VIEWS FROM THE "MINOR" BENCH: THE ASSOCIATE JUDGES SPEAK

I. The Honorable Cathy Shannon – Associate Judge of Harris County Probate Court Four

- Ethics Issues
  -Texas Disciplinary Rules of Professional Conduct 1.01, 1.15 and 3.05.

- The Estates Code
  -the importance of knowing the code sections and using them in pleadings.
  -changes in the form and wording of many sections.

II. The Honorable Georgia Akers – Associate Judge of Harris County Probate Court Three

- Guardianship Issues

III. The Honorable Ann Greene – Associate Judge of Harris County Probate Court Two

- Heirship Issues

IV. The Honorable Ruth Ann Stiles – Associate Judge of Harris County Probate Court One

- Contested Issues

- Attorney Fee Issues

Presented on February 11, 2014
CLE offered by the Presiding Judges of the Harris County Probate Courts

ETHICS ISSUES IN PROBATE

I. Withdrawing From Representation: The Ethics And The Necessity

TEX. DISCIPLINARY R. PROF'L CONDUCT 1.15

When you file a pleading as attorney for a party, you remain as the attorney of record until the court allows you to withdraw.

Attorneys continue to be attorneys of record for a party until the trial court gives them permission to withdraw. *Curtis v. Carey*, 393 S.W.2d 185 (Tex. Civ. App.-Corpus Christi, 1965, *no writ*).

Be aware: Failure to file a motion and obtain an order for withdrawal from representation may be cause for a malpractice action and/or the displeasure of the court.

If you do not wish to be responsible for litigation (or anything beyond your client agreement) in a probate matter, you must file a motion and obtain an order pursuant to Tex. R. Civ. P. 10.

An attorney may withdraw from representation of a client only if the attorney satisfies the requirements of Texas Rule of Civil Procedure 10 which governs the withdrawal of an attorney. *Rittenhouse v. Sabine Valley Center Foundation, Inc.*, 161 S.W.3d 157 (Tex. App.-Texarkana 2005, *no pet.*).

Be aware: TRCP 10 has specific instructions. No hearing is necessary if: 1) you include everything required pursuant to TRCP 10 in the motion to withdraw and 2) your client signed an agreement to the motion or you show completed CMRR service on the client.

II. Competent Representation

TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01

Accept a probate case only if you have experience in the particular type of case; can associate with an experienced attorney; or are willing to read the Estates Code and learn the laws and procedures regarding probate matters.

Be aware: Even if you have an agreement with your client regarding fees, many attorney fees in probate must be approved as reasonable and necessary.

III. Ex Parte Communication

TEX. DISCIPLINARY R. PROF'L CONDUCT 3.05

A lawyer shall not communicate with a court "for the purpose of influencing that entity or person concerning a pending matter..."

Be aware: Communicating by email or social media to any court staff member for the purpose of influencing the court is prohibited.

A GUIDE THROUGH THE ESTATES CODE

A. The Good

"It's so easy to fall in love" or Why you're going to love/like the Estates Code:

-The language is more contemporary.

-No more CAPITALS.

-Long sentences are now "sound bites."

e.g., §37 → §§101.001(a)(b); 101.003; 101.051 re passage of title (by will & intestacy).

-Incompatible couples are now "divorced."

e.g., §145 (a-r) → §401.001-401.008, except 145(h) → §402.001 re independent administrations

§867 → §1301.001, *et seq.* re management trusts

-Organization is the name of this game.

- Titles; Subtitles; Chapters; Subchapters; Sections

- Title 1: Chapter 21 - General Provisions; Purpose & Construction
  New: §21.005(b) re unsworn declarations n/a to wills
  Chapter 22 - Definitions
- Title 2: Estates of Decedents; Durable Powers of Attorney
  - Subtitle A: Scope, Jurisdiction, Venue and Courts
    §31.001 re Scope of "Probate Proceeding"
    §31.002 re Matters Related to "Probate Proceeding"
  - Subtitle B: Procedural Matters
    New: §51.203 re posting notice of intention re deposition/written ques.
  - Subtitle C: Passage of Title and Distribution of Decedents' Property in General
  - Subtitle D: Proceedings Before Administration of Estate
  - Subtitle E: Intestate Succession
  - Subtitle F: Wills (incl. §75 → 252.201-.204)
  - Subtitle G: Initial Appointment of Personal Representative and Opening of Administration
  - Subtitle H: Continuation of Administration
  - Subtitle I: Independent Administration
  - Subtitle J: Additional Matters (incl. Temporary Administrations §§452.001 *et seq.)*
  - Subtitle K: Foreign Wills
  - Subtitle L: Payment of Estates into Treasury
  - Subtitle P: Durable Powers of Attorney

- Title 3: Guardianships and Related Procedures: §§1001.001 *et seq.*

B. The Not-So-Good

"You don't bring me flowers anymore" or Why you may not appreciate the Estates Code:

-It doesn't begin at the beginning.

- **Title 1; Chapter 21; §21.001**

-What used to be one is now many.

- **§3→ §§22.001–22.034; §601 →§§1002.001-1002.030** re definitions.

-Your favorites may be hard to find.

- **§37 Ownership and Possession of Decedent's Property**

  -Who owns the property immediately after the moment of death?
  §101.001 If there is a will: the devisees. If no will, the heirs at law.
  §101.002 Part of 46(a) re Joint Tenancy Property. [The other part of 46(a) is now §111.001].

  -Who gets possession of the property?
  §101.003 If there is a will: the executor, upon his/her appointment as such. If no will but an administrator is appointed: the administrator. If no will and no administration: the heirs at law, subject to the debts.

  -When do the devisees or heirs at law get final, unfettered ownership and possession?
  §101.051 When the debts of the decedent have been paid and the estate administration, if there was one, has been closed.

