Tips from Judges to Elder and Guardianship Attorneys—Errors Seen in the Courtroom and Beyond

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I. INTRODUCTION

This paper is intended to offer helpful information to attorneys who practice in the area of guardianship law. It is not really about errors seen in the courtroom, because if it was, only one page would be dedicated to mistakes made by attorneys. The rest of the paper would focus on my myriad mistakes as a judge.

II. ATTEND TO THE BASICS

In this author's experience, at least a quarter of the applications for guardianship hit one snag or another before the hearing. Below are some helpful tips to avoid such complications and their associated delay and costs.

A. Is Your Client Disqualified?

The Texas Estates Code sets out grounds for disqualification in Sections 1104.351 through 1104.358. A person is disqualified if they:

- Are a minor child or incapacitated person;
- Are a person who, because of inexperience, lack of education, or other good reason, is incapable of properly and prudently managing and controlling the person or estate of a ward;
- Have notoriously bad conduct, as presumed by the following:
  - Any sexual offense;
  - Injury to a child or elderly or disabled person;
  - Aggravated assault;
  - Abandonment or endangering a child;
  - Terroristic threat; or
  - Family violence against the proposed ward or the proposed ward's family;
- Are a party to or is a person whose parent is a party to a lawsuit concerning the welfare of the proposed ward unless such party or person is not in conflict with the proposed ward or unless the court appoints a guardian ad litem to represent the proposed ward in such lawsuit;
- Are indebted to the proposed ward unless such debt is paid prior to appointment;
- Assert a claim adverse to the proposed ward;
- Are disqualified pursuant to a declaration of guardian signed by the proposed ward;
- Are not a resident of the State of Texas and fail to designate a resident agent; or
- Are a person found to have committed family violence and is subject to a protective order.

B. Are You Disqualified?

Pursuant to Section 1054.201 of the Estates Code, the attorney for an applicant for guardianship along with attorneys who are appointees of the court, including attorneys ad litem, guardians ad litem, and guardians must be certified by the State Bar of Texas as having successfully completed a four hour course of study in guardianship law and procedure, with one hour devoted to alternatives to guardianship and supports and services available to proposed wards. Without this certification, an attorney will not be able to proceed as the attorney for the applicant or as an appointee of the court in a guardianship proceeding. Note that an attorney for the contestant in a guardianship need not be certified unless such attorney is an appointee of the court.

May an attorney who represents a client represent another person seeking to obtain guardianship over such client if the client later becomes incapacitated? This author's answer is maybe. Rule 1.02 of the Texas Rules of Professional Conduct provides that:

> 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.

The comment to the rules explains that some situations might require a lawyer to take protective steps, such as initiating the appointment of a guardian. If the attorney plans on going a step further and representing the proposed guardian, the following situations, *inter alia*, might create an ethical quagmire and raise the specter of disqualification:

- the guardianship becomes contested;
- the attorney will likely become a witness;
- the former client is indebted to the attorney; or
- the attorney is indebted to the former client.

For the run of the mill, uncontested guardianship, it is this author's opinion that representing the proposed guardian in a guardianship proceeding against a former client whom the attorney believes to be incapacitated does not create an ethical dilemma in and of itself.

C. Review Application and Proposed Order

Before filing an application for guardianship, carefully review it with any eye toward adhering to the requirements set forth in Section 1101.001 of the Estates Code, paying particular attention to the following:

- Has your client considered lesser restrictive alternatives to guardianship? In Appendix D to Judge Steve M. King's Ad Litem Manual for 2017, which may be found on the website of Tarrant County Probate Court No. 1, Judge King sets out 56 alternatives to guardianship. Guardianship strips the ward of important rights and although often necessary, it may only be used if lesser restrictive alternatives are not feasible and do not obviate the need for guardianship.
- If the applicant is not a Texas resident, include an appointment of resident agent. Be aware that some courts may require the resident agent to file an acknowledgement or consent to appointment.
- The application for guardianship of an adult's person and/or estate should be filed in the county where the proposed ward resides or can be located or where the principal estate of the proposed ward is located. *See* TEX. EST. CODE §1023.001(a).
- The application for guardianship of a minor child should be filed in an appropriate county pursuant to Section 1023.001(b) of the Estates Code.
- The application should state whether the proposed ward's rights to vote and drive will be restricted.
- The application should list the persons required to receive service of citation pursuant to §1051.103 of the Estates Code including the proposed ward, his parents, and his spouse.
- In addition, the proposed ward's siblings and children, or, in the event no siblings or children of the proposed ward exist, relatives of the proposed ward who are related within the third degree of consanguinity must be listed in the application. *See* TEX. EST. CODE §1051.104.
- Provide the information necessary for the county clerk to run a background check on the proposed guardian. The county clerk of the county having venue of the proceeding for the appointment of a guardian shall obtain criminal history record information relating to proposed guardians that is maintained by the Department of Public Safety or the Federal Bureau of Investigation identification division. *See* TEX. EST. CODE §1104.402.

Attached as Appendix B to this outline is a proposed order appointing a guardian of the person and/or estate. Be aware that some courts require the use of form pre-approved by such court.

D. Check Citation and Posting

The citation serves the critical function of putting each interested person on notice with respect to information vital to their interests in an effort to preserve such person's right to due process. If the citation issued by the clerk contains erroneous information, due process is threatened. Depending upon the judge's tolerance for mistakes, errors in the citation might lead to unnecessary costs and delay. So, consider reviewing the citation with the following questions in mind:

- Is the name of the proposed ward the same as the name of the proposed ward listed on the application?
- Is return date on the citation before the hearing date?
- Does the name of the applicant match the name on the application?
- Does the type of guardianship listed in the citation match the type of guardianship plead for in the application (person or estate or both)?
- Does the citation served upon the proposed ward's spouse and/or parents contain a statement that if a guardianship is created for the proposed ward, the relative must elect in writing in order to receive notice about the ward under Section 1151.056 of the Estates Code? *See* TEX. EST. CODE §1051.103 (c).
- Was the citation posted properly and timely?

E. Ensure Proper Service and Notice

Service functions to confer upon the court its personal jurisdiction over the parties. Note that the manner of service to relatives listed in the application differs depending upon the relationship of such person to the proposed ward. See below:

- The proposed ward, the parents of the proposed ward, and the spouse of a proposed ward must be personally served with service of citation by sheriff or other officer. *See* TEX. EST. CODE §1051.103(a).
- A copy of the application along with a notice containing the information required in the citation must be sent registered or certified mail, return receipt requested (UPS or Fed Ex may be used as long as tracking information is available), to the adult children and adult siblings of the proposed ward and other, more distant relatives listed on the application.
- Don't forget to serve in the same manner as immediately above the purposed ward's nursing home administrator or the operator of a residential facility where the proposed ward lives, the agent under the proposed ward's power of attorney, the

person designated to serve as guardian via a written declaration or under the proposed ward's last surviving parent's will. *See* TEX. EST. CODE §1051.104.

- The notice containing the information required in the citation which is served upon the children and siblings of the proposed ward must contain a statement that if a guardianship is created for the proposed ward, the relative must elect in writing in order to receive notice about the ward under Section 1151.056 of the Estates Code. *See* TEX. EST. CODE §1051.104.
- Those entitled to service of citation, save and except the proposed ward, may waive such service pursuant to §1051.105 of the Estates Code.
- Once all interested persons have been served or have waived service, the applicant must file an Affidavit of Compliance verifying proper delivery of such notice or effective waiver of such service pursuant to Section 1051.104(b) of the Estates Code.

F. Review Physician's Certificate of Medical Exam

The Physician's Certificate of Medical Exam form which is accepted by the statutory probate judges in Texas is attached hereto as Appendix A and it conforms to Section 1101.103(b) of the Estates Code. It must accompany an application for guardianship of a proposed incapacitated adult.

It must be prepared by a physician licensed in the State of Texas. Section 571.003 of the Health and Safety Code defines physician as a person licensed to practice medicine in this state or a person authorized to perform medical acts under a physician-in-training permit at a Texas postgraduate training program approved by the Accreditation Council for Graduate Medical Education, the American Osteopathic Association, or the Texas Medical Board.

In addition, the Physician's Certificate of Medical Exam must be based on an examination by the physician performed not earlier than the 120th day before the date the application is filed. *See* TEX. EST. CODE §1101.103(1).

If the basis of the proposed ward's incapacity is intellectual disability, the applicant may present either a Physician's Certificate of Medical Exam or a letter stating that the proposed ward has been examined by a physician or psychologist licensed in the State of Texas or certified by the Department of Aging and Disability Services to perform the examination. If the latter is used, it must include written findings and recommendations which include a determination of intellectual disability. Such letter must be signed not earlier than 24 months prior to the hearing date of the guardianship. Or, if such letter was prepared earlier than 24 months prior to the hearing date, such letter may still be relied upon by the court so long as it is endorsed by a physician or psychologist not earlier than 24 months prior to the hearing date. *See* TEX. EST. CODE §1101.104.

G. Train the Proposed Guardian

Beginning June 1, 2018, a court may not appoint an individual to serve as guardian if the individual has not received the training required pursuant to Section 155.204 of the Government Code unless such training is waived by the court in accordance with Supreme Court rules adopted pursuant to Section 155.203 of the Government Code. *See* TEX. EST. CODE §1104.003.

The Office of Court Administration is working with consultants from the National Center for State Courts to develop an online training tool whereby proposed guardians may log on, obtain training, and earn a training certificate. Judges Steve King and Guy Herman along with several attorneys have formed a workgroup to provide information and make recommendations with respect to the development of the training tool. When the training tool is complete, it should look much like the training tool which is currently used in North Dakota and can be found at http://ndtraining.org/course/guardianship-training/.

H. Consider Bonding Options

Before seeking to have your client appointed as the guardian of an estate, know that the courts will require such guardian to be bonded in an amount equal to the value of the assets of the guardianship estate plus one year's worth of income generated by such assets. Many judges do not bond on the value of land. Consider whether your client can obtain a corporate surety bond. The credit history of and non-exempt assets available to your client make him more or less bondable.

To reduce the bond amount, some judges may allow your client to enter into a safekeeping agreement so that the assets held pursuant to such agreement may not be transferred without the court's order, provided such arrangement is in the best interest of the ward. *See* TEX. EST. CODE §1105.155.

In his 2017 Ad Litem Manual, Judge King points out that the Finance Code defines the types of financial institutions with whom safekeeping agreements may be executed and such institutions include:

- Banks, whether chartered under the laws of Texas, another state, the United States, or another country, including a state savings bank;
- Many savings and loan associations and credit unions whether chartered in Texas, another state, or having a federal charter; and
- Trust companies chartered under the laws of Texas or another state.

See TEX. FIN. CODE §201.101. So, unless a brokerage company is also a trust company, it will not qualify as a type of financial institution able to enter into a safekeeping agreement.

III. AVOID INTERFERING IN A GUARDIANSHIP PROCEEDING WHEN YOUR CLIENT HAS CLAIMS OR INTERESTS ADVERSE TO THE PROPOSED WARD

Sometimes, parties in a guardianship proceeding lack standing. A person who has an interest that is adverse to a proposed ward or incapacitated person may not: 1) file an application to create a guardianship; 2) contest the creation of guardianship; 3) contest the appointment of a person as guardian; or 4) contest the application for complete restoration of the ward's capacity or modification of the ward's guardianship. *See* TEX. EST. CODE §1055.001.

A. Standing vs. Disqualification

The standard for determining a person's standing to file a guardianship application under §1055.001(b)(1) of the Estates Code is distinct from the standard for determining whether a person is disqualified from being appointed as guardian under §1104.354 of the Estates Code which relates to conflicts of interest. "A good example of these differences arises in regard to the issue of debt. A person who is indebted to the proposed ward is disqualified from serving as guardian unless the debt is paid before the appointment; however, being indebted to the proposed ward does not automatically deprive a person of standing to apply for a guardianship." *In re Guardianship of Gilmer*, 2015 WL 3616071 (Tex. App.—San Antonio 2015, no pet.). *See also In re Guardianship of Miller*, 299 S.W.3d 179, 188–89 (Tex. App.—Dallas 2009, no pet.). To be clear, if a person is indebted to a proposed ward, he may not serve as guardian unless the debt is repaid. However, such person may still have standing to seek a guardianship and the appointment of another to serve or file a contest.

B. What is an Adverse Interest?

What constitutes an interest adverse to that of a proposed ward or incapacitated person? Not surprisingly, Texas courts find that plaintiffs prosecuting claims against a proposed ward lack standing to oppose the creation of a guardianship, even when it interferes with the plaintiff's ability to depose the proposed ward. *See Allison v. Walvoord*, 819 S.W.2d 624 (Tex. App.—El Paso 1991, orig. proceeding). Similarly, courts have held that a person who is suing a proposed ward or an incapacitated person has an interest adverse to the proposed ward or incapacitated person. *See In re Guardianship of Valdez*, 2008 WL 2332006 (Tex.App.—San Antonio June 4, 2008, pet. denied).

Further, when an applicant for guardianship is the spouse of the proposed ward and such applicant takes actions which conflict with the terms of a premarital agreement, such spouse lacks standing to pursue guardianship as such spouse has an interest adverse to the proposed ward. *See Benavides, infra*. However, the fact that the adult children of a proposed ward sought guardianship during the pendency of divorce proceedings between the children's father and the proposed ward did not constitute an interest adverse to the proposed ward on the part of the children. *See Gilmer, supra*.

The courts in *Allison, Valdez*, and *Benavides* found that litigants in a guardianship lacked standing because they advocated for a position that threatened the estate of the proposed ward. Finding adverse interest in those situations seems straight forward. But, what if a litigant in a guardianship advocates for a position that might harm the physical or emotional well-being of the proposed ward? Conflicts of this type arise regularly in contested guardianships. For example, it seems that a child married to a spouse having a history of domestic violence and living with an incapacitated parent in such parent's home might have interests adverse to such incapacitated parent and such child might lack standing to pursue a guardianship over such incapacitated parent.

C. Challenge to Standing via Motion in Limine

If the application of a person having an interest adverse to a proposed ward initiates or interferes with a guardianship proceeding for such proposed ward, the standing of such person may be challenged via a motion in limine. *See* TEX. EST. CODE §1055.001.

