

Guardianship Law, Part 2: Nuts & Bolts of Judicial Administration

Presented by

The Honorable Claudia Laird

County Court at Law 2, Montgomery County
Atrium Building 210 West Davis, Conroe, Texas 77301
Phone: 936-539-7832 Fax: 936-788-8357

Guardianship Law, Part 2 Paper Prepared by

The Honorable Guy Herman

Travis County Probate Court No. 1

The Honorable Claudia Laird

County Court at Law 2, Montgomery County

&

Tom Ruffner, Court Investigator

Travis County Probate Court No. 1

With Nuts & Bolts Commentary Added by

The Honorable Claudia Laird

County Court at Law 2, Montgomery County

© 2017

Annual Meeting

Texas College of Probate Judges

August 23-26, 2017

The St. Anthony Hotel, San Antonio, Texas

Judge Claudia Laird earned a Bachelor's Degree in International Studies from Texas A&M University in three years. She was honored as a distinguished student two times, and participated in the honor's program. She earned a Master's Degree in Business Administration jointly with a Doctor's Degree in Jurisprudence from The University of Houston. Judge Laird has acted as in house counsel as well as working for Simonsen & Associates in general litigation. She began her service to Montgomery County as Chief Prosecutor in the civil/white collar crime division of the Montgomery County District Attorney's Office. Judge Laird began her service as Presiding Judge of County Court at Law Number Two on 1/1/11. Judge Laird is the presiding Administrative Judge for the County Courts at Law for 2015.

2013 M.A.D.D. Judicial Service Award

2010 & 2012 Texas Federation of Republican Women Tribute to Women Award

2009-2012 & 2016 Montgomery County Bail Bond Board Member
2011 Vice Presiding Officer
2012 Presiding Officer

2009-2012 Executive Committee Member North Shore Republican Women
2010-2011 Vice President
2008-2009 Treasurer

2009-2011 Advisory Board Member Conroe Salvation Army
2010-2011 Secretary

2012-2013 The Woodlands Bar Association Board Member
2014-2015 Scholarship Committee Co-Chair

2013 Texas Center for The Judiciary Bench Book Committee Member
Responsible for the 2014 probate section of the Texas Bench Book

2015-2016 County Courts at Law Administrative Judge
Veterans Treatment Court Steering Committee Member

2015 County Court at Law #2 named Department of the Year for Montgomery County

Laird, Claudia. "Civil Law: Let the buyer beware." The Texas Prosecutor September - October 2010: 23-25

**Laird, Claudia. "Probate and Guardianship- The Fundamental Nuts and Bolts."
Presented to The Texas Center for the Judiciary Winter Regional Conference in 7
February 2013 & 7 January 2013.**

-Highest Conference Speaker Rating from January 2013

-Perfect "Knowledge of Topic" score from February 2013

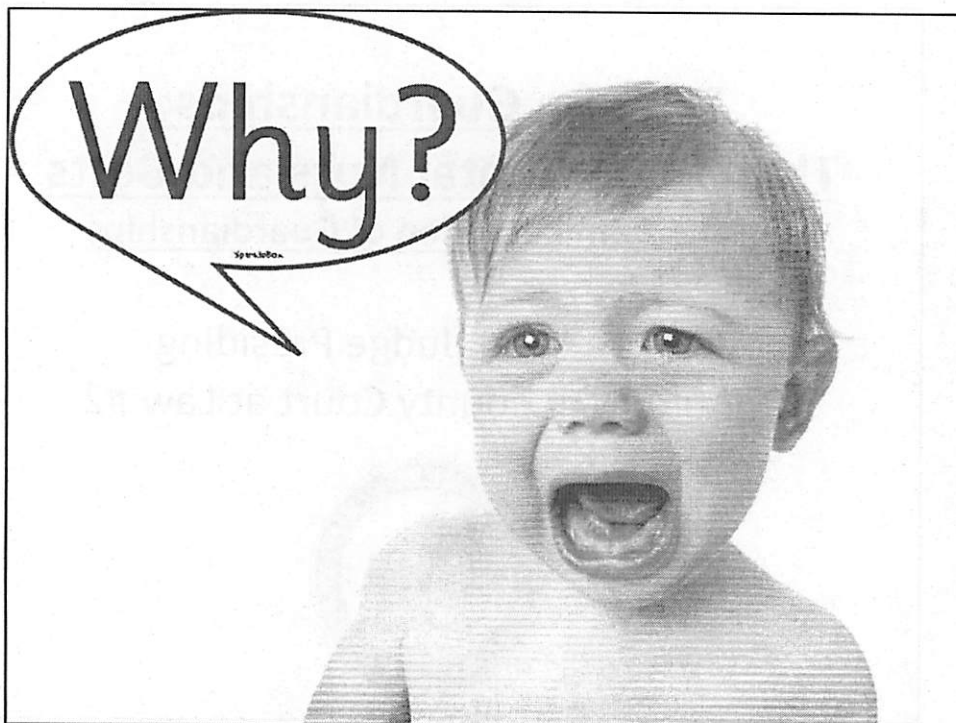
**Laird, Claudia & Payne Smith, Darlene. "Criminal Aspects of Guardianship."
Presented to The Texas Bar Association Advanced Guardianship Law Course on
4/4/14.**

**Presented to Montgomery County Court at Law Number Two Brown Bag Luncheon on
1/22/16.**

Probate Guardianships:
The Fundamental Nuts and Bolts
Judicial Administration of Guardianships

Claudia Laird, Judge Presiding
Montgomery County Court at Law #2





WHY AUDIT YOUR GUARDIANSHIP FILES?

- It is good for you.
- To adjust old guardianship orders to new laws.
- Its gonna happen anyway.



WHO WILL AUDIT YOUR GUARDIANSHIP FILES?

- Borrow someone.
- Hire someone on a temp basis.
- Contract with someone.
- Appoint someone.
- HIRE SOMEONE PERMANENTLY
 - HOURLY
 - PART TIME
 - FULL TIME
- YOU
- OCA



YOU MAY NEED HELP IF...

- You don't know about how many guardianship files you have.
- You have as many guardianships as bigger counties.
- You rarely find a guardianship that is out of compliance.
- You have guardianship cases that have been filed but never ruled on.



WHY AUDIT YOUR GUARDIANSHIP FILES?

To adjust old guardianship orders to new laws.

- Lesser Restrictive Alternatives (TEC 1002.015)
- Supported Decision-Making (TEC 1357.002)
- Annual modification determination (TEC 1201.052)
 - Typically partial guardianships
 - Can ward agree to a supported decision making?

**ANNUAL REPORT – INVESTIGATOR -
APPOINT AD LITEM**

WHY AUDIT YOUR GUARDIANSHIP FILES?

Its gonna happen anyway.

- Senate tasked OCA to audit – law requires it.
- Initial audit findings???
- Public.
- Discussed in senate.
 - Wards there.
 - Judges not cooperating.
 - We look really bad.



**KEEP
CALM
AND
BE
PREPARED**

GETTING STARTED

- CLERKS – are the files active, inactive, closed?
- Have a tickle system? Run the reports.
 - SHOW CAUSE!!!!
- Don't have a tickle system? GET ONE.
 - Annual reports
 - Annual accountings
 - Inventory
 - Allowance
 - Investment plan
- Old school?

ARE ALL YOUR CASES BONDED?



Table of Contents

I. Scope of Guardianship Law Parts 1 & 2 1

II. Administering a Guardianship 1

A. *Marshalling Assets, Notice to Creditors, and Filing the Inventory*..... 2

 1. Taking Possession 2

 2. Notice to Creditors 2

 3. Filing the Inventory 2

 4. Oath 3

B. *Powers and Duties of the Guardian* 3

 1. General 3

 a. Guardian of the Person..... 3

 b. Guardian of the Estate..... 4

 2. Power to Act With or Without Court Authority 4

 3. Support, Maintenance, and Education of the Ward..... 5

 a. Monthly allowance for the ward 5

 b. Where the Guardian Is Parent of a Minor/Ward 5

 c. Liability for Support of an Incapacitated Person by Non-Parent Guardian 5

 d. Expenditures of Corpus..... 5

 e. Court Approval of Previous Expenditures of Corpus 5

 f. Social Security Benefits..... 6

 g. Mental Health Services..... 6

 h. Miscellaneous Powers Case Law 6

 4. Collection of Claims and Recovery of Property..... 6

 5. Claims Against the Ward..... 7

 a. Authentication..... 7

 b. Claim by Guardian..... 7

 c. Order of Payment of Claims 7

 d. Notification to the Department of Veterans Affairs..... 7

 e. Allowing or Rejecting a Claim and Failure to Act on a Claim 7

 6. Borrowing..... 8

 a. General..... 8

 b. Purchase of Residence 8

 7. Sale and Partition..... 8

 8. Investments and Loans 9

 9. Rental and Leasing 9

 10. Gifts and Contributions 10

 a. General..... 10

 b. Gifts and Transfers..... 10

 c. Charitable Contributions..... 10

 11. Annual Reports..... 11

 12. Annual and Final Accountings 12

 a. Separate accountings for guardian of person 12

 b. Reference to prior accountings 12

 c. Closing a Depleted Estate 12

 d. Requirements of the Annual Account..... 12

 e. Action Upon Annual Account..... 13

 f. Re-examination of Previous Accountings..... 13

 13. Final Settlement, Accounting, and Discharge 14

 a. Settling a Guardianship of the Estate 14

 b. Action Permitted After Death of Ward 15

 c. Account for Final Settlement 15

 d. Notice..... 15

 e. Action by the Court..... 15

f. Discharge of Guardian	15
C. Guardian's Compensation	16
1. General	16
2. Limitations on Compensation.....	16
3. When Compensation Allowed.....	16
4. Compensation for Personal Services Rendered by Guardian	17
5. Compensation When Guardian and Attorney are the Same Person	17
6. Forfeiture of Compensation.....	18
7. Compensation of Guardian when Ward is a Medical Assistance Recipient.....	18
III. Fees for Attorneys and Ad Litems	18
A. <i>Attorney's Fees in Temporary and Permanent Guardianships</i>	18
1. Guardianship Contest	19
2. Proof.....	19
3. Hearing on Temporary Guardianship.....	19
4. Attorney's Fees to Non-prevailing Party When Guardianship Created	19
B. <i>Forfeiture of Attorney's Fees</i>	19
C. <i>Reasonable Attorney's Fees Are a Jury Issue</i>	20
D. <i>Attorney ad Litem</i>	20
E. <i>Guardian ad Litem</i>	20
F. <i>Ad Litem Fees Paid by County</i>	21
IV. Adjusting to Changes in Established Guardianships	21
A. <i>Death</i>	21
B. <i>Resignation</i>	21
C. <i>Removal</i>	21
1. Removal Without Notice.....	21
2. Removal With Notice.....	22
3. Additional Grounds for Removal	22
4. Prior Right	23
5. Minor Over 12 Years.....	23
6. Named Guardian Attains Adulthood.....	23
7. DADS as Successor Guardian	23
D. <i>Modification and Restoration</i>	23
V. Criminal Considerations	23
A. <i>Tex. Penal Code § 25.10</i>	23
B. <i>Code of Criminal Procedure Article 14.055</i>	23
VI. Conclusion	24

I. Scope of Guardianship Law Parts 1 & 2

What used to be one longer paper on guardianship law is now broken down into two parts:

- Guardianship Law Part 1, Investigation and Creation
- Guardianship Law, Part 2, Nuts & Bolts of Judicial Administration.

In addition to the administration parts of the previous guardianship paper, this paper includes boxed "Nuts & Bolts" commentary from Judge Claudia Laird.

NUTS & BOLTS from Judge Laird — STAFFING

Unlike other civil cases where upon final hearing you are unlikely to see the litigants again (appellate court be willing), in guardianship cases the work is just beginning. It is helpful to have specialized staff tasked solely with handling guardianship cases to aid the court in the work ahead necessary to properly monitor these important cases. There are three key roles to be filled:

Guardianship Coordinator: Selecting a guardianship coordinator with good people skills dedicated to management of guardianship cases is a must. Although many cases begin with attorneys, these attorneys often disappear as the years pass. The court is then left with pro se guardians struggling to serve the ward they have volunteered to care for. The guardianship coordinator spends her days patiently sitting with confused guardians explaining how to comply with the rules surrounding guardianship cases. It is a struggle to balance monitoring these cases for legal compliance against the practical challenges individuals face in caring for a loved one.

Court Investigator: The second employee dedicated to staffing guardianship cases is the court investigator. As of 9/1/17 the legislative gap regarding court investigators employed by non-statutory probate courts has been addressed. SB 39 added Section 1054.156 to the Estates Code allowing non-statutory probate courts to hire a probate investigator upon commissioner court approval. A handful of non-statutory courts already employ a court investigator. Some

other non-statutory courts have established a system for the investigation without the use of a court investigator employee.

It is a commonly accepted practice across Texas not to have a court investigator or investigation if there is no statutory probate court established in a county. However the court chooses to address this issue, with regard to the remainder of this paper, court investigator will be used to refer to the person or persons the court uses in the manner described above. The probate investigator is used in several ways, discussed as follows.

*An investigator must complete an investigation of each proposed guardianship to establish the necessity of the guardianship. Tex. Est. Code §§ 1054.151-1054.154.

*An investigator must investigate the necessity of continuing a guardianship upon receipt of a letter from the ward contesting the guardianship. Tex. Est. Code § 1201.054.

*An investigator or ad litem must investigate the necessity for a court initiated guardianship upon receipt of an "information letter." Texas Estates Code Chapter 1102.

*An investigator *should* investigate whenever there is any communication of concern to the court from any source alleging abuse, neglect or exploitation of a ward.