- **§37A Disclaimers**
  -Now 20 sections, beginning with §122.001.
  -*Note new*: §122.051(b): The disclaimer must state whether the disclaimant is a child support obligor as described in §122.107.
  -*Note not new:* DISCLAIMERS AND ASSIGNMENTS DO NOT AFFECT THE COURT'S DETERMINATION OF WHO ARE THE HEIRS.

C. The ToC and the D & D's and the I's are your new BFF's!
Also see the Conversion Chart on the website of Probate Court One. (Links/Forms/Handouts)

Guardianship

1. Check Citation
   - 1.1. Is the name of the proposed ward the same as the name for the proposed ward listed on the application
     - 1.1.1. Closeness counts, but if it is a common name it doesn't
   - 1.2. Is return date on the citation before the hearing date
   - 1.3. Is the name for the applicant the same as the applicant name on the application
   - 1.4. Does the type of guardianship (person & estate/person/estate) listed in the citation match the type of guardianship plead for in the application
2. Check application
   - 2.1. Is applicant a Texas resident
     - 2.1.1. If no, then check for appointment of a resident agent
   - 2.2. Make sure the application states whether the proposed ward's rights to vote and drive will be restricted
   - 2.3. Is the proposed ward domiciled or found in Harris County on the date the application is filed
     - 2.3.1. If no, then check to see if other venue requirements are met per section **§1021.001 & §1023.001 of the Texas Estates Code**
   - 2.4. Make sure application lists the persons required to receive service of citation pursuant to **§1051.103 *et seq.* of the Texas Estates Code**
     - 2.4.1. Parents of the proposed ward, any proposed ward over the age of 12 and the spouse of a proposed ward must be personally served by constable or private process server
       - 2.4.1.1. Note: The proposed ward must be served by constable or other officer
     - 2.4.2. Children and siblings can be served personally by certified mail
       - 2.4.2.1. Holders of a power of attorney and the administrator of a facility the proposed ward resides in must be served by certified mail
3. Check for waiver of proof of service upon the persons required to receive citation pursuant to **§1051.105**
   - 3.1.1. Parents of the proposed ward, any proposed ward over the age of 12 and the spouse of a proposed ward must be personally served by constable or private process server
     - 3.1.1.1. Note: The proposed ward must be served by constable or other officer
     - 3.1.1.2. Check to if the citation for personal service is returned
     - 3.1.1.3. The proposed ward cannot waive personal service, however, any competent adult may waive service
   - 3.1.2. Children and siblings can be served personally by certified mail
     - 3.1.2.1. Competent adults can waive service
     - 3.1.2.2. Only children and siblings over the age of 18 must be served
   - 3.1.3. Holders of a power of attorney signed by the proposed ward and administrators of facilities in which the proposed ward resides must be served by certified mail
4. Check the doctor's letter
   - 4.1. Any application filed after 9/1/2009 must comply with the requirements of the current law found in **§1101.103 *et seq.***

4.1.1. Note: All four courts have promulgated a doctor's form letter that meets the requirements of **§1101.103** ***et seq.*** and you should expect to see this form letter

4.2. Make sure the date of the doctor's letter is not greater than four months before the date which the application was filed with the clerk

4.3. Make sure that the date in which the doctor examined the proposed ward is not greater than four months before the date in which the application was filed with the clerk

5. Check to make sure the attorney ad litem has filed an answer

CHECKLIST FOR THE ATTORNEY AD LITEM ON GUARDIANSHIPS

- Review file (and not the day of the hearing)
- File an answer
- Make sure ward is located in Harris County the day the application was filed
- Remember that you job is to advocate for the ward and "best interests" should not be part of your vocabulary unless the ward has agreed to the guardianship and he/she feels it is in their best interests. A Guardian ad litem advocates best interests not the attorney ad litem.
- If you have reservations about the Ward's capacity – please file and give notice for a Motion for Independent Medical Examination (IME)
- Make sure ward has been properly served
- Make sure family members have been properly noticed
- Make sure nursing home administrator and Power of Attorney holder (if applicable) have been properly noticed
- Review the application – make sure all three levels of sanguinity are listed
- The application and Order should both state whether the Ward can vote or drive
- Make sure doctor's letter is not 120 days old from the date the application is filed (ward had to be seen by a doctor within 120 days of application's filing date, not when the doctor's letter was signed) If something is wrong with the application – contact the attorney or if you have questions – please contact the Guardianship Coordinator in that specific court
- If appointed as Attorney Ad Litem on a guardianship and are not familiar with the Court's procedures – please audit guardianship hearings prior to your scheduled hearing (you may do so with any Probate Court – check the Probate Court's website for hearing schedules – see website below)
- File your answer with the Probate Clerk's office (at least 1-2 weeks in advance of hearing – do not send a copy of your Answer to the Court Investigator or Guardianship Coordinator)
- Visit the ward before the hearing
- Investigate the applicant as to any disqualification issues (felonies, debts to ward, bond, etc.)
- Call Court for specific hourly rate – ask for Appointee Fee application (if paid by Harris County) (If paid by Harris County – applicant should file a Pauperis Affidavit)
- Review the Order Appointing Guardian before the hearing. Make sure the new notice is included in the order regarding peace officers enforcing the order
- Come prepared and bring your fee order. This should be a separate fee order.
- At the hearing, first person to speak should be the attorney ad litem explaining why the client (proposed ward) is not present and asking the court to waive his appearance. If the client is there, introduce him/her to the court.
- Keep your certificate for appointments current with the Court – if you want appointments and/or if you want to be considered for being appointed as Guardian as well. Please let the Courts know if you no longer want appointments
- When dropping off certificate for the first time – please bring resume and business cards as well
- Notify the Courts if you move or if your phone numbers, email, etc., change - tell them if you speak other languages besides English
- Do not call the Court and inquire as to when you will get an appointment
- Check out the Probate Courts' website at: www.hctx.net/probate