Challenging the standing of a party may be done at any time during the proceeding, as it relates to jurisdiction. Standing, which focuses on who may bring a lawsuit, is a prerequisite to subject matter jurisdiction and is essential to a court's power to decide a case. *See Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 502 (Tex. 2010). Further, whether a person has standing to

file an application to create a guardianship is a question of law not of fact. *In re Guardianship of Benavides*, 2014 WL 667525, at 1 (Tex. App.—San Antonio 2014, pet. denied).

D. Who Must Challenge Standing?

It is the duty of the attorney ad litem, and if appointed, the guardian ad litem, in a guardianship matter to determine whether the applicant has standing to pursue guardianship, and if the case is contested, whether the contestant has standing to pursue the contest. A party's standing confers subject matter jurisdiction on the court. Without it, the court lacks jurisdiction to hear the case.

IV. REIN IN THE RUNAWAY AD LITEM

A. Proper Role of Attorney Ad Litem

In a proceeding for the appointment of a guardian, the court shall appoint an attorney ad litem to represent the proposed ward's interests (or wishes). See TEX. EST. CODE § 1054.001. Unless the court determines that the continued appointment of an attorney ad litem is in the ward's best interests, the attorney's term of appointment expires, without a court order, on the date the court appoints a guardian or denies the application for guardianship. *See* TEX. EST. CODE § 1054.002.

An attorney ad litem is an attorney appointed by the court to represent and advocate on behalf of the proposed ward, an incapacitated person or person who has a legal disability, an unborn or unascertainable person, a nonresident, or unknown or potential heir in a guardianship proceeding. *See* TEX. EST. CODE §§ 1002.002, 1054.007. The duties of the attorney ad litem include meeting with the proposed ward within a reasonable time before the hearing to establish guardianship and discussing with the proposed ward, to the extent possible, the following:

- the law and facts of the case;
- the proposed ward's legal options regarding disposition of the case;
- the grounds on which guardianship is sought; and
- whether alternatives to guardianship would meet the needs of the proposed ward and avoid the need for the appointment of a guardian.

In addition, before the hearing, the attorney ad litem shall review:

- the application for guardianship;
- certificates of current physical, medical, and intellectual examinations; and
- all of the proposed ward's relevant medical, psychological, and intellectual testing records.

Finally, before the hearing, the attorney ad litem must discuss with the proposed ward the attorney ad litem's opinion regarding:

- whether a guardianship is necessary for the proposed ward; and
- if a guardianship is necessary, the specific powers or duties of the guardian that should be limited if the proposed ward receives supports and services.

In carrying out his duties, the attorney may have access to all of the proposed ward's relevant medical, psychological, and intellectual testing records. *See* TEX. EST. CODE § 1054.003.

A court appointed attorney and the attorney representing an applicant seeking guardianship must be certified by the State Bar of Texas as having completed a course of study in guardianship law and procedure. *See* TEX. EST. CODE § 1054.201. The course of study in guardianship and procedure requires four hours of credit, including one hour on alternatives to guardianship and supports and services available to proposed wards. TEX. EST. CODE § 1054.201.

Though the applicant's attorney and the attorney ad litem must hold guardianship certification, other attorneys who represent the interests of the ward in concomitant matters need not carry such certification. *See Guardianship of Glasser*, 279 S.W.3d 369 (Tex. App.—San Antonio 2009, no writ) (*holding* that when the guardianship involved complex litigation and the probate court authorized the retention of litigation counsel, such counsel was not required to hold guardianship certification).

B. Proper Role of Guardian Ad Litem

1. General Duties.

In accepting an appointment, a guardian ad litem assumes the dual responsibility of protecting the [child's, incapacitated person's, or proposed ward's] interests and acting as an officer of the court. *See Am. Gen. Fire & Cas. Co. v. Vandewater*, 907 S.W.2d 491, 493 (Tex. 1995).

2. Typical Situations Requiring Appointment of Guardian Ad Litem.

Judge Steve King, in his authoritative and informative 2017 Ad Litem Manual, which has been referred to previously in this ouline, sets out what must be every situation where a judge may or must appoint a guardian ad litem. Listing every scenario where a guardian ad litem may or must be appointed goes

beyond the scope of this outline, but in this author's experience, the following four proceedings most often give rise to the appointment of a guardian ad litem.

a. Appointment of Guardian or Modification of Guardianship.

In guardianship, a guardian ad litem is appointed to represent the best interests of an incapacitated person. *See* TEX. EST. CODE §1002.013. While the appointment of an attorney ad litem in guardianship is mandatory, the appointment of a guardian ad litem is often at the discretion of the court. *See* TEX. EST. CODE §1054.051.

Appointing a guardian ad litem can increase the cost of the proceeding considerably. Consequently, judges generally make such appointments in limited circumstances, for example when: 1) the guardianship is contested; 2) the applicant for guardianship is a party to a lawsuit concerning or affecting the welfare of the proposed ward; 3) a potential conflict of interest exists between the applicant for guardianship and the proposed ward and requires evaluation. *See* TEX. EST. CODE §1104.354.

In addition, in cases where original probate jurisdiction rests with a county court or county court-at-law and the court has probable cause to believe that a person domiciled or found in the county where the court is located is an incapacitated person, the judges appoint a guardian ad litem to investigate the person's condition and circumstances to determine whether such person is in likely incapacitated and whether a guardianship is necessary. *See* TEX. EST. CODE §1102.001.

All statutory probate courts in Texas employ a court investigator and normally the investigator is appointed by such courts to investigate the potential need for a guardianship. Though nothing in §1102.001 of the Estates Code prohibits a statutory probate court from appointing a guardian ad litem to serve the function of a court investigator, it is not the regular practice of most statutory probate courts to make such appointments.

The Estates Code does not require the appointment of a guardian ad litem in actions to modify or terminate a guardianship, as the Estates Code allows the court investigator to investigate the ward's circumstances, pursuant to Section 1202.054(b). However, seeking the appointment of a guardian ad litem may enable the court to make more reasoned decisions about modifications. Consider the following:

> **Example:** An incapacitated but high functioning person seeks to have his right to drive restored and writes a letter to the court seeking restoration of his right to drive per Section 1202.054 of the Estates Code. The court dispatches an investigator who, after investigation, writes a report as to the ward's circumstances, whether the ward remains incapacitated, and whether modification of the guardianship is necessary. If the investigator's report does not raise red flags with respect to the modification, a hearing is held without the appointment of a guardian ad litem. At the hearing, the attorneys present include the attorney ad litem and perhaps the attorney for the guardian. If the guardian has no objection to the modification and the evidence supports the modification, the guardianship is modified to restore the ward's right to drive.

All seems well and good with the result in this example except there is no attorney present at the hearing representing the best interests of the ward, challenging the reliability and sufficiency of the evidence, and questioning the appropriateness of the modification. As a consequence, as long as the evidence, taken at face value, supports the modification, it will likely be granted.

In this author's opinion, Section 1202.054 of the Estates Code should be changed to require courts considering a modification or termination of a guardianship to appoint a guardian ad litem to represent the best interests of the ward so as to protect the truly incapacitated from modifications and restorations which might put the safety and security of the ward and public at risk.

b. Trust Construction or Modification Actions

If the court determines that the interests of a minor, incapacitated, unborn, or unascertained person, or a person whose identity or address is unknown, is inadequately represented, then at any point during the proceeding, the court may appoint a guardian ad litem or attorney ad litem to represent such interests. TEX. PROP. CODE §115.014. Interestingly, in trust construction or modification actions, virtual representation often obviates the need for the appointment of an attorney or guardian ad litem. When a beneficiary has not been specifically named and there is no conflict of interest and no guardian of the estate or guardian ad litem has been appointed, a parent may represent a minor child as natural guardian or as next friend. Further, unborn or unascertained persons who are not otherwise represented are bound by an order to the extent their interest is adequately represented by another party having a substantially identical interest in the proceeding. *See* TEX. PROP. CODE §115.013.

c. Sale of Minor's Interest in Property.

When a minor without a parent or managing conservator has an interest in real property and such interest is valued at less than $100,000, the court may appoint an attorney ad litem or guardian ad litem to act

on the minor's behalf for the limited purpose of applying for an order to sell the minor's interest in property. *See* TEX. EST. CODE §1351.001.

d. Personal Injury Settlement.

Guardians ad litem are often appointed in the context of personal injury suits to represent the best interests of and serve as the personal representatives of minor children, incapacitated persons, and proposed wards. It is the duty of the guardian ad litem to report to the court and evaluate proposed settlements from the perspective of the person to whom they owe a duty considering: a) the damages suffered; b) the adequacy of the settlement; c) the manner in which settlement proceeds are distributed; and d) the attorney fees charged by the plaintiff's attorney. *See Byrd v. Woodruff*, 891 S.W.2d 689, 707 (Tex. App.—Dallas 1994, writ denied).

C. Runaway Ad Litems Take Many Forms

1. The Crazy Train.

Some ad litems pursue senseless litigation or undue research. Overzealous advocacy occurs most often in probate court within the context of heirship or guardianship proceedings.

In contested guardianships, knowing when to make war and when to make peace proves valuable. Internecine struggles abound in guardianship. Often, longstanding conflicts among children kept at bay by strong parental influences erupt when the capacity of a parent erodes. Irrespective of whether the appointee represents the best interests or the wishes of the proposed ward, carefully preserving the remainder of such person's capacity, health, relationships, and wealth is important but can also be a balancing act. Naturally, a flurry of discovery demands, capacity assessments, reports, and records can obscure the vision of the keenest eyes, but ad litems must be mindful of their duties and work to efficiently guide the case to just resolution.

In the words of Abraham Lincoln, "Discourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker the lawyer has superior opportunity to be a good man. There will still be business enough." The ad litem should not hop on the crazy train, but if the ad litem finds himself on the crazy train, he should check to make sure he is not the engineer. However, bringing a case to just resolution sometimes requires war, or the lawyer's version of war, going to trial. Even Aristotle acknowledged, "We make war that we may live in peace." Short of war, consider the options discussed later in this outline.

2. The Light Rail

Some ad litems sit on their hands as parties pursue unnecessary litigation and run up the costs of the proceeding. The passengers on a runaway train do not mind the ride when they are sitting in the dining car of the Orient Express. So, when the proposed ward will likely pay the freight and the court faces awarding fees out of the assets of the proposed ward's estate to the applicant, contestant, cross applicants, attorney ad litem, guardian ad litem, temporary guardian, mediator, and capacity assessor, it often falls upon the attorney or guardian ad litem to bring the mounting expenses to the attention of the court.

Often, litigants' demands become more reasonable when pursuing the litigation impacts their own wallet. For that reason, in 2011, the Texas Legislature equipped ad litems and others interested in a guardianship with the power to petition the court for an order requiring the person filing the application, complaint, or opposition to provide security for the probable costs of the proceeding. *See* TEX. EST. CODE §1053.052.

As an advocate of the proposed ward or for the best interests of the proposed ward, the ad litem should work to preserve the assets of the proposed ward and make efforts to contain any costs of litigation that diminish the estate of the proposed ward, especially when those assets will be needed in the future for the care of the proposed ward.

3. Off the Rails

Some appointees venture beyond the scope of their duties. In *Goodyear Dunlop Tires N. Am., Ltd. v. Gamez*, defendant Goodyear appealed a portion of the trial court's judgment awarding $400,000 in fees to six guardians ad litem. This products liability case arose when a high occupancy van rolled over in Arizona with sixteen migrant farm workers on board. Six of the passengers died as a result.

Six guardians ad litem were appointed to represent a total of twenty-two minor plaintiffs, with five guardians ad litem being appointed within one month of trial. Shortly before trial, the minor plaintiffs arrived at a settlement, but Goodyear objected to the requested fee of the guardians ad litem on the grounds that such fees were excessive. Over the objections of Goodyear, the trial court entered a final judgment approving the settlement, dismissing all claims against Goodyear, and awarding total fees of almost $400,000 to the guardians ad litem. *See Goodyear Dunlop Tires N. Am., Ltd. v. Gamez*, 151 .S.W.3d 574 (Tex. App.—San Antonio 2004, no pet.).

Generally, guardians ad litem must represent the best interests of their client while also serving as an officer of the court. "The ad litem is required to participate in the case to the extent necessary to adequately protect the interests of his ward." *Id.* at 580 (*quoting Am. Gen. Fire & Cas. Co. v. Vandewater*, 907 S.W.2d 491, 493 (Tex. 1995)). What is more, the role of the guardian ad litem ends when the conflict giving rise to such appointment ends; and work performed outside the scope of his duties or after the conflict has been resolved will not be compensated. *See Brownsville-Valley Regional Medical Center v. Gamez*, 894 S.W.2d 753, 755 (Tex. 1995).

However, the trial court shall award the guardian ad litem a reasonable fee to be taxed as costs of court and the appropriateness of such fee is determined by factors set out in Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct such as time and labor required and the novelty or difficulty of the legal questions involved. Additionally, the appellate court will not set aside an award of guardian ad litem fees without a showing of abuse of discretion. *Goodyear* at 580 (*quoting Boncquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998)).

Goodyear complained that, among other things, the guardians ad litem charged for activities outside the scope of their appointment when they prepared for, attended, and reviewed depositions not relevant to the minors to whom the guardians ad litem owed a duty. In addition, the guardians ad litem reviewed liability-related pleadings, discovery motions, and deposition notices.

The appeals court in *Goodyear* ultimately found that the guardians ad litem acted beyond the scope of appointment and unreasonably when they attended or reviewed every deposition, motion, and pleading without regard to its relevance to the minor child to whom they owed a duty. *See id.* at 584.

4. The Gravy Train

Some appointees charge too much. Recently, an attorney ad litem appointed to represent an indigent proposed ward in a guardianship proceeding filed by the Harris County Guardianship Program called the court coordinator to report that she had already invested one hundred hours in the case and she wanted to know how to get paid. Naturally, spending an inordinate amount of time representing a proposed ward when his doctor found him to be incapacitated and the court investigator found him to be clearly in need of a guardian seems wasteful, especially considering the fact that the appointee failed to set a status conference with or seek direction from the court before racking up $12,000 in fees. Sadly, the overzealous attorney ad litem will not be paid by the county more than the customary fee for such case.

Many factors play into determining whether appointee's fees are reasonable. Public perceptions of attorney fees, claims of cronyism among judges and attorneys, and pressure from lawmakers cause probate judges to scrutinize the fees charged by appointees of the court and increase the transparency with which appointments are made and fees awarded. In reviewing fees, the courts look to several sources for guidance, including: reports detailing customary fees; fee standards established by the court; and the standards established by the Texas Rules of Professional Conduct.

