

GUARDIANSHIPS:

GUARDIANSHIP OF THE ESTATE, GUARDIANSHIP OF THE PERSON, AND AD LITEM APPOINTMENTS¹

SHARON B. GARDNER

Crain, Caton & James
909 Fannin, Suite 3300
Two Houston Center
Houston, Texas 77010-1050

NATIONAL ALLIANCE OF THE MENTALLY ILL-FT. BEND CHAPTER

November 6, 2003

Number range level0. SCOPE OF ARTICLE

This outline provides a general overview of guardianships in Texas, including procedural and administrative requirements applicable to guardians and guardianship proceedings. References to the "Probate Code" and "Section" are to the Texas Probate Code. The outline also discusses certain provisions of the Health & Safety Code and the Texas Government Code which affect guardians, wards and the attorneys who represent them.

The outline includes a discussion of the role of an attorney ad litem and a guardian ad litem. The recent guardianship amendments clarify the differences between these two appointments and the duties conferred upon the appointees. Further, a discussion of guardianships would not be complete without at least a limited discussion of contested guardianships.

Finally, a number of forms are included in Appendix B to this outline. As with any form, they can be utilized as a guide; however, they should be carefully tailored to the specifics of the case.

Number range level0. A LITTLE HISTORY

For years, guardianships were generally governed by the same statutes that regulated decedents' estates. These sections did not address the specific needs of individuals subject to a guardianship or allow the courts and guardians the flexibility to custom tailor a guardianship to the particular needs and limitations of each ward. In an effort to address and "up-date" the outmoded guardianship structure, the Texas legislature revamped the Probate Code in 1993 and removed the guardianship statutes from their inclusion with decedents' estates and the other probate statutes. These statutes are now found in Chapter XIII of the Probate Code entitled "Guardianship."

A guardianship practitioner cannot, however, ignore the guardianship law in effect prior to 1993. Often, the new guardianship provisions are based, either in whole or in part, on the old sections. Further, a new practitioner will often find that there is limited case law addressing the new provisions, and it is important to review the prior case law for guidance and support. To assist in this endeavor, a cross-reference table is included as Appendix A to this outline, which provides a cross-reference between the old and new sections of the Probate Code.

Number range level0. DEFINITIONS.

Where are some of the common terms applicable to a guardianship?

Section 601 of the Probate Code serves as a definitional section for the guardianship statutes. Some of the more commonly used terms and definitions are as follows:

"Attorney Ad Litem" means an attorney who is appointed by a court to represent and advocate on behalf of a proposed ward, an incapacitated person, or an unborn person in a guardianship proceeding.

TEX. PROB. CODE ANN. § 601(1) (Vernon Supp. 1997).

"Guardian Ad Litem" means a person who is appointed by a court to represent the best interests of an incapacitated person in a guardianship proceeding.

TEX. PROB. CODE ANN. § 601(11) (Vernon Supp. 1997).

"Guardianship program" means a local, county, or regional program that provides guardianship and related services to an incapacitated person or other person who needs assistance in making decisions concerning the person's own welfare or financial affairs.

TEX. PROB. CODE ANN. § 601(12) (Vernon Supp. 1997).

"Incapacitated Person" means:

(A) a minor;

(B) an adult individual who, because of a physical or mental condition, is substantially unable to provide food, clothing or shelter for himself or herself, to care for the individual's own physical health, or to manage the individual's own financial affairs;

(C) a missing person; or

(D) a person who must have a guardian appointed to receive funds due the person from any governmental source.

TEX. PROB. CODE ANN. § 601(13) (Vernon Supp. 1997).

“Missing person” means:

(A) a person reported by an executive department of the United States to be a prisoner of war or missing in the course of public service to the United States; or

(B) a person reported missing and there is good cause, as shown by a police or other law enforcement agency report or a peace officer's testimony in court, to believe that the person is missing.

TEX. PROB. CODE ANN. § 601(17) (Vernon Supp. 1997).

“Next of kin” includes an adopted child, the descendants of an adopted child, and the adoptive parent of an adopted child.

TEX. PROB. CODE ANN. § 601(19) (Vernon Supp. 1997).

“Parent” means the mother of a child, a man presumed to be the biological father of a child, a man who has been adjudicated to be the biological father of a child by a court of competent jurisdiction, or an adoptive mother or father of a child, but does not include a parent as to whom the parent-child relationship has been terminated.

TEX. PROB. CODE ANN. § 601(20) (Vernon Supp. 1997).

What is a court investigator and court investigator's report?

Under Section 25.0025 of the Texas Government Code, the judge of a statutory probate court is required to appoint a individual as the court investigator. Upon the filing of an application for guardianship and generally before the appointment of an attorney ad litem, the court investigator will investigate the circumstances alleged in the application to determine whether a less restrictive alternative than guardianship is appropriate. TEX. GOV'T CODE ANN. § 25.0025 (Vernon Supp. 1997).

After making an investigation, the court investigator will file with the court a report setting out his or her findings and conclusions. In a contested case, the court investigator must provide copies of the report to the attorneys for the parties before the earlier of (i) seven (7) days after the report is completed, or (ii) six (6) days before trial is scheduled to begin.

HOT SPOT: If a contestant to a guardianship files a contest after the court investigator has visited the proposed ward, the contestant should inform the court investigator of the contest and seek a copy of the report.

What is a court visitor?

Each statutory probate court is required to operate a court visitor program to assess the conditions of wards and proposed wards. A county without a statutory probate court may operate a court visitor program in accordance with the financial abilities and population needs of the county. Any time before the appointment of a guardian or during the pendency of a guardianship, the court may appoint a court visitor to evaluate the proposed ward or the proposed ward and submit a written report to the court. The court visitor must file his or her report no later than fourteen (14) days after the date of the evaluation, and the report must be sworn to (under penalty of perjury) that it is accurate to the best of the court visitor's knowledge and belief.

Number range level0. GENERAL OVERVIEW OF GUARDIANSHIPS

What is a guardianship?

Although there is no statutory definition of a "guardianship," Section 602 provides that the policy and purpose of a guardianship is to grant another person or entity limited authority over an incapacitated person to the extent required by such person's mental and/or physical limitations. The authority should be limited to that necessary to promote and protect the incapacitated person. The guardianship should be designed to encourage the maintenance and development of self-reliance and independence of the incapacitated person.

What is a guardian?

A guardian is the person appointed to serve as the legal representative for an incapacitated person.

When is a person determined to be incapacitated?

A person is "incapacitated" upon a finding by a court that the person lacks the capacity to do some, but not necessarily all, of the tasks necessary to care for himself or herself or to manage his or her property. A person is totally incapacitated if he or she lacks the capacity to perform any task necessary to care for himself or herself or his or her property. A person is partially incapacitated if he or she lacks the capacity to perform some task and has capacity to perform other tasks necessary to care for himself or herself or his or her property. *See* TEX. PROB. CODE ANN. § 693(b) (Vernon Supp. 1997). Any determination of incapacity of an adult, proposed ward must be evidenced by recurring acts or occurrences within the proceeding six (6) month period, and not by isolated instances of negligence or bad judgment. *See* TEX. PROB. CODE ANN. § 684(c) (Vernon Supp. 1997).

What types of guardianships are available?

A. Temporary Guardianships. It generally takes a minimum of two (2) weeks from the time a guardianship proceeding is instituted until a guardian may be appointed. In certain circumstances, it may be necessary to seek the immediate appointment of a guardian via a "temporary" guardianship.

Sections 875 through 879 of the Probate Code set forth the specific rules applicable to temporary guardianships. The court may appoint a temporary guardian if it is presented with “substantial evidence” that an incapacitated person or a minor requires the immediate appointment of a guardian. TEX. PROB. CODE ANN. § 875(a)(Vernon Supp. 1997). If a temporary guardianship of the person is sought, be prepared to establish that imminent danger exists to the proposed ward’s physical health or safety, which will be seriously impaired without the requested appointment. If a temporary guardianship of the estate is sought, be prepared to establish that imminent danger exists to the proposed ward’s estate, which will be seriously damaged or dissipated unless immediate action is taken.

It is important to remember that a temporary guardianship is just that - temporary. It is valid for sixty (60) days unless a contest arises, in which case the term of the temporary guardianship can be extended until (i) the conclusion of the hearing challenging or contesting the application, or (ii) the date the guardian appointed by the court qualifies. The principal object of a temporary guardianship is to protect the ward’s health and well-being and/or preserve the estate until it can pass into the hands of a permanent guardian, or until the situation giving rise to the temporary guardianship is resolved by a less restrictive alternative. The establishment of a temporary guardianship is discussed in greater detail later.

HOT SPOT: The appointment and qualification of a temporary guardian of a ward’s estate revokes a power of attorney executed by the ward.

B. Permanent Guardianships. The majority of guardianships are “permanent” guardianships. A permanent guardianship can be either partial or total. A partial guardianship grants a guardian limited powers and the ward retains all other powers not stated in the order of appointment. A total or full guardianship grants the guardian total power over the ward’s person and/or estate. Sections 675 through 698 address the filing and procedural requirements of establishing a permanent guardianship, both partial and total. Because of the far reaching effects of appointing a permanent guardian, Section 684 requires that the court find by clear and convincing evidence that (i) the proposed ward is an incapacitated person, (ii) it is in the proposed ward’s best interest to have the court appoint a person as guardian, and (iii) the rights of the proposed ward and/or the proposed ward’s property will be protected by the appointment of a guardian. The court must also find by a preponderance of the evidence that the person seeking to be appointed guardian is eligible to act as the proposed ward’s guardian. Generally, a permanent guardianship will last until the ward either dies or is determined to no longer be incapacitated. *See* TEX. PROB. CODE ANN. § 694 (Vernon Supp. 1997). The establishment and administration of permanent guardianships is discussed in greater detail later.

HOT SPOT: The appointment and qualification of a permanent guardian of a ward’s estate revokes a power of attorney executed by the ward.

What are the alternatives to a guardianship?

A. Durable Power of Attorney. A durable power of attorney is a document by which an individual, known as the principal, designates another to act as his or her agent in financial matters. If properly drafted, a durable power of attorney will survive the principal’s incapacity and, thus, the agent may continue to act on behalf of an incapacitated principal. Needless to say, this is a less

costly way for a person to provide for the management of his or her financial affairs in the event of incapacity.

However, it is important to determine if the person has or had sufficient capacity to execute a durable power of attorney. If a power of attorney was improperly obtained, it may be necessary to institute a guardianship proceeding to safeguard the ward's estate. Chapter XII of the Probate Code governs the execution and construction of a durable power of attorney. *See* TEX. PROB. CODE ANN. §§ 481-506 (Vernon Supp. 1997).

HOT SPOT: Before seeking the appointment of a guardian, it is important to determine whether the proposed ward executed a valid durable power of attorney prior to his or her incapacity. Any search should include checking the real property records of the county in which the proposed ward resides and any county in which the person owns real property, and contacting any attorney who may have represented the proposed ward.

B. Durable Health Care Power of Attorney. Similar to a durable power of attorney, a durable power of attorney for health care is a document by which an individual may delegate to an agent the authority to make health care decisions. The agent under a durable power of attorney for health care may make any health care decision on the principal's behalf that the principal could have made *but for* the principal's lack of capacity to make such decision. *See* TEX. CIV. PRAC. & REM. CODE § 135.001(2)(a) (Vernon Supp. 1997).

C. Directive to Physician. This is more commonly known as a "living will." A "competent" individual may execute a written directive regarding the use of "life-sustaining procedures" in the event the individual has an incurable or irreversible condition certified by two (2) physicians to be "terminal." *See* TEX. HEALTH & SAFETY CODE § 672.003 (Vernon 1992). The individual may also appoint a designated person to make decisions for them in such a situation. Chapter 672 of the Texas Health & Safety Code, known as the Natural Death Act, provides for the execution of a Directive to Physician. *See* TEX. HEALTH & SAFETY CODE §§ 672.001-.021 (Vernon 1992).

D. Surrogate Decision Making. In 1993, the Texas legislature enacted the Consent to Medical Treatment Act, which allows certain individuals to act as "surrogate decision-makers" for an adult incapacitated individual who is without a guardian and who is incapable of making medical treatment decisions. *See* TEX. HEALTH & SAFETY CODE § 313.001 (Vernon Supp. 1997). Specifically, Section 313.004(a) of the Texas Health and Safety Code provides that:

(a) If an adult patient in a hospital or nursing home is comatose, incapacitated, or otherwise mentally or physically incapable of communicating, an adult surrogate from the following list, in order of priority, who has decision-making capacity, is available after a reasonably diligent inquiry, and is willing to consent to medical treatment on behalf of the patient may consent to medical treatment on behalf of the patient:

- (1) the patient's spouse;
- (2) an adult child of the patient who has the waiver and consent of all other qualified adult children of the patient to act as the sole decision-maker;
- (3) a majority of the patient's reasonably available adult children;

- (4) the patient's parents; or
- (5) the individual clearly identified to act for the patient by the patient before the patient became incapacitated, the patient's nearest living relative, or a member of the clergy.

TEX. HEALTH & SAFETY CODE § 313.004(a) (Vernon Supp. 1997).

If the family can agree on a treatment plan, it may be possible to avoid a guardianship of at least the person. Otherwise, the court, which would have guardianship jurisdiction, has jurisdiction to hear the dispute. TEX. HEALTH & SAFETY CODE § 313.004(b) (Vernon Supp. 1997).

E. Trusts.

1. Revocable or Irrevocable Trusts. These are also commonly known as "living" trusts. An individual may provide for management of his or her assets in the event of incapacity by creating a management trust. Such trusts allow individuals to choose to place their assets in a structure which will provide for continued management, either by an individual or corporate trustee, subsequent to their incapacity.

2. Section 142 Trust. In a suit in which a minor or other incapacitated person has no legal representative and is being represented by a next friend or guardian ad litem, the court may direct the creation of a trust for the management of funds recovered under a judgment in the lawsuit. TEX. PROP. CODE ANN. § 142.001 (Vernon 1995). The minor or incapacitated person's next friend or guardian ad litem generally applies to the court to create a 142 trust. If the proposed trust is for an incapacitated person, the applicant must be prepared to show, and the court must find that the person is, in fact, incapacitated.

