COMPLEX FAMILY MATTERS IN GUARDIANSHIP

Updated by
DARLENE PAYNE SMITH
SHARON B. GARDNER

Presented by
DARLENE PAYNE SMITH

State Bar of Texas
ADVANCED GUARDIANSHIP COURSE
March 6, 2009
Houston

CHAPTER 11

Special thanks to Sarah Patel Pacheco for use of portions of her Contested Guardianship and Peace Treaties speeches.

SHARON BRAND GARDNER is a shareholder with Crain, Caton & James, P.C. in Houston, Texas. Ms. Gardner specializes in probate, trust, and guardianship law. She is Editor of the Texas Guardianship Manual published by the State Bar of Texas and a Co-Author of The Texas Probate Practice Series published by West Publishing. She is an adjunct professor teaching estate administration and guardianship at South Texas College of Law, Houston, Texas. She is a Fellow of the American College of Probate and Trust Counsel.

DARLENE PAYNE SMITH

Crain, Caton & James, P.C.
1700 Five Houston Center
Houston, Texas 77010-4035
713-752-8640
Email - dsmith@craincaton.com

CRAIN CATON & JAMES

EDUCATION

Bachelor of Science: Criminal Justice, University of Houston (Magna Cum Laude)
Doctor of Jurisprudence, University of Houston Law Center

MEMBERSHIPS & CERTIFICATIONS

Texas Bar Association;
Houston Bar Association;
Texas Bar Foundation;
Probate Legislative Sub-Committee -- Houston;
Past President –Women Attorneys in Tax and Probate;
Former Vice President – Disability and Elder Law Lawyers Association;
Planning Committee – Elder Law Section, State Bar;
Planning Committee – Wills and Probate Institute;
Elder Law Committee;
Certified by the State Bar of Texas Pursuant to Texas Probate Code § 647A as Ad Litem

PERSONAL

Married – Michael David Smith;
Three Children – Stephan, Coleman and Hallie;
Hobbies - Singing, pistol shooting, tennis and squash.

SPEAKER/AUTHOR

Speaker:	Estate Planning for the Cancer Patient.
Speaker:	Texas Young Lawyers Association, The Women's Advocacy Project and Texas Lawyers Care.
Author/Speaker:	Texas College of Probate Judges (1991-94) - Head Injury.
Speaker:	Appeals, Mandamus & Recusal, Legislative Update, Advanced Directives.
Author/Speaker:	National College of Probate Judges, March 1993, Maui, Hawaii - The Ramification of Closed Head Injury.
Speaker:	Advanced Estate Planning and Probate - 1993, State Bar of Texas.
Speaker:	American Association for the Mentally Ill - 1993.

Speaker:	Texas Association of Legal Secretaries: Mock Trial; 1994.
Co-Author/Speaker:	State Bar of Texas: New Guardianship Laws in Texas. Topic: Show Cause, Contempt, Surcharge and Successor Actions; March 1994.
Speaker:	State Bar of Texas: Elder Law Institute. Topic: An Overview of Guardianships; 1994.
Co-Author/ Speaker:	State Bar of Texas; Wills and Probate Institute. Topic: Appeals, Mandamus and Recusal; 1992.
Speaker:	University of Houston: General Practice. Topic: "Money Saving Tips for Tomorrow Morning"; 1993, 1994.
Co-Author/ Speaker:	State Bar of Texas: Advanced Estate Planning and Probate Course. Topic: Procedural and Evidentiary Overview for the Probate Litigator; 1993.
Author/ Speaker:	A.G. Edwards, Structured Settlement vs. 142 Trusts.
Co-Author Speaker:	New Guardianship Forms.
Author/ Speaker:	Texas College of Probate Judges Probate Seminar. Topic: Accounting, June 1994; Duties of the Attorney Ad Litem Under the Amendments to the Texas Probate Code Affecting Guardianships and Removal and Surcharge, April 1994.
Author/ Speaker:	Legislative Changes that Affect Probate Practitioners, Law Seminars, Inc.
Speaker:	Guardianship Administration and Alternatives - Texas Elder Law Seminar.
Speaker:	Tips from the Experts - Independent and Dependent Estates.
Speaker:	University of Houston-Downtown – Guest Lecturer - Business Law, 1992; University of Houston-Clear Lake – Guest Lecturer - Advanced Directives.
Co-Author/Speaker:	University of Houston, General Practice Institute – Winter. Topic: Alternatives to Probate; 1994.
Co-Author/Speaker:	University of Houston, General Practice Institute – Summer. Topic: Law Office Management for General Practitioners; 1994.
Co-Author/Speaker:	South Texas College of Law, Wills and Probate Institute. Topic: Structuring Family Settlement Agreements to Avoid Will contests; 1994.
Speaker:	State Bar of Texas 18th Annual Advanced Estate Planning and Probate Course. Topic: Reformation and Construction Suits; June 1994.
Author/Speaker:	State Bar of Texas. Topic: Effect of Guardianships and Criminal Proceedings on Mental Health Hearings; March 1995.