Importantly, Rule 173 of the Texas Rules of Civil Procedure authorizes the court to award an ad litem a reasonable fee for his or her services. The amount of compensation awarded to the ad litem lies within the sound discretion of the court and a reviewing court will not overturn a fee award absent evidence showing a clear abuse of discretion. *Simon v. York Crane & Rigging Co.*, 739 S.W.2d 793, 794 (Tex.1987). However, if there is no evidence or insufficient evidence to support the award, there has been an abuse of discretion in making the award. *Brown & Root U.S.A., Inc. v. Trevino*, 802 S.W.2d 13, 16 (Tex.App.—El Paso 1990, no writ).

5. The Ghost Train

Some attorneys ad litem fail to communicate. Silence is golden except when it is from an ad litem, and then sometimes it is yellow. Recognize that people fail to communicate for myriad reasons including lack of confidence, inexperience, unavailability, and illness; but if an appointee shirks their duties and will not respond after numerous attempts at communication, proper advocacy may require seeking removal of the ad litem. Sometimes a letter to the court, copying all counsel, advising the judge that an ad litem has "disappeared" may spur him or her to contact you immediately.

6. The Train Wreck

Attorneys ad litem become Train Wrecks when they frustrate the efficient resolution of a case out of neglect, inexperience, or incompetence. Do not despair if the court appoints a Train Wreck, as a Train Wreck can often be salvaged and remade into the Little Engine that Could, given time, tutoring, and encouragement. Craig Hopper, in his outline, "Whack-A-Mole: Handling Problem Litigants and the Occasional Overzealous Ad Litem," suggests the following options

when dealing with the inexperienced ad litem: 1) share written resources with the appointee; 2) request the appointment of a guardian ad litem to help guide the appointee; or 3) set the matter for trial to enable swift resolution. If these options are inappropriate or fail to get results, other options are set out below.

D. Tools to Stop a Runaway Ad Litem

1. Ride the Right-Hand Side.

Maintain regular contact and be a resource to the ad litem. An old proverb teaches, "If you light a lamp for someone, it will brighten your own path." In the context of guardianship, closely working with and helping the ad litem enables the matter to be resolved properly and efficiently. Promptly and thoroughly responding to requests from the ad litem, facilitating the availability of people whom the ad litem wishes to interview, and educating the ad litem with respect to applicable law minimizes misunderstandings and missteps along the way.

2. Stop Feeding the Firebox.

Just say "No." Don Carnes, an attorney and frequent appointee in Austin, suggests the no-nonsense approach when an ad litem makes unreasonable requests. He recommends refusing such requests. Naturally, refusing requests might lead the ad litem to double down and file a motion to compel. If the requests of the ad litem are truly unreasonable and the court agrees, this approach will likely prove instructive to the ad litem and curb future overreaching by the ad litem.

Mr. Carnes reported his encounter with an attorney ad litem in a probate matter in further explaining his "Just say 'No.'" approach. Such attorney ad litem requested that the family agree to pay both the court ordered fee and the difference between the court ordered fee and the amount the attorney ad litem bills based upon his regular rate and billing practice. Two obvious problems stand out with respect to this requset. First, an attorney requesting ad litem appointments from a judge necessarily agrees to be paid according to the court's standard fee schedule. Second, the attorney reports his fees to the court and the judge signs the fee order based upon a finding that such fees are fair, reasonable, equitable and just.

3. Visit the Roundhouse.

Request a status conference with the court. Most statutory probate courts offer litigants the ability to meet with the judge or court staff to discuss cases, provided all parties are present or represented. Sometimes, the status conference takes place in the courtroom and is on the record. Most times, however, the parties prefer a more informal setting and meet in the jury room with a member of the court staff or a judge. Often, the judge or court staff point the litigants in the right direction and offer suggestions for bringing the case to efficient and just resolution.

The court might also help the parties enter into an agreed docket control order so that a trial date is set and deadlines for discovery, designation of experts, and mediation, among other things, may be established. Importantly, the parties will likely leave a status conference with a date before which mediation must take place. The vast majority of contested probate and guardianship matters settle once the parties engage in formal or informal mediation.

Finally, bringing to the attention of the court an overzealous ad litem during a status conference enables the court to gently remind the ad litem of his duties and point out that the ad litem should seek guidance from the court when he is in doubt as to the scope of his appointment or extent of his duties. Typically, when an ad litem questions the scope of their appointment, it is done via a formal motion for instruction. The court in *Jocson v. Crabb,* 133 S.W.3d 268 (Tex. 2004) suggests that it is wise for parties to seek direction from the court when they disagree about the role of an ad litem; but the court warns that pursuing every disagreement in this manner could be costly and disruptive. *See id*.

4. Call in a Stockholder.

Request the appointment of a guardian ad litem. When it appears that an attorney ad litem must advocate an insupportable position on behalf of a proposed ward, the applicant for guardianship might consider requesting that the court appoint a disinterested third party to serve as guardian ad litem to advocate for the best interest of the proposed ward. The judge may appoint a guardian ad litem to represent the best interests of an incapacitated person during a guardianship proceeding. TEX. EST. CODE §1054.051. In the words of Craig Hopper, in his outline entitled "Whack-A-Mole: Handling Problem Litigants and the Occasional Overzealous Ad Litem" and discussed above, "Requesting the appointment of a guardian ad litem can serve to bring sense back into a guardianship proceeding. If some outlaw party or an overzealous attorney ad litem is unnecessarily increasing the financial and emotional costs of the guardianship, a guardian ad litem can push everyone to become more realistic in the continued litigation."

5. Rattle Her Hocks.

Request the appointment of a temporary guardian. Sometimes, an attorney ad litem or guardian ad litem, perhaps facing pressure from the proposed ward or the family of the proposed ward, drags their feet and fails to allow the case to progress efficiently. Some amount of stalling can be tolerated unless it is at the peril of the proposed ward's person or property. When avoiding a determination of incapacity or imposition of guardianship threatens to place the proposed ward or the proposed ward's estate in imminent danger, a temporary guardian or temporary guardian pending contest may be necessary.

If substantial evidence supports a finding that the proposed ward is incapacitated and if probable cause exists that the immediate appointment of a temporary guardian is necessary to protect the proposed ward's person, estate, or both, from imminent danger, the court shall appoint a temporary guardian with powers and duties necessary to protect the proposed ward. *See* TEX. EST. CODE §§1251.001, 1251.101.

Importantly, an application for temporary guardianship is not required to be accompanied by a physician's certificate of medical exam indicating incapacity. *See Overman v. Baker*, 26 S.W.3d 506 (Tex. App.—Tyler 2000, no writ). A hearing on such application must take place within ten days after the date the application was filed unless the proposed ward's attorney consents to postponing the hearing; but, in any event, the hearing must be held within thirty days after the date the application is filed. *See* TEX. EST. CODE §1251.006. A party contesting the appointment of a temporary guardian has no right to a jury trial. *See In re Kuhler*, 60 S.W.3d 381 (Tex. App.—Amarillo 2001, no writ).

Naturally, the appointment of a temporary guardian or temporary guardian pending contest increases the costs of the guardianship in terms of attorney fees, bond premiums, and costs associated with preparing accountings. In addition, the appointment of a temporary guardian is, as the title of the position indicates, temporary. The temporary guardianship may not remain in effect for more than sixty days. *See* TEX. EST. CODE §1251.151.

While a temporary guardian pending contest appointed before January 1, 2014 could serve without interruption until the dismissal of the application or appointment and subsequent qualification of a permanent guardian, temporary guardians pending contest appointed after such date may serve until the nine-month anniversary of the date the temporary guardian qualified unless the term is extended by court order issued after a motion to extend the term is filed and heard. *See* TEX. EST. CODE §1251.052.

Finally, many statutory probate courts hesitate to appoint a temporary guardian, especially if the court's own appointee contributes to the delay which placed the proposed ward in danger. The court will likely encourage the parties to proceed immediately on the application for the appointment of a permanent guardian instead.

6. Pull the Pin.

Seek the removal of the ad litem. The Estates Code is largely silent as to the removal of an ad litem, but case law makes a distinction between the removal of an attorney ad litem as compared to the removal of a guardian ad litem.

a. Removal of Guardian Ad Litem

The guardian ad litem is an officer of the court and appointed to represent the best interest of the proposed ward. They participate as personal representative of the proposed ward, not as the proposed ward's attorney. The decision to appoint or to replace a guardian ad litem is within the discretion of the trial court, and that decision should be based upon the best interests of the proposed ward, not the interests of the applicant or attorney. *See Coleson v. Bethan*, 931 S.W.2d 706 (Tex. App.—Fort Worth 1996). *See also Urbish v. 127th Judicial Dist. Court*, 708 S.W.2d 429, 431–32 (Tex.1986).

b. Removal of Attorney Ad Litem

Since the attorney ad litem owes the same duty to his client as the attorneys representing applicants seeking to become guardian, allowing unrestrained discretion to remove an attorney ad litem once the court has made the appointment is counterproductive. However, probate courts must protect the interests of proposed wards and must not permit delays injurious to their estates. "So, in the context of such representation, [the court's] hands cannot be tied if it, or some opposing party, perceives a true need for the removal of an attorney ad litem." *Coleson, supra* at 713.

The court in *Coleson* discusses three methods to remove an attorney ad litem and only two of those three methods are proper. The *Coleson* case involved parents serving as the co-guardians of the estate for each of their minor children. Though they were appointed in May of 1992, they failed to timely obtain a bond. So, the attorney ad litem, in representing the minor children, filed a motion to remove the parents as co-guardians of

the estate in October of 1992. The parents were removed in January of 1993. Shortly after being removed, the parents filed the required bond and the court reversed itself and reappointed the parents as co-guardians of the estate. The attorney ad litem continued on the case, bringing it to the attention of the minor children and the court when inventories were late, accountings were incomplete, and expenditures were improperly made.

In September of 1994, the attorney for the parents and co-guardians motioned for removal of the attorney ad litem, but the court denied the motion. Then, in February of the following year, the attorney for the co-guardians writes in his timesheets (that must be filed of record and reviewed and approved by the court if such fees are to be paid out of the guardianship estates) that he made a trip to the courthouse "to ask judge for in chambers meeting with ad litem. Telephone conference with client regarding judge's commits [sic]. Call to judge that client wanted new ad litem." *Id.* at 709. Two days after such entry was made, the court signed an order removing the attorney ad litem and substituting a new attorney ad litem without a hearing.

The appeals court reversed the decision of the trial court to remove the attorney ad litem, as such decision was without a hearing, not based upon substantive grounds, and apparently the result of *ex parte* communications between counsel for the co-guardians and the judge. *See id.* at 713. Perhaps nervous about tying the hands of courts with respect to unruly attorneys ad litem, the appeals court in *Coleson* went on to clarify that the attorney ad litem appointed by the trial court could be removed by the trial court provided that proper procedures had been followed and sufficient justification for the removal or replacement exists. *See id*. Such actions by the trial court should be reviewed under the abuse of discretion standard because the ultimate responsibility for the protection of the ward lies with the court. *Id.* at 714.

Two proper procedures for removal are discussed by the court in *Coleson*, including a motion requiring the attorney ad litem to show authority pursuant to Rule 12 of the Texas Rules of Civil Procedure and seeking a temporary restraining order followed up by a permanent injunction pursuant to Rule 680 of the Texas Rules of Civil Procedure. *See id* at 712. The appeals court also discussed the third method or the method used in *Coleson v. Bethan*, whispering in the judge's ear so as to coax a removal order without a hearing. Naturally, this method was frowned upon and went unendorsed by the court of appeals.

Though the appeals court in *Coleson* identifies two valid procedures for the removal of an attorney ad litem, the motion to show authority and motion for temporary restraining order, such procedures can be time consuming and costly. The attorney ad litem in *Coleson* actively oversaw the administration of the guardianship estate and drew the ire of the co-guardians and the attorney for the co-guardians when he rightfully pointed out deficiencies in the performance of the co-guardians. It should be difficult to remove an attorney ad litem who dutifully fulfills his responsibility to his clients even when it irritates others.

What if an attorney ad litem fails to dutifully represent his client, is overzealous in such representation, or overcharges and nothing short of removal will enable the case to progress efficiently? Must one resort to a motion to show authority or seek an injunction? The appeals court in *Coleson* seems to acknowledge that trial courts have broad discretion in removing an attorney ad litem, but removals require three elements: 1) proper procedures; 2) substantive grounds; and 3) principled reason justifying removal. *See id.* at 713-714. Query whether a motion to remove the attorney ad litem followed with notice and a hearing constitutes a "proper procedure."

What if an attorney ad litem is a Ghost Train and never connected with the parties, never filed an initial pleading, failed to return phone calls and correspondence from the court and parties, and seemed to have fallen off the face of the earth? What if the attorney ad litem was appointed on a simple guardianship and resources were scarce? In the past, this author took matters into her own hands and simply discharged the Ghost Train and appointed The Little Engine that Could. In the future, however, this author will motion, *sua sponte*, that such attorney ad litem appear and show cause why he should not be removed before such removal.

7. Make 'Em Pay Freight

Set out below are tools ad litems might use to protect the interests of a proposed ward. The ad litem who fiddles in the tent while Rome burns, or the Light Rail discussed above, fails to guard the interests he was appointed to protect. So often, in the context of contested guardianships, the timid, inexperienced, or inattentive ad litem allows contestants to pursue litigation, lose sight of the ward's interests, and squander the assets of the proposed ward. In such cases, the ad litem should act with boldness and consider taking the following actions.

a. Seek Security for Costs in Guardianship

A court that creates a guardianship, on request of a person who filed an application to be appointed guardian of the proposed ward, an application for the appointment of another suitable person as guardian of the proposed ward, or an application for the creation of a management trust, may authorize the payment of reasonable and necessary attorney's fees, as determined by the court, in amounts the court considers equitable and just, to an attorney who represents the person who filed the application, regardless of whether the person is appointed the ward's guardian or whether a management trust is created, from available funds of the ward's estate or management trust, if created. *See* TEX. EST. CODE §1155.054. In contested guardianships, often the court awards attorney fees to each applicant, the attorney ad litem, and, if appointed, a guardian ad litem. The fees for the attorney ad litem and the guardian ad litem are taxed as costs of the proceeding.