Accountant: The final individual necessary for management of guardianships is the accountant. Because there are similar accounting functions in decedent's estate cases, the accountant acts as part of the guardianship team as well as the probate team. The accountant reviews the accountings, attorney fee applications, investment plan, budget, ratifications, expenditures, and commission applications.

II. Administering a Guardianship

The administration of a guardianship is distinguishable from the administration of a decedent's estate. Whereas administering a decedent's estate is intended to last only as long as necessary to wind up and distribute the estate, administering a guardianship is expected to continue for an extended period,

providing income for the maintenance and support of a in an incapacitated person.

A. *Marshalling Assets, Notice to Creditors, and Filing the Inventory*

1. Taking Possession

Immediately upon receipt of letters, the guardian of the estate shall collect and take possession of all personal property, records, title papers, and business papers of the estate. Tex. Est. Code § 1151.152. The guardian, however, is not entitled to possession of a will that has been placed in safekeeping with an attorney under the ward's instructions not to deliver the will to anyone until the ward's death. *Baumann v. Willis*, 721 S.W.2d 535 (Tex. App. – Corpus Christi 1986, no writ). Nor does the guardian, absent court approval, have authority to revoke a revocable trust. *Weatherly v. Byrd*, 566 S.W.2d 292 (Tex. 1978) (reasoning that the right to revoke a revocable trust, absent an agreement to the contrary, is a purely personal right of the settlor and does not vest in the guardian). Furthermore, while a parent is the natural guardian of a minor child, only a duly appointed guardian of the minor's estate is entitled to custody and control of the estate. *Patillo v. Allison*, 51 S.W.2d 1041 (Tex. Civ. App. – Waco 1932, no writ).

2. Notice to Creditors

Due process requires the personal representative of an estate to give actual notice by mail to all reasonably ascertainable creditors. *Tulsa Professional Collection Services, Inc. v. Pope*, 108 S. Ct. 1340 (1988). Under current Texas law:

a. Within one month after receiving letters, the guardian must publish a notice to creditors in a newspaper of general circulation in the county and must have a copy of the notice and the publisher's affidavit filed of record. Tex. Est. Code § 1153.001.

b. Within four months after receiving letters, the guardian must give notice to secured creditors by certified mail or registered letter, return receipt requested. Tex. Est. Code § 1153.003(a).

c. Within four months after receiving letters, the guardian must give notice to general claimants by certified or registered mail if the guardian has actual knowledge of the debt or claim. Tex. Est. Code § 1153.003(b). The guardian may expressly state in the notice to the unsecured creditor that the creditor has 120 days to file the claim or that it will be barred from future consideration of payment. Tex. Est. Code § 1153.004.

3. Filing the Inventory

Within 30 days after qualification, the guardian must file a verified inventory, appraisal, and list of claims due the estate of the ward. Tex. Est. Code § 1154.051. As of September 1, 2011, co-owners of

property listed on the inventory are no longer required to be listed. Approval of the inventory by the court is not an adjudication of property listed or omitted on the inventory, but is prima facie evidence of that fact. *Adams v. Sadler*, 696 S.W.2d 690 (Tex. App. – Austin 1985, writ ref'd n.r.e.).

**NUTS & BOLTS from Judge Laird –
INVENTORIES**

If the guardian does not timely file an inventory, it is important for the court to act. A gentle reminder via a notice to show cause to the proposed guardian normally resolves this situation. It is important to act at this point not only to make sure the estate is properly managed, but also because the inventory is a key resource in ensuring that you have set an appropriate bond. The inventory is a full financial accounting of all assets of the guardianship estate as of the date the guardian qualifies.

The inventory shall indicate the community property nature of any community property owned by the ward. Watch for descriptions like the following when reviewing inventories:

“Community property bank account with a value of \$50,000.”

How does the court know whether the guardian has already accounted for the 50% reduction such that the ward's half is \$50,000? Or whether the \$50,000 listed is the full amount in the bank, with the spouse entitled to half, and the ward's share actually only \$25,000? It is important to establish accurate balances in the inventory to ensure bond is accurate and because the inventory establishes the beginning balances in the first annual accounting.

Some other things to consider when reviewing inventories:

1. “Unknown” values should always give pause. Has the guardian taken the proper steps to gather the ward's assets and done the proper due diligence to determine the appropriate value for the ward's estate? An appraiser may be appointed to determine proper valuation of an estate asset if the guardian is unable to do so.
2. Real property outside Texas. While it may be noted on an inventory, it is not

properly included in the total valuation of the guardianship estate.

3. Use the inventory to determine whether the bond is sufficient! The inventory may reflect a million-dollar estate, which at the time of the hearing was thought only to be a \$200,000 estate, so the bond is far too low. Correct this situation by requiring an increased bond.
4. An estimate of any value of a potential lawsuit should be included under the claims section of the inventory.

4. Oath

Unless the ward is under 18, the guardian must file an oath before the 21st day after the order appointing guardian is signed.¹ Tex. Est. Code 1105.051.

NUTS & BOLTS from Judge Laird —

OATHS

It is important for the court to ensure the oath has been filed timely. Lack of filing of the oath could be indicative of further problems the guardian may have in administering the guardianship.

B. Powers and Duties of the Guardian

1. General

a. Guardian of the Person

A guardian of the person has the following powers and duties², including but not limited to the following:

- (1) the right to have physical possession of the ward and to establish the ward's legal domicile;
- (2) the duty to provide care, supervision, and protection for the ward;
- (3) the duty to provide the ward with clothing, food, medical care, and shelter;
- (4) the power to consent to medical, psychiatric, and surgical treatment other than the in-patient psychiatric commitment of the ward; and
- (5) the power to sign documents necessary or appropriate to facilitate employment of the ward.

As of September 1, 2015, a guardian of the person is required to give notice prior to moving a ward to a more restrictive care facility except in cases of emergency. Tex. Est. Code § 1151.051(e). A guardian of the person may only place the ward in a more restrictive care facility, except in cases of emergency, if the guardian provides notice of the proposed placement to the court, the ward, and any person who has requested notice. Tex. Est. Code § 1151.051(e). After giving notice, the guardian of the person cannot move the ward until the eighth business day after the court receives the notice, if the court does not schedule a hearing on the proposed placement before that day. Tex. Est. Code § 1151.051(e)(2). If the ward or another person objects to the proposed placement before the eighth business day after the person's receipt of the notice, then the court must conduct a hearing on the matter. Tex. Est. Code § 1151.051(e)(1).

A guardian of an adult ward also has the duty to inform the ward's spouse, parents, children, and siblings about the ward's health and residence. However, the guardian need only to provide notice to those relatives who (1) did not have a protective order issued against them to protect the ward, (2) have not been found by a court or other state agency to have abused, neglected, or exploited the ward, and (3) who had affirmatively elected to receive notice of the ward. Tex. Est. Code § 1151.056(a).³ Texas Estates Code § 1151.056(b) states, in part:

[T]he guardian of an adult ward shall as soon as practicable inform relatives if:

- (1) the ward dies;
- (2) the ward is admitted to a medical facility for acute care for a period of three days or more;
- (3) the ward's residence has changed; or
- (4) or the ward is staying at a location other than the ward's residence for a period that exceeds one calendar week.

In the event of the ward's death, the guardian must inform the ward's relatives of any funeral arrangements and the location of the ward's final resting place. Tex. Est. Code § 1151.056(c). A court may grant the guardian's request to not provide notice to a relative upon the filing of a motion and the showing of good cause and after the relative is provided an opportunity to present evidence to the court. Tex. Est. Code § 1151.056(e). In considering

¹ See also Tex. Est. Code § 1103.003 for guardianships of an adult created before the ward's 18th birthday.

² These powers and duties should be viewed in conjunction with the rights retained by the ward. A "bill of rights" for wards was recently established and can be found in Section 1151.351 of the Estates Code.

³ The 2017 Legislature narrowed the guardian's duty from informing all relatives to only those that met the three newly establish requirements. For guardianships that were created before June 15, 2017, current guardians are required to give notice to the ward's spouse, parents, children, and siblings that they must elect in writing in order to receive notice about the ward. The guardians must do so "as soon as possible but not later than September 1, 2019." Tex. Est. Code § 1151.056(h).

the motion, the court shall grant the request if the court finds that:

- (1) the motion includes a written request from a relative electing to not receive the notice;
- (2) the guardian was unable to locate the relative after making reasonable efforts to discover and locate the relative;
- (3) the guardian was able to locate the relative, but was unable to establish communication with the relative after making reasonable efforts to establish communication; or
- (4) notice is not in the best interest of the ward.

Tex. Est. Code § 1151.056(g).

The ward's spouse, parents, siblings, or children may file an application with the court to request access to the ward for visitation or communication. Tex. Est. Code § 1151.055. The court must schedule a hearing within 60 days of the filing of the application; however, if the application alleges that the ward's health is in significant decline or that the ward's death may be imminent, then the court must conduct an emergency hearing within 10 days after the filing of the application. Tex. Est. Code § 1151.055(c) and (d). The guardian must be personally served at least 21 days before the hearing unless an emergency hearing is requested. Tex. Est. Code § 1151.055(e)(1) If so, then service must be done "as soon as practicable." Tex. Est. Code § 1151.055(e)(2).

In deciding whether to grant the application, the court shall consider:

- (1) whether any protective orders have been issued against the applicant to protect the ward;
- (2) whether a court or other state agency has found that the applicant abused, neglected, or exploited the ward; and
- (3) the best interest of the ward. Tex. Est. Code § 1151.055(g).

The court may consider whether:

- (1) visitation by the applicant should be limited to situations in which a third person, specified by the court, is present; or
- (2) visitation should be suspended or denied. Tex. Est. Code § 1151.055(g).

In its order, the court may (1) prohibit the guardian of a ward from preventing the applicant access to the ward if the applicant shows by a preponderance of the evidence that the guardian's past act or acts prevented access to the ward; and the ward desires contact with the applicant; and (2) specify the frequency, time, place, location, and any other terms of access. Tex. Est. Code § 1151.055(f). The court also has discretion to award the prevailing party court costs and attorney's fees, but they are not to be paid out of the ward's estate. Tex. Est. Code § 1151.055(h).

b. Guardian of the Estate

The guardian of the estate is responsible for taking possession of and managing the estate and for collecting all funds and property due the estate. The guardian should manage the estate as a "prudent person would manage the person's own property." Tex. Est. Code §§ 1151.101, 1151.151.

2. Power to Act With or Without Court Authority

Tex. Est. Code § 1151.102 allows the guardian to do the following if authorized by an order of the court:

- a. purchase or exchange property;
- b. take property or a claim for the use and benefit of the estate in payment of a debt due or owing to the estate;
- c. compound a bad or doubtful debt due or owing to the estate;
- d. make a compromise or a settlement in relation to property or a claim in dispute or litigation;
- e. compromise or pay in full any secured claim that has been allowed and approved as required by law against the estate by conveying to the holder of the secured claim the real estate or personalty securing the claim, in full payment, liquidation, and satisfaction of the claim, and in consideration of cancellation of a note, deed of trust, mortgage, chattel mortgage, or other evidence of a lien that secures the payment of the claim;
- f. abandon worthless or burdensome property and the administration of that property;⁴
- g. purchase a prepaid funeral benefits contract; and
- h. establish a trust in accordance with 42 U.S.C. Section 1396p(d)(4)(B), as amended, and direct that the income of the ward as defined by that section be paid directly to the trust, solely for the purpose of the ward's eligibility for medical assistance under Chapter 32, Human Resources Code.

Tex. Est. Code § 1151.103 allows the guardian to perform the following acts without court authorization:

- a. release liens upon final payment;
- b. vote stocks;
- c. pay calls and assessments;
- d. insure against liability in appropriate cases;
- e. insure against fire, theft, and other hazards; and
- f. pay taxes, court costs, and bond premiums.

PRACTICE NOTE

This author believes the best practice is to ask for court authority whenever a power is not explicitly authorized by the Code.

⁴ Abandoned real or personal property may be foreclosed on by a secured party, trustee, or mortgagee without further order of the court. Tex. Est. Code § 1151.102.

3. Support, Maintenance, and Education of the Ward

a. Monthly allowance for the ward

If the appointing order did not specify a monthly allowance for the ward, the guardian must apply for a monthly allowance for the education and maintenance of the ward and the maintenance of the ward's property. Tex. Est. Code § 1156.001. This application must be filed no later than 30 days after qualification, or a later date specified by the court. The application must clearly separate amounts for the education and maintenance of the ward from amounts for the maintenance of the ward's property. Because the court must consider the condition of the ward's estate when determining the amount of the allowance, an application to the court for a monthly allowance should detail the condition of the estate and the income and corpus of the estate necessary to pay the reasonably anticipated regular education and maintenance expenses of the ward and maintenance expenses of the ward's property.

The court's order setting a monthly allowance must specify the types of expenditures the guardian may make each month. However, the order does not change the guardian's duty to account for expenditures of the allowance in the annual account required by Tex. Est. Code Subchapter A, Chapter 1163.