If the court finds that the creation of a 142 trust is in the minor or incapacitated person's "best interest," the court will enter an order approving the creation of the trust. The minor or incapacitated person must be the sole beneficiary of the trust. Discretionary distributions can be made for the beneficiary's health, education, maintenance and support. If the trust is for the benefit of a minor, it shall terminate upon the earlier of (i) the beneficiary reaching the age of 25, or (ii) the beneficiary's death. If the beneficiary is an incapacitated person, the trust terminates upon the earlier of (i) the beneficiary regaining capacity, or (ii) the beneficiary's death.

HOT SPOT: A Section 142 Trust must be created pursuant to a judgment such as a judgment involving a personal injury lawsuit or an heirship.

3. Section 867 Trust. Section 867 of the Probate Code authorizes a court with jurisdiction over a guardianship to create a trust for the management of guardianship funds. Obviously, this will not avoid a guardianship, but is a procedure to end a guardianship of the estate. The terms of the trust are similar to a 142 Trust. See TEX. PROP. CODE ANN. § 142.005 (Vernon 1995) (setting out terms of 142 trusts).

F. Community Administration. The spouse of an incapacitated person has the right and power to manage, control and dispose of the community estate, including the portion previously under the sole management of the incapacitated spouse. Upon a finding by the court that the spouse of an

incapacitated person would not be disqualified to serve as the ward's guardian, the court may authorize the spouse to manage the community property outside the guardianship. However, a guardianship of the estate may still be necessary if the ward also owns separate property. TEX. PROB. CODE ANN. § 883 (Vernon Supp. 1997). In the event the court does appoint a guardian, the capacitated spouse may demand that the guardian of the ward's estate deliver the community property to him or her. TEX. PROB. CODE ANN. § 884 (Vernon Supp. 1997).

G. Deposit Assets with County Clerk. A debtor of a minor or incapacitated person who is without a guardian may pay the money due to the county clerk where the creditor resides provided the amount due is \$25,000 or less. The debtor should provide the county clerk the following information: (i) creditor's name and address; (ii) the nature of the creditor's incapacity; and (iii) if a minor, the minor's age. The county clerk will then notify the creditor that the funds have been deposited in the registry on his or her behalf. A spouse or parent of the creditor may apply to withdraw the money as custodian for the creditor. If authorized by the court, the applicant must post a bond equal to two (2) times the amount of the funds withdrawn. *See* TEX. PROB. CODE ANN. § 887 (Vernon Supp. 1997).

Number range level0. GUARDIANSHIP JURISDICTION AND VENUE

Which court has jurisdiction?

Sections 605 and 606 of the Probate Code determine the jurisdiction of a guardianship proceeding. County courts have general jurisdiction pertaining to guardianship proceedings. *See* TEX. PROB. CODE ANN. § 605 (Vernon Supp. 1997). In counties which have a statutory probate court, county court at law, or other statutory court exercising original probate jurisdiction, those courts have original jurisdiction over guardianship proceedings. The following counties currently have statutory probate courts: Bexar, Brazoria, Dallas, Denton, El Paso, Galveston, Harris, Tarrant and Travis.

In counties in which there is no statutory probate court, county court at law, or other statutory court exercising original probate jurisdiction, the county court shall have jurisdiction over all applications, petitions and motions relating to guardianship and mental health matters. However, if the guardianship proceedings become contested, a judge may request the assignment of a statutory probate judge, or a transfer to the district court. TEX. PROB. CODE ANN. § 606(b) (Vernon Supp. 1997). If the transfer is requested by a party to the proceeding, the county court judge shall make the transfer. The county court maintains jurisdiction over the uncontested guardianship proceedings until the final disposition of the case is made by the assigned judge or district court. TEX. PROB. CODE ANN. § 606(c) (Vernon Supp. 1997).

Finally, Section 606(d) grants the district court concurrent jurisdiction with a statutory probate court over all actions by or against a person in his or her capacity as guardian.

Where is venue proper?

A. Incapacitated Person. In a proceeding for the appointment of a guardian of an incapacitated person, venue is proper in the county where the proposed ward is located or where the proposed ward resides on the date the application is filed. TEX. PROB. CODE ANN. § 610 (Vernon Supp. 1997).

B. Minor. In a proceeding for the appointment of a guardian of a minor, venue is proper as follows:

- (1) in the county in which both the minor's parents live;
- (2) if the parents do not reside in the same county, in the county in which the parent who is the sole managing conservator of the minor resides, or in the county in which the parent who is the joint managing conservator with the greater period of physical possession of and access to the minor resides;
- (3) if only one parent is living and the parent has custody of the minor, in the county in which that parent resides;
- (4) if both parents are dead but the minor was in the custody of a deceased parent, in the county in which the last surviving parent having custody resided; or
- (5) if both parents of a minor child have died in a common disaster and there is no evidence that the parents died other than simultaneously, in the county in which both deceased parents resided at the time of their simultaneous deaths, if they resided in the same county.

TEX. PROB. CODE ANN. § 610(c) (Vernon Supp. 1997).

If the appointment of a guardian was made by will and the appointee resides within the state, the proceeding may be brought in the county in which the will was admitted to probate or in the county of the appointee's residence.

C. Missing Person. In a proceeding for the appointment of a guardian for the estate of a missing person, venue is proper:

- (1) in the county in which the missing person's spouse resides;
- (2) if there is no spouse, in the county in which a parent or child of the missing person resides; or
- (3) if there is no spouse, parent, or child, in the county in which the missing person's next of kin resides.

TEX. PROB. CODE ANN. § 610(d) (Vernon Supp. 1997).

Can a matter related to a ward or the guardianship proceeding be transferred to the court where the guardianship proceeding is pending?

The judge of constitutional county court or a statutory probate court, on the motion of a party to the action or a person interested in the guardianship, may transfer to the judge's court from a district, county, or statutory court, a cause of action "appertaining or incident to" a guardianship estate pending in the court and may consolidate the transferred cause of action with the other proceedings in the court relating to the guardianship. TEX. PROB. CODE ANN. § 608 (Vernon Supp. 1997). Section 607 defines "appertaining or incident to a guardianship estate" to include the appointment of

a guardian, the issuance of letters of guardianship, a claim by or against the guardianship estate, all actions for trial of title to land incident to the guardianship estate, the enforcement of liens incident to the guardianship estate, actions for trial of the right of property incident to the guardianship estate, and generally all matters relating to the settlement, partition, and distribution of the guardianship estate.

Does the court continue to have jurisdiction upon the ward's death or reaching majority?

The court maintains only limited jurisdiction over the guardian and surety on a guardian's bond in the event the ward dies or, in the case of a minor, the ward reaches the age of majority. Section 606 (e) provides that the court retains jurisdiction to close a minor or an incapacitated person's estate and to sue the surety on the guardian's bond if the guardian did not perform the duties of the office as required by law.

Number range level0. GUARDIANSHIPS OF INCAPACITATED PERSONS

Who has standing to commence a guardianship proceeding and be appointed guardian?

A. Incapacitated Person. Any person who does not have an "adverse interest" to the proposed ward has the right to commence a guardianship proceeding. *See* TEX. PROB. CODE ANN. § 642 (Vernon Supp. 1997). Currently, there is no statutory definition of an adverse interest. The few examples of an adverse interest must be ascertained through case law. Examples of individuals who may have an adverse interest to a proposed ward include: (i) spouse filing for a divorce; (ii) person claiming assets from the proposed ward; (iii) potential creditor; (iv) business partner of the proposed ward; and (v) a guarantor of a proposed ward's promissory note. The proper means to challenge an individual's standing in a guardianship proceeding is by motion in limine. *See* TEX. PROB. CODE ANN. § 642(c) (Vernon Supp. 1997); *Womble v. Atkins*, 331 S.W.2d 294 (Tex. 1960).

Section 677 gives the court broad discretion to appoint a guardian for a person other than a minor according to the circumstances and considering the best interests of the proposed ward. However, Section 677 does stipulate that certain persons have priority to be appointed provided that they are found to be eligible to serve. These include a proposed ward's spouse; otherwise, the proposed ward's nearest of kin. *See* TEX. PROB. CODE ANN. 677(a)(1)-(2). Any person entitled to be appointed guardian may waive his or her right to serve.

FORM: A sample Waiver and Renunciation of Right to Be Appointed Guardian of the Estate is included in Appendix B to this outline.

B. Minors. A minor's parents are the natural guardians of the minor person. Prior to the 1993 amendments, a minor's parents could be jointly appointed co-guardians of a minor's estate. Section 676 now provides that if both parents are living, only one parent may be appointed guardian of the minor's estate. Generally, the parents may decide which one should be appointed guardian; however, if they can not agree, the court may appoint the parent it determines is better qualified to serve. If one parent is dead, the surviving parent is the natural guardian of the minor's person and is entitled to be appointed guardian of the minor's estate.

In the event both parents are deceased, a determination should be made whether the minor's last surviving parent appointed a guardian of the minor prior to the parent's death. A surviving parent of

a minor may now appoint under the terms of his or her will or other written declarations any eligible person to be guardian of the person of his or her minor children after the death of the parent. Upon the death of the last surviving parent and compliance with the Probate Code, an eligible person is also entitled to be appointed guardian of the child's estate. If it is determined that the last surviving parent did not make such a designation, the closest ascendent is entitled to be appointed guardian of the minor's person and estate. If the minor has no ascendent in the direct line, the nearest of kin is then entitled to be appointed. Finally, in the event no relative of the minor is eligible to be appointed as guardian, the court may appoint a qualified person as the minor's guardian.

C. Person Named in Designation of Guardian Before Need Arises. Section 679 allows a person to designate by written declaration the person or persons they desire to serve as his or her guardian in the event the need arises. The declarant may also identify the person or persons which he or she does not want to serve as his or her guardian.

D. Person Selected by Minor to Serve as Guardian. Section 680 allows a minor who is at least twelve (12) years of age to choose the minor's guardian (subject to the court determining that the minor's choice would be in the minor's best interest). This is consistent with Family Code Section 14.07(a), which allows a child twelve (12) years of age or older to choose the managing conservator, subject to the approval of the court. TEX. FAM. CODE ANN. § 14.07 (Vernon Supp. 1997).

FORM: A sample Selection of Guardian by Minor form is included in Appendix B to this outline.

E. Court Initiation of Guardianship Proceedings. Section 683 provides that if a court has probable cause to believe that a person domiciled or found in the county in which the court is located is an incapacitated person, and the person does not have a guardian in Texas, the court shall appoint a guardian ad litem or court investigator to investigate and file an application seeking appointment of a guardian of the person or estate, or both, if necessary.

Who is disqualified to serve as a guardian?

Section 681 enumerates the individuals who are ineligible to be appointed guardian. This includes individuals whose conduct is "notoriously bad," are incapacitated, are a party to a lawsuit or whose parents are parties to a lawsuit concerning or affecting the proposed ward's welfare (unless the court determines that the applicant and the proposed ward's interests do not conflict or the court appoints a guardian ad litem to cure the conflict), are indebted to the proposed ward (unless the applicant repays the debt prior to his or her appointment), are asserting a claim adverse to the proposed ward or his or her property, are incapable of managing and controlling the proposed ward's person or estate, or are non-residents of Texas and have not filed a designation of resident agent. TEX. PROB. CODE ANN. § 681(2)-(7) (Vernon Supp. 1997). It also includes a minor, any person the court determines to be an "unsuitable" individual, and any individual who the proposed ward disqualified in a written declaration pursuant to Section 679. TEX. PROB. CODE ANN. § 681(1), (8)-(9) (Vernon Supp. 1997).

HOT SPOT: It is very important to discuss the potential disqualification provisions with a client before filing the application seeking his or her appointment.

What is the general procedure to appoint a guardian?

A. Prepare and File Application. A guardianship starts with a written application filed in the court exercising probate jurisdiction by the person seeking the appointment of a guardian. An application for guardianship must detail the nature and degree of the proposed ward's incapacity, specify the areas of protection, assistance and limits of rights to be conferred, and describe compensation, pension, insurance or allowances that the ward will receive. If the guardianship is sought for multiple minors, one application can be filed seeking guardianship of all the minors. TEX. PROB. CODE ANN. § 682 (Vernon Supp. 1997). The application should clearly advise the court whether the applicant seeks a total or partial guardianship. Regardless of whether a total or partial guardianship is sought, the application must be sworn to by the applicant and contain all of the following information:

- ! The proposed ward's name, sex, date of birth, and address.
- ! The name, relationship, and address of the person seeking to be appointed guardian.
- ! The social security number of both the proposed ward and the person seeking to be appointed guardian.
- ! Facts showing the court has venue.
- ! Whether a guardianship of the proposed ward's person or estate, or both, is sought.
- ! The nature and degree of the alleged incapacity.
- ! The specific areas of protection and assistance requested, and the limitation of rights requested.
- ! Facts showing why a guardian should be appointed and the interest of the applicant in the appointment.
- ! Whether a guardianship of any kind exists for the proposed ward in Texas or any other state and, if so, a description of such guardianship.
- ! The name and address of any individual or institution having the care and custody of the proposed ward.
- ! A description of the proposed ward's property, including any compensation, pension, insurance, or allowance, and the estimated value.
- ! The requested term of the guardianship.
- ! The name and address of the agent under a power of attorney signed by the proposed ward and, if so, a description of the type of power of attorney.
- ! If the proposed ward is a minor, the names of the proposed ward's parents and next of kin and whether either or both of the parents are deceased.

- ! If the proposed ward is a minor, whether the minor was the subject of a legal or conservatorship proceeding within the last two (2) years and, if so, the court involved, the nature of the proceeding, and final disposition, if any, of the proceeding.
- ! If the proposed ward is sixty (60) years of age or older, the names and addresses, of the proposed ward's spouse, siblings, and children, or, if there is no spouse, sibling or child, the names and addresses of the proposed ward's next of kin.
- ! If the proposed ward is a missing person: (a) the last known residence of the missing person; (b) the name of the executive department of the United States reporting the proposed ward as a missing person, the date of the report, and the last known whereabouts of the missing person; and (c) the names and addresses of the missing person's spouse, children and parents, or, if none, the names and addresses of the missing person's next of kin.
- ! If applicable, that the person that the applicant desires to have appointed as guardian is a private, professional guardian who has complied with the requirements of Section 697.