NO. 000,000

IN THE MATTER OF THE GUARDIANSHIP OF THE PERSON OF JANE DOE, AN INCAPACITATED PERSON	§ § § § § § §	IN THE PROBATE COURT NO. THREE (3) OF HARRIS COUNTY, TEXAS

ORDER APPOINTING GUARDIAN OF THE PERSON

On this day, the Court heard the application of JAMES DOE for Letters of Guardianship of the Person of JANE DOE, an incapacitated person ("Ward"), under the authority of Section 1101 of the Texas Estates Code. After hearing all evidence and testimony of witnesses in support of the application, no contest or opposition having been asserted, the Court finds by clear and convincing evidence the following:

Ward is an incapacitated person. It is in the best interests of Ward to have a guardian appointed by this Court. The rights of Ward will be protected by the appointment of a guardian.

The Court further finds by a preponderance of evidence the following:

Due notice of the application has been given as required by law, and citation has been personally served on Ward in accordance with law and a Waiver of Right to Serve as Guardian and Waiver of Citation has been filed by all necessary persons.

Ward did not appear in person, and the Court finds that based on evidence presented, it was not necessary for Ward to appear in person. Ward appeared by and through her appointed attorney ad litem.

Ward is an adult female, 19 years old who is mentally incapable of caring for herself and has no legal guardian of her person or her estate. This Court has venue because Ward resides in Harris County, Texas with the Applicant, her custodial parent. Applicant is a proper person to be appointed as Guardian of the Person and is entitled to be appointed.

This Court has jurisdiction of this cause; evidence has been presented regarding the incapacity of Ward and the rights of the person will be protected by the appointment.

IT IS ORDERED that the Court finds that JANE DOE is totally incapacitated and totally incapable of maintaining her person. Evidence of this total incapacity was provided by medical and other evidence, and JAMES DOE, Ward's custodial parent, is granted the full powers of Guardian of the Person under the Texas Estates Code.

IT IS FURTHER ORDERED that the right of the Ward to drive a motor vehicle and the right to vote is hereby terminated.

IT IS FURTHER ORDERED that JAMES DOE is appointed Guardian of the Person of JANE DOE, an incapacitated person, and that the clerk of this Court issue Letters of Guardianship when he has qualified according to law.

IT IS FURTHER ORDERED that JAMES DOE has the right to physical possession of the Ward and to establish the Ward's legal domicile.

NOTICE TO ANY PEACE OFFICER OF THE STATE OF TEXAS: YOU MAY USE REASONABLE EFFORTS TO ENFORCE THE RIGHT OF A GUARDIAN OF THE PERSON OF A WARD TO HAVE PHYSICAL POSSESSION OF THE WARD OR TO ESTABLISH THE WARD'S LEGAL DOMICILE AS SPECIFIED IN TIDS ORDER. A PEACE OFFICER WHO RELIES ON THE TERMS OF A COURT ORDER AND THE OFFICER'SAGENCY ARE ENTITLED TO THE APPLICABLE IMMUNITY AGAINST ANY CIVIL OR OTHER CLAIM REGARDING THE OFFICER'S GOOD FAITH ACTS PERFORMED IN THE SCOPE OF THE OFFICER'S DUTIES IN ENFORCING THE TERMS OF THIS ORDER THAT RELATE TO THE ABOVE- MENTIONED RIGHTS OF THE COURT-APPOINTED GUARDIAN OF THE PERSON OF THE WARD. ANY PERSON WHO KNOWINGLY PRESENTS FOR ENFORCEMENT AN ORDER THAT IS INVALID OR NO LONGER IN EFFECT COMMITS AN OFFENSE THAT MAY BE PUNISHABLE BY CONFINEMENT IN JAIL FOR AS LONG AS TWO YEARS AND A FINE OF AS MUCH AS $10,000.

IT IS FURTHER ORDERED that the bond for Guardian of the Person is hereby fixed in the amount of $_____ cash bond.

IT IS FURTHER ORDERED that the duly appointed attorney ad litem, shall submit a separate fee application regarding his services, which shall be taxed as costs, and he is discharged as attorney ad litem in this matter.

IT IS FURTHER ORDERED that the Court finds that Applicant has brought this application in good faith and with just cause for the purposes of having a Guardian of the Person appointed for the Ward.

SIGNED on this the ____ day of _____, 2014.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

HEIRSHIP ISSUES

Texas Estates Code Chapters 201 et seq. and 202 et seq.

Application

An Application for Proceeding to Declare Heirship must be supported by the affidavit of each applicant that, to the applicant's knowledge (1) all the allegations in the application are true; and (2) no material fact or circumstance has been omitted from the application. **(TEC §202.007)**

Note that the affidavit most commonly attached to the application is a verification rather than a true affidavit in that it does not state that the affiant is over the age of 18, of sound mind and capable of making the affidavit.

Pursuant to **new TRCP 21c**, the application should include the name and address of a minor heir but not the birth date. But please note that the minor heir is a minor.

