the Doctor's letter (is it timely filed, are the conclusions hopelessly inconsistent?);
- relevant medical records of the proposed ward (is chronic overmedication a possible explanation for the proposed ward's condition?); and
- the investigator's report; 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.
- Talk to your client, the proposed ward, about the facts as explained to you.
- Discuss with the proposed ward the grounds on which guardianship is sought and the legal options available (see Appendix D for a discussion of Less Restrictive Alternatives).

- Spend some time checking out the extent of the ward's property. Consult the local tax appraisal district's records to see if the proposed ward is still record title owner of property.

- Use online searches such as the Texas Department of State Health Services searches regarding marriages and divorces: www.dshs.state.tx.us/vs/marriagedivorce/dindex.shtm. ***caveat: all counties may not be reporting 100%***

- Make an independent determination of the suitability of the proposed guardian and attempt to ascertain whether any of the items of disqualification are applicable.

Note on Representative Payees: If 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 and/or Court Auditor need to be so advised. The court has no enforcement authority with regard to these federal funds (Federal Preemption), but it is helpful, once a successor guardian is appointed, to be able to coordinate the support of the ward, particular if there is any evidence of fraud and abuse.

13. IS THE APPLICATION TIMELY? Applications should be filed immediately to stop the 120-day limitation on the Doctor's Letter from date of examination to date of *filing* (twenty-four months on a DMR: date of examination to date of the *hearing*) TEX. EST. CODE § 1101.103, 1101.104. To cover your bases, the Application can initially name the ad litem as "Applicant" and request that "any suitable person be appointed guardian of the person and, if necessary, the estate". An Amended Application can then be filed once a proposed guardian is located, the extent/lack of an estate is ascertained, etc.

The most important thing you can do as GAL to expedite your hearing is to have the Doctor's Letter in hand before the application is filed.

14. WHO PICKS UP THE TAB? – PAUPER'S AFFIDAVITS: If you are the Guardian Ad Litem and the **Applicant** has no ability to pay costs or is receiving governmental assistance based on indigency, consider filing an Affidavit of Inability to Pay Costs (a "Pauper's Affidavit") pursuant to TEX. RULES CIV. PROC 145. (Appendix I)

Note: It is now the *Applicant*, not the Proposed Ward whose inability to pay is measured. See *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 the contest, the burden is on the filer of the affidavit. *Pinchback at p.20*.

For excuses put forward in an unsuccessful appeal from denial of a pauper's affidavit, see *Guardianship of Rombough*, 2012 Tex. App. LEXIS 3716 (Tex. App. Fort Worth, May 10, 2012, no pet.).

Bulletproof: TEX. R. CIV. PROC. provides that 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).

Note (GALs): Don't muddy the water by filing or advising an applicant to file an Affidavit of Inability after the application has been filed. If it is a 'County Pay" case, it is unnecessary. If it is not, the client may refuse to pay you, using the Affidavit of Inability as a defense.

V. THE DOCTOR'S LETTER ("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*.

A. Basics: Incapacitated Proposed Ward

1. 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.

2. PHYSICIANS ONLY**:** Only "physicians" may complete a certificate of medical examination. TEX. EST. CODE § 1101.103 (a).

3. 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)

4. 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:

A. 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 and vote in a public election;

B. Summarize the proposed ward's medical history (if available);

C. Evaluate and describe the proposed ward's physical and mental condition and functional ability;

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

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

B. Basics: Intellectually Disabled Potential Ward

1. DETERMINATION OF INTELLECTUAL DISABILITY ("DID"): If the Proposed Ward is intellectually disabled (aka ***"MR"***), a Physician's Certificate alone *will not* be sufficient to appoint a guardian. Instead, the Application must also include documentation regarding intellectual disability. TEX. EST. CODE § 1101.104.

2. PHYSICIAN OR PSYCHOLOGIST: Either a physician or a psychologist may complete a DID pursuant to TEX. EST. CODE § 1101.104.

3. 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.

4. "BOOSTER SHOT" CERTIFICATE: If no DID has been done within the last two years, see if your court (and local MHMR or doctor) will allow you to obtain a certificate to attach to the most recent (but now out-of-date) DID 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.

5. 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 used.

6. THE DOC CAN DO IT: Physicians are now authorized to perform DIDs and combine the CME with a DID. A traditional DID may also still be submitted. TPC §1101.104 (Appendix C)

C. Independent Medical Exam

1. COURT'S OWN MOTION/ MOTION OF ANY PARTY: If the court determines it is necessary, or if the ad litems 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)

2. 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 T).

3. 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.

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

5. PRACTICAL POINTERS:

A. 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.*)

B. 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.

C. 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.

D. 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.

D. Evidentiary Considerations

1. QUICK CHECK: Is the CME: 1) in compliance with the statute and 2) dated properly?

2. 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.

3. 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.

4. 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 TRCP 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*.

5. BEST NON-PHYSICIAN IN A SUPPORTING ROLE: 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.

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.

E. HIPAA: HIPAA, the 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").

1. COURT ORDERED DISCLOSURE - AN EXCEPTION TO HIPAA. Because you, the ad litem, are specifically authorized access to such information, it is actually a violation of HIPAA to deny you the 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.

2. 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).

F. Defensive Considerations: The Answer May Depend On Who You Ask:

1. 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)

2. DIFFERENT DISCIPLINES/ DIFFERING PERSPECTIVES: 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 Department of Aging and Disability Services may, however, perform a Determination of Intellectual Disability under TEX. EST. CODE § 1101.104.

3. MEDICAL DOCTORS

A. Physician (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.

B. Geriatricians (MD specialist in aging).

C. 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.

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

E. 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.

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

4. NON-PHYSICIAN MEDICAL PROFESSIONALS

A. 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.

B. Geropsychologists receive additional training in problems of aging; forensic psychologists receive additional training in mental health and the law.

C. Forensic Psychologist - Mental health specialists trained to present their findings in the legal arena.

D. Geropsychologist - Mental health specialists in aging.

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

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

G. 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.

H. 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.

I. A Geriatric Care Manager is a health and human services professional, such as a gerontologist, social worker, counselor, or nurse, with a specialized body of knowledge and experience on issues related to aging and elder care issues. *see Appendix D, infra.*

VI. CAPACITY ASSESSMENT:

Inevitably, the Court Investigator, the Guardian Ad Litem and the Attorney Ad Litem must all assess the capacity of the proposed ward.

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.

A. The Capacity Assessment Handbook For Judges - After years of collaboration, the American Bar Association Commission on Law and Aging, the American Psychological Association and the National College of Probate Judges created a capacity assessment handbook entitled Judicial Determination of Capacity of Older Adults in Guardianship Proceedings. (the "Capacity Assessment Handbook") The handbook, free at ***www.apa.org/pi/aging/resources/guides/judges-diminished.pdf*** examines capacity from the standpoints of

1. MEDICAL CONDITION,
2. COGNITION,
3. EVERYDAY FUNCTIONING,
4. VALUES AND PREFERENCES,
5. RISK AND LEVEL OF SUPERVISION, AND
6. MEANS TO ENHANCE CAPACITY.

This approach is designed to help the judge make the ultimate decision in crafting a solution, trying to take into account as much good information as possible. It should be equally as helpful to give the ad litems (and others) a handle on their capacity assessment.

B. The How-To: Assessment is a combination of several steps:

1. REVIEW OF AVAILABLE DOCUMENTS AND MEDICAL RECORDS
2. VISIT WITH THE APPLICANT
3. INTERVIEW THE PROPOSED WARD

C. Access to Medical Records: With your certified copies of the order appointing you as ad litem in hand,

go to the medical records custodian at the doctor's office, hospital, assisted living facility or nursing home, as applicable. You may want to ask that they make a copy of your order for their files so that you can keep the one with the original seal (saves a few bucks). If you run into problems getting access to the records, see suggestions above regarding HIPAA.

D. Visit With the Applicant (If There is One): Get a good idea of what brought about the need to seek a guardianship. (See "What's the Stuff?" *supra*) Part of the capacity assessment is to try to determine whether the support system is broken beyond repair or can be repaired and strengthened.

Your visits with family members and friends may (and often do) reveal an undercurrent of family strife. This is not unusual and is to be factored in with all other issues.

E. Interview the Proposed Ward: This 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).

Inexperienced interviewers 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 learning will continue to serve them well.

F. Interview the Proposed Ward (Again): It is advisable to interview the proposed ward more than once, especially close to the time of the hearing. She or he may get better (or worse). Once a patient receives adequate nutrition/ hydration/ socialization / therapy/ medication for a few weeks or months, it is not unusual for many symptoms of delirium/ confusion/ diabetic conditions to clear up.

G. Perform Your Assessment: 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.

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.

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

2. COGNITION: As you ask your questions, observe how, not just what, your client answers and how well they are processing the information. Might there be other conditions, other than psychological/psychiatric factors, inhibiting their ability to understand. (Dead hearing aid battery? Missing glasses? Doctor's assessment a few minutes after a sleeping pill was administered? Hard time understanding English spoken by non-English speaking physician? Consider the effects of dehydration, diabetes, malnutrition or some other physical condition to hampering one's ability to process information. Most of these issues can affect one's ability to understand, but should not be the basis for a guardianship.

3. EVERYDAY FUNCTIONING: A series of questions may subtly determine the proposed ward's ability to function in a number of areas.

Talk about their ability to carry out the activities of daily living:

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

- Finances: Ask them to count some pocket change, whether they know the relationships between the coins and a bit about the use of money. Discuss their bank accounts, any loans they may have at the bank, or any "loans" they may have made to family members or "friends." (This latter area is particularly important if there are allegations of fraud and abuse.) (Pertinent to ability to contract and incur obligations; to handle a bank account; to apply for, consent to and receive governmental benefits and services; to accept employment; to hire employees; and to sue and defend on lawsuits. All of these are elements the doctor is asked to address in the CME.

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

Mandated Abuse Reporting: ***If, in your interview, you uncover fraud, abuse or neglect, you have an immediate (and affirmative) duty under TEX. HUM. RES. CODE §§48.051 & 48.052 to report that abuse to Adult Protective Services (800-252-5400/ www.txabusehotline.org). Even the Court Investigators and judges have the same duty.***

4. VALUES AND CHOICES: Consider the role that the lifestyle and values of the proposed ward may affect the situation. Obviously, a dislike of nursing homes will affect decision-making, but not to the extent of allowing patently unsafe or exploitive conditions to continue. Few people willingly choose to live in squalor, but clutter is not a sole reason for a guardianship. *Note however*, a chronic inability to deal with clutter can be a symptom of something more serious. Barnett and Labellarte, *Practical Assessment and Treatment of Attention-Deficit/Hyperactivity Disorder,* Adolescent Psychiatry, 2002

> ***Reality Check: Compare what you are hearing/seeing/(smelling?) with the other evidence (anecdotal, medical, financial). Does it add up? Does the Proposed Ward have 'blind spots' with regard to areas of disability which they will not acknowledge?***

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 – Consider the list of Less Restrictive Alternatives to Guardianship (Appendix D) and determine whether you can recommend any of them to avoid or lessen the effect of a guardianship. Consider whether a better "social safety net" might address the deficits.

H. Not Quite There Yet: In her very short, but excellent, paper, *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.

These clients are all on a continuum that may lead to incapacity. "Your mission, should you choose to accept it" is to determine if they have arrived.

I. Play Lawyer, Not Doctor - Unless you actually have a medical degree (such that you could be the one signing the doctor's letter) don't try to outguess the doctor. If you really take serous issue with the doctor's conclusions, consider requesting an independent medical exam pursuant to TEX. EST. CODE § 1101.103(c) and ask that the exam be conducted by a doctor in a different discipline (gerontology vs. psychiatry vs. neurology, etc.) (Appendix T).

J. Make A Threshold Determination ("The Ad Litem's Dilemma") It is usually 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 makes out a *prima facie* case and carries their burden of proof.

Consider Mary Koffend's characterization above. 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: Your 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.

K. No Summary Dismissals: In *Guardianship of Vavra*, 365 S.W.3d 476 (Tex. App. Eastland, March 29, 2012, no pet.), the district judge read TEX. EST. CODE § 1101.155 to be a procedural statute which authorized a pretrial summary hearing to assess capacity or competency, precluding a trial on the merits. *WRONG!*

The parties are clearly entitled to a jury trial or a bench trial on that issue.

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 that 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, tell the court or drop off a courtesy copy with the court of whatever it was you filed.

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

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

1. PLAN AHEAD: - Dockets fill up. If you have a dying proposed ward (why get a guardianship?) or an aging out MR minor, you need to think ahead and find sometime in advance for your prove-up.

2. SETTING REQUESTS/CONFIRMATIONS: All settings are to be by a request for a setting (preferably by e-mail). ***Settings should always be confirmed and all parties notified***. (see Appendix U).

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 litems 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: put your documents/files on your tablet computer to show the judge the documents got filed.

4. FILE REPORTS EARLY: The Guardian Ad Litem report (or in an heirship, the Attorney Ad Litem report)

should be filed no later than three days before the hearing. It would be a shame to have to re-schedule the hearing because of a missing report.

***Whether by e-filing or manually* – 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 who 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. P. 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. P. 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 §§ 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 §§ 51.051(b)(1), 1051.051(b)(1).
2. By a Disinterested Person (if person to be served is out of state) §§ 51.051(b)(2), 1051.051(b)(2).
3. By an alternative manner as directed by specific order (only upon application and order) §§ 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. any other known "next of kin" (if there is no spouse, parent, adult sibling or adult child) as required by TEX. EST. CODE § 1101.001(b)(11)(C).

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.).

Note: If the Texas Department of Aging and Disability Services (DADS) is the intended successor guardian, they must be served with personal citation by a sheriff/ constable. TEX. EST. Code § 1203.108(5).

D. WHAT TO SEND:

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

F. 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 (TPC § 633(f), now § 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 (§ 633(d)(2), now 1051.104(a)(2)) and Hospital Administrator (§ 633(d)(2), now § 1051.104(a)(3), therefore not error.
- failure of Court to observe "ten day waiting period" imposed by TPC § 633(f) (now §1051.106), held not to be jurisdictional.

F. Paperwork to Have on Hand:

1. PRELIMINARY CONSIDERATIONS

A. Early Paperwork: Try to get your paperwork to opposing counsel, the court investigator and the court at least a few 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, X, Y & Z)

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. 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.

C. 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.

D. Filing TEX. EST. CODE § 1105.002, 1105.003, 1105.110. Bonds must approved and filed within twenty (20) days after the order granting letters.

E. 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.
5. After the initial bond is set, made and approved, the amount of the bond may be reduced through the use of Safekeeping or "Freeze" Agreements. TEX. EST. CODE § 1105.155. Appendix Ac. 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. The amount of the bond of the personal representative may then be reduced in proportion to the cash or other assets placed in safekeeping.

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.

F. 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 Ab.

G. 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 Z)

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 f 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 (!?) and Voting: 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.

"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

H. 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.

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

Find out the court's preference on conforming copies. Some judges want to keep things moving and will let the courtroom clerk (or the clerk down the hall) conform the copies. Some judges will conform a limited number of copies themselves, unless there have been numerous strikeouts and amendments. Unless you order and pay for certified copies, don't expect your tax dollars to pay for free copies.

VIII. HEARING DAY: SOME GENERAL AND PRACTICAL OBSERVATIONS

A. Generally:

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.

B. Decorum:

1. NOT THE BUS STATION: While this is a public building, it is a court of law, not the bus station.
2. 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.
3. NO! No tobacco/ No gum/ No shorts/ No hats/ No cell phones/ No pagers/ No client conferences in the courtroom.
4. PROPER ATTIRE: If the court has a dress code, observe it. Advise your clients accordingly or re-schedule your hearing.
5. 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.
6. 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.
7. 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.
8. 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.
9. WHERE DID YOU GET THAT TIE? If you have a minor emergency or wardrobe malfunction (or non-function) remember: the court reporter usually has pens, paper, an Estates Code, emergency supplies, reading glasses, and a coat and tie available. (The tie may be pretty ugly though.)

C. 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 (Appendix V), in all cases, for all witnesses, every time.

   Hint: See if your court has preferred forms om 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 Y 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 §703

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?

D. 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.

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.

E. Bench Instructions and Training

1. GUIDANCE: Attached as Appendix Ag 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).

2. TRAINING: See if your court offers any training for the newly-appointed guardian. Our court has a training class one hour prior to the guardianship docket, with simple Powerpoint presentations for guardians of the person and guardians of the estate. The national trend is toward statutorily-mandated training (Cf: Alaska's one-hour training requirement for all guardians: www.courts.alaska.gov/forms.htm Form PG-510, p. 5).

F. 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.)

G. 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 and allow you to complete a blank form by hand, 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: Maybe the court will 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.

H. 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.

I. 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 is signed. TEX. PROB CODE §§ 1054.002, 1054.053.

2. SEPARATE ORDER REQUIRED FOR FEES: By a specific directive of the Texas Supreme Court, any order awarding a fee to a person appointed by a Statutory Probate Court (such as an Attorney or Guardian Ad Litem) must be separate and apart from any other pleading. Misc. Docket No. 94-9143, (Sept. 21, 1994) reprinted in *Texas Rules of Court 2013* at page 775.

J. 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, is to be followed.

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 U.)

D. Calling for Backup. In an appropriate case, the attorney ad item 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. TRCP12: The Applicant or Guardian Ad Litem might well consider a Motion to Show Authority pursuant to TEX. R. CIV. PROC. 12. (Appendix R). 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. 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. P. 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.'

4. CERTIFICATION REQUIRED: Unless proposed ward's chosen attorney is certified to act as an Attorney Ad Litem under TEX. EST. CODE § 1054.201, the retained counsel may not serve. *Guardianship of Wehe*, 2012 Tex. App. LEXIS 8931 (Tex. App. Corpus Christi 2012, no pet.).

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. Consider Seeking Security For Costs:

1. BE AWARE OF OLD, BAD LAW AND OTHER LAW THAT IS STILL GOOD: Until, the 83rd Legislature (2013), the Probate Code specified that, with one exception, all costs of the proceeding were to be paid out of the estate of the ward, if there was one, otherwise, the county was bound to pay the fees and expenses of the ad litems. TEX. PROB. CODE §§665A, 669. This basically meant the costs in a guardianship contest could not be taxed against the losing party as in a will contest.

This provision 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 §§ 1053.052, 1155.054.

Nevertheless, there are a considerable number of decisions under the prior law of which one must be aware, including: *in re Brookshire*, 2006 Tex. App. LEXIS 8257 (Tex. App. Houston, 1st Dist., 2006, orig. proceeding) (guardianship); *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)*; 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.).

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.

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

2. PUT UP OR SHUT UP! (TEX. EST. CODE § 1053.052). (Appendix Q) *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.

3. WHY IS THIS SUCH AN ISSUE? In guardianship matters, 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.

Additionally, unlike most civil cases, guardianship proceedings require the appointment of one or more ad litems, proportionally increasing 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. P. 143) or "who seeks judgment against any other party" (TEX. R. CIV. P. 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: 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. WHEN? – Such a motion may be filed and heard at any time before the trial. TEX. EST. CODE § 1053.052(b).

6. 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. P. 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*.

7. 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. P. 146 (regarding attachments, see TEX. R. CIV. P. 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. P. 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. P. 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. P. 146.

8. 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).

9. 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. P. 143; *Guardianship of Thomas*, 2009 Tex. App. LEXIS 1813 (Tex. App. Fort Worth 2009, no pet.).

10. 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).

11. 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….*"

12. Award of Attorney's Fees *(NEW!)* - 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.

13. PRACTICAL POINTERS

A. 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. 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. 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. If the contestant files a Pauper's Affidavit (see discussion under III.N. *supra* and Appendix I *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).

H. Ask For A Jury Trial.

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 Z) or consult *Texas Pattern Jury Charges 2012: 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. *In re Lynch,* 35 S.W.3d 162 (Tex. App. Texarkana 200, no pet.).

I. Pursue Adequate Discovery. 'nough said.

J. 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 *(NEW!)* 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. RULES CIV. PROC. 11 or another rule or law.

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.

K. 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.

L. "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.).

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 onto 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.

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 S.

M. 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 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 in determining the suitability of an applicant might be to have the would-be guardian order a credit report. Criminal history reports are already required on non-family members under TEX. EST. CODE § 1104.401ff.

a. 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.

b. 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.

c. 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).

N. 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.

O. Consider Requesting a Closed Hearing: Advisable particularly if a sideshow atmosphere is anticipated. A rare 'private trial' procedure. TEX. EST. CODE § 1101.051(c)).

P. 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 K, X). If there are to be co-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.

Note on Disclosure Requirement: Right to Physical Possession of Ward: In any order appointing a Guardian (with either limited authority (§ 1101.152) or full authority (§ 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.

Q. 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).

R. 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.

S. More Practice Pointers

- Review the most current State Bar of Texas Fiduciary Litigation Seminar materials.
- Just because you must advocate doesn't mean you mustn't settle.
- Find some way to take the money off the table: get a neutral third party, professional guardian, bank trust department or volunteer guardian to serve and isolate the dispute to the interpersonal issues.
- Don't try to be the lead counsel.
- Don't dig down until you can't get out of the hole (time-wise).
- Don't side against your own client/don't sell your client out.
- In contested matters do not ask court staff for guidance unless all other counsel are present and the judge is in the room. Otherwise it is an *ex parte* discussion.
- Are you in over your head? You can ask procedural questions of court staff, including how to get out of a jam.

X. FEE CONSIDERATIONS

A. Introduction: It is the Court's duty to ensure that estates of decedents and wards pay only for "reasonable attorney's fees necessarily incurred" TEX. EST. CODE § 352.051 (decedent's estates) and § 1155.101 (guardianships) and "necessary and reasonable" expenses. TEX. EST. CODE § 352.051 (decedent's estates) and § 1155.102 (guardianships).

1. 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.

2. RECENT CASES: There has been a proliferation in the last few years of cases defining the compensable and non-compensable elements in ad litem fees in personal injury actions, family law cases and in guardianships. *Jocson v. Crabb, supra; 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, June 4, 2008, no pet.); *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). *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.); *Estate of Frederick, supra; Ford Motor Company v. Garcia*, 2010 Tex. App. LEXIS 8129 (Tex. App. Corpus Christi, 2010, (reversed & remanded 363 S.W.3d 573 (Tex. 2012)*; Columbia Rio Grande Healthcare v. De Leon*, 2011 Tex. App. LEXIS 431 (Tex. App Corpus Christi 2011, no pet.); *In Re Mitchell*, *supra*; *Trevino v. Reese*, 2011 Tex. App. LEXIS 4558 (Tex. App. Houston 1st Dist, June 16, 2011).

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

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. P. 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 litems 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.) G*uardianship 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 litems.

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 Ab, Ac. 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 Ab, Ac.

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. Appendices Ad, Ae.

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 (wirh 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 at or 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.

U. What to Do with the Fee Application: Determine how your court wants the fee application handled:
1. File the application with the clerk and let it be handled through channels, or
2. Hand it to the judge at the bench and risk embarrassment in front of your peers. (The judge has no way of knowing if you have had a disagreement with staff and may be trying an "end-around.")

I vote for option "a."

V. Separate Order Always Required – By a specific order of the Texas Supreme Court, **any order awarding a fee to a person appointed by a Statutory Probate Court must be separate and apart from any other pleading**: Amended Order Regarding Mandatory Reports Of Judicial Appointments & Fees, Misc. Docket No. 94-9143, (Sept. 21, 1994) reprinted in *Texas Rules of Court 2013* at page 775, cited in *Epstein v. Hutchison*, 175 S. W. 3d 805 (Tex. App. - Houston - 1st District, 2004, pet. denied).

W. Specific Areas of Concern on Fee Applications:
1. CONTESTS: Contests in guardianships are particularly hard on ad litems 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 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)

XI. CLOSING THOUGHTS

A. Removal of an Ad Litem
1. GENERALLY - Once the guardian has qualified or the application is denied, the appointments of both the Guardian Ad Litem and the Attorney Ad Litem terminate (TEX. EST. CODE § 1054.002) (Attorney Ad Litem), TEX. EST. CODE § 1054.053) (Guardian Ad Litem)). If the judge wishes to continue the appointment of one or both of the ad litems, he or she must affirmatively continue the appointment with a finding that continuation of the appointment is in the best interest of the ward. *Ibid.* Typically, the Application for Payment of Fees and Expenses should include a discharge of the ad litem. (Appendices Ad, Ae)

The comments to the State Bar Rules point out that while a lawyer should carry out his duties until they are concluded, if the attorney's representation was limited to a specific matter, "the relationship terminates when the matter has been resolved." TEX. DISCIPLINARY R. PROF. CONDUCT 1.02 & cmt. 6, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon

Supp. 1996) (STATE BAR RULES art. X, § 9) (located following section 83.006 of the TEX. GOV'T CODE).
2. REMOVAL: 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.*
3. 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 dism'd judgmt. cor.); *Coleson, supra*.
4. 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. P. 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. P. 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. P. 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. P. 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. Back in the Saddle Again: Re-Activation of the Ad Litem

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

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 ANN. §§ 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 ANN. §1054.056).
2. GUARDIAN SEEKING TO PURCHASE FROM ESTATE: Under TEX. EST. CODE ANN. § 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. 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 ANN. §1202ff, the court may appoint a Guardian Ad Litem to investigate TEX. EST. CODE § 1202.054. 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.
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 ANN. § 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.

XII. HEIRSHIP PROCEEDINGS

A. Introduction

Appointment of an Attorney Ad Litem is mandatory in all heirship determinations. TEX. EST. CODE 202.009; TEX. R. CIV. PROC. 244).

Because the Estates Code provides only for the appointment of attorneys ad litem and not guardians ad litem in heirship proceedings, new TEX. R. CIV. PROC. 173.1ff will not apply here.

This outline and materials are designed to assist you, the practitioner acting as an Attorney Ad Litem, in adequately representing your clients, even though you (in most instances) will never meet them and (in some instances) they will not "exist," except in a legal fiction. Two general situations will be addressed:

PROVING UP THE OBVIOUS VS. SOLVING AN OLD MYSTERY In many cases, you merely will be verifying otherwise straightforward family history facts. In other cases, the existence of heirs will not be disclosed, either from ulterior motives or honest ignorance. In yet other situations, the existence of heirs "on the other side of the family" is simply a mystery.

1. THE "PLAIN JANE" CASE: If your principal job is to confirm that a) the application is correct, b) there appears to be no controversy in the proceeding and c) the applicant has carried his/her burden of proof, (and for which you are receiving only the capitated $400.00 fee), your checklist is simpler and should look something like the one shown below.

2. THE "MYSTERY" CASE: If it appears that there are heirs whose very existence as well as whereabouts are unknown, you have just become a genealogist/skip tracer. Keep your time and understand what resources will be available to pay your fee. Your checklist is constrained by your imagination, the size of the estate and what the judge considers to be a reasonable effort to locate the "missing" heirs.

B. Statutory Bases for Heirship Proceedings - Heirship is the relationship between a Decedent (a person who dies owning or entitled to property and who leaves no will, or whose will fails to effectively dispose of all of that person's property) and an Heir (the person designated by the applicable Laws of Descent and Distribution to receive the property). TEX. EST. CODE § 202.002.

It is now also possible for a trustee holding assets for the benefit of a decedent to seek to determine the heirs of the decedent. TEX. EST. CODE § 202.002(3).

1. NECESSITY: The lawful heirs and their shares of the estate must be determined in an intestate administration. TEX. EST. CODE § 202.002.

2. APPLICATION: TEX. EST. CODE § 202.005. A representative, a person claiming part of the estate, or a secured creditor can apply to determine heirship. The application should contain the information listed in TEX. EST. CODE § 202.005, and shall be supported by an affidavit stating that all facts are true and that nothing has been omitted. All unknown heirs, known heirs, and all persons shown by the deed records to own a share or interest in any of the estate property shall be made parties to the proceeding.

