THE
AD LITEM MANUAL
2011

FOR
GUARDIANSHIP & HEIRSHIP PROCEEDINGS
IN
TEXAS PROBATE COURTS

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JUDGE
TARRANT COUNTY PROBATE COURT NUMBER ONE
FORT WORTH, TEXAS
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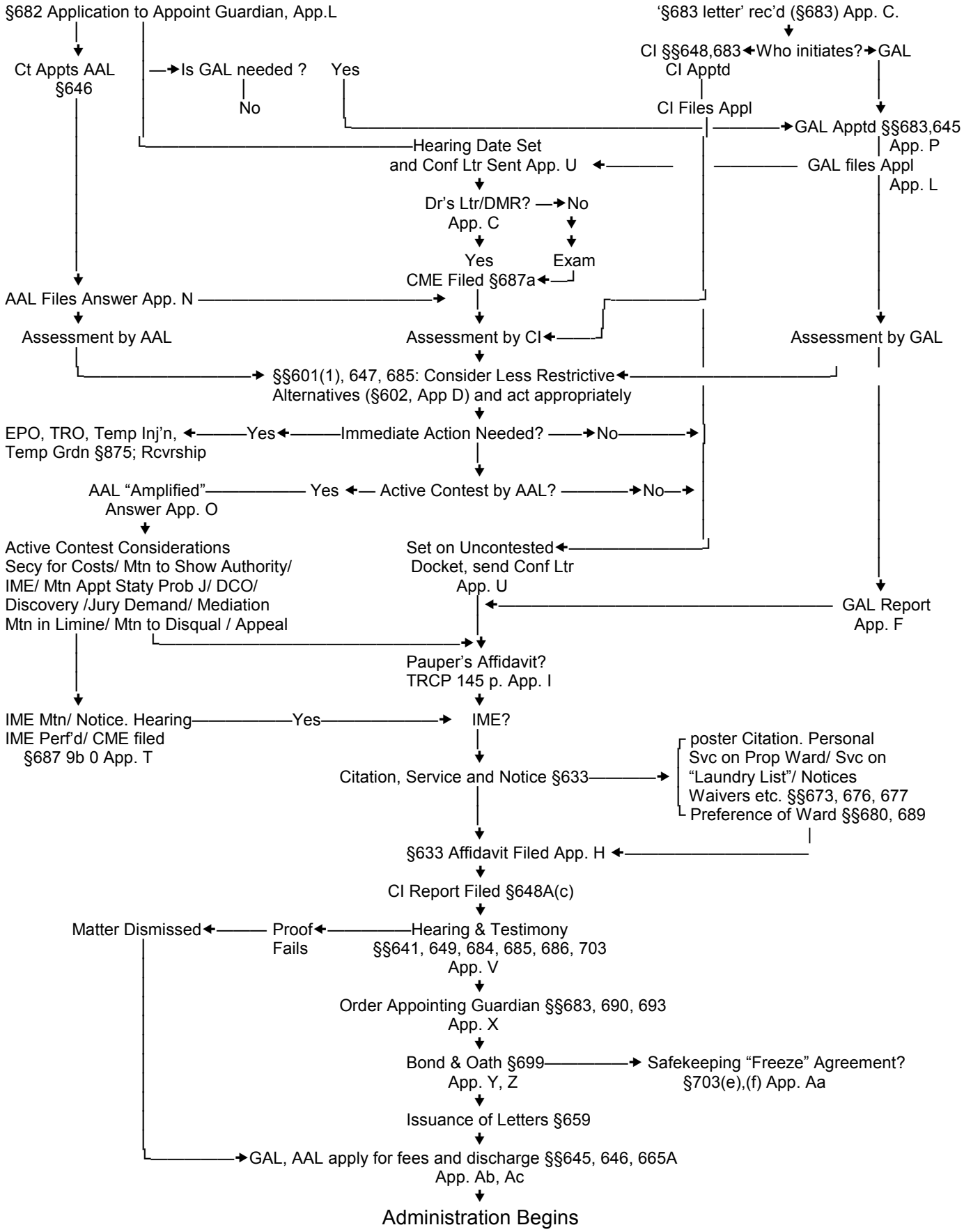
GUARDIANSHIP
(From the Ad Litem's Perspective)



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I. INTRODUCTION

Since September 1, 1993, the appointment of ad litems in guardianships has become a fact of life for the probate courts and a source of training and income to young (and sometimes not so young) Texas lawyers.

Hopefully, this manual will help the reader to:

1. become familiar with the types of proceedings in which ad litems may be appointed;
2. appreciate the varying role(s) 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 the Probate Judge seem to be overly concerned about how the guardianship is conducted? By definition, probate courts are where people come in to ask for permission to handle the affairs of other 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. PROB. CODE §671(d) provides that "If damage or loss results to a guardianship or ward because of gross neglect of the judge to use reasonable diligence in the performance of the judge's duty under this section, the judge shall be liable on the judge's bond to those damaged by the judge's neglect." 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 like having a target on the back of their robe.

Active judicial oversight, and requiring guardians to timely account, and employing ad litems to assist the court in enforcing the probate code, is the best defense 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 certified. Certification is by the State Bar of Texas of successful completion of a State Bar-sponsored three hour CLE course on guardianship law and procedure. TEX. PROB. CODE §647A 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. PROB. CODE §646(c) 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. PROB. CODE §647A(c) and (e).

The certification requirement applies during administration of the guardianship as well. When a guardian attempted to resign, it was error for the trial court to appoint an attorney without certification under Tex. Prob. Code Ann. § 647A to ensure that the ward's interests are protected. *Guardianship of Marburger*, 2010 Tex. App. LEXIS 10255 (Tex. App. Corpus Christi, December 30, 2010, no pet. hist.)

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

C. Liability and Immunity:

TEX. PROB. CODE §645A provide for immunity from civil damages for a Guardian Ad Litem (appointed under §§ 645, 683, or 694A) 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, TRCP 173 (as of October, 2004) governs ad litem appointments other than pursuant to a specific statute, such as the Family Code and the Probate 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). 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 Code. Acts 2009, 81st Leg., R.S., Ch. 1224, Sec. 1, eff. September 1, 2009.*

A. Appointment of a Guardian

1. ATTORNEY AD LITEM

A. Defined TEX. PROB. CODE §601(1): "an attorney who is appointed to represent and advocate on behalf of a proposed ward, an alleged 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. TEX. PROB. CODE §646.

In 2009, the Code was amended to make clear that, when a management trust under TPC §867 is to be created, with or without a guardianship being created, an attorney ad litem must be appointed. *Ibid.*

B. Duties TEX. PROB. CODE §647 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;
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 (Appendix N,O);
6. Visit with the Applicant's attorney, the Guardian Ad Litem and/or the Court Investigator concerning the Application;
7. Consider suggesting mediation or other appropriate ADR technique;
8. 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. and
9. File an application for payment of fees and an order (Appendices Ab, Ac).

C. 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.

D. 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 are no less work 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.)

2. GUARDIAN AD LITEM

A. Defined TEX. PROB. CODE §601(12): "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. PROB. CODE §645, 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 appointed an attorney ad litem under §681(4) to keep a person who has been brought a suit affecting the proposed ward's welfare from being otherwise disqualified, that attorney ad litem may also serve as guardian ad litem

Under TEX. PROB. CODE §683, 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.

B. Duties TEX. PROB. CODE §683 and various other sections relating to the role of the Applicant in a guardianship proceeding:

1. Personally interview the proposed ward as soon as possible;
2. Interview the concerned party who filed the '§683 letter' concerning the proposed ward as well as known relatives and friends of the proposed ward;
3. Consider whether less restrictive alternatives to guardianship are appropriate (Appendix D);
4. Consider the necessity of temporary guardianship or other extraordinary relief (EPO, Receivership);
5. 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);
6. 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';
7. If appropriate, complete and file an Affidavit of Inability to Pay Costs (as applicable) (see Appendix I);
8. Consider suggesting mediation or some other appropriate alternate dispute resolution technique;
9. Locate and/or recruit a person to serve as guardian or contact your local guardianship program (amend the Application, if necessary);
10. File a Report of 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);
11. Determine if a representative payee for Social Security funds or any other government benefits has been designated and relay this information to the Court.
12. Notify 'laundry list' as required by TEX. PROB. CODE §633 and file the required affidavit. (Appendix H);
13. Visit with the Attorney Ad Litem concerning the Application (as applicable);
14. Set a hearing on application;
15. Prepare Proof of Facts, Bond, Oath and Order (see Appendices V, Y, Z & X);
16. Attend the hearing on application and, if the judge uses handouts regarding the responsibilities of the Guardian (see Appendices Ae, Af), go over the duties and responsibilities;
17. Assist the guardian in obtaining his or her bond and letters;
18. File an Application for Payment of Fees and Order (see Appendices V, W & X).

C. 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 note on HIPAA *infra*)

B. Restoration/Modification of Guardianship - Attorney Ad Litem TEX. PROB. CODE §§694A-K.

If the ward or any person interested in the ward's

welfare seeks a complete restoration or modification of the guardianship, an Attorney Ad Litem must be appointed.

C. Removal of Community Administrator - Attorney Ad Litem TEX. PROB. CODE §883D

In a proceeding to remove a community administrator serving under §883, 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. PROB. CODE §§34A, 50, 53(b), 53(c).

A detailed discussion of the responsibilities of the attorney ad litem in heirship determinations follows *infra* at VI. HEIRSHIP PROCEEDINGS.

E. 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).

F. 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.

G. Sports and Entertainment Contracts Entered Into by Minors – Guardian Ad Litem TEX. PROB. CODE §§901-905. 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.

H. Inspection by Guardian of Ward's Estate Planning Documents – Guardian Ad Litem TEX. PROB. CODE 865A 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 make tax-motivated gifts under TEX. PROB. CODE §865.

I. 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, §§761, 797, 807, 837, 851, 854, 859, 863, 859; 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.

J. 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.

K. 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.

L. "Utility Outfielder" Appointments - Attorney Ad Litem TEX. PROB. CODE §34A 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. PROB. CODE §646 in a guardianship proceeding where the guardian seeks to resign. *Guardianship of Marburger, supra*

III. ELECTRONIC RESOURCES - Learn the Law/Embrace the Technology

> *"It is no sin to be wrong. However, you must never, never, never appear to be unsure."*
>
> *Prof. Loy M. Simpkins*
> *Baylor Law School, 1975*

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. ELECTRONIC TEXAS PROBATE CODE: If you don't wish to buy a Probate Code, you can download the Texas Probate Code from Michael Koenecke's website (complete with the Thumb-tabbed Probate Code Index included in this paper at p. 119: http://koeneckelaw.com/public/Texas.

2. A ZIPPED VERSION of the Texas Probate Code is also available at the Texas Legislature Online website: www.capitol.state.tx.us/statutes/pbtoc.html.

3. 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.capitol.state.tx.us/

4. TEXAS RULES OF CIVIL PROCEDURE: at http://www.supreme.courts.state.tx.us/rules/trcphome.asp.

5. STATE BAR OF TEXAS: The State Bar of Texas website (www.mytexasbar.com) also has many excellent (and otherwise free) resources.

6. 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/

7. 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

8. 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, 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/membership-2/.

2. IPHONE J. D.: a blog by a Louisiana lawyer with an iPhone who spends a lot of time finding useful and productive (or a least interesting) things to do with an iPhone. http://www.iphonejd.com/

3. EVERNOTE: a good utility to take notes and store phone pictures for future reference. It seamlessly synchs between iPhone/Blackberry/Android with your laptop and desktop. http://www.evernote.com/

4. FAST CASE: A free search service for legal opinions. Move over, Lexis! http://www.fastcase.com/

5. TANGO & OOVOO: Video calling and teleconferencing. Oovoo's free version allows up to 6 people at a time on the screen. http://tango.me/; http://www.oovoo.com/

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 of the Manual 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 JOB: Before you can be any good to anybody, you need to understand what you are there to do.