Notwithstanding Section 16.051, Civil Practice and Remedies Code, a proceeding to declare heirship of a decedent may be brought at any time after the decedent's death. **(TEC §202.0025)**

Citation (TEC §§202.051 through 202.056)

Citation in a proceeding to determine heirship must be served by registered or certified mail on each distributee age 12 or older and on the parent, managing conservator, or guardian of each distributee who is younger than age 12. The parent, managing conservator, or guardian of distributees younger than age 12 can waive this citation, but they cannot waive citation for those distributees age 12 and older. **(TEC §202.051 and 202.056)**

Citation must be posted in the county in which the proceeding is commenced and the county of the last residence of the decedent. **(TEC §202.053)**

Affidavit of Citation – NEW REQUIREMENT

An heirship applicant must also file (1) a copy of any required citation and the proof of delivery of service of the citation and (2) an affidavit sworn to by the applicant or a certificate signed by the applicant's attorney stating that the citation was served; the names of those to whom citation was served, if the person's name is not shown on the proof of delivery; and the name of each person who waived citation. **(TEC §202.057)**

Publisher's Affidavit (TEC §202.052)

The applicant's attorney should check with the Clerk's Office to make sure that the publisher's affidavit has been "returned served." You pay the Clerk to issue citation to the publisher (usually Daily Court Review), but you must also pay the publisher for publishing the notice. Until that has happened, the publisher will not return service to the Clerk. The fact that you have a copy of the published information does not mean that service has been returned to the Clerk.

Administration

An application for administration, in addition to the heirship application, must be posted. If applying for an independent administration under TEC **§401.003** (not included in the conversion table), make sure that it is posted as independent rather than as dependent.

On occasion an attorney will file for an independent administration in an intestate situation without also filing an application to determine heirship. The court cannot act on that application without having

judicially determined who the heirs are who can then consent to the independent administration. Thus, the heirship and independent administration are usually done at the same time. However, one can apply for a dependent administration prior to a judicial determination of the heirs.

Generally, Court 2 will not grant an independent administration if there are minor heirs unless all the property can be characterized as community property. There may be some differentiation among the courts on that issue.

The applicant must have every heir's consent to an independent administration.

If the applicant is requesting appointment as administrator of the estate, he must file an appointment of resident agent if he lives out of state, and he is not qualified to serve until the appointment is filed.

If a decedent's heir passes away after the decedent, the heir's estate's personal representative must sign a waiver of notice and/or a consent to independent administration.

Ad Litem

The court **shall** appoint an attorney ad litem in a proceeding to declare heirship to represent the interests of heirs whose names or locations are unknown. **(TEC 202.099)**

The ad litem should file an answer as soon as he or she is appointed as the answer is the ad litem's appearance in the case.

If an ad litem has an opportunity to review the file and notes missing items such as the publisher's affidavit, please notify the applicant's attorney.

Court 2 does not require a written report, but there are circumstances in which one may be either helpful or necessary to the investigation.

Barring some unusual circumstance, do not interview witnesses in the hallway the day of the hearing. It is acceptable to question one witness before the court, and then abbreviate your questions to the second witness. However, do not simply skip questioning either witness before the court because you have previously interviewed them.

Distribution

Please check the Code to ensure that the percentages of the division of property are correct.

Please include division of **both** community **and** separate property for married decedents regardless of your belief that there is no separate property in the estate.

Disclaimers and assignments do not affect the court's determination of who the heirs are. Remember that a disclaimer cannot direct to whom the interest will go – the disclaimed interest is distributed as though the disclaimant predeceased the decedent. **(TEC §§122.001 et seq.)**

The court cannot do "an heirship within an heirship." If an heir dies after the decedent, then his or her share goes to the "Estate of...," and how that share is divided may have to be determined in an estate proceeding for that heir.

The division of community property interests was amended effective September 1, 1993, so the division will be different for a decedent who died before that date.

Depositions on Written Questions (TEC §51.203)

A commission is no longer required, but the questions must still be posted.

NO. 123,456

IN THE ESTATE OF	§	IN THE PROBATE COURT
	§	
MARY SMITH,	§	NO. TWO (2) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

CERTIFICATE OF NOTICE TO INTERESTED PARTIES
PURSUANT TO TEXAS ESTATES CODE SECTION 202.057

The following persons are identified in the Application to Determine and Declare Heirship as interested parties and heirs of Decedent's estate:

1. Joe Smith, Address
2. Patricia Smith, Address
3. Henry Smith, Address

The following person is the Applicant and did not require service:

Joe Smith, Address

The following persons each signed a Waiver of Citation of Filing of Application to Determine and Declare Heirship which has been filed in this matter. Copies of the Waivers are attached hereto.

1. Patricia Smith, Address
2. Henry Smith, Address

I believe that all of the requirements of Section 202.057 of the Texas Estates Code have been completed

Signed this _____ day of _____, 2014.

Firm

By:_____
Attorney

ATTORNEYS FOR JOE SMITH

Standards for Court Approval of Attorney Fee Petitions

The Probate Courts of Harris County are committed to maintaining and improving the image of the legal profession. Enforcing reasonable fees is one way Harris County Probate Courts can accomplish this goal. Exercise good ethical and moral responsibility, common sense, and professionalism in your billing. These standards are not absolute rules; the Courts will make exceptions in particular circumstances as fairness and justice demand. In formulating and revising these standards, the Courts have given consideration to the Texas Probate Code, the Texas Rules of Disciplinary Procedure, and applicable case law.[1]

I. Attorney's Fees

It is the Courts' duty to ensure that estates of decedents and wards pay only for "reasonable and necessary" attorney's fees and expenses. *See* Probate Code § 242 (decedent's estates) and § 665B (guardianship estates).[2]

A. Court-Approved Fees for a Fiduciary's Attorney

Below is a table setting forth what the Courts believe are appropriate rates for court appointed fiduciaries' attorney's fees.[3] This fee schedule does not apply to court appointed counsel for indigent parties (*see* paragraph I.B.1 herein).