3. CITATION: TEX. EST. CODE § 51.001. The citation required here differs in several ways from the citation and service required for an administration.

A. Service by Certified Mail on all distributees over 12 whose names and addresses can be found with reasonable diligence (Court can require personal service here). TEX. EST. CODE §§ 51.001(b), 202.051, 202.054.

A parent, managing conservator, guardian, Attorney Ad Litem, or Guardian Ad Litem of a distributee who is younger than 12 may waive citation required to be served on the distributee under this section. TEX. EST. CODE § 202.051.

B. Service by Publication in a newspaper of general circulation on 1) all unknown heirs and 2) heirs whose addresses cannot be found, in the county of the proceeding and the county of the decedent's last residence. TEX. EST. CODE § 202.052.

C. Posted Citation in the county where proceedings are commenced and where the decedent last resided, except where publication is used as in (B) above. TEX. EST. CODE § 202.053.

4. APPOINTMENT OF ATTORNEY AD LITEM

Except as provided by TEX. EST. CODE § 202.009 (mandatory appointment of Attorney Ad Litem for unknown heirs), the judge of a probate court may 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 any probate proceeding. Each Attorney Ad Litem appointed under this section is entitled to reasonable compensation for services in the amount set by the court and to be taxed as costs in the proceeding. TEX. EST. CODE § 53.104.

A court must appoint an Attorney Ad Litem for all unknown heirs and may appoint an Attorney Ad Litem for all the living heirs whose whereabouts are unknown. TEX. EST. CODE § 202.009.

An Attorney Ad Litem must be appointed where service has been made by publication and no answer has been filed nor appearance entered. TEX. R. CIV. PROC. 244.

5. EVIDENCE IN HEIRSHIP

A. The Live Evidence in an heirship hearing usually consists of live testimony by witnesses with personal knowledge regarding the family history of the decedent and the heirs. This includes information regarding identity and relationship of the family members, births, deaths and marriages, as well as the order of deaths and marriages.

B. Affidavits of Heirship and Judgments concerning Heirship or Family Identity, as authorized by TEX. EST. CODE §203.001ff, are prima facie evidence of such matters, but only (as to the affidavits) if the affidavits have been of record in the records of a county or district court for at least five years by the time the instant heirship proceeding is commenced.

Any errors contained in such recorded instruments may be proved by interested parties during the heirship proceeding. *Ibid.* This provision is not exclusive of any other methods of proof available under other rules or law. *Ibid.*

C. What this means is:

1. Affidavits of heirship filed expressly for the current proceeding are inadmissible and essentially a waste of time. *Compton v. WWV Enterprises*, 679 S.W.2d 668 (Tex. App. - Eastland 1984, no pet.).
2. Recorded documents such as birth, marriage and death certificates are admissible because of TEX. EVID. RULE 902(1) ("Domestic Public Documents Under Seal").
3. Written statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts or tombstones, etc. are specifically excepted from the hearsay rule - TEX. EVID. RULE 803(13), but are subject to the twenty-year authentication requirement of TEX. EVID. RULE 901(b)(8).
4. On the other hand, oral statements of reputation concerning personal or family history - TEX. EVID. RULE 803(19) - are hearsay exceptions without any authentication requirement other than a demonstration of personal knowledge. TEX. EVID. RULE 901(b)(1).

D. Evidentiary Standard: The lack of specifics in the heirship provisions of the Estates Code would indicate that, beyond requiring "that level of proof which would create in the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established" *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 31 (Tex. 1994), the judge (or jury) in an heirship proceeding is guided by their own sense of what is right, just and true.

E. Evidence Reduced to Writing: A Court may require all or any part of the evidence to be reduced to writing and subscribed and sworn to by the witnesses. TEX. EST. CODE § 202.151.

F. Statement of the Evidence – No Separate Statement Required: TEX. RULES CIV. PROC. 244 provides: "A statement of the evidence approved by the Court must be filed with the record where service has been made by publication and no answer has been filed nor appearance entered." This need not be a separate document. A properly drafted Order Determining Heirship will contain the appropriate findings and holdings required and satisfies this requirement. A separate "Statement of the Evidence" is unnecessary.

G. Heirship Judgment. TEX. EST. CODE § 202.001ff. To be a final judgment, the order declaring heirship must include:

1. The names and places of residence of the heirs;
2. The respective shares and interests in the real and personal property of the estate;
3. Whether the proof is deficient in any respect.

NOTE: Unless specific declaratory relief is requested, the court can make no findings as to the characterization of property. A judgment which addresses only some, but not all, categories of property: real and personal, separate and community does not comply with the statute. It is extremely common for additional property to be discovered. If it is not addressed in the judgment, another heirship hearing will be necessary. Make sure the suggested form of judgment categorically includes the division of every type of property.

If all of these elements are present, the judgment is final and may be appealed. TEX. EST. CODE § 202.202.

However, an heirship judgment that does not include all the elements required by TEX. EST. CODE § 202.201, *supra* is not a final judgment. *Estate of Loveless*, 64 S.W.3d 564, 570 (Tex. App. Texarkana 2001), subsequent appeal after remand 2003 Tex. App. LEXIS 676 (Tex. App. Texarkana 2003, no pet.).

C. Scope of "Heirship Determinations"

For purposes of appointments under TEX. EST. CODE § 202.009 "heirship determinations" will include those proceedings:

1. incident to a dependent administration;
2. where no other administration is sought or pending;
3. pursuant to declaratory judgment actions where it is necessary to determine heirs because of intestacy

under a will, trust or other instrument, etc.

4. where an intestate independent administration is sought pursuant to TEX. EST. CODE § 401.003.

D. Duty and Standing of the Attorney Ad Litem

It is the duty of the Attorney Ad Litem to defend the rights of his involuntary client with the same vigor and astuteness he would employ in the defense of clients who had expressly employed him for such purpose. *Estate of Tartt v. Harpold*, 531 S.W.2d 696, 698 (Tex. App.-Houston [14th Dist.] 1975, writ ref'd n.r.e.) (quoting *Madero v. Calzado*, 281 S.W. 328 (Tex. Civ. App.-San Antonio 1926, writ dism'd)); *Estate of Stanton*, 2005 Tex. App. LEXIS 10901 (Tex. App. Tyler 2005, pet. denied). (dependent administration and heirship).

The Attorney Ad Litem in an heirship proceeding appointed under TEX. EST. CODE § 53.104 was found to have both standing and authority to oppose the appointment of a temporary administrator and apply for the appointment of an independent third-party administrator, to the same extent as if his clients had been present. *Estate of Stanton*, 2005 Tex. App. LEXIS 10901 (Tex. App. Tyler 2005, pet. denied). (dependent administration and heirship).

E. Pointers on Different of Types of Cases:

1. The "Plain Jane" Case -:

- pigeonhole the situation: if it is simple to start with, it should end up that way. If it is complicated, learn how to chart your findings and explain the complications so even the judge can understand it.

It is not your job to duplicate all efforts made by the attorney for the applicant. You simply grade the other guy's homework, not do it all over yourself. YOU do not do the spadework unless there truly are unknown heirs.

2. The "Mystery" Case

On the other hand, if there is an allegation that there are heirs whose whereabouts or identities are unknown, you have just become a genealogist/skip tracer.

The only known surviving heirs may be from only one side of the family and there may be literally no one who can easily tell you who the other heirs might be. While it is nigh impossible that there are no heirs on a particular side of a family, it may not be possible, given the constraints of the information, your abilities or the available resources of the estate, to track down the whereabouts of those heirs whose whereabouts are unknown within a billable-timeframe that is reasonable.

The secret is determining where the "tipping point" is devoting billable time to the search vs. the hope of discovering the answers. When in doubt, schedule a conference with the court and all other counsel and get your marching orders in a clear fashion.

Caveat: Anyone trying to suppress information regarding the "black sheep" of the family will, of course, present you with a straightforward picture of a happy family - minus the black sheep.

For a scenario where the ad litem in an heirship proceeding exposed fraud by the applicant, see *Beevers v. Lampkins*, 2012 Tex. App. LEXIS 3443 (Tex. App. Amarillo 2012, no pet. h.).

In complicated cases, a fair amount of deductive reasoning and intuition (or genealogical research experience) must sometimes be employed.

Appendix E is a distillation of a few books on searching for lost persons plus some helpful websites.

Using appropriate forms to record your data, obtain as much additional information as possible to build a "family tree," including identity and location information on all family members (not just heirs), with dates and references to documentation.

Having every little scrap of information recorded and easily available can be invaluable. If the record keeping gets too cumbersome, specialized genealogy programs such as *Family Tree Maker©* or *Personal Ancestral File (free!)* can be lifesavers.

In an appropriate situation, (and on prior approval by the court) a professional forensic genealogist may be retained.

A great little paperback to provide guidance in genealogical research is Searching for your Ancestors: The How and Why of Genealogy by Gilbert H. Doane. It is available for under $2.00 at *www.abebooks.com*.

F. Due Diligence - In either type of heirship case described, the Attorney Ad Litem should:

1. Review all relevant pleadings, documents and citations: Get a copy of the order appointing you.
2. File an Answer on behalf of your clients. This 'joins the issues' and properly gets you in court. (Appendix Ai.)
3. Contact the Applicant's attorney to get:

a) copies of the pleadings, any death certificates, birth certificates, divorce decrees, etc. and any other 'official' documentation affecting descent and distribution. You do not necessarily need original seals on your certified copies, but you might look at them for comparison purposes.

b) the names and contact information of family members and disinterested witnesses who might be knowledgeable of the facts of heirship.

4. Personally interview the Applicant to verify the heirship facts and obtain the names and whereabouts of persons knowledgeable of the heirship facts.
5. Contact at least two disinterested persons, if not all of the persons known to have knowledge of the heirship

facts (not just the one you may be referred to by the family) and verify the information provided. Telephone interviews are OK as long as you can determine to whom you are really talking.

Note: If possible, try to get to someone truly disinterested, who has no particular reason to try to please the Applicant.

6. After about two hours of billable time are spent, check back with the court for guidance as to how much time should be spent, even in a complicated case.

7. Make an independent determination (if appropriate) whether the information provided is sufficient, whether there are persons not listed in the application, whether intentionally or unintentionally omitted, who may be minors, otherwise incapacitated or whose identity or whereabouts may be unknown. It is always necessary for the ad litem to ask the impolite questions: whether there were any other marriages, whether there were any other children (born in or out of wedlock), etc. (the Smell Test: If it smells, find out where it has been swimming and how long it has been dead.)

8. If the issue of common-law marriage or the lack thereof presents itself, the ad litem should look for affidavits of 'single-hood' by the alleged common-law spouse to obtain or retain public assistance, health insurance, life insurance, military benefits, social security.

9. Send a letter by certified mail, return receipt requested, to all of your clients whom you are able to locate, informing them of the heirship proceeding, that they may have an interest in the decedent's estate and to contact you. Seek to obtain waivers of citation from each of them, if the attorney for the Applicant has not already done so.

10. Prepare a written report of your findings when you have completed your investigation. This report should contain:

a) a statement of whether you agree or disagree with the application for determination of heirship;

b) a skeletal recitation of the documents reviewed and persons consulted; and

c) a distribution chart, fully showing how all interests devolve upon the heirs.

Note: DO NOT omit the distribution chart. It is usually the first document the judge will review when the file is brought to court for hearing (which may literally be seconds before your hearing).

Thought for the Day: Statutory probate courts almost always have crowded dockets, whether the hearings are specially-set or on a first-come first-serve basis, so clarity and precision are crucial for paperwork in uncontested hearings. If the Judge has to try to decipher a convoluted family tree/pedigree chart (whether drawn on butcher paper or created by specialized software), chances are you may be coming back for a chambers conference to complete the hearing.

Appendix Aj contains a strongly suggested format which can be easily prepared on any word processor. No butcher paper or special software is necessary. It is based on the format of a division order title opinion from oil & gas practice.

11. If you have located a heir whose name or whereabouts was previously unknown, include all contact information for each such individual in your report, with a copy of the report to all counsel.

Note: SSA Letter Forwarding to Missing Person
For $25.00, the Social Security Administration will attempt to forward a letter to a missing person under circumstances involving a matter of great importance, such as a death or serious illness in the missing person's immediate family, or a sizeable amount of money that is due the missing person.

Because SSA reads each letter to ensure it contains nothing embarrassing to the missing person if read by a third party, the letter should be in a plain, unstamped, unsealed envelope showing only the missing person's name.

The missing person's Social Security number or date and place of birth, father's name, and mother's full birth name must be furnished.

The letter is usually forwarded to the employer who most recently reported earnings for the missing person. If the person is receiving benefits, a home address maybe available. No second letters will be sent.

Social Security Administration
Letter Forwarding
P.O. Box 33022
Baltimore, MD 21290-3022
http://www.ssa.gov/foia/html/ltrfwding.htm

At this point, if you have found an "unknown heir," the Applicant should be preparing an amended application to determine heirship. If they are unwilling to do so, consider seeking security for costs TEX. EST. CODE § 53.052 or setting a conference with the court.

If these newly discovered heirs want you to represent them, you may well have a conflict of interest among your clients. Consider requesting the Court to appoint another ad litem, so you may withdraw and enter an appearance on behalf of your new clients.

12. Confer with Applicant's attorney as to an appropriate date for the hearing on the application and ensure you get a copy of the confirmation of the setting.

13. At the hearing: See "Dealing with Court Personnel"

supra.

While you are still out in the hall before your hearing:

a) Review the proposed order to make sure it accurately reflected the names and locations of the heirs and has correctly calculated the distribution in the proposed judgment.

b) Compare the judgment with your notes and report.

c) Introduce yourself to the witnesses if there is time.

In the hearing:

a) When the attorney for the applicant passes the witness, don't simply say: "No questions." If nothing else, ask: "Since we last spoke, is there anything that you recall regarding the Decedent that you did not tell me at that time?"

b) Ask about relationships that might have lasted more than a few months. Ask about any claims of paternity or court proceedings for paternity or legitimization. Ask about any direct knowledge of children put up for adoption or about deceased siblings who had children. For suggested Cross-Examinations questions for the hearing, see Appendix Y.

G. Time Records and Fee Applications

1) Determine beforehand whether you are to receive a set fee. You will receive a fee of $400 unless the Court has previously determined that additional time is required due to the circumstances of the particular matter.

2) If you have a "Mystery" case, schedule a conference with the court and all other counsel to get some idea of how far you can go (time-wise) and any procedural suggestions you might get.

3) Keep your time in either type of case, just in case things get unexpectedly complicated.

4) After you have spent about two hours on the case, unless you can see the light at the end of the tunnel, check signals with the court.

5) Find out how the court appointing you wants the fee application handled. If you need to file your application with the clerk, don't hand it to the judge at the bench and expect it to be acted on at that moment. The judge has no way of knowing if you have had a disagreement with staff and may be trying an "end-around."

6) If you have had a "Plain Jane" case, file an Application for Payment of Fees with an Order and seek discharge of your appointment as Attorney Ad Litem. (Appendix Ak).

7) If you have had a "Mystery " case, file an itemized Application for Payment of Fees with a narrative of time expended and services rendered.

8) In an appropriate case, consider seeking <u>security for costs</u>. *Estate of Stanton*, *supra.* See discussion under "Actively Contesting the Guardianship" *supra.*

9) See "Fee Considerations," *supra.*

H. Areas of Particular Concern

1. <u>Shares of the Estate</u> are better noted as <u>fractional interests</u> ("**½ of ¼ of ¼**") rather than as "1/88" or ".011363636." This allows the court (and others) to better understand the division of the property in the tabular listing of the distributees. Fractional listings are also more definite than decimal listings, where arguments have been known to arise over how many places should be used to accurately express the decimal interest.

2. <u>How Did We Get Here</u>? Like your Junior High math teacher told you, you should "show your work" in your Distribution Chart. If one set of cousins gets 1/5 each and another set gets 1/10 each, show the derivative predeceased ancestors that made it be that way. Don't make the judge guess. You might not like the answer.

3. <u>Imbedded Heirships</u> - If you are running down the list of heirs and determine that one of the heirs has survived the Decedent, then subsequently died, the trail ends there for this proceeding. For purposes of this case, the relevant determination is whether that deceased heir has had an estate administration opened or not. If so, any distributive share is payable to the personal representative of the estate. If not, the distributive share of the deceased heir is payable to the registry of the court.

Do not attempt to "double-up" and go on to determine the heirship of an heir who survived, but then died unless a separate heirship proceeding has been filed on that heir's behalf. The court can only act within its jurisdiction and that jurisdiction (for these purposes) is determined by the pleadings and citation of whose heirship is being determined. An attempt by the court to act outside of or beyond its jurisdiction produces a void result. *Kowalski v. Finley*, 2004 Tex. App. LEXIS 8393 (Tex. App. Houston 14th Dist. 2004, no pet.).

4. <u>Per Stirpes and Per Capita Distributions</u> - TEX. EST. CODE §201.101 *When the intestate's children, descendants, brothers, sisters, uncles, aunts, or any other relatives of the deceased standing in the first or same degree alone come into the distribution upon intestacy, they shall take per capita, namely: by persons; and, when a part of them being dead and a part living, the descendants of those dead shall have right to distribution upon intestacy, such descendants shall inherit only such portion of said property as the parent through whom they inherit would be entitled to if alive.*

These terms relate to situations in which property

passes by intestacy to a group of people, some of whom have predeceased the Decedent. When those people stand within the first degree of consanguinity (children, descendants, brothers, sisters, uncles, aunts) and they all survive the decedent, each takes a full share for those who survive. This is *per capita* ("by heads").

However, if some of these people predeceased the Decedent and some are still living, the descendants of those who have predeceased share the portion of the one through whom they inherit would be entitled to if alive.

For example, Mother dies with five children. If all five survive, each of the five take one-fifth. If four survive and the fifth children leaves three children, the three grandchildren of the Decedent with the pre-deceased parent divided that child's one-fifth. This distribution is *per stirpes* ("by the roots").

If none of the people of a certain generation survive, the per capita distribution is determined at the generation at which there is a living relative. (hence "standing in the first or same degree alone").

5. Half-Blood and Whole-Blood Distributions - High divorce rates and serial marriages make this a real probability. In a typical situation, May Jones first married John Smith. They had four children. John Smith died. Mary then married John Doe and they had two children.

Mary Jones
m1: ~~John Smith~~ (deceased)
  a. Bob Smith
  b. Randy Smith
  c. Sally Smith
  d. Johnny Smith
m2: John Doe
  a. Jane Doe
  b. John Robert ("J.R.") Doe

Mary and John Doe subsequently die. Later, Bob (one of Mary's children by her first husband) dies intestate (without children or a wife) and you have to determine the distribution of Bob's estate among his collateral kindred.

~~Mary Jones~~
m1: ~~John Smith~~ (deceased)
  a. ~~Bob Smith~~
  b. Randy Smith
  c. Sally Smith
  d. Johnny Smith
m2: ~~John Doe~~
  a. Jane Doe
  b. John Robert Doe

TEX. EST. CODE § 201.057 provides: *HEIRS OF WHOLE AND HALF BLOOD. In situations where the inheritance passes to the collateral kindred of the intestate, if part of such collateral be of the whole blood, and the other part be of the half blood only, of the intestate, each of those of half blood shall inherit only half so much as each of those of the whole blood; but if all be of the half blood, they shall have whole portions.*

To make the proper calculation, you first determine at what level the initial distribution is made. It must be at the highest level (generation closest to the decedent) at which someone is living TEX. EST. CODE § 201.101. Here, that's easy because all survivors are of the same generation.

Next, a per capita ("by head") share is assigned to each person.

~~Mary Jones~~
m1: ~~John Smith~~ (deceased)
  a. ~~Bob Smith~~
  b. Randy Smith ● (one share)
  c. Sally Smith ● (one share)
  d. Johnny Smith ● (one share)
m2: ~~John Doe~~
  a. Jane Doe ● (one share)
  b. John Robert Doe ● (one share)

Then, each "Whole-Blood" - those sharing both ancestors (here, both parents) with the Decedent (Black's Law Dictionary 182 (8th ed. 2004) - get another share.

~~Mary Jones~~
m1: ~~John Smith~~ (deceased)
  a. ~~Bob Smith~~
  b. Randy Smith ● ● (two shares)
  c. Sally Smith ● ● (two shares)
  d. Johnny Smith ● ● (two shares)
m2: ~~John Doe~~
  a. Jane Doe ● (one share)
  b. John Robert Doe ● (one share)

As there are 8 shares, each share is 1/8. The Half-Bloods take 1/8 each, while the Whole-Bloods take 2/8 or 1/4 each.

~~Mary Jones~~
m1: ~~John Smith~~ (deceased)
  a. ~~Bob Smith~~
  b. Randy Smith 2/8 or ¼
  c. Sally Smith 2/8 or ¼
  d. Johnny Smith 2/8 or 1/4
m2: ~~John Doe~~
  a. Jane Doe 1/8

b. John Robert Doe 1/8

Note 1: This section applies only to collateral kindred, not lineal kindred. If the inheritance is determined in a straight line, up or down, it is lineal. If lineage can only be determined by reference to a person other than the deceased, such as siblings, aunts, uncles, nieces, nephews, and cousins-who are not descendants or ancestors but are related to the decedent through an ancestor, they are collateral kindred. Blacks Law Dictionary 741 (8th ed. 2004).

Note 2: If Mary were the decedent in the above example, there would be no half-bloods, since they are all her children. Additionally, if John Doe (Mary's 2nd husband), were the decedent, the step-children from the first marriage would take nothing.

Note 3: Grandparent adoptions of a favored grandchild can wreak havoc with the distributive scheme. Adoptions of stepchildren can "promote them" into being whole-bloods.

6. Heirship and Disclaimers - The order showing the identity of the heirs and their respective shares of the estate should not reflect the effect of any disclaimers or transfers executed pursuant to TEX. EST. CODE § 122.001ff. *Welder v. Hitchcock,* 617 S.W.2d 294 (Tex. Civ. App.--Corpus Christi 1981, writ ref'd n.r.e.).

a. A declaratory judgment action is the proper vehicle to determine if a disclaimer or transfer is effective for estate planning, tax purposes or for creditor avoidance. *Tate v. Siepielski,* 740 S.W.2d 92, 93 (Tex. App.-Fort Worth 1987, no writ). Such an action may be validly joined with the heirship proceeding to properly place before the court the legal effect of the disclaimer. Otherwise, it is asking the court to render judgment on the legal effect of the disclaimer by taking several shortcuts - without sufficient citation, pleadings, testimony and evidence.

b. In *Welder, supra*, the appellants argued the language of the disclaimer statute created a legal fiction ("as if the person disclaiming had predeceased the decedent") requiring a different distribution - one showing the effect of the disclaimer as a part of the heirship determination. The Corpus Christi court of appeals rejected this argument, holding such an argument would require 1) a finding that the Legislature intended to alter partially the order of descent and distribution set out in TEX. PROB. CODE § 43 (now TEX. EST. CODE § 201.101) by the enactment of the disclaimer statute and 2) a finding that the effect of the disclaimer was to re-order and affect the distribution of the entire estate rather than "the property subject thereof," referring only to the property over which the disclaimant had authority by inheritance. The court in *Welder* held that, by enacting TEX. EST. CODE §37A (now TEX. EST. CODE § 122.001), the Legislature intended to affect only to whom a disclaimed share descends, and not the manner in which an entire estate is to be distributed.

7. Adult Adoptees - An adopted adult is entitled to inherit from and through the adopted adult's adoptive parents as though the adopted adult were the biological child of the adoptive parents. However, the adopted adult may not inherit from or through the adult's biological parent. Also, a biological parent may not inherit from or through an adopted adult. TEX. FAM. CODE § 162.507

8. Deadbeat Dads - Although the legislature attempted to block "Deadbeat Dads" from inheriting from deceased minor children where the parent had either abandoned the mother and child or had been found guilty of a list of crimes enumerated within the statute, (TEX. EST. CODE §§ 201.062, the Texas Attorney General has opined that, except in narrow circumstances, these provisions run afoul of Article I, section 21 of the Texas Constitution, which provides that "no conviction shall work corruption of blood or forfeiture of estate." In Opinion No. GA-0632 (May 30, 2008), Attorney General Abbott concludes that unless the parent is also within the provisions of the Slayer's Rule (see *infra*) the new provisions go too far and are unconstitutional.

9. The Slayer's Rule - Heirs convicted (or in a wrongful death suit - found by a civil court) of "willfully bringing about the death of the Decedent" do not forfeit their right to inherit under TEX. EST. CODE § 201.058. However, under TEX. INS. CODE §21.23 there is statutory exception to this rule, imposing a forfeiture. This is cross-referenced in TEX. EST. CODE § 201.058(b). In addition, the courts of Texas have recognized the equitable right of a family member to seek the imposition of a constructive trust against the ownership interest of one who willfully brings about the death of a family member. *see* Branyon, The Slayer's Rule Revisited, 1996 Advanced Estate Planning and Probate Course, State Bar of Texas and *Bounds v. Caudle*, 560 S.W.2d 925 (Tex. 1977); *Medford v. Medford*, 68 S.W.3d 242 (Tex. App. Ft. Worth 2002, no pet.); *Mowbray v. Avery* 76 S.W.3d 663 (Tex. App. Corpus Christi 2002, pet. denied); and *Admin. Comm. for the H.E.B. Inv. & Ret. Plan v. Harris*, 217 F. Supp. 2d 759, (E.D. Tex. 2002). (ERISA discussion).

10. DNA Evidence and Heirship – Thanks to amendments in 2007, probate lawyers can now take advantage of genetic testing in heirship without the necessity of instituting a Uniform Parentage Act proceeding under TEX. FAM. CODE Chap 160.

New TEX. EST. CODE §§ 204.001ff allow a petition for a right of inheritance and the use of genetic

testing. For an extended discussion (and forms), see *King, Blood Will Out: The Use of DNA Evidence in Texas Estate Proceedings, 30th Annual Advanced Estate Planning and Probate Course, State Bar of Texas 2006.*

11. Surviving Spouse's Interest – Get it clear: with community property - if there are heirs other than the children of the Decedent and the Surviving Spouse, the Surviving Spouse does not inherit anything. However, the Surviving Spouse retains his/her half of the community property.

I. Job Skills - More a list of pointers than anything else. You should:

1. Really understand the intestacy chart: Appendix Al.
2. Make sure you have all necessary documentation and information by counsel for the Applicant. The Applicant must bear the burden of proof - let them do the heavy lifting.
3. Feeling a lack of cooperation? Get a feeling they are hiding something? Ask for a conference with the court and all other counsel or consider the tactics listed under "Actively Contesting the Application," *supra*.
4. Don't contest something just because you are unsure as to how to proceed. ASK.
5. Be professionally skeptical. As President Reagan quoted to Gorbachev during the U.S.-Russia disarmament talks in the 1980s: *"Doveryay, no proveryay"* (*Trust, but verify).*
8. See through prejudice and ignorance of the law. People are often defensive about embarrassing family situations or lifestyles. Family members may emotionally "write off" the children of a deceased "black sheep" with the rationalization "We were never close to them." Adopted-out children born out of wedlock are sometimes 'conveniently' forgotten.

XIII. EPILOGUE: TAKING OVER THE REINS

A. 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.)

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

- Don't rely on counsel for the applicant or court personnel to tell you when to do your job.
- Don't make work or churn the file for more billable time, but stay on top of what needs to be done.
- Use the flowchart as starting point for checklist of responsibilities. Develop your own checklists for scheduling the progress in a guardianship matter. Create a memo knowledge bank
- Don't ask the court to count the days on enforcement matters.
- Always listen for the dog that is not barking.