TABLE OF CONTENTS

I. INTRODUCTION

Advances in science and medical technology have altered the process of dying and prolonged the life expectancy of man. Inherently, with longer lives comes an increased incidence of chronic degenerative diseases. The fear once associated with dying has been supplanted with the fear of being kept alive in a degenerative or vegetative state. Consequently, individuals are very concerned about the possibility of their becoming incapacitated before death. Modern medical science enables individuals to live longer, but it does not guarantee them the ability to manage their lives. Advance preparation for future circumstances can circumvent the necessity for court intervention in situations where a person's decision-making ability becomes impaired. Conversely, the lack of preparation for the future is the root cause of guardianship proceedings, and many times contested guardianship proceedings.

Understanding the alternatives to a guardianship, and the complex family issues which lead to challenge of the estate plan, is essential to the proper application of guardianship law. These complex family matters affect both personal and business decisions and some of these issues require initiation of court intervention. Fortunately, if the alternatives are upheld, they end court intervention.

There are numerous statutory mechanisms that serve as alternatives to guardianships of the person and/or estate of an incapacitated person. Succinctly stated, utilizing one of these alternatives can expeditiously resolve a particular problem in a less restrictive fashion than a guardianship. Part of using alternatives involves family involvement and participation.

Conversely, if lack of preparation results in the institution of a guardianship, the economic and emotional cost can be staggering and irreparable. The Court has an obligation to protect the proposed incapacitated person. One way to protect that person is to encourage resolution and conservation of the proposed incapacitated person's assets. Sometimes, some shred of familial relationships can be maintained at the same time, and other times they are destroyed. If the guardianship process is ongoing, there are ways to resolve all issues without a trial on the merits.

II. PRE-LITIGATION ISSUES

A. Designation of Guardian Before Need Arises

The Designation of Guardian Before Need Arises is an excellent backup measure to other alternative actions that can be taken to obviate the need for a guardianship, e.g. durable power of attorney, revocable management trust. Although the declarant may have elected to use another form of advance directive and a subsequent need arises for a guardianship, the declarant will have at least answered one question: Who will be appointed the guardian of my person and/or estate?

The clear language of Section 679 can be a settling factor in a contested guardianship if a person other than the person designated files to be guardian, or the person expressly disqualified by the designation files to be guardian. The language is as follows:

> "Unless the Court finds that the person designated in the declaration to serve as guardian is disqualified or would not serve the best interest of the Ward, the Court shall appoint the person as guardian … (emphasis added).

This section indicates two things: (1) a strong preference of the proposed incapacitated person, and (2) that the Court shall be the deciding factor. As you can see, this section makes specific reference to the Court as the fact finder. The strong language of Section 679 can assist in settlement of a contested guardianship prior to trial.