If the applicant has spent in excess of the monthly allowance, the court may approve such expenditures upon clear and convincing proof that the expenditures were reasonable and

- a. the expenditures were made when it was not convenient or possible for the guardian to first secure court approval;
- b. the court would have granted authority in advance to make the expenditures; and
- c. the ward received the benefits of the expenditures. Tex. Est. Code § 1156.004.

b. Where the Guardian Is Parent of a Minor/Ward

Special rules govern the support and maintenance of children. The parent of a minor has a legal duty to support the child from the parent's own resources. Therefore, absent evidence that the parent is unable to support the child, the parent has no authority as guardian to invade either the income or corpus of the child's estate. Tex. Est. Code § 1156.051.

c. Liability for Support of an Incapacitated Person by Non-Parent Guardian

Once an allowance has been approved by the court, the guardian of the person of an incapacitated person is entitled, without additional court order, to use that allowance for the ward's education and maintenance. Tex. Est. Code § 1156.001(a); *In re*

Guardianship Estates of Kaufman, 429 S.W.2d 612 (Tex. Civ. App. – Dallas 1968, no writ); *Dallas Trust & Saving Bank v. Pitchford*, 208 S.W. 724 (Tex. Civ. App. – Dallas 1919, no writ). Pension benefits payable to a minor beneficiary are “corpus” and not “income” and cannot be expended without court order. *Bagwell v. McCombs*, 31 S.W.2d 835 (Tex. Civ. App. – Dallas 1930, no writ); *Anderson v. Steddum*, 194 S.W. 1132 (Tex. Civ. App. – Texarkana 1917), *aff'd*, 222 S.W. 1090 (Tex. Comm'n App. 1920, holding approved); *Ross v. United States*, 348 F.2d 577 (5th Cir. 1965). The term “net income” means “that portion of the total income remaining after payment of all necessary expenses incident to proper administration of the estate.” 42 Tex. Jur. 3d Guardianship and Conservatorship § 114 (1995).

d. Expenditures of Corpus

Invading the corpus of the estate for the ward's education and maintenance must be authorized by court order. Tex. Est. Code § 1156.001(a); *Ross v. United States*, 348 F.2d 577 (5th Cir. 1965); *Pemberton v. Leatherwood*, 218 S.W.2d 500 (Tex. Civ. App. – Eastland 1949, writ *ref'd n.r.e.*).

PRACTICE NOTE

Many lawyers are unfamiliar with the prohibition on invasion of principal and place themselves in jeopardy with their clients and carriers by failing to inform their clients of this restriction. Many guardians have been removed or have been held personally liable for various fees resulting from the guardian's unauthorized invasion of principal. Under certain circumstances, the court can ratify a guardian's unauthorized expenditures. Tex. Est. Code § 1156.004.

e. Court Approval of Previous Expenditures of Corpus

The court in its discretion may approve expenditures in excess of the monthly allowance authorized by the court if (1) the expenditures were made when it was not convenient or possible to first secure court approval; (2) it is clear and convincing that the expenditures were reasonable and proper; (3) the court would have granted authority in advance to make the expenditures; and (4) the ward received the benefits of the expenditures. Tex. Est. Code § 1156.004(1-4). If the guardian is a parent of the ward, he must also show that he is unable to provide adequate support for the ward. *Ross v. United States*, 348 F.2d 577 (5th Cir. 1965). The court should hear evidence and make findings on any claim for retroactive approval of expenditures of corpus.

f. Social Security Benefits

In *Tharp v. Blackwell*, 570 S.W.2d 154 (Tex. Civ. App. – Texarkana 1978, no writ), the court held that social security benefits for a minor were not “corpus” of the guardianship estate because the Social Security Act, 42 U.S.C. § 405, preempts the field concerning social security benefits paid to an individual payee. 20 C.F.R., Subpart Q, § 404.1604. However, if the social security funds are commingled with guardianship estate funds or if such funds are paid directly to the guardianship, the social security funds must be accounted for by the guardian to the satisfaction of the court.

g. Mental Health Services

Under Tex. Est. Code § 1151.053, the general rule is that a guardian may not voluntarily admit an incapacitated person to an inpatient psychiatric facility or to a residential facility operated by the Texas Department of Aging and Disability Services (formerly Texas Department of Mental Health and Mental Retardation). A guardian does have the following options, however:

A guardian of a person younger than 18 years of age may request admission of an incapacitated person to a public or private inpatient psychiatric facility for care and treatment. Tex. Health & Safety Code §572.001; Tex. Est. Code § 1151.053(b).

Any guardian may transport a ward to an inpatient mental-health facility for a preliminary examination in accordance with Texas Health and Safety Code §573, A & C. Tex. Est. Code § 1151.053(a)(3). A guardian of the person may direct the ward’s transport by emergency medical services or other means to an inpatient mental-health facility for this purpose. Tex. Est. Code § 1151.051(d). As of September 1, 2017, the guardian is required to immediately give notice to the court that granted the guardianship of any application for emergency detention that is filed. EC § 1151.051(d).

A guardian may apply to a court to commit the ward under Texas Health and Safety Code § 462.001 *et seq.*, §571.001 *et seq.*, and §591.001 *et seq.* See also Tex. Est. Code § 1151.053(a)(2).

The guardian of an adult ward under protective custody can consent to the administration of psychoactive medication as prescribed by the ward’s physician, regardless of the ward’s expressed preferences regarding treatment with such medication. Tex. Est. Code § 1151.054.

A guardian of a person “may voluntarily admit an incapacitated person to a residential care facility for emergency care or respite care under Section 593.027 or 593.028, Health and Safety Code.” Tex. Est. Code § 1151.053(c). In addition, Tex. Est. Code §

1151.053(a)(1) states that the guardian may “apply for” services under these sections.

h. Miscellaneous Powers Case Law

- It has been held that the guardian has authority, with court approval, to donate a ward’s kidney. *Little v. Little*, 576 S.W.2d 493 (Tex. Civ. App. – San Antonio 1979, no writ).
- A guardian is not authorized to consent to sterilization of an incompetent ward. *Frazier v. Levi*, 440 S.W.2d 333 (Tex. Civ. App. – Houston [1st Dist.] 1969, no writ).
- The Texas Supreme Court held that a guardian may exercise the right of a ward to obtain a divorce. *Wahlenmaier v. Wahlenmaier*, 762 S.W.2d 575 (Tex. 1988); *see also Stubbs v. Ortega*, 977 S.W.2d 718 (Tex. App. – Ft. Worth, 1998, pet. den.) (evidence of verbal abuse allowed the court to act in the best interest of the ward). The validity of a ward’s marriage can be challenged post-death, based on the incapacity of the ward. Tex. Est. Code §§ 123.102–.104.
- According to Texas Attorney General Opinion No. JC-0461 (Feb. 8, 2002), a guardian had no authority to prevent Advocacy Inc. from having access to a ward with a mental illness or developmental disability or from having access to that ward’s records. The applicable federal statutes and regulations governing a federally funded state protection and advocacy program trumped any inconsistent guardianship provisions.

4. Collection of Claims and Recovery of Property

Tex. Est. Code § 1155.053 provides that the guardian of an estate may contract to hire an attorney on a contingent-fee basis to collect claims or recover property of the estate. Prior law limited recovery for an attorney’s services under a contingency-fee contract to one-third of the total recovery, with the attorney’s percentage bearing the costs and expenses of litigation. *Malone v. U.S.*, 493 F. Supp. 527 (S.D. Tex. 1980); *Bolton v. Baldwin*, 57 S.W.2d 957 (Tex. Civ. App. – Beaumont 1933, writ dism’d). Under subsequent revisions to the Estates Code, the cost and expense portion of litigation has been shifted from the attorney’s share to the ward’s share. Tex. Est. Code § 1155.053. However, upon approval of the court, a guardian may convey a contingent interest that exceeds one-third of the property for attorney’s services as long as the court approves the agreement before any services are performed. Tex. Est. Code § 1155.053(b).

In approving a contract or conveyance under this section, the court shall consider the following:

1. the time and labor required, the difficulty of the questions involved, and the skill required to perform the tasks;
2. the fee customarily charged for similar services;
3. the value of the property recovered;
4. the experience and ability of the attorney; and
5. the benefits to the estate. Tex. Est. Code § 1155.053(c).

As pointed out in *Stern v. Wonzer*, 846 S.W.2d 939 (Tex. App. – Houston [1st Dist.] 1993, no writ), Texas Rules of Civil Procedure 44 gives a next friend no greater authority to contract for legal services than a guardian. Rule 44 provides: “Such next friend shall have the same rights concerning such suits as guardians have.”

ETHICAL CONSIDERATION

A practitioner should be careful in the area of contingency-fee contracts, especially when a lawsuit could be brought either under a guardianship or as next friend. When the lawsuit could proceed either way, how many lawyers actually advise their prospective client that if a guardianship is obtained, a lawyer’s contingency-fee contract will be limited to one-third plus expenses unless the probate court pre-approves or ratifies a higher percentage? If a lawyer does not, is the lawyer making a full and frank disclosure to the client? Is there a conflict of interest that will subject a lawyer to discipline under the Texas Disciplinary Rules of Professional Conduct? Would it be a deceptive trade practice not to make the disclosure as to this contingency-fee limitation?

PRACTICE NOTE

The statute of limitations on a minor’s cause of action is tolled during minority even if a guardian has been appointed. *Collins v. McCarty*, 3 S.W. 730 (Tex. 1887); *Neblett v. Valentino*, 92 S.W.2d 432 (Tex. Comm’n App. 1936, opinion adopted); *Massingale v. Barnes*, 106 S.W.2d 368 (Tex. Civ. App. – San Antonio 1937, writ ref’d.).

5. Claims Against the Ward

a. Authentication

The general rule is that all claims must be authenticated before the personal representative of an

estate may allow the claim, but in matters of guardianship, the guardian is permitted to pay an unauthenticated claim if he believes it to be just. The claim must be supported by an affidavit that the claim is just and that all legal offsets, payments, and credits known to the affiant have been allowed. Note, however, that the guardian acts at his own peril, and if the court finds the claim to be unjust, he and his sureties will be liable for the amount paid. Tex. Est. Code §§ 1157.004, 1157.102.

b. Claim by Guardian

A claim held by the guardian before appointment must be verified and presented as in other cases. Tex. Est. Code § 1157.201(a). A guardian is prohibited from purchasing a claim against the estate. Tex. Est. Code § 1157.202

c. Order of Payment of Claims

Under § 1157.103(a), once claims have been allowed and approved by the court or established by suit, they are paid in the following order if the estate is solvent:

- (1) expenses for the care, maintenance, and education of the ward or the ward’s dependents;
- (2) funeral expenses of the ward and expenses of the ward’s last illness, if the guardianship is kept open after the ward’s death, except that any claim against the estate of a ward that has been allowed and approved or established by suit before the death of the ward shall be paid before the funeral expenses and expenses of the last illness;
- (3) expenses of administration; and
- (4) other claims against the ward or the ward’s estate.

When the estate is insolvent, the guardian shall first pay claims relating to the administration of the guardianship. All other claims shall be paid in the order of priority listed above. Tex. Est. Code § 1157.103(b). When there is a deficiency of assets to pay all claims of the same class, the claims in the same class shall be paid pro rata, as directed by the court. Tex. Est. Code § 1157.106.

d. Notification to the Department of Veterans Affairs

If the ward is a DVA beneficiary, that agency is entitled to notice and hearing before any claim is paid, but the DVA may waive notice and hearing.

e. Allowing or Rejecting a Claim and Failure to Act on a Claim

The Estates Code directs that a guardian shall allow or reject a claim, in whole or in part, within 30 days after the date the claim is presented or filed.

Failure of a guardian to endorse his allowance or rejection of a claim within 30 days constitutes a rejection of the claim. Tex. Est. Code §§ 1157.002, 1157.051-.052.

PRACTICE NOTE

A creditor must pay attention to this automatic-rejection rule because suits on rejected claims are barred if not brought within 90 days after rejection. Tex. Est. Code § 1157.063. This rule results in the barring of many lawsuits by the unwary.

6. Borrowing

a. General

Under order of the court, a guardian may mortgage or pledge estate property as security on a loan to pay taxes, expenses of administration, business or farm expenses, claims, and extensions on liens, or to make improvements and repairs so that property may be made revenue producing. Tex. Est. Code § 1151.201(a).

b. Purchase of Residence

The court may authorize the borrowing of money to purchase a residence for the ward or his dependents, if the court finds it to be in the best interest of the ward. Tex. Est. Code § 1151.201(a)(6).

7. Sale and Partition

a. A guardian cannot purchase any property of the ward unless one of the following is true:

- (1) The guardian entered into a written executory contract signed by the ward before the ward became incapacitated. Tex. Est. Code § 1158.652.
- (2) The court approves the purchase after having an attorney ad litem appointed to represent the ward's interest. Tex. Est. Code § 1158.653.

b. Upon approval of the inventory, the guardian must immediately apply for an order of the court to sell all property of the estate liable to perish, waste, or deteriorate in value. Tex. Est. Code § 1158.051.

PRACTICE NOTE

Estates Code § 1158.051 has the potential for creating a nightmare for guardians, their lawyers, and probate judges. There have been lawsuits filed in this state against guardians for diminution in value of property in circumstances where the guardian maintained the property without approaching the court for authority to sell. Some of these guardians have filed malpractice claims against their lawyers for failure to advise them of the duty to dispose of property

subject to diminution in value. In at least one of these suits, the judge of the probate court was joined as a party for allegedly failing to monitor the estate as required by law.

c. Under Estates Code §§ 1158.251 and 1158.501, the guardian may apply to sell property in order to do any of the following:

- (1) pay expenses of administration, funeral expenses, allowances, claims, and debts against the estate;
- (2) make up a deficiency when the income from the estate is insufficient for the ward's education and maintenance;
- (3) dispose of an undivided interest in real estate;
- (4) provide an easement or right-of-way;
- (5) dispose of non-productive real estate;
- (6) sell mineral interests in order to conserve the estate; or
- (7) dispose of real property if it is in the best interest of the ward.

d. Sales of real estate must be for cash or credit with a minimum one-fifth in cash and a note bearing at least 4 % interest secured by a vendor's lien and deed of trust. Tex. Est. Code § 1158.302.

e. Sales may be made by private sale or by auction as approved by the court. Tex. Est. Code §§ 1158.103, 1158.402, 1158.451.

f. The court may authorize a temporary guardian to sell estate property. *McKinley v. Salter*, 136 S.W.2d 615 (Tex. Civ. App. – El Paso 1940, writ dismissed).

g. All sales of guardianship property require court approval, and a sale without court approval is considered void. *Browne v. Fidelity & Deposit Co.*, 80 S.W. 593 (Tex. 1904).

h. The guardian has several courses of action available to him in dealing with jointly or commonly owned property:

- (1) He can possess the property in common with other co-owners. Tex. Est. Code § 1151.153.
- (2) With court approval, he may sell the ward's undivided interest. Tex. Est. Code § 1158.251.
- (3) With court approval, he may enter into an agreement with other joint owners for partition. Tex. Est. Code § 1158.701.
- (4) If he cannot reach an agreement for partition with other joint owners, he may sue for partition in court. Tex. Est. Code § 1158.706.

i. In 2007, the Legislature made it easier to sell real estate by allowing the court to order the sale without a hearing if there is no opposition to the application to sell. Tex. Est. Code § 1158.255(b).