C. 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.

Appendix A

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

Legislative changes that began in 1993 have completely overhauled the guardianship process in Texas. Now, effective January 1, 2014, The guardianship laws are found in the Texas Estates Code ("TEX. EST. CODE"), §§ 1001.101-1356.056. The Courts are now required to customize each guardianship to fit the needs of an 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;
2. The Court Visitor Program; and
3. Annual Determination.

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, investigate complaints about guardianships and generally act as a liaison between the public, social workers, attorneys and the Court.

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" ("IP") which is defined in TEX. EST. CODE § 1002.017 to mean

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 § 1001.101 provides that:

1. A court may appoint a guardian with full authority over an IP; or
2. A court may appoint a guardian with limited authority over an IP:
   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 IP, the Court shall design the guardianship to <u>encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person.</u>

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

1. <u>Guardian of the Person</u> – A guardian of the person has the:
   a. right to have physical possession of the IP and to establish the IP's legal domicile;
   b. duty of care, control and protection of the IP;
   c. duty to provide the IP 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 IP.
2. <u>Guardian of the Estate</u> – A guardian of the estate of the IP has the following powers and duties:
   a. to possess and manage all property of the IP;
   b. to collect all debts, rentals or claims that are due to the IP;
   c. to enforce all obligations in favor of the IP; and
   d. to bring and defend suits by and against the IP.

II. WHEN IS A GUARDIANSHIP NECESSARY?

A. Common Situations mental retardation, 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 Used 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 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 IP should examine these alternatives. A list of some of the most common Less Restrictive Alternatives is attached to this paper.

III. HOW DOES ONE GET A GUARDIANSHIP STARTED?

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 IP.

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."

In Tarrant County, the Courts require an information letter and a doctor's letter to establish probable cause. If the IP's incapacity is intellectual disability, the Court must be provided with a Determination of Intellectual Disability or "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 IP 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 IP. If no emergency action is necessary, APS should make a referral to the Texas Department of Aging and Disability Services 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 IP. 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 IP will be in imminent danger when discharged is not considered imminent danger by most courts.

E. Guardian Appointment Process

1. 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 IP with a copy of the Application.
3. The Court appoints an Attorney Ad Litem to represent and advocate for the IP.
4. The known relatives of the IP 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 IP is personally served.
6. The Attorney Ad Litem must personally visit the IP and determine if the IP wants to contest the guardianship.
7. The applicant's attorney must file a doctor's letter with the court which states that the IP is incapacitated and generally describes the nature of the incapacity.
8. A hearing date is set with the Court. The IP must attend the hearing unless the Court determines that it is not in the best interests of the IP to attend.
9. The Judge or jury hears testimony and decides if a guardianship is necessary, what powers the guardian should have, how the IP'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?

Statutory Priority Texas Estates Code §§ 1104.051 & 1104.102 provide a legal priority as follows:

1. a person selected by IP on a declaration of guardian;
2. IP's spouse;
3. nearest of kin;
4. any suitable person.

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 IP's mental and physical condition and stating any change of the IP's or guardian's residence. A guardian of the estate is required to file an annual account stating all receipts, disbursements, cash on hand, and assets being administrated. 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 volunteer makes an annual visit on each IP who is the subject of a guardianship. The Court Visitor personally visits the IP and the guardian and reports his or her findings and conclusions to the Court concerning the IP's social and intellectual functioning 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.

Appendix B:

COURT INITIATED GUARDIANSHIPS IN TARRANT COUNTY PROBATE COURTS

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

The Tarrant County Probate Courts have implemented the following procedures to comply with this statute.

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

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

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

Tarrant County Probate Courts
Tarrant County Courthouse
100 W. Weatherford
Fort Worth, Texas 76196

(Requests may be sent to the court by fax at 817/884-3178, but must be followed by originals.)

Once these documents are received, the case will be assigned to either Probate Court One or Two

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

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

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

a. personally interview the Proposed Ward as soon as possible;

b. interview the person who filed the Information Letter concerning the Proposed Ward as well as the known relatives/friends of the Proposed Ward;

c. consider whether less restrictive alternatives to guardianship are advisable;

d. consider the necessity of filing for a temporary guardianship (see 5. below);

e. as soon as possible, file an Application for Appointment of a Guardian (if necessary) and prepare an Order Appointing Attorney Ad Litem;

f. set the case for a hearing and call the Probate Clerk's Office, to ensure that Proposed Ward is properly served and that the citation has been on file for a sufficient amount of time prior to hearing;

g. locate a person to serve as Guardian or contact Guardianship Services, Inc or the Texas Department of Aging and Disability Services. (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 Texas Estates 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:

BARRIE ALLEN 817-884-2189
Court Investigator
ballen@tarrantcounty.com
MARY CAROE 817-884-1897
mecaroe@tarrantcounty.com
Assistant Court Investigator
Probate Court Number One
100 W. Weatherford, Rm. 260A
Fort Worth, TX 76196
Fax: 884-3178

JEFF ARNIER 817-884-3395
Court Investigator
jarnier@tarrantcounty.com
ARLENE SHORTER 817-884-2719
ashorter@tarrantcounty.com
Assistant Court Investigator
Probate Court Number Two
100 W. Weatherford, Rm. 314A
Fort Worth, TX 76196
Fax: 884-1807

Appendix C: Information Letter Date: _____

Judge Steve M. King, Tarrant County Probate Court 1
Judge Patrick W. Ferchill, Tarrant County Probate Court 2
100 West Weatherford Street
Fort Worth, TX 76196

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

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

Name: _____ Phone: _____
Address: _____ Birthdate:_____
_____ 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 Tarrant County
☐ YES ☐ NO is located in Tarrant County
☐ YES ☐ NO has a Guardian in Texas. (Parents are the natural guardians of children under 18.)
☐ YES ☐ NO has executed a Power of Attorney. If "YES," to whom was it given?
Name: _____ Phone: _____
Relationship: _____ Social Security Number: _____
Address: _____

☐ is a minor ☐ is an adult
☐ cannot provide food, clothing, or shelter for him/herself.
☐ cannot care for the individual's own physical health.
☐ cannot manage the individual's own financial affairs.
The person has the following property :(include Real Property, Cash, Bank Accounts, Certificates of Deposit, Stocks, Securities, other investments, automobiles, etc.)

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

MONTHLY INCOME: (Show sources and amounts per month)

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

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

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

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

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

Non-family members who might be willing to serve as guardian. Attach additional sheets as needed.

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

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

_____ (initials) Generally, Texas Courts will not appoint a guardian if a "less restrictive alternative" *is* available. In that regard a list of less restrictive alternatives is attached to this form as an appendix. This is not intended to be an exclusive list, nor is it intended to substitute for the advice of legal counsel. However, you are requested to review this list, and indicate that you have done so by initialing the blank above and do not believe a less restrictive alternative is available.

Sincerely,

_____

DECLARATION

"My name is _____ and
(First) (Middle) (Last)

my address is _____.
(Street & Apt #) (City) (State) (Zip Code) (Country)

"I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge."

Executed in County of _____, State of _____, on _____.

_____
Declarant

_____
Printed Name of Declarant

Revised June 15, 2013

Physician's Certificate of Medical Examination

Revision November 2013

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

For Court Use Only
Court Assigned:_____

To the Physician

The purpose of this form is to enable the Court to determine whether the individual identified above is incapacitated according to the legal definition (set out on page 4), and whether a guardian should be appointed to care for that person.

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 Function

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.

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
☐--- Performing simple calculations
☐--- 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)
☐ 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 on page 4.
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 _____

Developmental Disability, continued

Please answer the questions in the 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 on the next page.

"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, 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 on the next page.
   - ☐ **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 certified by the Department of Aging and Disability Services 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.

If you answered "NO" to all of the questions regarding decision-making in Section 5 (on page 2) and yet still believe the Proposed Ward is **partially** incapacitated, please explain: _____

_____

_____

If you answered "YES" to any of the questions regarding decision-making in Section 5 (on page 2) and yet still believe the Proposed Ward is **totally** incapacitated, please explain: _____

_____

_____

9. Ability to Attend Court Hearing

☐ YES ☐ NO ---- The Proposed Ward would be able to attend, understand, and participate in the hearing.

☐ YES ☐ NO ---- Because of the Proposed Ward's incapacities, I recommend that the Proposed Ward not appear at a Court hearing.

☐ YES ☐ NO ---- Does any current medication taken by the Proposed Ward affect the demeanor of the Proposed Ward or his or her ability to participate fully in a court proceeding?

10. What is the least restrictive placement that you consider is appropriate for the Proposed Ward:

☐--- Nursing home level of care

☐--- Memory care unit

☐--- Other _____

11. Additional Information of Benefit to the Court: If you have additional information concerning the Proposed Ward that you believe the Court should be aware of or other concerns about the Proposed Ward that are not included above, please explain on an additional page.

_____ _____

Physician's Signature Date

_____ _____

Physician's Name Printed License Number

Appendix D:

LESS RESTRICTIVE ALTERNATIVES TO GUARDIANSHIP

I. AVOIDING GUARDIANSHIP OF THE PERSON

1. Emergency Protective Order ("EPO") or Emergency Order for Protective Services ("EOP") TEX. HUM. RES. CODE § 48.208 - A procedure to remove a person lacking capacity to consent to medical services from a situation posing an immediate threat to life or physical safety. Adult Protective Services files a verified petition and an Attorney Ad Litem is appointed. On a finding of probable cause by the probate court of the threat and lack of capacity, the person is removed to treatment and examined within 72 hours. The removal may last no longer than 72 hours unless extended by the court for up to 30 days. An application for temporary and permanent guardianship usually follows.

2. Surrogate Decision -Making ("SDM") – TEX. HLTH. & SAF. CODE § 313.001-.007 – For **non-emergency** medical decisions to be made for incapacitated individuals who are either in a hospital or nursing home without the necessity of a guardianship.

Decision–Maker Priority: 1) the patient's spouse; 2) an adult child of the patient with the waiver and consent of all other qualified adult children of the patient to act as the sole decision-maker; 3) a majority of the patient's reasonably available adult children; 4) the patient's parents; or 5) the individual clearly identified to act for the patient by the patient before the patient became incapacitated, the patient's nearest living relative, or a member of the clergy.

Limitations on consent: Surrogate decision-maker cannot consent to: 1) voluntary inpatient mental health services; 2) electro-convulsive treatment; 3) the appointment of another surrogate decision-maker; 4) emergency decisions; or 5) end-of-life decisions (extending or withdrawing life support).

SDM does not: 1) replace the authority of a guardian nor an agent under a medical power of attorney; 2) authorize treatment decisions for a minor unless the disabilities of minority have been judicially removed; 3) authorize patient transfers under Chapter 241 of the Health and Safety Code.

Withdrawal of Life Support: for provisions concerning withdrawal of life support where no Directive to Physicians has been executed, and in situations where there is no guardian, see TEX. HLTH. & SAF. CODE § 166.039.

3. Surrogate Decision Making for Intellectually Disabled (MR) - TEX. HLTH. & SAF. CODE § 597.041 – A more specialized form of surrogate decision-making, this statute allows SDM Committees to act for MR persons who reside in an intermediate care facility for the mentally retarded (ICF/MR) – Allows medical and non-medical decisions to be made by the committee.

4. Surrogate Decision Making for Minors When Parent Unavailable TEX. FAM. CODE § 32.001ff - consent to dental, medical, psychological, and surgical treatment of a child by persons authorized in statute.

5. Authorization Agreement for Non-Parent Relative – TEX. FAM. CODE Ch. 34 - A parent may authorize a grandparent, adult sibling or adult aunt or uncle to have decision-making authority for a minor child for: healthcare, insurance coverage, school enrollment, school activities, driver's education, employment and application for public benefits. This essentially authorizes the designee to do anything a guardian of the person could do.

The official form, promulgated by the Texas Department of Protective and Family Services and identified as "Form 2638", can be accessed at: www.dfps.state.tx.us/documents/Child_Protection/2638.pdf

6. Emergency Medical Treatment Act - TEX. HLTH. & SAF. CODE § 773.008 - In certain limited circumstances involving emergency situations, consent to medical treatment does not have to be given, it is implied. Hospital emergency rooms could not function if consent had to be secured beforehand.

Emergency treatment of minors - Consent is also implied for the treatment of a minor who is suffering from what reasonably appears to be a life-threatening injury or illness (even if they can communicate) if the minor's parents, conservator, or guardian is not present. TEX. HEALTH & SAFETY CODE § 773.008(3).

7. Managing Conservatorships TEX. FAM. CODE Ch. 153 - **Functional equivalent to Guardian of the Person** Especially for families involved in a divorce context, a conservatorship may be used in place of a guardianship of the person for a minor, but only when there is no issue of assets belonging to the minor children.

Check the small print - The divorce decree, if there is one, should be carefully examined regarding any management powers granted either spouse regarding property of the children. TEX. FAM. CODE §153.132 grants a parent appointed sole managing conservator essentially the full rights of a guardian of the person and in TEX. FAM. CODE §153.073, the right to manage the property of the child "to the extent that the estate has been created by the parent or the parent's family." The Family Code provides no monitoring mechanism for property management.

8. School Admission Procedures - TEX. EDUC. CODE §25.001(d) – Under §25.001(d) of the Education Code, a school district may adopt guidelines to allow admission of non-resident children to school without the need for a guardianship. You may want to find out who in the school district administration possesses this information before you need it.

9. School Admission Procedures - TEX. EDUC. CODE §

25.001(b)(9) – A school district may adopt guidelines to allow admission of non-resident children to school if a grandparent of the child resides in the school district and the grandparent provides "a substantial amount" of after-school care for the child. The local school board is to adopt guidelines to implement this provision. No cases yet as to how this might square with TEX. EDUC. CODE § 25.001(d) if there is a guardian, but the child wants to live with the grandparent.

10. Court-Ordered Mental Health Services - TEX. HLTH. & SAF. CODE §§ 462.001, 571.001, 574.001 – In the case of a chronically mentally ill person, a temporary involuntary commitment may well be preferable to a guardianship. A guardianship, with its attendant removal of functional rights, might well be much more restrictive once the patient/ward has become stabilized on medication. Commitment provisions for the chemically dependent, mentally retarded, persons with AIDS and tuberculosis are also available in limited circumstances.

11. Driving Issues: Katie's Law and the Re-Test Request - Effective September, 1, 2007, Texas drivers aged 79 or older can no longer renew a driver's license by mail or electronic means, but must renew the license in person at an authorized license renewal station. In addition, drivers aged 85 and older will now have to renew every two years, rather than every six years. TEX. TRANSPORT. CODE § 521.2711

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

A relatively new concept is the "Family Driving Agreement" a type of advance directive for driving decisions. The driver agrees in writing to designate someone to advise him or her when it is time to "give up the keys." For more information, see keepingussafe.org.

12. Mental Illness Diversion Programs (Criminal Courts)

Persons with mental health issues are often jailed for crimes over which they had little or no control.

In a mental illness diversion program, individuals with a documented mental health problem are treated as patients, not criminals.

In the program, individuals are placed on a strict, supervised probation with regular court check-in dates to document and receive progress updates. Psychiatrists and other professionals develop a mental health treatment program, customized to meet the specific needs of the participants.

Following completion of the program, the charges are dismissed and may be eligible for expunction.

II. ADVANCED MEDICAL DIRECTIVES

The Federal Patient Self-Determination Act 42 USCA § 1395cc(f) requires health care providers, to be eligible for Medicare and Medicaid payments, to supply patients with information regarding Medical Powers of Attorney as well as Directives to Physicians. Patients are to be given information regarding their rights under Texas law to make decisions regarding medical care (including the right to accept or refuse treatment) and the right to formulate advance directives. TEX. HLTH. & SAF. CODE Ch. 166 consolidates the location of the law regarding the 1) the Medical Power of Attorney, 2) and the Directive to Physicians. and 3) the "Out of Hospital Do Not Resuscitate" form. The chapter also provides common definitions to be used among all three documents

13. Medical Power of Attorney - TEX. HLTH. & SAF. CODE § 166.151 The most commonly used tool to avoid guardianship, the Medical Power of Attorney (formerly the Durable Power of Attorney for Health Care) is a creature of statute and should be prepared and executed with close attention to the statutory scheme set out in the Health & Safety Code. Most prudent estate planners will include the Medical Power of Attorney along with a Will and Durable Power of Attorney in a basic estate plan.

The Medical Power of Attorney is not automatically revoked upon the appointment of a guardian. The court may choose to suspend or revoke the power of the agent or to leave the Medical Power of Attorney in place as a less restrictive alternative.

CAVEAT: Nursing homes and hospitals may be reluctant to accept Medical Powers of Attorney which are executed made close to the time they are needed, particularly if the patient's capacity is questionable.

14. Directive to Physicians and Family or Surrogates ("Living Will") – TEX. HLTH. & SAF. CODE § 166.031 –

The newly revised and renamed form also now requires a disclosure statement (much like in the medical power of attorney), a place to indicate a choice between two treatment options, and a place for designation of an agent. The Directive interrelates to the Medical Power of Attorney in that it instructs the principal not to designate an agent on the Directive if a Medical Power has been executed. Unlike the new mandatory form for the Medical Power, the new Directive form is **permissive**.

Intractable Pain Treatment Act. - TEX. REV CIV. STATS Art. 4495c. This act, adopted in 1995, was the first state statute in the nation designed to protect doctors for prescribing morphine to terminal patients for pain management during end-stage treatments without fear of professional disciplinary action for addicting the patients. See www.medsch.wisc.edu/painpolicy. the website for the Pain & Policy Studies Group of the University of Wisconsin Medical School for additional information and discussion on pain management policy.

15. Out-of Hospital DNR ("EMT-DNR")- TEX. HLTH. &

SAF. CODE § 166.081 – requires the ambulance personnel to let you die if that is your expressed wish. The tricky thing is having the right document or indicator available. This is one form that you cannot prepare. The forms are actually printed by the Texas Department of Health. Only the officially printed forms (with red ink in the right places) will be honored by the EMTs. The Texas Department of Health has information on ordering the forms and necessary identifying bracelets at http://www.tdh.state.tx.us/hcqs/ems/index.htm#EMSRESOURCES.

16. End-Stage Planning: The Patient's Intent, If Known

With or without legal assistance, a person may express his or her wishes and desires as to treatment decisions as disability or death approach. The oldest and most widespread of these is the "Five Wishes," a pamphlet developed in Florida and used in 33 states. It combines 1) surrogate decision making, 2) a medical power of attorney and 3) palliative care choices, many of which are sufficiently thought-provoking to promote some discussion on the topic with the one considering such choices.

CAVEAT: Because of the stringent witnessing requirements under the Advanced Medical Directives Act (TEX. HLTH. & SAF. CODE Ch. 166) and the mandatory nature of the form of the Texas Medical Power of Attorney, the universal *Five Wishes*™ pamphlet has not been implemented in Texas, however, Texas law does require that the patient's wishes, if known, are to be followed, (e.g.: TEX. HLTH. & SAF. CODE § 166.152(e)(1)). As a result, the Five Wishes may still function as a statement of the patient's intent. www.agingwithdignity.com

III. AVOIDING GUARDIANSHIP OF THE ESTATE

17. Common Law Power of Attorney

A common law power of attorney is an agency relationship created by contract between a principal and an attorney-in-fact (person to whom the principal gives power to act). Thus, anyone who has the legal capacity to create a valid contract may appoint an attorney-in-fact. See *Texas Transaction Guide* §92.21.

No writing required, but very limited application. Not available for minors or the incapacitated. Expires upon incapacity. If "coupled with an interest" may be irrevocable.

Don't seriously consider arguing this unless it is your only hope.

18. Durable Power of Attorney - TEX. EST. CODE § 751.001ff – provides for all acts done by the attorney in fact (agent) to have the same effect, inure to the benefit of, and bind the principal and the principal's successors in interest as if the principal were not disabled. The statutory form allows the grant of broad authority. **If** the Proposed Ward still has enough capacity to grant the power, this is virtually a "no-brainer".

Will the Bank accept it? If you have a client who is planning to use a durable power of attorney and you have some special provisions that have been requested, it is really a good idea to check with your client's banker, stockbroker and other people who are gatekeepers with respect to the client's assets. If they are not prepared to accept those special provisions, you probably want to go a different direction.

Other drawbacks – Because there are no real checks-and-balances on the attorney-in-fact, anecdotal evidence of fraud and abuse often comes "too little, too late" for effective relief. Amendments in 2001 impose a duty on the agent to inform and account to the principal of actions taken under the power and to maintain complete records of actions taken. TEX. EST. CODE § 751.101.

Patriot Act – Know Your Customer – A further complication hampering the use of Durable Powers of Attorney comes as a result of the "Know Your Customer" provisions of the "Patriot Act" (Public Law 107-56 – Oct. 26, 2001). Because the bank must aggressively verify identities, if the attorney in fact presents the power of attorney in question after the incapacity of the principal, there will most likely be insurmountable problems.

19. Convenience Accounts - TEX. EST. CODE § 113.102

- allows a depositor to name a co-signer on his or her account without giving the co-signer ownership rights before or after the depositor's death.
- creates a straightforward agency relationship for a potential ward to allow a family member or friend to help them pay bills and handle other banking business.
- a Convenience Signer cannot pledge the assets of the account. TEX. EST. CODE § 113.251.

Convenience Signer On Other Accounts TEX. EST. CODE § 113.106 – Account owner may designate "Convenience Signers" on other types of multi-party accounts such as joint tenancy with right of survivorship, pay-on-death and trust accounts.

Beware of unintended consequences.

20. Sophisticated Tax Planning

This alternative is included by way of issue recognition, rather than as an attempted exposition. Non-tax-planners might consult their tax planning brethren if a situation presents itself where there is a potential to employ tax planning as a part of disability planning/guardianship avoidance.

21. Inter Vivos ("Living") Trusts - TEX. PROP. CODE §§ 111-115 – Like any tool in the toolbox, a revocable inter vivos trusts has its particular applications. It is an excellent and highly flexible tool when drafted by a knowledgeable, competent estate planning lawyer, working with a full understanding of the client's needs, objectives, and circumstances, and when coordinated with other appropriate estate planning tools and techniques. The trustee can be given much more freedom that a guardian would enjoy, especially in such areas as investments and distributions.

Scam Trusts - IRS - The See IRS Pamphlet 2193 for the attempts of the IRS to educate the public about trust scams. It gives consumers some simple ways to help decide if the trust they are contemplating is "too good to be true."

Irrevocable Trusts – To protect clients from themselves.

22. §142 Trusts – TEX. PROP. CODE § 142.005

In a suit in which a minor who has no legal guardian or an incapacitated person is represented by a next friend or an appointed Guardian Ad Litem, the court may, on application by the next friend or the Guardian Ad Litem and on a finding that the creation of a trust would be in the best interests of the minor or incapacitated person, order the clerk to deliver any funds accruing under the judgment to a trust company or a state or national bank with trust powers. TEX. PROP. CODE § 142.005.

Drawback: These trusts generally fail to provide for any accountability on the part of the trustee. A burgeoning number of fiduciary breach suits are being brought as a result.

Advance Planning: If the suit in question has not already gone to judgment, consider instituting a guardianship proceeding and requesting that the suit be transferred into the probate court.

If you are not in a statutory probate court, ask for a Statutory Probate Judge to be appointed under TEX. GOVT CODE § 25.0022. The Statutory Probate Judge brings with him or her all of the jurisdiction of a statutory probate court, including the transfer power under TEX. EST. CODE § 1022.007. TEX. GOVT CODE § 25.0022(n).

Once you are in the probate court, a Guardianship Management Trust may be created without the necessity of also creating a guardianship. TEX. EST. CODE § 1301.051.

23. Testamentary Trusts

Testamentary trusts can be used to avoid a guardianship for the Testator's spouse, any family members with special needs and children and grandchildren of the Testator. When combined with traditional disability and tax planning, the potential for avoiding guardianship (and most of probate altogether) is great. As always, getting the client in to start the planning process is the hardest part.

24. Guardianship Management Trusts – TEX. EST. CODE § 1301.051 - An effective property management tool while protecting the property from malfeasance.

- may be established whether a guardian is ultimately appointed or not.

- Applicants can include a guardian, an Attorney Ad Litem, a Guardian Ad Litem or a person interested in the welfare of the ward.

The ability to continue the administration of the trust until age 25 (TEX. EST. CODE § 1301.203) can be particularly advantageous to provide a few more years of professional money management during an extended "training wheels" period for the ward/beneficiary.

- **Distribution to Pooled Trust Subaccount** – In light of the global economic downturn since 2008, the Guardianship Management Trust assets can be transferred to a subaccount of a Master Pooled Trust for more economic management of assets that might otherwise be too modest for a bank trust department. TEX. EST. CODE §§ 1302.001ff. See *infra*.

25. Pooled Trust Subaccounts TEX. EST. CODE §§ 1302.001ff - As an alternative to a Guardianship Management Trust, funds otherwise appropriate for a Management Trust to be transferred to a pooled trust, such as that operated by the Association for Retarded Citizens (ARC). It will preserve Medicaid qualification. It requires that an annual report be filed, but not a guardianship-style accounting. The trustee may assess its standard fees against the subaccount.

26. Special Needs/ Medicaid Qualification Trusts - 42 USC 1396p (1)(d)(4)(A)

Medicaid is a federal, means-tested program health program for eligible individuals and families with low incomes and resources. It is jointly funded by the state and federal governments, and is managed by the states. In Texas, an individual whose resources or income exceed certain limits cannot qualify for Medicaid benefits. However, certain resources, or assets, do not count for Medicaid eligibility purposes.

The enabling statute, "OBRA 93", allows the use of very specific trusts which may be established with an individual's own assets, but which will not count against the resource limit for that individual for Medicaid purposes.

Although there are three types of such trusts, it is the trust for disabled persons under age 65, authorized pursuant to 42 U.S.C. § 1396p(d)(4)(A) which typically involves the courts. These are most often called "Special Needs Trusts" or "Supplemental Needs Trusts."

Personal injury attorneys are only recently appreciating the utility of these trusts in preserving assets for the permanently disabled client who will remain institutionalized.

Be aware of the potential exposure for an Attorney Ad Litem in a P.I. case who fails to consider the appropriate use of the supplemental needs trust, resulting in a much smaller net benefit for the disabled client.

27. Trusts for Intellectually Disabled (MR) Persons TEX. HLTH. & SAF. CODE § 593.081 - Up to $250,000 may be placed in a trust for the benefit of MR individuals in certain residential-care facilities without disqualifying them from receiving state benefits and without the need for a guardianship.

A copy of the trust must be provided to Texas Department of Aging and Disability Services.

DADS may request current financial statements.

Guardianship funds - Ch. 142 trusts, patient's trust fund's in a residential-care facility, child support, an interest in a decedent's estate, and funds in the registry of the court are not considered trusts and are not entitled to the exemption.

28. Community Administrator - TEX. EST. CODE § 1353.002 - Upon a declaration of incapacity of one spouse, the other spouse, in the capacity of "community administrator" (no the decedent's estates kind) has the power to manage, control and dispose of the entire community estate without the necessity of a guardianship upon a finding by the Probate Court that: 1) it is in the best interest of the ward for the capacitated spouse to mange the community

property, and 2) the capacitated spouse would not be disqualified to be appointed as guardian of the estate under §1104.351ff.

An ad litem may be appointed, the administrator required to return an inventory and accountings and a guardian of the estate may retain management rights over some specified varieties of real and personal property. These matters are considered in the context of a guardianship application and are not freestanding applications.