When the ward likely foots the bill in a contested guardianship, contestants, unbridled with the financial responsibility for the litigation, sometimes allow it to persist beyond what would otherwise be considered a reasonable point. One way to insure that the contestants have skin in the game is to seek security for costs. At any time before the trial of an application, complaint, or opposition in a guardianship proceeding, an officer of the court or a person interested in the guardianship or in the welfare of the ward may, by written motion, obtain from the court an order requiring the person who filed the application, complaint, or opposition to provide security for the probable costs of the proceeding. *See* TEX. EST. CODE §1053.051.

Rule 143 of the Texas Rules of Civil Procedure sets out the consequences of noncompliance when a party ordered to give security for costs fails to do so. Rule 143 provides as follows, "A party seeking affirmative relief may be ruled to give security for costs at any time before final judgment, upon motion of any party, or any officer of the court interested in the costs accruing in such suit, or by the court upon its own motion. If such rule be entered against any party and he fails to comply therewith on or before twenty (20) days after notice that such rule has been entered, the claim for affirmative relief of such party shall be dismissed." TEX. R. CIV. P. 143.

Sadly, ordering a party to deposit security for costs had limited use for several years as the costs of the guardianship were taxed to the guardianship estate or the county treasury unless the court denied an application for the appointment of a guardian based upon the recommendation of the court investigator. *See* TEX. PROB. CODE §669 (West 2013). Only in this limited circumstance was an applicant for guardianship required to pay for the cost of the proceeding.

Consequently, even if the court ordered a party to deposit with the clerk security for costs, the court was not authorized to tax court costs against such security unless the court denied the application for appointment of a guardian based upon the recommendation of the court investigator. *See In re Mitchell*, 342 S.W.3d 186 (Tex. App.—El Paso 2011, no writ). In other words, prior to the legislative changes of 2013, even if a party was ordered to deposit security for costs in a contested guardianship, such security would likely not be used to pay the costs of the guardianship, as the court in almost every case was only authorized to tax the costs of the guardianship against the estate of the ward or the county treasury.

In 2013, the Texas Legislature amended §1155.151 of the Estates Code (formerly §666 of the Texas Probate Code) to add a provision enabling a court finding that a party acted in bad faith or without just cause to order such party to pay all or part of the costs of the proceeding. If such party was required to provide security for costs, the costs of the proceeding ordered to be paid by such party would be taxed first against the security deposited with the clerk by such party. *See* TEX. EST. CODE §1155.151. In a guardianship proceeding, the following expenses represent "costs of the proceeding": a) guardian ad litem fees; b) attorney ad litem fees; c) court visitor expenses; d) fees of mental health professionals; and e) fees charged by interpreters. *See id.*

In sum, the recent legislative changes to §1155.151 of the Estates Code augmented the court's authority to order a party to deposit security for the probable costs of the guardianship proceeding pursuant to §1053.051 of the Estates Code. So, in the context of contested guardianships, if the court finds that a party is prosecuting or objecting to an application in bad faith or without just cause, the court may order such party to place in the registry of the court security for costs. Ultimately, the costs of the proceeding may be taxed against such funds placed in the registry of the court.

b. Seek Applicant's Attorney Fees in Guardianship

The Texas Legislature amended §1155.054 of the Estates Code (formerly §665B of the Texas Probate Code) in 2013 to authorize the court to require a party whom the court found to be acting in bad faith or without just cause in prosecuting or objecting to an application in the proceeding to reimburse the ward's

estate for all or part of the attorney's fees awarded by the court. *See* TEX. EST. CODE §1155.054. The amendment to §1155.054 relating to attorney fees parallels the amendment to §1155.151 relating to costs of the proceeding and ups the ante for parties seeking to pursue applications or objections in bad faith or without just cause.

Both §§1155.054(d) and 1155.151(c) of the Estates Code require the court to make a finding that a party acted in bad faith or without just cause in a guardianship proceeding. This begs the question, what constitutes bad faith? Bad judgment or negligence alone does not constitute bad faith; rather, bad faith is the "conscious doing of a wrong for dishonest, discriminatory, or malicious purpose." *Elkins v. Stotts–Brown*, 103 S.W.3d 664, 669 (Tex. App.—Dallas 2003, no pet.). Improper motive is an essential element of bad faith. *Id*. However, direct evidence of a sanctioned person's subjective intent is not required and may be shown by circumstantial evidence. *See Owen v. Jim Allee Imports, Inc.,* 380 S.W.3d 276, 289–90 (Tex. App.—Dallas 2012, no pet.).

Interestingly, the statutory probate court in Collin County recently found the mother of a disabled adult child who had a longstanding, acrimonious relationship with the child's father and guardian acted in bad faith and without just cause when she prosecuted a series of motions seeking to modify the guardianship and remove the guardian. *See In re Guardianship of Laroe*, 2017 WL 511156 (Tex. App.—Dallas 2017). Perhaps also irritated by the fact that the mother sent emails to the facility where the father sought to place his incapacitated adult daughter warning the facility of the daughter's difficult behavior, the probate court awarded costs pursuant to §1155.151 of the Estates Code and ordered the mother to pay $3,342.50, which equaled half of the outstanding attorney ad litem fees. *See id.* The appellate court dubbed the order requiring the mother to pay costs a "sanction" and found it to be an abuse of discretion, as the appellate court found no evidence rebutting the strong presumption that the mother filed her motions in good faith. *See id* at 21.

8. Motion to Show Authority

Sometimes, the proposed ward will hire private counsel, either before or after the attorney ad litem has been appointed by the court. If the private counsel is not certified pursuant to §1054.201 of the Estates Code, he is not qualified to represent the proposed ward. If the private attorney hustles and obtains the necessary educational credentials required by §1054.201 of the Estates Code (4 hours of credit that may be obtained by webcast through the Texas State Bar at a cost of $170), such attorney may represent the proposed ward well and enable the matter to be efficiently and peacefully brought to resolution, especially if the private attorney has earned the trust and respect of the proposed ward. The attorney ad litem, if already appointed by the court, may wish to withdraw in favor of the private attorney representing the proposed ward.

However, if the private attorney sees the case as a cash cow and becomes a Gravy Train, promising to deplete the resources of the proposed ward with his overzealous representation, a Rule 12 Motion to Show Authority might be the best tool to put the case back on track. In his outline presented to the 2014 Conferences & CLE, Disability Planning—Health Care, Elder Law, Guardianship and entitled, "Whack-a-Mole: Handling Problem Litigants and the Occasional Overzealous Ad litem," Craig Hopper offers some cautionary advice regarding who should file a Rule 12 Motion and advocate for the idea that a proposed ward lacked capacity to hire a private attorney. The attorney ad litem must adhere to ethical obligations and advocate on behalf of his client. So, the Rule 12 Motion to Show Authority would most properly be filed by a guardian ad litem or an applicant. Craig Hopper's outline also offers practical and commonsense ideas to work with private attorneys to avoid filing a Rule 12 motion.

V. ADVISE REGARDING THE DUTIES OF THE GUARDIAN OF THE PERSON

The guardian of the person is obligated to care for the ward's physical, emotional, and educational needs. Under the Estates Code, a guardian of the person with full authority has the rights and duties set out below:

- The right to have physical possession of the ward and to establish the ward's legal domicile;
- The duty to provide care, supervision, and protection for the ward;
- The duty to provide the ward with food, clothing, medical care, and shelter;
- The power to consent to medical, psychiatric, and surgical treatment other than the inpatient psychiatric commitment of the ward (including administration of psychiatric medication, obviating the need for an order to administer psychiatric medication if the ward refuses such medication);
- On application and order the power to establish a supplement needs trust;
- Sign documents to facilitate the ward's employment;

- Transport or direct transport of ward to an inpatient mental health facility for preliminary examination;
- In an emergency, place the ward in more restrictive care facility without notice to the court, the ward, and any person who has requested notice;
- Spend funds of the guardianship to care for and maintain the ward;
- File with the court annual reports as to the condition of the ward;
- Review with the ward, in a manner which is understood by the ward, the ward's Bill of Rights which is attached hereto as Appendix C.

See TEX. EST. CODE §§1151.051-1151.054.

In addition to the duties set out above, guardians of the person have relatively new obligations to notify certain family members and the court under certain circumstances. If a guardian causes the ward to be transported to an inpatient mental health facility for the purpose of obtaining court ordered mental health services, the guardian shall immediately provide written notice of such event to the court that granted the guardianship. *See* TEX. EST. CODE §1151.051 and TEX. HEALTH & SAFETY CODE §573.004.

The following persons have the right to certain information regarding the ward, so long as such persons have elected in writing to receive such notice and have not been found by a court or state agency to have abused, neglected, or exploited the ward or have not had a protective order issued against them to protect the ward:

- Spouse
- Parents
- Siblings
- Children

See TEX. EST. CODE §1151.055.

Unless the court relieves the guardian of his obligation to provide notice about a ward to a relative after a hearing on a motion and notice to such relative pursuant to Section 1151.056(e) of the Estates Code, the guardian must inform the relatives described above of the following events:

- The ward dies (must also advise as to funeral arrangements and final resting place);
- The ward is admitted to a medical facility for acute care for a period of three days or more;
- The ward's residence has changed; or
- The ward is staying at a location other than his residence for a period longer than a week.

See TEX. EST. CODE §1151.056.

In addition, for guardianships pending on or created after June 15, 2017, guardians must, as soon as possible but not later than September 1, 2019, notify the relatives identified above whose whereabouts are known or can reasonably be ascertained that they must elect in writing in order to receive notice about the ward. *See id.* This follows, because as of June 15, 2017, the citations issued pursuant to the initiation of a guardianship and served on relatives requiring service contain a statement informing such relatives that they must elect in writing to receive notice. Before June 15, 2017, the citation contained no such statement.

VI. KNOW OF PLANNING OPPORTUNITIES AND PITFALLS WHEN MANAGING THE GUARDIANSHIP ESTATE

A. Role of the Guardian of Estate

Becoming a guardian of an estate involves stepping into the shoes of another and making decisions on behalf of such other person. When the incapacitated person's estate contains assets which require time-sensitive decision making, are volatile, or seem complex, acting as the surrogate decision maker requires a higher level of expertise, added research, and far more analysis to create, prepare, and maintain the investment plan.

1. Gather and Protect Assets

Immediately after receiving letters of guardianship, the guardian of the estate must take possession of the ward's personal property, record books, title papers, and other business papers. TEX. EST. CODE §1151.152. Consider taking the following actions upon receiving Letters of Guardianship:

- Change locks on ward's residence;
- Change the ward's address to the address of the guardian of the estate;
- Contact financial institutes to notify them that the ward has a guardian of his estate and request such assets be delivered to such guardian;
- Establish financial accounts for non-qualified plans in the name of the guardianship estate using a tax identification number issued to the guardianship estate and styled as follows: "Jane Doe, Guardian of the Estate of John Doe, an Incapacitated Person";
- Collect personal and financial records;
- Verify that personal and real property of the ward is properly insured;
- Determine whether life insurance on the ward should be reinstated;
- Take action to pursue valid claims of the ward; and

- Access the ward's digital assets.

See TEX. EST. CODE §1151.101 and Chapter 2001.

2. Provide Required Notices

a. Publication of Notice

Within one month after receiving letters of guardianship, the guardian of the estate shall provide notice requiring any person who has a claim against the estate to present the claim within the period prescribed by law. This notice must be published in a newspaper printed in the county where the Letters of Guardianship were issued and sent to the comptroller by certified or registered mail if the ward remitted or should have remitted taxes administered by the comptroller. *See* TEX. EST. CODE §1153.001. Proof of such publication shall be established by filing a copy of the published notice along with a publisher's affidavit with the court in which the case is pending. *See* TEX. EST. CODE §1153.002.

b. Notice to Certain Claimants

Within four months after receiving letters of guardianship, the guardian of an estate must provide notice of the issuance of such letters to each of the ward's creditors holding a claim secured by real estate. *See* TEX. EST. CODE §1153.003. In addition, the guardian of an estate may send notice to unsecured creditors in an effort to expedite the receipt of claims, confirm the amount of such claims, and cause the claims of creditors who fail to file such claims pursuant to such notice within 120 days to be barred. *See* TEX. EST. CODE §1153.004.

c. Ward is VA Beneficiary

If the ward is a beneficiary of the Department of Veterans Affairs ("VA"), the guardian of the estate must provide notice to the VA within five days of filing either an annual or other account of funds or an application for the expenditure or investment of funds. *See* TEX. EST. CODE §1151.301 Such notice requirement is satisfied by mailing a certified copy of such account of funds or application to the office of the VA in whose territory the court is located. *See id.*

3. Prepare and File Inventory

Within 30 days of the date the guardian of the estate qualifies, unless the court grants an extension, the guardian shall file with the court clerk an Inventory and Appraisement. *See* TEX. EST. CODE §1154.051. Such Inventory and Appraisement must contain a verified, full, and detailed inventory of the ward's property that has come into the possession of guardian or of which the guardian has knowledge. *See id.* In addition, such Inventory and Appraisement must set out the fair market value of each item described on the Inventory and Appraisement as of the date the letters of guardianship were issued to the guardian of the estate. *See id.* In addition to listing the assets of the ward's estate, the Inventory and Appraisement may also contain a list of claims the ward may have against others. *See* TEX. EST. CODE §1154.052. Such list of claims shall set out against whom the ward has a claim and the details regarding such claim. *See id.*

4. Invest Assets

In investing assets on behalf of the ward's estate, the guardian should consider the following factors: 1) age, education, current income, ability to earn income, net worth, and liabilities of the ward; 2) anticipated costs of supporting the ward; 3) nature of the ward's estate; 4) other resources available to the ward. *See* TEX. EST. CODE §1161.003.

a. Safe Harbor Investments

The Estates Code sets out a list of investments that the Texas Legislature considered to meet the standard of care. Such investments include: 1) bonds or other obligations of the United States; 2) tax supported bonds of Texas, including municipal bonds; 3) FDIC insured savings accounts and certificates of deposit; 4) certain corporate bonds; and 5) ABLE (Achieving a Better Life Experience) accounts. *See id.*

b. Standard of Care

The Estates Code also establishes a standard for the management and investment of the estate and directs the guardian to exercise the judgment and care "under the circumstances then prevailing that a person of ordinary prudence, discretion, and intelligence exercises in the management of the person's own affairs, considering the probable income from probable increases in value of, and safety of the person's capital." TEX. EST. CODE §1161.002. In determining whether a guardian of the estate has met such standard of management and investment, the court will consider the assets of the guardianship estate as a whole, rather than the prudence of a single investment. *See id.* The standard of care may be modified or eliminated if it is determined by clear and convincing evidence that such modification or elimination is in the best interests of the ward and his estate. TEX. EST. CODE §1161.005.