8. Investments and Loans

a. The guardian of the estate is required to invest any money on hand beyond what is necessary to educate and maintain the ward. Tex. Est. Code § 1161.001. The court or a party may require a guardian to show cause why the estate is not properly invested; then “the court shall render an order considered to be in the best interests of the ward.” Tex. Est. Code § 1161.007.

b. The standard for investing by guardians is one of ordinary prudence and may take into account the cost of supporting the ward, the ward’s net worth or earning capacity, the nature of the estate, and any other resources available to the ward. Tex. Est. Code § 1161.002(a). In determining whether a guardian has invested prudently, the court shall, absent fraud or gross negligence, take into account all the investments that the guardian manages and not merely a single investment. Tex. Est. Code § 1161.002(b). The Texas Estates Code lists investment products that meet the statutory standard of safety.

c. Under Estates Code § 1161.003, the guardian has met the standard if he invests in the following:

- (1) U.S. bonds;
- (2) state tax-supported bonds;
- (3) tax-supported bonds of local government entities as long as the net funded debt of the entity does not exceed 10% of the assessed value of taxable property;
- (4) collateral bonds of companies with \$1 million of paid-in capital or more, etc. (Tex. Est. Code § 1161.003(5)); or
- (5) certificates of deposit of less than one year in length insured by the FDIC.

For a complete list of investments that satisfy the standard, see Tex. Est. Code § 1161.003.

d. A guardian may retain assets for up to one year (or longer, with court approval) without incurring liability for lack of diversification. Tex. Est. Code § 1161.006.

e. No later than 180 days after qualification, the guardian must either have the estate assets invested according to § 1161.003 or file an application for a court order either (1) authorizing the guardian to invest and detailing an investment plan or (2) “modifying or eliminating the guardian’s duty to invest.” Tex. Est. Code § 1161.051. The court will sign an order with specific terms to this effect, upon determining that the action requested is in the best interests of the ward. Tex. Est. Code § 1161.052. It should be noted, however, that this procedure defers to other codified procedures applicable to specific sales and investments by a guardian and is not required for investments “specifically authorized by other law.” Tex. Est. Code § 1161.054.

f. A guardian may invest estate assets in real estate if it is in the best interest of the ward and there are on hand sufficient additional assets to provide for the education, support, and maintenance of the ward and others the ward supports and for the maintenance, insurance, and taxes of the real estate purchased. This investment requires a written application and a court order. Tex. Est. Code § 1161.151(a)(1)-(4). The usual procedures for investment apply. Tex. Est. Code §§ 1161.151–1161.153.

g. If the guardian fails to invest according to Estates Code Chapter 1161, the guardian and the guardian’s surety are liable for the principal and the greater of (1) the highest legal rate of interest on the estate’s principal or (2) the overall return that would have resulted from investing according to the Texas Estates Code, in addition to attorney’s fees and costs related to enforcement. Tex. Est. Code § 1161.008.

h. The guardian may apply to the court for an order to invest in a life insurance policy or annuity contract, or to renew an existing life insurance policy or annuity. Tex. Est. Code § 1161.102.

i. If the return on the ward’s estate investments is greater than the amount needed for the education, support, and maintenance of the ward and others the ward supports, the guardian may loan the money for a reasonable rate of interest, in accordance with the terms of Tex. Est. Code § 1161.203 requiring collateral of double value. “Reasonable rate” is considered to be “at least 120% of the applicable short-term, midterm, or long-term interest rate under § 7520 of the 1986 Internal Revenue Code.” Tex. Est. Code § 1161.202. If the loan was court-approved, the guardian, unless negligent, is not liable for the borrower’s default. Tex. Est. Code § 1161.205.

j. Before making a loan, the guardian must obtain the written opinion of an attorney that all papers, documents, and titles to bonds, notes, or realty are good, except that a title insurance policy on real estate may be obtained in lieu of the attorney’s opinion. Tex. Est. Code § 1161.203.

k. Any loan made without court approval must be reported to the court within 30 days. Tex. Est. Code § 1161.204.

9. Rental and Leasing

a. The guardian may rent real or personal property without court order for a term of one year or less; however, he is liable for the value of any unpaid rent absent court approval. Tex. Est. Code § 1159.001.

b. The guardian must file a written application with the court if he is renting any property for a period in excess of one year. Tex. Est. Code § 1159.002.

c. If the guardian neglects to rent property, any person may file a sworn written complaint for the guardian to show cause for not renting property. Tex. Est. Code § 1159.005.

d. The court may also order the leasing of mineral rights:

- (1) The order must be on written application with notice by publication at least 10 days before the hearing. If the court enters an order authorizing the lease, the guardian has 30 days to enter into the lease. Tex. Est. Code Subchapter B, Chapter 1160.
- (2) Proof of publication is required at the hearing. If public notice would be disadvantageous to the estate, § 1160.101 permits a private lease without notice, but the time for court action on such applications is the narrow window between the fifth day after filing and the tenth day after filing.

10. Gifts and Contributions

a. General

In discussing gifts or contributions made by the guardian on behalf of the ward, it is important to note that Texas does not recognize the Substitution of Judgment Doctrine. *In re Guardianship of Neal*, 406 S.W.2d 496 (Tex. Civ. App. – Houston 1966) (writ ref'd n.r.e., per curium, 407 S.W.2d 770 (Tex. 1966)).

“The so-called substitution of judgment doctrine permits a court to substitute its judgment for that of the person under a disability in connection with dispositions of that person's assets by inter vivos transfer. The substitution of judgment doctrine is generally invoked in incompetency cases where a person who claims to be the natural object of the incompetent's bounty, seeks an inter vivos transfer of a portion of the incompetent's estate. In few reported cases, the courts discuss the two criteria for such transfer: (1) that the assets of the incompetent are sufficient to meet his needs and those whom he is under a duty to support during his lifetime and, to a lesser extent, that the bulk of the estate will devolve substantially as intended by the incompetent when sane and (2) that if competent, the incompetent would have made the transfer. In no case, however, has the doctrine of substitution of judgment been applied to void a transfer of an incompetent's or conservatee's assets which transfer was presumably made at a time when the disabled was fully competent.” *In re Dana*, 119 Misc. 2d 815, 465 N.Y.S.2d 102, 1982 N.Y. Misc. LEXIS 4112 (N.Y. Sup. Ct. Dec. 17, 1982)

b. Gifts and Transfers

Tex. Est. Code § 1162.001 allows the guardian to make certain gifts and transfers if it can be shown that the ward will probably remain incapacitated. The gifts or transfers may be made only with court authorization and only to the following:

- (1) charitable organizations in which the ward would reasonably have an interest;

- (2) the ward's spouse, descendant, or other persons related to the ward by blood or marriage who are identifiable at the time of the order;
- (3) devisees under the last valid will of the ward; or
- (4) the guardian, if he is an heir or devisee.

An application must be filed and notice given to all interested persons; the Estates Code does not specify the manner of notice. Additionally, the court may appoint a guardian ad litem. At the hearing, the court will attempt to ascertain the ward's intentions. A proposed estate plan shall be presented to the court. Tex. Est. Code § 1162.002.

c. Charitable Contributions

Tex. Est. Code §§ 1162.051–1162.053 allow the guardian to apply for an order authorizing contributions to religious, charitable, scientific, literary, or educational organizations. The application must remain on file for 10 days before the court may consider it.

Necessary Findings. To grant an application for a charitable contribution, the court must find that:

- (1) the amount of the contribution will probably not exceed 20% of the ward's net income for the calendar year;
- (2) the ward's income for the year will probably exceed \$25,000;
- (3) the full amount of the contribution will probably be deductible from the ward's gross income in determining taxable income for income tax purposes;
- (4) the condition of the estate is such as to justify the contribution;
- (5) the contribution is reasonable; and
- (6) the contribution is for a worthy cause.

NUTS & BOLTS from Judge Laird — AFTER YEAR ONE AND ANNUALLY THEREAFTER....

After the initial year of the guardianship, there are several tasks that must or should be repeated annually for the duration of the guardianship:

1. Review the report of the person (guardianships of the person).
2. Send a court visitor to visit the ward.
3. Review the accounting (guardianships of the estate).
4. Ensure the guardian has updated the monthly budget (guardianships of the estate).

5. Determine whether the guardianship should continue, be terminated, or be modified.
6. Ensure the bond is sufficient.
7. Send the court investigator to visit the ward if necessary.

And, as always, if the court finds something is amiss, send the court investigator for a follow up visit.

11. Annual Reports

Texas Estates Code Chapter 1201 mandates the court conduct an annual review of the wellbeing of the ward. As part of that annual review, the court should review the annual report of the person.

The court should enter an order approving or disapproving the annual report of the person. The clerk may not renew letters of guardianship relating to the appointment of a guardian of the person until the court receives and approves the annual report.

NUTS & BOLTS from Judge Laird – ANNUAL REPORTS

When reviewing the annual report of the person, always pay attention to the address of the ward and the guardian. If the guardian has left Texas for more than three months without permission or has moved from Texas, the court may remove the guardian. It is of particular interest if either the ward or guardian has moved from Texas, as jurisdictional restrictions limit the ability of the court to ensure the ward is cared for. Even if the ward is still in Texas, the court should also check to determine if the ward has been moved from the county. A probate court in the county of the ward’s residence is oftentimes more able to manage the guardianship than a judge many miles away. Consider transferring the guardianship to the county in which the ward resides.

The relatively new statute giving courts the ability to depend on Supported Decision Making agreements as a lesser restrictive alternative should be considered for those guardianships (especially partial) created before September 1, 2015. Re-evaluate the guardianship to determine if a ward has the support and ability to sign a supported decision making agreement in order to close the guardianship in lieu of this new lesser restrictive alternative.

NUTS & BOLTS from Judge Laird – COURT VISITOR PROGRAM

The purpose of the Court Visitor Program is to check on the well-being of individuals who have been placed under guardianship. This important monitoring function enables the court to have first-hand information regarding the wards under its supervision. The reports filed by the court visitor assist the court in determining whether each pending guardianship case should be continued, modified, or terminated. All reports are reviewed by the court to determine whether further action is necessary.

The court visitor should:

1. Meet with the Court Investigator (or guardianship coordinator for non-statutory probate courts) for orientation and training.
2. Obtain a case assignment from the Court Investigator.
3. Review the necessary information from court files, schedule a visit, and then personally visit with the ward.
4. Make an assessment of the ward's situation and then timely submit a Court Visitor Report recording observations to the Court Investigator.

The qualifications of a Court Visitor are as follows:

1. Access to a car or other reliable transportation.
2. Good listening skills, patience, and tact.
3. Ability to work with a wide variety of individuals, including people with significant physical and mental impairments from different racial, socioeconomic, and cultural backgrounds.
4. Ability to remain objective and nonjudgmental in making reports to the court.
5. Ability to keep information confidential.
6. Willingness to visit people in their homes, nursing homes, group homes, hospitals, and other care facilities.

A court visitor program is crucial to many courts because the number of guardianships coupled with the work involved in monitoring guardianship makes use of volunteers necessary to ensure adequate supervision of existing guardianships. Before court visitors are allowed to make official court visits, they complete training, execute a series of liability waivers (which should be provided by your county's county attorney or risk management department), and they have a criminal background check completed.

12. Annual and Final Accountings

The inventory, annual accounts, and account for final settlement should reconcile with each other. In other words the beginning balances for the first accounting should match the balances from the inventory. In the same manner the ending balances from an accounting should match the beginning balances for the year subsequent to that accounting. The guardian must file the first annual account upon the expiration of 12 months from date of qualification and receipt of letters.

a. Separate accountings for guardian of person

If there are separate guardians of the estate and person, the guardian of the person must file a separate account reporting on the ward's condition and stating each item of receipt and disbursement for the ward's support, maintenance, and education. Tex. Est. Code § 1163.101.

NUTS & BOLTS from Judge Laird — REPORTING FROM CO-GUARDIANS

Where there are co-guardians, make sure both sign off on the annual reports and/or accountings and inventory if each has not individually submitted their own.

b. Reference to prior accountings

If property is sufficiently described in the inventory or in a previous account, a later accounting may refer to the previous description. Tex. Est. Code § 1163.002(c).

c. Closing a Depleted Estate

The court may close a guardianship of the estate upon a finding that the ward's personal property has a negligible or fixed income, and the court may permit the guardian of the person to receive all income and apply it to the ward's support, maintenance, and education, and account to the court when the estate is closed. Tex. Est. Code § 1163.006. If the estate is

only receiving social security funds, there is no reason for a guardianship of the estate. Ensure there is a representative payee named with social security, and close the estate. Many times after a guardianship is open, a trust will be created and all guardianship funds will be transferred to the trust. **REMEMBER** to close the guardianship estate. The last thing the court wants is for a guardianship estate to linger out there creating the opportunity for funds to be placed therein and spent without court knowledge or approval, because the estate has been forgotten after the trust was created.

d. Requirements of the Annual Account

Under Estates Code § 1163.001, the guardian of the estate must annually file a sworn account that contains the information listed below.