TEX. FAM. CODE § 3.301ff (the corollary provision to TEX. EST. CODE § 1353.002) was drastically amended in 2001. It is no longer possible to have the capacitated spouse manage or sell the community property under the Family Code, absent highly unusual circumstances.

29. Court Registry - TEX. EST. CODE § 1355.001 - This provision is often viewed as simply an administrative deposit mechanism and is often overlooked as an opportunity to avoid administration of a minor's or other incapacitated person's guardianship estate. Up to $100,000 may be deposited into the court's registry during the period of incapacity. The clerk is to bring the matter to the judge's attention and the funds are to be ordered invested in an interest-bearing account.

"Mini-administration:" Certain specified persons are permitted to withdraw all or a portion of the funds in the registry under bond to be expended for the benefit of the incapacitated person. After an accounting to the court, the bond may be released. This provides a very simple alternative to guardianship, particularly in a rural county. Upon attaining majority, minors are able to withdraw the funds upon proof of age and an order of the court. TEX. EST. CODE § 1355.105.

CAVEAT: TEX. LOC. GOVT. CODE §§ 117.054 & 117.055 authorize the county clerk to charge investment management fees on funds in the court's registry: a) 10% of any interest earned on interest-bearing accounts and b) 5% (but not to exceed $50.00) on non interest bearing accounts.

Where funds are interplead because of a settlement but no probate case is pending, make sure the order specifies that the funds are to be deposited in an interest-bearing account.

Institutionalized incapacitated individuals: TEX. EST. CODE § 1355.151ff allow funds being held for an incapacitated individual who is institutionalized by the State of Texas to be paid to the institution for a trust account for the benefit of the individual, up to a maximum of $10,000.

30. **Payment to Non-Resident Creditor** TEX. EST. CODE § 1355.002 Permits money payable to a non-resident minor, a non-resident adult ward or a non-resident former ward of a terminated Texas guardianship ("non-resident creditor") to be paid either to the guardian of the non-resident creditor in the domiciliary jurisdiction or to the county clerk where the non-resident creditor owns property or in the county of the debtor's residence.

30. Sale of Minor's Interest in Property - TEX. EST. CODE § 1351.001

This relatively simple procedure allows the interest of a minor in realty to be sold and deposited into the court's registry if the minor's interest is less than $100,000. The minor's interest needs to be cash only, so it sometimes is necessary to do a bit of structuring to "cash out" a minor's undivided interest.

The sworn application, which must contain the name of the minor and a legal description of the property, is filed and then is supposed to sit for five days. Citation is optional with the court. Most courts will want to see some indication of value beyond a contract and tax statement. Venue for this procedure is the same as for a guardianship. Court approval is subject to a 'best interest' test on behalf of the minor.

Upon approval by the court (check your local practice as to whether a hearing is actually required), the sale is closed and the proceeds deposited into the court's registry. The funds are available for withdrawal as described above.

31. Sale of Adult Incapacitated Ward's Interest in Property - TEX. EST. CODE § 1351.051

Until this section was enacted, adult incapacitated individuals with meager personal property but with undivided interests in real property were often required to have somewhat meaningless guardianships of the estate. This provision allows adult incapacitated individuals to proceed with a guardian of the person only where their interest in real property is valued at less than $100,000.

32. Mortgage of Minor Interest/ Minor Ward's Interest in Property - TEX. EST. CODE §§ 1352.051, 1352.101

These provisions allow the parents, managing conservator or guardian of the person (as applicable), to obtain a home equity loan secured by the minor's interest in homestead property for the payment of education and medical expenses , for repairs to the homestead property, and for repayment of the loan.

A bond set in twice the amount of the loan amount is required, as well as a hearing on the front end and annual accountings while the loan is being paid off.

33. Uniform Transfers to Minors Act - TEX. PROP. CODE § 141.001 et. seq. - The ability of a donor to make transfers of various types of assets to a minor by the donor's appointment of a custodian has broad coverage and far-reaching implications. The custodian has authority to invest and expend the transferred assets – without court order – for the support, education, maintenance and benefit of the minor.

Again, the lack of supervision may dictate against this as a vehicle of choice unless the custodian is sophisticated enough to really understand fiduciary responsibility.

34.Receivership TEX. EST. CODE § 1354.001, TEX. CIV. PRAC. & REM. CODE §§ 64.001ff, - Of particular interest is where the incapacitated person owns an interest in a going business or commercial property which is in danger of injury. The court may appoint a receiver, who is subject to the same compensation and bonding provisions under the Estates Code as a personal representative. The Receiver administers the property until the need for the receivership is over.

In 1999, the provisions for guardianship for missing persons were repealed. Receivers are now to be appointed for missing persons.

35. Order of No Administration TEX. EST. CODE §§ 451.001ff

If your object is simply to transfer title to estate assets to a disabled surviving spouse or minor children and your facts meet the criteria specified, this somewhat archaic procedure, sort of an amalgamation of a small estate affidavit and an application for family allowance, may be employed if there is otherwise no necessity for administration. The court may dispense with notice or may prescribe the quality and quantity of notice required. TEX. EST. CODE § 451.002.

The court's order reads like the "facilitation of payment" language in a muniment of title proceeding and acts as authority to effect the transfer of the property involved. TEX. EST. CODE § 451.003. Such an order may be "undone" within one year if other information comes to light showing a necessity for administration. TEX. EST. CODE § 451.004.

36. Representative Payee 42 USC § 1383(a)(2)

A Representative Payee may be appointed by the Social Security Administration to manage Social Security benefits without the appointment of a guardian. Potentially available to all of the 50 million individuals receiving some sort of Social Security benefits, close to 7 million people currently receive Social Security benefits under the representative payee program. This is approximately ten times greater than all active court-supervised guardianships in the United States.

37. Veteran's Benefits Fiduciary - 38 USC § 5502(a)(1) Very similar to the Social Security rep payee program, the Department of Veteran's Affairs allows the appointment of a person to handle the administration of veteran's pension benefits without the appointment of a guardian. www.vba.va.gov/bln/21/Fiduciary/index.htm

38. Payment of Employees Retirement System Funds to Parent of Minor - Op. Tex. Att'y Gen. No. H-1214 - a parent may receive and manage a minor child's Texas Employees Retirement System (ERS) benefits without guardianship. This opinion relies on two propositions:

- a parent has authority to manage the estate of a minor child without court appointment of a guardian. TEX. FAM. CODE § 151.001(a)(4).
- A parent may also receive, hold, and disburse funds for the minor's benefit. TEX. FAM. CODE § 151.001(a)(8).

39. International Treaty

There is at least one international treaty between Mexico and the united States that provides for judgments benefitting minors who are Mexican Nationals to be paid to the Mexican Government to as trustee. E-mail from Judge Guy Herman, April 12, 2002 to Texas Probate Listserve www.texasprobate.net

Similarly, Memoranda of Understanding are frequently executed between governmental agencies providing for international cooperation regarding minors in cross-border situations. See Memorandum of Understanding Between the Monterey County Department of Social and Employment Services, Family and Children Services and the Consulate General of México in San José, California Regarding Consular Involvement in Cases Involving Minors www.f2f.ca.gov/res/pdf/Monterey MOUMexicanconsulate.pdf Accessed February 16, 2011

40. Suit by Next Friend - TEX. RULES CIV. PROC. 44

A minor without a legal guardian may sue by next friend. A next friend has the same rights concerning such suits as guardians have. These rights include seeing that the funds or other property recovered is placed in the court's registry, placed in a § 142 Trust under the Property Code or a Guardianship Management Trust under the Estates Code.

Under no circumstances should a non-parent next friend be allowed to seeks to manage the funds personally, as neither the Property Code nor the Rules of Civil Procedure provide for any oversight mechanism for next friend management of a minor's property.

CAVEAT: Next Friends are subject to the same restrictions as guardians re contingent fee agreements. *Massey v. Galvan* 822 S.W.2d 309 (Tex. App. – Houston – [14th District] 1992, wr. den.) In *Stern v. Wonzer* 846 S.W.2d 939 (Tex. App. – Houston - [1st District] 1993, no pet.).

CAVEAT #2: When a P.I. case settles and little or no thought is given to the allocation of the award between the survival cause of action and the wrongful death cause of action, some sticky tax issues and angry creditors (and probate judges) may have to be faced. *Texas Health Insurance Risk Pool v. Sigmundik*, 315 S.W.3d 12 (Tex. 2010); *Elliott v. Hollingshead*, 327 S.W.3d 824 (Tex. App. Eastland, 2010, no pet.).

41. Social Service Agencies - Many social services agencies provide a variety of services specifically tailored to the needs of children, the disabled and elderly. A quick check of the yellow page listings under "social service agencies," will reflect literally dozens of organizations existing to this purpose. Many will have a particular emphasis toward a target group: veterans, the elderly, intellectually disabled, etc.

Beyond the Order for Emergency Protection (*supra*) the ability of either Adult Protective Services or Child Protective Services to investigate a potential exploitation or neglect situation is vital.

42. Geriatric Care Manager

A Geriatric Care Manager (GCM) is a health and human services professional, such as a gerontologist, social worker, counselor, or nurse, with a specialized body of knowledge and experience on issues related to aging and elder care issues.

GCMs are able to coordinate and manage eldercare services, which often includes conducting an assessment to identify problems, eligibility for assistance and need for services; coordinating medical services, including physician contacts, home health services and other necessary medical services; screening, arranging and monitoring in-home help

or other services; reviewing financial, legal, or medical issues and offering appropriate referrals to community resources; providing crisis intervention; ensuring everything is going well with an elder person and alerting families to problems; and assisting with moving an older person to or from a retirement complex, care home, or nursing home.

While California has developed a state registry of Geriatric Care Managers, Texas does not yet have any central registry. The National Association of Professional Geriatric Care Managers, the non-profit association of these professional practitioners, has promulgated a Pledge of Ethics and Standards of Practice. Their website has a locator database. *www.caremanager.org*

IV. LIMITING THE EFFECT OF THE GUARDIANSHIP

43. Pre-Need Designation of Guardian For Self – TEX. EST. CODE § 1104ff

An adult with capacity may, by written declaration designate those persons whom the declarant wishes to serve as guardian of the person or of the estate of the declarant in the event of later incapacity. The declaration may be in any form adequate to clearly indicate the declarant's intention to designate a guardian for the declarant's self in the event of the declarant's incapacity. The designation may be holographic, acknowledged before a notary or attested to by two witnesses, age 14 years of age or older and who are not designees to be guardian. In the case of attestation, a self-proving affidavit should be executed and attached.

A declaration that is not written wholly in the handwriting of the declarant may be signed by another person for the declarant under the direction of and in the presence of the declarant.

The court is required to follow the designations in the declaration, unless the court finds such designee to be disqualified or their appointment not to be in the ward's best interest.

Pre-Need Disqualification - Perhaps more importantly, the declarant may also indicate those persons who are to be specifically disqualified from serving as guardian, either of the person or estate. Such a disqualification is binding on the court and is among the listed reasons for disqualification under TEX. EST. CODE § 1104.202.

Revocation/Nullification - The designation may be revoked by execution of another designation or by following the same formalities as revoking a will. Divorce will serve to nullify a designation of a former spouse.

44. Pre-Need Designation of Guardian by Parent - TEX. EST. CODE §§ 1104.103, 1104.151

Similarly, a parent may designate, either in by separate written declaration or in the parent's will, those persons (in preferential order) whom they desire to be guardian of the person and/or estate of their child or children. The designation may specify that the court waive bond as to a guardian of the person, but not as to a guardian of the estate. This designation may be for either minor children or for adult incapacitated children.

Like the designation for one's self, the designation for a child may be in any form adequate to clearly indicate the declarant's intention to designate a guardian for the declarant's child in the event of the declarant's death or incapacity.

Unlike the Pre-Need Designation for Self, the Pre-Need Designation of Guardian by Parent does not contain the provision to expressly disqualify others as guardian.

45. Pre-Need Declaration for Mental Health Treatment - TEX. CIV. PRAC & REM. CODE § 137.007

A capacitated adult may, by written declaration, indicate his or her preferences or instructions for mental health treatment, including the right to refuse such treatment. Such a declaration is effective on execution and expires on the third anniversary of its execution or when revoked, whichever is earlier.

Witnesses - The declaration is to be witnessed by two qualified witnesses (similar to other advanced directives). Physicians or other health care provider are to follow such declaration, however, as long as the declarant is capable for giving informed consent, such informed consent is to be sought.

Does not apply – The declaration is ineffective if the declarant, at the time of making the designation, is under a temporary or extended commitment and treatment is authorized under the Mental Health Code or in the case of an emergency when the declarant's instructions have not been effective in reducing the severity of the behavior that has caused the emergency.

46. Safekeeping or "Freeze" Agreements - TEX. EST. CODE § 1105.155 - Where the personal representative deposits estate cash or other assets in a state or national bank, trust company, savings and loan association, or other domestic corporate depository, to be held under an agreement that the depository will not allow withdrawal or transfer of the principal of the assets and/or interest on the deposit except on written court order. (See example in Appendix) The amount of the bond of the personal representative may then be reduced in proportion to the cash or other assets placed in safekeeping.

47. Restoration of Ward - TEX. EST. CODE § 1202.051 - A Guardian Ad Litem must be appointed and everyone noticed similar to the original grant of guardianship.

48. Annual Determination - TEX. EST. CODE § 1201.052 - Each year, the probate judge is required to review each guardianship file created after September 1, 1993,and may review annually any other guardianship files to determine whether the guardianship should be continued, modified, or terminated. This provision appears fairly innocuous, but is in reality very powerful. It was recently used in a very large guardianship with massive pending litigation to restore the ward's capacity and terminate the guardianship. Because the standards for the court are somewhat of a blank slate (i.e.

discretionary), especially in courts other than statutory probate courts, this provision could be employed in a number of creative ways. Even though the procedure and standards for modification under § 1202.051 are fairly restrictive (see above), the annual determination under § 1201.052 contains no such procedural requirements.

49. Emancipation of Minor Ward - TEX. FAM. CODE § 31.01ff - Where a minor who is over 16, self-supporting (or married) and living apart from parents, a conservator or guardian may ask the court to legally remove the disabilities of minority for either limited or general purposes. The petition is decided on a "best interest" standard and the order is to specify whether the removal of disabilities is limited or general in scope and the purposes for which disabilities are removed.

50. Enumeration of Powers in Guardianship Order TEX. EST. CODE § 1101.151ff - If the guardianship is to be a plenary guardianship, it is perhaps best to simply reflect in the order that *"The guardian is to be granted all power and authority allowed under Texas law and the rights of the ward are limited to the extent not inconsistent therewith."* Otherwise, attempting to cover everything by an exhaustive listing may leave the guardian with specific deficits. Some attorneys feel that a listing of eight or ten powers is complete, while others can go on for pages.

However, if the ward is partially capacitated, a careful enumeration of those areas in which the ward's rights are not to be limited can have a great effect on the ward's functioning ability and self-esteem.

51. Interstate Guardianships TEX. EST. CODE § 1253.001ff - Where a guardianship exists in another state and the ward has been moved to this state, it can be advisable to allow a part of the guardianship to remain in the other state until affairs (pending litigation, etc) are resolved before all of the remnant is transferred.

52. Negligible Estate TEX. EST. CODE §§ 1204.001 - When the ward's estate is exhausted or when the foreseeable income accruing to a ward or his estate is so negligible that maintaining the guardianship would be a burden, the court may authorize the income to be paid to a parent or other person acting as guardian, to assist as far as possible in the maintenance of the ward, and without any liability for future accountings as to the income.

53. Minor Ward's Estate <$100,000 TEX. EST. CODE §§ 1204.001(d) & 1355.102 - Unlike the adult ward's estate, which is needed for the upkeep and maintenance of the ward, a minor ward's guardianship estate is less likely to be called upon for day-to-day living expenses. If the guardian of the estate is a parent of the ward, the court is usually going to want to see some proof that the guardian/parent cannot make the expenditures out of his/her own pocket rather than out of guardianship assets. The mindset here is more of asset preservation and maybe some college planning, assuming of course that the minor ward has no special needs to deplete the estate. If the estate cash falls below $100,000 (up from $50,000 in 2001), the guardianship of the estate may be closed and the remaining funds paid into the court registry. Withdrawals are then possible under the procedure set out under TEX. EST. CODE § 1355.102 above.

54. Mediation and Family Settlement Agreements TEX. EST. CODE § 1055.151 - Rarely on a guardianship contest is issue of incapacity the real issue. Most often, decades of unresolved conflict among the family members of the proposed ward spark the contests. Perceived favoritism, sibling rivalry, jealousy of a stepparent or step-children or step-siblings, unresolved grief, etc. are all manifested in the guardianship arena.

While resolution of a guardianship contest might remove the procedural obstruction in granting a guardianship, it rarely resolves the family disputes and wounded relationships which led to the contest. Mediation can provide a level playing field for the family to resolve those issues behind the guardianship fight. The long-standing "burrs under the saddle" that so often give rise to fights in the probate arena can be aired and often resolved. TEX. EST. CODE § 1055.151 allows those settlements to be made irrevocable.

"A family settlement agreement is a favorite of the law." *Shepherd v Ledford*, 962 S.W.2d 28 (Tex. 1998).

55. Mother Nature and Father Time -

Spontaneous Remission - It is not unusual - once a person gets adequate nutrition/ hydration/ socialization / therapy/ medication for a few weeks or months - for many symptoms of delirium/ confusion/ diabetic conditions to clear up. In some instances, it is a question of employing successive alternatives in an effort to forestay the inevitable, whether a guardianship or death.

It is rarely in the best interest of a terminally-ill proposed ward to go through successive independent medical examinations and for extensive litigation to exhaust an already beleaguered estate, only to have the ward die the day after letters are granted.

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Appendix E: **Investigator's Checklist**

1. Basic Identification: - Get as complete a **name** as possible (court records, Government ID, SS Card, etc.)

Build a Dossier: - Gather any available documents: Birth Certificate, Social Security Number, School Records, Old Driver's License

2. Telephone Number: - Call and see who answers. Is the telephone number contained in the court records?

A. Check current phone listings for ward & guardian.

B. 411 operator for directory assistance

C. Internet listings: www.peoplesmart.com (old addresses); www.anywho.com (people and businesses); infospace.com; peoplesearch.lycos.com; switchboard.com and www.yp.com (yellow pages); www.intelius.com (address, phone and e-mail); people.yahoo.com/

3. Address

A. Current telephone directory

B. City directory or criss-cross directory

1. See how long subject was at that address (look back every 4 to 5 years until they are no longer listed, then come forward year by year until they appear again).

2. When subject disappears from listings, check the Death Certificate Index (see below) for the year previous to the last directory listing and succeeding years.

3. See if the neighbors listed in the old directories are currently listed in the telephone directory. They might have kept up with your subject. (Same with ex-in-laws.)

4. Government Records: A Potpourri

A. Municipal: Birth & death records (also county & state)/ court records, citations, tickets / medical examiner, autopsy records/ doctor's records/ funeral home records / police accident reports / dog, cat, exotic animal licenses/ health dept. food handling records/ public library fortworthlibrary.org - "Online Databases," use your library card for ***Heritage Quest Online*** to search U.S. Census Records**;** local history dept.

B. County: **JP court**: (especially citations and returns)/ **Co.Clerk**: deed records (including heirship affidavits); birth and death records (unincorporated areas); marriage records, assumed name records; power of attorney filings; UCC filings; court registry records; voter registration records / ad valorem tax records/ appraisal district website / / **County Court**: (citations and returns, especially) / **County Court at Law & Probate Court (**ditto**); District Clerk**: civil and criminal court records (citations and returns); child support decrees (contain Social Security Numbers); **District Attorney's office**, District Attorney's Investigator

C. School Districts: alumni associations and directories / school records / relatives / former neighbors/ classmates / school clubs

D. State: 1. Birth and death records – http://vitals.rootsweb.com/tx/death/search.cgi 2. Abandoned property records Tex Comptroller of Public Accounts: http://window.state.tx.us/up/ 3. State-Licensed Occupational Agencies 4. State Associations (legal/medical/ banker/ pest control/ barber/etc.) 5. TX Sec of State: Corporate records/ Unincorp'd Assocs/ Notary Public records 6. Vehicle-related: Car/Boat/Trailer/ Airplane Registration / Auto Body Histories 7. Driver's License/Driving Record www.txdps.state.tx.us 8. Worker's Comp records 9. Concealed Handgun permits 10. TP&W/ Hunting licenses 11.Texas State Library: Confederate Pension Index: tsl.state.tx.us/arc/pensions/

E. Federal 1. *Social Security Death Index*: ssdi.genealogy.rootsweb.com/cgi-bin/ssdi.cgi; *SSA Forwarding Letter* www.ssa.gov/foia/html/ltrfwding.htm $25.00 will get a letter forwarded to the last known employer; 2. *Federal Court records, Bankruptcy records* 3. Peace Corps 4. *FAA*: pilot's licenses/ medical records 5. *ICC* (truckers) 6. *Passport* applications 7. *Civil Service* records on govt personnel 8. USPO business address (physical address FOIA request – USPS Publication 549) 9. *Military/ Armed Services Child Support Locator* / military records / active duty locator 10. *VA* locator service 11. *National Archives* www.nara.gov free help on Genealogy/ Indians/ land records/ naturalization records/ immigrant ship passenger lists/ Passport records/ Fed personnel records before 1940/ National Cemetery System 12. *Fed Empl Child Support Enforcement* (fed and state) IRS will assist) 13. *Foreign Consular Offices*

5. Private Records

A. Newspapers – Articles about the subject individual, Obituary Index card file, Obituaries (watch for several days after death date to pick up info on survivors)

B. Salvation Army ($10.00)

C. Credit Bureaus: order a credit history

D. Historical/Genealogical Societies.

E. Service clubs/Fraternal Associations

F. Funeral Homes/Cemeteries – Who made the arrangements for Mama when she died?

6. The Web

A. Social Networking Sites www.facebook.com; www.linkedin.com (for professionals); www.myspace.com; https://plus.google.com/ (brand new and growing fast); www.friendster.com (transitioning to gaming site); www.bebo.com; www.hi5.com (youth-oriented)

B. Genealogy Sites: www.cyndislist.com (over 300,000 links); www.familysearch.org (Mormon database); Rootsweb (above); www.ancestry.com/

C. Search Sites (may be a fee): The Last One Online Investigative Systems : www.tlo.com; www.courthousedirect.com; www.publicdata.com; www.kadima.com; www.peoplesearch.com; adoptees.adoption.com; www.unclaimedpersons.com (San Bernadino CA Coroner); www.genlookups.com/ (volunteers)

7. Finding Aids: Search firms: heirsearch.com; heirfinder.com; searchint.com; Accurint.com; Heritage Quest Online (public library); WorldConnectProject; findersusa.com; www.intl-research.com; www.joshbutler.com; globaltracing.com/home-content.htm; blakeandblake.com; Board certified genealogists: www.bcgcertification.org/; www.three-legged-willie.org

JUDGE STEVE M. KING,
TARRANT COUNTY PROBATE COURT ONE
Rev 8/23/12

Appendix F: No._____

Guardianship of	§	Probate Court
_____,	§	Number One
An Incapacitated Person	§	Tarrant County, Texas

Report of Guardian Ad Litem

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW_____, a practicing attorney in Tarrant County, Texas, having been appointed by this Court as Guardian Ad Litem for _____, the Proposed Ward, by order dated _____ and makes this report to the Court as follows:

1. **I concur with the position of Applicant that the Proposed Ward cannot manage his/her financial affairs nor meet his/her personal needs and is in need of a Guardian of the Person/Estate.**
   (or)
1. **I disagree with the position of Applicant and believe that the Proposed Ward can manage his/her financial affairs and meet his/her personal needs and is NOT in need of a Guardian of the Person/Estate.**
2. After being appointed to investigate the need for establishing a regular, permanent guardianship on the Proposed Ward, I reviewed copies of the documents on file furnished by the Court and met with the Proposed Ward.
3. On or about _____, I contacted Counsel(s) for the Applicant/Proposed Guardian/Contestant, requesting further information concerning the Proposed Ward's personal history, family background and estate.
4. On or about _____, I filed an Application/Answer with this Court on behalf of the Proposed Ward.
5. I have contacted the following persons to obtain information on the advisability of the guardianship being taken out and the identity of the person, if any, who was the person best qualified and most suitable to serve as Guardian in their opinion.
6. On or about _____, I spoke with Dr._____, the Proposed Ward's treating physician as well as the Proposed Ward's caregiver, _____, regarding the mental and physical condition of the Proposed Ward.
7. Additionally, _____ (Give a detailed, written synopsis of your investigation, your findings and recommendations. Include any information regarding sources of income, pensions, annuities, government benefits, representative payees, etc.)

Dated: _____

Respectfully submitted,

_____
Guardian Ad Litem

Certificate of Service

I hereby certify that a true and correct copy of the foregoing instrument was served upon the following counsel by certified mail and/or by facsimile transmission on this _____.

Name CMRRR #
Address (Repeat as Necessary)

_____
[Attorney Name]

Appendix G: Waiver of Citation, Consent to Appointment

No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One
	§	
An Incapacitated Person	§	Tarrant County, Texas

Waiver of Citation & Right to be Appointed Guardian
& Consent to Applicant's Appointment as Guardian

STATE OF TEXAS §
§
COUNTY OF _____ §

BEFORE ME, the undersigned authority, on this day appeared Affiant and, after being duly sworn, upon his (her) oath, deposes and says:

1. "My name is _____.
2. I have read the Application for Appointment of a Guardian of the Person (and Estate) of _____ Proposed Ward, filed by _____.
3. I am related to Proposed Ward in that I am his (her) _____.
4. I have read the aforementioned Application for Appointment of Guardian.
5. I hereby waive the service of citation in this matter and I do not wish to receive notice from the Court or any party to this action of any further proceedings herein.
6. Additionally, I waive my right to be appointed Guardian of Proposed Ward and I consent to the appointment of _____ as Guardian of Proposed Ward."

Declaration

"My name is _____.
(First Name) (Middle Name) (Last Name)
My date of birth is _____.
(Month) (Day) (Year)
My address is _____.
(Street & Apt #) (City) (State) (Zip Code) (Country)

I declare, under penalty of perjury, that the foregoing is true and correct."

Executed in _____ County, State of _____, on the _____ day of_____, _____.

_____
Declarant

_____
Printed Name of Declarant

Appendix H: Affidavit Regarding Notice Under § 1051.104)

NO. _____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

AFFIDAVIT REGARDING NOTICE UNDER SECTION 1051.104

BEFORE ME, the undersigned authority, personally appeared _____, who, after being duly sworn, declared the following:

"I am the Applicant in the above entitled and numbered cause. I have personal knowledge of the material facts set forth in this affidavit, and they are true and correct. I am filing this affidavit to comply with the requirements of Texas Estates Code Section 1051.104."

"I sent notice of this proceeding to the individuals/institutions listed below. Attached to this affidavit is a copy of the notice sent and proof of delivery or attempted delivery of same."

LIST OF PERSONS TO WHOM NOTICE SENT

"Further, Affiant sayeth not."

_____

AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME by _____ on _____.

_____

Notary

Appendix I: Affidavit of Inability to Pay Costs No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

Affidavit of Inability to Pay Costs

The person who signed this affidavit appeared, in person, before me, the undersigned notary, and stated under oath:

"My name is _____. My phone number is: _____.
"My mailing address is _____.
"I am above the age of eighteen (18) years, and I am fully competent to make this affidavit. I am unable to pay court costs. The nature and amount of my income, resources, debts, and expenses are described in this form.