A. Attorney Ad Litem: First, understand you are there because the laws mandates it. TEX. PROB. CODE §646(a). You are the lawyer for the proposed ward.

1. The Prime Directive - Your principal charge is to *advocate* for your client. But, this does not mean you have to march over a cliff if your client says to. The legislative intent of the 1993 guardianship statutes, as reflected in TEX. PROB. CODE §602 is that *a less restrictive alternative, if available, is to be followed.*

2. Real World Scenario - Many AALs anguish over their responsibility toward their client when the client adamantly says "I don't want a guardian" – even when the medical testimony and the anecdotal and factual evidence demonstrate indicate a clear inability to function and the need for protection of the person or property of the proposed ward.

Consider your position if you were appointed as criminal defense counsel where your client stands accused of bank robbery and, at your first interview, your "hero" still had the purple stains on his face and hands from the exploding dye packet in the money bag from the bank. When he says: "I didn't do it," is it your job to use every possibly method in the Penal Code, Code of Criminal Procedure, Rules of Evidence and Rules of Appellate Procedure to prevent a conviction? Manifestly not.

Your job, (under similar circumstances) 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 Probate 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)

B. Guardian Ad Litem: Jiminy Cricket or Quarterback?

1. §682 situation – "Jiminy Cricket" - If your scenario includes an applicant with their own attorney, your role is more 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. §683 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.

5. LESS RESTRICTIVE ALTERNATIVES: LEARNING THE ROPES - The court and the officers of the court (that would be 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 more than three 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. The listing should be consulted often for you 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 creation of a guardianship and others afterward.

6. LOCAL RULES: ('You're Not From Around Here, Are You?') - All the statutory probate courts (found in Bexar, Collin, Dallas, Denton, El Paso, Galveston, Harris, Hidalgo, Tarrant and Travis counties), have local rules (approved by the Supreme Court) that may differ from the local rules for the District Courts in your county. The judges didn't go through all the trouble necessary to get these adopted for nothing. A word to the warned should be sufficient.

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 probate 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. Generally, 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. Returning a call from the Investigator on a Friday afternoon may wreck your weekend plans, but it will mean paying work.

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.

A hearing has been set when you got appointed. This is to get the citation issued (?) and to give you a date to work against.

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. A 683 Letter: (a/k/a "Suggestion of Need for Guardian or Need for Investigation of Circumstances under §683, Texas Probate Code.") (Appendix C)

B. A "Doctor's Letter" (a/k/a "CME" or Certificate of Medical Examination). (Appendix C) More on that later.

C. An Order Appointing Guardian Ad Litem (Appendix P) or Order Appointing Attorney Ad Litem.

You should study these carefully. Each will set the factual and legal base 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. Emergency Protective Order - TEX. HUM. RES. CODE § 48.208.

B. Temporary Guardianship - TEX. PROB. CODE §875 (see *infra*).

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

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

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

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

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

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

10. TEMPORARY GUARDIANSHIPS - Following the 2003 amendments to TEX. PROB. CODE §875, local variations in granting temporary guardianships have largely been stamped out. *Ex Parte* temporary guardianships are (and should be) a thing of the past. Seriously consider another avenue (TRO, EPO, Receivership) before coming in to ask for a temporary guardian.

A. A Strong Smell of Gas and the Potential for a Spark: A temporary guardianship may be granted in an emergency situation where it is *immediately* necessary to safeguard either the person or property of the proposed ward. TEX. PROB. CODE §875. It must truly be "on fire and burning" for most judges to grant a temporary guardianship.

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

- the inability to get life-saving treatment for a recalcitrant nursing home resident.
- financial exploitation of an elderly or developmentally disabled person by a family member, gigolo or faithless fiduciary.
- a 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.

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

1. A sworn, written application must be filed (No more oral applications); Appendix J.
2. An attorney ad litem must be appointed;
3. The clerk must issue notice;
4. Service of notice must be accomplished on the proposed ward, *In Re Cantu*, 2009 Tex. App. LEXIS 2241 (Tex. App. Corpus Christi, April 2, 2009, pet. filed), the Attorney Ad Litem and the proposed temporary guardian; and
5. A signed order setting the hearing. (Appendix J).

> Practice Pointer: Have your process server (preferably plain-clothed, whether private or governmental) lined up to go to serve the proposed ward and have the Attorney Ad Litem ready to go along on the same trip. Be aware the use of private process servers is not allowed by the court in some counties.

C. Hearing Date: This is your one shot. There are no 'confirmation' hearings. 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.

> Note: Because a temporary guardianship is governed by TEX. PROB. CODE §875, which does not require a medical report or a recent medical exam, a temporary guardianship can be granted before the CME has been completed. TEX. PROB. CODE §687 is inapplicable for the granting of the temporary guardianship only. *In Re Moreno*, 2010 Tex. App. LEXIS 9799 (Tex. App. Eastland, December 10, 2010, no pet. h.)

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. PROB. CODE §875(k).

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 2003 amendments removed the statement that "an order granting a temporary guardianship is not an adjudication of incapacity." The findings in the order granting a temporary guardianship are now admissible as evidence on the issue. Remember the old contract rule of *Contra Proferentem*. *Ulrickson v. Hawkins*, 696 S.W. 2d 704 (Tex. App. – Fort Worth 1985, writ ref'd n.r.e.).

G. Order: Because TEX. PROB. CODE §875 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) An order granting the Temporary Guardian "all the powers and duties as stated in the Texas Probate Code" confers no authority upon the temporary guardian. *Bennett v. Miller*, 137 S.W.3d 894, 897 (Tex. App. Texarkana 2004, pet. filed)

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 N) 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 O)

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, did the doctor give a "medical Miranda", 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).
- Make an independent determination of the

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

CAVEAT: Allegations of Abuse and Videotape
Be aware that under §242.848 Tex. Health & Safety Code, you are deemed to have viewed any videotape in your possession within seven days of its receipt and may incur criminal liability for failure to report abuse or neglect which may be shown on such tape under §242.131, Tex. Health & Safety Code.

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. PROB. CODE §687c. 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 proposed ward 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. R. CIV. PROC 45. (Appendix I)

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)

Such an affidavit should be filed as early as possible, before substantial costs are incurred.

V. THE DOCTOR'S LETTER ("CME"):

Note: As of December 6, 2010, the Judges of the Statutory Probate Courts have adopted a single form of CME (which includes a DMR as well). It 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.

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 TPC §687. Amended five times since 1993, this section now 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. PROB. CODE §687(b).

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 intellectual incapacity ("mental retardation"): 24 months)

4. DETAILED CONTENTS: *Effective 9/1/2009, TEX. PROB. CODE §687 is much more 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: Mentally Retarded Potential Ward

1. DETERMINATION OF MENTAL RETARDATION ("DMR"): If the Proposed Ward is intellectually disabled (aka ***"MR"***), a Physician's Certificate *will not* be sufficient to appoint a guardian (but *will* allow citation to issue) TEX. PROB. CODE §687c. Instead, the Application must include a timely Determination of Mental Retardation ("DMR").

2. PHYSICIAN OR PSYCHOLOGIST: Either a physician or a psychologist may complete a determination of mental retardation under TEX. PROB. CODE §687(c).

3. TIME CONSTRAINTS: Rather than a 120 day timeframe, the DMR must be based on an examination performed within the twenty-four months preceding the hearing. TEX. PROB. CODE §687(c). It is not unusual to encounter an MR patient who has not been examined in some years, particularly if their physical health is stable.

4. "BOOSTER SHOT" CERTIFICATE: If no DMR 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) DMR reflecting that the information contained in the most recent DMR 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 MR diagnosis, but also a medical diagnosis (i. e. autism, static encephalopathy, etc.), then a DMR is not required and the regular CME may used.

6. THE DOC CAN DO IT: Physicians are now authorized to perform DMRs and combine the CME with a DMR. A traditional DMR may also still be submitted. TPC §687 *See* 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 and appoint the necessary physicians. TPC §687(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. TEX. PROB. CODE §687(b) (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 should 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: Because the statute (TEX. PROB. CODE §687) requires that a CME be in the court's file, that it be presented to the court and that it be considered by the court before ruling on the application for guardianship, the Amarillo Court of Appeal held in *Guardianship of Parker*, 275 S.W.3d 623 (Tex. App. Amarillo, December 31, 2008, no pet.) that the CME is not subject to evidentiary objections.

3. YOUR STIPULATIONS COULD COME BACK TO HAUNT YOU: In *Robinson v. Willingham*, 2006 Tex. App. LEXIS 2788 (Tex. App. Austin 2006, no pet.), where counsel for the proposed ward objected that the doctor's letter and accompanying reports were inadmissible because he did not waive physician-patient privilege in writing, citing TEX. R. EVID. 509, 510, the court found that the 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 to preserve error.

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, November 29, 2007, no pet.), the medical records of the nursing home where proposed ward was placed 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 ward's hearsay objections because the affidavits accompanying the reports tracked the language of TEX. R. EVID. 803(6), indicating that they were made in the regular course of business 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 (A Hippo-Sized Headache): HIPAA, the Health Insurance Portability and Accountability Act (P.L.104-191) is one of the biggest bugaboos in recent memory. This act severely limits the ability of health care providers ("covered entities") to grant public access to patient records ("protected health information").

The people at the doctor's office, nursing home and hospital now think they have the excuse they wanted all along: to tell you to go away.

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. PROB. CODE §687.

Psychologists may have a Ph.D. in Psychology, but that does not make them a "physician." for purposes of §687.

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.

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.abanet.org/aging/docs/judgesbooksum.doc*, 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, point out:

1. ACCESS AUTHORIZED BY COURT ORDER: the order appointing you provides: "*the Guardian Ad Litem (or Attorney Ad Litem) is to be considered an officer of this Court and is to be given access to all of the proposed incapacitated person's relevant financial, medical, psychological and intellectual testing records,"*

2. HIPAA SPECIFICALLY AUTHORIZES DISCLOSURE: "*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."
3. IF THERE IS A PROBLEM: Get the exact spelling of the name of Records Custodian. Advise the court you need a subpoena *duces tecum* for the Custodian to produce the records at the courtroom.

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*) Most people, even if infirm, have a support system to help them get along. However, at some point, these support systems fail. The house of cards collapses. Part of the capacity assessment is to try to determine whether the support system is broken 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. This is not a visit to Aunt Sadie. You want to put your client at ease, but don't lose sight of the fact that you are a professional, observing and factoring in all the data you are receiving.

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. A plethora of internet resources are readily available, such as 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) for a description of how a history of frequent falling can be indicative of atrophy of the brain and attendant diminution of capacity.
2. COGNITION: As you ask your questions, observe how your client answers and how well they are processing the information. Consider any conditions, other than psychological factors, that may inhibit the ability of the proposed ward to understand. Is the hearing aid battery dead? Are their glasses missing? Did they have a hard time understanding the dialect of English in which their examining physician spoke? Could dehydration, diabetes, malnutrition or some other physical condition be hampering their 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: Go through a series of questions to subtly determine their ability to function in a number of areas.

Ask questions such as details of their family: (childrens' birthdays, grandchildrens' names); details of their medications (what they are for and when they are to be taken).

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.

All of this all goes to their 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 of the proposed ward to recognize financial exploitation is often an indicator against 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).

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.

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

- Communication: ask about the telephone, can they recall important telephone numbers?

- Shopping and food 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

- 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.)

Ask about their 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.

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

Unfortunately, overworked and undertrained investigators for Adult Protective Services have often used the mantra of "lifestyle choice" to close their files on investigations referred to them regarding conditions of squalor. **"**Elderly Lady Living In Filth, Protective Service Under Scrutiny," Fort Worth Star-Telegram 12/10/2004

5. RISK AND LEVEL OF SUPERVISION: – Try to gauge the extent to which the deficits (if any) of your client threaten their ability to "do the tasks necessary to care for himself or to manage his property.: TEX. PROB. CODE §693.

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. PROB. CODE §687(b) 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.

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

A. Your Best Allies: A wise old lawyer once told me that making friends with the court clerks and court staff was 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. 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 (usually by telephone). Settings must be confirmed by letter (see Appendix V).