- (1) A list of all claims against the estate that were presented to the guardian within the period covered by the account, further specifying the following:
 - which claims have been allowed, paid, or rejected by the guardian,
 - the date when any claim was rejected, and
 - which claims (if any) have been the subject of a lawsuit, and the status of each lawsuit.
- (2) A list of all property coming into the guardian's possession since the last accounting period;
- (3) Any changes in the property since the last accounting period;
- (4) A complete account of all receipts and disbursements during the accounting period:
 - the account should indicate the source and nature of the receipts and disbursements, and
 - receipts of principal and income are to be shown separately;
- (5) A complete, accurate, and detailed description of all property being administered, including:
 - the condition of the property,
 - the use being made of the property, and
 - if rented, the terms of the rental and the price for which the property is being rented;
- (6) The balance of cash on hand in any form, together with the name and location of each depository;
- (7) A detailed description of all bonds, notes, securities, and other personal property of the estate; include the following information *plus any other data necessary to identify the property fully*:

- the name of the obligor and obligee, or whether payable to bearer;
- the date of issue and maturity;
- the rate of interest;
- serial or other identifying numbers;
- in what manner the property is secured; and
- how and where the property is held for safekeeping.

The annual account must be supported by attachments containing:

- (1) credit vouchers;
- (2) verification letters from banks or other depositories; and
- (3) proof of existence and possession of securities. See Tex. Est. Code § 1163.004. for options.

The annual account shall contain an affidavit stating that:

- (1) "the account contains a correct and complete statement of the matters to which the account relates";
- (2) the guardian has paid the bond premium for the next accounting period; and
- (3) the guardian has filed all tax returns of the ward and paid all taxes due and showing the amount paid, date paid, and name of the governmental entity receiving the tax payment.

e. Action Upon Annual Account

- (1) The annual account must remain on file for 10 days before it is approved by the court. If the ward is a beneficiary of the Veterans Administration, that agency is entitled to notice of a hearing to be held not fewer than 20 days from the date of the filing of the account, application, petition, or claim. Tex. Est. Code § 1151.301. The VA, however, normally waives formal notice and hearing. The VA's waiver should be attached to the annual account.
- (2) The court may order correction of the account. Tex. Est. Code § 1163.052.
- (3) If the annual account is approved by order of the court, the court may order payment of unpaid claims if the estate has sufficient funds on hand, or pro rata payment if not. Tex. Est. Code § 1163.054.

f. Re-examination of Previous Accountings

Previous accountings may be re-examined on a final accounting, and even court approval of the annual accounts does not preclude a later challenge. *di Portanova v. Hutchison*, 766 S.W.2d 856 (Tex. App. – Houston [1st Dist.] 1989, no writ).

NUTS & BOLTS from Judge Laird – ACCOUNTINGS

There are many things to look for in an annual accounting. Some are as follows:

1. Were all of the expenses approved by the court, ratified by the court, or statutorily allowed without court action? If not, determine whether the expense is appropriate. If the expense is appropriate, have the guardian submit a motion for ratification of the expense before approving the annual account. If the expense is inappropriate, then disapprove the accounting and set the guardian for a show cause hearing.
2. Were all of the expenses within the budget categories? In other words did they budget \$5000 for living expenses and \$500 for miscellaneous, but spend \$1000 in living expenses and \$4,500 in miscellaneous? Guardians should use the same budget categories in their accountings as they did in their budget. Guardians should not exceed individual budget category expenses.
3. A guardian may charge rent for the ward living in the guardian's home; however the ward should pay fair market value for a room rental, not a pro rata share of all mortgage expenses, utilities, living, and maintenance expenses of the home.
4. When reviewing expenses (especially miscellaneous expenses) look at the receipts. If it is a meal, was the meal for one or two?
5. When reviewing expenses (especially miscellaneous expenses) look for funds given to individuals. What is their relationship to the ward and the guardian? Why are they getting money from the ward? Many times these will jump off the page, because they are family members sharing the ward or guardian's last name.
6. Look for transfers between bank accounts. Verify that a transfer between the ward's bank accounts actually appeared in the receiving account once it left the originating account. Transfers should not be listed in the section of the accounting regarding changes in asset value, because there should be no change in the value of the asset for a

transfer...just a change in location of the asset. If there is a change in value, then money is missing.

7. If attorney's fees were paid and not approved, they need to be approved before approval of the accounting. If the fees are not approved in part or in whole, then what was overpaid to the attorney needs to be listed in the accounting as a claim due to the estate from the attorney.
8. Check the accounting for claims due to the estate. Did any claims due to the estate disappear between accounting periods? Why?
9. Are there receipts for everything? The code requires the guardian to file receipts. If they do not have receipts, cancelled checks help as well as any other documentation indicating the expense has actually been paid.
10. Are the investments in compliance with the investment plan, and are they doing well?
11. If there are expenses made for a home, check the address listed where the work was done to ensure it is a home the ward owns.
12. Are there expenses for an assisted living facility AND a home? The ward should not have both unless the home is garnering income for the estate! If not, then show cause for failure to sell the home. The guardian of an estate, shall promptly apply for an order of the court to sell all of the estate that is liable to perish, waste, or deteriorate in value or that will be an expense or disadvantage to the estate if kept.
13. Is the ward running out of money? Do changes need to be made the budget to ensure the ward has funds with which to live? Does the ward need to be moved to a less expensive living facility in order to maintain funds.
14. Has a source of income disappeared? Why?
15. Verify the amounts listed in the accounting reconcile with the bank statements and certification of account balances provided by the bank.
16. If the ward is a minor and the guardian is the ward's parent or legal conservator, look for funds taken from

the ward's estate that are for the wards health, education, and maintenance. Funds cannot be taken from the ward's estate for this purpose absent a showing that the parent or legal conservator is unable to pay the expense.

The bottom line on accountings is this: Pretend it is YOUR money! What questions would you ask if you had someone else manage your money, and this was the report that person gave to you?

NUTS & BOLTS from Judge Laird — ANNUAL REVIEW OF GUARDIANSHIPS

The information garnered from the annual report and annual accounting is extremely important to the court in its annual review process. If the guardian is not providing the reports or is not providing the appropriate information as required in the reports, the court may cite the guardian for a show cause hearing, order the guardian to file the document required, and unless good cause is shown for the guardian's failure, the court may fine the guardian up to \$1,000, revoke the letters of guardianship or both. Whenever the court removes a guardian, review the information available to determine whether a successor guardian is appropriate.

Once the accounting is approved, make sure an annual monthly expense request or annual budget is still in place. If it is not, order a show cause hearing to get one in place, otherwise the guardian will assume it is in place and continue to spend the ward's funds (without court approval).

With all the information from the report of the person, annual account, budget, and court visitor and/or court investigator report, the court is now in a good position to determine whether or not to continue or modify the guardianship.

13. Final Settlement, Accounting, and Discharge

a. Settling a Guardianship of the Estate

The estate of the ward shall be settled under Estate Code § 1204.001 when any of the following occurs:

- (1) The minor ward dies, turns 18 years of age, marries, or otherwise has the disability of minority removed under Texas law.
- (2) The incapacitated ward dies or is restored to capacity.

- (3) The spouse of a married ward qualifies as community survivor under Estates Code Subchapter A, Chapter 1353.
- (4) The estate becomes exhausted, or income becomes negligible.
- (5) The foreseeable income accruing to a ward or to his estate is so negligible that maintaining the guardianship would be unduly burdensome.
- (6) All the assets of the estate have been placed in a management trust, or have been transferred to a pooled trust subaccount, and the court determines that a guardianship for the ward is no longer necessary.
- (7) The court determines for any other reason that a guardianship for the ward's estate is no longer necessary.

Before the guardianship of an estate is closed, the probate court must take evidence to determine the reason for closing the estate. *Novak v. Schellenberg*, 669 S.W.2d 162 (Tex. App. – Corpus Christi 1984, no writ).

b. Action Permitted After Death of Ward

Upon the death of the ward, the probate court should require the guardian to file a final accounting and settle and close the guardianship. The Estates Code specifies that the guardian may keep the estate open after the death of the ward and that the guardian has the authority to do the following:

- (1) to make funeral arrangements, and to pay funeral expenses and all other debts of the estate, Tex. Est. Code § 1204.051;
- (2) to pay inheritance or estate taxes or expenses of administration (the court may order the sale of properties for purposes of paying estate and inheritance taxes or distributing the estate among the heirs), Tex. Est. Code § 1204.052;
- (3) to collect money that becomes due pending final discharge, Tex. Est. Code § 1204.107; and
- (4) to maintain an action to determine heirship, Tex. Est. Code §202.004.

c. Account for Final Settlement

Before an estate can be closed, the guardian must present his verified account for final settlement (final account), which may refer to and adopt descriptions of property in previous accounts. Tex. Est. Code §§ 1204.101–.102.

The final account must contain:

- (1) the property, rents, revenues, and profits received by the guardian, and belonging to the ward, during the guardianship;

- (2) the disposition made of the property, rents, revenues, and profits;
- (3) the expenses and debts against the estate that remain unpaid, if any;
- (4) any property of the estate that remains in the guardian's hands;
- (5) a complete account of the taxes the guardian has paid during the guardianship, including the tax returns, the amount of the taxes, the date the guardian paid the taxes, and the name of the governmental entity to which the guardian paid taxes;
- (6) a description of all current delinquencies in the filing of tax returns and the payment of taxes and a reason for each delinquency;
- (7) a statement that the guardian has paid all required bond premiums; and
- (8) "other facts as appear necessary to a full and definite understanding of the exact condition of the guardianship."

d. Notice

The clerk shall issue citation upon the filing of the final account. Tex. Est. Code § 1204.105.

- (1) If the ward is a resident of Texas and is over fourteen years of age, he must be cited by personal service, unless he waives service.
- (2) If the ward is deceased, his executor or administrator shall be personally served, unless the guardian is the executor or administrator.
- (3) If the ward's residence is unknown, or he is a non-resident, or he is deceased with no executor or administrator of his estate, citation shall be by posting, and the court shall appoint an attorney ad litem to represent the interest of the ward. Tex. Est. Code § 1204.002.

e. Action by the Court

The court, on being satisfied that citation has been duly served on all persons interested in the estate and after hearing all exceptions or objections to the account, shall audit and settle the account and order any remaining property to be distributed to the ward or personal representative of the deceased ward's estate, or any other person legally entitled thereto. Tex. Est. Code §§ 1204.106, 1204.109.

f. Discharge of Guardian

Whenever the final account has been approved and all property remaining has been delivered to the persons entitled to receive the property, the court shall discharge the guardian and surety, and shall declare the estate closed. Tex. Est. Code § 1204.152. The court may enter a conditional discharge in its order approving the final account. The guardian need only

file a receipt of delivery, and the estate would be automatically closed.

C. Guardian's Compensation

1. General

A guardian or temporary guardian of the estate is entitled to reasonable compensation on application to the court at the time the court approves an accounting filed by the guardian. A fee of 5% of the gross income of the ward's estate and 5% of all money paid out of the estate, subject to the award of an additional amount if the court finds this amount to be unreasonably low, is considered reasonable only upon a finding by the court that the guardian has taken care of and managed the estate in compliance with the standards of Title 3 of the Estates Code.

The guardian's compensation is statutorily set under Chapter 1155, which provides that the court may authorize compensation for a guardian or a temporary guardian serving as guardian of the person alone from the available funds of the ward's estate or other funds available for that purpose. As of September 1, 2009, Tex. Est. Code § 1155.002(a) directs that the court may set the compensation in an amount not exceeding 5% of the ward's gross income. In determining whether to authorize compensation for a guardian under this section, the court shall consider the ward's monthly income from all sources and whether the ward receives medical assistance under the state Medicaid program.

Upon application by an interested person or upon the court's own motion, the court has the authority to modify the compensation of a guardian of the person or estate if the court finds the amount unreasonably low when considering the services rendered as guardian.

PRACTICE NOTE

The court is not authorized to pay guardians by the hour. The statutory formula described above is the only formula a court may use to compensate guardians except when the court finds the amount of compensation to be unreasonably low under Estates Code § 1155.006.

The finding that the compensation is unreasonably low cannot be based solely on the ground that the amount of the statutorily calculated compensation is less than the usual or customary charges that the person serving as guardian receives in any other capacity.

The court, on application of an interested person or on its own motion, may deny a fee authorized under this section in whole, or in part, if:

a. The court finds that the guardian or temporary guardian has not adequately performed the duties required of the guardian or temporary guardian under this Tex. Est. Code, Chapter 1155; or

b. The guardian or temporary guardian has been removed for cause.

2. Limitations on Compensation

1. "Gross income" does not include Department of Veterans Affairs or Social Security benefits received by a ward. VA disability payments are not income from a ward's estate. *Bagwell v. McCombs*, 31 S.W.2d 835 (Tex. Civ. App. – Dallas 1930, no writ). "Money paid out" does not include any money loaned, invested, or paid over on a settlement of the guardianship or a tax-motivated gift made by the ward. Tex. Est. Code § 1155.001.

2. Principal on a note collected by the guardian is not income from a ward's estate. *Pemberton v. Leatherwood*, 218 S.W.2d 500 (Tex. Civ. App. – Eastland 1949, writ ref'd n.r.e.).

3. Cash received for sale of the ward's real estate is "corpus" and not "gross income"; therefore, the guardian is not entitled to a 5% fee. *Guardianship of Rehberg*, 745 S.W.2d 435 (Tex. App.-Houston [1st Dist.] 1988, no writ).