" I receive these public benefits that are based on indigency:

☐ SSI ☐ WIC ☐ Food Stamps/SNAP
☐ TANF ☐ Medicaid ☐ CHIP
☐ AABD ☐ Public Housing ☐ Low-Income Energy Assistance
☐ Emergency Assistance ☐ Community Care via DADS ☐ LIS in Medicare "Extra Help"
☐ Needs-Based VA Pension ☐ County Assistance, County Health Care, or General Assistance (GA)
☐ Child Care Assistance under Child Care and Developmental Block Grant
☐ (other): _____

If you receive any of the above public benefits, attach proof and label it "Exhibit: Proof of Public Benefits"

My income source are stated below:
☐ Unemployed since: _____ (date)
Or
☐ Wages: I work as a _____ for _____
Job Title) Employer
☐ Child/Spousal Support ☐ My Spouse's income or income from another member of my household
☐ Tips, bonuses ☐ Military Housing ☐ Worker's Comp ☐ Disability
☐ Unemployment ☐ Social Security ☐ Retirement/Pension ☐ Dividends, interest, royalties
☐ 2nd job or other income: _____(describe)

"My income amounts are stated below:

(A) My monthly gross income before deductions are taken out:	$ _____
(B) The amount I receive each month in public benefits is:	$ _____
(C) The amount of income from other people in my household is:	$ _____
(If they contribute to your household income)	$ _____
(D) The amount I receive from other sources is:	$ _____
(E) My TOTAL monthly income:	= $ _____

About my dependents:
"The people who depend on me financially are listed below:

Name	Age	Relationship to Me
1. _____	_____	_____
2. _____	_____	_____
3. _____	_____	_____
4. _____	_____	_____
5. _____	_____	_____
6. _____	_____	_____

" My property includes:	Value*
Cash	$ _____
Bank Accounts, other financial assets	
_____	$ _____
_____	$ _____
_____	$ _____
Vehicles (cars, boats) (make & year)	
_____	$ _____
_____	$ _____
_____	$ _____
Real estate (house and land) (Address or description)	
_____	$ _____
_____	$ _____
Other property (jewelry, stocks, etc.)	
_____	$ _____
_____	$ _____
Total value of property	= $_____

* The value is the amount the item would sell for less the amount you still owe on it (if anything)

My monthly expenses are:	
Rent/house payments and maintenance	$ _____
Food and household supplies	$ _____
Utilities and telephone	$ _____
Clothing and laundry	$ _____
Medical and dental expenses	$ _____
Insurance (life, health, auto, etc.)	$ _____
School and child care	$ _____
Transportation, auto repair, gas	$ _____
Child/spousal support	$ _____
Wages withheld by court order	$ _____
Debt payments to: (list)	$ _____
_____	$ _____
_____	$ _____
_____	$ _____
_____	$ _____
Total Monthly Expenses	= $ _____

"My debts include (list debt and amount owed):

_____

_____

_____

"I am unable to pay court costs. I verify the statements made in this affidavit are true and correct."

☐ Check here if add another page of proof.

Do not sign until you are in front of a notary.

➔ _____ _____

Signature of Person Signing Affidavit Date

State of Texas

County of _____

Sworn to and subscribed before me, the undersigned notary, on this date _____/_____/_____ at ___:____ __m. by _____.

(Name of Person Signing Affidavit)

_____

Notary's Signature

Appendix J: Application for Temporary Guardianship and Fiat for Hearing

	No._____	
Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

Application for Appointment of Temporary Guardian

_____, Guardian Ad Litem, applies for appointment of a temporary guardian of the alleged incapacitated person as identified below and in support of this application, would show the court as follows:

1. PROPOSED INCAPACITATED PERSON. _____ ("Proposed Ward") is an adult female who resides at _____. Proposed Ward's date of birth is _____. Proposed Ward is an incapacitated person as defined by Texas Estates § 1002.017 and may be served with notice of this proceeding at the above-stated address.

2. KIND OF GUARDIANSHIP. Applicant believes that a temporary guardian of the person and estate are necessary for the protection and welfare of the Proposed Ward and requests that a suitable person or entity be appointed temporary guardian of the person and estate to handle the personal and financial affairs of the Proposed Ward.

3. NEED FOR GUARDIANSHIP. Proposed Ward is an incapacitated person as evidenced by the statement of Proposed Ward's physician attached to this Application as Exhibit "A". Proposed Ward's memory and judgment are impaired which causes the Proposed Ward to become easily confused. Applicant believes that the appointment of a guardian is in the best interest of Proposed Ward and is necessary to promote and protect the Proposed Ward's well-being and to assist in managing the Proposed Ward's estate.

An imminent danger to the Proposed Ward's person and estate exists should a Temporary Guardian not be appointed. (*state details*) _____
_____
_____
_____

The appointment of a temporary guardian is needed to secure the safety of the Proposed Ward and secure her assets. Applicant recommends that the Court appoint suitable third parties as temporary guardians.

4. PROPOSED GUARDIAN. Applicant requests that a suitable person or entity be appointed Temporary Guardian with powers over the person of the Propose Ward and Temporary Guardian with powers over the estate of Proposed Ward to assist her in managing her estate and personal affairs.

5. EXISTING POWERS OF ATTORNEY OR GUARDIANSHIPS. An application for the appointment of a permanent guardian is on file herein, as well as a contest thereto. Proposed Ward has executed powers of attorney in favor of _____, which are attached to Applicant's application for permanent guardianship, but should be suspended upon the appointment of a temporary guardian.

6. CARE AND CUSTODY OF THE WARD. The Proposed Ward is currently under the care and custody of _____.

7. NEXT OF KIN. Proposed Ward has the following relatives who are entitled to be appointed guardian:

NAME: _____
ADDRESS: _____
RELATIONSHIP: _____

(Repeat as Necessary)

However, due to the past behavior of the Proposed Ward's family members, Applicant does not believe it would be in her best interest for any family members to be appointed. Due to the contest herein, Applicant recommends that a third party be appointed as temporary guardian.

8. VENUE. This Court has venue of this proceeding because Proposed Ward resides in this county.

9. DUTIES AND POWERS OF GUARDIAN. Applicant requests that the Temporary Guardian with powers over the Estate of the Proposed Ward be granted the following powers: (*List only as applicable*)

A. To possess and manage the properties of the Proposed Ward, including all bank accounts, securities accounts, annuities, and other investments of the Proposed Ward, and to have possession and management of the Proposed Ward's home, Proposed Ward's personal possessions, and any other property owned by the Proposed Ward. To have total access to all records and past transactions of Proposed Ward and her attorney-in-fact with respect to such properties.
B. To take possession of the Proposed Ward's cash on hand or on deposit, the Proposed Ward's stocks, bonds or other securities, and the Proposed Ward's accounts at financial institutions or at stock or brokerage firms and to open new accounts and to be the authorized signatory on such accounts.
C. To collect debts, rentals, wages or other claims due the Proposed Ward.
D. To pay, compromise, or defend claims against the Proposed Ward, subject to court approval.
E. To represent the Proposed Ward in any legal action, subject to court approval.
F. To contract and to incur other obligations on the Proposed Ward's behalf and to renew and extend any obligations, subject to court approval.
G. To collect and give receipt for any monies, rents, dividends, interest, trust proceeds, and any and all other types of income payable to or receivable by the Proposed Ward.
H. To apply for and to receive funds from governmental sources for the Proposed Ward, including: Social Security, Medicare, Supplemental Security Income Benefits (SSI), HUD Section 8 Rent Subsidies, Childhood Disability Benefits under the Old-Age Survivors and Disability, Insurance Program, Aid to Families with Dependent Children (AFDC), and Veteran's benefits.
I. To apply for and to consent to governmental services on the Proposed Ward's behalf including: Vocational Rehabilitation Programs, Medicaid Services, Food Stamps, Veteran's benefits.
J. To apply for and to secure insurance on the Proposed Ward's behalf for the Proposed Ward's property and the Proposed Ward's person.
K. To file a federal income tax return on the Proposed Ward's behalf and to pay federal, state and local taxes of the Proposed Ward.
L. To review, to take possession of and to consent to the disclosure of the Proposed Ward's legal, financial or other confidential books, documents or other records, including the power to enter into the Proposed Ward's safe deposit box.
M. To meet the Proposed Ward’s housing needs by renting real property for the Proposed Ward’s residence.
N. To employ and to discharge from employment attorneys, accountants, appraisers and other persons necessary in the administration of the estate of the Proposed Ward.
O. To employ and to discharge from employment nurses, sitters, caregivers, tutors, therapists and other persons engaged to assist the Proposed Ward.
P. To do such other and further acts concerning the property and interests of the ward and the Proposed Ward's estate as the Court may from time to time direct by express authorization through written order of the Court.

Applicant requests that the Temporary Guardian with powers over the person of the Proposed Ward be granted the following specific powers and duties:

A. To review, to take possession of and to consent to the disclosure of the Proposed Ward's medical or dental records.
B. To apply for, arrange for, and consent to any and all psychological, psychiatric or medical examinations, tests or evaluations for the Proposed Ward.
C. To consent to or object to medical and dental treatment for the ward, including surgery, but not the power or authority to consent to a sterilization or abortion for the Proposed Ward.
D. To apply for, to consent to, and to enroll the Proposed Ward in non-residential aging or Alzheimer's programs and services which are reasonably required and needed by the ward and which are operated by public and private agencies and facilities.
E. The duty to live with the Proposed Ward or, alternatively, the power and authority to make application for, to consent to, and to enroll the Proposed Ward in private and public residential care facilities.
F. To make application for, to consent to, and to place the Proposed Ward in private and public 24 hour care facilities or nursing home facilities.
G. To apply for and to secure an identification card, social security card or other identification documents for the Proposed Ward.
H. To apply for, to consent to, and to enroll the Proposed Ward in appropriate educational, vocational, and recreational services.

I. To have possession and control of the Proposed Ward and to deny anyone access to the Proposed Ward if such is in the best interest of Proposed Ward, and including the power and authority to obtain the services of the _____ County Sheriff s Department, a Constable, a municipal Police Department or any peace officer, and/or _____ Ambulance Service or other similar ambulance service, to forcibly, if necessary, remove Proposed Ward from Proposed Ward's place of residence or wherever Proposed Ward may be found, restrain, and transport Proposed Ward to a private home, group home, hospital, residential care facility, nursing home or such other place as the Temporary Guardian directs, with or without Ward's consent

J. To do such other and further acts concerning the Proposed Ward as the Court may from time to time direct by express authorization through written order of the Court.

K. For such other and further powers which the Court may deem necessary for the Protection of the Proposed Ward.

10. PROPERTY OF PROPOSED WARD. The Proposed Ward receives the following monthly compensation and income: $_____ per month for _____. Proposed Ward's estate consists of real property, cash, and cash equivalents in excess of $_____. Applicant knows of no other assets of the Proposed Ward.

WHEREFORE, Applicant requests that notice of this Application be given as required by law; that after hearing on this Application, a suitable person or entity be appointed Temporary Guardian with powers over the person of the Propose Ward and Temporary Guardian with powers over the estate of Proposed Ward with the powers and duties set forth herein; and that Applicant have such other and further relief to which she may be entitled.

Respectfully submitted,

_____

_____

State Bar No. _____
Address Block
GUARDIAN AD LITEM

STATE OF TEXAS §
COUNTY OF TARRANT §

_____, being first duly sworn, upon her oath, deposes and says that: "I am the Applicant in the above entitled and numbered cause. I have read and examined the foregoing Application for Appointment of Temporary Guardian which is to be filed in this cause and all the allegations contained therein are true and correct."

_____

_____

SWORN TO AND SUBSCRIBED BEFORE ME by _____
on this _____ day of _____, 20__.

_____
Notary Public, State of Texas

INSERT CERTIFICATE OF SERVICE

No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

Order Setting Hearing on Application for Temporary Guardianship
(Fiat)

A hearing on the Motion for Appointment of a Temporary Guardian filed herein by _____, Attorney Ad Litem for Proposed Ward, is scheduled to be heard before the Court on the ____ day of _____, 20__ at ___ o'clock __ m.

Signed on this _____

_____
JUDGE PRESIDING

Appendix K: No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number _____ of
	§	
An Incapacitated Person	§	_____ County, Texas

Order Appointing Temporary Guardian

On this date, the Court heard and considered the Application for Appointment of Temporary Guardian filed in this cause. The Court, having heard the evidence and arguments of counsel makes the following findings and orders:

1. This Court has jurisdiction over the subject matter and parties herein and venue of this proceeding is proper in this court;
2. There is substantial evidence that _____ is an incapacitated person;
3. There exists an imminent danger that the physical health or safety of the Proposed Ward will be seriously impaired and that the Proposed Ward's estate will be seriously damaged or dissipated unless immediate action is taken;
4. There is an immediate need for the appointment of a temporary guardian;
5. The Proposed Ward has been personally served with notice of this proceeding prior to the entry of this Order;
6. All prerequisites of law have been met;
7. It would be in the best interest of the Proposed Ward that a temporary guardian be appointed to protect the Proposed Ward; and
8. _____.is a suitable person/entity to act as Temporary Guardian and is not disqualified by law from acting as such.

The Court further finds by substantial evidence:

9. There is an imminent danger and likelihood the Proposed Ward will resist by force any attempt to remove him from wherever he may be found.
10. It will be necessary in order to give effect to the powers and authority of the Temporary Guardian and that it would be in the best interest of the Proposed Ward, and for the protection of the Proposed Ward and others, that the Tarrant County Sheriffs Department, any other peace officer, and/or MedStar Ambulance Service be ordered to remove the Proposed Ward from wherever he may be found and transport the Proposed Ward to such place as the Temporary Guardian directs.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that _____ is appointed Temporary Guardian of _____ for a period of sixty (60) days from the date of this appointment, unless there is a contest to an application for a permanent guardian for _____. In the event of a contest, the appointment of _____ as Temporary Guardian shall continue until such time as the contest is resolved and by further order of this Court.

IT IS FURTHER ORDERED that Temporary Guardian shall have the following specific powers over the estate:

1. To possess and manage the properties of the Proposed Ward, including all cash on hand, bank accounts, stocks, bonds, securities accounts, annuities, and other investments of the Proposed Ward and to open new accounts and to be the authorized signatory on such accounts; to have possession and management of the Proposed Ward's home, Proposed Ward's personal possessions, and any other real or personal property owned by the Proposed Ward and to take reasonable measures to safeguard the same pending the appointment of a permanent guardian; and to have total access to all records and past transactions of Proposed Ward and his attorney-in-fact with respect to such properties;
2. To collect debts, rentals, wages or other claims due the Proposed Ward;
3. To pay, compromise, or defend claims against the Proposed Ward, subject to court approval;
4. To represent the Proposed Ward in any legal action, subject to court approval;
5. To contract and to incur other obligations on the Proposed Ward's behalf and to renew and extend any obligations, subject to court approval;

6. To collect and give receipt for any monies, rents, dividends, interest, trust proceeds, and any and all other types of income payable to or receivable by the Proposed Ward;
7. To apply for and to receive funds from governmental sources for the Proposed Ward, including: Social Security, - Medicare, Supplemental Security Income Benefits (SSI), HUD Section 8 Rent Subsidies, Childhood Disability Benefits under the Old-Age Survivors and Disability Insurance Program Aid to Families with Dependent Children (AFDC), Veteran's benefits, and Federal Pension received from the Office of Personnel Management;
8. To apply for and to consent to governmental services on the Proposed Ward's behalf including: Vocational Rehabilitation Programs, Medicaid Services, Food Stamps, and Veteran's benefits;
9. To apply for and to secure insurance on the Proposed Ward's behalf for the Proposed Ward's property and the Proposed Ward's person;
10. To file a federal income tax return on the Proposed Ward's behalf and to pay federal, state and local taxes of the Proposed Ward;
11. To review, to lake possession of and to consent to the disclosure of the Proposed Ward's legal, financial or other confidential books, documents or other records/including the power to enter into the Proposed Ward's safe deposit box;
12. To meet the Proposed Ward's housing needs by renting real property for the Proposed Ward's residence;
13. To employ and to discharge from employment attorneys, accountants, appraisers and other persons necessary in the administration of the estate of the Proposed Ward;
14. To employ and to discharge from employment nurses, sitters, caregivers, tutors, therapists and other persons engaged to assist the Proposed Ward; and
15. To do such other and further acts concerning the property and interests of the ward and the Proposed Ward's estate as the Court may from time to time direct by express authorization through written order of the Court.

IT IS FURTHER ORDERED that Temporary Guardian shall have the following specific powers over the person:

1. The power and authority to take charge and control of the person of the Ward, including having physical possession of the Ward, and to establish Ward's legal domicile and place of residence, and including the power and authority to obtain the services of the _____ County Sheriff's Department, a Constable, a municipal Police Department or any peace officer, and/or _____ Ambulance Service or other similar ambulance service, to forcibly, if necessary, remove Ward from Ward's place of residence or wherever Ward may be found, restrain, and transport Ward to a private home, group home, hospital, residential care facility, nursing home or such other place as the Guardian of the Person directs, with or without Ward's consent;
2. To review, to take possession of and to consent to the disclosure of the Proposed Ward's medical, psychological and intellectual testing records pursuant to 45 CFR 164.512(e)(1)(i), Health Insurance Portability and Accountability Act;
3. To apply for, arrange for, and consent to any and all psychological, psychiatric or medical examinations, tests or evaluations for the Proposed Ward, but not the power or authority to consent to a voluntary placement in a mental health facility.
4. To consent to or object to medical and dental treatment for the Proposed Ward, including surgery, but not the power or authority to consent to a sterilization or abortion for the Proposed Ward;
5. To apply for, to consent to, and to enroll the Proposed Ward in nonresidential aging or Alzheimer's programs and services which are reasonably required and needed by the Proposed Ward and which are operated by public and private agencies and facilities;
6. The duty to live with the Proposed Ward or, alternatively, the power and authority to make application for, to consent to, and to enroll the Proposed Ward in private and public residential care facilities;
7. To make application for, to consent to, and to place the Proposed Ward in private and public 24 hour care facilities or nursing home facilities;
8. To apply for and to secure an identification card, social security card or other identification documents for the Proposed Ward;
9. To have possession and control of the Proposed Ward and to deny anyone access to the Proposed Ward if such is in the best interest of Proposed Ward; and
10. To do such other and further acts concerning the Proposed Ward as the Court may from time to time direct by express authorization through written order of the Court.

IT IS FURTHER ORDERED that the following legal and civil rights and powers are removed from the Proposed Ward:

a. the right to vote;
b. the right to travel;
c. the right to make any gifts of real or personal property;
d. the power to drive and obtain a driver's license;
e. the power to execute a Directive to Physician's {Living Will);
f. the power to execute a power of attorney,
g. the power to execute any and all legal documents or contracts; and
h. the power to marry.

IT IS FURTHER ORDERED that Temporary Guardian shall execute and file with the Court a corporate surety bond in the amount of $_____, conditioned and approved as required by law and that upon filing the bond and oath, the Clerk of this Court shall issue Letters of Temporary Guardianship to _____ as Temporary Guardian of _____;

IT IS FURTHER ORDERED that the Temporary Guardian is authorized to expend up to and including the amount of $_____ per month, out of the income and, if necessary, corpus of the estate for the care, support, and maintenance of the ward and the ward's property, without further order of this Court;

IT IS FURTHER ORDERED that the _____ County Sheriff's Department, any other peace officer, and/or _____ Ambulance Service is authorized, empowered, and directed to remove the Proposed Ward from wherever he or she may be found, and transport him immediately to such place as the Temporary Guardian of the Person shall direct.

IT IS FURTHER ORDERED that the powers of any agent under all powers of attorney in effect for the Proposed Ward are hereby suspended.

SIGNED _____.

_____
JUDGE PRESIDING

"Notice to any peace officer of the State of Texas: you may use reasonable efforts to enforce the right of a guardian of the person of a ward to have physical possession of the ward or to establish the ward's legal domicile as specified in this order. A peace officer who relies on the terms of a court order and the officer's agency are entitled to the applicable immunity against any civil or other claim regarding the officer's good faith acts performed in the scope of the officer's duties in enforcing the terms of this order that relate to the above-mentioned rights of the court-appointed guardian of the person of the ward. Any person who knowingly presents for enforcement an order that is invalid or no longer in effect commits an offense that may be punishable by confinement in jail for as long as two years and a fine of as much as $10,000."

Revised June 21, 2013

Appendix L: No. _____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

Application for the Appointment
of a Guardian of the Person (And Estate)
Pursuant To § 1102.001, Texas Estates Code

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES_____, Applicant and Guardian Ad Litem, and pursuant to §683 of the Texas Probate Code, files this Application for the appointment of a suitable person to serve as Guardian of the person (and estate) of _____, Proposed Ward, and, in support thereof, represents to the Court as follows:

1. Proposed Incapacitated Person. Proposed Ward is a _____ year old, (race), adult/minor (fe)male whose date of birth is _____, and whose Driver's License number is _____. (S)he is an incapacitated person as defined in § 1002.017, Texas Estates Code. Proposed Ward is located at _____, Tarrant County, Texas, _____ where (s)he can be served. Proposed Ward is in the care and custody of _____ whose address is _____ and to whom Applicant has mailed a copy of this Application by certified mail, return receipt requested.
2. Proposed Guardian. Applicant requests that the Court appoint a suitable person to serve as Guardian of the person (and estate) of Proposed Ward. The names, addresses and telephone numbers of the Proposed Ward's adult relatives, if any, are listed immediately below:
   Name Relationship to Proposed Ward Address Telephone number
   Applicant recommends that _____, Proposed Guardian, as a suitable person to be appointed Guardian for the Proposed Ward. *(Proposed Guardian's relationship to Proposed Ward, address and telephone number are to be provided here.)*
3. Nature of the Incapacity. The Physician's Certificate of Dr._____ is attached to the Motion to Appoint Guardian Ad Litem filed previously in this cause, is dated within 120 days of the filing of this Application and is based upon an examination the physician performed not earlier than 120 days from the date this Application was filed. A developmental disability is (not) the basis, at least in part, of the physician's diagnosis of incapacity. *(If a developmental disability such as intellectual disability or autism forms the basis for the physician's diagnosis, then Determination of Intellectual Disability, conducted in accordance with MHMR guidelines, must be attached to the Physician's Certificate.)*
4. Specific Areas of Protection and Assistance Requested. Applicant requests Proposed Guardian be granted the full powers allowed under the Texas Estates Code. *(If a Limited Guardianship is sought, list only those powers which are appropriate.)*
5. Limitation of Rights Requested. Applicant requests the rights of Proposed Ward be fully limited. In addition, the Applicant herein seeks to take away the right of the adult proposed ward to vote in a public election and to hold or obtain a license to operate a motor vehicle. *(If a Limited Guardianship is sought, limit only those rights which are appropriate. If the Proposed Ward's right to drive is being removed, provide the Proposed Ward's Driver's License number.)*
6. Estate. Proposed Ward owns the following real and personal property:
   Property %Interest Owned $Value

Proposed Ward receives the following income each month:

Income Source $Monthly Income $Annual Income

(Include income from social security here, however, if social security benefits are the sole source of revenue, then a guardianship of the estate is unnecessary. However, if there is a representative payee or Veteran's benefits fiduciary, set forth the name and address.)

7. Miscellaneous. Applicant requests the term of the guardianship to be not less than one year. To the Applicant's knowledge, there is no guardianship established for Proposed Ward in this or any other state. (If the Proposed Ward is a minor, inform the Court of any legal or conservatorship proceedings within a 2-year period and state "*the guardianship is not created for the purpose of enabling the Ward to establish residency for enrollment in a school or school district for which the Ward is not otherwise eligible for enrollment*".) To the Applicant's knowledge, (no one)/ _____ holds a Power of Attorney signed by Proposed Ward. (If a POA exists, provide the agent's address and telephone number, the type of POA and the date on which it was executed.) Venue is proper in this county because Proposed Ward was located (resided/had his principal estate) here at the time this Application was filed.
8. Other Relevant Facts. *(Report how you came to the conclusion that a guardianship was necessary and any other information you deem important. Do not include a request for attorney's fees with this Application. Attorney's fees are to be requested in a separate Application which is presented to the Court at the hearing.)*

WHEREFORE, Applicant respectfully requests the Court to issue notice of this Application as required by law and, following a hearing, appoint a suitable person to serve as Guardian of the Person (and Estate) of Proposed Ward with all of the duties and powers as set forth herein and for such further relief as the Court may deem appropriate.

Respectfully submitted,

_____

Applicant and Guardian Ad Litem
(Attorney Information)

STATE OF TEXAS §
COUNTY OF TARRANT §

_____, Applicant and Guardian Ad Litem, first being duly sworn, upon his (her) oath, deposes and says:

"My name is _____, and I am the Applicant and Court-appointed Guardian Ad Litem in the above styled and numbered cause. I have read and examined the foregoing Application for the Appointment of Guardian which is to be filed in this cause and all allegations contained therein are true and correct to the best of my knowledge."

_____

Applicant/Guardian Ad Litem

SWORN TO AND SUBSCRIBED BEFORE ME on _____.

_____

Notary

Insert Certificate of Service

Appendix M: No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

Original Answer of Proposed Ward

TO THE HONORABLE JUDGE OF THIS COURT:

_____, proposed ward, by and through _____, a practicing attorney in Tarrant County, Texas, having been appointed by this Court as Attorney Ad Litem pursuant to § 1054.001 of the Texas Estates Code and makes and files this his Original Answer to the Application for Guardianship of the Person/and Estate and respectfully shows the Court the following:

1. Proposed Ward asserts a general denial and respectfully requests that the Court require the Applicant to prove all claims, charges and allegations by clear and convincing evidence as required by the laws of the State of Texas.

2. Proposed Ward reserves the right to amend and answer further in this proceeding in the manner authorized by the Texas Rules of Civil Procedure.

WHEREFORE, PREMISES CONSIDERED, Proposed Ward prays that the Applicant take nothing, that costs be adjudged against the Applicant; and that he go hence without day.

Dated: _____

Respectfully submitted,

[Attorney Information]

Attorney Ad Litem for
Proposed Ward

Certificate of Service

I hereby certify that a true and correct copy of the foregoing instrument was served upon the following counsel by certified mail and/or by facsimile transmission on this _____.

Name: _____
Address: _____
CMRRR #: _____
Fax #: _____

(Repeat as Necessary)

_____
[Attorney Name]

Appendix N: No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

Proposed Ward's Original Answer
(Contest)

TO THE HONORABLE JUDGE OF THIS COURT:

Proposed Ward, proposed ward, ("P. W.") by and through her Attorney Ad Litem, files this Original Answer to the application for appointment of permanent guardianship filed by Applicant and respectfully shows the Court the following:

1. Proposed Ward asserts a general denial, denying each allegation set forth in the application and demanding strict proof thereof by clear and convincing evidence as required by the laws of the State of Texas.
2. P.W. would show that she is not an "incapacitated person" under § 1002.017 of the Texas Estates Code in that she has the ability to care for herself and to manage her property. P.W. currently resides with G. Golow, her friend and companion. P.W. is able to meet her day to day needs and to provide for her person and estate.
3. P.W. would further show that it is not in her best interest for the court to appoint Applicant as her guardian.
4. P.W. would further show that she has the ability to protect her own rights and does not require the appointment of a guardian to act on her behalf.
5. P.W. hereby objects to the certificate of medical examination of Dr. _____, filed herein on or about _____, and specifically objects to his finding of incapacity.

WHEREFORE, PREMISES CONSIDERED, Proposed Ward prays that the application be denied and she be granted any other relief to which she is entitled.

Respectfully submitted,

[Attorney Information]

Attorney Ad Litem for
Proposed Ward

Certificate of Service

I hereby certify that a true and correct copy of the foregoing instrument was served upon the following counsel by certified mail and/or by facsimile transmission on this _____.