See TEX. PROB. CODE ANN. § 682 (Vernon Supp. 1997).

FORM: A sample Application for Appointment of Guardian of the Person and Estate (for total incapacity), Application for Appointment of Guardian of the Person and Estate (for partial incapacity), and Application for Appointment of Guardian of the Estate (of a Minor) are included in Appendix B to this outline.

B. Prepare and File Application and Order to Appoint Attorney Ad Litem. The court must appoint an attorney ad litem to represent the interests of a proposed ward. The role of the attorney ad litem will be discussed in greater detail later. It is generally preferable to file a motion seeking the appointment of the attorney ad litem with the original application for guardianship. This will expedite the appointment.

FORM: A sample Motion for Appointment of Attorney Ad Litem and related Order are included in Appendix B to this outline.

C. Arrange Notice and Citation. Section 633 sets out the persons and entities who must be notified of the guardianship proceeding. Upon the filing of an application for guardianship, the court clerk issues a notice stating that the application for guardianship was filed, the name of the proposed ward and the name of the applicant. The notice must cite all persons interested in the welfare of the proposed ward to appear at the time and place stated in the notice if they wish to contest the application. A copy of the notice must be posted and the officer posting the notice shall return the original notice, officially signed and marked in writing with the time and place of posting. The officer posting the notice shall personally serve a copy of the notice with citation to appear and answer the application for guardianship, to each of the following persons:

- ! The proposed ward, if twelve (12) years of age or older.
- ! The proposed ward's parents.

- ! Any conservator or person having control of the care and welfare of the proposed ward.
- ! The proposed ward's spouse.
- ! The attorney and/or guardian ad litem appointed to represent the interests of a missing person.

See TEX. PROB. CODE ANN. § 633(c) (Vernon Supp. 1997).

An individual, other than the proposed ward, who is entitled to receive personal service of citation under Section 633(c), may waive the issuance of personal service of citation by a writing, which is filed with the clerk of the court. The attorney ad litem for the proposed ward should never waive service on behalf of the proposed ward but may answer and/or waive service on the ad litem's own behalf.

The court may not act on an application for the creation of the guardianship until the Monday following the expiration of the ten (10) day period beginning the date service of notice and citation has been made and returned. Therefore, it is imperative to obtain citation as soon as possible. This is often accomplished by filing a Motion for service pursuant to Rule 103 of the Texas Rules of Civil Procedure, which allows an applicant to arrange service by a qualified private process server.

FORM: A sample Motion for 103 Service and related Order are included in Appendix B to this outline.

D. Mail Certified Notices of Application. Section 633 also sets out the persons and entities who should be notified of the guardianship proceeding via certified mail. The applicant (or the county clerk at the applicant's request) must mail a copy of the notice to all of the following persons:

- ! All the proposed ward's adult siblings.
- ! All the proposed ward's adult children.
- ! The administrator of a nursing home or similar facility where the proposed ward resides.
- ! The operator of a residential facility in which the proposed ward resides.
- ! The agent(s) under a power of attorney executed by the proposed ward.

See TEX. PROB. CODE ANN. § 633(d) (Vernon Supp. 1997).

Similar to the rules applicable to personal citation, the court may not consider the application for guardianship until the Monday following the expiration of the ten (10) day period after notice has been mailed to the proposed ward's adult siblings and children. While the other notices listed are important, failure to timely provide these notices will not generally delay the hearing date.

E. Obtain Medical Examinations and Reports and Prepare Medical Testimony.

1. Incapacitated Person. Section 687 provides that the court may not appoint a guardian for an incapacitated person, other than a minor or missing person, unless provided with current medical evidence of the person's incapacity. Thus, a letter or certificate from a doctor stating the opinion of the doctor should be attached to the application or submitted to the court at the hearing. The physician's letter should state that the person for whom the appointment of a guardian is sought is incapacitated and should generally describe the extent of the incapacity. At a minimum, the physician should include in his or her letter or certificate the following information:

- ! A description of the nature and degree of incapacity, including the medical history if reasonably available.
- ! The doctor's medical prognosis specifying the estimated severity of the incapacity.
- ! Statement as to how or in what manner the proposed ward's ability to make or communicate responsible decisions concerning himself or herself is affected by the person's physical or mental health.
- ! A statement regarding whether any current medication affects the demeanor of the proposed ward or the proposed ward's ability to participate fully in a court proceeding.
- ! A description of the precise physical and mental conditions underlying a diagnosis of senility if applicable.
- ! Any other information which may be helpful to the court.

In most cases, the applicant can offer the physician's letter as evidence of the proposed ward's incapacity to the court. However, in any marginal case, such as when the proposed ward suffers from early onset of Alzheimer's disease or a bipolar disorder, it is advisable to retain a psychiatrist or neurologist who has experience testifying in legal proceedings to testify as to the proposed ward's incapacity. Generally, they will be familiar with the legal test for capacity. A good source for a testifying witness is to check and find out who the judge customarily appoints on independent psychiatric examinations. The judge obviously respects his or her appointee's opinion and the doctor will have experience in the area of capacity and mental examinations appropriate to the situation. In choosing a medical expert, it is important that the physician be board certified and have adequate credentials.

It is preferable to obtain some medical evidence prior to initiating a guardianship proceeding. However, in certain situations it may be necessary to begin the proceeding without written evidence of the proposed ward's incapacity because the proposed ward will not agree to a medical examination. In such a case, it may be necessary to file the application and then immediately file a motion for an independent medical examination.

HOT SPOT: The doctor's letter or certificate must be dated not later than the 120th day before the date of the filing of the application. TEX. PROB. CODE ANN. § 687(a) (Vernon Supp. 1997).

FORM: A sample doctor's letter is included in Appendix B to this outline.

2. Mental Retardation. If the basis of the proposed ward's alleged incapacity is mental retardation, Section 687(c) requires that the proposed ward be examined by a physician or psychologist licensed in Texas or certified by the Texas Department of Mental Health and Mental Retardation to perform the examination, unless there is written documentation filed with the court that shows that the proposed ward has been examined according to the rules adopted by the Texas Department of Mental Health and Mental Retardation not earlier than six (6) months before the date of the hearing to appoint a guardian for the proposed ward. The doctor must submit written findings and recommendations to the court.

F. Schedule Hearing. Each court has its own scheduling practices and procedures. It is advisable to contact the court regarding the dates and times available and, if possible, set the hearing at a date agreeable with the attorney ad litem (and guardian ad litem, if one has been appointed).

G. Hearing. The applicant, his attorney, the attorney ad litem, guardian ad litem, if one has been appointed, and any other party should be present at the hearing. Further, the proposed ward (other than a missing person) must be present at the hearing to appoint a guardian unless the court, on the record, determines that a personal appearance is not necessary. The court may close the hearing if the proposed ward or the proposed ward's counsel requests a closed hearing. The proposed ward is entitled, on request, to a jury trial.

1. Proposed Ward's Attendance. Generally, the duty to bring the proposed ward to the courtroom or to explain his non-appearance rests with the attorney ad litem.

2. Make the Relevant Inquires. At the hearing, the court shall:

! Inquire into the ability or inability of any allegedly incapacitated adult person to feed, clothe, and shelter himself or herself, to care for the individual's own physical health, and to manage the individual's property or financial affairs.

! Ascertain the age of any proposed ward who is a minor.

! Inquire into the governmental reports for any missing person or person who must have a guardian appointed to receive funds due the person from any governmental source.

! Inquire into the qualifications, abilities and capabilities of the person seeking to be appointed guardian.

See TEX. PROB. CODE ANN. § 685 (Vernon Supp. 1997).

3. Burden of Proof. The burden of proof is on the person alleging the incapacity. *See* TEX. PROB. CODE ANN. § 684(c) (Vernon Supp. 1997); *see also* *Ulrickson v. Hawkins*, 696 S.W.2d 704 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.).

4. Preference of Ward. An attempt must be made to determine who the proposed ward would like to serve as his or her guardian. The court must make a reasonable effort to consider the incapacitated person's preference as to the person to be appointed guardian and, shall give due consideration to the preference. TEX. PROB. CODE ANN. § 689 (Vernon Supp. 1997). The proposed

ward's preference can be made known in the attorney ad litem's answer, through the proposed ward's testimony, either in open court or via deposition testimony, or it can be made by the proposed ward's written designation.

HOT SPOT: The guardianship sections do not indicate whether a previous designation of guardian in the event of later incapacity overrides a current designation.

5. Findings Required.

a. Incapacitated Person. Before appointing a guardian, the court must find by **clear and convincing evidence** that: (i) the proposed ward is an incapacitated person; (ii) it is in the proposed ward's best interest to have the court appoint a guardian; and (iii) the rights of the proposed ward and/or the proposed ward's property will be protected by the appointment of a guardian. The Texas Supreme Court in *State v. Addington*, 588 S.W.2d 569 (Tex. 1979), defines the "clear and convincing evidence" standard of proof as applied to civil cases as:

[T]hat measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. This is an intermediate standard, falling between the preponderance standard of ordinary civil proceedings and the reasonable doubt standard of criminal proceedings. While the . . . proof must weigh heavier than merely the greater weight of the credible evidence, there is no requirement that the evidence be unequivocal or undisputed.

Id. at 570; *see also Upjohn v. Freeman*, 847 S.W.2d 589 (Tex. App.--Dallas 1992, no writ).

The court must also find, by a **preponderance of the evidence**, that the person seeking to be appointed guardian is eligible to act as the proposed ward's guardian.

b. Guardianship of Missing Person. If the guardian is appointed for a missing person, the person must be reported missing by an executive department of the United States for at least six (6) months prior to the date of the filing of the application and must remain missing.

6. Order Appointing Guardian or Dismissing Guardianship. Section 693 provides that if it is found that an adult person possesses the capacity to care for himself or herself and to manage his or her property as a reasonably prudent person would, the court must dismiss the application seeking guardianship. If it is found that the proposed ward is totally without capacity to care for himself or herself and to manage his or her property, the court must include that determination as a finding of fact in its order appointing a guardian and may appoint a guardian of the person or estate, or both, with full authority over the incapacitated person. If it is found that the person lacks the capacity to do some but not all of the tasks necessary to care for himself or herself or to manage his or her property, the court may appoint a guardian with limited powers and permit the individual to care for himself or herself and/or to manage his or her property to the extent the person is able.

The Order must also contain the specific powers, limitations, or duties of the guardian with respect to the care of the ward or the management of the ward's property. At a minimum, the order of the court appointing a guardian should specify the following:

- ! The name of the person appointed.
- ! The name of the ward.
- ! Whether the guardian is of the person or of the estate, or both.
- ! The amount of bond required.
- ! The name of one, but not more than three, disinterested persons to appraise the estate and to return the appraisal to the court (if it is a guardianship of the estate and the court deems an appraisal is necessary).
- ! That the Clerk will issue Letters of Guardianship to the person appointed when the person has qualified according to law.

FORM: A sample Order Appointing Guardian of the Person and Estate, for a totally incapacitated person, Order Appointing Guardian of the Person and Estate, for a partially incapacitated person, and Order Appointing Guardian of the Person and Estate, for a minor, are included in Appendix B to this outline.

7. Set Amount of Bond.

a. Bond of Guardian of the Person. Section 702 provides that a guardian of the person is required to give bond unless the guardian is a corporate fiduciary or was named in a will of the ward's last surviving parent, which was probated in Texas and which directs that the guardian appointed in the Will serve without bond. Many judges will require a bond even if bond is waived in a will.

b. Bond of Guardian of the Estate. Section 703 provides that the court will set the bond of the guardian of the estate at an amount equal to an estimated value of all cash and personal property and will include income for twelve (12) months. In determining the amount of the bond, the court may not take into account the assets of the estate that are placed in a management trust under Section 867 of the Probate Code. The court may not waive the requirement of a bond for the guardian of the estate of a ward, regardless of whether the surviving parent's will direct the court to waive the bond. In the case of multiple minors, only one bond is necessary.

c. Safekeeping Assets. In order to reduce the bond, the guardian of the estate may apply to the court to create a safekeeping account with a domestic state or nation bank, trust company, savings and loan association or other domestic corporate depository and deposit some or all of the cash, securities, and other personal property of the estate. With court approval, the bank or trust company becomes the custodian of the assets and agrees not to allow the withdrawal of the assets in safekeeping without a court order. In return, the bank or trust company receives a fee for its services. The guardian's bond is then reduced by an amount equal to the value of the assets delivered to the custodian. In considering whether to enter into a safekeeping agreement, it is important to consider: (i) the cost of bond premium in comparison to the safekeeping custodian's fees and expenses; (ii) the ability of the guardian to obtain a large bond; and (iii) the restrictions and inflexibility of a safekeeping account.

FORM: An Application for (i) Authority to Deposit Assets of Estate in Safekeeping and (ii) Authority to Make Limited Investments, and related Order, Receipt of Depository Under Custodial Agency and Safekeeping Agreement Pursuant to Section 703(h) of the Texas Probate Code, and related Order, are included in Appendix B to this outline.

H. Qualify. It is very important that a newly appointed guardian “qualify” as quickly as possible after his or her appointment. A guardian qualifies by:

! Taking and filing an oath of office; and

! Securing a bond in the amount set by the court, filing the bond with the court and obtaining the judge’s approval of the bond.

1. Oath. A person appointed guardian must take an oath that they will faithfully discharge his or her duties as guardian of the ward’s person or estate, or both. *See* TEX. PROB. CODE ANN. § 700 (Vernon Supp. 1997). The oath may be taken before anyone authorized to administer oaths in Texas. *See* TEX. PROB. CODE ANN. § 701 (Vernon Supp. 1997).

HOT SPOT: A guardian’s oath (and bond, if required) must be given within twenty (20) days of the order appointing the guardian or before the court revokes the letter for failure to qualify. *See* TEX. PROB. CODE ANN. § 701 (Vernon Supp. 1997).