4. The guardian is not entitled to commission upon payment of veteran's war risk insurance. *Gilbert v. Hines*, 32 S.W.2d 876 (Tex. Civ. App. – Dallas 1930, no writ).

5. Pension benefits are not "income" of ward's estate. *Anderson v. Steddum*, 194 S.W. 1132 (Tex. Civ. App. – Texarkana 1917), aff'd, 222 S.W. 1090 (Tex. Comm'n App. 1920, holding approved).

7. Guardians are not entitled to compensation for making charitable contributions under Estates Code Subchapter B, Chapter 1162.

3. When Compensation Allowed

1. Before the 81st Legislative session, the only time the guardian of the estate could have made a claim for compensation was at the time of filing the annual or final account. Upon approving the account, the court would have allowed compensation upon finding the guardian had taken care of and managed the estate prudently. Tex. Est. Code § 1155.003. Although this method is preferable, a court may authorize compensation for a guardian in an estimated amount the court finds reasonable to be paid quarterly before the guardian files an annual report if the court finds that delaying the payment of compensation until the guardian files an accounting would create a hardship for the guardian. Tex. Est. Code § 1155.006(a)(2).

2. If the assets of the ward's estate are insufficient to pay for the services of a private professional guardian or of a licensed attorney serving as guardian, the court may compensate the guardian if funds in the county treasury are budgeted for that purpose. Tex. Est. Code § 1155.002.

4. Compensation for Personal Services Rendered by Guardian

1. The personal representative is entitled to additional compensation for personal services rendered to the estate. See generally, 28 Tex. Jur. 3d Decedent's Estates §281 (1996). However, a guardian is not entitled to additional compensation for performing guardian services such as making bank deposits or providing general caregiver services. The types of skills that are separately compensable go beyond guardian services. For example, a guardian who is an CPA could be compensated for providing tax services.

2. Any additional compensation should be based on a contract that is approved by the court in advance.

PRACTICE NOTE

Guardians are also entitled to "reasonable compensation" for their services in managing a farm, ranch, factory, or other business of the ward pursuant to Tex. Est. Code § 1151.155. See also Tex. Est. Code § 1001.002.

5. Compensation When Guardian and Attorney are the Same Person

1. Historically, many courts did not allow a guardian to be compensated both as an attorney and as personal representative because of the difficulty in segregating legal work from guardian work. Some courts have permitted this dual compensation. See *Henderson v. Viesca*, 922 S.W.2d 553, 558 (Tex. App. – San Antonio 1996, writ denied); *Burton v. Bean*, 549 S.W.2d 48 (Tex. Civ. App. – El Paso 1977, no writ). Although § 1155.052 now provides a basis for dual compensation, the historical perspective on when dual compensation was allowed can still be of assistance. Dual compensation was usually restricted to situations where:

- There was full disclosure of the guardian-attorney's request for dual compensation at the time of appointment or upon motion and hearing if the request for dual compensation is made after appointment. If the request was after the time of appointment, notice of the motion and hearing should be given to all interested parties who have made an appearance in the case.
- The guardian-attorney sought only guardian's compensation for guardian's services and sought attorney's fees only for legal services.
- The guardian-attorney keeps meticulous records, carefully segregating legal and non-

legal work, and applications for attorney's fees gave a detailed account of the legal services rendered to the estate.

- Attorney-fiduciaries were not paid attorney's fees for fiduciary services. For example, they should not be paid at their court-approved attorney-fee rate for obtaining a bond, gathering estate assets, or making health care decisions for a ward of the court. If the attorney believes that the statutory compensation formula as applied to a particular guardianship is unreasonably low (Tex. Est. Code § 1155.006), then he or she should submit, with the annual or final account, contemporaneous time records of the fiduciary services for which additional hourly compensation is requested above the statutory fee. Note that the hourly fee approved by the court for attorney fiduciary services presumably would be significantly less than the court-approved legal rates for attorneys.

2. Legislative changes in 2009 clarified that an attorney serving as both attorney and guardian may receive compensation for both roles. Specifically, Tex. Est. Code § 1155.052 provides:

- An attorney who serves as guardian and also provides legal services in connection with the guardianship may not receive compensation for either service unless the attorney files with the court a detailed description of the services performed, identifying which of the services are guardianship services and which are legal services.
- An attorney providing both guardianship and legal services is not entitled to attorney's fees for guardianship services that are not legal services.
- Compensation for guardianship services provided by an attorney serving as both attorney and guardian must be set by the court in accordance with Subchapter A, Chapter 1155 of the Estates Code regarding compensation of guardians and temporary guardians. Attorney's fees for legal services provided by an attorney serving as both attorney and guardian must be set by the court in accordance with Estates Code §§ 1155.054, 1155.101, and 1155.151.

3. Should there be a prior agreement about the dual compensation? The statute as recently amended does not require a prior agreement. However, in many cases that allowed dual compensation, the courts, beneficiaries, or other parties agreed to the dual representation and dual compensation in advance. See, e.g., *Henderson*, 922 S.W.2d at 556; *Burton*, 549

S.W.2d at 50; *Neblett v. Butler*, 162 S.W.2d 458 (Tex. Civ. App. – Galveston 1942, writ ref'd w.o.m.). Later appellate courts construing these decisions have held that reasoning was not based on the existence of a prior agreement or order. *In re Estate of Devitt*, 758 S.W.2d 601, 607 (Tex. App. – Amarillo 1988, writ denied); *Epstein v. Hutchison*, 175 S.W.3d 805, 809 (Tex. App. – Houston [1st Dist.] 2004, pet. denied). In *Devitt*, the court did note, however, that an agreement was the better practice. 758 S.W.2d at 607.

6. Forfeiture of Compensation

1. The court may deny the guardian's fee in whole or in part (1) if the guardian has not taken care of and managed the estate prudently, Tex. Est. Code § 1155.008, or (2) if the guardian has been removed, Texas Estates Code Subchapter B, Chapter 1203.

2. A personal representative is not entitled to a commission when the representative knowingly fails to account for the funds of the estate. *Moroney v. Moroney*, 280 S.W. 254 (Tex. Civ. App. – Waco 1925), reformed and affirmed, 286 S.W. 167 (Tex. Comm'n App. 1926); *American Sur. Co. of New York v. Hardwick*, 185 S.W.2d 235 (Tex. Civ. App. – Galveston 1945, writ ref'd).

3. A guardian who invests the ward's funds without court approval is entitled to guardian's commission if the acts of the guardian caused no loss to the estate. *Legler v. Legler*, 189 S.W.2d 505 (Tex. Civ. App. – Austin 1945, writ ref'd w.o.m.).

4. With the introduction of court authorized estimated quarterly compensation in 2009, the amended statute now also provides a mechanism for the court to later reduce or eliminate the guardian's compensation if, on review of an annual or final accounting, the court finds that the guardian received compensation in excess of the amount permitted; has not adequately performed the duties required of a guardian; or has been removed. The guardian and the surety on the guardian's bond are liable to the guardianship estate for any excess compensation received. Tex. Est. Code § 1155.007(b).

7. Compensation of Guardian when Ward is a Medical Assistance Recipient

1. The state-administered Medicaid program allows certain recipients to receive medical assistance that is paid to a nursing home. In determining the amount of medical assistance paid by the state to a nursing home, an adjustment is made for the "applied income" that is earned and unearned by the recipient, or if applicable, the recipient and the recipient's spouse. Current Texas statutes and administrative rules related to Medicaid allow for guardian fees to be deducted from the amount of "applied income." The amount of the deduction for guardian fees is currently set by the court as a guardian/fiduciary fee, under

§358.502 (Allowable Deductions), Texas Administrative Code. As a result of this deduction for guardian fees, higher guardian fees ordered by the court result in a lower "applied income" amount, which increases the amount of medical assistance paid for by the Medicaid program to a nursing home. Although many states limit this deduction from "applied income," before the 81st Legislative session, the Probate Code and Texas Administrative Code did not place a limit on the amount of court ordered guardian fees that were deductible in calculating the amount of "applied income" for a recipient of medical assistance.

To solve this problem, Tex. Est. Code § 1155.202 was added. Effective September 1, 2009, a court that appoints a guardian for a recipient of medical assistance may order compensation to be paid to the guardian in an amount up to \$175 per month. The section also places restrictions on costs directly related to establishing or terminating the guardianship. Tex. Est. Code § 1155.202.

III. Fees for Attorneys and Ad Litem

PRACTICE NOTE

An attorney for an applicant for guardianship and a court-appointed attorney in a guardianship proceeding, including an attorney ad litem, must be certified by the State Bar of Texas, or a person or other entity designated by the state bar, as having successfully completed a course of study in guardianship law and procedure sponsored by the state bar or the state bar's designee. Tex. Est. Code § 1054.201

A. Attorney's Fees in Temporary and Permanent Guardianships

A temporary or permanent guardian is entitled to reasonable attorney's fees necessarily incurred in connection with the proceedings and management of the ward's estate. Tex. Est. Code Subchapters B, C, and D, Chapter 1155. An attorney ad litem and guardian ad litem can be paid at any time after the commencement of the guardianship proceeding instead of having to wait until a guardian is appointed. Tex. Est. Code § 1155.151(b). If the ward's estate is insufficient to pay for the reasonable and necessary attorney's fees, fees may be paid from the county treasury – but "only if the court is satisfied that the attorney to whom the fees will be paid has not received, and is not seeking, payment for the services . . . from any other source." Tex. Est. Code § 1155.054(e).

1. Guardianship Contest

A contestant in a guardianship proceeding is entitled to attorney's fees if the contestant is appointed guardian as a result of the contest. *Carney v. Aicklen*, 587 S.W.2d 507 (Tex. Civ. App. – Tyler 1979 writ ref'd n.r.e.).

2. Proof

To obtain the court's approval for attorney's fees, the court must find that the applicant acted in good faith and just cause. Tex. Est. Code § 1155.054(c). Tex. Est. Code § 1155.054(a) further requires proof that the attorney's services were reasonable and necessary for the preservation, management, and safekeeping of the estate. Tex. Est. Code § 1155.054. In *Woollett v. Matyastik*, 23 S.W.3d 48 (Tex. App. – Austin 2000, pet. denied), the appeals court reversed the trial court's approval of attorney's fees and expenses because the fees were not supported by any evidence or proof and did not meet the requirements of § 1155.103. The application submitted by the temporary guardian was not verified, not itemized, not based on expert testimony, and it failed to detail the work, hourly rate or number of hours expended. It further failed to state that the rate was reasonable and customary in the county.

3. Hearing on Temporary Guardianship

Attorney's fees resulting from representation of a party in a hearing to determine the necessity for temporary guardianship may be assessed under §§ 1155.054 and 1155.151 against the estate or the county if the estate is insufficient. Tex. Est. Code § 1251.013.

4. Attorney's Fees to Non-prevailing Party When Guardianship Created

An attorney for an unsuccessful applicant where a guardianship is created may receive attorney's fees when the applicant has acted in good faith and for just cause in the attorney's representation of the person filing the application. Tex. Est. Code § 1155.054. If there is no money in the estate, the county can reimburse the attorney, assuming there are funds available for this purpose. Tex. Est. Code § 1155.054(b).

5. Parties Acting in Bad Faith

A significant change to the law regarding who pays for the guardianship proceeding went into effect January 1, 2014, that allows the courts to shift the costs of the guardianship proceeding from the ward's estate to a party acting in bad faith. That legislative session included the passing of Tex. Est. Code § 1155.151(c), which allows a court to order a party to pay all or part of the costs of the proceeding, which includes the cost of the guardians ad litem, attorneys ad litem, court visitor, mental health professionals, and interpreters, if

it finds that the party acted in bad faith or without just cause in bringing or objecting to a guardianship application. Tex. Est. Code § 1155.151(c). If the party was required to provide security for the probable costs under Tex. Est. Code § 1053.052, the court shall first apply the amount put up as security as payment for the costs ordered. Tex. Est. Code § 1155.151(c). This change gives flexibility to a court to order the bad-acting party to pay for all of the court costs that occurred as a result of that party's acting in bad faith and causing unnecessary expense and attorneys' fees.

B. Forfeiture of Attorney's Fees

The conduct of the guardian or attorney may cause a forfeiture of attorney's fees. See generally, 42A Tex. Jur. 3d Guardianship and Conservatorship §383 (2006).

1. An attorney retained by a ward who had been adjudicated to be of unsound mind could not recover fees for legal services in a guardianship contest. *Breaux v. Allied Bank of Texas*, 699 S.W.2d 599 (Tex. App. – Houston [14th Dist.] 1985, writ ref'd n.r.e.), cert. denied, 479 U.S. 1002 (1986).

2. When the guardian's omission or malfeasance is at the root of the litigation, the estate will not be required to reimburse the guardian for his attorney's fees. *Tindall v. State*, 671 S.W.2d 691 (Tex. App. – San Antonio 1984, writ ref'd n.r.e.). In *Tindall*, the guardian incurred attorney's fees in defense of a bill of review filed by the State because he had neglected to notify the State of a proposed tax-motivated gift.

3. A guardian who is removed from his position is not entitled to attorney's fees in defending his acts or attempting to retain appointment. *Dumitrow v. Hitt*, 601 S.W.2d 472 (Tex. Civ. App. – Houston [14th Dist.] 1980, writ ref'd n.r.e.); *Gordon v. Terrence*, 633 S.W.2d 649 (Tex. App. – Houston [14th Dist.] 1982, no writ). But if the guardian successfully defends a suit for removal, he is entitled to attorney's fees. *Moore v. First City Bank*, 707 S.W.2d 286 (Tex. App. – Fort Worth 1986, no writ). The court in *Moore* stated: "A guardian that is subject to a baseless and ill-founded removal action brought on behalf of the ward . . . should not be required to bear its own expenses in defending such a vexatious action." *Id.* at 287.