Name: _____
Address: _____
CMRRR #: _____
Fax #: _____

(Repeat as Necessary)

_____
[Attorney Name]

Appendix O: No. _____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

Application for Authority to Utilize Attorneys
And Staff of Appointee's Law Firm for Legal Services

To the Honorable Judge of Said Court:

_____ (referred to as "Applicant" herein), duly appointed Attorney Ad Litem for _____ ("Proposed Ward"), makes this Application for Authority to Utilize Attorneys and Staff of Appointee's Law Firm for Legal Services and respectfully shows the following:

1. Applicant was appointed Attorney Ad Litem for Proposed Ward by Order of this Court dated _____, 2010, to represent Proposed Ward in this guardianship proceeding.
2. Applicant requests authority to utilize attorneys and staff of Applicant's law firm to assist Applicant in performing legal services related to Applicant's duties as Attorney Ad Litem for Proposed Ward, pursuant to *Goodyear Dunlop v. Gamez*, 151 S.W.3d 574 (Tex. App. San Antonio 2004, no pet.) Applicant believes that it is in the best interest of Proposed Ward for Applicant to utilize attorneys and staff of Applicant's law firm, including legal assistants and paralegals under the direction and supervision of your appointee, in providing legal services. In particular, Applicant's use of legal assistants and paralegals to provide some legal services will reduce the overall cost of Applicant's services as appointee representing Proposed Ward and will result in more timely services.
3. The following special circumstances justify the use of additional personnel to assist the Attorney Ad Litem: (*provide details of special circumstances justifying additional persons billing to file on ad litem's appointment*).
4. Applicant is familiar with the reasonable rates charged by attorneys, paralegals, and legal assistants in Tarrant County, Texas, for work in guardianship cases. Applicant requests authority to utilize attorneys and staff at the rates set forth below, which are reasonable for each person based upon the services expected to be performed and each person's respective experience and qualifications.
5. Applicant requests that the Court authorize the use of the following persons by Applicant;
   a) _____ was admitted to the bar and licensed as an attorney in Texas in ____. He joined the firm in ____ and was Board Certified in Estate Planning and Probate Law by the Texas Board of Legal Specialization in _____. Requested Rate: $____per hour.
   b. The Legal assistants and paralegals of the law firm and a brief summary of their qualifications, as required by *Gill Sav. Ass'n v. Int'l Supply*, 759 S.W.2d 697, 702 (Tex. App. Dallas 1988, wr. denied) are listed below. Request is hereby made for approval for billing at the following rates, subject to review and approval by the Court upon actual application for payment.
      1) _____ is a litigation/trial paralegal with an Associate Degree in _____ from _____ College. She is certified by the Texas Board of Legal Specialization in Personal Injury Trial Law ("inactive" due to change in specialty field) and has been employed as a litigation/trial paralegal with Applicant's law firm since _____, working in the areas of guardianship, probate, estate planning, and probate litigation. She has a total of 25 years of litigation and trial experience as a paralegal. She is a member of the Paralegal Division of the State Bar of Texas and the Fort Worth Paralegal Association Requested Rate: $___ per hour.
      2) _____ has been employed as a paralegal with Applicant's law firm since _____, working in the areas of guardianship, probate, estate planning, and probate litigation. She has 25 years' experience as a legal secretary, including experience in estate

planning. She has taken several paralegal courses, including a Probate Law course at _____. She is also a member of the Fort Worth Paralegal Association. Requested Rate: $____per hour.

WHEREFORE, Applicant respectfully requests that the Court authorize Applicant's use of attorneys, legal assistants, and paralegals of Applicant's law firm as described above to assist Applicant in his/her appointed duties as Attorney Ad Litem for Proposed Ward, that the Court approve the hourly rates for each legal assistant or paralegal as set forth above, subject to review by the Court upon actual application for payment, and that Applicant have such other and further relief to which Applicant may be justly entitled.

Dated: _____

Respectfully submitted,

[Attorney Information]

Attorney Ad Litem for
Proposed Ward

Insert Certificate of Conference

Insert Certificate of Service

No. _____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

Order Authorizing Utilization of Attorneys
And Staff of Appointee's Law Firm for Legal Services

On this day, the Court considered the Application for Authority to Utilize Attorneys and Staff of Appointee's Law Firm for Legal Services (the "Application") filed by _____ ("Applicant"), duly appointed Attorney Ad Litem for _____ ("Proposed Ward"), and the Court finds

1. The special circumstances which justify the use of additional personnel to assist the Attorney Ad Litem are: _____
_____
_____
_____
2. Applicant's use of legal assistants and paralegals to provide some legal services may reduce the overall cost of Applicant's services as appointee representing Proposed Ward and will result in more timely services.
3. It is in the best interest of Proposed Ward to authorize the utilization of additional personnel of Applicant's law firm in providing legal services.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Applicant is authorized to utilize attorneys and staff members of Applicant's law firm to assist Applicant in her duties as Attorney Ad Litem for Proposed Ward, as follows:

1. Attorneys of Applicant's law firm, as set forth below, at reasonable rates to be reviewed and approved by separate order of the Court upon application for payment.
   a. _____.
   b. _____.

2. Legal assistants and paralegals of Applicant's law firm as set forth below, at reasonable rates to be reviewed and approved by separate order of the Court upon application for payment.
   a. _____.
   b. _____.

SIGNED _____

_____
JUDGE PRESIDING

Appendix P: Motion for Appointment of Guardian Ad Litem and Order

No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

Motion for Appointment of Guardian Ad Litem

TO THE HONORABLE JUDGE OF SAID COURT:

_____, Attorney Ad Litem for _____ ("Movant"), files this Motion for Appointment of Guardian Ad Litem herein, and in support thereof would show this Court as follows:

1. Movant is the court-appointed Attorney Ad Litem for _____, Proposed Ward herein.
2. Movant respectfully requests that the court appoint a Guardian Ad Litem for the Proposed Ward pursuant to TEX. EST. CODE § 1054.051 to represent and act in the best interests of the Proposed Ward in this matter.
3. Good cause exists for the appointment of a Guardian Ad Litem.

WHEREFORE, Movant prays that the Court take up and act upon this Motion, and for such other and further relief in law and in equity to which Movant may be entitled.

Dated: _____

Respectfully submitted,

[Attorney Information]

Attorney Ad Litem for
Proposed Ward

Certificate of Service

I hereby certify that a true and correct copy of the foregoing instrument was served upon the following counsel by certified mail and/or by facsimile transmission on this _____.

Name: _____
Address: _____
CMRRR #: _____
Fax #: _____

(Repeat as Necessary)

_____
[Attorney Name]

No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

ORDER APPOINTING GUARDIAN AD LITEM
PURSUANT TO § 1054.051
OF THE TEXAS ESTATES CODE

On this day, the Court finds it necessary to appoint a Guardian Ad Litem to represent the interests of the proposed incapacitated person in this guardianship proceeding pursuant to § 1054.051 of the Texas Estates Code in a manner that will enable the Court to determine what action will be in the best interests of the proposed incapacitated person.

IT IS THEREFORE ORDERED that _____, Ph # (817)_____, who is an Attorney licensed to practice law in the State of Texas, is appointed as Guardian Ad Litem of Proposed Ward to perform with due diligence the following duties:

a. to personally interview the Proposed Ward;

b. 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;

c. 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);

d. 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;

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

IT IS ORDERED that the Guardian Ad Litem is to be given access to all of the Proposed Ward's financial, medical, psychological and intellectual testing records. This Order is issued pursuant to 45 CFR 164.512(e)(1)(i) Health Insurance Portability and Accountability Act which authorizes covered entities to disclose protected health information in the course of any judicial or administrative proceeding when responding to an order of the Court.

IT IS FURTHER ORDERED that a hearing pursuant to Texas Estates Code § 1101.051 is scheduled in the above entitled and numbered case on _____ at _____o'clock ___.m.

SIGNED _____

_____
JUDGE PRESIDING

Appendix Q: Motion for Security for Costs & Order: No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

Motion for Security for Costs

TO THE HONORABLE JUDGE OF SAID COURT:

_____, Guardian Ad Litem for _____ ("Movant"), files this Motion for Security for Costs, and in support thereof would show this Court as follows:

1. Movant is the court-appointed Guardian Ad Litem for _____, Proposed Ward herein.

2. _____ ("Respondent") has filed a contest to the application of _____ seeking appointment as Guardian of the Person and Estate of Proposed Ward. Movant has answered the contest, and denies the allegations made in such contest.

3. In accordance with Texas Estates Code § 1053.051 and Rule 143 of the Texas Rules of Civil Procedure, Movant requests that Respondent be ordered to give security for the probable costs of this proceeding.

WHEREFORE, Movant prays that a hearing is scheduled for this Motion for Security Costs and that, after a hearing, the Court order Respondent to give security for the probable costs of this proceeding in accordance with Texas Probate Code § 1053.051 and Rule 143 of the Texas Rules of Civil Procedure, and for such other and further relief in law and in equity to which Movant may be entitled.

Dated: _____

Respectfully submitted,

[Attorney Information]

Guardian Ad Litem for
Proposed Ward

Insert Certificate of Conference

Insert Certificate of Service

No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

Order Granting Security for Costs

On the date shown below, the court considered the Motion for Security for Costs filed by _____, Guardian Ad Litem for _____, Proposed Ward.

The Court, having examined the pleadings and having heard the evidence presented and arguments of counsel, makes the following findings and orders as follows:

1. Citation and notice have issued as required by law;
2. Movant is the duly appointed and qualified Guardian of the ward in this estate; and
3. The Motion is well taken and should be granted.

It is, therefore, ORDERED, ADJUDGED, and DECREED that _____, ("Respondent") be and hereby is ordered to give security for the probable costs of this proceeding, which is hereby determined to be $_____, on or before __:00 __.m., _____, _____ (which date is 20 days after the date of this Order), and that such security be given pursuant to Rule 146 of the Texas Rules of Civil Procedure, by, at Respondent's option,

1) a deposit of cash in the aforesaid sum with the Clerk of this Court and such security will be accepted as compliance with this order on the condition that Applicant will deposit any additional sum as the Court from time to time may designate as sufficient to pay the probable costs in this proceeding;

2) an attachment on appropriate property of Respondent, pursuant to Rule 592ff of the Texas Rules of Civil Procedure, or

3) an open bond to secure payment of the probable costs of this proceeding, made payable to the Judge of this Court, conditioned that Respondent as principal and his sureties will pay all such costs as may be adjudged against Respondent in this proceeding.

It is, further, ORDERED, ADJUDGED, and DECREED that should such security in form acceptable to this Court fail to be deposited with the Clerk of this Court on or before the date stated above, Respondent's Application/Contest is dismissed as of the time and date of said deadline aforesaid, and that costs of the proceedings as determined by the Court, including compensation for Movant in an amount to be set by further order of this Court, shall be taxed against Respondent, said costs to be paid by Respondent within thirty (30) days of the date of said further order.

SIGNED _____.

_____
Judge Presiding

No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

Motion to Show Authority

TO THE HONORABLE JUDGE OF SAID COURT:

_____, Attorney Ad Litem for _____ ("Movant"), files this Verified Motion to Show Authority, and in support thereof, under oath, does swear or affirm as follows:

1. Movant is the court-appointed Attorney Ad Litem for _____, Proposed Ward herein.
2. _____ ("Respondent") has entered an appearance on behalf of Proposed Ward as privately-retained counsel and filed a contest to the application of _____ seeking appointment as Guardian of the Person and Estate of Proposed Ward. Movant has answered the contest, and denies the allegations made in such contest.
3. Movant believes that such contest is being prosecuted without authority in that Proposed Ward lacks the capacity sufficient to retain counsel.
4. In accordance with Rule 12 of the Texas Rules of Civil Procedure and TEX. EST. CODE 1054.006, Movant requests that Respondent be caused to appear and show his authority to act on behalf of Proposed Ward.

WHEREFORE, Movant prays that a hearing be scheduled on this Motion and that Respondent be cited to appear and show his authority to act on behalf of Proposed Ward in this proceeding, in accordance with Rule 12 of the Texas Rules of Civil Procedure, and that upon hearing hereof, Respondent not be permitted to further appear on behalf of Proposed Ward herein, that any pleadings filed on behalf of Proposed Ward by Respondent be stricken, and for such other and further relief in law and in equity to which Movant may be entitled.

Dated: _____

[Attorney Information,
Address Block and Signature]
Attorney Ad Litem for
Proposed Ward

STATE OF TEXAS §
COUNTY OF TARRANT §

Before me, the undersigned notary, on this day personally appeared _____, the affiant and Movant herein, a person whose identity is known to me. After I administered an oath to affiant, affiant testified:

> "My name is _____. I am capable of making this verification. I read the Motion to Show Authority. The facts stated in it are within my personal knowledge and are true and correct."

_____
Name of affiant

SWORN TO AND SUBSCRIBED before me by Affiant on _____.

_____
Notary

Insert Certificate of Conference

Insert Certificate of Service

SHOW CAUSE CITATION

No. 2014-GD12345-1

THE STATE OF TEXAS)	**IN THE PROBATE COURT**
)	**NUMBER ONE OF**
COUNTY OF TARRANT)	**TARRANT COUNTY, TEXAS**

To Any Sheriff or Any Constable Within the State of Texas, GREETING:

YOU ARE HEREBY COMMANDED to summon **H. Lee Lamar, Attorney**
who may be served at **1434 Tallahatchee Bridge St.,**
Fort Worth, Texas 76102

regarding the guardianship of **Billie Jo McAlister, an Incapacitated Person**

if to be found in your County, to be and appear before the Probate Court Number ONE of Tarrant County, at 100 West Weatherford, in the City of Fort Worth, Texas on the **21st day of June A. D. 1999** at **4:00 O'clock p.m.**
and show his authority to represent Billie Jo McAlister in the above-styled and numbered proceeding**.**

Herein fail not, and make due return of this Writ. By Order of the Honorable Probate Court.

Witness, MARY LOUISE GARCIA, Clerk, and seal of said Court, at my office in Fort Worth, Texas on this **20th day of May A. D. 2014**

MARY LOUISE GARCIA, Clerk of the
Probate Courts of Tarrant County
100 West Weatherford Street
Fort Worth, Texas 76196-0401

_____
Dosey Doates, Deputy

No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

Order [Granting/Denying] Motion to Show Authority

On this date, the Court, considered the Motion filed herein by _____, Attorney Ad Litem for the Proposed Ward in this matter, requiring _____ to appear and show his authority to act on behalf of Proposed Ward in this proceeding, in accordance with Rule 12 of the Texas Rules of Civil Procedure and TEX. EST. CODE 1054.006;

Option A and it appearing to the Court that Respondent has failed to show such authority;

It is, therefore, ORDERED that the pleadings filed by Respondent on behalf of Proposed Ward be STRICKEN and that Respondent is hereby refused permission to appear on half of and represent Proposed Ward in this matter.

Option B and it appearing to the Court that Respondent has adequately demonstrated such authority,

It is, therefore, ORDERED that Respondent be permitted to appear on half of and represent Proposed Ward in this matter and that _____, Attorney Ad Litem herein, be, and he is hereby DISCHARGED from further responsibility in this matter.

SIGNED _____

_____
JUDGE PRESIDING

Appendix S: No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

Motion in Limine and to Dismiss Application

TO THE HONORABLE JUDGE OF SAID COURT:

Interested Person ("Movant") files this motion in limine and to dismiss the application for appointment of a permanent guardian of the person and estate of Proposed Ward filed by Applicant and would how the court as follows:

1. Applicant has filed an application for appointment of a permanent guardian of the person and estate of Proposed Ward. Interested Person has filed a contest to this application and has filed his own application for appointment of a permanent guardian of the person and estate of Proposed Ward.

2. Applicant has an interest adverse to that of Proposed Ward, in violation of § 1055.001 of the Texas Estates Code. Applicant is therefore prohibited from filing an application to create a guardianship for the proposed ward or contesting the appointment of a person as guardian of the person or estate, or both, of the proposed ward.

3. Further, Applicant is disqualified and ineligible to serve as guardian of the person or estate of Proposed Ward pursuant to TEX. EST. CODE § 1055.001. Movant would show Applicant is one whom the proposed ward has expressly disqualified by prior designation under TEX. EST. CODE § 1104.202(b) and attached hereto as Exhibit "A."

4. Applicant lacks standing to either prosecute his application for appointment of a permanent guardian of the person and estate of Proposed Ward or to contest the application filed by Movant herein.

WHEREFORE, PREMISES CONSIDERED, Movant prays that the Court dismiss Applicant's application and for such other relief to which Movant may be entitled.

Dated: _____

Respectfully submitted,

[Attorney Information]

Attorney Ad Litem for
Proposed Ward

Insert Certificate of Conference

Insert Certificate of Service

Appendix T: No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

Motion for Independent Medical Examination

TO THE HONORABLE JUDGE OF SAID COURT:

Movant, Attorney Ad Litem for Proposed Ward, files this Motion for Independent Medical Examination and in support respectfully shows the court as follows:

1. Movant believes it is in the best interests of Proposed Ward pursuant to § 1101.103 of the Texas Estates Code and Rule 167a of the Texas Rules of Civil Procedure for the Court to order a complete independent medical examination of Proposed Ward, to be conducted by a court-appointed psychiatrist, for the purpose of determining the present mental state of Proposed Ward and for assessment of her current care needs.

2. Movant has filed a contest to the application to create a guardianship for the proposed ward, denying that Proposed Ward is incapacitated. Based on these facts, Movant believes it would be in the best interest of Proposed Ward to have an independent medical examination.

3. Movant therefore moves the Court to designate the time, place, manner, conditions, and scope of the examination to be conducted by the psychiatrist named by the Court to make such examination of Proposed Ward. It is further requested that the report of the examining psychiatrist be provided to the Court and all counsel of record.

4. Movant requests that the expenses of said examination be paid out the estate of Proposed Ward as it is beneficial to the ward and her estate to have the facts of her mental status determined.

WHEREFORE, PREMISES CONSIDERED, Movant prays that the Court order Proposed Ward to appear before a psychiatrist to be designated by the Court for the purpose of undergoing an independent medical examination pursuant to § 1101.103 of the Texas Estates Code and Rule 167a of the Texas Rules of Civil Procedure to determine her mental status and that the Court order such examination to be paid out the estate of Proposed Ward; and for such other and further relief to which Movant may show himself to be justly entitled..

Dated: _____

Respectfully submitted,

[Attorney Information]

Attorney Ad Litem for
Proposed Ward

Insert Certificate of Conference

Insert Certificate of Service

No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

Order Setting Hearing on Application for Independent Medical Examination
(Fiat)

A hearing on the Motion for Independent Medical Examination, filed herein by _____ _____, Attorney Ad Litem for Proposed Ward, is scheduled to be heard before the Court on _____ at _____ o'clock _____ m.

Signed _____

_____
JUDGE PRESIDING

No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

Order Granting Independent Medical Examination

On this day, the Court considered the Motion for Independent Medical Examination filed herein by _____, Attorney Ad Litem for Proposed Ward, and the Court, after having considered the motion and the applicable law and having heard the evidence and arguments of counsel, is of the opinion and finds that good cause has been shown for the granting of such motion.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that _____ is hereby appointed by the Court to make a medical examination of Proposed Ward pursuant to § 1101.103 of the Texas Estates Code, to determine the present mental state and to assess her current care needs.

IT IS FURTHER ORDERED that such psychiatrist shall render his or her findings in a written report to this Court and all counsel of record.

IT IS FURTHER ORDERED that such examination shall be conducted on or before _____, that the report of the psychiatrist be filed with the court within _____ days of the examination, and that the expenses of said examination and report be paid out the estate of Proposed Ward.

Dated: _____

_____
JUDGE PRESIDING

Appendix U: Setting Confirmation

From: H. Louis Dewey [hugheylouiedewey@pmail.com]
Sent: Friday, January 24, 2014 4:23 PM
To: Jane R. Doe
Cc: Marge Inovera; Atticus Finch, Esq.
Subject: Re: Setting Confirmation: # No. 2013-GD00210-1; Guardianship of Natalie Attired

This is to confirm the above-referenced matter is set for hearing on the Application for Letters of Guardianship on Monday, April 1, 2014 at 3:00 p.m.

By copy of this e-mail, all parties and counsel of record are being notified of this hearing.

Please let me know if you have any questions. Thank you for your assistance in this matter.

Sincerely,

H. Louis Dewey
Dewey, Cheatham & Howe
(817)000-0000
[hugheylouiedewey@pmail.com]

From: Jane R. Doe
Sent: Friday, January 24, 2014 4:15 PM
To: H. Louis Dewey
Subject: Settting Confirmation: # No. 2013-GD00210-1; Guardianship of Natalie Attired

I have Monday, April 1, 2014 at 3:00p.m. available for a hearing on letters of guardianship.

Jane R. Doe, Coordinator,
Yabolusha Co Probate Court One

Appendix V: No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

Proof of Facts
(Guardianship)

On this day, the undersigned Affiant ("Affiant"), appeared personally in open court and, after being duly sworn, upon oath deposes and says that:

1. "My name and residence address are: _____
_____.

2. "Proposed Ward,_____
is an incapacitated person as defined by § 1002.017 of the Texas Estates Code and is a(n):
   a. ☐ adult ☐ minor ☐ male ☐ female aged ___ years and.
   b. ☐ resident of this County; or ☐ has an estate located principally in this county; or
      ☐ located in this county at the time of the filing of the Guardianship Application.
   c. ☐ totally incapacitated; or ☐ partially incapacitated as reflected in the Physician's Certificate filed herein in accordance with § 1101.103 of the Texas Estates Code; or
      ☐ incapacitated by virtue of minority only.

3. "Proposed Ward is: ☐ present in open court; or ☐ not present in open court as it is not in Proposed Ward's best interest to require attendance and Proposed Ward is not able to materially participate in the hearing if present.

4. "Proposed Guardian, _____, is a suitable person to be appointed Guardian, is not disqualified by law from serving in that capacity or from accepting Letters of Guardianship, is entitled to Letters of Guardianship, and it is in Proposed Ward's best interest and is necessary to promote and protect Proposed Ward's well-being for Proposed Guardian to be appointed to assist Proposed Ward in managing his/her estate.

5. "There are no guardianships of any kind existing for Proposed Ward in this, or any other, state.

6. (Minors only) "This guardianship is not sought for the primary purpose of enabling minor Proposed Ward to establish residency for enrollment in a school.

Signed _____. _____
Affiant

SWORN TO AND SUBSCRIBED before me by Affiant on _____.

_____

Appendix W: No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

Evidence in Support of Requested Bond

	Monthly Income	Annualized Income	
Income			
Social Security	$ _____	$ _____	
_____ Annuity	_____	_____	
_____ Pension	_____ (after taxes)	_____	
Total Income	_____		$ _____
Bondable Property			
Checking Account (approximate balance)		$ _____	
Credit Union Account (approximate balance)		_____	
2006 Chrysler 300		_____	
Total Bondable Property			$ _____
Debts (Unsecured)			
Unsecured Demand Note		$ _____	
Credit Card Accounts		_____	
Total Debts			$ _____
Total Annual Income, Bondable Property & Debts			$ _____
plus 10% of the above total			_____
Indicated Bond Amount (Rounded Up to Nearest Thousand)			$ _____

Appendix W: No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

Evidence in Support of Requested Monthly Allowance

A. Care Facility: _____ $ _____
B. Storage Facility: (personal property from residence: _____
C. Residence
   - Utilities _____
   - Lawn Maintenance _____
   - Tax & Insurance (prorated) _____
D. Medical Expenses and Prescriptions _____
E. Water for _____ Property _____
F. Miscellaneous items _____
   including, but not limited to, newspaper subscription, taxi fare, medical, personal care items and dining out

TOTAL: $ _____

Appendix Y: **Suggested Cross-Examination Questions for the Ad Litem**

Guardianship

DON'T DO THIS: *"If I asked you the same questions that you were just asked, would your answers be any different?*

If you are directly examining a corroborative (second) witness, then it saves time to ask:
"*You have just heard the questions that were asked of the other witness. If I asked you the same questions that I just asked the first witness, would your answers be the same?"*

Unless you are doing a comedy routine (see Abbott & Costello, "Who's on First?" www.baseball-almanac.com/humor4.shtml), it makes *little or no sense* to listen to a direct examination by another attorney and then ask the witness if they could manage to answer the same questions the same way a second time.

Appropriate Topics:

1. Do you remember when I spoke with you about the guardianship for _____?
2. Do you remember when we discussed – suitability/ incapacity/ living arrangements
3. Ward's presence in courtroom would not be of any assistance to court.
4. This guardianship for minor not just for qualification for school
5. Explanation of family dynamics that judge needs to know about
   - discuss any sore spots that might be a problem later
   - visitation money management by spouse/sibling
   - medication issues / driving / voting / marriage
   - property disputes you anticipate will crop up

   Have you fully disclosed all of the assets of the ward?
6. Standing (adverse interest) "a position that does not promote the well-being of the ward."
7. Disqualification issues of other family members ("driving nails in the coffin lid")
   minors / notoriously bad conduct / incapacity / party to a lawsuit affecting proposed ward's welfare / indebted to proposed ward / having a claim adverse to the property or person of the proposed ward / incapable of prudently managing estate (lack of experience, education, or other good reason) / one found unsuitable by the court / one expressly disqualified under §679 / a nonresident without a designation of resident agent.

Sometimes an oblique question will get a more nearly honest answer:

Instead of asking: *Have you ever been convicted of a felony involving moral turpitude?*
Ask: *Have you ever been in trouble with the law?*

8. Cross-examination of proposed Guardian when you still have doubts that money or property will be managed correctly - **commit future guardian to course of action** while under oath and in front of judge.
9. Less Restrictive Alternatives (See Appendix J)- *Have you considered (fill in the blank)?*
10. Changed Circumstances: Is there anything that has changed since I last spoke to you?

Heirship

See **DON'T DO THIS**: *(supra)*

Appropriate Topics:

1. Are you aware of any relationships the Deceased had for more than one year?
2. Do you know if any of these relationships resulted in the birth of a child?
3. Are you aware of any claims of paternity or paternity actions brought in court against the Deceased?
4. Are you aware of any legitimation claims / court proceedings for legitimation brought against the Deceased?
5. Do you have any direct knowledge of paternity / of marriage / of children?
6. Do you recall any discussions/ have any direct knowledge regarding deceased siblings / nieces / nephews?
7. Do you recall any discussions/ have any direct knowledge of the Deceased admitting to being the father of ____
8. Since we last spoke, is there anything that you recall regarding the Decedent that you did not tell me at that time?