Many times, investing the ward's assets in the safe harbor investments sanctioned by Section 1161.003 of the Estates Code may be imprudent. For example, if the

ward owns annuities, retirement assets, life insurance, real property, or small business interests, converting such assets to cash for the purpose of making safe harbor investments could be unwise and irresponsible.

c. *Liability of Guardian*

In addition to other remedies at law, the guardian of the estate and his surety is liable if he fails to invest assets in accordance with the standard of care set out in the Estates Code, for the principal and the greater of the highest legal rate of interest on the principal for the time such guardian failed to invest such principal or the overall return that would have been expected if the principal had been invested pursuant to such standard of care. TEX. EST. CODE §1161.008. Further, the guardian and the guardian's surety are liable for attorney's fees, litigation expenses, and costs related to a proceeding. *Id.*

5. The Investment Plan

Section 1161.051 of the Estates Code sets out a procedure for allowing a guardian of an estate to invest the ward's assets in investments which fall outside of the safe harbor investments enumerated by Section 1161.003 of the Estates Code. If the guardian wishes to retain assets or acquire assets which are not described in Section 1161.003 of the Estates Code, within 180 days of his appointment (if he wishes to retain assets), he must file a written application with the court for a court order authorizing the guardian to:

- develop and implement an investment plan for estate assets;
- invest in or sell securities under an investment plan;
- declare that one or more estate assets must be retained; or
- loan estate funds, invest in real estate, or make other investments, or purchase life insurance or annuities.

See TEX. EST. CODE §1161.051. Retaining or investing in more complex assets within a guardianship can be difficult but yield greater returns. Later in this outline, more attention will be paid to how to evaluate such assets.

As a side note, during the years 2003 through 2007, every guardian of the estate was required to file an investment plan with the court. As it stands now, the guardian of the estate must only file an investment plan if the guardian plans to invest estate assets outside the safe harbor investments set out in Section 1161.003 of the Estates Code.

Protecting and providing for the ward and effectively managing the ward's estate are not the guardian of the estate's only concerns. A thoughtfully drafted investment plan will attach reasoning to the guardian's proposed investment policy, put others on notice as to future plans and give interested persons the right to object, enable the court to approve the guardian's analysis of the proper way to proceed with the guardianship estate, and perhaps reduce the guardian's liability to third parties. When drafting the investment plan, address the following considerations.

a. *Consideration #1: Age and Life Expectancy of Ward*

Naturally, the guardian does not have a crystal ball and it is awfully morbid to consider the timing and manner of death for anyone. However, if the ward has a condition that objectively reduces his life expectancy, such information would be important to include in the investment plan for a variety of reasons. Such information is especially helpful when the guardian seeks to invest or retain assets not included in the Estates Code's list of safe harbor investments or when the guardian seeks to dispose of assets bequeathed to or designated for the benefit of another upon the death of the ward.

Life expectancy could be an important consideration as the life expectancy of the ward could affect: 1) spending plan; 2) risk tolerance; 3) investment strategy and vehicles; 4) importance of retaining assets dedicated to another upon the death of the ward; 5) whether planning for Medicaid eligibility should be a focus of the investment plan; and 6) how aggressive tax motivated giving should be.

b. *Consideration #2: Expenses Associated with Maintaining Ward*

Naturally, the investment plan should address the anticipated costs associated with caring for and maintaining the ward and how such investment plan will fund the expenses associated with the ward. It is likely that all of this information is already contained in the application for monthly allowance and has been approved by the court.

c. *Consideration #3: Other Resources Available to the Ward*

The greater the available resources of the ward, the more flexibility the guardian has with respect to investment decisions.

d. Consideration #4: Tax Consequences Associated with Assets

Distributions from qualified annuities and qualified plans such an IRA and 401(k) are fully taxable as ordinary income, as such assets were funded with pre-tax dollars. Qualified annuities and qualified plans enjoy the benefit of tax deferral and so the longer they are allowed to gain value on a tax deferred basis, the greater the benefit to the annuitant or participant.

Sales of assets such as real property, equities, and small business interests might generate short or long-term capital gains taxes to the ward, or perhaps even depreciation recapture if an asset's depreciation had previously been used to offset income.

e. Consideration #5: Contracts Which Govern Assets

Almost all assets are governed by agreements, covenants, or laws specific to such assets. Real property is often subject to deed restrictions. Brokerage and bank accounts are established per a contract. Annuities and life insurance are, in and of themselves, simply agreements. Business interests are subject to stakeholder agreements and the Texas Organization's Code. 401K plans are governed by ERISA and the plan document, etc. Take care to review the instruments or laws which govern the assets of the guardianship estate.

f. Consideration #6: The Ward's Overall Estate Plan

Often times, the ward develops an estate plan prior to his incapacity. The ward's estate plan may involve specific bequests in a will, beneficiary designations, and transfer on death provisions. In developing an investment plan, the guardian should consider the ward's existing estate plan.

The fact that an asset is the subject of a specific bequest or would otherwise be payable to a beneficiary upon the ward's death will not prevent the guardian of the estate from taking control of such asset, closing such account, or stop the court from authorizing an action or modifying a duty with respect to such asset. *See* TEX. EST. CODE §1161.053.

Though the Estates Code grants the guardian of an estate the authority to take control of assets otherwise payable to a beneficiary upon the ward's death, an important question arises when the guardian takes control of assets and, as a consequence, effectively interferes with the rights of others having an intended beneficial interest. When a guardian alters a ward's estate plan by closing accounts with a named beneficiary or payee on death or by disposing of assets specifically bequeathed to a beneficiary, the guardian of the estate should act with the blessing of the court and the ward must receive a benefit from the closing of such accounts. Even if assets designed to pass to another on the death of the ward are retained in the guardianship estate, such assets should be segregated from the other assets of the guardianship estate and spent on a pro-rata basis.

In cases where the guardian believes it is in the ward's best interest to invest assets in a manner which interferes with the ward's estate plan, the guardian should address the issue in the ward's investment plan, ask the court to schedule a hearing on the matter, and notice all interested parties. The investment plan should answer the following questions:

- Why is it in the best interest of the ward to sell an asset which would otherwise pass to another on the death of the ward?
- Do other equally beneficial investment alternatives exist that would not disturb the ward's existing estate plan?
- Will steps be taken to segregate the proceeds of assets that, if not sold, would have passed to another on the ward's death?
- What is the spending plan as it relates to the segregated proceeds?
- If an asset that would otherwise be exempt from the creditor claims of the ward is being liquidated or surrendered, does the guardianship estate hold unpaid claims or is the ward likely to expose the guardianship estate to claims?

g. Consideration #7: Medicaid Eligibility

If appropriate, the investment plan should address a plan to enable the ward to become eligible for Medicaid. The investment plan might also consider the resources available to the ward's spouse and other dependents along with tools that may become necessary to enable the ward to become eligible for Medicaid, like the supplemental needs trust.

If the ward owns an annuity, consider whether the purchase of such annuity fits in with the ward's overall plan to qualify for Medicaid. If it is possible to surrender the annuity in exchange for a lump sum of money, or if it is time to annuitize the investment and start receiving a monthly stream of income, consider how such decisions will affect the ward's Medicaid eligibility. If annuitizing the investment will result in a monthly income which exceeds Medicaid eligibility limits, consider whether or not the formation of a Supplemental Needs Trust might help the ward with Medicaid eligibility.

h. Consideration #8: Multidisciplinary Approach

Stepping into the shoes of another and managing their affairs can be overwhelming at times, especially if the guardianship estate contains complex assets. Looming liability exposure associated with difficult decisions can heap more pressure on a stressed guardian. Consequently, a multidisciplinary approach to managing the guardianship estate may be important. Assembling a team of professionals including a financial advisor and CPA might enable the guardian to develop better solutions and make more efficient decisions. Also, seeking advice from other attorneys with specialties in areas such as Medicaid planning, estate and gift tax, and income tax may also be helpful. Finally, seeking court approval for your decisions will go a long way in limiting your liability exposure.

6. Apply for Monthly Allowance

Not later than the 30th day after the date the guardian qualifies as guardian, unless the court allows more time, the guardian of the estate shall file with the court an application requesting an allowance to provide for the monthly expenses of the ward out of the income and corpus of the ward's estate. *See* TEX. EST. CODE §1156.001. The application must clearly separate amounts requested for the ward's education and maintenance from the amounts requested for the maintenance of the ward's property. *See id.* In the event the guardian of the estate fails to pay the guardian of the person the amount approved by the court, the guardian of the estate may be cited to appear before the court and may be compelled to make such distribution to the guardian of the person. See TEX. EST. CODE §1156.003.

In the event the expenditures of the guardian made in good faith to the ward exceed the monthly allowance, the court may approve such expenditures provided that it was not convenient or possible to obtain court approval first, the expenditures were reasonable and proper based upon clear and convincing evidence, the court would have granted the authority to make the expenditures had an application been filed in advance, and the ward received the benefit of the expenditures. *See* TEX. EST. CODE §1156.004.

Upon application, the court may also approve expenditures made for the benefit of the ward's spouse or dependents. *See* TEX. EST. CODE §1156.052. In considering such application, the court considers the circumstances of the ward and his family, the ability and duty of the ward's spouse to support herself and the ward's dependents, the size of the ward's estate, and any existing estate planning designed to benefit the ward's spouse or dependents. *See id.*

7. Prepare and File Annual and Final Accounts

Within 60 days after the first anniversary of the guardian of the estate's qualification, unless the court extends such time, the guardian shall file with the court its first annual account. *See* TEX. EST. CODE §1163.001.

a. Contents of Account

Such account must be made under oath and provide the following information:

- All claims against the estate and whether they were allowed and paid, or rejected;
- All property that has come to the guardians knowledge or possession;
- Any change in the ward's property;
- A complete account of receipts and disbursements for the period covered by the account, including the source and nature of receipts and disbursements;
- Description of property being administered, condition and use being made of such property, and if rented, the terms on which and the price for which the property is being rented;
- Cash balance on hand and the name and location of the institution where such cash is held;
- Cash being held in a savings account or other manner that was deposited subject to court order and the name and location of the institution where such account is held;
- Description of personal property and where such property is being stored for safekeeping; and
- For bonds, notes, and other securities, the description must include: name of obligor and obligee, date of issuance and maturity, interest rate, serial number or other identifying numbers, manner in which property is secured, and other information necessary to fully identify the bond, note, or other security.

b. Support Documentation

In addition, the account must be supported by a voucher for each item of credit claimed in the account (or other evidence found suitable by the court), official letters from the bank or other depository where the cash of the guardianship estate is held confirming the amount of such cash, and proof of the existence and possession

of securities or other assets held in a financial institution. *See* TEX. EST. CODE §§1163.003-1163.004.

Finally, the guardian of the estate must file an affidavit stating that the accounting contains a correct and complete statement of the matters to which the account relates, that the guardian has paid the bond premium for the next accounting period, that the guardian has filed all tax returns of the ward due during the accounting period, and if the guardian is a private professional guardian, guardianship program, or DADS, whether they are or have been the subject of an investigation by the Guardianship Certification Board during the accounting period. *See* TEX. EST. CODE §1163.005.

c. Privacy Considerations

On December 13, 2013, the Supreme Court of Texas adopted Texas Rule of Civil Procedure (TRCP) 21c, Privacy Protection for Filed Documents, effective January 1, 2014. Rule 21c defines sensitive data as: 1) a driver's license number, passport number, social security number, tax identification number, or similar government-issued personal identification number; 2) a bank account number, credit card number, or other financial account number; and 3) a birth date, home address, and the name of any person who was a minor when the underlying suit was filed. Unless sensitive data is specifically required by a statute, court rule, or administrative regulation, a document containing sensitive data may not be filed unless the sensitive data is redacted by using the letter 'X' in place of each omitted digit or character or by removing the sensitive data in a manner indicating that the data has been redacted. The filing party is required to retain an unredacted version of the filed document while the case is ongoing. To address this Rule, the judges of the Harris County Probate Courts have provided attorneys with the following instructions which are set out in the Administrative Order Regarding the Texas Supreme Court's Adoption of Mandatory E-Filing and Texas Rule of Civil Procedure 21c:

- File the accounting in compliance with TRCP 21c, redacting sensitive data as needed (for example in the required verifications of deposit, confirmations of safekeeping, and tax affidavits).
- File the accounting electronically as required by Texas Supreme Court Order and TRCP Rule 21.
- No financial statement, check copy, or other back-up to an annual or final accounting shall be filed with the Clerk, whether or not any sensitive data is redacted.
- Within 7 business days of filing the accounting, deliver a paper copy of the following by mail or by hand-delivery to the office of the probate court in which the accounting was filed: 1) An unredacted copy of the filed accounting that clearly indicates on the first page or in a cover letter the date the accounting was filed; 2) All required, unredacted, back-up documents including financial statements (e.g. bank statements, copies of returned checks, brokerage statements, etc.); and 3) If it is a first annual accounting, an unredacted copy of the inventory.

B. Estate Plan of Ward

1. Tax Motivated and Other Transfer Planning

In the event the ward is a high net worth individual or an individual who might qualify for government benefits, the guardian of the estate might consider seeking court authority to establish an estate plan on behalf of the ward and his family. It is interesting to note that the Estates Code allows any interested person to make application authorizing the guardian to make transfers from the guardianship estate. *See* TEX. EST. CODE §1162.001.

In cases where a showing can be made that the ward will probably remain incapacitated during the ward's lifetime, the court may enter an order that authorizes the guardian to apply any principal or income of the ward's estate that is not necessary for the support of the ward or the ward's family during the ward's lifetime toward the establishment of an estate plan for the purpose of minimizing income, estate, inheritance, or other taxes payable out of the ward's estate, or to transfer a portion of the ward's estate as necessary to qualify the ward for government benefits. *See id.*

Such estate plan could involve gifts or transfers outright or in trust for the benefit of:

- Charitable organizations in which the ward would reasonably have an interest;
- The ward's spouse, descendant, or other persons related by blood or marriage;
- A devisee under the ward's most recent, validly executed purported will, trust, or instrument indicating a beneficiary of the ward;
- A person serving as the guardian of the ward, so long as they are either a family member or devisee of the ward.