Years Practicing Probate and Guardianship Law	Court-Approved Rate
0 – 2 years	up to $165/hour
3 – 5 years	$165 – 195/hour
6 – 10 years	$195 – 250/hour
11 + years	$250 – 350/hour

In determining how lawyers will be paid within the practice categories above, the Courts will consider the extent of the lawyer's experience in the area of law involved as well as Board Certification in Probate and Estate Planning. In the 11 + category, the Courts will pay the highest rate to those few lawyers whose experience and mastery of probate, estate planning, and guardianship law qualify them as experts in these areas.

B. Attorney Ad Litem and Guardian Ad Litem Fees

Formulating standards for the compensation of reasonable attorney's fees for an attorney ad litem or guardian ad litem is challenging not only because of the variety of factors set forth in Rule 1.04 of the Texas Rules of Professional Conduct, but also because of certain factors over which the Court has limited control.

1. **Court Appointed Counsel for Indigent Parties.** The Courts must heed Harris County budgetary considerations. If an estate is unavailable or unable to pay fees, the Court approves fees under a budget approved and overseen by the Commissioners Court.

Thus, attorneys who accept Court appointments in probate and guardianship cases with an indigent party should not expect to be reimbursed at their regular hourly rates because the Court's annual budget limits the amounts it can pay for such services. Ordinarily, the Courts compensate attorneys ad litem and guardians ad litem involved in county-pay cases at an hourly rate of $100. If an attorney is willing to perform the duties of an attorney ad litem pro bono, he or she should notify each court of that willingness.

2. **Court Appointed Counsel Involving Solvent Estate.** The Court's award of reasonable attorney's fees usually begins with the Court determining if the representation provided by, and reasonably required of, the ad litem is "typical" or "normal." In a "typical" or "normal" case, the Courts ordinarily award total fees of $300 to $750 to an attorney ad litem.[4]

3. **Compensation Regarding a Deceased Ward.** In those rare instances wherein a proposed ward dies before a guardianship estate is established, but an ad litem appointment has been made, the Courts normally would not expect a fee application to be made.

C. Fees when an Attorney is also the Fiduciary

In those rare situations in which a Court appoints an attorney as a fiduciary in a guardianship or an administration, the attorney normally must elect either to seek payment calculated on the statutory probate or guardianship commission formula or to obtain reimbursement for attorney's fees. If the guardianship or administration is particularly complex, the Courts may approve dual compensation upon request of the attorney, preferably at the time of appointment. Dual compensation would include payment at the appropriate hourly rate for legal work done in the case and a separate commission for work done as a personal representative or as a guardian under § 241 or § 665 of the Probate Code, respectively. To be entitled to dual compensation, the attorney fiduciary must adhere to the following guidelines:

1. **Full Disclosure.** There must be full disclosure of the attorney-fiduciary's request for dual compensation at the time of appointment or upon motion and hearing if the request for dual compensation is made after appointment. If the request is after the time of appointment, notice of the motion and hearing shall be given to all interested parties who have made an appearance in the case.

2. **Keep Records and Separate Legal and Non-Legal Work.** The attorney-fiduciary must keep meticulous time and expense records, carefully segregating legal and non-legal work. The attorney work should be submitted periodically just as an attorney would if representing a client. The non-legal work should be reflected on the regular bills for legal work, without a dollar extension, and with the notation "PRC" for "Personal Representative Compensation." An example invoice is attached as Appendix A.

3. **Compensation for Legal and Non-Legal Services.** Under Texas law, an attorney-fiduciary must seek only fiduciary compensation for guardian or personal representative services and may seek attorney's fees only for legal services.

Applications for attorney's fees should give a detailed account of the legal services he or she rendered to the probate or guardianship estate. Attorney-fiduciaries will not be paid attorney's fees for fiduciary services. Should the attorney believe that the statutory compensation formula as applied to a particular estate or guardianship is unreasonably low (*see* T.P.C. §§241 and 665), then he or she should submit, with the annual or final account, the total personal representative compensation time reported, or contemporaneous time records of the fiduciary services for which additional hourly compensation is requested above the statutory fee. Note that the hourly fee approved by the Courts for attorney-fiduciary services (between $45-100 per hour) is significantly less than the Court approved legal rates for attorneys. If an attorney-fiduciary is submitting an application for higher compensation because the statutory compensation formula is unreasonably low, this must be set for a hearing with the Court.

4. **Quarterly Fiduciary Compensation.** Should the attorney-fiduciary find it a hardship to wait for the compensation as a fiduciary, a fee may be paid on a quarterly basis. The Court must find that a hardship exists for the attorney-fiduciary to be paid quarterly.

II. Paralegal/Legal Assistant Charges

The Courts will reimburse an attorney for paralegal/legal assistant work at a rate between $45 and $100 depending upon the experience of the paralegal.[5] The Courts do not pay for secretarial services at the paralegal rate even if such services are performed by paralegals. It is the Courts' position that secretarial services are included in the attorney's overhead, for which an attorney is reimbursed at his or her hourly rate.

III. Billing in Ongoing Guardianship and Estate Matters

Please observe the following guidelines when preparing fee applications.

A. Form of Fee Applications

1. **Period of Accounting.** Indicate the period covered by the application in the title or prominently in the body.

2. **Include Total Accumulated Fees.** Each application for fees should contain a statement indicating the total amount of attorney fees and expenses approved since the inception of the guardianship or estate administration.

3. **Include Affidavit.** Attach an affidavit by the applicant attorney swearing to the reasonableness of the fees and the necessity of the services and indicating the number of years he or she has practiced probate and guardianship law.

4. **Signature of Client.** The fiduciary who hired the attorney should sign the application.

5. **Fees Sought Should not be Preprinted on Order.** Attach an Order approving the fees containing a blank for the fees, expenses, and total amount, so the Judge may fill in the approved amounts.