Appendix Z:	No._____	
Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

Order Appointing Guardian of the Person (and Estate)

On this day, came on to be heard the Application for Letters of Guardianship of the Person (and Estate) of ____ _____, an Incapacitated Person (hereinafter referred to as "the Ward") which _____, Guardian Ad Litem, caused to be filed pursuant to § 1102.001 of the Texas Estates Code; and the Court, having read the Application and the Physicians' Certificate as required under § 1101.103 of the Texas Estates Code; and after hearing all evidence, testimony and arguments of witnesses and counsel in support of such Application; and being fully advised in the premises, no contest or opposition thereto being asserted, it appears to the Court and the Court hereby finds that:

1 This Court has jurisdiction and venue of this cause;
2. Due notice of said Application has been given to those persons as required by the Texas Estates Code;
3. Citation has been personally served upon the Ward in accordance with the law;
4. The Ward was/was not present in Court and/but was represented by *his* Attorney Ad Litem; The personal appearance of the Ward at the hearing was not necessary or advisable because the Ward's incapacities are such that the Ward would not have been able to understand or participate in the hearing;
5. Pursuant to § 1101.151 of the Texas Estates Code, the Ward is totally without capacity to care for *him*self or to manage *his* property; *or Pursuant to § 1101.152 of the Texas Estates Code, the Ward lacks the capacity to do some, but not all, of the tasks necessary to care for himself or to manage his property; or The Ward is without capacity solely by virtue of his minority;*
6. _____, (hereinafter referred to as "the Guardian") is eligible to be appointed as Guardian and is entitled to be appointed Guardian of the Person *and Estate* of _____, the Ward.
7. *The guardianship is not created for the primary purpose of enabling the Ward to establish residency for enrollment in a school or school district for which the Ward is not otherwise eligible for enrollment.*

Further, the Court finds by clear and convincing evidence that:

8. The Ward is an incapacitated person as defined by § 1002.017 of the Texas Estates Code, who has no legal Guardian of *his* person *and estate*; The incapacity is evidenced by recurring acts or occurrences within the preceding six (6)-month period and not by isolated instances of negligence or bad judgment;
9. It is in the best interest of the Ward to have the Court appoint a person as his Guardian;
10. The rights of the Ward *and his property* will be protected by the appointment of a Guardian.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. _____ is hereby appointed Guardian of the Person *(and Estate)* of _____, the Ward, and is hereby granted full authority over the Ward with *all* powers to act on the Ward's behalf as authorized under the Texas Estates Code and to do such other and further acts concerning the Ward as the Court may, from time to time, direct by express authorization through written order of the Court and specifically including the ability to apply for a passport on behalf of the ward, and the rights of the Ward are limited to the extent not inconsistent herewith, including the right to hold or obtain a license to operate a motor vehicle and the right to vote in a public election.
2. The Guardian appointed is hereby ordered to swear and subscribe to an oath that *she* will faithfully discharge the duties of Guardian of the Person *and Estate* of the Ward;
3. The Guardian shall give good and adequate bond in the amount of $_____, conditioned as required by law;

4. Upon the filing of the Guardian's Oath and approval of the Guardian's Bond as required herein, the Clerk of the Court shall issue Letters of Guardianship to the Guardian;
5. A petition for adjudication that a guardianship is no longer needed by the Ward may not be filed within a period of one (1) year from the date of the signing of this order without special leave of the Court.

SIGNED this _____.

_____
Judge Presiding

"Notice to any peace officer of the State of Texas: you may use reasonable efforts to enforce the right of a guardian of the person of a ward to have physical possession of the ward or to establish the ward's legal domicile as specified in this order. A peace officer who relies on the terms of a court order and the officer's agency are entitled to the applicable immunity against any civil or other claim regarding the officer's good faith acts performed in the scope of the officer's duties in enforcing the terms of this order that relate to the above-mentioned rights of the court-appointed guardian of the person of the ward. Any person who knowingly presents for enforcement an order that is invalid or no longer in effect commits an offense that may be punishable by confinement in jail for as long as two years and a fine of as much as $10,000."

Appendix Aa:

No. _____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

PERSONAL SURETY BOND
GUARDIAN OF THE PERSON

STATE OF TEXAS }
COUNTY OF _____ }

KNOW ALL PERSONS BY THESE PRESENTS, that we, as Guardian of the Person of the above-named Ward and Principal herein and as Sureties (all as shown below), DO HEREBY BIND OURSELVES, jointly and severally, and our heirs and successors, to the Judge of Probate Court Number ____, _____ County, Texas, and his/her successors in office, IN THE SUM OF $100.00, conditioned that said Guardian shall well and truly perform all the duties required of him or her as Guardian of the Person herein.

Date: _____ PRINCIPAL: _____
PRINTED NAME: _____
ADDRESS: _____
CITY, STATE, ZIP _____

Date: _____ SURETY: _____
PRINTED NAME: _____
ADDRESS: _____
CITY, STATE, ZIP _____

Date: _____ SURETY: _____
PRINTED NAME: _____
ADDRESS: _____
CITY, STATE, ZIP _____

APPROVED this _____.

_____
JUDGE PRESIDING

Appendix Ab:

No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

OATH OF GUARDIAN

That I, _____, do solemnly swear that I will faithfully perform and discharge the duties of Guardian of the Person of _____, an Incapacitated Person, according to law.

_____
Guardian

SUBSCRIBED AND SWORN TO BEFORE ME on _____.

_____

Appendix Ac: No. _____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

Safekeeping ("Freeze") Agreement

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES _____*(BANK)* by and through an officer of such institution, whose signature is duly affixed below, and does hereby certify that _____, Guardian of the above-captioned Estate, has deposited with such institution in _____ Account No. _____, funds belonging to said Estate with a balance as of this date of $_____.

Further, BANK certifies that it will not deliver to the said Guardian or any other person, any of said funds so deposited, including any subsequent deposits to the account or any interest or dividends credited to such account, except upon the written authority of the Judge of Probate Court Number One of Tarrant County, Texas, in accordance with § 1105.155 of the Texas Estates Code, as amended.

Witness the signature and seal of _____ (Bank)*,* this _____ *day of* _____*, 20*___.

_____ BANK
By_____
Its _____

APPROVED this _____ day of _____, 20___.

_____
JUDGE PRESIDING

APPENDIX AD: No._____

Guardianship of	§	Probate Court
_____,	§	Number One of
An Incapacitated Person	§	Tarrant County, Texas

Sworn Statement of Services and Expenses by Appointee in Court-Initiated Guardianship

On this day personally appeared _____("Appointee"), known to me, who first being duly sworn upon oath to tell the truth, deposed and stated:

"I am an attorney licensed to practice law in the State of Texas and appointed by the Court in this cause. The nature of services rendered in this action on behalf of my client by myself or someone in my employ is as follows:

Guardian Ad Litem

a. *personally interviewed Proposed Ward;*
b. *interviewed party who filed the letter concerning Proposed Ward and known relatives of Proposed Ward;*
c. *filed Application for Guardianship and a written report prior to hearing and ensured proper service and return of citation on Proposed Ward;*
d. *located a person to serve as Guardian or coordinated with Volunteer Guardians and notified family members as required by Texas Estates Code § 1051.104;*
e. *consulted with Attorney Ad Litem concerning Application;*
f. *set and attended hearing on Application;*
g. *assisted Guardian in obtaining his or her bond and letters.*

Attorney Ad Litem

a. *reviewed application for guardianship, certificates of physical, medical and intellectual examination and relevant medical, psychological and intellectual testing records of Proposed Ward;*
b. *personally interviewed Proposed Ward and discussed the laws and facts of the case, Proposed Ward's legal options and grounds on which guardianship is sought;*
c. *ascertained whether the Proposed Ward wishes to oppose the proceedings and filed appropriate Answer, with copy of the report to the Court Investigator;*
d. *consulted with Guardian Ad Litem or Court Investigator concerning Application;*
e. *appeared on behalf of Proposed Ward at the hearing;*
f. *reported on the need for continuation of the appointment or discharge of the Attorney Ad Litem at the hearing.*

I therefore request the following fees and expenses for my representation of the Proposed Ward: (check one)

☐ Guardian Ad Litem fee $ 1,000.00 ☐ Attorney Ad Litem fee $ 500.00

☐ Expenses and reimbursement requested. *(Please check appropriate line and attach proof and explanation)*

- parking charges, long distance calls or other expense $_____

TOTAL OF ATTORNEY'S FEES AND EXPENSES REQUESTED: $_____

Signature : _____ Taxpayer ID/SS#: _____

Address: _____ Bar Card #: _____

_____ Phone Number:_____

SUBSCRIBED AND SWORN TO before me by the aforesaid attorney on _____

_____

Notary

ORDER

On this day, the Court considered foregoing, and finds that said Appointee has rendered necessary services on behalf of the Proposed Ward, that such fees and expenses are reasonable and just, and should be paid.

It is therefore ORDERED that said Appointee be immediately paid the total sum of $_____ from funds of Tarrant County.

It is further ORDERED that the appointment of Appointee is terminated and that the Attorney named herein is discharged as ad litem in this cause.

Signed this _____.

_____

Judge Presiding

Appendix Ae: No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

Application for Payment of Fees and Expenses of Ad Litem
("Private Pay or County Pay in Excess of Set Fee")

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, _____, Applicant (and duly-appointed _____ Ad Litem for _____, "Ward",) and respectfully shows the Court as follows:

1. Applicant was appointed _____ Ad Litem by Order of this Court dated _____.
2. Applicant is an attorney licensed to practice law in the State of Texas. As _____ Ad Litem in the above-referenced matter, Applicant has spent ___ hours on this matter and incurred expenses in the amount of $_____ as set forth in the itemized statement attached hereto as Exhibit A and incorporated herein for all purposes.
3. A Guardian was appointed for the Ward/ The Application for Guardianship was denied.
4. Applicant is familiar with the reasonable and customary fees charged by attorneys serving as _____ Ad Litem in Probate Court proceedings in Tarrant County, Texas. In my opinion, which is based upon my experience, education and training, the amount of $ _____is a reasonable and customary fee for the services I have provided in this matter and such fee is necessary and was incurred while representing the best interest of the Ward.

WHEREFORE, Applicant respectfully requests that this Court award attorney's fees and expenses in the amount of $_____and order that such fees be paid by funds available in the Ward's estate/ by the Applicant/ out of the funds of Tarrant County.

Submitted this _____

_____ SBOTID_____
Applicant/Ad Litem
Address_____
_____
Phone _____ Fax _____

Certificate of Service

I hereby certify that a true and correct copy of the foregoing instrument was served upon the following counsel by certified mail and/or by facsimile transmission on this _____.

Name
Address (Repeat as Necessary)
CMRRR #

_____
[Attorney Name]

Approved: _____
Guardian/Attorney for Guardian

No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Incapacitated Person	§	Tarrant County, Texas

Order Approving Ad Litem Fees and Authorizing Payment
(Private Pay)

On this day, the Court considered the Application for Payment of Attorney's Fees filed by _____, Guardian/Attorney Ad Litem in this cause, and finds as follows:

1. the time expended and expenses advanced are reasonable and just and should be paid as ordered below.

2. the Court finds that such fees and expenses shall be paid out of the guardianship estate

(or)

3. *based upon the recommendation of the Court Investigator, the Application for Guardianship filed herein should be and has been denied and the Applicant shall pay all costs of this proceeding.*

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the attorney's fees and expenses should be immediately paid to the aforementioned Ad Litem in the amount of $
and that such fees and expenses shall be taxed as costs in this case to be paid from the funds available in the Ward's estate; *or by the Applicant.*

SIGNED this _____.

_____
Judge Presiding

Appendix Af:

Practice Tips from The Court Investigators of Probate Court Number One

1. Read the Ad Litem Manual.
2. Read the Texas Estates Code.
3. If you are notified of an appointment, promptly pick up your paperwork.
4. Check the Order Appointing Ad Litem for a hearing date.
5. Review the Physician's Certificate to verify that it meets the requirements of TEX. EST. CODE § 1101.103.
6. If you are a Guardian Ad Litem, either file a report or an Application for Guardianship within 14 days of your appointment.
7. Check the physician's evaluation - is it still timely?
8. If you are an Attorney Ad Litem, file an answer. It's hard to convince the judge to appoint a guardian when the proposed ward has not been represented by counsel.
9. Calling the Court Investigator is not a substitute for action (and you don't get paid for it).
10. If you have a contested case, please do not call the Court Investigator to talk about facts or for advice as to how to proceed. Ex parte communications are prohibited.
11. All Guardian Ad Litems and TEX. EST. CODE § 1101.001 applicants must comply with all of the requirements of § 1051. Make sure the affidavit is filed at least 1 week prior to the scheduled hearing, and any necessary waivers, etc. are obtained.
12. No TEX. EST. CODE § 1051.104 affidavit is required if there are no waivers or notices.
13. Make sure your application contains an itemized listing of income and assets of the proposed ward, including the value of the assets, (and any trust accounts for the ward at a nursing home) sufficient to allow the court to set a bond and a monthly allowance beneficial interest in trusts?
14. If the description or value of income or assets are unknown, let the investigator know they are unknown.
15. The Court Investigator's office is open during regular Court hours; however, the Court Investigator may be out of the office conducting an investigation, attending meetings, etc…. You are always welcome to stop by, but you might want to make sure the Court Investigator will be in the office before making a special trip to the courthouse.
16. Turn your fee application in to the clerk - not at the bench
17. Don't bother to 'cc' the Judge on everything.

BARRIE ALLEN 817-884-2189
Court Investigator
ballen@tarrantcounty.com

MARY CAROE 817-884-1897
Assistant Court Investigator
mecaroe@tarrantcounty.com

Probate Court Number One
100 W. Weatherford, Rm. 260A
Fort Worth, TX 76196
Fax: 884-3178

Appendix Ag:

Roster: Texas Court Investigators:

Statutory Probate Courts

Bexar: Probate Court 1
Robert Augsburger, Ct Inv 210-335-2583 robert.augsburger@bexar.org
100 Dolorosa, Room 123, San Ant, TX 78205
Probate Court 2
Sue Bean, Ct Inv 210-335-2279 sbean@bexar.org
100 Dolorosa, Room 117, San Ant, TX 78205

Collin: Michael L. Vaughan, Ct Inv 972-548-6463 mvaughan@co.collin.tx.us
Collin County Courthouse
2100 Bloomdale Rd., Suite 12360
McKinney, TX 75071

Dallas: Myra Kirkland 214-653-6446 myra.kirkland@dallascounty.org
Elizabeth Hart 214-653-6446 elizabeth.hart@dallascounty.org
Drew Dixon 214-653-6446 drew.dixon@dallascounty.org
Patricia McArdle 214-653-6446 patricia.mcardle@dallascounty.org
Murad Campbell 214-653-6446 murad.campbell@dallascounty.org
Probate Courts of Dallas County
501 Main Street, #217
Dallas, TX 75202

Denton: Carol Dabner, Ct Inv 940-349-2148 carol.dabner@dentoncounty.com
Missy Rainey, Asst Ct Inv 940-349-2149 missy.rainey@dentoncounty.com
Denton County Probate Court,
1450 E. McKinney St., Suite 2412
Denton, TX 76209

El Paso: Probate Court 1
Beth Parsons, Ct Inv 915-546-2161 eparsons@epcounty.com
500 E. San Antonio, Suite 803
El Paso, TX 79901
Probate Court 2
Raquel Lauretano, Ct Inv 915-546-8183 rlauretano@epcounty.com
Alma Calderon, Ct Inv 915-546-8183 acalderon@epcounty.com
500 E. San Antonio, Suite 422
El Paso, TX 79901

Galveston: Debbie Diaz, Grdn Inv 409-770-5188 debbie.diaz@co.galveston.tx.us
Probate Court of Galveston County
600 59th Street, Suite 2305
Galveston, TX 77551

Harris: Probate Court 1
Anthi Pavlicek, Ct Inv 713-368-6701 anthi.pavlicek@prob.hctx.net
201 Caroline, 6th Floor
Houston, TX 77002
Probate Court 2
Dawn King, Ct Inv 713-368-6715 dawn.king@prob.hctx.net
201 Caroline, Suite 680
Houston, TX 77002

Probate Court 3
Tara Zinn, Ct Inv 713-368-6736 tara.zinn@prob.hctx.net
201 Caroline, 7th Floor
Houston, TX 77002
Probate Court 4
Ray Sullins, Ct Inv 713-368-6767 ray.sullins@prob.hctx.net
201 Caroline, 7th Floor
Houston, TX 77002

Hidalgo: David T. Marroquin, Ct Inv 956-318-2385
100 N. Closner Blvd., 3rd Floor
Edinburg, TX 78539

Tarrant: Probate Court 1
Barrie Allen, Ct Inv 817-884-2189 ballen@tarrantcounty.com
Mary E. Little Caroe, Asst Ct Inv 817-884-1897 mecaroe@tarrantcounty.com
100 Weatherford, Rm 128A
Fort Worth, TX 76196
Probate Court 2
Jeff Arnier, Ct Inv 817-884-3395 jcarnier@tarrantcounty.com
Arlene Shorter, Asst Ct Inv 817-884-2719 ashorter@tarrantcounty.com
100 Weatherford, Rm 367
Fort Worth, TX 76196

Travis:
Tom Ruffner, Ct Inv 512-854-4978 tom.ruffner@travis.tx.us
Michael P. Gianotti, Asst Ct Inv 512-854-4359 michael.gianotti@co.travis.tx.us
1000 Guadalupe, Room 217
Austin, TX 78701

County Courts at Law
Brazoria: County Courts at Law 1,2,3 & 4
Barbara "BB" Brannan, Grdn Inv 979-864-1252 bb@brazoria-county.com
Brazoria County Courthouse
111 East Locust St., Suite 106
Angleton, TX 77515

Lubbock: _(Position Vacant)__, Ct Inv 806-775-1723
Office of Dispute Resolution
916 Main St., Suite 800
Lubbock, TX 79401

Montgomery: County Court at Law 2
Jacqueline Ullom, Ct Inv 936-760-6915 jacqueline.ullom@mctx.org
210 West Davis
Conroe, TX 77301

Appendix Ag: **Cause No. / No. de Causa_____**

COURT INSTRUCTIONS: GUARDIAN OF THE PERSON
INSTRUCCIONES DE LA CORTE PARA EL GUARDIAN DE LA PERSONA

As a duly-appointed Guardian of the Person, you are hereby advised by the Court that you **must** do the following: (All section references are to the Texas Estates Code unless otherwise indicated.)

Como El Guardián designado con la responsabilidad de la Heredad, La Corte se le notifica que usted **debe** hacer lo siguiente: (Todas las referencias a las secciones son del Código Estates de Texas [Texas Estates Code] a menos que hay otras indicaciones al contrario.)

STEVE M. KING, JUDGE/ JUEZ
PROBATE COURT #1
TARRANT COUNTY, TEXAS

CORTE TESTAMENTARIA #1
CONDADO DE TARRANT, TEXAS

I acknowledge receipt of a copy of these instructions.

I further acknowledge that I attended the Court's guardianship training class on _____, 20__.

Yo, guardián del sujeto de esta custodia, afirmo que he leído y entiendo lo anterior y he recibido una copia de estas instrucciones.

Yo reconoso que assiste la clase de entrenamineto el _____, 20__.

Name/Nombre: _____

Guardian/ Guardián Date/ Fecha

_____

Name Printed/ Nombre en letra de molde

A. Qualify as Guardian: Within twenty (20) days of receiving the order appointing you as guardian (§ 1105.002):

1. Take and file an o*ath* (§ 1105.051);
2. File the required *bond*, (§ 1105.101), and
3. Obtain *Letters of Guardianship* from the probate clerk's office (§ 106.001).

B. Powers: Guardian of the Person (§ 1151.051)

1. The right to have physical possession of the ward and to establish the ward's legal domicile;

2. The duty of care, control, and protection of the ward;

3. The duty to provide the ward with clothing, food, medical care, and shelter; and

A. Para Calificar Como Guardián: Dentro de (20) días de recibir la orden que le designa como guardián usted debe (§ 1105.002):

1. *Juramentarse* y registrar el *juramento* (§ 1105.051);
2. Registrar la *fianza* designada (§ 1105.101), y
3. Obtener *Las Cartas de Custodia* de la oficina (§ 1106.001).

B. Los Poderes del Guardián de la Persona (§ 1151.051)

1. El derecho de tener posesión física del sujeto de la custodia y establecer el domicilio legal del sujeto de la custodia;

2. La obligación del cuido, control y la protección del sujeto de la custodia;

3. La obligación de proveer la ropa, la comida, el cuido medico y el albergue al sujeto de la custodia; y

4. The power to consent to medical, psychiatric, and surgical treatment other than the in-patient psychiatric commitment of the ward, but including the right to make end-of-life decisions decisions regarding the withdrawing of life support, hydration and nutrition (§166.039 Texas Health & Safety Code).

5. The duty to file an **annual report** setting forth specific information regarding the condition of the ward from a medical and social standpoint. It should be filed within 30 days after receipt.(§ 1163.101)

6. The power, on application and order, to establish a Special Needs Trust for the ward.

7. The power to transport the ward for a preliminary psychiatric examination pursuant to TEX. HLTH & SAF. CODE Ch. 573.

8. Any other powers specified granted in the order appointing the guardian.

WARNING: Letters of Guardianship EXPIRE one year and four months after the date of issuance unless renewed. (§ 1106.002) The clerk cannot renew the letters until the guardian has filed the required annual report for the guardian of the person (§ 1106.003(b).

9. The duty to advise the court immediately of any address changes of the guardian or the ward. **Failure to do so is cause for removal of the guardian and cancellation of all Letters of Guardianship**; (§ 1203.051)

10. The duty to advise the Court **immediately** if the ward dies or, in the case of a minor, when the ward turns 18;

11. Notify the Court **immediately** if you or any other person or entity has been appointed the conservator of the ward or if adoption has occurred.

4. El poder de aprobar el tratamiento medico, psiquiátrico y quirúrgico, pero no incluye el poder de ingresar el sujeto de la custodia a tratamiento psiquiátrico. Este poder incluye el derecho de tomar decisiones del fin de vida que se tratan de quitar aparatos que prolongan la vida, la hidratación y la nutrición (§166.039 Texas Health & Safety Code).

5. La obligación de registrar un **reportaje anual** estipulando información especifica de la condición del sujeto de la custodia del punto de vista médica y social. Se debe registrar el reportaje dentro de 30 días después de recibirlo. (§ 1163.101)

6. El poder, después de la aplicación y el orden, a establecer un Fideicomiso para Necesidades Especiales para el pupilo.

7. El poder para el transporte el sujeto para un examen psiquiátrico preliminar. TEX. HLTH & SAF. CODE Ch. 573.

8. Cualquier otro poder especificado en la orden designando el guardián.

AVISO: Las Cartas de la Custodia SE VENCEN un año y cuatro meses después de la fecha de emisión a menos que las cartas estén renovadas. (§ 1106.002) La secretaria del juzgado no puede renovar las cartas hasta que el guardián registre los reportes anuales necesarios para el guardián de la persona. (§ 1106.003(b).

9. La obligación de informar al juzgado inmediatamente de cualquier cambio de dirección del guardián o del sujeto de la custodia. **La falta de actuar así es razón para quitar el guardián y cancelar todas Las Cartas de La Custodia**; (§ 1203.051)

10. La obligación de informar al juzgado **inmediatamente** cuando se muera el sujeto de la custodia o, en el caso un menor de edad cuando el sujeto de la custodia cumpla 18 años;

11. La obligación de informar al juzgado **inmediatamente** si usted o cualquier otra persona ha sido designado el guardián del sujeto de la custodia o si el sujeto
ha sido adoptado.

12. A Court Visitor will be assigned annually, or at more frequent intervals as deemed necessary by the Court, to assess the condition of the Ward. You are required to cooperate with the Court Visitor. (§ 1054.101).

D. Expectations of the Guardian of the Person: (§ 1163.101)

1. See that the ward is **appropriately housed,**
2. Have frequent and meaningful **personal visits** with the Ward.
3. Make every effort to insure the Ward is receiving **all available benefits** for which he/she may be eligible and entitled.
4. Obtain **psychological, social services, training, educational, social and vocational opportunities** for the Ward as needed and appropriate.
5. Authorize and arrange any **needed medical, dental, ophthalmological and surgical treatment**.

12. Un visitante del juzgado será designado anualmente para determinar la condición del sujeto de la custodia. Se le requiere de cooperar con esta persona. (§ 1054.101).

D. Expectativas del Guardián de la Persona: (§ 1163.101)

1. Asegurar que el sujeto de la custodia tiene **alojamiento apropiado**.
2. Tener visitas personales con el sujeto de la custodia que son frecuentes y significantes.
3. Hacer todo lo posible para asegurar que el sujeto de la custodia recibe todos los beneficios que tiene el derecho de recibir.
4. Obtener oportunidades para el sujeto de la custodia cuando es necesario y apropiado de: **la psicología, servicios sociales, la capacitación; obtener atención psicológica, servicios sociales, entrenamiento educacional y oportunidades sociales y vocacionales**.
5. Autorizar y planificar cualquier **necesidad medica, dental, oftalmologica y tratamiento quirurgico**.

Cause No. / No. de Causa_____

COURT INSTRUCTIONS: GUARDIAN OF THE ESTATE
INSTRUCCIONES DE LA CORTE PARA EL GUARDIAN DE LA HEREDAD

As a duly-appointed Guardian of the Estate, you are hereby advised by the Court that you **must** do the following: (All section references are to the Texas Estates Code unless otherwise indicated.)

Como El Guardián designado con la responsabilidad de la Heredad, La Corte se le notifica que usted **debe** hacer lo siguiente: (Todas las referencias a las secciones son del Código Estates de Texas [Texas Estates Code] a menos que hay otras indicaciones al contrario.)

STEVE M. KING, JUDGE / JUEZ
PROBATE COURT #1
TARRANT COUNTY, TEXAS

CORTE TESTAMENTARIA #1
CONDADO DE TARRANT, TEXAS

I acknowledge receipt of a copy of these instructions.

I further acknowledge that I attended the Court's guardianship training class on _____, 20__.

Yo, guardián del sujeto de esta custodia, afirmo que he leído y entiendo lo anterior y he recibido una copia de estas instrucciones.

Yo reconoso que assiste la clase de entrenamineto el _____, 20__.

Name/Nombre: _____

Guardian/ Guardián Date/ Fecha

_____

Name Printed/ Nombre en letra de molde

A. Fiduciary Responsibility: (§§ 1151ff) As a guardian, you are a **fiduciary**, a position of the highest trust and responsibility with respect to the ward, keeping all affairs confidential; maintaining accurate and complete financial records and ensuring that all dealings undertaken on behalf of the ward, such as the purchase of goods and services, are properly completed.

A. Responsabilidad Fiduciaria: (§§ 1151ff) Como guardián usted esta en una posición **fiduciaria**. Es una posición que lleva un alto grado de confianza y responsabilidad al sujeto de la custodia. Los deberes del guardián incluyen: mantener todos los asuntos confidenciales; mantener los archivos financieros en una forma completa y precisa; asegurar que todos los tratos hechos por parte del sujeto de la custodia como la compra de bienes y servicios, se completan en una forma apropiada.

Avoid **conflicts of interest** (and potential removal and personal liability) by: 1) **not** commingling your personal funds with the funds of the ward; 2) **not** borrowing money from or lending money to the ward; 3) **not** selling or encumbering real or personal property, or any interest therein, to yourself, a relative, friend or business acquaintance.

As a fiduciary, you and your bond surety may be held **liable** for any breach of your fiduciary duties. The requirements of the Estates Code are clear regarding your responsibilities.

B. Qualify as Guardian: Within twenty (20) days of receiving the order appointing you as guardian (§ 1105.002):

1. Take and file an o*ath* (§ 1105.051);
2. File the required *bond*, (§ 1105.101), and
3. Obtain *Letters of Guardianship* from the probate clerk's office (§ 1106.001).

C. Limited Power of Guardian to Act Without Court Authority (§ 1151.103) Without prior authorization by the court, the guardian may only: 1. Purchase liability and property insurance; 2.Pay taxes, court costs, & bond premiums; 3.Release liens upon final payment; 4.Vote stocks; 5.Pay calls and assessments.

You are not authorized or empowered to do any other actions without **prior approval** of the court or **ratification** by the court upon your application. You and your bond surety can be held liable for failure to get court approval before taking action or spending estate money. If in doubt, ask your attorney.

D. Take Possession of all Property of the Ward Immediately upon receiving Letters of Guardianship, collect and take possession of all personal property and business records of the estate. (§ 1151.152) This may include, as necessary:

1. Security Change the locks on real property;

Para evitar **conflictos de interés** (y deposición y riesgo personal potencial): 1) **no** se mezcla sus fondos personales con los fondos del sujeto de la custodia; 2) **no** pide prestado ni prestar dinero a el sujeto de la custodia; 3) **no** vende ni endeuda bienes o propiedad personal o cualquier interés similar a usted mismo, un pariente, un amigo o un conocido de negocios.