4. The personal representative is not entitled to attorney's fees in the prosecution of his own claim against the estate. *Oldman v. Keaton*, 597 S.W.2d 938 (Tex. Civ. App. – Texarkana 1980, writ ref'd n.r.e.). The personal representative may not recover attorney's fees for unfounded and unnecessary litigation instituted by him. *Neblett v. Bulter*, 162 S.W.2d 458 (Tex. Civ. App. – Galveston 1942, writ ref'd w.o.m.).

C. Reasonable Attorney's Fees Are a Jury Issue

Estates Code § 1055.052 provides that on contested issues of fact, a jury may be demanded, and this section includes the issue of reasonable attorney's fees when such are contested. *Griffin v. Barr*, 587 S.W.2d 477 (Tex. Civ. App. – Dallas 1979, no writ).

D. Attorney ad Litem

Attorney's fees for a court-appointed attorney ad litem are specifically provided for in §§ 1054.007 and 1204.002. Both sections provide for reasonable compensation, which is left to the sound discretion of the court, and such fees are taxed as costs.

Although the court has discretion, an award of attorney's fees must be supported by competent evidence; a court "does not have authority to adjudicate the reasonableness of attorney's fees on judicial knowledge without the benefit of evidence." *Brown & Root U.S.A., Inc. v. Trevino*, 802 S.W.2d 13, 14-15 (Tex. App. – El Paso 1990, no writ). *Brown & Root* is an excellent example of a case of a trial court abusing its discretion in awarding fees based solely on an attorney's representation of the time he spent without providing supporting time records, much less testimony that his hourly rate was a "reasonable" rate or that the time expended was "necessary" for litigating the matter.

An attorney ad litem may receive compensation for guardianship-related expenses, but defending the court's appointment of the attorney ad litem at appellate proceedings is in the attorney's self-interest, and should not be compensated. *In re Guardianship of Glasser*, No. 04-07-00559-CV, 2009 WL 763351 (Tex. App.—San Antonio, Jan. 30, 2009, no pet.).

E. Guardian ad Litem

A guardian ad litem is entitled to "reasonable compensation for services in the amount set by the court to be taxed as costs in the proceeding." Tex. Est. Code § 1054.055(a). Similar to an award of fees to an attorney ad litem, an award of fees for a guardian ad litem must be supported by competent evidence. See *Samco Properties, Inc. v. Cheatham*, 977 S.W.2d 469 (Tex. App. – Houston [14th Dist.] 1998, pet. denied) (finding abuse of discretion to award \$100,000 in guardian ad litem fees based on the proof provided); see also *Celanese Chem. Co., Inc. v. Burleson*, 821 S.W.2d 257 (Tex. App. – Houston [1st Dist.] 1991, no writ) (holding that despite the agreement by the ad litem and the attorney for the ward's father that the amount sought was reasonable, the trial court was bound to apply the same factors used to determine the reasonableness of attorney fees as in other cases).⁵

⁵Those factors include "the difficulty and complexity of the case, the amount of time spent by the attorney, the benefit

Fees for guardians ad litem are further constrained because a guardian ad litem is not entitled to compensation for work that exceeds proper responsibilities. *Samara v. Samara*, 52 S.W.3d 455 (Tex. App. – Houston [1st Dist.] 2001, pet. denied). A good guide for attorneys of what not to do and for courts of what not to approve regarding fees for guardians ad litem is found in *Goodyear Dunlop Tires N.A. v. Gamez*, 151 S.W.3d 574 (Tex. App. – San Antonio 2004, no pet.).⁶

As the court in *Gamez* noted, a guardian ad litem assumes the dual responsibility of acting as an officer of the court and protecting the interest of the person he was appointed to represent. The guardian ad litem is required to participate in the case to the extent necessary to adequately protect the interests of his ward, and the guardian ad litem's role ends when the conflict leading to his appointment ends. *Id.* at 580-581. These restrictions on a guardian ad litem's role lead to three restrictions on a guardian ad litem's fees:

1. "If [a guardian] ad litem engages in work more appropriate for the plaintiff's attorney and beyond the scope of the ad litem's role, such work is non-compensable." *Id.* at 583.; accord *Youngstown Area Jewish Federation v. Dumleavy*, 223 S.W.3d 604 (Tex. App. – Dallas 2007, pet. denied) (concluding that the work performed by the ad litem such as reviewing state law on his own, case law provided by the plaintiff's attorney, obtaining medical records, and contacting persons not associated with the case was not reasonable and necessary to protect the minor's best interest). In *Gamez*, the appellate court rejected the idea that guardians ad litem could receive fees for reviewing all litigation-related documents, even those that did not relate to their own clients, or for attending depositions that did not relate to their own clients. The court stated that "[w]hen in doubt, time and circumstance permitting, a guardian ad litem should request guidance from the trial court in advance before engaging in the particular activity in question." *Id.* at 584.

derived by the client, and the skill and experience reasonably needed to perform."

⁶In *Gamez*, the trial court appointed six guardians ad litem to protect the interests of numerous minors in a products liability suit against Goodyear. Five of the guardians ad litem were appointed only six weeks before final settlement of the lawsuit. The trial court awarded each of those five ad litem fees for 160 to 222 total hours. The appellate court noted: "In amassing the 160 to 222 hours, the ad litem engaged in activities outside the scope of their appointment, billed for other attorneys not approved by the trial court, billed for multiple attorneys to attend hearings, billed for attending and summarizing irrelevant depositions, billed between 0.10 and 4.00 hours to review each deposition notice, and even billed time for sleeping." 151 S.W.3d at 591.

2. As a general rule, a guardian ad litem cannot be compensated for time expended by other attorneys. *Id.* at 588. As the appellate court in *Gamez* noted, “[w]hen a guardian ad litem is appointed, the trial court intends that appointed attorney to personally protect the minor’s interests and to act as an officer of the court. *Id.* (emphasis added). “Accordingly, it is generally not anticipated or reasonable for a guardian ad litem to delegate his ad litem responsibilities to other attorneys. . . . We hold that a guardian ad litem may not be compensated for time expended by other attorneys, unless the trial court has made a specific finding that the other attorney’s services were reasonable and necessary under a particular extenuating circumstance.” *Id.*

3. Guardians ad litem cannot be compensated for work performed after the conflict for which they were appointed has been resolved. *Id.* at 580. For example, guardians ad litem are not entitled to earn fees for post-conflict services in pursuit of their own interests, such as drafting their fee statements, preparing for the fee hearing and their time defending their fees at the hearing. *Id.* at 587. Moreover, a guardian ad litem may not recover fees for future services to be performed after the conflict of interest that required appointment of a guardian ad litem was resolved. *Rio Grande Valley Gas Co. v. Lopez*, 907 S.W.2d 622, 625 (Tex. App. – Corpus Christi 1995, no writ).

PRACTICE NOTE

A guardian ad litem may not be awarded a percentage of the recovery as fees unless the order appointing the ad litem stated that the ad litem’s fees were contingent upon success. *Tex-Pack Express, L.P. v. Martin*, 80 S.W.3d 666, 668 (Tex. App. – Tyler 2002, no pet.).

F. Ad Litem Fees Paid by County

Under § 1155.151(a)(4), the county is responsible for costs of a guardianship proceeding if the assets of the ward’s estate or court-created management trust are insufficient to cover the costs, and the party to the proceeding who incurred the costs has filed an affidavit of inability to pay costs. Fees of guardians ad litem and attorneys ad litem are included in costs of the proceeding.

IV. Adjusting to Changes in Established Guardianships

A. Death

If the guardian dies, the court may immediately appoint a successor guardian without citation upon a finding that there is an immediate need. In the case of

death, the legal representative of the deceased guardian shall file a final accounting and deliver all assets of the estate to the successor guardian. Tex. Est. Code § 1203.102.

B. Resignation

The guardian may resign by filing a written application accompanied by a verified final account. Tex. Est. Code § 1203.001. Citation shall be by posting unless the court directs that it be by publication. Tex. Est. Code § 1203.004. The court may immediately accept the resignation and appoint a successor. Tex. Est. Code § 1203.002.

A guardian who has filed his resignation and final account shall not be discharged until the court has approved the final account, and the guardian has delivered the assets of the estate to his successor. The surety on the guardian’s bond remains liable and cannot be discharged until the guardian is discharged. Tex. Est. Code § 1203.006. *Gabriel v. Snell*, 613 S.W.2d 810 (Tex. Civ. App. – Houston [14th Dist.] 1981, no writ).

C. Removal

The court or any interested person may move for the removal of the guardian for the specified reasons set out in Chapter 1203, Subchapter B; see *Bell v. Grossenbacher*, 432 S.W.2d 575 (Tex. Civ. App. – San Antonio 1968, writ ref’d n.r.e.). However, a properly appointed guardian under § 1104.001 can be removed only pursuant to Chapter 1203, Subchapter B.⁷

1. Removal Without Notice

Under § 1203.051, the court may remove a guardian without notice if the guardian –

- (1) neglects to qualify within 20 days;
- (2) fails to file an inventory within 30 days (see, e.g., *Prince v. Ladd*, 15 S.W. 159 (Tex. 1890) (decided when the time was 90 days);
- (3) fails to give a new bond when ordered to do so;
- (4) absents himself or herself from the state for three months or moves out of the state without court permission;
- (5) cannot be served with notices or processes because (a) the guardian’s whereabouts are unknown, (b) the guardian is eluding service, or (c) the guardian has not appointed a resident agent;
- (6) has misapplied, embezzled, or removed from the state all or any part of the property committed to his care or is about to do so (requires clear and convincing evidence given under oath);

⁷ Removal of a co-guardian because the probate court preferred to deal with a single guardian is not one of the specified reasons set out in the statute. *Guardianship of Finley*, 220 S.W.3d 608 (Tex. App. – Texarkana, 2007).

(7) has engaged in conduct with respect to the ward that would be considered to be abuse, neglect, or exploitation, as defined by §48.002 of the Human Resources Code, if engaged in with respect to an elderly or disabled person (requires clear and convincing evidence given under oath); or

(8) has neglected to educate or maintain the ward as liberally as the means of the ward and the condition of the ward's estate permit.

The court shall appoint a guardian ad litem and an attorney ad litem in a proceeding to remove a guardian on these grounds: (6) misapplication, embezzlement, or removal of property from the state, (7) abuse, neglect, or exploitation of an elderly or disabled person, or (8) neglect to educate or maintain ward as liberally as the ward's means permit. Tex. Est. Code § 1203.051(b). The court may appoint the same person as guardian ad litem and attorney ad litem unless a conflict exists in the interests to be represented.

If the court signs an order removing the guardian, the clerk shall issue notice of the order of removal. Tex. Est. Code § 1203.0531. The notice must include:

(1) the names of the ward and the removed guardian;

(2) the date the court signed the order of removal;

(3) the following statement printed in 12-point bold font:

“If you have been removed from serving as guardian under § 1203.051(a)(6)(A) or (B), Estates Code, you have the right to contest the order of removal by filing an application with the court for a hearing under § 1203.056, Estates Code, to determine whether you should be reinstated as guardian. The application must be filed not later than the 30th day after the date of the court signed the order of removal”; and

(4) a copy of the order of removal.

The notice must be personally served on the removed guardian not later than the seventh day after the date the court signed the order of removal.

2. Removal With Notice

After a guardian has been properly noticed⁸, Tex. Est. Code § 1203.052 allows a court to remove the guardian on the court's own motion or on the complaint of an interested person when any of the following occurs:

(1) It appears that the guardian has misapplied, embezzled, or removed from the state any property of the estate or is about to do so.

(2) The guardian fails to return any account due. *Prince v. Ladd*, 15 S.W. 159 (Tex. 1890); *Brown v. Brown*, 142 S.W. 23 (Tex. Civ. App. – Fort Worth 1911, no writ). Ignorance of the law in failing to file an annual account is not a sufficient excuse for noncompliance. *In re Higginbotham's Estate*, 192 S.W.2d 285 (Tex. Civ. App. – 1946, no writ) (no court indicated).

(3) The guardian fails to obey a court order with respect to the performance of the guardian's duties.

(4) The guardian is proved guilty of gross misconduct or mismanagement in the performance of the guardian's duties. Removal for gross mismanagement or misconduct requires a finding of willful or intentional breach of duty or harm to the ward. *See Guardianship of Finley*, 220 S.W.3d 608 (Tex. App. – Texarkana, 2007) (holding that co-guardian's purchase of a mobile home with his own funds prior to court approval of reimbursement from the ward's estate did not constitute gross mismanagement).

(5) The guardian becomes incapacitated, or is sent to the penitentiary, or otherwise becomes incapable of performing his duties.

(6) The guardian engaged in conduct with respect to the ward that would be considered to be abuse, neglect, or exploitation, as defined by §48.002 of the Human Resources Code, if engaged in with respect to an elderly or disabled person.

(7) The guardian neglects to educate or maintain the ward as liberally as the means of the ward's estate and the ward's ability or condition permit.

(8) The guardian interferes with the ward's progress or participation in programs in the community.

(9) A private professional guardian fails to comply with the requirements set out in Subchapter G, Chapter 1104, requiring the guardian to apply annually to the clerk for a certificate of registration.

(10) The court determines that, because of the dissolution of the marriage of joint guardians, joint guardianship is no longer in the best interests of the ward.

(11) The guardian fails to meet the eligibility requirements set out in Subchapter H, Chapter 1104 at any time after being appointed or whose ineligibility was not detected at the time of the appointment.