FORM: A sample Oath is included in Appendix B to this outline.

2. Bond. As soon as the guardian is appointed, contact a bond company to obtain the bond set by the court. The bonding company will generally require a copy of the application and order appointing the guardian. The person appointed guardian will need to complete and sign the bonding company’s standard application. Once approved, the bonding company will issue a bond in the amount set by the court and deliver it to the guardian. The bond is then filed with the court and forwarded to the probate judge for approval.

HOT SPOT: It is important to advise the person seeking to be appointed guardian that the application for a bond will require the disclosure of the guardian’s personal financial information.

Who is responsible for the payment of the attorney’s fees?

On the request of a person who filed an application to be appointed guardian of the proposed ward, the court may authorize compensation of an attorney who represents the person at the application hearing from available funds of the ward’s estate regardless of whether that person is appointed the ward’s guardian. *See* TEX. PROB. CODE ANN. § 665B (Vernon Supp. 1997). However, the court may not authorize compensation under this Section unless the court finds that the applicant acted in good faith and for just cause in filing the application seeking the appointment of a guardian.

HOT SPOT: The payment of an applicant’s attorney fees and expenses from a proposed ward’s estate are contingent on an applicant being successful in obtaining a guardianship (regardless who is appointed guardian). If the applicant is not successful, the attorney’s fees and expenses of the applicant may not be recovered from the proposed ward’s estate.

Number range level0. TEMPORARY GUARDIANSHIPS

When can a temporary guardian be appointed?

A temporary guardianship is authorized when a court is presented with substantial evidence that a person is a minor or other incapacitated person and that the court has probable cause to believe that the person or the person's estate, or both, requires the immediate appointment of a guardianship. *See* TEX. PROB. CODE ANN. § 875(a) (Vernon Supp. 1997).

Who has standing to commence a temporary guardianship proceeding and be appointed temporary guardian?

If a person has the right to commence a permanent guardianship proceeding and be appointed permanent guardian, such person is also entitled to commence a temporary guardianship proceeding and be appointed temporary guardian. *See* TEX. PROB. CODE ANN. § 877 (Vernon Supp. 1997).

Who is disqualified to serve as a temporary guardian?

Similarly, any person who is disqualified to be appointed a permanent guardian is also disqualified to be appointed temporary guardian. *See* TEX. PROB. CODE ANN. § 877 (Vernon Supp. 1997).

What is the general procedure to appoint a temporary guardian?

A. Obtain Proof of Medical Emergency or Incapacity. If the imminent danger arises from medical reasons, a letter or certificate from a doctor stating the opinion of the doctor and describing the imminent danger should be obtained and attached to the application for temporary guardianship. However, even if the imminent danger relates to non-medical reasons, the court may not appoint a temporary guardian unless provided with medical evidence of the proposed ward's incapacity. The letter should contain the same information necessary to support the need for a permanent guardianship.

B. Prepare and File Application. A written application for the appointment of a temporary guardian may be filed before or after the appointment of a temporary guardian. If filed afterward, it must be filed not later than the end of the next business day of the court after the date the temporary guardian is appointed. The application must be sworn to and state all the following information:

- ! The name, address and social security number of the proposed ward.
- ! The alleged imminent danger to the proposed ward or the proposed ward's property.
- ! The type of appointment and the particular protection and assistance being requested.
- ! Facts supporting the allegations and requests.
- ! The name, address, and qualification of the proposed temporary guardian.
- ! The name, address, social security number and interest of the applicant.

! If proposed temporary guardian is a private professional guardian, a statement that the proposed temporary guardian has complied with the requirements of Section 697.

See TEX. PROB. CODE ANN. § 875(c) (Vernon Supp. 1997).

It is also advisable to include any other information which would generally be included in an application for the appointment of a permanent guardian as Section 877 appears to require its inclusion. *See* TEX. PROB. CODE ANN. § 877 (Vernon Supp. 1997)(all provisions applying to permanent guardianships apply to temporary guardianships).

FORM: An Application for Appointment of Temporary Guardian of the Person and Estate is included in Appendix B to this outline.

C. Prepare and File Order. Also, it is necessary to prepare and file with the application an order appointing temporary guardian. The order should include a finding of the imminent danger which requires the appointment of a temporary guardian and include all of the following:

! The name of the ward.

! The name of the person appointed temporary guardian and whether they are appointed temporary guardian of the ward's person or estate, or both.

! The term of the temporary guardianship (the maximum term is sixty (60) days).

! The powers of the temporary guardian.

! The name of the attorney ad litem appointed to represent the interests of the proposed ward at the confirmation hearing which is required to be held within ten (10) days of a temporary guardian's appointment.

! The date, time and place of the confirmation hearing.

! The amount of bond.

! A direction to the Clerk to issue a Certificate of Appointment to the person appointed upon the person qualifying according to the law.

FORM: A sample Order Appointing Temporary Guardian is included in Appendix B to this outline.

D. Present the Application and Order to the Court. The court may consider an application for temporary guardianship and appoint a temporary guardian ex parte. No hearing on the original ex parte application is necessary. The application and order should be presented to the court as quickly as possible.

E. Qualify. The temporary guardian should qualify immediately, but no later than the confirmation hearing discussed below. A temporary guardian qualifies in the same manner as a permanent guardian. *See* TEX. PROB. CODE ANN. §§ 699-701 (Vernon Supp. 1997).

F. Citation. Upon the entry of the order appointing the temporary guardian, Section 875(e) requires that the court clerk issue notice of the filing of the application for guardianship, and describing the rights of the parties, the date, time and place of the confirmation hearing, the purpose of the hearing and the possible consequences of the hearing on the application for temporary guardianship. The notice shall be personally served on the proposed ward and the proposed ward's appointed attorney.

It is also advisable to serve and notice any other persons which would be entitled to service or notice of an application for the appointment of a permanent guardian. *See* TEX. PROB. CODE ANN. § 877 (Vernon Supp. 1997) (all provisions applying to permanent guardianships apply to temporary guardianships).

HOT SPOT: The proposed ward must be served and citation returned prior to the hearing to confirm the temporary guardianship.

F. Hearing. The hearing confirming the appointment of a temporary guardian must be held within ten (10) days of the filing of the application for temporary guardianship unless the hearing date is extended pursuant to Section 875(f)(2). TEX. PROB. CODE ANN. § 875(f)(1) (Vernon Supp. 1997). The ward, or his counsel, has the right to present evidence and confront and cross-examine witnesses. Section 875(f)(2) allows for the extension of the confirmation hearing for a period not to exceed sixty (60) days upon the agreement of the parties. TEX. PROB. CODE ANN. § 875(f)(1) (Vernon Supp. 1997).

1. Ward and Ward's Counsel Attendance. The proposed ward is entitled to prior notice of the hearing, to be present and represented by counsel. Generally, the proposed ward is represented by the attorney ad litem; however, a proposed ward may also retain other counsel to represent him if he or she has sufficient capacity to do so. The duty to bring the proposed ward to the courtroom or to explain his or her non-appearance rests with the attorney ad litem.

2. Make the Relevant Inquires. At the hearing, the court shall:

! Inquire into the allegedly incapacitated adult person's ability to feed, clothe, and shelter himself or herself, to care for the individual's own physical health, and to manage the individual's property or financial affairs.

! Ascertain the age of any proposed ward who is a minor.

! Inquire into the allegations of imminent danger to the ward's person or estate.

! Inquire into the qualifications, abilities and capabilities of the person seeking to be appointed guardian.

See TEX. PROB. CODE ANN § 685 (Vernon Supp. 1997).

3. Burden of Proof. The burden of proof is on the person alleging the incapacity. *See* TEX. PROB. CODE ANN. § 684(c) (Vernon Supp. 1997).

4. Preference of Ward. Similar to a permanent guardianship, the court must make a reasonable effort to consider the incapacitated person's preference of the person to be appointed guardian and shall give due consideration to the preference.

5. Findings Required. Before appointing a temporary guardian, the court must find **substantial evidence** that (i) the proposed ward is a minor or an incapacitated person, and (ii) there is imminent danger to the ward's physical health and safety, and/or that the ward's estate will be seriously damaged or dissipated, unless immediate action is taken.

G. Order Confirming Appointment of Temporary Guardian. If the court confirms the temporary guardian's appointment, the court should enter an order confirming the appointment of the temporary guardian. The order should state the specific powers, limitations, or duties of the temporary guardian with respect to the care of the ward and/or the management of the ward's property. The court may only grant a temporary guardian those powers necessary to protect the ward against the imminent danger shown. TEX. PROB. CODE ANN. § 875(h) (Vernon Supp. 1997).

FORM: A sample Order Confirming Appointment of Temporary Guardian is included in Appendix B to this outline.

What powers does a temporary guardian have?

A temporary guardian has all of the same powers as that of a guardian of the person and estate of an incapacitated person to the extent specified in the order of appointment. TEX. PROB. CODE ANN. § 877 (Vernon Supp. 1997).

How long does a temporary guardianship last?

A temporary guardianship cannot remain in effect longer than sixty (60) days, unless it is a contested guardianship proceeding, in which case the temporary guardianship can remain in effect until the conclusion of the hearing challenging or contesting the application. If the court appoints a permanent guardian for the proposed ward, the temporary guardianship terminates on the date the permanent guardian qualifies. TEX. PROB. CODE ANN. § 875(k) (Vernon Supp. 1997).

Number range level0. CONTESTED GUARDIANSHIP

Who has standing to contest a guardianship proceeding?

A. Guardianship of an Incapacitated Person. Any person who does not have an "adverse interest" to the proposed ward has the right to appear and contest any guardianship proceeding or the appointment of a particular guardian. See TEX. PROB. CODE ANN. § 642 (Vernon Supp. 1997).

B. Guardianship of a Minor. Section 609 provides that if an interested person contests an application for the appointment of guardian of the person of a minor or seeks the removal of a guardian of the person of a minor, the judge, on the judge's own motion, may transfer all matters relating to the guardianship of the person of the minor to a court of competent jurisdiction in which a suit affecting the parent-child relationship under the Texas Family Code is pending.

The court that transfers a proceeding pursuant to Section 609 shall send to the court with jurisdiction over suits affecting the parent-child relationship the complete files of all matters affecting the guardianship of the person of the minor and certified copies of all entries in the minutes. The transferring court shall keep a copy of the transferred files. If the transferring court retains jurisdiction of the guardianship of the estate of the minor or of another minor who was the subject of the suit, the court shall send a copy of the complete files to the court to which the transfer is made and shall keep the original files. The court to which the transfer is made under this Section shall apply the procedural and substantive provisions of the Family Code, including Section 11.05 (h), in regard to enforcing an order rendered by the court from which the proceeding was transferred. Note that there is no similar provision for the contest of the guardian of an estate of a minor.

How do you challenge a contestant's standing?

The proper method of challenging a contestant's standing is by motion in limine. See TEX. PROB. CODE ANN. § 642(c) (Vernon Supp. 1997); see also *Allison v. Woodruff*, 819 S.W.2d 624 (Tex. App.--El Paso 1991, original proceeding [leave denied]). (court stated that guardianship provisions of Probate Code were intended to protect well-being of individual and persons with adverse interests were not persons interested in well-being of ward).

What procedures are commonly utilized in contested guardianship?

A. Demand for Jury Trial. The proposed ward or any party is entitled to a jury in a contested guardianship if one is requested. See TEX. PROB. CODE ANN. §§ 643, 685 (Vernon Supp. 1997).

B. Motion for Independent Medical Exam. Rule 167a of the Texas Rules of Civil Procedure permits a court to order a physical or mental examination of a person when the person's physical or mental condition is in controversy.

FORM: A sample Motion for Independent Medical Exam and related Order are included in Appendix B to this outline.

C. Order Extending Temporary Guardianship Pending Contest. Section 875(k) of the Probate Code allows a temporary guardianship to extend beyond sixty (60) days pending a contest. Also, a party or the court on its own motion may appoint a temporary guardian to serve pending the contest. The term of the temporary guardianship expires at the conclusion of the hearing challenging or contesting the application.

FORM: A sample Motion to Extend Temporary Guardianship Pending Contest Pursuant to Texas Probate Code Section 875(k), related Order Extending Temporary Guardianship Pending Contest, and Application to Appoint Temporary Guardian Pending Contest Pursuant to Texas Probate Code Section 875(k), are included in Appendix B to this outline.

D. Interrogatories, Requests for Production, and Requests for Admissions. Often discovery is an effective tool to determine another party's motivations in seeking or contesting a guardianship. It also allows you to ascertain whether such party has an adverse interest to the proposed ward which would disqualify him or her from either seeking or contesting the guardianship.

FORM: A sample First Set of Interrogatories and Request for Production and Admissions is included in Appendix B to this outline.

E. Settlement Agreement. Often times a contest can be compromised by the appointment of a third-party guardian. Additionally, this will be an excellent opportunity to cut off an anticipated will contest, which may arise after the proposed ward dies.

Number range level0. ATTORNEY AD LITEM

What is an attorney ad litem?

An attorney ad litem is an attorney appointed by a court to represent and advocate on behalf of a proposed ward, an incapacitated person, or an unborn person in a guardianship proceeding. TEX. PROB. CODE ANN. § 601(1) (Vernon Supp. 1997). In order to be eligible for appointment as an attorney ad litem, an attorney must be certified by the State Bar of Texas as having successfully completed a course of study of guardianship law and procedure sponsored by the State Bar. For certification, the State Bar currently requires the completion of a four (4) hour CLE course. This can be fulfilled by either attending an actual seminar or by video. You should check with your local bar association as to whether they offer the video. Once the certification is obtained, you should forward a copy to the local court(s) having jurisdiction over guardianship matters. Section 646(b)-(d) also requires recertification every two (2) years if the guardianship course has significantly changed since the attorney last completed the course.

Additionally, Section 81.114 of the Texas Government Code requires that the State Bar provide a course of instruction for attorneys who represent parties in guardianship cases or who serve as court-appointed guardians. This section further instructs the State Bar to adopt rules necessary to accomplish the purposes of this section. Section 22.01 of the Texas Government Code instructs the Supreme Court to provide a course for instruction related to issues arising in guardianship cases for judges involved in those cases and further describes what the instruction must include.