Con el poder fiduciario usted y su fianza pueden ser **responsables** por cualquier violación de sus deberes fiduciarios. Los requisitos del Código Testamentario son claros en cuanto a sus responsabilidades.

B. Calificarse como Guardián: Dentro de veinte (20) días de recibir la orden que le designa a usted como guardián usted debe (§ 1105.002):

1. *Juramentarse* y archivar el *juramento* (§ 1105.051);
2. Archivar la *fianza* designada, (§ 1105.101), y
3. Obtener *Cartas de Custodia* de la oficina de la secretaria del juzgado (§ 1106.001).

C. El Poder del Guardián Limitado para Actuar sin Autoridad de la Corte (§ 1151.103) Sin autorización previo de la corte el guardián solo puede: 1. Comprar seguro de riesgo y de propiedad; 2.Pagar impuestos, costos de corte y primas de fianza; 3.Liberar deudas al hacer el pago; 4.Votar acciones; 5.Visitar y opinar sobre el sujeto de la custodia.

Cualquier otra acción del guardián debe ser con la **autorización previa** de la corte o ser **ratificado** por la corte. Usted y su fianza pueden ser responsables por la falta de conseguir aprobación de la corte antes de actuar o gastar el dinero de la heredad. Si usted tiene dudas pregúntale a su abogado.

D. Poseer Toda La Propiedad del sujeto de la custodia inmediatamente después de recibir Cartas de la Custodia, reunir y poseer toda la propiedad personal y documentos de negocio de la heredad. (§ 1151.152) Este puede incluir cuando sea necesario:

1. Seguridad Cambie las cerraduras en los bienes;

2. Storage Place non-perishable personal property in insured storage;

3. Perishable Property Obtain permission to sell perishable personal property (§ 1158.051) after the Inventory has been filed and approved;

4. Accounts and Investments Set up appropriate accounts for the Guardianship funds. (All Guardianship funds must be deposited in insured accounts in the name of the Guardianship. Retain in a checking account only such funds reasonably necessary for the current support and maintenance of the Ward. You are required to invest all additional funds in insured, interest-bearing accounts. (*Do not commingle Social Security Benefits with other estate accounts and non-probate assets. you need only to account to the Social Security Administration for the use of these funds);*

5. Cancel Credit Cards issued in the Ward's name and send written notice to credit reporting agencies that the Ward has been declared incapacitated and will not be making any loans or accepting "pre-approved" credit cards.

E. **Manage the Property** of the Ward as a "prudent person would manage one's own property." (§ 1151.151)

1. Spending Money - Obtain a written order of this Court authorizing any expenditure of Guardianship funds **before** any such expenditure is made. Get an order for a monthly allowance for the maintenance and support of the Ward. (§ 1156.001)

2. Expenditures for Support - A parent of a minor ward has a legal duty to support the child from his own resources. Absent a showing that the parent is unable to support the child, the parent has no authority as guardian to invade either the income or corpus of the child's estate. (§ 1156.051

3. Sales and Leases - Obtain a written order of this Court before attempting to sell, lease, transfer or otherwise dispose of any non-cash asset of the Guardianship;

2. Almacenaje Ponga propiedad personal no corruptible en almacenaje asegurado;

3. Propiedad Corruptible Obtenga permiso para vender propiedad personal corruptible (§ 1158.051) después de que el inventario ha sido archivado y aprobado;

4. Cuentas e Inversiones Establezca cuentas apropiadas para los fondos de la Custodia. (Todos los fondos de la Custodia deben ser depositados in cuentas aseguradas con el nombre de la Custodia. Retenga en una cuenta de cheques solamente los fondos necesarios para el apoyo y mantenimiento actual del sujeto de la custodia. Debe invertir todos los fondos adicionales en cuentas aseguradas que ganan interés. (*No se mezcla los beneficios de Seguridad Social con otras cuentas de la heredad y posesiones no testamentarias. Su responsabilidad es a la Administración de Seguro Social para el uso de estos fondos);*

5. Cancela Tarjetas de Crédito distribuidas con el nombre del sujeto de la custodia. Envié notificación escrita a las agencias de reportaje de crédito que ha sido declarado que el sujeto de la custodia esta incapacitado y no pedirá prestamos ni aceptara tarjetas de crédito "pre-aprobadas."

E. **Administra la Propiedad** del sujeto de la custodia en la misma manera que "una persona prudente administraría su propia propiedad." (§ 1151.151)

1. Desembolsar Dinero – Obtenga una orden escrita de esta Corte autorizando cualquier desembolso de fondos de la Custodia **antes** de realizar tal desembolso. Obtenga una orden para la concesión mensual para el mantenimiento y apoyo del sujeto de la Custodia. (§ 1156.001)

2. Desembolsos de Apoyo – Un padre de un sujeto de la custodia menor de edad tiene el deber legal para apoyar el menor de los recursos del padre. El padre no tiene la autoridad como guardián para invadir a los ingresos o el valor principal de la heredad del menor a menos que el padre muestra que no es capaz de apoyar al menor. (§ 1156.051)

3. Venta y Contratos de Arrendamiento – Obtenga una orden escrita de esta Corte antes de intentar vender, arrendar, transferir o disponer de cualquier posesión no al contado de la Custodia.;

4. Insurance - Obtain adequate health for the ward, if possible; obtain adequate property insurance on all non-cash assets and, when funds are available, make appropriate funeral and burial arrangements.

5. Collect all debts, rentals, or claims due to the ward, and, if necessary, with court permission, litigate on behalf of the ward;

6. Creditor's Claims must be very carefully handled. Consult your attorney. Your improper approval of a claim or your failure to timely act on a claim can result in your personal liability.

7. Loans Under certain circumstances, the court may authorize a guardian to mortgage or pledge estate property as security on a loan: (§ 1161.051) or sale of estate property (§ 1158)

8. Gifts The guardian has no authority to make a gift, absent specific authorization

F. Filing an Inventory Within 3**0 days** after qualification, the guardian must file a sworn inventory, appraisement and list of claims due the estate of the ward. (§ 1154.001)

G. Notice to Creditors Within **one month** after qualification, the guardian (through an attorney) must publish a notice to creditors in a newspaper of general circulation in the county and file a copy of the notice and the publisher's affidavit. (§ 1153.001) Within **four months** after qualification, the guardian must give notice by certified or registered mail, return receipt requested, to all secured creditors (§ 1153.003) and any general claimants if the guardian has actual knowledge of the debt or claim.

H. Accountings

1. Maintain an accurate record of all expenditures and receipts of Guardianship funds;

4. Seguro – Obtenga seguro de salud adecuado para el sujeto de la custodia cuando posible; obtenga seguro de propiedad adecuado en todas las posesiones no al contado y realiza planes apropiados para el funeral y entierro cuando los fondos estén disponibles.

5. Cobra todas las deudas, alquileres, o peticiones que se debe pagar al sujeto de la custodia y cuando es necesario litiga por parte del sujeto de la custodia con permiso de la corte.;

6. Peticiones de Acreedores se debe manejar con mucho cuidado. Consulte a su abogado. Su aprobación no apropiada de la petición o su falta de actuar a tiempo con una petición puede resultar en su responsabilidad personal.

7. Prestamos En ciertas circunstancias la corte puede autorizar una guardián para hipotecar o comprometer propiedad de la heredad como fianza de una persona: (§ 1161.051) o venta de la propiedad de la heredad (§ 1158)

8. Donaciones El guardián no tiene la autoridad para hacer una donación sin autorización específica.

F. Registrar un Inventario Dentro de 3**0 días** de calificar, el guardián debe registrar un inventario, valoración y una lista de las peticiones que se deben entregar a la heredad del sujeto de la custodia bajo juramento. (§ 1154.001)

G. Notificación a Acreedores Dentro de **un mes** de calificar el guardián (a través de un abogado) debe publicar una notificación a los acreedores en un periódico de circulación general en el condado y registrar una copia de la notificación y la declaración del editor. (§ 1153.001) Dentro de **cuatro meses** después de calificar el guardián debe dar una notificación por correo certificado o registrado y pedir el regreso del recibo de todos los acreedores asegurados (§ 1153.003) y cualquier otra persona con quien el sujeto de la custodia tiene una deuda y tiene conocimiento actual de la deuda.

H. Contabilidad

1. Mantenga un archivo preciso de todos los desembolsos y recibos de los fondos de la Custodia;

2. Within 60 days of the anniversary of your qualification, file your Annual Account in the form prescribed by the Court.

WARNING: Your Letters of Guardianship will EXPIRE one year and four months after the date of issuance unless they are renewed. The Probate Clerk cannot renew the letters until you have filed the required annual account for the guardian of the estate (§ 1106.002, 1106.003(b).

3. File your Final Account when the Guardianship is ready to be closed due to the death of the Ward, the Ward regaining capacity or (if Guardian of a Minor) the Ward reaches 18 years of age;

I. Address Changes - Notify the Court **at once** if your address or the address of the Ward changes. Failure to do so is a cause for your removal. (§ 1203.051)

J. Attorney's Fees - Attorney's fees and expenses may be paid upon application and order, as any other expenditure, subject to the guidelines of the court for billing procedures

K. Questions? Consult with your attorney (not the Court) on any matter regarding this Guardianship that you do not understand.

2. Dentro de 60 días del aniversario de su calificación registre su Contabilidad Anual en la forma designada por la Corte.

AVISO: Sus Cartas de Custodia SE VENCERAN en un año y cuatro meses después de la fecha de emisión a menos que sean renovadas. La Secretaria de la Corte Testamentaria no puede renovar las cartas hasta que usted ha registrado la contabilidad anual designada para el guardián de la heredad (§ 1106.002, 1106.003(b).

3. Registre su Contabilidad Final cuando La Custodia este lista para cerrar debido a la muerte del sujecto de la custodia, cuando el sujeto de la custodia recobra la capacidad o (si El Guardián de un Menor) el sujeto de la custodia cumpla 18 años;

I. Cambios de Dirección – Notifique a la Corte inmediatamente si su dirección o la dirección del sujeto de la custodia cambien. La falta de notificar es causa para su disposición. (§ 1203.051)

J. Gastos para el Abogado – Los gastos y desembolsos para el abogado se deben pagar a solicitud y orden como cualquier otro desembolso, según las reglas de la corte por procedimientos de facturación.

K. Preguntas? Consulta su abogado (no con la Corte) por cualquier asunto de esta Custodia que usted no entiende.

Appendix Ah: **TO BE FILED BY THE GUARDIAN OF THE PERSON WITHIN THIRTY DAYS OF APPOINTMENT.**

No._____

GUARDIANSHIP OF	§	IN THE PROBATE COURT
	§	
_____	§	NUMBER ONE FOR
	§	
AN INCAPACITATED PERSON	§	TARRANT COUNTY, TEXAS

INITIAL REPORT OF GUARDIAN OF THE PERSON

Under penalty of perjury, I provide the following information to the best of my knowledge:

1.**GUARDIAN**: _____
(Last) (First) (Middle) (Maiden)
Date of Birth: _____ Place of Birth: _____
Social Security No. _____ Drivers' Lic-State _____ # _____
Relationship to Ward: _____
Home Address: _____
(Street) (City) (State) (Zip Code)
Employer: _____ Occupation: _____
Bus. Address: _____
(Street) (City) (State) (Zip Code)
Home Ph (_____) _____ Work Ph (_____) _____

2. GUARDIAN'S SPOUSE: _____
(Last) (First) (Middle) (Maiden)
Date of Birth: _____ Place of Birth: _____
Social Security No. _____ Drivers' Lic-State _____ # _____
Relationship to Ward: _____
Home Address: _____
(Street) (City) (State) (Zip Code)
Home Ph (_____) _____ Work Ph (_____) _____

3. **RELATIVES WHO WILL ALWAYS KNOW HOW TO CONTACT GUARDIAN**:
Name: _____ Phone: (_____)_____
Address: _____
(Street) (City) (State) (Zip Code)
Name: _____ Phone: (_____)_____
Address: _____
(Street) (City) (State) (Zip Code)

4. **WARD**: _____
(Last) (First) (Middle) (Maiden)
SSN: _____ Date of Birth: _____ Age _____
Address: _____
(Street) (City) (State) (Zip Code)
Home Ph (_____) _____ Work Ph (_____) _____

YOU MUST IMMEDIATELY INFORM THE COURT OF ANY CHANGE IN YOUR ADDRESS OR THE WARD'S.

5. LIVING CONDITIONS AND CIRCUMSTANCES: The Ward resides in:
☐ the Ward's home ☐ the guardian's home ☐ A relative's home (explain below)
☐ a nursing home ☐ a hospital/medical facility ☐ foster/boarding/group home
☐ other _____
Facility Name: _____ Phone: _____
Other comments: _____

6. PROPERTY MANGEMENT

I have possession and control of the Ward's estate. YES ☐ NO ☐
(If "YES") I was appointed Guardian of the Estate. YES ☐ NO ☐
(If "NO", mark below as applicable to Ward's estate)
Parent (Natural Guardian) YES ☐ NO ☐
Managing Conservator (a copy of Court Order is attached) YES ☐ NO ☐
The Ward is a beneficiary of a §867 Guardianship Management Trust YES ☐ NO ☐
(If 'YES,' give details under #11, below.)

7. MHMR CASE MANAGER: Name: _____
Phone: _____ Pager: (_____)_____
Address: _____
(Street) (City) (State) (Zip Code)

8. BASIS FOR INCAPACITY

☐ Intellectual Disability: ☐ Mild ☐ Moderate ☐ Profound/Severe
☐ Chronic Mental Illness ☐ Stroke ☐ Head Injury ☐ Alzheimer's Dementia
☐ Other: _____ Other Medical Conditions:_____

9. WARD'S MEDICAL HISTORY and **CURRENT TREATMENT INFORMATION**

A. medical problems/conditions: _____
_____
B. Prognosis for the Ward: GOOD ☐ STABLE ☐ POOR ☐
C. Ward's medical team: (Medical providers seen regularly)

Specialty	Doctor's name	Phone
Primary Care		

Give a brief medical history of the Ward, including any recent hospitalizations and injuries:
_____

10. **PHYSICAL CONDITION** of the Ward:

A. Generally describe the Ward's physical condition: _____
_____
B. On-going medical services the Ward receives (such as home health care, etc) _____
_____
C. Does the Ward have unmet physical needs? (dentures, hearing aid, glasses, surgery, therapy)
_____
D. Guardian's Plan for meeting Ward's unmet physical needs: _____
_____

9. **FINANCIAL CONDITION OF THE WARD**:

Indicate any Government/Social Programs in which the Ward participates, including funds payable to the Ward or to others for the benefit of the Ward

Source	Received Per Month	Value
☐ Social Security	_____	_____
Representative Payee _____		
☐ Veterans Administration	_____	_____
Representative Payee _____		
☐ SSI Disability	_____	_____
Representative Payee _____		
☐ Government Pension (Specify)	_____	_____
☐ Rail road Retirement	_____	_____
☐ Military Retirement	_____	_____
☐ Trust Income (Specify)	_____	_____
☐ Other (Specify)	_____	_____

A. The Ward "works". ☐ YES ☐ NO
If "YES", give name of employer or workshop and describe employment. _____
_____
B. The Ward is able to participate in planned activities such as outings. ☐ YES ☐ NO
If "YES", describe: _____
C. Transportation to activities is being provided for the Ward. ☐ YES ☐ NO
D. The Ward goes to a senior citizen facility or adult care facility. ☐ YES ☐ NO
E. Ward's unmet social needs: _____
F. Guardian's Plan for meeting Ward's unmet social needs: _____
_____

10.The INTELLECTUAL/EDUCATIONAL CONDITION of the Ward is as follows:
A. The Ward responds to his/her name ☐ YES ☐ NO
B. The Ward can communicate verbally. ☐ YES ☐ NO
If "NO", how does the Ward communicate? _____.
C. The Ward is able to read. ☐ YES ☐ NO
D. The Ward is able to write. ☐ YES ☐ NO
E. The Ward is attending school. ☐ YES ☐ NO
If "YES", name the school and the program of study:_____
F. The Ward participates in the following programs: _____
G. Ward's unmet intellectual needs: _____
H/. Guardian's Plan for meeting Ward's unmet intellectual needs: _____
_____

11. ADDITIONAL CONCERNS, recommendations and/or comments concerning the Ward which I wish to share with the Court: _____
_____
_____

12. If possible, please attach a current photograph of the Ward.

DECLARATION

"My name is _____, my date of birth is _____, and my
(First) (Middle) (Last
address is _____.
(Street & Apt # (City) (State) (Zip Code) (Country)

"I declare under penalty of perjury that the foregoing is true and correct."

Executed in _____ County, State of _____, on the _____ day of_____ , _____.

_____
Declarant

_____
Printed Name of Declarant

ORDER APPROVING INITIAL REPORT OF GUARDIAN OF THE PERSON

On this day, came on to be considered the Initial Report of the Guardian of the Person, and the Court, having considered the same, finds the Report complies with the requisites and policies of the Court and should be approved;
It is therefore ORDERED, ADJUDGED AND DECREED that the Initial Report of the Guardian of the Person be and it is hereby APPROVED;

SIGNED _____

_____
Judge Presiding *Rev:6/15/13*

Appendix Ai:

No. _____

ESTATE OF	§	PROBATE COURT
	§	
_____,	§	NUMBER ONE
	§	
DECEASED	§	TARRANT COUNTY, TEXAS

Answer of Attorney Ad Litem in Heirship Proceeding

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes _____, appointed by this Court as Attorney Ad Litem for the unknown heirs of the above-referenced Decedent, pursuant to § 202.009 of the Texas Estates Code and makes this Answer as follows:

1. Your Attorney Ad Litem asserts a General Denial and respectfully requests that the Court require the Applicant to prove all claims, charges and allegations by a preponderance of the evidence as required by the Constitution and Laws of the State of Texas.

2. Your Attorney Ad Litem reserves the right to amend and answer further in this proceeding in the manner authorized by the Texas Rules of Civil Procedure.

WHEREFORE, PREMISES CONSIDERED, your Attorney Ad Litem prays that the Applicant take nothing, that costs be adjudged against the Applicant; and that he go hence without day.

Dated: _____

Respectfully submitted,

_____
Attorney Ad Litem
<Attorney Data>

Certificate of Service

I hereby certify that a true and correct copy of the foregoing instrument was served upon the following counsel by certified mail and/or by facsimile transmission on this _____.

Name
Address (Repeat as Necessary)
CMRRR #

_____
[Attorney Name]

Appendix Aj: No._____

ESTATE OF	§	PROBATE COURT
	§	
_____,	§	NUMBER ONE
	§	
DECEASED	§	TARRANT COUNTY, TEXAS

Report of Attorney Ad Litem in Heirship Proceeding

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes _____, appointed by this Court as Attorney Ad Litem for the unknown heirs of the above-referenced Decedent, pursuant to § 202.009 of the Texas Estates Code and makes this report as follows:

1. **I am of the opinion that the listing of the heirs of the Decedent, as shown in the Application, is true, correct and complete; that the respective shares are correctly reflected, and that there are no unknown heirs, minors, incompetents or heirs with a legal disability, other than as shown in the Application.**

2. I reviewed the Application for Determination of Heirship *(or as appropriate)*, together with all other documents on file in this case and met with the attorney for the Applicant herein.

3 I filed my Answer on behalf of the unknown heirs on _____.

4. I contacted the following person to obtain or verify the Decedent's personal history and family background and to determine the existence and location, as applicable, of any unknown heirs of the Decedent.
   A. _____ (relation to Decedent)
   B. _____ (relation to Decedent) Etc.

5. **Attached hereto as Exhibit "A" is a chart showing the correct distribution of the shares of the Estate of the Decedent.**

Dated: _____

Respectfully submitted,

_____
Attorney Ad Litem
<Attorney Data>

Certificate of Service

I hereby certify that a true and correct copy of the foregoing instrument was served upon the following counsel by certified mail and/or by facsimile transmission on this _____.

Name
Address (Repeat as Necessary)
CMRRR #

_____
[Attorney Name]

Exhibit A

Distribution Chart

~~HORACE VANDERGELDER~~ (Decedent)
Born April 14, 1926, Menlo Park, Ill. to Isaac VanDerGelder and Fannie Cooke
Died February 23, 2004, Fort Worth, Tarrant County, Texas

Married

1. ~~Dolly Levi~~ *(predeceased)*
   - A. ~~Cornelius M. VanDerGelder~~ *(predeceased)* (1/5)
     - I. ~~Annie May VanDerGelder Riddle~~ *(predeceased)*(1/5)
       - a. Nelson Van Riddle (Great Grandchild) — ½ of 1/5
         (Address)
       - b. Ima Riddle (Great Grandchild) — ½ of 1/5
         (Address)
   - B. ~~Margaret V. Wolff~~ *(deceased) (1/5)*
     - I. ~~Francis Scott VanDerGelder~~ *(predeceased)* (1/5)
       - a. Alice Marie V. Wilson (Grandchild) — 1/3 of 1/5
         (Address)
       - b. ~~Edmund P. VanDerGelder~~ *(predeceased)* (1/3 of 1/5)
         - i. Moon Unit VanDerGelder Zappa (Grandchild) — 1/3 of 1/5
           (Address)
       - c. Rosamond V. Brecht (Child) — 1/3 of 1/5
         (Address)
   - C. ~~Albert Sidney VanderGelder~~ *(predeceased, no issue)*

2. ~~Fannie Brice~~ *(predeceased)*
   - A. ~~Virginia Brice VanDerGelder~~ *(deceased)(1/5)*
     - I. Edward Bruce VanDerGelder (Grandchild) — ½ of 1/5
       (Address)
     - II. ~~A. B. VanDerGelder~~ *(survived, then died testate)*
       T. R. VanDer Gelder, (Great Grandchild)(Independent Executor) — *½ of 1/5*
       (Address)
   - B. Augustus McRae VanDerGelder (Child) — *1/5*
     (Address)

100 %

Appendix Ak:

No._____

ESTATE OF	§	PROBATE COURT
	§	
_____,	§	NUMBER ONE
	§	
DECEASED	§	TARRANT COUNTY, TEXAS

SWORN STATEMENT OF SERVICES AND EXPENSES BY ATTORNEY AD LITEM
IN HEIRSHIP DETERMINATION

On this day personally appeared _____, ("Attorney Ad Litem") known to me, who first being duly sworn upon oath to tell the truth, deposed and stated:

I am an attorney licensed to practice law in the State of Texas and appointed by the Court in this cause to represent unknown heirs. I have performed all of the services required under the due diligence policy promulgated by the Probate Courts of this county.

I therefore request the following fees and expenses for my representation:

Attorney Ad Litem fee	*$ 400.00*
Expenses and reimbursement requested. (Attach proof and explanation)	*$_____*

Total of Attorney's Fees and Expenses Requested: *$_____*

Signature : _____ Taxpayer ID/SS#: _____
Address: _____ Bar Card #: _____
_____ Phone Number:_____

Subscribed and Sworn to before me on _____.

_____
Notary Public, State of Texas

ORDER

On this day, the Court heard and considered the foregoing, and the Court finds that said Attorney Ad Litem has rendered necessary services on behalf of the unknown heirs of Decedent, that such Attorney's fees and expenses are reasonable and just, and should be paid.

It is therefore ORDERED, ADJUDGED, AND DECREED that said Attorney be paid the total sum of $_____ to be taxed as costs against the Applicant herein and to be immediately paid from funds held in the registry of this Court for such purpose, with any balance due to be paid by the Applicant herein within thirty (30) days of the date hereof.

It is further ORDERED, ADJUDGED, AND DECREED that this appointment is terminated and that the Attorney named herein is discharged as Ad Litem in this cause.

Signed this _____.

_____
Judge Presiding

Appendix Al:

DIVISION OF PROPERTY UPON INTESTACY IN TEXAS

I. WITHOUT Surviving Spouse - Texas Estates Code §201.001

A. With Children or their descendants: Children & their descendants---------- All

B) Without Children or their descendants:

1) Both Parents Survive: Father ---------- 1/2
Mother ---------- 1/2

or 2) One Parent Surviving: Surviving Parent ---------- 1/2
Siblings and their descendants ---------- 1/2

or 3) One Parent Surviving alone ---------- All

or 4) Siblings and their descendants alone ---------- All

or 5) a) Paternal Kin: 1) Both Grandparents: Grandfather---------- 1/4
Grandmother ---------- 1/4

or 2) One Grandparent Surviving ---------- 1/4
& Descendants of deceased Grandparent---------- 1/4

or 3) One Grandparent Surviving alone ---------- 1/2

or 4) Descendants of deceased Grandparent alone---------- 1/2

& b) Maternal Kin: ---------- other half in same order

I. WITH Surviving Spouse - Texas Estates Code §201.001

A. SEPARATE ESTATE (§ 201.002, Texas Estates Code)

1) **With** Children or their descendants - §201.002(b)

a) Pers Prop: 1) Surviving spouse ---------- 1/3
2) Children and their descendants ---------- 2/3

b) Real Prop: 1) Surviving spouse has life interest in ---------- 1/3
(with remainder interest to children and their descendants)
2) Children and their descendants have fee in ---------- 2/3

2) **Without** Children or their descendants - §201.002(c):

1) Pers Prop: Surviving spouse ---------- All

2) Real Prop: a) Surviving spouse has fee in ---------- ½

b) 1) Both Parents Survive: Father ---------- ¼
Mother ---------- ¼

or 2) One Parent Surviving ---------- ¼
& Siblings and their descendants ---------- ¼

or 3) One Parent Surviving alone ---------- ½

or 4) Siblings and their descendants alone ---------- ½

or 5) Surviving spouse alone ---------- All

B. COMMUNITY ESTATE (§ 201.003, Texas Estates Code)

1) **With** Surviving Spouse **and** Children (or their descendants):

a) Surviving Spouse and Decedent were the parents of all the children
Surviving Spouse ---------- All

b) Surviving Spouse and Decedent were not the parents of all the children:
Surviving Spouse (retains Surviving Spouse's ½) ---------- None
Children or their descendants (take Decedent's ½) ---------- All

2. **With** Surviving Spouse only ---------- All

3. **With** Children or their descendants only ---------- All

Courtesy Judge Steve M. King, Tarrant County Probate Court One

Appendix Am:

INSTRUCTIONS FOR ESTATES CODE THUMB-TAB INDEX (2014 EDITION)

1. **Materials:** **1 Estates Code of your choice (2014 Edition)**
   1 set alphabetical thumb-tab dividers
   1 set numerical (1-31) thumb-tab dividers
   2 index pages (below)

2. **Reduce a copy of the index pages to the size of your Estates Code pamphlet (85%).**

3. **Mark the reduced index pages and both sets of the dividers to be trimmed to the same size as your Estates Code.**

4. **With the copy of the Code, the index pages, and the dividers, ask your friendly corner copy shop to cut off the spline of your code and trim the dividers and index pages to the same size to just fit in the trimmed code. (The thumb-tabs should, of course, protrude).**

5. **Insert the thumb tabs as close to the appropriate sections (as close as you can directly before or after) as indicated in the Index. Put the first ("Decedent's Estates") index page after tab "A" and the second ("Guardianship") index page after tab "1". This will make it a lot easier to find the Indexes again.**

6. **Return to the copy shop and have them bind your (now-thicker) Code. "GBC" or other plastic spiral-type bindings seem to work best.**

Note: **"Large Print Editions" exist only in your imagination (or, if your code pamphlet should magically experience a 10-12% increase in size, where it would conveniently fit in a three ring binder with conventionally numbered dividers).**

Good Luck!

Steve M. King, Judge
Probate Court Number One
Tarrant County, Texas

© Steve M. King, 2013

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