Id.

Section 1162.002 of the Estates Code provides guidance as to the application for authority to make transfers and requires an outline of the proposed transfer plan along with a statement of the benefits that are to be derived from the plan. In addition, if the ward's intentions are known, the application must state that such intentions are consistent with the transfer plan. Or, if the ward's intensions cannot be ascertained, the ward is presumed to favor reduced taxes, qualification for government benefits, and partial distribution of the ward's estate. *See id.*

2. Inspection of Estate Planning Documents

In the event that the guardian of the estate is not in possession of the ward's estate planning documents yet seeks court approval of tax motivated estate planning for the ward, such guardian may apply to the court to inspect, in camera, the estate planning documents of the ward, including the ward's will, codicil(s), trust(s), or any other estate planning instrument of the ward as a means of obtaining access to the instrument. TEX. EST. CODE §1162.005.

The application must be sworn to by the guardian, list the instruments requested for inspection, and state the reason such inspection is necessary. *Id.* Notice of such application must be provided to: 1) each person having custody of the listed estate planning documents; 2) the ward's spouse; 3) the ward's dependents; 4) the devisees set out in the estate planning documents (query how is this to be determined without first inspecting such documents); and 5) any other person directed by the court. TEX. EST. CODE §1162.006. An attorney does not violate the attorney-client privilege by complying with an order to release estate planning documents pursuant to an order of inspection. TEX. EST. CODE §1162.007.

C. Complex Assets in Estate.

1. Annuities

When a guardianship estate contains an annuity, special care should be taken by the fiduciary in managing such investment. Section 1161.105 of the Estates Code provides that an annuity contract owned by the ward when the proceeding for the appointment of a guardian of the estate is commenced may be continued in full effect if it is shown that:

- The company issuing the contract is an authorized life insurance company or the contract is administered by the VA; and
- All future premiums for the contract may be paid out of surplus funds of the ward's estate.

The guardian must apply to the court for an order to either continue the contract pursuant to its existing terms or modify the contract to fit new developments affecting the ward's welfare. Such application must be accompanied by a detailed report as to the financial condition of the ward's estate. *See* TEX. EST. CODE §1161.105.

An annuity is an insurance product that provides the annuitant with a stream of income and can be used as part of a retirement strategy. How does it work? An investor purchases an annuity in exchange for a stream of payments which may start immediately or at a later date and the payments may be made over a fixed period of time or for the remainder of the annuitant's life. The payments may be either a fixed amount or an amount based upon the value of the underlying investments of the annuity.

a. Terms

Below are some terms that might be helpful to know when discussing annuities:

- Accumulation Phase. The period of time when the investor is making contributions to the annuity and the value of the annuity is building. The accumulation phase is usually followed by the distribution or annuitization phase.
- Accumulation Value. The amount of cash invested in the annuity, plus any capital earned from interest and investment.
- Annuitize. To commence a series of payments from the capital that has accumulated in an annuity. The payments may be a fixed amount, for a fixed period of time, for a lifetime, or for the lifetime of the survivor of the annuitant and a joint annuitant.
- Bailout Provision. Deep within the fine print of a fixed rate annuity contract, the bailout provision may be found. If after the guaranteed interest rate period, the insurance company renews the annuity at an interest rate that is lower than the guaranteed interest rate by an amount designated in the contract, the investor may surrender the annuity without penalty.

- Distribution Phase. The period of time when payments are paid out to the annuitant for a specified period of time, the life of the annuitant, or the lives of the annuitant and the co-annuitant.
- The Exclusion Ratio. Applies to nonqualified income annuities. This is the ratio that determines which portion of an annuity distribution is earnings and which portion is a return of the original investment. Only the portion consisting of earnings is taxable.
- Nonqualified Annuity. A nonqualified annuity is funded with after-tax dollars.
- Qualified Annuities. Qualified annuities are annuities used to fund an IRA or other type of retirement arrangement. A qualified annuity is funded with pre-tax dollars.
- Surrender. Cancelling or cashing-in an annuity contract.
- Surrender Fees. A surrender fee, or withdrawal charge, is a common aspect of annuity contracts. It is a charge levied against an investor for the early withdrawal of funds from an annuity contract, or for the cancellation of the agreement. Surrender fees act as an economic incentive for investors to keep their contract in force.
- Surrender Period. The amount of time an investor must wait until he can withdraw funds from an annuity without facing a penalty. Withdrawing money before the holding period stated in the annuity contract will result in a surrender charge.
- Surrender Value. The surrender value is also referred to as "cash value." The surrender value equals the amount of an annuity the investor can access in the event he decides to terminate the contract or cash the contract in and forgo annuitizing the contract. The surrender value of an annuity can be much less than the accumulation, or actual value, of the account because surrendering the annuity generates a surrender fee.
- Underlying Portfolio. The stocks, bonds, cash equivalents or other investments purchased with the money invested in a variable annuity.

b. *Types of Annuities*

- Deferred vs. Immediate. In a deferred annuity, money is invested for a period of time or until the annuitant is ready to begin taking withdrawals, typically in retirement. With an immediate annuity, payments to the annuitant begin soon after the annuitant makes his initial investment. Many consider purchasing an immediate annuity as they approach retirement age. The deferred annuity accumulates income while the immediate annuity pays out. Deferred annuities can also be converted into immediate annuities when the owner wants to start collecting payments.
- Fixed vs. Variable. A fixed annuity is somewhat like a certificate of deposit, except that it is issued by an insurance company and the overall return is greater. An annuitant purchases a fixed annuity with a lump sum of cash in exchange for a stream of fixed payments over the term of the annuity contract. A variable annuity is a tax-deferred retirement vehicle that allows an annuitant to develop his own investment portfolio based upon options established by the life insurance company. The payments from the annuity are directly related to the performance of the investments chosen by the annuitant.
- Qualified vs. Nonqualified. The assets in an IRA or qualified retirement plan enjoy tax deferral. An annuity contract may be used to fund an IRA or qualified retirement plan when the investor seeks to benefit from the unique, beneficial features of an annuity, specifically: 1) the lifetime income payout option; 2) the death benefit protection; and 3) for variable annuities, the ability to transfer among investment options without sales or withdrawal charges. When the product is annuitized, the payments to the annuitant are subject to income tax as ordinary income. In a nonqualified annuity, the underlying portfolio of the annuity produces and accumulates income that is tax deferred. When the product is annuitized, the payments to the annuitant are partially subject to income tax, depending upon the ratio of income to return of capital.

c. *Risks, Disadvantages, and Benefits of Annuities*

The payments pursuant to a fixed annuity are not dependent upon market conditions, and therefore such investment is attractive to the risk intolerant. The fixed annuity is not insulated from other risks, however. For example, the cost of living might increase at a higher than expected rate and the fixed annuity fails to address such changes. In addition, the value of a fixed annuity is directly related to the integrity of the company issuing the annuity. If the insurance company which sold the annuity fails, the payments could cease. Finally, with a conventional fixed annuity which makes payments to

the annuitant over his lifetime, the insurance company stops making payments on the death of the annuitant. Consequently, if the annuitant dies prematurely, he may receive much less in payments as compared to the purchase price of the annuity. In contrast to the fixed annuity, the payments made to the annuitant from a variable annuity fluctuate with the performance of the investments chosen by the annuitant.

Once money is invested in an annuity, it becomes generally illiquid, as withdrawal of the original investment is subject to hefty penalties. In addition to being illiquid, annuities are laden with fees. To start, an annuity earns the broker as much as 10% in commissions on the front end. In addition, if the annuitant seeks to cash-in the annuity, surrender charges apply. Though surrender charges may be as high as 7% if the surrender occurs soon after the annuity is purchased, surrender charges typically apply but the surrender charge declines with the aging of the annuity. What is more, with respect a variable annuity, insurance fees and investment management fees can erode the investment benefits of the annuity as such fees often range anywhere from 2%-3% of the account value each year.

Investing in annuities enables investors to sock away large amounts of cash and enjoy tax deferral on income. The longer the annuity remains invested, the greater the benefit, as the income from the initial investment compounds over time. Since the income is not taxed until it is distributed to the annuitant, the money which would otherwise go to the government in the form of taxes remains in the annuity and continues to earn income. When the surrender period for the annuity expires, the investor may annuitize the annuity and begin receiving a stream of payments, or the investor may choose to withdraw the amounts in the annuity as a lump sum distribution.

d. Continuation of Annuity Purchased Prior to Guardianship

When the ward owns an annuity or life insurance policy prior to the appointment of a guardian of his estate, such annuity or life insurance policy may be continued in full force and effect if the guardian shows that the insurance company is licensed by the Texas Department of Insurance and maintains the legal reserve required by the State of Texas or the policy or contract is administered by the Department of Veterans Affairs. *See* TEX. EST. CODE §1161.101 and 1161.105. In addition, the ward's estate must contain the surplus necessary to continue making premium payments on the policy or contract. *Id.* The guardian of the estate should file an application with the court which sets out the guardian's plan to either continue the policy or contract in accordance with its terms or modify the policy or contract to address new developments affecting the ward's welfare. *Id.* The application must include a report that shows in detail the financial condition of the ward's estate as of the date such application is filed. *Id.*

e. Options with Respect to Qualified Annuities During the Accumulation Phase

Important and timely decisions must be made by the guardian of the estate of a ward when such estate: 1) contains a tax deferred or qualified annuity; 2) contains an annuity which has not yet been annuitized; and 3) would enable the ward to qualify for Medicaid but for the income payments from an annuity. The options available to the guardian of the estate depend upon whether the annuity is in the accumulation phase or distribution phase.

When the ward's estate contains annuities which were used to fund an IRA or other tax deferred arrangement, the efficiency of taking distributions versus postponing distributions should be evaluated if other resources are available to care of the ward.

Should the fiduciary take distributions or wait to take distributions? Distributions from qualified annuities are fully taxable as ordinary income. The decision to begin taking distributions on behalf of the ward from a qualified annuity hinges on the age of the ward and the other resources available to the ward.

If the ward is over the age of 59 ½, and has not yet begun to receive distributions, the guardian of the estate may elect to begin receiving distributions or wait until the ward attains the age of 70 ½, at which time the guardian of the ward's estate must begin receiving distributions. The longer the qualified annuity is allowed to accumulate in value tax free, the greater the payments will be to the annuitant and the more tax efficient the qualified annuity will be, generally speaking. So, if the ward has income from other sources that is not from tax-deferred sources and is able to sustain the ward, the more likely it is that the guardian of the estate will wait until the ward is closer to his 70 ½ birthday before taking distributions from a qualified annuity.

When the ward is under the age of 59 ½, taking early distributions from a qualified annuity can be very tax inefficient and a poor investment decision overall. First, if the ward is under the age of 59 ½, it is likely that the annuity is in the accumulation phase and subject to a surrender charge. The surrender charge is set out in the annuity contract and is often represented by a

percentage of the accumulation value of the annuity. This percentage often declines during the accumulation phase of the annuity. However, surrender charges can run between 1% and 20% depending upon the terms of the annuity contract. Second, if the ward is under the age of 59 ½, not only will the distributions to the ward be fully subject to ordinary income tax, the distributions will also be subject to a 10% early withdrawal penalty unless the ward qualifies for an exception. *See* IRC § 72(t). Some of the most common exceptions are set out below:

- The ward permanently or totally disabled;
- The ward was unemployed and paid for health insurance premiums;
- The ward paid for college expenses for himself or a dependent; and
- The distributions were required by a divorce decree or separation agreement (applies to employer provided qualified plan).

See id.

Though it is likely that a person under guardianship who is under the age of 59 ½ will avoid paying the 10% early distribution penalty imposed on distributions from a qualified annuity, taking early distributions from a qualified annuity remains a poor investment decision if other sources of funding the wards maintenance and care are available.

Most annuity contracts contain terms that allow the investor to withdraw a certain percentage of the accumulation value of the annuity without a surrender charge. A free withdrawal is simply money taken out of the annuity with no charges attached. The amount of the free withdrawal is often expressed as a percentage of the accumulation value or contract value and a common percentage is 10%. What is more, free withdrawals are often allowed on an annual basis. Requesting free withdrawals might enable the guardian of the estate to more efficiently provide for the needs of the ward without terminating the annuity contract during the accumulation phase. Though the free withdrawal is free from surrender charges, a distribution from a qualified annuity is fully subject to income tax at ordinary income tax rates. Further, most free withdrawals are conditioned upon an emergency need.

f. Options with Respect to Qualified Annuity During Distribution Phase

When a ward is already accepting payments it is important to know whether the annuity is fixed or variable. If the annuity is a variable annuity, the guardian of the estate may have more flexibility with regard to investment choices enabling him to maximize the growth and income of the annuity. When the annuity has not yet been annuitized and is within the accumulation period, important and timely decisions should be made.

i. Surrender

The choice to surrender an annuity should not be made lightly, especially when the ward has other resources available to provide for his care and maintenance. If the surrender of an annuity is not required to provide for the ward's support or maintenance, the guardian should approach the surrender of an annuity as an investment decision and consider: 1) how long the annuity has been owned; 2) the surrender charge; and 3) the taxes associated with surrendering the annuity.

Generally speaking, the longer the annuity has been owned, the lower the surrender charge, but the taxes associated with surrendering the annuity are higher. This follows because most annuity contracts contain surrender charge schedules based upon the length of time the annuity has been owned and the contract value or accumulation value of the annuity. The surrender charge dwindles to nothing or almost nothing over the course of ten years in most annuity contracts. However, the longer the contract is owned, the higher the accumulation value of the annuity. So, if the annuity is terminated or surrendered, a larger component of the distribution is taxable as ordinary income.