B. Invoice Accompanying Fee Application

1. **Avoid Block Billing.** Itemize all unrelated activities separately, with their respective times and amounts. Do not block bill for unrelated activities. Block billing is a practice whereby time entries contain several unrelated items with a single cumulative time and amount, rather than complete itemization.

2. **Include Descriptions.** Describe the topic or purpose for each telephone or office conference.

3. **Include Legend.** If it is not clear from the invoice for whom time is being billed, please include a Legend to indicate the name of the timekeeper, initials of the timekeeper, whether the timekeeper is an attorney or paralegal, and the years of probate experience of the timekeeper.

4. **Include All Time.** Include all the time you have spent on the file, even that time for which you are not charging, and indicate such fact with the following notations: "NO CHARGE" or "N/C."

5. **Justify Extraordinary Efforts.** If you believe that the time you have spent on an activity may be perceived as excessive, include a statement in brackets at the end of the entry as to why such extraordinary time was justified.

6. **Travel.** The Courts do not reimburse for an attorney's or staff member's travel mileage or expenses inside Harris County.

7. **Research.** The Courts will only reimburse attorneys for costs associated with necessary and reasonable legal research conducted to address novel legal questions or to respond to legal issues posed by the Court or opposing counsel.[6]

8. **Preparation of Fee Petitions.** The Courts will not reimburse attorneys for the costs of preparing invoices and the standardized fee applications and orders that accompany them.[7]

9. **Conversations with Court Staff.** It is not appropriate to charge an estate for the time the Courts spend providing the personal representative's attorney with assistance. Nor will the Courts reimburse attorneys for time spent in discussions with an auditor aimed at correcting deficiencies in the client's accountings. Of course, if a member of the Court's staff requests an attorney to provide information not ordinarily contained in properly drafted pleadings, the Courts will reimburse the attorney for the time spent responding to that request. Or, if the fee petition reveals special circumstances requiring the attorney to seek guidance from the Courts, the Courts will award attorney's fees. For example, the Courts will reimburse attorneys for communications with the Courts regarding the need for corrective action when a guardian, administrator, or an attorney dies during an ongoing estate. In addition, the Court will not reimburse attorneys from probate and guardianship estates for calls to the Clerk's office.[8]

10. **Copies and Faxes.** The Courts will reimburse attorneys up to $.15 per page for copies. Copies made by the Clerk's office will be reimbursed at the rate charged by the Clerk.

The Courts will not pay for facsimile transmissions. It will, however, pay the long-distance charges associated with long-distance faxes in the same manner it reimburses long-distance phone calls.

11. **Deliveries.** In situations in which the Court deems hand delivery to be appropriate given the circumstances stated in the fee petition, the Court will approve the actual cost of hand delivery up to $25, regardless of whether an attorney, paralegal, secretary, or commercial courier service actually delivered the document.

12. **Costs Necessitated by Misfeasance or Malfeasance.** Estates should not be charged with any attorney time or mileage for resolving problems or attending hearings necessitated by the misfeasance or the malfeasance of the client or attorney. For instance, if a personal representative sells property without Court approval and there are attendant costs associated with rectifying the situation, the personal representative should be personally responsible for any added expense. Likewise, show-cause hearings fall within this exception, and the attorney or the client will be responsible for all costs associated with attendance at the hearing, including service and filing fees assessed by the Clerk.

13. **Avoid Filing Fee Applications for Amounts Under $1000.00.** The Courts will generally not consider an application for fees and expenses for amounts totalling less than $1000.00, unless the attorney is an attorney ad litem and is appointed by the Court in an heirship or guardianship matter, the fee is agreed upon, and the fee totals less than $1000.

14. **Itemized Invoice Should Accompany Fee Application.** Any time an attorney is making application for his or her fees to the Court, an invoice itemizing the time and expenses is required, even when the estate is solvent and the fee amount is agreed upon by all parties. However, be aware that when an attorney ad litem is appointed by the Court in an heirship or guardianship matter and the attorney ad litem's fee is agreed upon and totals less than $1000, an invoice is not required.

IV. Court Action on Fee Applications

A. When Hearing on Fee Application is Required

The Courts hold all attorney-fee applications for 10 days to give other parties an opportunity to file objections to those applications. If no objections are filed, the Courts will consider the applications on submission and without a hearing, unless the amount of fees requested is significant or the Court has questions about the propriety or reasonableness of the fees. In such cases, the Court will request that the application be set for a hearing. As explained in Paragraphs I.C.1 and I.C.3 herein, a hearing is required if an attorney-fiduciary is seeking dual compensation after appointment or more than the statutory formula for compensation as a fiduciary.

B. Hearing Required if Fee Request Filed as Claim

Fee requests should be filed as applications for payment of fees or for reimbursement of fees (if paid already by the representative) and not as claims against the estate. If the representative chooses to disregard the Court's policy and file the fee application as a claim, the Court will in every case require a hearing under Probate Code § 312(c) and § 799(c).

Signed this 1st day of June, 2011 and effective as of such date.