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 and are filed. There is no method 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. CONTINUANCES/CANCELLATIONS: 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 turn in all of your documents to the Clerk's office at the time you file the application. The documents you give to the clerks when you file the application will be in the file when it's pulled for review.

3. TELL IT TO THE COURT: If you cannot turn in all of the documents when you file the application, deliver unexecuted documents (for example, order, testimony reduced to writing, etc.) directly to the Court, not to the Clerk after the hearing is set. Indicate the hearing date and time on a cover letter or Post-It note attached to the documents.

4. FILE IT FIRST: Documents that are ready to be filed (e.g. notarized waivers, designations of resident agent) need to be filed with the clerk and a file-marked copy brought to the hearing. The risk of losing an executed but unfiled and unscanned document is then avoided.

5. 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.
6. COURTESY COPY, PLEASE? If you need to change something, bring a courtesy copy to the court (but not on the hearing day).
7. CORRESPONDENCE on the case 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.
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 might think about examining the Court Investigator's report (TEX. PROB. CODE 548A(c)) to make sure everyone is on the same page.

E. Notices: A Jurisdictional Foundation and the Laundry List
1. POSTER CITATION: Citation must be posted. (TEX. PROB. CODE §633b)
2. PERSONAL SERVICE: Citation must be personally served (TEX. PROB. CODE §633c) on:

A. a proposed ward 12 or older;
B. the parents, if their whereabouts are known;
C. any court-appointed conservator or person with control of the care and welfare of the proposed ward;
D. the spouse of the proposed ward, if her/his whereabouts is known;
E. the proposed guardian, if not the same as the Applicant.

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, January 30, 2008, no pet.) All other persons entitled to personal service may file waivers**.** (TEX. PROB. CODE §633).
3. 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. PROB. CODE §633(d)):

A. adult children of the proposed ward;
B. adult siblings of the proposed ward ;
C. the administrator of a nursing home where the proposed ward is located; or
D. the operator of a residential facility in which the proposed ward resides;
E. any known holder of a power of attorney from the proposed ward;
F. any person known to be designated to serve under a designation of guardian under TEX. PROB. CODE §679;
G. a person designated to serve as guardian in the probated will of the proposed ward's last surviving parent;
H. any person known to be designated by a deceased parent to serve under a designation of guardian; under TEX. PROB. CODE §677A and
I. any other known "next of kin" (if there is no spouse, parent, adult sibling or adult child) as required by TEX. PROB. CODE §682(12)(E).

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).
4. WHAT TO SEND:

A. If personal service is otherwise required, and waivers can be given, (not the proposed ward), obtain a Waiver of Service (Appendix G)
B. If the person is on the "Laundry List" TEX. PROB. CODE §633(d), a copy of the front side of the Poster Citation may be sent.

5. 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:

A. Get your waivers/notices and affidavit of service under TEX. PROB. CODE §633(d-1) affidavit processed with enough lead time to comply with the **10-day 'lead-time' requirement** under TEX. PROB. CODE §633(f). (See Appendix H).
B. Keep copies of all of your paperwork.
C. Make certain there is a certificate of service on the ad litem report.

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.

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. PROB. CODE §671(e)

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. PROB. CODE §684). Make sure you track the findings required by the appropriate Code Sections. See Appendices V, 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. PROB. CODE §703 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. PROB. CODE §709) or deposit cash or other securities with a qualified corporate depository. TEX. PROB. CODE §703(p). 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. PROB. CODE §601(2)

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. PROB. CODE §703(o)).
2. The bond premium is payable by the Estate. TEX. PROB. CODE §703(o).
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. PROB. CODE §701. Bonds must filed and approved 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.

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. PROB. CODE §703(e)&(f). Appendix Aa. 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 §101.102 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? 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 Aa.

G. The Proposed Order: Powers of the Guardian/ Limitations of the Ward - If you anticipate a guardianship with plenary authority, do not use a "laundry list" of powers, rather use an order with a grant of plenary power: *the guardian is hereby granted all powers authorized by the Texas Probate Code and the rights of the Ward are hereby restricted to the extent not inconsistent therewith.* (Appendix M)

The listing of powers is problematic. If you try to use a very short form order, showing plenary authority, some provider or bank will inevitably want to see a specific power written into the order (if not a line specifying their bank and no other!)

In negotiating whether to give the guardian plenary (full) guardianship or if some powers should be retained, consider both the anecdotal evidence as well as the CME and the results of your investigation and capacity assessment in determining whether the order should be a

Driving: It is required, effective 9/1/2007, that the application, the doctor's letter, and the order appointing the guardian to specifically address the ability of the ward to operate a motor vehicle and to vote in a public election. TEX. PROB. CODE §§ 682, 687 and 693(a), respectively.

"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.

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. (Bring your completed form with you to the hearing). Resident agents may resign and a new agent may be appointed TEX. PROB. CODE §760A. Also, a non-resident guardian may be removed without notice for failure to appoint a new resident agent. TEX. PROB. CODE §761(a)

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.

If you are filing something within three days of the hearing, deliver a courtesy copy to the court.

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.

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. LET 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.

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 remember: the court reporter usually has pens, paper, a Probate 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. 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.
2. SPEAK UP: it's your show.
3. LEAD THE WITNESS and avoid droning repetition.
4. 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.
5. PREPARE YOUR WITNESSES: Discuss the testimony and legal issues outside the presence of the Court and then ask summary questions (e.g.: disqualification, incapacity).
6. 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 W for suggested cross-examination questions)
7. BOND TESTIMONY: Elicit sufficient testimony on the nature and extent of the Estate to enable the court to set the bond: TEX. PROB. CODE §703

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. PROB. CODE §684

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 Af 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.)

If your judge doesn't provide such handouts, make a suggestion or get your own signed (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.

F. Contested Hearings

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, 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. §16.002, Tex Elect. Code, 693(b)(4), Tex. Prob. Code.

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. §521.319, Tex. Transp. Code. 693(b)(4), Tex. Prob. Code.

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 §§645, 646.

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 2010* at page 701.

J. Selling the Follow-Through

Be aware that the court is charged by statute (TEX. PROB. CODE §§648 671, 672, 741, 742 & 743) 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. ACTIVELY CONTESTING 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), with the enactment of the current guardianship statutes in 1993, the legislative mandate, as reflected in TEX. PROB. CODE §602, is that a <u>less restrictive alternative</u>, 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 (see Appendix "O") 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.

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, January 30, 2009, no pet.) In *Scally v. Scally*, 2010 Tex. App. LEXIS 8045 (Tex. App. Houston-14th Dist October 5, 2010), the ad litem in a SAPCR proceeding retained counsel to collect fees awarded the ad litem.

E. "*Rule 12:*" Motion to Show Authority.

1. <u>BYOL: BRING YOUR OWN LAWYER</u>: 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.
2. <u>TRCP12:</u> The Applicant or guardian ad litem might well consider a <u>Motion to Show Authority</u> pursuant to TEX. R. CIV. PROC. 12. (Appendix R). In this sworn motion, the privately-retained attorney is cited to appear and 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 159, 98 WL 104819 (unpublished), 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. FAMILIARITY: Another consideration is that as Craig Hopper puts it in "Call in the Sheriff, op. cit., "If the proposed ward's chosen attorney happens to be familiar with the guardianship process (and certified under TPC §647A), it may make sense for the appointed attorney ad litem to step down in favor of the proposed ward's chosen attorney, especially if the proposed ward's chosen attorney has the proposed ward's trust and confidence more than the attorney ad litem.

5. INEXPERIENCE: "Usually, however, the proposed ward's new attorney creates problems. Even if the attorney 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, July 13, 2005, pet. denied) is an example of the court dodging a motion to transfer a guardianship to a statutory probate court because the motion referenced the wrong section of the Probate Code.

G. Consider Seeking Security For Costs:

1. PUT UP OR SHUT UP! (TEX. PROB. CODE §622). (Appendix Q) The strongest string in the ad litem's bow. A 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.

2. 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. PROB. CODE §36.

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*)

3. 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. PROB. CODE §622(a).

A. In Ordinary Civil Cases: Only a "party who seeks affirmative relief" (TEX. R. CIV. P. 143) or a "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 maybe required from persons who are simply complaining about or opposing a guardianship matter, regardless of whether they are seeking affirmative relief. TEX. PROB. CODE §*622(b.*

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. PROB. CODE §622(c).

4. WHEN? – Such a motion may be filed and heard at any time before the trial. *Ibid.*

5. 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. PROB. CODE §622(b). 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 a guardian ad litem, TEX. PROB. CODE §645; fees for attorneys, mental health professionals, and interpreters appointed by the court, TEX. PROB. CODE § 665A; the attorney's fees of a person other than a guardian ad litem who filed an application for appointment of a guardian. TEX. PROB. CODE §665B; 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, or a temporary guardianship pending the contest. TEX. PROB. CODE §875.

6. 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.

7. 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).

8. 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, March 12, 2009, no pet.),

9. 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).

10. 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. 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)

11. CAVEAT: A SWORD BUT NOT A SHIELD: As the law now stands, all costs of the proceeding are to be paid out of the estate of the ward, if there is one, otherwise, the county pays the fees and expenses of the ad litems. TEX. PROB. CODE §665A. In a contested proceeding, the costs cannot be taxed against the losing party as in a will contest. *Overman v. Baker,* 26 S.W.3d 506, 512 (Tex. App.-Tyler 2000, no pet.);; *Guardianship of Humphrey*, 2008 Tex. App. LEXIS 4429 (Tex. App. Tyler, June 18, 2008, no pet.)**;** *Guardianship of Humphrey* 2009 Tex. App. LEXIS 1099, 1100 (Three Opinions) (Tex. App. Tyler, February 18, 2009, pet. denied) *Guardianship of A.M.K. and A.A.K.*, 2009 Tex. App. LEXIS 2551 (Tex. App. San Antonio, April 15, 2009, no pet.).

Although *Ajudani v. Walker*, 232 S.W.3d 219 (Tex. App. Houston 1st Dist, 2007, no pet.) followed this same reasoning in a will contest in denying the ad litem's motion to tax the costs against the losing party, the Fort Worth Court of Appeals expressly disapproved this holding in *Estate of Frederick*, 2010 Tex. App. LEXIS 2537 (Tex. App. Fort Worth, April 8, 2010, no pet.) and upheld the taxing of costs (ad litem fees) against the non-prevailing party.

This still leaves the trial court in a guardianship with the ability to rule for costs, and dismiss the contest if security is not furnished, but with no mechanism to use the security provided to lessen the expense to the ward's estate. Hopefully, this shortcoming will be addressed in the next session of the legislature. In the meantime, well-timed Motion for Security for Costs may force a dismissal of the contest.

k. Reported Decisions: *Guardianship of Thomas, supra* (guardianship); *in re Brookshire*, 2006 Tex. App. LEXIS 8257 (Tex. App. Houston, 1st Dist., 2006, orig. proceeding) (guardianship); *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). (dependent administration and heirship) and *Estate of Frederick*, *supra* (dependent administration).

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. PROB. CODE. §21.

2. SPECIAL ISSUES: You can 'reverse engineer' your issues from the sample order (Appendix X), or, for a discussion of issues and forms, see three papers by 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 *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. PROB. CODE §606(h)), 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.

HERE ENDETH THE LESSON (AGAIN).

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. CIV. PRAC. & REM. CODE §§64.001ff .

L. "Interesting" Challenge – Interest for Standing *vs.* Adverse Interest:

1. STATUTORY BAR: Under TEX. PROB. CODE §642(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; or
C. contest the appointment of a guardian.