> **Example:** Jerry invests $300,000 in a deferred annuity when he is 55 with the idea that he will retire when he is 65 and begin receiving distributions from the annuity. When Jerry is 57, he becomes incapacitated. Aside from this annuity, Jerry has resources that should maintain him comfortably for the next 5 years. The guardian of his estate must decide whether to terminate the annuity immediately or wait until his other resources are depleted. The accumulation value of the annuity is $330,750 and it is expected to grow at a rate 5% each year, compounded annually. Jerry currently has a marginal income tax rate of 33%. It is expected that in 5 years, his marginal income tax rate will be 25% if he begins receiving regular payments from the annuity as he had planned or 33% if he decides to surrender the annuity. The current surrender charge of the annuity is 7% of the accumulation value of the annuity. The

surrender charge declines at a rate of 1% each year. Consider the following options:

Option 1: Jerry's Annuity is Surrendered Now When He is 57:

Accumulation Value:	$330,750
Surrender Charge:	($23,153)
Cash Value of Annuity:	$307,598
Taxes on Distribution:	($2,507)
Amount Available to Guardian:	$305,091

Option 2: Jerry's Annuity is Surrendered When He is 62:

Accumulation Value:	$422,130
Surrender Charge:	($8443)
Cash Value of Annuity:	$413,687
Taxes on Distribution:	($37,517)
Amount Available to Guardian in Year 5:	$376,170
Tax Adjusted Present Value of Amount Available to Guardian in Year 5:	$319,030

Waiting to annuitize the annuity until Jerry is 62 increases the present value of the annuity by almost $14,000, or approximately 5% of the surrender value of the annuity.

ii. Annuitize

So long as the annuity is a variable annuity or fixed annuity with a rate of return greater than or equal to the market rate, annuitizing the annuity so that the ward receives a stream of income is preferable from an investment perspective. However, this option may not be practical if the ward lacks the resources outside of the annuity to provide for his care and maintenance or if the ward's life expectancy is short.

In an effort to illustrate the benefits of annuitizing an annuity versus surrendering it, below is a continuation of Jerry's example. In the following example, Jerry's guardian decides that Jerry's disability did not cut his life expectancy short and that Jerry has resources aside from the annuity that will provide for his care and maintenance for the next 8 years. All of the other previous assumptions hold true for the following example:

Option 3: Guardian Receives 120 Monthly Distributions from Annuity beginning when Jerry is 65:

Accumulation Value:	$488,668
Monthly Distributions:	$5162
Total Value of Annuity Payments:	$619,440
Total Value of Annuity Payments Adjusted for Income Tax:	$464,580
Annuity Payments Adjusted for Income Tax and to Present Value:	$379,714

So, if Jerry keeps the annuity in place and accepts payments in accordance with its terms, the present value of the stream of future payments exceeds the surrender value by almost $75,000 or approximately 25% of the surrender value.

As discussed previously, most annuities have provisions that allow about 10% to 15% of the account to be withdrawn for emergency purposes without penalty. The free withdrawal option might enable the guardian the flexibility needed to postpone the surrender of an annuity or wait until the time for annuitizing the annuity is optimal.

If the ward owns an annuity and is enjoying the annuitized income payments from the annuity, yet depletion of the ward's assets is forecasted, Medicaid qualification planning should be contemplated. When the distribution amount from an annuity exceeds the Medicaid income qualification threshold and the ward has assets with a value less than the Medicaid asset qualification threshold, a supplemental needs trust might be advisable to collect the income in excess of the income qualification threshold and enable the ward to become qualified for Medicaid.

2. Life Insurance

When a guardianship estate contains life insurance purchased by the ward before his incapacity, the guardian must take action and decide whether it is prudent to keep such policy in place. Section 1161.105 of the Estates Code provides that life insurance owned by the ward when the proceeding for the appointment of a guardian of the estate is commenced may be continued in full effect if it is shown that:

- The company issuing the policy is an authorized life insurance company or the policy is administered by the VA; and
- All future premiums for the policy may be paid out of surplus funds of the ward's estate.

The guardian must apply to the court for an order to either continue the policy pursuant to its existing terms or modify the contract to fit new developments affecting the ward's welfare. Such application must be accompanied by a detailed report as to the financial

condition of the ward's estate. *See* TEX. EST. CODE §1161.105.

Depending upon the type of life insurance purchased by the ward, it may or may not make financial sense to keep such policy in place. Below are the most common types of life insurance.

a. Term

Term life insurance is the most basic and affordable form of life insurance. The owner pays the premiums and if the insured dies within the policy term, the death benefit is paid. If the policy is surrendered it has no value, as no value accumulates within the policy. Some term policies are equipped with the option to convert the policy to a permanent policy. It makes sense to review the life insurance contract to determine if a term policy is convertible. If the ward's life expectancy has been cut short as compared to his life expectancy when the policy was purchased, converting the policy from a term to a permanent policy is probably a good investment decision, especially if the term during which the ward is insured will likely expire before the ward does.

b. Permanent

Permanent life insurance is different from term insurance because it offers both a death benefit and a cash value component. In addition, as the name suggests, the policy is in effect for the remaining lifetime of the insured, so long as premiums are paid. Permanent life insurance could be a source of liquidity for the guardianship estate, as the guardian may be able to withdraw the cash value. Or, if the ward's estate does not contain the surplus necessary to continue making premium payments, the guardian might seek to have the contract modified after gaining the approval of the court so that the existing cash reserves of the life insurance policy may be used to make premium payments (which might necessitate a decrease in the death benefit).

c. Other considerations

Before abandoning a life insurance policy purchased by the ward before his incapacity because no surplus within the ward's estate exists to pay premiums, consult with the beneficiary named on the policy and determine if such person wishes to make the premium payments on behalf of the guardianship estate. It might also be possible to transfer the policy to the beneficiary pursuant to Section 1162.002 of the Estates Code, as discussed *supra.*

Some insureds whose life expectancy is cut very short enter into viatical settlements whereby third parties are willing to pay the insured more than the cash value of a life insurance policy but less than the death benefit, betting that the insured will die soon and the third party investor will enjoy the death benefit. To date, no guardian has sought authority to enter into a viatical settlement in Harris County Probate Court 4.

3. Farm, Ranch, Factory, or Other Business

If the ward owned a farm, ranch, factory, or other business it may be continued or rented pursuant to a court order so long as it is not required to be immediately sold for the payment of a debt or other lawful purpose (like pursuant to the provisions of a buy-sell agreement for example) and so long as it appears to the court to be in the best interest of the ward's estate. *See* TEX. EST. CODE §1151.155.

In considering whether continuing or renting such business is in the best interest of the ward's estate, the court shall consider:

- The condition of the estate; and
- The necessity that may exist for the future sale of the property or business for the payment of a debt, claim, or other lawful expense.

See id. If the farm, ranch, factory, or other business is to be rented, the period for such rental may not extend beyond what appears consistent with the maintenance and education of the ward. *Id.*

If the business is a professional business organization and only another professional having the same or similar credentials may step in and manage such business, the guardian will need to hire a person who has the necessary credentials to manage such business so long as continuation of the business is necessary. *See* TEX. BUS. ORGS. CODE § 301.007. *See also*, Pacheco, Administration of Closely Held Business Interests in Estate and Guardianship Proceedings, 2015 Adv. Est. Plan. & Probate, ch. 30.

4. Real Estate

Often, trust companies administering court created trusts such as 1301 Management Trusts shy away from managing real estate because it is, *inter alia*, fraught with liability, labor intensive to administer, and often unproductive. Even if trust companies agree to take on real estate as part of the trust's portfolio, it is conditioned upon the prompt sale of such real property. As a consequence, real estate often ends up in guardianship estates.

Sometimes, real estate is co-owned in some form, whether it is as community property, tenants in common, or joint tenancy (uncommon in Texas). Section 1151.153 of the Estates Code makes it clear that

the guardian of the estate is entitled to possession of a ward's property held or owned in common with a part owner in the same manner as another owner in common or joint owner is entitled.

The options for managing real property in the context of a guardianship are not as limited as one might think. According to Section 1151.201 of the Estates Code, the guardian, pursuant to court order, may mortgage or pledge any property of a guardianship estate by deed of trust or otherwise as security for indebtedness when necessary for:

- The payment of taxes (ad valorem, income, gift, or transfer tax);
- Payment of expenses (including the operation of a business owned by the estate);
- Payment of any claim allowed and approved or established by suit against the ward's estate;
- The renewal and extension of an existing lien;
- An improvement or repair if improvements will facilitate or increase revenue production
- The purchase of a residence for the ward or his dependant; or
- Funeral expenses of the ward or expenses in last illness provided the guardianship remains open after the ward's death.

In addition, pursuant to a court order, the guardian may receive an extension of credit on the ward's behalf that is secured by a lien on real property that is the ward's homestead when necessary to:

- Make improvements or repairs to the homestead; or
- Pay for the ward's education or medical expenses.

See id. Enabling real property to be pledged for security provides the guardian a great deal of flexibility. This flexibility frequently comes in handy when the only asset of the ward is his home and his home is an appropriate placement. The guardian may apply to the court for an order enabling him to take out a reverse mortgage on the home so that payments from the reverse mortgage can finance the care of the ward.

VII. CONSIDER THE 1301 MANAGEMENT TRUST

Does serving as the guardian of an estate seem complicated? Consider placing the ward's assets into a 1301 Management Trust and calling it a day.

VIII. CONSIDER USING THE ARC MASTER POOLED TRUST FOR MODEST ESTATES TO MAINTAIN OR ENABLE MEDICAID ELIGIBILITY.

The ARC Master Pooled Trust ("MPT") is a supplemental needs trust which pools the assets of beneficiaries for investment and management purposes and establishes sub-accounts for individual beneficiaries. Pooling assets enables the trustee to make larger investments, increasing the potential return for the beneficiaries. The ARC of Texas manages the MPT and JP Morgan Chase serves as the trustee.

The Arc is a known and trusted organization, having served people with disabilities for over 60 years. The ARC knows trust laws and governmental requirements, and how best to serve the needs of people with disabilities. The costs associated with establishing and managing the MPT are much lower as compared to that of a §1301 Trust or guardianship estate. What is more, the ARC MPT will take any size sub-account, there is no minimum investment required. Finally, beneficiaries of the ARC's MPTs enjoy the security and benefits associated with a major trust company's management of trust assets.

The ARC's MPT may take the form of a self-settled trust or a third party settled trust. When an MPT is settled by the beneficiary, the funding sources often include back disability payments, personal injury settlements, inheritances, or savings accounts. Upon the beneficiary's death, any assets remaining in the trust must be used to reimburse Medicaid for expenditures Medicaid made on behalf of the beneficiary.

When a third-party seeks to establish an MPT for the benefit of a beneficiary with special needs, funding sources most often include a bequest in such third-party's will or life insurance proceeds on such third-party's life. No Medicaid payback provisions apply to MPTs settled by third-parties.

IX. CONCLUSION

Jonathan Blattmachr, a well regarding attorney, author, and speaker from New York told me that the best way to master a subject was to write about it. Make no mistake, a lot was learned by me while writing this paper and I am grateful to the many people, including my father, who have helped me develop my knowledge, skills, and experience as an attorney and a judge. It is my privilege to share this paper with you and I hope you found it helpful.

APPENDIX A: PHYSICIAN'S CERTIFICATE OF MEDICAL EXAMINATION

Physician's Certificate of Medical Examination

Revision October 2016

In the Matter of the Guardianship of For Court Use Only

_____, Court Assigned:_____

an Alleged Incapacitated Person

To the Physician

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

1. General Information

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

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

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

I last examined the Proposed Ward on _____, 20_____ at:
☐ a Medical facility ☐ the Proposed Ward's residence ☐ Other: _____

☐ YES ☐ NO The Proposed Ward is under my continuing treatment.
☐ YES ☐ NO Before the examination, I informed the Proposed Ward that communications with me would not be privileged.
☐ YES ☐ NO A mini-mental status exam was given. If "YES," please attach a copy.

2. Evaluation of the Proposed Ward's Physical Condition

Physical Diagnosis: _____
a. Severity: ☐ Mild ☐ Moderate ☐ Severe
b. Prognosis: _____
c. Treatment/Medical History: _____

3. Evaluation of the Proposed Ward's Mental Functioning

Mental Diagnosis: _____
a. Severity: ☐ Mild ☐ Moderate ☐ Severe
b. Prognosis: _____
c. Treatment/Medical History: _____

If the mental diagnosis includes dementia, answer the following:
☐ YES ☐ NO----- It would be in the Proposed Ward's best interest to be placed in a secured facility for the elderly or a secured nursing facility that specializes in the care and treatment of people with dementia.
☐ YES ☐ NO----- It would be in the Proposed Ward's best interest to be administered medications appropriate for the care and treatment of dementia.
☐ YES ☐ NO----- The Proposed Ward currently has sufficient capacity to give informed consent to the administration of dementia medications.

d. Possibility for Improvement:

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

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

4. Cognitive Deficits

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

☐ Person ☐ Time ☐ Place ☐ Situation

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

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

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

5. Ability to Make Responsible Decisions

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

☐ YES ☐ NO----- Make complex business, managerial, and financial decisions
☐ YES ☐ NO----- Manage a personal bank account
If "YES," should amount deposited in any such bank account be limited? ☐ YES ☐ NO
☐ YES ☐ NO----- Safely operate a motor vehicle
☐ YES ☐ NO----- Vote in a public election
☐ YES ☐ NO----- Make decisions regarding marriage
☐ YES ☐ NO----- Determine the Proposed Ward's own residence
☐ YES ☐ NO----- Administer own medications on a daily basis
☐ YES ☐ NO----- Attend to basic activities of daily living (ADLs) (e.g., bathing, grooming, dressing, walking, toileting) without supports and services
☐ YES ☐ NO----- Attend to basic activities of daily living (ADLs) (e.g., bathing, grooming, dressing, walking, toileting) with supports and services
☐ YES ☐ NO----- Attend to instrumental activities of daily living (e.g., shopping, cooking, traveling, cleaning)
☐ YES ☐ NO----- Consent to medical and dental treatment at this point going forward
☐ YES ☐ NO----- Consent to psychological and psychiatric treatment at this point going forward

6. Developmental Disability

☐ YES ☐ NO----- Does the Proposed Ward have developmental disability?
If "NO," skip to number 7 below.
If "YES," answer the following question and look at the next page.

Is the disability a result of the following? (Check all that apply)

☐ YES ☐ NO----- Intellectual Disability?
☐ YES ☐ NO----- Autism?
☐ YES ☐ NO----- Static Encephalopathy?