HOT SPOT: Legislation is currently pending which may effect the certification requirements of attorney ad litem.

How is the attorney ad litem appointed?

An attorney ad litem is appointed pursuant to Section 646. The court must appoint an attorney ad litem to represent the interest of the proposed ward in a guardianship proceeding for the appointment of a guardian for a person other than a missing person. *See* TEX. PROB. CODE ANN. § 646 (Vernon Supp. 1997).

What is role of the attorney ad litem?

A. Be an Advocate. The attorney ad litem is the proposed ward's attorney. His or her job is to advocate for the proposed ward and, thus, oppose any guardianship. It is no longer appropriate to file a report of attorney ad litem with the court. The attorney ad litem is an advocate. If the attorney ad litem files a report, this may cause him or her to become a fact witness.

Further, Section 1.02(g) of the Texas Disciplinary Rules of Professional Conduct should not be viewed as a restraint on the attorney ad litem. Section 1.02 (g) provides that:

A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.

Because the question of capacity has already been brought to the attention of the court, Section 1.02 (g) should not be perceived as an impediment or limitation on the attorney ad litem's duty to zealously advocate for his or her client.

B. Statutory Duties. Section 647 sets out an attorney ad litem's basic duties which include:

1. Meeting the Ward. It is imperative that an attorney ad litem interview the proposed ward within a reasonable time prior to the hearing. To the extent possible, the attorney ad litem should discuss with the proposed ward the law and facts of the case, the proposed ward's legal options regarding disposition of the case, and the grounds on which the guardianship is sought.

2. Request/Receive Medical History/Records. The applicant's attorney should supply the attorney ad litem with copies of all the current pleadings, filings and access to all of the proposed ward's relevant medical, psychological, and intellectual testing records. If the applicant's attorney does not provide the attorney ad litem with the relevant records, the attorney ad litem should request them. If they are not provided within a reasonable time, it is prudent for the attorney ad litem to apply to the court for an order directing the release of the records.

3. Review Application and Court File. As soon as possible, the attorney ad litem should review the court file. It is important to review the application for guardianship filed with the court and determine if the proposed ward was properly served and whether notice to third parties has been properly given.

C. Duties not Enumerated in the Statutes. In addition to the basic statutory duties, an attorney ad litem should, at minimum, accomplish the following:

1. Answer. File a general denial prior to the hearing.

FORM: A sample Original Answer of Attorney Ad Litem is included in Appendix B to this outline.

2. Contact Physician. Speak to the ward's doctor or other care provider if the proposed ward is an incapacitated person.

3. Request Medical Examination. Apply for an independent mental and/or physical exam if the attorney ad litem believes the medical information is inadequate or incorrect.

Form: A sample Application For Independent Medical Examination is included in Appendix B to this outline.

4. Meet and Confirm Age of Minor. If the proposed ward is alleged to be a minor, the attorney ad litem should confirm such fact and the need for an appointment of a guardian. The attorney ad litem should also meet the child and, if possible, examine the living conditions of the minor.

5. Arrange For Proposed Ward to Attend Hearing. Make an initial determination regarding whether the proposed ward is able to attend the hearing. If possible, the proposed ward should attend the hearing. If the proposed ward is not able to attend the hearing, be prepared, either by personal knowledge or by calling the proposed ward's physician or other appropriate witness, to testify why the proposed ward's presence in the courtroom is not in the proposed ward's best interest. There are several methods that can be utilized to prove why the proposed ward's presence at the hearing would not be in his best interest. These may include:

! Incorporating into the doctor's letter the medical reasons why the proposed ward's presence is inappropriate.

! Preparation of a written statement by the ad litem for his client to sign expressing his desire not to appear.

! Tape record the proposed ward's statement (with permission) for the court.

! Arrange for a telephonic appearance if the proposed ward is physically unable to attend.

! Testimony by the ad litem of the proposed ward's lack of desire or ability to attend.

6. Verify Applicant's Eligibility. Determine whether the person seeking to be appointed guardian is appropriate and eligible. Also check the extent and nature of the ward's estate (this will also be useful in setting the bond) and discover if the applicant owes money to or have been taking financial advantage of the proposed ward.

7. Confidentiality. Maintain client confidences.

8. Prepare for Hearing. The attorney ad litem should notify the proposed ward in advance of the hearing of the position he or she will be advocating in court. Prepare the proposed ward to testify, if necessary.

9. Communications. Avoid ex parte communications with the court.

D. Contested Guardianship. If the guardianship is headed for a contest, an attorney ad litem, exercising due diligence, should consider performing some or all of the following acts:

1. Demand Jury. Demand a jury trial in writing and pay the jury fee.

2. Communicate. Communicate with counsel and, if appropriate, with the prior permission of counsel, meet the opposing parties to gather information.

3. Pleadings. File necessary pleadings, including discovery requests.

4. Experts. Obtain opinions outside the scope of his or her expertise.

5. Interview Witnesses. Interview doctors, nurses, social workers, pastors, priests, rabbis, hairdressers, and other potential witnesses.
6. Object to Hearsay. Object to the applicant's doctor's letter as hearsay. This will force the applicant to arrange for a medical expert to attend the hearing. This allows the attorney ad litem the opportunity to cross-examine the medical expert regarding his or her examination of the proposed ward and the basis of the expert's opinions. Out of courtesy and to avoid an unnecessary hearing, the attorney ad litem should inform the other parties if he or she intends to object to the letter on the basis of hearsay.
7. Document File. Document your file so that you are ready for trial.
8. Security for Costs. Consider whether security for the attorney ad litem's costs should be posted. See TEX. PROB. CODE ANN. § 622 (Vernon Supp. 1997). If the attorney ad litem perceives that either the application or the contest is totally frivolous, he or she can file a motion for security for costs. If filed, the parties will generally consider their pleadings and decide whether the risk of having to post security is worth going forward.
9. Verify Medical Disclosure. Consider whether the medical professional who examined the proposed ward gave the proposed ward adequate disclosure prior to the medical examination. Rule 510(d) of the Texas Rules of Civil Evidence requires that health care professionals give a "miranda" type warning to the proposed ward that advises the proposed ward that anything that he may say to the health care professional "is not confidential." This disclosure is necessary even if the exam is court ordered. *Subia v. Texas Dept. of Human Services*, 750 S.W.2d 827, 830-31 (Tex. App.--El Paso 1988, no writ). Where proper disclosure has been given to the ward, the discussions will not be privileged and the health care professional may testify as to those discussions he had with the proposed ward after disclosure took place. *Dudley v. State for Dudley* 730 S.W.2d 51, 54 (Tex. App.--Houston [14th Dist.] 1987, no writ). If, however, the health professional fails to make this disclosure, the attorney ad litem can move successfully for the exclusion of all of the medical expert's testimony.

Does an attorney ad litem have a duty to represent a ward after the court has declared the ward to be incapacitated?

The appointment of the ad litem does not necessarily cease with the final judgment. The attorney ad litem may be called upon to represent his or her client on appeal and should do so when it is in the interest of the client. See *Executors of Tartt's Estate v. Harpold*, 531 S.W.2d 696, 698 (Tex. Civ. App.--Houston [14th Dist.] 1975, writ ref'd n.r.e.). Texas courts have clearly held that it is the attorney ad litem's duty to defend the rights of this involuntary client with the same vigor and astuteness he would employ in the defense of clients who had expressly employed him or her for such purpose. As such, the attorney ad litem should exhaust all remedies available to him or her, including but not limited to appealing a finding of incapacity, if appropriate.

How is an attorney ad litem paid?

An attorney ad litem's fee is generally based on the time expended in representing the proposed ward. However, it is subject to court approval. Section 665A addresses the payment of professional services and provides that:

The court shall order the payment of a fee set by the court as compensation to the attorneys, mental health professionals, and interpreters appointed under Sections 646 and 687 of this code, as applicable, to be taxed as costs in the case. If after examining the proposed ward's assets the court determines the proposed ward is unable to pay for services provided by an attorney, a mental health professional, or an interpreter appointed under Sections 646 and 687 of this code, as applicable, the county is responsible for the cost of those services.

HOT SPOT: It is very important that the attorney ad litem keep accurate records of the time he or she has expended in the case. At all times, an ad litem should be able to prove up his or her reasonable and necessary fees and expenses.

Number range level0. GUARDIAN AD LITEM

What is a guardian ad litem?

“Guardian ad litem” is the person who is appointed by a court to represent the best interests of an incapacitated person in a guardianship proceeding.

How is the guardian ad litem appointed?

The court may appoint a guardian ad litem to represent the interests of an incapacitated person in a guardianship proceeding. Any party or the attorney ad litem may seek the appointment of a guardian ad litem. The court may also appoint a guardian ad litem on its own motion. Note, this is discretionary and, in many instances, the judge may not appoint a guardian ad litem.

HOT SPOT: Section 645(e) provides that in the interest of judicial economy, the court may appoint as guardian ad litem under Section 681(4) the person who has been appointed attorney ad litem under Section 646 or the person who is serving as an ad litem for the benefit of the ward in any other proceeding. However, if an attorney is appointed as both an attorney ad litem and a guardian ad litem, he or she is faced with an inherent conflict of interest.

What is the role of the guardian ad litem?

A guardian ad litem is an officer of the court and must consider the best interest of the ward. Section 681(4) also provides for the appointment of a guardian ad litem where the court determines that the person who has applied to be appointed guardian is a party to a lawsuit concerning or affecting the welfare of the proposed ward and the appointment of a guardian ad litem to represent the interest of the proposed ward throughout the litigation of the ward's lawsuit claim is in the best interest of the proposed ward. Be aware of the recent opinion in *Roark v. Mother Francis Hosp.*, 862 S.W.2d 643 (Tex. App.--Tyler 1993, writ denied), which held as follows:

The guardian ad litem is required to participate in the case to the extent necessary to protect the ward. *Pleasant Hills Children's Home v. Nida*, 596 S.W.2d 947, 951 (Tex. Civ. App.--Fort Worth 1980, no writ); *Coastal States Gas Producing Co. v. Locker*, 436 S.W.2d 592, 596 (Tex. Civ. App.--Houston [14th Dist.] 1968, no writ). Obviously, the guardian ad litem should be allowed considerable latitude in determining what depositions, hearings, conferences, or other activities are necessary to that effort. *Phillips Petroleum*, 702 S.W.2d 672, 675 (Tex. App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.). . . . A guardian ad litem who goes beyond his role and assumes the duties of a plaintiff's attorney is not entitled to compensation for work done assisting or acting for plaintiff's counsel. *Dawson v. Garcia*, 666 S.W.2d 254, 265 (Tex. App.--Dallas 1984, no writ).

Roark, 862 S.W.2d at 647.

A good resource on the duties of an attorney ad litem or guardian ad litem in relation to personal injuries is the seminar materials presented April 15, 1994, by the Houston Bar Association Continuing Legal Education Committee entitled "Civil Court Ad Litem Institute."

What are the duties of the guardian ad litem?

The guardian ad litem shall protect the incapacitated person in a manner that will enable the court to determine what action will be in the best interests of the incapacitated person.

TEX. PROB. CODE ANN. § 645 (Vernon Supp. 1997).

How is a guardian ad litem paid?

Similar to an attorney 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. If a guardian ad litem is appointed under Section 681(4) of the Probate Code, the fees and expenses of the guardian ad litem are costs of the litigation proceeding that made the appointment necessary.

Who pays the cost incurred in a guardianship proceeding?

Section 665A gives the court authority to order the payment of a fee set by the court as compensation to the attorneys, mental health professionals, and interpreters appointed under Section 646 and 687 of the Code, to be taxed as costs in the case. If the court determines that the proposed ward is unable to pay for services provided by an attorney, a mental health professional, or an interpreter, the County is responsible for the cost of those services. This Section also applies to the guardianship of a minor.

Number range level0. EFFECT OF AN ADJUDICATION OF INCAPACITY

What powers does the ward retain?

Under Section 675, an incapacitated person for whom a guardian is appointed retains all legal and civil rights and powers except those designated by court order as legal disabilities by virtue of having been specifically granted to the guardian.

What is the effect of a guardianship on a power of attorney?

The appointment and qualification of a guardian of a ward's estate revokes a power of attorney executed by the ward. The attorney-in-fact or agent must deliver to the newly appointed guardian of the estate all the ward's assets and provide an accounting of the agent's actions. See TEX. PROB. CODE ANN. § 485 (Vernon Supp. 1997).

Does it effect the ward's right to drive?

Texas Transportation Code Section 521.201 prohibits the State Department of Highways and Public Transportation from issuing a driver's license to any person who has been adjudged mentally incapacitated and has not been restored to capacity by judicial decree. The Transportation Code also provides that a driver's license may not be issued to any person the department determines to be afflicted with a mental or physical disability or disease that prevents the person from exercising reasonable and ordinary control over a motor vehicle while operating the vehicle on a highway, except that a person may not be refused a license because of a physical defect if common experience shows that the defect does not incapacitate a person from safely operating a motor vehicle. Thus, if a ward is determined to be totally incapacitated, the ward loses his or her right to drive. However, if the ward is found partially incapacitated, the ward's right to drive is dependent on the findings of the court in its order appointing the guardian. If the order is silent on this issue, it appears that the ward retains the right to drive even though the provisions of the Texas Transportation Code and the Probate Code provisions clearly conflict.

HOT SPOT: In the event that it is determined that the ward is not capable of driving, the guardian should notify the Department of Highways and Public Transportation so that the ward's license will be revoked.

Does it effect the ward's right to vote?

Section 11.002 of the Texas Election Code defined a qualified voter as a person who has not been determined mentally "incompetent" by a final judgment of a court. The Election Code's reference to incompetent means an incapacitated person. TEX. PROB. CODE ANN. § 603(b) (Vernon Supp. 1997). Thus, if a ward is determined to be totally incapacitated, the ward loses his or her right to vote. However, if the ward is found partially incapacitated, the ward's right to vote is dependent on the findings of the court in its order appointing the guardian. If the order is silent on this issue, it appears that the ward retains the right to vote even though one could argue that the Texas Election Code and the Probate Code provisions conflict.