2. CHALLENGE: The proper challenge is by motion in limine. TEX. PROB. CODE. §642(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, May 27, 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. PROB. CODE §681, 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, particularly where TEX. PROB. CODE §681(7) 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. PROB. CODE §642. 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. PROB. CODE §681. 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. PROB. CODE §679; or (10) a nonresident who has not designated a resident agent for service.

a. Suitability A finding by the court of unsuitability under TEX. PROB. CODE §681(9) trumps any priority for appointment under TEX. PROB. CODE §§676 and 677. *Guardianship of K.B.*, 2006 Tex. App. LEXIS 5123 (Tex. App. San Antonio, June 14, 2006, pet. denied), *Phillips v. Phillips*, 511 S.W.2d 748, 749 (Tex. Civ. App.--San Antonio 1974, no writ).

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. PROB. CODE §47A.

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. PROB. CODE §47A(b). Such a proceeding may not be filed after the first anniversary of the date of the decedent's death. TEX. PROB. CODE §47A(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 (Temporary Guardianship hearings only) Advisable particularly if a sideshow atmosphere is anticipated. A rare 'private trial' procedure. TEX. PROB. CODE §875(f)(1)(E)

P. 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. Appendix M. 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.

Q. An Appealing Thought? If you really think there has been a serious abuse of discretion committed, 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).

1. 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).

2. 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, November 5, 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, April 11, 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 management trust under TEX. PROB. CODE §867 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, the failure to have negotiated 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 and necessary" attorney's fees and expenses. TEX. PROB. CODE §242 (decedent's estates) and §665C (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: Numerous 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); *Estate of Frederick, supra*

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. PROB. CODE §§645, 646, 665A and 755), estate (TEX. PROB. CODE §34A), heirship (TEX. PROB. CODE §53(c)), 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, June 4, 2008, no pet.) *In Re White Inter Vivos Trusts*, 2009 Tex. App. LEXIS 6933 (Tex. App. San Antonio, August 31, 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.

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.

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, December 1, 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. December 15, 2006); *Borden, Inc. v. Martinez*, 19 S.W.3d 469, 471 (Tex. App.-San Antonio 2000, no pet.)

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. PROB. CODE §645A. *Land Rover, supra;* Ford Motor Company v. Garcia, 2010 Tex. App. LEXIS 8129 (Tex. App. Corpus Christi, October 7, 2010) (pet. filed)

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 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

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: Attorneys practicing in this area should be familiar with general probate and guardianship matters; therefore, 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 an attorney's overhead, as are the costs of a hard-copy library. These costs are not reimbursable. *Goodyear-Dunlop, supra.* Reimbursement may be allowed for necessary and reasonable legal research conducted to address novel legal questions or to respond to legal issues posed by the Court or opposing counsel.

2. PREPARATION OF FEE APPLICATION, FEE HEARINGS, APPEALS: The Court will not reimburse attorneys for the costs of preparing invoices, nor the application and order nor any hearing or appeal relating to fees that may follow. *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.) These were held to be actions promoting the ad litem's own interests, not those of the client.

However, an ad litem who successfully appealed a trust termination and had the trust reinstated as to the ad litem's clients was awarded appellate attorney's fees. The appellate fee award was upheld on appeal. *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 At Appendix P 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 October 5, 2010)(M) (Ad litem in SAPCR proceeding retained counsel to collect awarded fees.)

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.

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. PROB. 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.

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. PROB. CODE §665A *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. Appendix Ac.

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 as 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 coupled with payment of any required filing and posting fee will help ensure that attorneys receive conformed copies of all proposed orders and will reduce 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 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 2006* at page 645, 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, August 29, 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. PROB CODE §645(f) (guardian ad litem), §646(e). 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 Ab, Ac)

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 Probate 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. PROB. CODE ANN. §§759-765). This is often preferable to the immediate appointment of a successor guardian because of the qualified judicial immunity of the guardian ad litem. (TEX. PROB. CODE ANN. §645A).

2. GUARDIAN SEEKING TO PURCHASE FROM ESTATE: Under TEX. PROB. CODE ANN. §831, when a guardian seeks to **purchase property** of the estate, an Attorney Ad Litem must be appointed to represent the ward's interests.

3. TAX-MOTIVATED GIFTS: When a guardian seeks to make **tax-motivated gifts** under TEX. PROB. CODE ANN. §865, a Guardian Ad Litem may be appointed for the benefit of the ward or any interested party.

4. RESTORATION: When an application is filed to **modify the guardianship or restore the ward's capacity** in whole or in part under TEX. PROB.CODE ANN. §694A.

5. SETTLING AND CLOSING – GUARDIAN-SHIP: During the process of the **settling and closing** of the guardianship of the estate under TEX. PROB. CODE ANN. §745, an Attorney Ad Litem may be appointed for the ward's interests.

6. SETTLING AND CLOSING – DECEDENT'S ESTATE: In settling and closing a deceased ward's estate, an Attorney Ad Litem may be appointed under TEX. PROB. CODE ANN. §755 to represent the deceased ward:

- who has **no executor or administrator** or
- who is a **non-resident** of the state or
- whose **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. PROB. CODE §646. *Guardianship of Marburger, supra.*

XII. HEIRSHIP PROCEEDINGS

A. Introduction

Since September 1, 2001, in all heirship determinations, there is now a mandatory requirement of 1) the appointment of an Attorney Ad Litem and 2) Citation by Publication. TEX. PROB. CODE 53(c); TEX. R. CIV. PROC. 244)

Because the Probate 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. PROB. CODE §48.

1. NECESSITY: The lawful heirs and their shares of the estate must be determined in an intestate administration. TEX. PROB. CODE § 48.

2. APPLICATION: TEX. PROB. CODE § 49. 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. PROB. CODE § 49(a)(1)-(8), 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 any of the estate property shall be made parties to the proceeding.

3. CITATION: TEX. PROB. CODE § 50. This citation is different from personal service required for an administration.

A. Service by Certified Mail on all distributees whose names and addresses can be found with reasonable diligence (Court can require personal service here).

A parent, managing conservator, guardian, attorney ad litem, or guardian ad litem of a distributee who is at least 12 years of age but younger than 19 years of age may not waive citation required to be served on the distributee under this section. TEX. PROB. CODE §50(e).

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.

C. Posted Citation in the county where proceedings are commenced and where the decedent last resided, except where publication is used as in (b).

4. APPOINTMENT OF ATTORNEY AD LITEM

Except as provided by TEX. PROB. CODE §53(c), 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. PROB. CODE §34A.

A court must appoint an attorney ad litem for all unknown heirs and a Court may appoint an attorney ad litem for all the living heirs whose whereabouts are unknown. TEX. PROB. CODE §53.

An attorney ad litem must be appointed where service has been made by publication and no answer has been filed nor appearance entered. TEX. PROB. CODE §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. PROB. CODE §52, are prima facie evidence of such matters, but only if they 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 Probate 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. PROB. CODE § 53.

F. Statement of the Evidence – No Longer Required: A relic of past practice, this reason for this instrument is based on TEX. RULES CIV. PROC. 244 which 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." With the mandatory appointment of an attorney ad litem in all heirship proceedings under TEX. PROB CODE §53 (and their responsibility to file an answer), a separate "Statement of the Evidence" is no longer necessary.

G. Heirship Judgment. TEX. PROB. CODE §54. 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: Do *NOT* , repeat *DO NOT* approve of a judgment which reflects only community property and no separate property or which reflects only personal property and no real property. 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. PROB. CODE §55

However, an heirship judgment that does not include all the elements required by TEX. PROB. CODE §54, *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)

C. Scope of "Heirship Determinations"

In this court, "heirship determinations," for purposes of TEX. PROB CODE §53(c) appointments, will include:

1. heirship determinations incident to a dependent administration;
2. heirship determinations where no other administration is sought or pending;
3. heirship determinations pursuant to declaratory judgment actions where it is necessary to determine heirs because of intestacy under a will, trust or other instrument, etc.

It does not include (and no mandatory ad litem appointment will be made) in TEX. PROB CODE §145(e) actions where an intestate independent administration is sought and clear and convincing evidence as to heirship has been provided pursuant to

TEX. PROB CODE §145(g). Check your local listings: another judge may feel otherwise.

D. Duty and Standing of the Attorney Ad Litem

It is the duty of 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. PROB. CODE §34A 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. TEX. PROB. CODE §§3(r), 76(c), 131A(h)(1). *Estate of Stanton*, 2005 Tex. App. LEXIS 10901 (Tex. App. Tyler 2005). (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.

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 Ah.)

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.

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;

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

NOTE: The distribution chart 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 is 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 TEX. PROB CODE §53 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. PROB. CODE §12 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.

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 W.

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*, 2005 Tex. App. LEXIS 10901 (Tex. App. Tyler 2005) 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 ancestor 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. Per Stirpes and Per Capita Distributions

<u>Per Stirpes vs. Per Capita</u> TEX. PROB. CODE §43

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. PROB. CODE §41(b) 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. PROB. CODE §43. 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. PROB. CODE §37A. *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 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. PROB. CODE §37A, 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. PROB. CODE §§41(e) and (f)), the Texas Attorney General has opined that 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. PROB. CODE §41(d). However, under TEX. INS. CODE §21.23 there is statutory exception to this rule, imposing a forfeiture. 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, 1977 Tex. LEXIS 302, 21 Tex. Sup. Ct. J. 92 (Tex. 1977); *Medford v. Medford*, 68 SW3d 242 FW No Pet 1/31/02; *Mowbray v. Avery* 76///663 CC 041102 and *Admin. Comm. for the H.E.B. Inv. & Ret. Plan v. Harris*, 217 F. Supp. 2d 759, 2002 U.S. Dist. LEXIS 16889 (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. PROB. CODE §§53A-53E 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.*

I. Job Skills

More a list of pointers than anything else. You should:

1. Really understand the intestacy chart: Appendix Al.

2. Be furnished with 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. Ask for documentation - get the best proof at the most reasonable expense.

4. Feeling a lack of cooperation? Get a feeling they are hiding something? Ask for a conference with the court and all other counsel.

5. Do not just go along to get along. If you honestly feel a fraud is being perpetrated, consider the tactics listed under "Actively Contesting the Application," *supra*.

6. Don't contest something just because you are unsure as to how to proceed.

7. 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 what they perceive to be embarrassing family situations or lifestyles. The children of a deceased "black sheep" of the family may have been emotionally "written off" by the other family members with the rationalization "We were never close to them." Adopted-out children born out of wedlock are sometimes conveniently forgotten.

VII. EPILOGUE: TAKING OVER THE REINS

1. (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.

2. 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 at least a rudimentary understanding of the dependent administration of an estate in probate. The additional benefit about learning how a guardianship estate is handled is that it varies only slightly from 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. The guardianship laws are now found in the Texas Probate Code ("TPC"), Sections 601 – 905. 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 TPC 601(14) to mean a minor or an adult individual who,

1. because of a physical or mental condition,
2. is substantially unable:
   a. to provide food, clothing or shelter for himself or herself; or
   b. to care for the individual's own physical health; or
   c. to manage the individual's own financial affairs.

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. Section 602 of the TPC 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 Probate 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 mental retardation, the Court must be provided with a Determination of Mental Retardation or "DMR" pursuant to §687(c) of the Texas Probate Code. This section states that if the basis of the Proposed Ward's incapacity is mental retardation 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 Probate Code, Section 677 provides 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 and file an application for the appointment of a guardian of the person or estate, or both, of the person believed to be incapacitated. Texas Probate Code §683

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 mental retardation, a Determination of Mental Retardation (DMR) 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 ay 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 §683 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 Probate Code §633;

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

PAULA CONLEY 817-884-3395
Court Investigator
pconley@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

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 §683, Texas Probate 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. (Parent 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.

I hereby swear that this information is true and correct to the best of my knowledge.

Sincerely,

_____

Revised January 13, 2005

Physican's Certificate of Medical Exam

In the Matter of the Guardianship of

_____,

an Alleged Incapacitated Person

For Court Use Only

Court Assigned:_____

The purpose of this certificate is to enable the Court to determine whether the individual identified above is incapacitated according to the legal definition, and whether a guardian should be appointed to care for him or her.

DEFINITION OF INCAPACITY

For purposes of this certificate, an "**Incapacitated Person**" is "*an adult individual who, because of a physical or mental condition, is substantially unable to provide food, clothing or shelter for himself or herself, to care for the individual's own physical health, or to manage the individual's own financial affairs.*" Texas Probate Code § 601(14).