Judge Loyd Wright — Probate Court No. 1

Judge Mike Wood — Probate Court No. 2

Judge Rory Olsen — Probate Court No. 3

Judge Christine Butts — Probate Court No. 4

Appendix A
Sample Invoice #1 (Legal Related and Fiduciary Time Separated)

Law Office of Jackie Chiles
123 Main Street
Houston, Texas 77002
(713) 867-5309
(713) 867-5308 Fax

June 1, 3011

Invoice submitted to:

Estate of Jacopo Peterman, an Incapacitated Person

Legal Related Activities

Date	Time Keeper	Description	Hours	Rate	Amount
4/9/2011	JAC	Reviewed contract with nursing home.	1.0	250	250
4/14/2011	JAC	Telephone call to the Ward's CPA to ask for another draft of the Ward's income tax return, as the first draft was accidentally shredded.	.15	250	N/C
4/15/2011	JAC	Reviewed and signed Ward's income tax return.	2.25	250	562.5
4/27/2011	JAC	Reviewed listing agreement prepared with realtor.	.5	250	125
4/27/2011	JW	Telephone call to realtor to discuss changes to listing agreement. Followed up with e-mail.	.25	90	22.5
4/27/2011	JAC	Telephone call to the Court to find out whether or not the listing agreement can be signed without first obtaining Court approval.	.25	250	N/C
4/28/2011	JAC	Opened bank account for guardianship estate. [The reason it took so long to open the bank account was because the Ward's caregiver who had a durable power of attorney was at a different bank branch demanding to make a withdrawal from the Ward's existing account. The bank's legal department had to review the durable power of attorney, the Letters of Guardianship, and the Order creating the guardianship in order to establish who rightfully had authority over the Ward's account.]	2.5	250	625
4/28/2011	JAC	Obtained copies of and reviewed Ward's joint tenant with rights of survivorship agreement relating to his savings account.	.75	250	187.5
4/28/2011	JW	Researched real property records to obtain legal description of the Ward's real property in effort to begin Inventory.	1.25	90	112.5
	For professional services rendered		**6.75**		**$1885**

Non-Legal Fiduciary Activities (Personal Representative Compensation "PRC")

Date	Timekeeper	Description	Hours
4/1/2011	JAC	Visited Ward in hospital.	.75
4/1/2011	JAC	Telephone call to the Ward's daughter to let her know Ward was asking for the family photo albums.	.25
4/1/2011	JAC	Telephone call to Dr. Mactavish to schedule podiatry appointment.	.10
4/1/2011	JAC	Called hospital to let them know that Dr. Mactavish would be coming by on Tuesday to visit with and care for Ward.	.10
4/5/2011	JAC	Worked with Ward's daughter to pack and store all of the Ward's household goods and prepare the Ward's home for sale.	6.0
4/8/2011	JAC	Visited two nursing homes and interviewed some of the staff members at each facility to determine which home would be the best fit for the Ward.	2.0
4/9/2011	JAC	Reviewed Ward's mail.	.5
4/20/2011	JAC	Deposited Ward's royalty check and and IRS refund check.	.25
4/20/2011	JAC	Changed the Ward's address with the post office.	.5
4/20/2011	JAC	Visited Social Security office to change the payee.	1.0
4/20/2011	JAC	Met locksmith at the Ward's home so that the locks could be changed.	1.5
4/25/2011	JAC	Called Ward's creditors (Visa, Mastercard, Macy's, Exxon) to verify debts.	.5
4/25/2011	JAC	Met with nursing home administrators regarding paperwork necessary to enable the Ward to be admitted once the Ward is discharged from hospital.	1.0
4/26/2011	JAC	Paid invoices from AT&T, Centerpoint, and Reliant.	.25
4/26/2011	JAC	Reconciled bank statement.	.5
4/27/2011	JAC	Met with realtor to discuss sale of home and walk through home.	2.0
	Total hours in non-legal service as fiduciary		**17.2**

The Legend set out below is not required by, but is very helpful to, the Courts:

Legend

Initials	Name	Position	Experience in Probate
JAC	Jackie Chiles	Attorney	9 years
JW	John Watson	Paralegal	12 years

Appendix A
Sample Invoice #2 (Legal Related and Fiduciary Time Listed Chronologically)

Law Office of Jackie Chiles
123 Main Street
Houston, Texas 77002
(713) 867-5309
(713) 867-5308 Fax

June 1, 3011

Invoice submitted to:

Estate of Jacopo Peterman, an Incapacitated Person

Date	Time Keeper	Fiduciary (PRC) vs. Legal Service (LS)*	Description	Hours	Rate	Amount
4/1/2011	JC	PRC	Visited Ward in hospital.	.75		
4/1/2011	JC	PRC	Telephone call to the Ward's daughter to let her know Ward was asking for the family photo albums.	.25		
4/1/2011	JC	PRC	Telephone call to Dr. Mactavish to schedule podiatry appointment.	.10		
4/1/2011	JC	PRC	Called hospital to let them know that Dr. Mactavish would be coming by on Tuesday to visit with and care for Ward.	.10		
4/5/2011	JC	PRC	Worked with Ward's daughter to pack and store all of the Ward's household goods and prepare the Ward's home for sale.	6.0		
4/8/2011	JC	PRC	Visited two nursing homes and interviewed some of the staff members at each facility to determine which home would be the best fit for the Ward.	2.0		
4/9/2011	JAC	LS	Reviewed contract with nursing home.	1.0	250	250
4/9/2011	JC	PRC	Reviewed Ward's mail.	.5		
4/14/2011	JAC	LS	Telephone call to the Ward's CPA to ask for another draft of the Ward's income tax return, as the first draft was accidentally shredded.	.15	250	N/C
4/15/2011	JAC	LS	Reviewed and signed Ward's income tax return.	2.25	250	562.5
4/20/2011	JC	PRC	Changed the Ward's address with the post office.	.5		
4/20/2011	JC	PRC	Deposited Ward's royalty check and and IRS refund check.	.25		
4/20/2011	JC	PRC	Changed the Ward's address with the post office.	.5		
4/20/2011	JC	PRC	Visited Social Security office to change the payee.	1.0		
4/20/2011	JC	PRC	Met locksmith at the Ward's home so that the	1.5		