HOT SPOT: If it is determined that the ward is not capable of voting the guardian should notify the County Tax Assessor. Otherwise, the ward may receive a jury summons which, if not responded to, may result in a court ordering a fine or issuing a bench warrant.

What is the effect of a guardianship on the payment and receipt of social security benefits?

Unless the social security benefits are paid directly to a guardianship, the benefits are not includable in the ward's estate. However, if the social security benefits are commingled with any portion of the guardianship estate, the guardian must account to the court for the social security funds in the same

manner as the other guardianship assets. *See Tharp v. Blackwell*, 570 S.W.2d 154 (Tex. Civ. App.--Texarkana 1978, no writ).

Can a ward execute a will or other testamentary document?

An adjudication of incapacity does not automatically render a ward unable to execute a will or other testamentary document. It is, however, prima facie evidence that the ward was not competent to execute a will or similar document. Often this can be overcome with evidence that the ward has testamentary capacity. *Clement v. Rainey*, 50 S.W.2d 359 (Tex. Civ. App.--Texarkana 1932, writ ref'd). A ward's testamentary capacity can often be determined by a qualified psychiatrist or neurologist.

Can a ward be deposed?

The fact that a guardianship exists does not preclude the taking of a ward's deposition and does not automatically render a ward unable to testify or incapable of giving his deposition. *Mobil Oil Corp. v. Floyd*, 810 S.W.2d 321, 324 (Tex. App.--Beaumont 1991, no writ). However, a guardianship does create a rebuttable presumption of incapacity, so the testimony may not be admissible at trial.

Can a ward be required to stand trial in a criminal proceeding?

An adjudication of incapacity does not constitute a judicial determination or prima facie showing of a person's incapacity to stand trial in a criminal proceeding. *Koehler v. State*, 830 S.W.2d 665 (Tex. App.--San Antonio 1992, no writ).

Number range level0. POWERS AND DUTIES OF GUARDIAN

What are the powers and duties of a guardian of the person?

A. Generally. Section 767 grants the guardian of the person the care and control of the ward, subject to any limitation set by the court. Specifically, Section 767 provides that the guardian of the person has the right to have physical possession of the ward and to establish the ward's legal domicile, the duty of care, control, and protection of the ward and provide the ward with clothing, food, medical care, and shelter, and the power to consent to the medical, psychiatric, and surgical treatment other than the in-patient psychiatric commitment of the ward. *See* TEX. PROB. CODE ANN. § 767(1)-(4) (Vernon Supp. 1997).

B. Obtain Letters of Guardianship. Immediately upon qualification, a guardian of the person should obtain Letters of Guardianship from the clerk's office.

C. Understand Powers and Duties. The guardian's attorney should explain to the newly appointed guardian his or her powers and duties as soon as possible after his or her appointment. It is advisable to follow up with a letter confirming these discussions to reduce them to writing. This serves as a helpful reference tool for the guardian over the course of the administration.

FORM: A sample letter to a guardian regarding his or her duties is included in Appendix B to this outline.

D. Notify Healthcare Providers. The guardian of the person should notify a ward's physician and other health care provider of his or her appointment and provide them copies of his or her Letters of Guardianship.

E. Arrange and Consent to Medical Treatment. A guardian has the duty to arrange and the power to consent to medical, dental, ophthalmologic, psychiatric, and surgical treatment for and on behalf of the ward. A guardian does not, however, have the power to consent to the in-patient psychiatric commitment of the ward. TEX. PROB. CODE ANN. § 767(4) (Vernon Supp. 1997). To the extent possible, the guardian should consult with and discuss any preventative or other medical treatment with the ward. The guardian should attempt to take into account a ward's preferences in choosing the ward's primary physician, dentist, and ophthalmologist.

The issue of what "medical treatment" is must be deduced from case law. In *Little v. Little*, 576 S.W.2d 493 (Tex. Civ. App.--San Antonio 1979, no writ), a guardian was allowed to consent to the removal of the ward's kidney for the purpose of transplanting it into the ward's minor brother. The court's reasoning was that the ward would receive substantial psychological benefit from the donation of the organ. *Id.* at 500. However, in *Frazier v. Levi*, 440 S.W.2d 393 (Tex. Civ. App.--Houston [1st Dist] 1969, no writ), the court of appeals held that a guardian is without authority to consent to the sterilization of the ward.

F. Living Arrangements. A guardian of the person should make living arrangements for the ward if the ward is an incapacitated person. To the extent possible, the guardian should consult and discuss any living arrangements with the ward. The guardian should also discuss with the ward any proposed change in the ward's residence. Placement of a ward in a nursing home or other skilled nursing care facility should be upon the suggestion of the ward's treating physician and, if warranted, confirmed by an independent physician. The ward should be placed in a facility best suited to care for the ward based on the ward's financial situation. Once a custodial arrangement has been made, it is important that the guardian of the person continue to supervise the ward's living environment.

G. Visit Ward. A guardian of the person should stay in contact with the ward and monitor the ward's health and well-being.

H. Arrange Vocational, Educational and Recreational Activities. The guardian of the person should attempt to keep the ward as active as possible based on the ward's abilities. The guardian of the person has the power to apply, consent and enroll a ward in appropriate education, vocational and recreational activities. The guardian should seek ward's input in determining activities in which the ward has an interest.

I. Employment. The guardian of the person should assist the ward in locating appropriate employment if the ward is not currently employed.

What are the powers and duties of a guardian of the estate?

A. Generally. The guardian of the estate of a ward is entitled to possess and manage all properties belonging to the ward, to collect debts, rents or claims due to the ward, to enforce all obligations in the ward's favor and bring or defend suits by or against the ward. A guardian has the

general duty to manage the ward's estate as a prudent person would manage his or her own estate. *See* TEX. PROB. CODE ANN. § 768 (Vernon Supp. 1997).

Virtually all actions of a guardian of a ward's estate are subject to prior court approval. However, a guardian of the estate is entitled to exercise the following powers without court order:

- (1) release a lien on payment at maturity of the debt secured by the lien;
- (2) vote stocks by limited or general proxy;
- (3) pay calls and assessments;
- (4) insure the estate against liability in appropriate cases;
- (5) insure property of the estate against fire, theft, and other hazards; and
- (6) pay taxes, court costs, and bond premiums.

TEX. PROB. CODE ANN. § 774(b) (Vernon Supp. 1997).

B. Obtain Letters of Guardianship. Immediately upon qualification, a guardian of the estate should obtain Letters of Guardianship from the clerk's office.

C. Understand Powers and Duties. The guardian's attorney should explain to the newly appointed guardian of a ward's estate his or her powers and duties as soon as possible after his or her appointment. In these discussions, it is important to impress upon the new guardian two fundamental rules. First, the guardian should never expend funds without discussing it with the attorney first. The guardian should understand that failure to obtain prior court approval, except in very limited circumstances, may subject the guardian to personal liability. Second, the guardian should never sign any contract without discussing the contract first with the attorney. Similar to the expenditures of funds, such contracts can rarely be executed without prior court approval. This will also ensure that the guardian executes the contract only in his or her fiduciary capacity to avoid inadvertently subjecting him or herself to personal liability. As previously discussed, it is advisable to then follow up with a letter confirming these discussions and reducing them to writing.

FORM: A sample letter to a guardian of a person and estate regarding his or her duties is included in Appendix B to this outline.

D. Collect and Preserve Assets. The guardian of the estate should gather, collect, and preserve the assets of the estate as soon as possible. It is important to gain exclusive control of the assets to prevent theft or conversion by a third party who may have access to such assets. Prudent actions would include the following:

1. Change Locks. Consider changing the locks to a ward's home or apartment. If there is an alarm, contact the alarm company and provide them with a copy of the Letters of Guardianship and name the guardian as the emergency contact. Also, change the alarm code.

2. Change of Address. Arrangements should be made to change the ward's mailing address. Generally, this can be simply accomplished by submitting and completing a Change of Address, Form 3575, available at a local post office.

3. Contact Asset Holders. Notify all potential asset holders, such as banks, trust companies, brokerage firms, etc., of the guardian's appointment and request that they secure the accounts until the guardian can arrange to collect the assets and render them under his or her sole control. As soon as possible, the guardian should visit the respective institution(s) and arrange for the assets to be transferred to guardianship accounts.

If any third parties are in possession and control of a ward's assets, the guardian should notify such person or persons of his or her appointment and request that the assets be delivered to the guardian. If the third party does not deliver the assets within a reasonable period of time, the guardian should consider showing causing the individual to explain why the assets have not been delivered.

4. Establish Guardianship Accounts. Arrange to open an interest bearing guardianship account and consolidate the ward's assets to the extent possible. The account should be established at a federally insured institution and the funds on deposit should not exceed the maximum insured amount (generally \$100,000). The tax identification number for the account should be the ward's social security number and the account should be styled to reflect that it is a fiduciary account. For example, "John G. Smith, Guardian of the Estate of Betty F. Smith, an Incapacitated Person."

5. Collect Personal and Financial Records. As soon as possible, the guardian should gather the ward's personal and financial records. Generally, this can be accomplished with a thorough search of the ward's home. However, if some or all of ward's records are in the hands of a third party, the guardian should request that the original records be delivered to the guardian.

A guardian is not, however, entitled to possession of the will of a ward that has been placed in safekeeping with an attorney under the ward's instruction to not deliver the will to anyone until the ward's death. *Bauman v. Willis*, 721 S.W.2d 535 (Tex. App.--Corpus Christi 1986, no writ). Nor does a guardian have the authority to revoke a revocable trust created by a ward prior to his incapacity, *Weatherly v. Byrd*, 566 S.W.2d 292 (Tex. 1978) (right to revoke trust, absent agreement to the contrary, is purely personal right of settlor and does not vest in guardian).

6. Verify Property Insurance. Verify that all of the ward's personal and real property are adequately insured. If the existence of insurance cannot be readily verified, it is advisable to obtain insurance on the property in the interim and then cancel the policy if it is subsequently determined that the property was adequately insured.

HOT SPOT: A guardian can be held personally liable for any loss to the guardianship estate resulting from the guardian's failure to obtain adequate insurance if funds were available to purchase the insurance.

7. Consider Whether to Reinstate Lapsed Life Insurance. Under Article 3.44d of the Texas Insurance Code, the guardian may request reinstatement of life insurance coverage for the ward if the policy was in effect for at least five (5) years immediately preceding the lapse, there were no defaults in paying premiums before incapacity, and the subsequent unintentional default in premium payments was caused by mental incapacity of the insured. Section 3 of Art. 3.44d defines mental

incapacity as lacking the ability, based on reasonable medical judgment, to understand and appreciate the nature and consequences of a decision regarding failure to pay a premium when due and the ability to reach an informed decision in the matter. Section 5 requires the insurer to reinstate the coverage without further evidence of insurability. *See* TEX. REV. CIV. STAT. ANN. art. 3.44d (Vernon Supp. 1997).

E. Prepare Notice to Creditors.

1. General Notice. Within one (1) month of the guardian's appointment, prepare the general notice to creditors for publication in a local newspaper of general circulation requiring all persons having a claim against the estate to present the claim within the time limits prescribed. Once published, the newspaper should return to the guardian a copy of the printed notice, along with an affidavit of the publisher, sworn to and subscribed before the proper officer, evidencing that the notice was properly published. The copy of the notice and affidavit should be filed with the court.

FORM: A sample notice to the general creditors is included in Appendix B to this Outline.

2. Comptroller of Public Accounts. Within one (1) month of the guardian's appointment, notice of the guardianship and the guardian's appointment should be sent to the comptroller of public accounts if the ward remitted or should have remitted taxes administered by the comptroller.

3. Notice to Secured and Unsecured Creditors. Within four (4) months after receiving letters, the guardian of an estate shall give notice of the issuance of the letters to each person having an outstanding claim for money against the estate of a ward if the guardian has actual knowledge of the claim. TEX. PROB. CODE ANN. § 784(b) (Vernon Supp. 1997). Secured creditors may include a person or business entity having an outstanding claim secured by a deed of trust, mortgage or vendor's, mechanic's, or other contractor's lien on real property belonging to the estate. Unsecured creditors include any person or business entity having an outstanding claim for money against the ward's estate not secured by a ward's real or personal property. Typical creditors include anyone holding a mortgage on a ward's real properties, utility companies, such as water, gas, electric and/or telephone, and credit card companies.

HOT SPOT: A guardian can be held personally liable for any damages which a creditor suffers as a result of the failure to receive the required notice.

HOT SPOT: The letter giving a creditor notice should be carefully worded so as to avoid admitting that a debt exists.

FORM: A sample letter to a creditor is included in Appendix B to this Outline.

F. Prepare and File Inventory, Appraisement and List of Claims. A guardian of the estate must file an inventory of all the property of the ward that has come into the guardian's possession or knowledge within ninety (90) days after qualifying as guardian. The inventory must include: (1) all real property of the ward that is located in the state of Texas; and (2) all personal property of the ward wherever located. *See* TEX. PROB. CODE ANN. § 729(a) (Vernon Supp. 1997). The inventory should set out the guardian's appraisement of the fair market value of each item of property as of the date of the granting of the Letters of Guardianship. Additionally, the inventory should specify what

portion of the property is properly characterized as a married ward's separate and community property. *See* TEX. PROB. CODE ANN. § 729(c). (Vernon Supp. 1997).

The guardian should attach to the inventory a full and complete list of claims due or owing to the ward. It is not necessary to list debts owing by the ward. The list of claims should include:

- (1) the name of each person indebted to the ward and the address of the person, if known;
- (2) the nature of the debt, whether it is a note, bill, bond, or other written obligation, or whether it is an account or other verbal contract;
- (3) the date of the indebtedness and the date when the debt is or was due;
- (4) the amount of each claim, the rate of interest on each claim, and time for which the claim bears interest; and
- (5) what portion of the claim is held in common with others, including the names and the relationships of other part owners and the interest of the estate in the claim.

TEX. PROB. CODE ANN. § 730 (Vernon Supp. 1997).

FORM: A sample Inventory and List of Claims and related Order are included in Appendix B to this outline.