☐ YES ☐ NO----- Cerebral Palsy?
☐ YES ☐ NO----- Down Syndrome?
☐ YES ☐ NO----- Other? Please explain _____

Answer the questions in the "Determination of Intellectual Disability" box below only if both of the following are true:

(1) The basis of a proposed ward's alleged incapacity is intellectual disability.
and
(2) **You are making a "Determination of Intellectual Disability" in accordance with rules of the executive commissioner of the Health and Human Services Commission governing examinations of that kind**.

If you are not making such a determination, please skip to number 7 below.

"DETERMINATION OF INTELLECTUAL DISABILITY"

Among other requirements, a Determination of Intellectual Disability must be based on an interview with the Proposed Ward and on a professional assessment that includes the following:

1) a measure of the Proposed Ward's intellectual functioning;
2) a determination of the Proposed Ward's adaptive behavior level; and
3) evidence of origination during the Proposed Ward's developmental period.

As a physician, you may use a previous assessment, social history, or relevant record from a school district, another physician, a psychologist, an authorized provider, a public agency, or a private agency if you determine that the previous assessment, social history, or record is valid.

1. Check the appropriate statement below. If neither statement is true, skip to number 7 below.
   - ☐ **I examined the proposed ward in accordance with rules of the executive commissioner of the Health and Human Services Commission governing Intellectual Disability examinations**, and my written findings and recommendations include a determination of an intellectual disability.
   - ☐ **I am updating or endorsing in writing a prior determination of an intellectual disability** for the proposed ward made in accordance with rules of the executive commissioner of the Health and Human Services Commission by a physician or psychologist licensed in this state or an authorized provider certified by the Health and Human Services Commission to perform the examination.
2. What is your assessment of the Proposed Ward's level of intellectual functioning and adaptive behavior?
   ☐ Mild (IQ of 50-55 to approx. 70) ☐ Moderate (IQ of 35-40 to 50-55)
   ☐ Severe (IQ of 20-25 to 35-40) ☐ Profound (IQ below 20-25)
3. ☐ Yes ☐ No ----Is there evidence that the intellectual disability originated during the Proposed Ward's developmental period?

Note to attorneys: *If the above box is filled out because a determination of intellectual disability has been made in accordance with rules of the executive commissioner of the Health and Human Services Commission governing examinations of that kind, a Court may grant a guardianship application if (1) the examination is made not earlier than 24 months before the date of the hearing or (2) a prior determination of an intellectual disability was updated or endorsed in writing not earlier than 24 months before the hearing date. If a physician's diagnosis of intellectual disability is not made in accordance with rules of the executive commissioner — and the above box is not filled out — the court may grant a guardianship application only if the Physician's Certificate of Medical Examination is based on an examination the physician performed within 120 days of the date the application for guardianship was filed. See Texas Estates Code § 1101.104(1).*

7. Definition of Incapacity

For purposes of this certificate of medical examination, the following definition of incapacity applies:

An "**Incapacitated Person**" is an adult who, because of a physical or mental condition, is substantially unable to: (a) provide food, clothing, or shelter for himself or herself; (b) care for the person's own physical health; or (c) manage the person's own financial affairs. Texas Estates Code § 1002.017.

8. Evaluation of Capacity

☐ YES ☐ NO----- Based upon my last examination and observations of the Proposed Ward, it is my opinion that the Proposed Ward is incapacitated **according to the legal definition in section 1002.017 of the Texas Estates Code, set out in the box above.**

If you indicated that the Proposed Ward is incapacitated, indicate the level of incapacity:

☐ **Total** ---------- The Proposed Ward is totally without capacity (1) to care for himself or herself and (2) to manage his or her property.

☐ **Partial** ---------- The Proposed Ward lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself or to manage his or her property.

If you indicated the Proposed Ward's incapacity is partial, what specific powers or duties of the guardian should be limited if the Proposed Ward receives supports and services? _____
_____
_____

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

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

9. Ability to Attend Court Hearing

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

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

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

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

☐ ---------- Nursing home level of care ☐--- Assisted Living Facility

☐ ---------- Group Home ☐--- Memory care unit

☐ ---------- Own Home or with family ☐--- Other _____

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

_____ _____
Physician's Signature Date

_____ _____
Physician's Name Printed License Number

APPENDIX B: ORDER APPOINTING GUARDIAN OF PERSON AND/OR ESTATE
CAUSE NO.

GUARDIANSHIP OF	§	IN PROBATE COURT
	§	
NAME OF PROPOSED WARD,	§	NUMBER **COURT NO.** OF
	§	
AN INCAPACITATED PERSON	§	_____ COUNTY, TEXAS

ORDER APPOINTING GUARDIAN OF **PERSON AND/OR ESTATE**

On this day came on to be heard the **NAME OF APPLICANT'S** Application for Guardianship of the **PERSON AND/OR ESTATE** of **NAME OF PROPOSED WARD**, and the Court finds by clear and convincing evidence as follows:

1. **NAME OF PROPOSED WARD** is an incapacitated person.

2. It is in **NAME OF PROPOSED WARD'S** best interest to have this Court appoint a guardian.

3. **NAME OF PROPOSED WARD'S** rights and property will be protected by the appointment of a guardian.

4. **NAME OF POPOSED WARD** was notified of this hearing, was represented by the duly appointed Attorney Ad Litem, **NAME OF ATTORNEY AD LITEM**, and a personal appearance is not necessary.
   - ☐ **OR NAME OF PROPOSED WARD** was present at the hearing and was represented by the duly appointed Attorney Ad Litem, **NAME OF ATTORNEY AD LITEM**.
   - ☐ Guardian Ad Litem, **NAME OF GUARDIAN AD LITEM**, was appointed to represent the best interest of **NAME OF PROPOSED WARD** and has entered an appearance.

5. Alternatives to guardianship that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible.

6. Supports and services available to the proposed ward that would avoid the need for the appointment of a guardian have been considered and it was determined that the supports and services were not feasible.

The Court further finds by a preponderance of the evidence as follows:

1. The Court has venue of this case and jurisdiction over this matter.

2. No eligible person with a superior right to be appointed as guardian has applied for guardianship and **NAME OF APPLICANT**, is a proper person to serve and entitled to appointment and to act as guardian.

3. **NAME OF PROPOSED WARD** is totally without capacity as provided by the Texas Estates Code for self-care or property management.

OR

3. **NAME OF PROPOSED WARD** lacks the capacity to do some, but not all, of the following tasks necessary to care for him/herself or to manage his or her property:

Y	N	
☐	☐	Make complex business, managerial, and financial decisions
☐	☐	Manage a personal bank account or funds in the amount of $_____
☐	☐	Safely operate a motor vehicle
☐	☐	Vote in a public election

□ □ Make decisions regarding marriage
□ □ Determine own residence
□ □ Administer own medications on a daily basis
□ □ Attend to basic activities of daily living (ADLS) (e.g., bathing, grooming, dressing, and walking)
□ □ Attend to instrumental activities of daily living (e.g., shopping, cooking, traveling)
□ □ Consent to medical and dental treatment, now or in the future
□ □ Consent to psychological and psychiatric treatment, now or in the future

4. There □ is / □ is not a possibility for improvement in **NAME OF PROPOSED WARD'S** functioning. The NAME OF PROPOSED WARD should be reevaluated / should not be reevaluated to determine whether a guardianship continues to be necessary. If a reevaluation is required by this order, it should be completed by_____.

5. **NAME OF APPLICANT** has proven each element required by the Texas Estates Code to create a guardianship.

It is therefore ORDERED that **NAME OF APPLICANT** is hereby appointed Guardian of the **PERSON AND/OR ESTATE** of **NAME OF PROPOSED WARD**, until said ward may be restored by further order of this Court, with full authority over the ward.

It is further ORDERED that the ward's right to vote and ward's ability to obtain or hold a driver's license are hereby terminated.

It is further ORDERED that the ward shall no longer have the right to own, possess, purchase, or use a firearm or ammunition;

It is further ORDERED that the ward's rights to make decisions regarding marriage and residential placement decisions are terminated,

It is further ORDERED that any Statutory Durable Power of Attorney which may be held by any party is hereby null and void.

It is further ORDERED that any advanced healthcare directives appropriately executed by the proposed ward prior to incapacity will not be revoked by this Order.

It is further ORDERED that, should the guardian plan to move the ward to a more restrictive residential facility, notice shall be given to the court, the ward and any other person who has requested notice.

It is further ORDERED that the guardian shall qualify upon filing the Oath and posting bond in the amount of $_____ and the Clerk is directed to issue Letters of Guardianship to **NAME OF APPLICANT** upon said qualification.

It is further ORDERED, that the said Attorney Ad Litem is hereby discharged from further duty on this matter.

NOTICE TO ANY PEACE OFFICER OF THE STATE OF TEXAS: YOU MAY USE REASONABLE EFFORTS TO ENFORCE THE RIGHT OF A GUARDIAN OF THE PERSON OF A WARD TO HAVE PHYSICAL POSSESSION OF THE WARD OR TO ESTABLISH THE WARD'S LEGAL DOMICILE AS SPECIFIED IN THIS ORDER. A PEACE OFFICER WHO RELIES ON THE TERMS OF A COURT ORDER AND THE OFFICER'S AGENCY ARE ENTITLED TO THE APPLICABLE IMMUNITY AGAINST ANY CIVIL OR OTHER CLAIM REGARDING THE OFFICER'S GOOD FAITH ACTS PERFORMED IN THE SCOPE OF THE OFFICER'S DUTIES IN ENFORCING THE TERMS OF THIS ORDER THAT RELATE TO THE ABOVE-MENTIONED RIGHTS OF THE COURT-APPOINTED GUARDIAN OF THE PERSON OF THE WARD.

ANY PERSON WHO KNOWINGLY PRESENTS FOR ENFORCEMENT AN ORDER THAT IS INVALID OR NO LONGER IN EFFECT COMMITS AN OFFENSE THAT MAY BE PUNISHABLE BY CONFINEMENT IN JAIL FOR AS LONG AS TWO YEARS AND A FINE OF AS MUCH AS $10,000.

SIGNED this _____ day of _____, 2018.

_____
JUDGE PRESIDING

APPENDIX C: WARD'S BILL OF RIGHTS
SUBCHAPTER H. RIGHTS OF WARDS
TEXAS ESTATES CODE, SEC. 1151.351.

BILL OF RIGHTS FOR WARDS.

(a) A ward has all the rights, benefits, responsibilities, and privileges granted by the constitution and laws of this state and the United States, except where specifically limited by a court-ordered guardianship or where otherwise lawfully restricted.

(b) Unless limited by a court or otherwise restricted by law, a ward is authorized to the following:

(1) to have a copy of the guardianship order and letters of guardianship and contact information for the probate court that issued the order and letters;

(2) to have a guardianship that encourages the development or maintenance of maximum self-reliance and independence in the ward with the eventual goal, if possible, of self-sufficiency;

(3) to be treated with respect, consideration, and recognition of the ward's dignity and individuality;

(4) to reside and receive support services in the most integrated setting, including home-based or other community-based settings, as required by Title II of the Americans with Disabilities Act (42 U.S.C. Section 12131 et seq.);

(5) to consideration of the ward's current and previously stated personal preferences, desires, medical and psychiatric treatment preferences, religious beliefs, living arrangements, and other preferences and opinions;

(6) to financial self-determination for all public benefits after essential living expenses and health needs are met and to have access to a monthly personal allowance;

(7) to receive timely and appropriate health care and medical treatment that does not violate the ward's rights granted by the constitution and laws of this state and the United States;

(8) to exercise full control of all aspects of life not specifically granted by the court to the guardian;

(9) to control the ward's personal environment based on the ward's preferences;

(10) to complain or raise concerns regarding the guardian or guardianship to the court, including living arrangements, retaliation by the guardian, conflicts of interest between the guardian and service providers, or a violation of any rights under this section;

(11) to receive notice in the ward's native language, or preferred mode of communication, and in a manner accessible to the ward, of a court proceeding to continue, modify, or terminate the guardianship and the opportunity to appear before the court to express the ward's preferences and concerns regarding whether the guardianship should be continued, modified, or terminated;

(12) to have a court investigator, guardian ad litem, or attorney ad litem appointed by the court to investigate a complaint received by the court from the ward or any person about the guardianship;

(13) to participate in social, religious, and recreational activities, training, employment, education, habilitation, and rehabilitation of the ward's choice in the most integrated setting;

(14) to self-determination in the substantial maintenance, disposition, and management of real and personal property after essential living expenses and health needs are met, including the right to receive notice and object about the substantial maintenance, disposition, or management of clothing, furniture, vehicles, and other personal effects;

(15) to personal privacy and confidentiality in personal matters, subject to state and federal law;

(16) to unimpeded, private, and uncensored communication and visitation with persons of the ward's choice, except that if the guardian determines that certain communication or visitation causes substantial harm to the ward: (A) the guardian may limit, supervise, or restrict communication or visitation, but only to the extent

necessary to protect the ward from substantial harm; and (B) the ward may request a hearing to remove any restrictions on communication or visitation imposed by the guardian under Paragraph (A);

(17) to petition the court and retain counsel of the ward's choice who holds a certificate required by Subchapter E, Chapter 1054, to represent the ward's interest for capacity restoration, modification of the guardianship, the appointment of a different guardian, or for other appropriate relief under this subchapter, including a transition to a supported decision-making agreement, except as limited by Section 1054.006;

(18) to vote in a public election, marry, and retain a license to operate a motor vehicle, unless restricted by the court;

(19) to personal visits from the guardian or the guardian's designee at least once every three months, but more often, if necessary, unless the court orders otherwise;

(20) to be informed of the name, address, phone number, and purpose of Disability Rights Texas, an organization whose mission is to protect the rights of, and advocate for, persons with disabilities, and to communicate and meet with representatives of that organization;

(21) to be informed of the name, address, phone number, and purpose of an independent living center, an area agency on aging, an aging and disability resource center, and the local mental health and intellectual and developmental disability center, and to communicate and meet with representatives from these agencies and organizations;

(22) to be informed of the name, address, phone number, and purpose of the Judicial Branch Certification Commission and the procedure for filing a complaint against a certified guardian;

(23) to contact the Department of Family and Protective Services to report abuse, neglect, exploitation, or violation of personal rights without fear of punishment, interference, coercion, or retaliation; and

(24) to have the guardian, on appointment and on annual renewal of the guardianship, explain the rights delineated in this subsection in the ward's native language, or preferred mode of communication, and in a manner accessible to the ward.

(c) This section does not supersede or abrogate other remedies existing in law.

Effective June 19, 2015.