GENERAL INFORMATION

Proposed Ward's Name _____

Date of Birth _____ Age_____ Gender ☐ M ☐ F

Current Location of Ward: _____

Physician's Name _____ Phone: (_____)_____

Office Address _____

_____

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

I have been the doctor for the Proposed Ward since _____

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 ----Prior to 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.

==========

Based upon my last examination of the Proposed Ward, I provide the following information:

1. EVALUATION OF THE PROPOSED WARD'S PHYSICAL CONDITION

Physical Diagnosis: _____

Conditions underlying diagnosis: _____

a. Prognosis: _____

b. Severity: ☐ Mild ☐ Moderate ☐ Severe

c. Treatment: _____

2. EVALUATION OF THE PROPOSED WARD'S MENTAL FUNCTION

Mental Diagnosis: _____

Conditions underlying diagnosis: _____

a. Prognosis: _____

b. Severity: ☐ Mild ☐ Moderate ☐ Severe

c. Treatment: _____

Physican's Certificate of Medical Exam

☐ YES ☐ NO -----A summary of Proposed Ward's medical history is attached (if reasonably available).

☐ YES ☐ NO -----Would the Proposed Ward benefit from supports and services that would allow the individual to live in the least restrictive setting?

☐ YES ☐ NO -----Does this mental diagnosis include dementia?

☐ YES ☐ NO -----Would the Proposed Ward benefit from placement 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 -----Would the Proposed Ward benefit from medications appropriate to the care and treatment of dementia?

☐ YES ☐ NO -----Does the Proposed Ward have sufficient capacity to give informed consent to the administration of dementia medications?

3. DECISION MAKING

Alertness, Attention, and Deficits

Alertness: ☐ Alert ☐ Lethargic ☐ Stupor

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

☐ Person ☐ Time ☐ Place ☐ Situation

In my opinion, the ability of the Proposed Ward to make or communicate responsible decisions concerning himself or herself is affected by the Proposed Ward's deficits and abilities as indicated:

Deficit(s) (check all that apply): ☐ Short-term memory ☐ Long-term memory ☐ Immediate recall

☐ YES ☐ NO -----Able to understand or communicate (verbally or otherwise)

☐ YES ☐ NO -----Able to recognize familiar objects and persons

☐ YES ☐ NO -----Able to perform simple calculations

☐ YES ☐ NO -----Able to reason logically

☐ YES ☐ NO -----Able to grasp abstract aspects of his or her situation or to interpret idiomatic expressions or proverbs

☐ YES ☐ NO -----Able to break complex tasks down into simple steps and carry them out

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

In my opinion, the Proposed Ward is able to make or communicate responsible decisions concerning himself or herself regarding the following:

A. Business and Managerial Matters; Financial Matters

☐ YES ☐ NO -----Contract and incur obligations; handle a bank account; apply for, consent to and receive governmental benefits and services; accept employment; hire employees; sue and defend on lawsuits; make gifts of real or personal property?

☐ YES ☐ NO -----If "YES," should amount deposited in any such bank account be limited?

☐ YES ☐ NO -----Execute a Durable Power of Attorney?

☐ YES ☐ NO -----Execute a Health Care Power of Attorney?

B. Personal Living Decisions

☐ YES ☐ NO -----Determine own residence?

☐ YES ☐ NO -----Safely operate a motor vehicle?

☐ YES ☐ NO -----Vote in a public election?

☐ YES ☐ NO -----Make decisions regarding marriage?

C. Medical Decision-Making

☐ YES ☐ NO -----Consent to medical, dental, psychological, and psychiatric treatment?

☐ YES ☐ NO -----Administer own medications on a daily basis?

D. Daily Life Activities

Administer to daily life activities (e.g., bathing, grooming, dressing, walking toileting):

☐ YES, independently ☐ YES, with assistance ☐ NO, requires total care

4. DEVELOPMENTAL DISABILITY

☐ YES ☐ NO -----Does the Proposed Ward have developmental disability?

If "YES," is the disability a result of the following? (Check all that apply)

☐ YES ☐ NO -----Mental retardation?

☐ YES ☐ NO -----Autism?

☐ YES ☐ NO -----Static Encephalopathy?

☐ YES ☐ NO -----Cerebral Palsy?

☐ YES ☐ NO -----Down's Syndrome?

☐ YES ☐ NO -----Other? Please Explain _____

DETERMINATION OF MENTAL RETARDATION

The court may not grant an application to create a guardianship if the basis for the Proposed Ward's incapacity is mental retardation unless a Determination of Mental Retardation is made. A Determination of Mental Retardation (Texas Health and Safety Code § 593.005) requires that the determination be based on an interview with the Proposed Ward and on a professional assessment.

The assessment, at a minimum, must include:

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. 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)

2. ☐ Yes ☐ No---Is there evidence that the mental retardation originated during the Proposed Ward's developmental period?

5. EVALUATION OF CAPACITY

☐ YES ☐ NO -----Based on the information above, it is my opinion that the Proposed Ward is incapacitated according to the definition given at the top of page 1.

If "YES," please indicate the level of incapacity

☐ PARTIAL ☐ TOTAL

Physican's Certificate of Medical Exam

If you answered "YES" to any of the questions regarding decision-making in Section 3 (previous page) and believe the Proposed Ward is totally incapacitated, please explain: _____

_____

_____

_____

_____

If you answered "NO" to all of the questions regarding decision-making in Section 3 (previous page) and believe the Proposed Ward is partially incapacitated, please explain: _____

_____

_____

_____

_____

6. ABILITY TO ATTEND COURT HEARING

If a hearing on an application for the appointment of a guardian is scheduled in court:

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

☐ YES ☐ NO -----Because of his or her incapacities, it would ***not*** be advisable for the Proposed Ward to appear at a Court hearing because the Proposed Ward would not be able to understand or participate in the 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

7. 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:

_____

_____

_____

_____

_____

_____ _____

Physician's Signature Date

_____

Physician's Name Printed

Revised December 6, 2010

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") – §313.001-.007, Health and Safety Code – 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 Health & Safety Code §166.039.

3. Surrogate Decision Making for Mentally Retarded Persons - §597.041, Health & Safety Code – 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 by Non-Parent Relative - Chap 34, Family Code - 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. 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

5. Emergency Medical Treatment Act - §773.008, Health and Safety Code - 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.

6. Managing Conservatorships Ch. 153, Family Code **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. The Family Code provides no monitoring mechanism for property management. Also, inherent jurisdictional conflicts exist between the Family Code and the Probate Code, especially as to visitation when a disabled minor under a conservatorship needs a guardianship upon attaining age 18. **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. Family Code §153.132 grants a parent appointed sole managing conservator essentially the full rights of a guardian of the person and in Family 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." But there is still no mechanism to supervise the use of the money. Family Code §153.011 does allow the Family Court judge to require a bond of the managing conservator.

7. School Admission Procedures - §25.001(d), Education Code – 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.

8. School Admission Procedures - §25.001(b)(9), Education Code – Under §25.001(b)(9) of the Education Code, 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 Education Code §25.001(d) if there is a guardian, but the

child wants to live with the grandparent.

9. Court-Ordered Mental Health Services - §462.001, §571.001, §574.001, Health & Safety Code – 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.

10. 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. TRANSPORTATION 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 n 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.

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. In 1999, a new Chapter 166 of the Health and Safety Code 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 new chapter also gives us some common definitions to be used among all three documents

11. Medical Power of Attorney - §166.151, Health & Safety Code 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. The **statutory form is now mandatory** as of September 1, 1999. 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.

12. Directive to Physicians and Family or Surrogates ("Living Will") – §166.031, Health and Safety Code 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. Art. 4495c. The Texas Intractable Pain Treatment Act, enacted 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.

13. Out-of Hospital DNR ("EMT-DNR")- §166.081 Health and Safety Code – 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.

14. The Patient's Intent, If Known: A statement of End-Stage Planning such as the 'Five Wishes' Pamphlet : www.agingwithdignity.com

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 if 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 (Ch. 166, Health & Safety Code) 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, even if not fully compliant as a Medical Power of Attorney or Living Will, Texas law does require that the patient's wishes, if known, are to be followed, (e.g.: Health & Safety Code §166.152(e)(1)). As a result, the Five Wishes may still function as a statement of the patient's intent. This is an elegant, caring way to allow a client/patient to express those wishes. Aging with Dignity may be contacted via their website http://www.agingwithdignity.com or at: Aging with Dignity, P.O. Box 1661, Tallahassee, Florida 32302-1661 Ph: 850.681.2010, Fax: 850.681.2481

III. AVOIDING GUARDIANSHIP OF THE ESTATE

15. Durable Power of Attorney - §481, Probate Code – The most recent incarnation of the Power of Attorney is found in §481 of the Probate Code. Known as the Texas Durable Power of Attorney Act, it 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. §489B, Probate Code.

16. Inter Vivos ("Living") Trusts - §§111-115, Property Code – 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."

17. §142 Trusts/Testamentary Trusts - §142, Property Code Where no guardianship exists and a "next friend" suit has been brought, §142 trusts (as well as testamentary trusts) have long been used to avoid guardianships. The principal disadvantage is demonstrated by the burgeoning rate of breach of fiduciary duty lawsuits being brought in our probate and district courts. Most of these trusts fail to provide for any accountability on the part of the trustee. Probate management trusts (see *infra*) while initially more expensive, have proven to be excellent management vehicles for moderate-sized estates (>$100K).

18. Probate Management Trusts - §867, Probate Code First authorized with the sweeping changes of the 1994 Probate Code revisions, "867 Trusts" have become an almost default provision for avoidance of a guardianship of the estate where a minor has liquid assets over $100,000. It has generally proven to be a very cost-effective property management tool. Also see Deborah Green's excellent article on 867 (and other) trusts *"Special Trusts §§867, 142, 1396 Supplemental Needs Trusts – When and How to Use Them"* in the 1998 State Bar Advanced Estate Planning and Probate Course at tab "C."

19. Pooled Trust Subaccounts §§868C, 870(b) 910-916, Probate Code (Effective 9/1/2009) As an alternative to an 867 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.

20. Special Needs/ Medicaid Qualification Trusts 42 USC 1396p (1)(d)(4)(B)(i) & (ii) Such a trust allows a patient/ward/injured party to qualify for Medicaid in a nursing home where available income is otherwise too high for qualification. Personal injury attorneys are only recently appreciating the utility of these trusts in preserving assets for the permanently disabled client who will remain institutionalized. Many issues, such as priorities between heirs and reimbursement of Medicaid payments/liens remain. May be created, upon motion and order by the Guardian of the Person under Probate Code §767(5) or the Guardian of the Estate under Probate Code §774(a)(8).
CAVEAT: 1) Only available for persons under 65. **2)** Also consider the potential exposure for the P.I. attorney or 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.

21. Management of Community Property by Community Administrator - §883, Probate Code Upon a declaration of incapacity of one spouse, the other spouse, in the capacity of "community administrator" (no, not the type you learned about in law school and have never done - that's in decedent's estates) 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 §681. Under extensive amendments in the 2001 legislature, 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. The 2001 amendments to §883 also repealed the Family Code (§3.301ff) provisions corollary to Probate Code §883. It will no longer be possible to have the capacitated spouse manage or sell the community property under the Family Code.

22. Payment of Claims Without Guardianship (Court Registry) - §887, Probate Code 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 (increased from $50,000 in 2001) 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. §887(f) **CAVEAT:** Local Government 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

23. Sale of Minor's Interest in Property - §889, Probate Code 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 (increased from $50,000 in 2001). 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 you local practice as to whether a hearing is actually required), the sale is closed and the proceeds deposited into the court's registry per §887. The funds are available for withdrawal as described above pursuant to §887.