G. Apply to Retain Professionals. A guardian's employment of professionals, such as attorneys, accountants, or other professional advisors must be done with prior court approval. Therefore, file an application to retain such professionals with the court to avoid any future issue(s) regarding the guardian's authority to retain such professionals and, more importantly, pay their related fees.

FORM: A sample Application for Authority to Employ Accountant and related Order are included in Appendix B to this outline.

H. Apply to Expend Funds. Subject to a few limited exceptions, any expenditure of a ward's funds must be done with prior court approval. If the expenditure of funds is in a ward's best interest, the guardian should file an application with the court describing the purpose and amount of the requested expenditure and a related Order. The court will review the application, usually by submission, and if it determines the expenditure is proper, will authorize the guardian to expend the funds. Such expenditures and applications may include the following:

1. Sums Allowable for the Maintenance and Education of Ward.

As soon as possible after his or her appointment, the guardian of a ward's estate should prepare a budget listing the estimated costs of the ward's education and living expenses. Generally, a guardian cannot expend funds in excess of the net income of the ward's estate for the ward's education and maintenance. TEX. PROB. CODE ANN. § 776(a) (Vernon Supp. 1997). The guardian may, however, expend funds in excess of the ward's income if the court approves such excess spending.

FORM: A sample Application For Approval of Annual Budget and For Authority to Expend Funds and related Order are included in Appendix B to this outline.

2. Ratification of Previous Expenditures. In the event a guardian has in good faith expended funds from the estate of the ward for support and maintenance of the ward, and it was not convenient or possible for the guardian to first secure court approval, the court may approve the expenditures in the same manner as if the expenditures were made by the guardian out of the income from the ward's estate, if the proof is clear and convincing that the expenditures were reasonable and proper, and are expenditures that the court would have granted authority to make out of the corpus, and the ward received the benefits of the expenditures. *See* TEX. PROB. CODE ANN. § 776(b) (Vernon Supp. 1997).

HOT SPOT: An expenditure under this section may not exceed \$5,000 per ward during an annual accounting period, unless made to a nursing home.

3. Attorney's Fees and Expenses. An attorney representing a guardian may apply to the court for approval to pay the attorneys' fees and expenses from the ward's estate.

FORM: A sample Application for Authority to Pay Attorneys' Fees and Expenses and related Order are included in Appendix B to this outline.

I. Investments and Loans. The guardian of an estate is required to invest guardianship funds on hand beyond that which is necessary to educate and maintain the ward. TEX. PROB. CODE ANN. § 855 (Vernon Supp. 1997). If the guardian neglects to invest surplus money, he can be held liable for the highest interest rate which the funds would have earned. TEX. PROB. CODE ANN. § 863 (Vernon Supp. 1997). Section 855 permits the guardian to invest funds, without court approval, in the following:

- ! Bonds or other obligations of the United States.
- ! Texas tax-supported bonds.
- ! Tax-supported bonds of a incorporated city or town or a county, district, political subdivision in Texas subject to certain restrictions.
- ! Shares or share account of a building and loan association which organized under Texas law and insured by the Federal Savings and Loan Insurance Company.
- ! Shares or share account of a federal savings and loan association which is domiciled in Texas and insured by the Federal Savings and Loan Insurance Company.
- ! Collateral bonds of companies incorporated under Texas law and which have paid in capital of \$1,000,000.00 or more and which are a direct obligation of the company that issues the bonds and specifically secured by first mortgage real estate notes or other securities pledged with a trustee.
- ! Certificates of deposits that have a term of one year or less in a bank that does business in Texas and which are insured by the Federal Deposit Insurance Corporation.

Upon written application and order of the court, the guardian may invest in “property and every kind of investment that persons of ordinary prudence, discretion, and intelligence acquire or retain for their own account.” See TEX. PROB. CODE ANN. § 856 (Vernon Supp. 1997), TEX. PROP. CODE § 113.056 (Vernon 1995). The guardian may also apply to the court for authority to invest in a life insurance policy, annuity contract, or real estate. TEX. PROB. CODE ANN. §§ 857, 860 (Vernon Supp. 1997).

Surplus money may also be loaned by the guardian to a borrower without court approval if the interest rate is the highest rate obtainable and the loan is secured by a mortgage with power of sale on unencumbered real estate in Texas worth at least twice the amount of the loan. TEX. PROB. CODE ANN. § 858 (Vernon Supp. 1997). However, the guardian can be personally liable if the borrower is unable to pay, unless the guardian obtained prior court approval for the security on the loan. TEX. PROB. CODE ANN. § 859 (Vernon Supp. 1997).

J. Tax-motivated Gifts. A guardian may apply to the court for authority to make tax-motivated gifts if it can be shown that the ward will probably remain incapacitated. TEX. PROB. CODE ANN. § 865 (Vernon Supp. 1997). The gifts may only be made with court authorization to:

- ! charitable organizations in which the ward would reasonably have an interest;
- ! the ward’s heirs at law;
- ! devisees under the last valid will of the ward; and
- ! the guardian, if he or she is an heir or devisee.

An application must be filed and notice given to all interested persons. At the hearing, the court will attempt to ascertain the ward’s intentions and may appoint an attorney ad litem to represent the ward. If the ward has a will, the court will generally want to review the terms to determine if the proposed tax-motivated gifts are consistent with the ward’s current testamentary plan.

FORM: A sample Application For Authority to Make Tax-Motivated Gifts and related Order are included in Appendix B to this outline.

K. Charitable Contributions. Section 866 allows the guardian to apply for an order authorizing contributions to religious, charitable, scientific, literary or educational organizations. The application must remain on file for ten (10) days before it is considered by the court. In order to grant the application the court must find that:

- (a) the amount of the contribution will probably not exceed 20 percent (20%) of the ward’s net income for the calendar year;
- (b) the ward’s income for the year will probably exceed \$25,000;
- (c) the full amount of the contribution will probably be deductible from the ward’s gross income in determining taxable income for income tax purposes;

- (d) the condition of the estate is such to justify the contribution; and
- (e) the contribution is for a worthy cause.

TEX. PROB. CODE ANN. § 866 (Vernon Supp. 1997).

L. Hiring and Renting Property. The guardian of an estate may rent real or personal property without court approval for a term of one (1) year or less. However, an interested person may file a sworn complaint that the stated terms are not reasonable. Thus, it is often advisable to seek court approval of the arrangement to avoid subjecting the guardian to subsequent liability. TEX. PROB. CODE ANN. § 839 (Vernon Supp. 1997). If the rental period is for one year or more, the guardian must file a written application with the court. If the guardian neglects to rent property, any person may file a sworn written complaint requiring that the guardian be show cause to appear to explain why he or she did not rent the property. See TEX. PROB. CODE ANN. § 842 (Vernon Supp. 1997).

Additionally, the court may authorize the guardian to lease mineral rights. The order must be on written application with notice by publication at least ten (10) days before the hearing and proof of the publication will be required at the hearing. If the court enters an order authorizing the lease, the guardian has thirty (30) days to enter into the lease. TEX. PROB. CODE ANN. § 847 (Vernon Supp. 1997). If public notice would be disadvantageous to the estate, Section 848 permits a private lease without notice.

What is the procedure for a guardian of the estate to sell property in a ward's estate?

A. Generally. The guardian cannot sell any property of the ward without an order of court authorizing the sale. TEX. PROB. CODE ANN. § 811 (Vernon Supp. 1997). Also, the guardian of the estate may not purchase property from the estate unless he enters into a written executory contract signed by the ward prior to his becoming incapacitated or upon the court determining that such sale would be in the best interests of the estate. TEX. PROB. CODE ANN. § 831 (Vernon Supp. 1997).

B. Sales of Real Property. The sale of real property is basically a three step process.

1. Apply for Authority to Sell. The first step requires the preparation and filing of an application with the court, pursuant to Section 820, describing the real property the guardian seeks to sell and advising the court of the reason for the proposed sale and the proposed means of sale, i.e, public or private sale, cash or credit. The application for sale of real estate must contain the information required by Section 821 and be verified by an affidavit executed by the guardian. The information should contain sufficient facts to advise the court of the reason for the sale. Such reasons may include:

- ! Providing for the payment of expenses.
- ! Increasing liquidity to make up the deficiency when the income of a ward's estate, the personal property of the ward's estate, and the proceeds of previous sales, are insufficient to pay for the education and maintenance of the ward or to pay debts against the estate.
- ! Disposing of property which is deemed to be in the best interest of the ward's estate to sell.

- ! Disposing of real estate which is nonproductive or does not produce sufficient revenue to make a fair return on the value of the real estate.

See TEX. PROB. CODE ANN. § 820 (Vernon Supp. 1997).

Once the application is filed, the clerk's office will issue citation by posting, generally describing the real property sought to be sold. After the expiration of ten (10) days (and assuming no one has filed an objection to the sale) the court may consider the application and enter an order authorizing the sale. The order must include all of the following information:

- ! A description of the property being sold.
- ! The terms of the sale, i.e., private sale or public auction, etc.
- ! The necessity or advisability of the sale.
- ! That the sale may be made.
- ! Whether the guardians's bond will be sufficient or the increased bond amount.
- ! That the guardian shall file a report with the court regarding the sale.

TEX. PROB. CODE ANN. § 825 (Vernon Supp. 1997).

FORM: A sample Application for Authority to Sell Real Property Pursuant to Section 820 of the Texas Probate Code and related Order Authorizing Sale of Real Estate are included in Appendix B to this outline.

2. Locate Buyer and Negotiate Best Deal. Once the court authorizes the guardian to sell the real estate, the next step is to locate a willing buyer who is willing to purchase the real estate in compliance with the court's order. Most guardians retain a real estate broker to assist the guardian with listing and marketing the property. However, similar to any other contract, the listing agreement should be executed by the guardian only in his or her fiduciary capacity. Further, it is generally advisable to amend the standard listing agreement to provide that the payment of any broker's fees are subject to the approval of the judge.

Once a buyer is located, the guardian and buyer will typically enter into a earnest money contract similar to any other real estate sale. However, it is beneficial to make certain revisions to the standard earnest money contract to make allowances for the unique circumstances applicable to sales by guardian. The potential modifications may include:

- ! Providing that the conveyance will be made by Special Warranty Deed rather than General Warranty Deed.
- ! Providing that the sale is subject to the approval of the court and conveyance shall be made only upon the entry of a decree approving and confirming the sale.

- ! Providing that no brokerage fees will be earned until the court approves the sale and the sale actually closes and funds.
- ! Providing that time is of the essence and the contract will be null and void unless the buyer is in strict compliance with the closing requirements and date.
- ! An extension of the closing date to the extent necessary to obtain a decree approving and confirming the sale from the court.
- ! A release and discharge from the buyer to the guardianship for any environmental liability which may be discovered in the future.

3. File a Report of Sale. After the guardian and the potential buyer have reached an agreement on the terms of the sale and executed an earnest money contract, the guardian then must file with the court a report of sale. The report must contain all the following information:

- ! The date of the Order authorizing the sale.
- ! Description of the property sold.
- ! The time and place of sale.
- ! The name of the purchaser.
- ! The sales price.
- ! The terms of the sale.
- ! A statement whether the purchaser is ready to comply with the terms of the sale.
- ! A copy of the earnest money contract.

TEX. PROB. CODE ANN. § 832 (Vernon Supp. 1997).

After the report of sale has been on file five (5) days, the court may consider the report and enter the decree approving and confirming the sale. TEX. PROB. CODE ANN. § 834 (Vernon Supp. 1997).

FORM: A sample Report of Sale of Real Estate and related Decree Confirming and Approving Sale of Real Property are included in Appendix B to this outline.

C. Sales of Personal Property. There are two means of seeking court authority to sell personal property.

1. Sales of Property Liable to Perish, Waste or Deteriorate. Section 812(a) provides that the guardian of an estate, after approval of the inventory and appraisement, shall promptly apply for an order of the court to sell at public auction or privately, 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. Property exempt from forced sale, a specific legacy, or personal property necessary to carry on a farm, ranch,

factory, or any other business that it is thought best to operate, may not be included in a sale under Section 812.

FORM: A sample Application for Authority to Sell Personal Property Pursuant to Section 812, Texas Probate Code (Household Furnishings and Personal Effects) and To Conduct Garage Sale and related Order are included in Appendix B to this outline.

2. Sales of Other Personal Property. The court may order the sale of any personal property of the estate not required to be sold under Section 812 if the court finds that the sale of the property would be in the best interests of the ward or the ward's estate in order to pay expenses related to the care, maintenance, and education of the ward or the ward's dependents, expenses of administration, allowances, or claims against the ward or the ward's estate, and funeral expenses. The procedure to sell such personal property is the same as that necessary to sell real property. TEX. PROB. CODE ANN. § 813 (Vernon Supp. 1997).

What are the annual reporting requirements?

A. Guardian of the Estate. It is the duty of the guardian of the estate, upon the expiration of twelve (12) months from the date of his or her qualification, to return to the court an accounting reflecting the condition of the estate. The accounting should list the claims presented to the guardian and specifying which claims have been allowed, paid, or rejected by the guardian. The accounting should also include all the following information:

- ! All property which has come to the guardian's knowledge or into his possession which has not been previously listed.
- ! Any changes in the property of the ward.
- ! A complete account of receipts and disbursements for the period.
- ! A description of the property being administered, its condition, and the use being made of it.
- ! The cash balance on hand and name and location of the depository.
- ! A detailed description of personal property.

See TEX. PROB. CODE ANN. § 741 (Vernon Supp. 1997).

If the guardian seeks to be compensated, the annual account should include a request for compensation and a calculation of the amount requested. See discussion of guardian compensation discussed below.

FORM: A sample Annual Accounting Report and related Order and Order Approving Appointee's Compensation, are included to Appendix B of this outline.