3. Additional Grounds for Removal

The guardian may also be removed for –

a. his failure to endorse his allowance or rejection of a claim within 30 days, Tex. Est. Code § 1157.052;

b. his wrongful purchase of a claim against the estate, Tex. Est. Code § 1157.202; or

⁸ Before September 1, 2017 personal service must be completed on the guardian. After September 1, 2017 if the motion is made by the court only notice by certified mail is required. If the motion is made by someone other than the court, personal service is still required.

c. his neglect to file a deed of trust securing a lien on the ward's property, Tex. Est. Code § 1158.559.

In addition, on the complaint of the Guardianship Certification Board, the court may remove a guardian because of the guardian's failure to maintain certification required under Tex. Est. Code § 1104.356. Tex. Est. Code § 1203.052(b).

4. Prior Right

When a person who has a prior right to act as guardian and has not waived such right applies to be guardian, the court shall remove the previous guardian. *Novak v. Schellenberg*, 669 S.W.2d 162 (Tex. App. – Corpus Christi 1984, no writ); *Bell v. Grossenbacher*, 432 S.W.2d 575 (Tex. Civ. App. – San Antonio 1968, writ ref'd n.r.e.). However, a prior right to be guardian may be waived either expressly or by conduct. *Estate of Morris v. First Int'l Bank*, 664 S.W.2d 132 (Tex. App. – San Antonio 1983, no writ). Citation shall be by personal service upon the guardian. Tex. Est. Code § 1203.052.

5. Minor Over 12 Years

A minor upon attaining the age of 12 may select another guardian with the court's approval and personal service on the guardian. Tex. Est. Code § 1104.054(b). *In re Carrigan's Estate*, 517 S.W.2d 817 (Tex. Civ. App. – Tyler 1974, no writ).

6. Named Guardian Attains Adulthood

If a guardian named in a will was not an adult at the time the will was probated, he may apply to be guardian upon becoming an adult, and, upon proof that he is not otherwise disqualified, the court shall revoke any prior letters. Tex. Est. Code § 1203.104.

7. DADS as Successor Guardian

Tex. Est. Code §§ 1203.102 and 1203.108 allow a court to appoint the Department of Aging and Disability Services as successor guardian in certain limited circumstances where there is no one else available to serve. Because appointing DADS under Tex. Est. Code § 1203.108(c) is allowed without DADS filing the application for guardianship, the total statewide appointments under this statute are limited to 55 per year, roughly distributed among the health and human services regions of the state.

D. Modification and Restoration

The Estates Code procedures for both restoring a ward to capacity and for modifying the terms of an existing guardianship are laid out in Subchapters B through D, Chapter 1202. The modification of a ward's guardianship or restoration of a ward's capacity is given priority to the list of matters set by a trial court. A court investigator or guardian ad litem who is appointed by the court after the court receives a request

to modify a guardianship or restore a ward to full capacity is required to file an application for restoration or modification only if he or she determines that such filing is in the best interest of the ward. Effective September 1, 2017, after receiving a request from a ward to modify the guardianship or restore the ward to full capacity, the court must send a letter via certified mail within thirty days to the ward acknowledging receipt of the letter. Tex. Est. Code § 1202.054(b-2). The court investigator or guardian ad litem who is appointed by the court shall provide the ward with the report of the investigation's findings and conclusions. Tex. Est. Code § 1202(c).

V. Criminal Considerations

A. Tex. Penal Code § 25.10

Of particular interest to guardianship judges is Tex. Pen. Code § 25.10 which makes it a felony offense if a person takes, retains, or conceals a ward when the person knows that the person's taking, retention, or concealment interferes with a possessory right with respect to the ward. A judge considering injunctive relief for a pending guardianship wherein the non-movant resides outside Texas may be advised to enter orders of temporary guardianship pending contest in lieu of a restraining order. If a litigant removes the proposed ward from the state, jurisdictional problems will arise with enforcing the injunctive order; however, Tex. Penal Code § 25.10 can be used to present the situation to a grand jury for criminal prosecution. Unfortunately, law enforcement officers are sometimes unfamiliar with the provisions of Tex. Penal Code § 25.10. A call from the judge or court investigator to supervising officers to explain guardianship and Tex. Penal Code § 25.10 will help in these situations.

B. Code of Criminal Procedure Article 14.055⁹

As soon as practicable, but not later than the first working day after the date a peace officer detains or arrests a person who is a ward, the peace officer or the person having custody of the ward shall notify the court having jurisdiction over the ward's guardianship of the ward's detention or arrest.

⁹Effective September 1, 2017.

**NUTS & BOLTS from Judge Laird —
ANNUAL REVIEW OF
GUARDIANSHIPS**

When the judge gets a call from police,
what should happen?

*The guardian should be contacted so
that an attorney is immediately obtained.¹⁰

*Steps should be taken to ensure all
medications are being administered at the jail
if the ward is still incarcerated.

VI. Conclusion

Guardianship proceedings have become such a major part of probate-court dockets nationwide that the National College of Probate Judges, the National Center for State Courts, the State Justice Institute, and the American College of Trust and Estate Counsel Foundation created the Commission on National Probate Court Standards to promulgate minimum national standards. Known as the National Probate Court Standards, these standards are the experts' ideas of best practices in the area of guardianship.

The Texas Office of Court Administration has also published a document detailing best practices regarding guardianship administration. This document can be found at <http://www.txcourts.gov/media/1073478/guardianship-study-20150303.pdf>.

Texas law is considered a national model of guardianship law because it meets most of these best-practice recommendations. The legislative revisions throughout the years ensure: (1) that attorneys for applicants for proposed wards or incapacitated persons, as well as attorneys ad litem appointed to represent proposed wards, are well informed of the applicable guardianship laws and procedures; (2) that state agencies adopt a uniform assessment tool for determining levels of incapacity; and (3) that courts undertake ongoing monitoring responsibilities with respect to existing guardianships and regularly ascertain the continued need for the guardianship. However, the hope remains that the number of full guardianships obtained declines while the corresponding autonomy preserved to proposed wards increase.

¹⁰As of the 84th Legislative Session a guardian may now request court appointed counsel for his ward, and complete all paperwork necessary to establish indigence. Code of Criminal Procedure § 26.041.

ARE ALL YOUR CASES BONDED?

- New judge mistakes.
- Transfers in (prior to the bond review law)
- The estate was closed leaving the GOP open – and guess what the attorney put in the order?

SET THE BOND NOW!

- State amount.
- State why.
- State when (10 day).

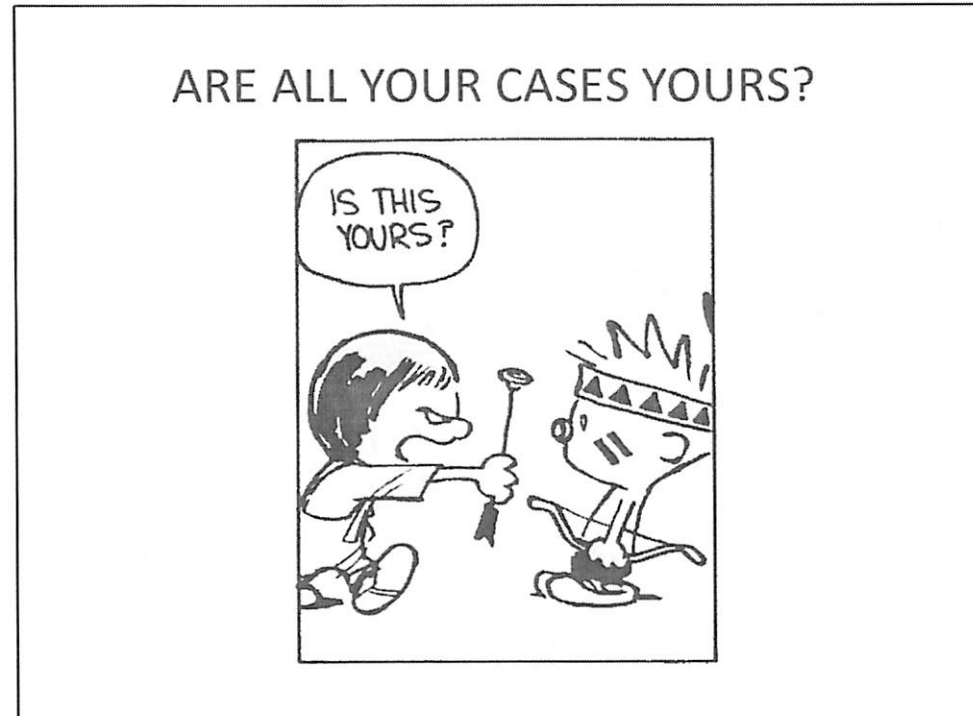
GETTING STARTED

- Old files that were never ruled on?
 - DWOP!!!!
- Old files that are old?
 - How old?
 - Active?
 - Send a letter to the guardian.
- The rest of the problem files...

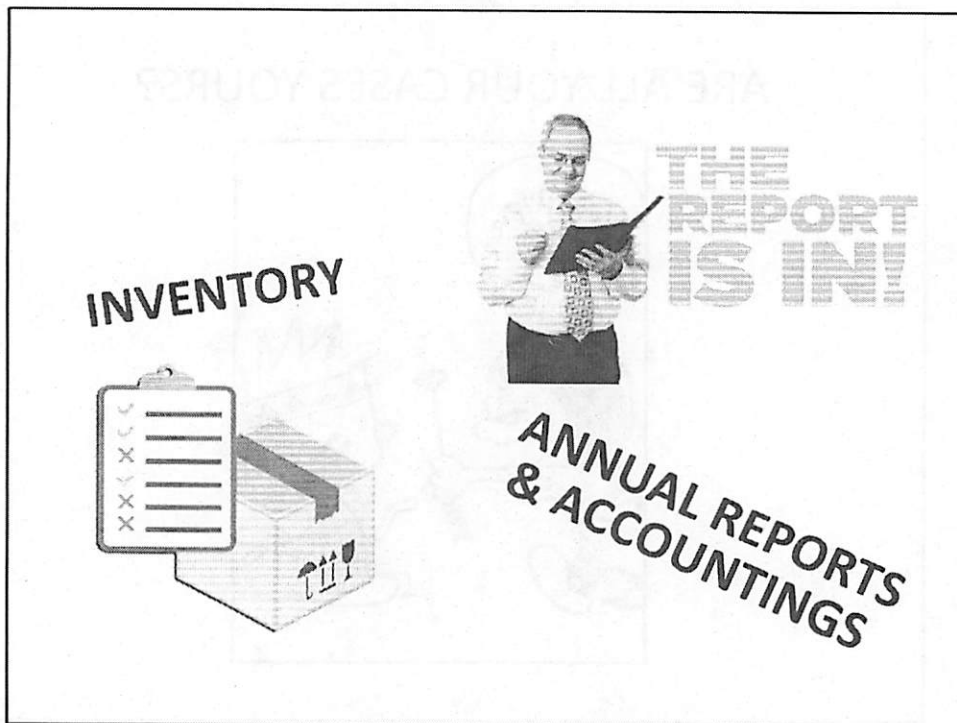
- REMOVAL (TEC 1203.051)
 - USE IT AS A TOOL & PROCEED WITH CARE!
 - Fax to attorney of record show cause order ☺
 - No bond. ☺
 - No oath. ☺
 - Late inventory - GOE. ☺
 - Fails to give new bond. ☺
 - Where is the guardian? ☺
 - Ward is removed from state. ☺
 - No annual report .
 - No annual accounting - GOE.
 - No budget – GOE.
 - No investment plan – GOE.
 - SB 39

- REMOVAL (TEC 1203.051)
 - USE IT AS A TOOL & PROCEED WITH CARE!
 - Fax to attorney of record show cause order ☺
 - No SHOW? Remove or NOTICE
 - SHOW? BEG!





- ARE ALL YOUR CASES YOURS?
- Liability.
 - Work.
 - Resources???
 - New law – SB 39 court can transfer on its own motion.



ANNUAL REPORTS

- GUARDIANSHIP NO LONGER NECESSARY!
 - Ward taking care of the guardian
 - Ward taking care of the other patients
 - Brain injury healed

ANNUAL ACCOUNTS

- GUARDIANSHIP NO LONGER NECESSARY!
 - Just social security?

Need HELP?

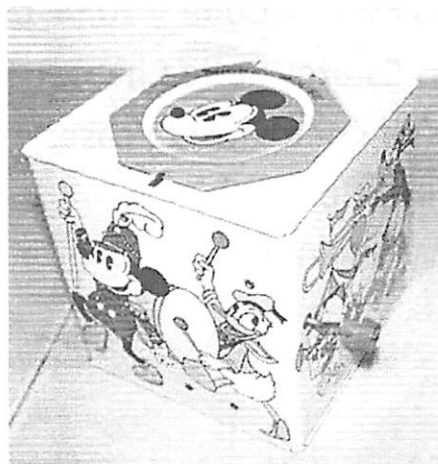


WE
are
WHAT WE
repeatedly
DO.
-aristotle

SB 1096

- September 1, 2017
- Police have to notify the court of a ward's arrest
- **JUDICIAL BRANCH CERTIFICATION COMMISSION**
 - Guardian training
 - Not for certified, INITIAL term temporary, attorney, corp.
 - Court may waive ... Texas Supreme Court
 - June 2018
 - Registration program – Texas Supreme Court
 - Notify of creation and removal.
 - Criminal history
 - Not for certified, attorney, corporation, certified guardian

AUDIT INCOMING CASES.



AUDIT ON INCOMING CASES.

- Bond.
- Someone needs to look behind the curtain.
- What might you find?



COURT INVESTIGATOR

- **See Texas Estates Code § 1054.151**
- **See Texas Estates Code Chapter 1102**
- **Nonsuits of guardianship cases**
- **APS Notifications**
- **NEW LAW SB 1016**