24. Sale of Adult Incapacitated Ward's Interest in Property - §890, Probate Code Until this section was recently enacted, adult incapacitated individuals with meager personal property but with undivided interests in real property often were required to have somewhat meaningless guardianships of the estate. This provision, entirely parallel to §889, 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 (increased from $50,000 in 2001).

25. Uniform Transfers to Minors Act - §141.001 et. seq., Property Code 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.

25.Receivership §885, Texas Probate Code. Of particular interest 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 Probate 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.

27. Order of No Administration §§139 – 142 Texas Probate Code. Albeit of limited application in the guardianship context (or any other context for that matter), 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, 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. §140 The court's order reads like the operative language in a muniment of title proceeding and acts as authority to effect the transfer of the property involved §141

28. 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. 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. The system works amazingly well, considering that the appointments of the representative payees are made at a very low level, by one of 16,500 SSA claims representatives. Appointment takes about two

months.

29. 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.

30. Suit by Next Friend Rule 44, Rules Civ. Pro. A minor without a legal guardian may sue by next friend (R44) 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 §867 Trust under the Probate 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**: Attorneys proceeding in litigation representing a next friend need to be aware that their contingent fee agreements are subject to attack if the next friend is not the guardian, whether court-appointed or natural. *Massey v. Galvan* 822 S.W.2d 309 (Tex. App. – Houston – [14th District] 1992) In *Stern v. Wonzer* 846 S.W.2d 939 (Tex. App. – Houston - [1st District] 1993), the contingent fee agreement was limited to "one-third, including expenses," upon the finding that next friends were subject to the same restrictions as guardians.

31. 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.

32. 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 the eldercare services, which often includes conducting assessments 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 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

33. Pre-Need Designation of Guardian - §679, Probate Code **For one's self** - 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 *holographic* ***(NEW!)*** or attested to by two witnesses, age 14 years of age or older and who are not designees to be guardian and a self-proving affidavit should be executed and attached. 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, and such a disqualification is binding on the court.

34. Pre-Need Designation of Guardian by Parent - §677A, §702(c) Texas Probate Code 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. ***(NEW!)*** Like the designation for one's self, the designation for a child may be holographic or self-proven.

34. Pre-Need Declaration for Mental Health Treatment
§137.007 Civil Practice and Remedies Code
An adult with capacity may, by written declaration, indicate the declarant's 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. The declaration is to be witnessed by two qualified witnesses (similar to the Advanced Directive witness qualifications). 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. **The designation does not apply if** the declarant is under a temporary or extended commitment and treatment is authorized under the Mental Health Code (Chapter 574, Health and Safety 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.

36. Safekeeping or "Freeze" Agreements - §703, Probate Code - 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.

37. Restoration of Ward - §694A, Probate Code - This wholesale revision of the 1994 restoration provisions includes several innovations and additional requirements in modifying the respective roles of the guardian and ward or restoring the ward's capacity and terminating the guardianship A guardian ad litem must be appointed and everyone noticed similar to the original grant of guardianship.

38. Annual Determination - §672, Probate Code 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 §694A are fairly restrictive (see above), the annual determination under §672 contains no such procedural requirements.

39. Emancipation of Minor Ward - §31.01ff, Family Code - 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.

40. Enumeration of Powers in Guardianship Order §693, Probate Code 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.

41. Interstate Guardianships §891, Probate Code 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.

42. Negligible Estate §745(a)(5)&(b), Probate Code 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.

43. Minor Ward's Estate <$100,000 §§745(c)&887, Probate Code 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 §887 above.

44. Family Settlement Agreements A Family Settlement Agreement to implement a negotiated resolution to existing disputes and/or to alter existing financial arrangements (e.g: alteration of an *inter vivos* trust to be made irrevocable or established as a special needs trust or §867 guardianship management trust.) This may or may nor require the joinder of the ad litem(s) and approval by the court.

45.Mother Nature and Father Time - 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.

By the same token, 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: **Tips for Finding the Elusive Person (Living or Otherwise)**

1. **Name:** - Get as complete a name as possible (court records, Government I.D., SS Card, etc.)

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 telephone listings: www. anywho .com ; peoplesearch.lycos.com; info space.com; switchboard.com; 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-inlaws.)

4. Government Records: A Potpourri

A. Municipal Level: 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 or check **Sanborn Fire Maps;** local history dept.

B. County Level: 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 / County Court: (citations and returns, especially) / County Court at :Law: (citations and returns, especially) / Commissioners Court: cc.co.tarrant.tx.us/ / Probate Court cc.co.tarrant.tx.us/CivilCourts/HTML/Probate/ProbatePublicBrowse.htm / voter registration records / ad valorem tax records (check out appraisal district websites) / District Clerk: civil and criminal court records (citations and returns, especially); Divorce Court: 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 Level: 1. Birth and death records – No longer available online through State Bureau. of Vital Statistics. Instead use 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 (c. 100 professions) 4. State Assocs (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 Level 1. Social Security Death Index: ssdi.genealogy.rootsweb.com/cgi-bin/ssdi.cgi 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) 9. Military/ Armed Services Child Support Locator / military records / active duty locator 10. VA locator service 11. National Archives www.nara.gov Federal records center in Fort Worth: Genealogy/ Indians/ land records/ naturalization records/ immigrant ship passenger lists/ Passport records/ Fed personnel records before 1940/ National Cemetery System 12. federal employees Child Support enforcement (fed and state) IRS will assist) 13. Foreign Consular Offices

5. Private Records

A. Newspapers – Articles about the subject person(s) and Obituaries / Check Obituary Index card file / Check papers for several days after death date for obituaries to determine survivors. Use same techniques as above to locate these people. B. Salvation Army ($10.00) C. Credit bureaus: order a credit history, D. Historical/Genealogical Societies. E. Service clubs/Fraternal Associations

6. The Web

A. Genealogy Sites Mother of All Genealogy Reference Sites: http://www.cyndislist.com/ (over 240,850 links) Mormon Church Database: www.familysearch.org; Rootsweb: (above) / Ancestry: http://www.ancestry.com/

B. Special Interest Sites: Public Data Search Service (fee) www.publicdata.com Adoptee Search Site www.adoptee.com Maps (put in an address, get a map!) www.mapquest.com Peoplesearch.com (fee) www.peoplesearch.com Ameridex Information Systems (fee) www.kadima.com Stalker's Homepage www.glr.com/stalk.html San Bernadino Cal. Coroner www.unclaimedpersons.com Call out the Volunteers! http://www.genlookups.com/ Handbook of Texas Online tsha.utexas.edu/handbook/online/index.html

7. Hire a Pro: Read You Too Can Find Anybody by Joe Culligan www.joeculligan.com or browse the numerous internet sites for skip tracers and heir locators like Search International: www.searchint.com or even do-it-yourself investigative software like **Net Detective** and **Genealogy Detective**: www.affiliatesuccess.net

8. Finding aids: Search firms: heirsearch.com/heirfinder.com searchint.com/Accurint.com/ Heritage Quest Online (public library) cyndislist.com/ WorldConnectProject/ findersusa.com/ www.intl-research.com/heirs.htm www.globaltracing.com/home-content.htm www.blakeandblake.com www.joshbutler.com/heir_finders/s_mh.html Board certified genealogists: www.bcgcertification.org/rosts_tx.html www.three-legged-willie.org

JUDGE STEVE M. KING, TARRANT COUNTY PROBATE COURT ONE

Rev 1/10/07

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."

_____
Affiant
Name Printed:_____

SWORN TO AND SUBSCRIBED BEFORE ME on _____.

_____
Notary

Appendix H: Affidavit Regarding Notice Under §633(d-1)

NO. _____

IN THE MATTER OF	§	IN THE PROBATE COURT
THE GUARDIANSHIP OF	§	
	§	NUMBER ONE
_____,	§	
AN INCAPACITATED PERSON	§	TARRANT COUNTY, TEXAS

AFFIDAVIT REGARDING NOTICE UNDER SECTION 633(d-1)

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 Probate Code Section 633 (d-1)."

"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 TO WHOM NOTICE SENT

"Further, Affiant sayeth not."

_____

AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME by _____ on _____, 200_.

_____

Notary

Appendix I: Pauper's Affidavit No._____

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

Affidavit of Inability To Pay Costs

The undersigned appeared before me, a notary public, and after being duly sworn, declared the following:

I, _____, ("Applicant"), declare that the Proposed Ward who is named above has insufficient assets and income to pay court costs in this guardianship proceeding. In support of such conclusion, I am aware of the following information concerning the Proposed Ward. **(please put N/A by all items that do not apply)**

1. Proposed Ward's Income (per month)
   a. Social Security _____
   b. Supplemental Security Income _____
   c. Food stamps _____
   d. Other income: sources:_____ _____
   sources:_____ _____
   TOTAL INCOME _____

2. Proposed Ward's Assets **(list value)**
   a. Home _____
   b. Mortgage _____
   c. Automobiles _____
   d. Bank Accounts _____
   e. Certificates of Deposit _____
   f. Stocks & Bonds _____
   g. Other assets: type:_____ _____
   type:_____ _____
   TOTAL ASSETS _____

3. Proposed Ward's Monthly Expenses:
   a. Housing _____
   b. Food _____
   c. Medical _____
   d. Clothing _____
   e. Utilities _____
   f. Misc.: type:_____ _____
   type:_____ _____
   TOTAL EXPENSES _____

I swear under penalty of perjury that the above information is complete and correct.

_____
APPLICANT

SUBSCRIBED AND SWORN TO before me by _____ on _____.

_____
Notary

Appendix J: Application for Temporary Guardianship and Fiat for Hearing

	No._____	
Guardianship of	§	Probate Court
_____,	§	Number One
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 _____October 23, 1932, and her social security number is ***-**-****. Proposed Ward is an incapacitated person as defined by Texas Probate Code §601(14)(B) 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 of the person and of 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 of the Estate 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 of 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.

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.

Applicant further requests the Court authorize Temporary Guardian to have 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 of the person and estate for 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 _____, 2008.

_____

Notary Public, State of Texas

INSERT CERTIFICATE OF SERVICE

No._____

Guardianship of	§	Probate Court
	§	
	§	
_____,	§	Number One of
	§	
	§	
An Alleged 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 _____, 200__ at ___ o'clock __ m.

Signed on this _____

_____
JUDGE PRESIDING

Appendix K: No. _____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Alleged Incapacitated Person	§	Tarrant 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 and the Court finds that:

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 and that 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 and that there is an immediate need for the appointment;
3. The Ward has been personally served prior to the entry of this Order;
4. All prerequisites of law have been met; and
5. _____.is a suitable entity to act as Temporary Guardian and is not disqualified by law from acting as such.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that _____ _____ is appointed Temporary Guardian of _____ until the expiration of sixty (60) days from the date of this order, with the following specified powers:

1. The exclusive authority to transport (via ambulance or automobile) and to place the Ward in a hospital, nursing home, structured living facility or medical facility to the extent necessary to provide a safe and healthy environment for the Ward, **with or without the Ward's consent** and under the supervision of a peace officer if deemed advisable by the Temporary Guardian;
2. The power and authority to arrange for and consent to any and all major or surgical procedures and medications necessary, but not the power or authority to consent to a sterilization or to a voluntary placement in a mental health facility.
3. The authority to take exclusive possession and control of any and all of the Ward's real and personal property, including but not limited to any and all funds on deposit in any bank, financial institution, financial manager or broker and to take reasonable measures to safeguard the same pending the appointment of a permanent guardian.

IT IS FURTHER ORDERED that Temporary Guardian shall execute and file with the court a corporate surety bond in the sum of_____, conditioned as required by law, that when Temporary Guardian has qualified according to law, the clerk of this Court shall issue Letters of Temporary Guardianship setting forth the powers to be exercised by Temporary Guardian.

SIGNED this _____.