			locks could be changed.			
4/25/2011	JC	PRC	Met with nursing home administrators regarding paperwork necessary to enable the Ward to be admitted once the Ward is discharged from hospital.	1.0		
4/26/2011	JC	PRC	Paid invoices from AT&T, Centerpoint, and Reliant.	.25		
4/26/2011	JC	PRC	Reconciled bank statement.	.5		
4/27/2011	JC	PRC	Met with realtor to discuss sale of home and walk through home.	2.0		
4/27/2011	JAC	LS	Reviewed listing agreement prepared with realtor.	.5	250	125
4/27/2011	JW	LS	Telephone call to realtor to discuss changes to listing agreement. Followed up with e-mail.	.25	90	22.5
4/27/2011	JAC	LS	Telephone call to the Court to find out whether or not the listing agreement can be signed without first obtaining Court approval.	.25	250	N/C
4/28/2011	JAC	LS	Opened bank account for guardianship estate. [The reason it took so long to open the bank account was because the Ward's caregiver who had a durable power of attorney was at a different bank branch demanding to make a withdrawal from the Ward's existing account. The bank's legal department had to review the durable power of attorney, the Letters of Guardianship, and the Order creating the guardianship in order to establish who rightfully had authority over the Ward's account.]	2.5	250	625
4/28/2011	JAC	LS	Obtained copies of and reviewed Ward's joint tenant with rights of survivorship agreement relating to his savings account.	.75	250	187.5
4/28/2011	JW	LS	Researched real property records to obtain legal description of the Ward's real property in effort to begin Inventory.	1.25	90	112.5
		For legal services rendered		**$1885**		

Total Legal Services $1885
Total Fiduciary Services 17.2 hours

Legend

Initials	Name	Position	Experience in Probate	Fiduciary vs. Legal Service
JAC	Jackie Chiles	Attorney	9 years	Legal
JC	Jackie Chiles	Attorney Fiduciary	9 years	Fiduciary
JW	John Watson	Paralegal	12 years	Legal

*Indicating Fiduciary vs. Legal Service is not necessary on the time log if indicating in Legend by different initials.

End Notes

[1] The Probate Courts of Harris County have promulgated guidelines concerning attorney fees for their respective courts. These guidelines essentially mirrored one another with some exceptions. The Probate Courts have now unanimously formulated the following standards to assist attorneys with drafting fee petitions in probate and guardianship cases. By understanding how the Courts evaluate fee petitions, attorneys will be better able to comply with Court standards, reducing the need for consultations between attorneys and Court personnel regarding problems with specific petitions.

[2] The factors to be considered in determining the reasonableness of attorney's fees are set forth in Rule 1.04 of the Texas Rules of Professional Conduct. These include the time and labor involved in the case, the difficulty or novelty of the work performed, the customary hourly rate of the attorney requesting the approval of fees, and the customary hourly rates of attorneys with similar education and skills performing similar services.

[3] Attorneys should be aware, however, that the Courts may depart from these rates in certain circumstances. For example, a particularly difficult probate or guardianship matter may require special expertise that should be compensated at a rate higher than the attorney's standard rate under the Courts' guidelines. Similarly, the Courts will adjust an attorney's rate in situations in which the estate is so small that the requested fee would consume most of the estate. Moreover, the Courts will reduce an attorney's fee when the time expended by the attorney on a particular matter far exceeds the amount normally expended by attorneys on similar matters or, in those rare instances, when it comes to the Courts' attention that a lawyer is not performing up to the standards of those licensed for an equivalent length of time. Be advised that it is a particular lawyer's experience in probate and guardianship law that determines his or her rate, not the number of years that the lawyer has been licensed.

[4] In determining whether representation is "typical" or "normal," the Courts consider matters such as the type of case, the complexity or potential complexity of the case in terms of the number of parties and issues involved, and any unusual circumstances. 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, attorneys ad litem and guardians ad litem should expect to receive a fee that is less than the fee of the applicant's attorney unless special factors are present.

[5] In determining the appropriate billing rate for a paralegal, the Courts consider the following factors: 1) certification as a paralegal by the NALA, or recognition as a PACE–Registered Paralegal, or successful completion of a legal assistant program, or possession of a post-secondary degree (Associates degree or higher); 2) number of years experience in the probate, estate planning, and guardianship field; 3) certification in Estate Planning and Probate Law from the Texas Board of Legal Specialization; and 4) number of continuing legal education courses in probate, guardianship, and estate planning attended in the past three years.

[6] The Courts expect attorneys who practice in Probate Court to be familiar with general probate and guardianship matters; therefore, the Courts will not reimburse attorneys for basic legal research in these areas. The Courts consider the contract costs of computerized legal research (such as Westlaw and Lexis) to be part of an attorney's overhead, as are the costs of a hard-copy library. Consequently, the Courts do not reimburse for those costs.

[7] It is the general practice of attorneys to include in their overhead the cost of generating and reviewing billing invoices and of drafting and mailing the cover letters that accompany the invoices. Even though the Courts are cognizant that Court authority must be obtained for the approval of fee petitions in certain circumstances, the Courts believe that the estate of a decedent or ward should not be taxed with the attorney's billing costs.

[8] The Courts' staff is a vital source of information and assistance to the legal community. The Courts attempt to answer questions and to provide guidance where appropriate. However, please attempt to resolve estate issues with your client, i.e. the personal representative, to minimize or obviate unnecessary use of court personnel. While the Courts understand that problems arising in the Clerk's office may frustrate attorneys, the Courts do not believe that estates should be required to pay for the attorney's time spent addressing these problems. The Courts urge attorneys to communicate concerns directly to the Clerk's office so that systemic improvements can be made to prevent the recurrence of any such problems. Moreover, the Courts urge adherence to the common practice of attaching to all applications a copy of the proposed order and a self-addressed, stamped envelope. This step, coupled with payment of the correct filing and posting fee, if required, 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. Alternatively, the attorney can check Probate Court records on the Clerk's website at http://www.cclerk.hctx.net/applications/websearch/.