B. Guardian of the Person. The guardian of the person should likewise file an annual report setting forth the condition of the ward including medical and social information. The sworn report should contain the following information:

- ! The guardian's current name, address, and phone number.
- ! The ward's current name, address, phone number, age and his or her date of birth.
- ! The type of home in which the ward resides.
- ! The length of time the ward had resided at his or her current residence and if there has been a change in the ward's residence in the past year, and the reason for the change.
- ! The date the guardian most recently saw the ward and the frequency in which the guardian has seen the ward in the past year.
- ! A statement indicating whether or not the guardian has possession or control of the ward's estate.
- ! A statement regarding the ward's health.
- ! A statement regarding the ward's medical care.
- ! A description of the ward's activities during the past year, including recreational, educational, social, and occupational activities.
- ! The guardian's evaluation of the ward's living arrangements.
- ! The guardian's evaluation of whether the ward is content or unhappy with his or her living arrangements.
- ! The guardian's evaluation of un-met needs of the ward.
- ! A statement of whether or not the guardian's power should be increased, decreased, or unaltered.
- ! Any additional information the guardian desires to share with the court.

See TEX. PROB. CODE ANN. § 743 (Vernon Supp. 1997).

FORM: A Questionnaire to Guardian for Annual Report on Location, Condition and Well-Being of Ward, Annual Report on Location, Condition and Well-Being of Ward, and related Order are included in Appendix B to this outline.

C. Penalty for Failure to File Accounting, Exhibit, or Report. If a guardian fails to file an accounting, exhibit, report of the guardian of the person, or other report required, any person interested in the estate may, on written complaint filed with the clerk of the court, or the court on its own motion, cause the guardian to be cited to appear and show cause why the guardian should not file the account, exhibit, or report, and, on hearing, the court may order the guardian to file the account, exhibit, or report, and, unless good cause is shown for the failure to file the account,

exhibit, or report, the court may fine the guardian an amount not to exceed \$1,000, and revoke the letters of the guardianship. TEX. PROB. CODE ANN. § 744 (Vernon Supp. 1997).

HOT SPOT: An annual accounting can be waived by the court if the income is fixed or negligible. In such case, the guardian will be permitted to receive all income and apply it to the support, maintenance, and education of the ward and account to the court for all income and corpus in the final account. TEX. PROB. CODE ANN. § 741(g) (Vernon Supp. 1997).

Is a guardian entitled to compensation?

A. Guardian of the Person. The court can authorize compensation for a guardian serving as guardian of the person. The court determines the amount of the compensation, and the amount cannot exceed five percent (5%) of the ward's gross income. When making the decision whether to authorize compensation, the court will consider the ward's monthly income and whether the ward receives medical assistance under Medicaid. TEX. PROB. CODE ANN. § 665(a) (Vernon Supp. 1997).

B. Guardian of the Estate. If the court finds that the guardian of an estate has taken care of and managed the estate in compliance with the standards set out in the Probate Code, they are entitled to a fee of five (5%) percent of the gross income of the ward's estate and five percent (5%) of all money paid out of the estate. TEX. PROB. CODE ANN. § 665(b) (Vernon Supp. 1997); *see also Henderson v. Viesca*, 922 S.W.2d 553 (Tex. App.--San Antonio 1996, writ denied). Section 665 defines "money paid out" not to include any money loaned, invested, or paid over on the settlement of the guardianship or a tax-motivated gift made by the ward. Additionally, if the five (5%) percent fee is unreasonably low, the court can authorize reasonable compensation to the guardian.

Number range level0. DEATH, RESIGNATION, REMOVAL AND RESTORATION

What happens in the event of a guardian's death?

If the guardian dies, his or her personal representative may file a final account on behalf of the deceased guardian and deliver to the person legally entitled to receive the property, all the property belonging to the guardianship. TEX. PROB. CODE ANN. § 759 (Vernon Supp. 1997). If the court finds that a necessity for the immediate appointment of a successor guardian exists, the court may appoint one without citation or notice.

How can a guardian resign?

The guardian may resign by filing a written application, accompanied by a verified final account. TEX. PROB. CODE ANN. § 760 (Vernon Supp. 1997). The court may immediately accept the resignation and appoint a successor. However, 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. *Gabriel v. Snell*, 613 S.W.2d 810 (Tex. App.--Houston [14th] 1981, no writ).

How can a guardian be removed?

A. Without Notice. Section 761(a) of the Probate Code provides that a guardian can be removed without notice, if he or she:

- ! Neglects to qualify in the manner and time required by law.
- ! Fails to file an inventory within ninety (90) days without obtaining an extension.
- ! Fails to increase his or her bond when necessary.
- ! Absents himself or herself from Texas for three (3) months or moves out of the state without court approval.
- ! Cannot be served with notices or other processes because his or her whereabouts are unknown, or because he or she is eluding service.
- ! Has misapplied, embezzled, or removed from the state, or is about to misapply, embezzle, or remove from the state, all or any part of the property committed to the guardian's care.
- ! Has cruelly treated a ward or 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.

See TEX. PROB. CODE ANN. § 761(a) (Vernon Supp. 1997).

B. With Notice. Under Section 761(c) of the Probate Code, on notice by personal service, the court on its own motion, or the motion of any interested person, may remove the guardian when:

- ! Sufficient grounds support the belief that the guardian has or is about to misapply, embezzle, or remove from the state, any part of the property committed to his or her care.
- ! The guardian fails to return any account or report that is required by law to be made.
- ! The guardian fails to obey a court order.
- ! The guardian is proved to have been guilty of gross misconduct or mismanagement in the performance of his or her duties.
- ! The guardian becomes incapacitated, or is sentenced to the penitentiary, or from any other cause becomes incapable of properly performing his or her duties.
- ! The guardian cruelly treats the ward, or 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.
- ! The guardian interferes with the ward's progress or participation in programs in the community.
- ! Fails to properly register as a private professional guardian as required by Section 697.

TEX. PROB. CODE ANN. § 761(a) (Vernon Supp. 1997).

The burden of proof is on the party challenging the guardianship. If the guardian establishes that he or she has not violated Section 761, he or she will be entitled to summary judgment. *Youngs v. Choice*, 868 S.W.2d 850 (Tex. App.--Houston [14th Dist.] 1993, writ denied).

C. Upon Application of Person with Priority to Serve. When an eligible person having a prior right to act as guardian who has not waived such right applies, the court shall remove the previous guardian and grant the applicant Letters of Guardianship. A prior right to be guardian may, however, be waived either expressly or by conduct. *Estate of Morris v. First International Bank*, 664 S.W.2d 132 (Tex. App.--San Antonio 1983, no writ).

If a guardian named in a will was not an adult at the time the will was probated, he or she may upon becoming an adult, apply to be guardian and the court shall revoke any prior Letters of Guardianship. TEX. PROB. CODE ANN. § 759(c) (Vernon Supp. 1997).

If a guardian named in a will was ill or absent from the state when the testator died, the person may accept and qualify as guardian not later than the sixtieth (60th) day after the person's return or recovery from illness. If the Letters of Guardianship have been issued to another person, the letters shall be revoked. TEX. PROB. CODE ANN. 759(d) (Vernon Supp. 1997).

Can a guardian who is removed be reappointed guardian?

A guardian who is removed under Sections 761(a)(6) or (a)(7) may file an application with the court for a hearing to determine whether the prior guardian should be reinstated, not later than the tenth (10th) day after the court signs the order of removal. TEX. PROB. CODE ANN. § 762 (Vernon Supp. 1997). If at the conclusion of a hearing the court is satisfied by a preponderance of the evidence that the applicant did not engage in the conduct that directly led to the guardian's removal, the court shall set aside an order appointing a successor representative, if any, and shall enter an order reinstating the guardian.

When is a guardianship terminated?

A. Incapacitated Person. A guardianship of an incapacitated person terminates upon the ward's death or restoration. However, the court continues to retain limited jurisdiction over the guardian and surety after a ward death. TEX. PROB. CODE ANN. § 606(e) (Vernon Supp. 1997)(court retains jurisdiction to close incapacitated person's estate and to sue surety in guardianship proceeding). Section 606(e) was recently enacted to correct the ruling in *Gutierrez v. Gutierrez*, 786 S.W.2d 112 (Tex. App.--San Antonio 1990, no writ).

B. Minor. The guardianship of a minor terminates upon the minor's eighteenth (18th) birthday.

How can a ward be restored?

A. Upon Determination of the Court that the Guardianship Should be Terminated. A court in which a guardianship proceeding is pending is required to annually review each guardianship in which the application to create the guardianship was filed after September 1, 1993, to determine

whether the guardianship should be continued, modified, or terminated. TEX. PROB. CODE ANN. § 672 (Vernon Supp. 1997).

B. Application of Ward or Any Interested Person. A ward or any person interested in the ward's welfare may petition the court, by informal letter, for an order finding that the ward (i) no longer needs a guardian and ordering the settlement and closing of the guardianship, or (ii) has regained the capacity to do some, but not all, of the tasks necessary to care for himself or herself or to manage his or her property. TEX. PROB. CODE ANN. § 694A (Vernon Supp. 1997). If the court doubts the allegations, a jury will be impaneled to try the issue. *Green v. Masters*, 79 S.W.2d 184 (Tex. Civ. App.--Dallas 1935, no writ).

FORM: A sample Application for Restoration of the Ward and Termination of Guardianship, and related Order, and Application for Partial Restoration of Ward, and related Order, are included in Appendix B to this outline.

What is the procedure to close a guardianship?

A. Generally. Section 745 provides that a guardianship of the estate shall be settled and closed upon any of the following:

- ! A minor ward dies or becomes an adult by becoming eighteen (18) years of age, or by removal of disabilities of minority either by marriage or pursuant to Texas law.
- ! An incapacitated ward dies or is restored to full legal capacity;
- ! The spouse of a married ward qualifies as survivor of the community and the ward owns no separate property.
- ! The ward's estate is exhausted.
- ! The foreseeable income accruing to the ward or his or her estate is so negligible that maintaining the guardianship in force would be burdensome.
- ! All the assets of the estate have been placed in a management trust.
- ! The court determines that a guardianship is no longer necessary.

TEX. PROB. CODE ANN. § 745 (Vernon Supp. 1997).

B. Account for Final Settlement. When a guardianship is closed, the guardian of the estate must file a final account. The final account must be sworn to by the guardian. The final account should include the information included in an annual account (for the period since the guardian's last annual account) and should also include all of the following information:

- ! The property, rents, revenues and profits received by the guardian and belonging to the ward and the disposition, if any, of such property.
- ! Any expenses and debts which remain unpaid.

- ! A list of the property which remains in the guardian's hands.
- ! Any other information which may assist the court in understanding the condition of the ward's estate.

See TEX. PROB. CODE ANN. § 749 (Vernon Supp. 1997).

To the extent necessary, the guardian should refer and incorporate prior pleadings, accountings, etc., rather than reiterate information previously filed with the court.

FORM: A sample Account for Final Settlement of the Estate of a Minor Ward and related Order, Waiver of Citation and Receipt and Release are included in Appendix B to this outline.

C. Application to Discharge Guardian. Upon the filing and approval of the guardian's account for final settlement, and the delivery of all property of the ward in the guardian's possession or control to the emancipated ward or other person entitled to the property, the guardian may apply to the court to be discharged as guardian. The guardian should also request that the surety on his or her bond be discharged. If the guardian posted a cash bond, the guardian should file an application seeking the release of the cash bond.

HOT SPOT: It is the obligation of the guardian to notify the surety of the guardian's discharge.

FORM: A sample Application to Close Estate and Discharge Guardian, and related Order, Motion to Release Cash Bond, and related Order, are included in Appendix B to this outline.

D. Procedure In Case of Neglect or Failure to File Final Account or Report. If a guardian charged with the duty of filing a final account fails or neglects to do so at the proper time, and a complaint has been filed by the emancipated ward or any person interested in the estate, the court may, upon its own motion, or shall, upon the complaint of the emancipated ward or any interested person, cause such representative to be cited to appear and present such account within the time specified in the citation. *See* TEX. PROB. CODE ANN. § 750 (Vernon Supp. 1997).

Number range level0. CONCLUSION

The foregoing discussion is intended to provide a broad overview of guardianships in Texas. The legislature has underscored the importance of this area of law by mandating special certification courses for those serving as ad litem in guardianship matters. If you are interest in serving as an ad litem or representing a guardian, it is advisable to attend one or more of these courses and keep abreast the various new court decisions which affect guardians and the attorneys who represent them. We hope the foregoing outline will be a first step toward that process.

REFERENCES

Austin, Judge Russell, *The Attorney Ad Litem in Probate Court 1 or "Why Your the Last Line of Defense,"* (copy available in Harris County Probate Court One).

Brink, Rhonda, *Planning for Adult Incapacity*, in STATE BAR OF TEXAS ADV. EST. PLAN. & PROB., (1996).

Cox, Deborah, *Planning for Disability-The Practitioner's Perspective*, in STATE BAR OF TEXAS ADV. EST. PLAN. & PROB., (1991).

Featherstone, Thomas M., *When the Debtor is Married or Deceased or the Settlor, Trustee or Beneficiary of a Trust*, in STATE BAR OF TEXAS ADV. CREDITORS' RIGHTS COURSE, (1996).

Gardner, Sharon B., *Guardianship Guidelines*, in STATE BAR OF TEXAS PRACTICE SKILLS COURSE, (1991).

Gardner, Sharon B. and Patel, Sarah, *Trying a Contested Guardianship*, in HOUSTON BAR ASSOCIATION CONTINUING LEGAL EDUCATION: GUARDIANSHIPS AND AD LITEMS IN THE PROBATE COURTS, (1993).

Goehrs, Linda and Gardner, Sharon B., *Guardianship: Update Including 1995 Legislation*, STATE BAR OF TEXAS ADV. EST. PLAN. & PROB., (1995).

Lilly, M.D., Ralph, *Determination of Incapacity*, in STATE BAR OF TEXAS ADV. EST. PLAN. & PROB., (1996).

Norris, John, *Contested Guardianship Proceedings*, in STATE BAR OF TEXAS ADV. EST. PLAN. & PROB., (1995).

Schwartzel, Boone C., *Claims Procedures in Probate and Guardianship*, in STATE BAR OF TEXAS ADV. EST. PLAN. & PROB., (1996).

Spencer, Judge Polly, *Special Problems in Guardianship: A Truncated Trilogy of Trying Trip-Ups*, in STATE BAR OF TEXAS ADV. EST. PLAN. & PROB., (1993).