_____
JUDGE PRESIDING

Revised January 9, 2011

Appendix L: No. _____

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

Application For The Appointment
of a Guardian of The Person (And Estate)
Pursuant To §683, Texas Probate 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 _____, whose social security number is _____, and whose Driver's License number is _____. (S)he is an incapacitated person as defined in §601(13)(A-D), Texas Probate 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 social security number is_____. *(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 mental retardation or autism does form the basis for the physician's diagnosis, then a supplemental report of an examination of the Proposed Ward, 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 Probate 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:

Powers Requested by Proposed Guardian

(Illustrative)

***PREFERRED* Language: (We really mean this!!)**

"The Guardian is hereby granted full authority over the Ward with all powers authorized by the Texas` Probate Code and the rights of the Ward are limited to the extent not inconsistent therewith."

Other Specific Language:

(**Guardian of the Person**)

- to review, take possession of and consent to the disclosure of medical or dental records
- to apply for, arrange for and consent to psychological, psychiatric and medical examinations, testing and evaluations
- to consent or object to medical and dental treatment, including surgery, but not to consent to sterilization or abortion
- to apply for, consent to and enroll in private and public residential care facilities, including 24-hour care facilities, and nursing homes
- to apply for and secure an identification card, social security card, passport and other identification documents
- to apply for, consent to and enroll in appropriate educational, vocational and recreational services
- to apply for and receive funds from governmental sources, including Social Security Disability, Medicare, Supplemental Security Income benefits, HUD Section 8 rent subsidies and VA benefits
- to apply for and consent to governmental services, including, vocational rehabilitation programs, Medicaid services, food stamps and Veteran's benefits

(**Guardian of the Estate**)

- to manage all real and personal property, including bank accounts and other deposit and investment accounts with Court permission, to take legal action necessary or appropriate to enforce and protect property rights; and to defend, pay, compromise, settle and adjust liability for debts and obligations owed; and to settle, compromise and release claims held or asserted
- with Court permission, to sell, exchange and otherwise dispose of property
- to manage, maintain, repair and insure any interest in real, personal and mixed property, tangible and intangible
- to apply for Certificates of Title upon, endorse and transfer titles to motor vehicles; and to represent in such transfer assignments that the title to such motor vehicle is free and clear of all liens and encumbrances except those set forth in the transfer assignment
- to obtain access to rented safety deposit boxes; and to remove the contents thereof; and surrender such safety deposit box with Court permission, to maintain or purchase insurance policies, including life, health and property insurance and Medicare, Social Security and other private and public welfare programs; and to take such action as may be appropriate to obtain possession and control of such policies; and to collect the proceeds thereof
- to cause to be prepared, execute and file tax returns, claims for refunds and other documents which must or should be filed to pay taxes, penalties and interest shown to be due by such return; and to appear before any taxing authority and represent the Ward in any matter with the authority to execute a waiver of any type and consent to extensions; and compromise and settle all tax liabilities asserted; and make any return or report to any governmental agency or authority which may be required or which Ward may be entitled to make
- to do such other and further acts concerning the Ward and the Ward's properties, interests and estate as the Court may direct by express authorization through written court order.

Rights of Ward to be Limited

- to hold or obtain a license to operate a motor vehicle
- to vote in a public election
- to make decisions involving marital status
- to make gifts of real and personal property
- to exercise the powers and authority over Ward's person and estate which are granted to Guardian

Appendix N: No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Alleged 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 §646 of the Texas Probate 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 (Repeat as Necessary)
CMRRR #

_____
[Attorney Name]

Appendix O: No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Alleged 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 §684 of the Texas Probate 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 (Repeat as Necessary)
CMRRR #

_____
[Attorney Name]

Appendix P: No. _____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Alleged 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.).

3. 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 as maybe prudent and necessary 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.

4. Applicant requests that the Court authorize the use of the following persons by Applicant;
a. Duly licensed and practicing attorneys of the law firm of _____, P.C., at reasonable rates to be reviewed and approved by the Court upon actual application for payment. The attorneys of the firm and a brief summary of their qualifications are listed below. All the attorneys are members of the Tarrant County Probate Bar Association.
1) _____ is Board Certified in Estate Planning and Probate Law by the Texas Board of Legal Specialization. He was admitted to the bar in Texas in 1980 and since 1982 has practiced regularly in the area of trusts, estate planning, and probate, with an emphasis on probate litigation.
2) _____ was admitted to the bar and licensed as an attorney in Texas in 2004. He joined the firm in 2007.
b. The Legal assistants and paralegals of the law firm and a brief summary of their qualifications, as reuired 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 a member of the Paralegal Division of the State Bar of Texas, the Fort Worth Paralegal Association, and the College of the State Bar of Texas. Requested Billing Rate: $125 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 Billing Rate: $75 per hour.

5. 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 whenever prudent to do so. 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.

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 Alleged 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 that the Application should be GRANTED.

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 at reasonable rates to be reviewed and approved by separate order of the Court upon application for payment.

2. Legal assistants and paralegals of Applicant's law firm at the following rates, subject to review and approval of the Court upon application for payment:
   a. _____, at the rate of $__ per hour.
   b. _____, at the rate of $__ per hour.

SIGNED _____

_____
JUDGE PRESIDING

Appendix Q: Motion Appointment of Guardian Ad Litem and Order

No._____

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

APPLICATION FOR APPOINTMENT OF GUARDIAN AD LITEM

TO THE HONORABLE JUDGE OF SAID COURT:

_____, Attorney Ad Litem for _____ ("Movant"), files this Application 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. PROB. CODE §645 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 Application, 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 _____.
(Remember that parents and spouses must be personally served or execute a waiver of service.)
Name CMRRR #
Address (Repeat as Necessary)

_____
[Attorney Name]

No._____

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

ORDER APPOINTING GUARDIAN AD LITEM
PURSUANT TO § 645
OF THE TEXAS PROBATE 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 § 645 of the Texas Probate 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 Probate Code §685 is scheduled in the above entitled and numbered case on _____, 200___ at _____o'clock ___.m.

SIGNED _____

_____
JUDGE PRESIDING

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

Guardianship of	§	Probate Court
_____,	§	Number One
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 Probate Code §622 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 §622 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
An Incapacitated Person	§	Tarrant County, Texas

Order Granting Security for Costs

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

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

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

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

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

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

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

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

SIGNED _____.

_____
Judge Presiding

Appendix S: Motion to Show Authority

No._____

Guardianship of	§	Probate Court
_____,	§	Number One
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, Movant requests that Respondent be caused to appear and show his authority to act on behalf of Proposed Ward.

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

Dated: _____

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

STATE OF TEXAS §
COUNTY OF TARRANT §

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

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

_____
Name of affiant

SWORN TO AND SUBSCRIBED before me by Affiant on _____.

_____
Notary

Insert Certificate of Conference

Insert Certificate of Service

No._____

Guardianship of	§	Probate Court
_____,	§	Number One
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;

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 T: No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Alleged 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 §642(b) of the Texas Probate 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. PROB. CODE §681. Movant would show Applicant is one whom the proposed ward has expressly disqualified by prior designation under TEX. PROB. CODE §679 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 U: No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Alleged 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 §687 of the Texas Probate 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 §687 of the Texas Probate 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 Alleged 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 the ____ day of _____, 200__ at ___ o'clock __ m.

Signed _____

_____
JUDGE PRESIDING

No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Alleged 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 §687 of the Texas Probate 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 V: Setting Confirmation Letter

Hugh Louis Dewey
Dewey, Cheatham & Howe
1234 Main Street
Fort Worth, Texas 76102

January 19, 2011

Ms. Kelly Hand
Court Coordinator
Tarrant County Probate Court One
100 W. Weatherford, Rm 260A
Fort Worth, Texas 76196-0241

Re: No. 11-GD01111-1
Guardianship of Natalie Attired

Dear Ms. Hand:

This letter will confirm that the above-referenced matter is set for hearing on the Application for Letters of Guardianship on Monday, April 1, 2007 at 3:00 p.m..

By copy of this letter, 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,

Hugh Louis Dewey
Guardian Ad Litem

cc: Marge Inovera

Appendix W: No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Alleged 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 §601(13) of the Texas Probate 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 §687 of the Texas Probate 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 X: **Suggested Cross-Examination Questions for the Ad Litem**

Guardianship

Please don't EVER cross-examine by asking:

If I asked you the same questions Ms. _____ just asked you, would your answers be the same?

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

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 Y:	No._____	
Guardianship of	§	Probate Court
_____,	§	Number One of
An Alleged 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 §683 of the Texas Probate Code; and the Court, having read the Application and the Physicians' Certificate as required under §687 of the Texas Probate 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 Probate 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 §693(a) of the Texas Probate Code, the Ward is totally without capacity to care for *him*self or to manage *his* property; *or Pursuant to §693(b) of the Texas Probate 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 §601(14)*(A or B)* of the Texas Probate 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 Probate 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

Appendix Z: No._____

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

Personal Surety Bond

THE STATE OF TEXAS §
§ KNOW ALL PERSONS BY THESE PRESENTS
COUNTY OF TARRANT §

That we, _____ as Principal, and _____ and _____, as Sureties, are held and firmly bound, jointly and severally, unto the Judge of the Probate Court Number One of Tarrant County, Texas, and to the successors in office of such Judge, in the amount of $100.00 (One Hundred Dollars) conditioned that the above-bound Principal, who has been duly appointed by such Judge as Guardian of the Person of _____, an Incapacitated Person, shall well and truly perform all duties required by law under the appointment.

_____
Principal

_____	_____
Surety	Surety
_____	_____
_____	_____
Address	Address

SIGNED AND APPROVED this _____.

_____
Judge Presiding

Appendix Aa: No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Alleged 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 Ab: No. _____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Alleged 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 §703 of the Texas Probate 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 Ac:	No._____	
Guardianship of	§	Probate Court
_____,	§	Number One of
An Alleged Incapacitated Person	§	Tarrant County, Texas

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

On this day personally appeared _____, ("Applicant/Attorney") 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 the known relatives of the Proposed Ward;
c. filed Application for Guardianship and a written report with the Court 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 Probate Code §633;
e. consulted with Attorney Ad Litem concerning Application;
f. set and attend hearing on Application;
g. assist 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 ☐ $ 750.00
Attorney Ad Litem fee ☐ $ 350.00
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 heard and considered foregoing, and the Court finds that said Applicant/Attorney has rendered necessary services on behalf of the Proposed Ward, that such Attorney's fees and expenses are reasonable and just, and should be paid.

It is therefore, ORDERED, ADJUDGED, AND DECREED that that said Applicant/Attorney, be paid the total sum of $_____ from funds of Tarrant County.

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 Ad: No._____

Guardianship of	§	Probate Court
	§	
_____,	§	Number One of
	§	
An Alleged 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 as a result of the Court Investigator's recommendation* on _____.
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 Alleged 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 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 Ae:

Practice Tips from The Court Investigators of Probate Court Number One

1. Read the Ad Litem Manual.
2. Read the Texas Probate 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. PROB. CODE §687.
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 §682 applicants must comply with all of the requirements of §633. Make sure the affidavit is filed at least 1 week prior to the scheduled hearing, and any necessary waivers, etc. are obtained.
12. No §633 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.

Appendix Af: **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 Probate 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 Testamentario de Texas [Texas Probate 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.
Yo, guardián del sujeto de esta custodia, afirmo que he leído y entiendo lo anterior y he recibido una copia de estas instrucciones.

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 (§699):

1. Take and file an o*ath* (§700);
2. File the required *bond*, (§702), and
3. Obtain *Letters of Guardianship* from the probate clerk's office (§659).

B. Specified Powers of Guardian of the Person (§767)

1. The right to have physical possession of the ward and to establish the ward's legal domicile;
2. The power to consent to medical, psychiatric, and surgical treatment other than the in-patient psychiatric commitment of the ward, but including the right to make end-of-life decisions regarding the withdrawing of life support, hydration and nutrition (§166.039 Texas Health & Safety Code)

A. Para Calificar Como Guardián: Dentro de (20) días de recibir la orden que le designa como guardián usted debe (§699):

1. *Juramentarse* y registrar el *juramento* (§700);
2. Registrar la *fianza* designada (§702), y
3. Obtener *Las Cartas de Custodia* de la oficina (§659).

B. Los Poderes Especificados del Guardián de la Persona (§767)

1. El derecho de tener posesión física del sujeto de la custodia y establecer el domicilio legal del sujeto de la custodia;
2. El poder de aprobar el tratamiento medico, psiquiátrico y quirúrgico. Este poder incluye el derecho de de tomar decisiones del fin de vida que se tratan de quitar aparatos que prolongan la vida, la hidratación y la nutrición; pero no incluye el poder de ingresar el sujeto de la custodia a tratamiento psiquiátrico.(§166.039 Texas Health & Safety Code)

3. Any other powers specified granted in the order appointing the guardian.

C. Specified Duties of Guardian of the Person (§767)

1. The duty of care, control, and protection of the ward;

2. The duty to provide the ward with clothing, food, medical care, and shelter; and

3. 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.(§743)

WARNING: Letters of Guardianship EXPIRE one year and four months after the date of issuance unless renewed. (§659(b)) The clerk cannot renew the letters until the guardian has filed the required annual report for the guardian of the person (§743).

4. 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**; (§761)

5. Notify the Court **immediately** if the ward dies or, in the case of a minor, when the ward turns 18;

6. 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;

7. A Court Visitor will be assigned annually to assess the condition of the ward. Please cooperate with this person. (§648).

3. Cualquier otro poder especificado en la orden designando el guardián.

C. Los Poderes Especificados del Guardián de la Persona (§767)

1. La obligación del cuido, control y la protección del sujeto de la custodia;

2. La obligación de proveer la ropa, la comida, el cuido medico y el albergue al sujeto de la custodia; y

3. 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. (§743)

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. (§659(b)) La secretaria del juzgado no puede renovar las cartas hasta que el guardián registre los reportes anuales necesarios para el guardián de la persona. (§743).

4. 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**; (§761)

5. Notificar 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.;

6. Notificar 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.

7. Un visitante del juzgado será designado anualmente para determinar la condición del sujeto de la custodia. Favor de cooperar con esta persona. (§648).

D. Expectations of the Guardian of the Person: (§743)

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**.

D. Expectativas del Guardián de la Persona: (§743)

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 Probate 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 Testamentario de Texas [Texas Probate 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.

Yo, guardián del sujeto de esta custodia, afirmo que he leído y entiendo lo anterior y he recibido una copia de estas instrucciones.

Name: _____
Guardian/ Guardián Date/Fecha

_____
Name Printed/ Nombre en letra de molde

A. Fiduciary Responsibility: (§§771ff) 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: (§§771ff) 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 Probate Code are clear regarding your responsibilities.

B. Qualify as Guardian: Within twenty (20) days of receiving the order appointing you as guardian (§699):

1. Take and file an o*ath* (§700);
2. File the required *bond*, (§702), and
3. Obtain *Letters of Guardianship* from the probate clerk's office (§659).

C. Limited Power of Guardian to Act Without Court Authority (§774(b)) 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; (§774(b)). Any other actions by the guardian must be with **prior approval** of the court or be **ratified** by the court. 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. (§771) This may include, as necessary:

1. Security Change the locks on real property;

2. Storage Place non-perishable personal property in insured storage;

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 (§699):

1. *Juramentarse* y archivar el *juramento* (§700);
2. Archivar la *fianza* designada, (§702), y
3. Obtener *Cartas de Custodia* de la oficina de la secretaria del juzgado (§659).

C. El Poder del Guardián Limitado para Actuar sin Autoridad de la Corte (§774(b)) 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; (§774(b)). 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. (§771) Este puede incluir cuando sea necesario:

1. Seguridad Cambie las cerraduras en los bienes;

2. Almacenaje Ponga propiedad personal no corruptible en almacenaje asegurado;

3. Perishable Property Obtain permission to sell perishable personal property (§812) 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." (§768)

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. (§693(b)(3))

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. TEX. PROB. CODE §777

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;

3. Propiedad Corruptible Obtenga permiso para vender propiedad personal corruptible (§812) 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." (§768)

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. (§693(b)(3))

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. TEX. PROB. CODE §777

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: (§781) or sale of estate property (§811)

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. (§729)

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. (§783) Within **four months** after qualification, the guardian must give notice by certified or registered mail, return receipt requested, to all secured creditors (§784) 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: (§781) o venta de la propiedad de la heredad (§811)

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. (§729)

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. (§783) 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 (§784) 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 (§741).

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. (§759)

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 (§741).

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. (§759)

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 Ag:

TO BE FILED BY THE GUARDIAN OF THE PERSON WITHIN THIRTY DAYS OF APPOINTMENT.

(ENGLISH/SPANISH FORMS ARE AVAILABLE FROM THE COURT UPON REQUEST)

No._____

IN RE: 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. **WARD**: _____
(Last) (First) (Middle) (Maiden)
SSN: _____ Date of Birth: _____ Age _____
Address: _____
(Street) (City) (State) (Zip Code)
Home Ph (_____) _____ Work Ph (_____) _____

2.**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 (_____) _____

3. 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 (_____) _____

4. **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)

YOU MUST IMMEDIATELY INFORM THE COURT OF ANY CHANGE IN YOUR ADDRESS OR THE WARD'S.

PROVIDE INFORMATION BELOW IF IT IS APPLICABLE TO YOUR WARD'S CIRCUMSTANCE.

3. 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.)

4. MHMR CASE MANAGER: Name: _____
   Phone: _____ Pager: (_____)_____
   Address: _____
   (Street) (City) (State) (Zip Code)

5. LIVING CONDITIONS AND CIRCUMSTANCES: The Ward resides in:
   ☐ the Ward's home ☐ the guardian's home ☐ A relative's home (explain below)
   ☐ assisted living ☐ a nursing home ☐ a hospital/medical facility
   ☐ foster/boarding/group home ☐ other _____
   _____
   Manager Name: _____ Phone: _____
   Other comments: _____

6. PRINCIPAL NATURE OF INCAPACITY / REASON FOR GUARDIANSHIP: _____
   _____
   _____

7. 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:
   _____
   _____

8. 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.

STATE OF TEXAS } BEFORE ME, the undersigned authority, this day personally appeared the undersigned,
} known to me to be the Guardian of the Person described in the foregoing Plan, and whose
COUNTY OF } name is subscribed to the foregoing Plan, who, after being by me duly sworn, did on his/her oath, depose and state: "I hereby swear, under penalty of perjury, that the information contained in this report is accurate to the best of my knowledge."

SIGNED _____ _____

_____, Guardian

SUBSCRIBED AND SWORN BEFORE ME on _____.

_____
Notary Public, State of Texas

.....do not write below this line.....

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 on _____

_____
Judge Presiding

Rev:1/11/05

Appendix Ah:

No. _____

IN RE: 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 §53(c) of the Texas Probate 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 Ai: No._____

IN RE: 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 §53(c) of the Texas Probate 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 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]

No._____

IN RE: ESTATE OF	§	PROBATE COURT
	§	
_____,	§	NUMBER ONE
	§	
DECEASED	§	TARRANT COUNTY, TEXAS

Report of Attorney Ad Litem in Heirship Proceeding
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	½ of 1/5
b. Ima Riddle	½ of 1/5
B. ~~Margaret V. Wolff~~ *(deceased) (1/5)*	
I. ~~Francis Scott VanDerGelder~~ *(predeceased)* (1/5)	
a. Alice Marie V. Wilson	1/3 of 1/5
b. ~~Edmund P. VanDerGelder~~ *(predeceased)* (1/3 of 1/5)	
i. Moon Unit VanDerGelder Zappa	1/3 of 1/5
c. Rosamond V. Brecht	1/3 of 1/5
C. ~~Albert Sidney VanderGelder~~ *(predeceased, no issue)*	
2. ~~Fannie Brice~~ *(predeceased)*	
A. ~~Virginia Brice VanDerGelder~~ *(deceased)(1/5)*	
I. Edward Bruce VanDerGelder	½ of 1/5
II. ~~A. B. VanDerGelder~~ *(survived, then died testate)*	
T. R. VanDer Gelder, Independent Executor	*½ of 1/5*
B. Augustus McRae VanDerGelder	*1/5*
	100 %

Appendix Aj:

No._____

IN RE: THE ESTATE OF § PROBATE COURT NUMBER _____
_____, 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 *$ 350.00*

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 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

DIVISION OF PROPERTY UPON INTESTACY IN TEXAS

I. COMMUNITY PROPERTY (§45, Texas Probate 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 1/2
      children or their descendants ---------- decedent's 1/2
2. **With surviving spouse only**
      surviving spouse ---------- All
3. **With children or their descendants only**
      children or their descendants ---------- All

II. SEPARATE PROPERTY (§38, Texas Probate Code)

1. **With** surviving spouse (§38(b)):
   A) **With** Children or their descendants
      1) Pers Prop: a) Surviving spouse ---------- 1/3
         b) Children and their descendants ---------- 2/3
      2) Real Prop: a) Surviving spouse has life interest in ---------- 1/3
         (with remainder interest to children and their descendants)
         b) Children and their descendants have fee in ---------- 2/3

   B) **Without** Children or their descendants

      1) Pers Prop: Surviving spouse ---------- All

      2) Real Prop: a) Surviving spouse has fee in ---------- 1/2
         b) 1) Both Parents Survive: Father ---------- 1/4
            Mother ---------- 1/4
         or 2) One Parent Surviving ---------- 1/4
            & Siblings and their descendants ---------- 1/4
         or 3) One Parent Surviving alone ---------- 1/2
         or 4) Siblings and their descendants alone ---------- 1/2
         or 5) Surviving spouse alone ---------- All

2. **Without** Surviving Spouse (§38(a)):
   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 ---------- 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

Courtesy Judge Steve M. King,, Tarrant County Probate Court One

Appendix Al:

Instructions for Probate Code Thumb-Tab Index (2010 Edition)

1. **Materials:** **1 Probate Code of your choice (2010 Edition)**
   1 set alphabetical thumb-tab dividers
   1 set numerical (1-31) thumb-tab dividers
   2 index pages

2. **Reduce a copy of the index pages to the size of your Probate Code pamphlet (85%).**

3. **Mark the reduced index pages and both sets of the dividers to be trimmed to the same size as your Probate Code.**

4. **Take the index pages, the dividers, and the paperback code to your friendly corner copy shop and ask them 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. **Tell the copy shop you will be back real soon to have the whole shebang bound.**

6. **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.**

7. **Make good on your threat to 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 15% increase in size, where it would conveniently fit in a three ring binder with conventional numbered dividers).**

Good Luck!

Steve M. King, Judge
Probate Court Number One
Tarrant County, Texas

© Steve M. King, 2010

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APPENDIX Am:

The Parable of the Blind Men and the Elephant

It was six men of Indostan
To learning much inclined,
Who went to see the Elephant
Though all of them were blind,
That each by observation
Might satisfy his mind.

The First approached the Elephant
And, happening to fall
Against his broad and sturdy side,
At once began to bawl:
"God bless me, but the Elephant
Is very like a wall!"

The Second, feeling the tusk,
Cried, "Ho! what have we here
So very round and smooth and sharp?
To me 'tis very clear
This wonder of an Elephant
Is very like a spear!"

The Third approached the animal
And, happening to take
The squirming trunk within his hands,
Thus boldly up he spake:
"I see," quoth he, "The Elephant
Is very like a snake!"

The Fourth reached out an eager hand,
And felt about the knee:
"What most the wondrous beast is like
Is very plain," quoth he;
"Tis clear enough the Elephant
Is very like a tree!"

The Fifth, who chanced to touch the ear,
Said, "Even the blindest man
Can tell what this resembles most;
Deny the fact who can:
This marvel of an elephant
Is very like a fan!"

The Sixth no sooner had begun
About the beast to grope
Than, seizing on the swinging tail
That fell within his scope,
"I see," quoth he, "the Elephant
Is very like a rope!"

And so these men of Indostan
Disputed loud and long,
Each in his own opinion
Exceeding stiff and strong.
Though each was partly in the right,
They all were in the wrong!

-- John Godfrey Saxe (1816-1887)