1. Guardianship Utilization to Circumvent the Durable Power of Attorney

A court of competent jurisdiction may appoint a **permanent** guardian after the execution of a durable power of attorney and thereafter the powers of the attorney in fact or agent terminate upon the qualification of the permanent guardian. *Tex. Prob. Code§ 485*. Additionally, if a motion is filed in connection with a petition for appointment of a guardian or, if a temporary guardian has been appointed, a probate court shall determine whether to suspend or revoke the authority of the agent under a durable power of attorney for health care, and whether to suspend the power of attorney for finances until the expiration of the temporary guardianship. *Texas Health and Safety Code § 166.156* and *Tex. Prob. Code*

§ 485. Hence, if the declarant's family dynamics are not ideal, he may be well advised to formally designate as his guardian of the person or estate the same person or persons designated under the power of attorney, thereby allowing two methods for eliminating the need for a guardianship.

2. Utilization of the Designation to Disqualify

The designation of a guardian before a need arises may also specify who ***shall not*** be appointed guardian. One of the more useful provisions of this statute is that it permits the declarant to "blackball" a person who otherwise would be eligible to serve as guardian if the declarant is estranged from that family member. The statute's specific language is:

> "A declarant may, in the declaration, disqualify named persons from serving as guardian of the declarant's person or estate, and the persons named may not be appointed guardian under any circumstances." *Tex. Prob. Code § 679(b).*

Planners should avoid too much wording in the disqualification. A simple statement that a person is disqualified should do. A designation can be used as potential evidence of incapacity if the reason or reasons stated for disqualification has no basis in fact or lacks merit.

Ethical Quandary:

If you are an attorney ad litem in a contested guardianship, do you have a proposed Ward who you believe to have capacity, execute a designation of guardian? The answer is certainly not clear. If you desire is to avoid an expensive trial to your client, and the medical, or at least the majority of the medical supports capacity, the "shall" language in *§ 679* of the Texas Probate Code could assist in bringing the contest to a speedy resolution. Conversely, if the person is not competent, you have further entrenched the person not designated and perhaps made the contested guardianship more expensive. Having your client execute a designation is one method to attempt to settle a contested guardianship.

B. Use of Declaratory Judgments

In many litigation matters, the tendency is to plead everything. So, in whatever contest or response alleging no need for a guardianship, we may ask for a declaratory judgment that there is a least restrictive alternative under Section 602 of the Texas Probate Code. There are broader uses for declaratory actions:

1. What is a Declaratory Action?

Declaratory judgments are located in Chapter 37 of the Texas Civil Practice and Remedies Code. It states in part that

> (b) This chapter is remedial; its purpose is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered. § 37.002(b).

Further, the Chapter states:

> (b) The declaration may be either affirmative or negative in form and effect, and the declaration has the force and effect of a final judgment or decree.

Thus, a declaratory judgment can be used as a sword to declare that certain documents signed to avoid the cost of a guardianship are valid. Sometimes the suspicion of impropriety or incapacity in a drafted document is merely that.

a) Powers of Attorney

When a guardianship is threatened, it may be an alternative to seek first, or at least plead for a declaratory judgment that (1) the principal had capacity on the date signed; (2) the provisions of the power of attorney are ripe (*i.e.* two physicians have declared that the principal is incapacitated if instrument so states); or (3) if the power of attorney is already being utilized, that the agent has well and faithfully performed their duties as agent under the power of attorney.

b) Pre-Death Actions

Estate planning for larger estates can be costly. The Grantor of a trust or creator of a Family Limited Partnership may have gone to great detail and expense to protect his or her assets from contest and/or creditors. It is usually the very person who raised the concern, prompted the trust, or was

designated not to serve in any capacity that wants to invoke a guardianship to undo the estate plan. If, however, the trust, family limited partnership, or other vehicle to totally or partially avoid probate was done during incapacity, it is irrelevant who is leading the charge.

If you wish to uphold the trust or other intervivos vehicle, a declaratory judgment may be the appropriate vehicle. However, Texas does not allow pre-death declaratory judgments to declare the validity of a last will and testament. *See Cowan v. Cowan*, 254 S.W.2d 862 (Tex. Civ. App.—Amarillo 1952, no writ).

C. Money for Minors

1. Registry of the Court

If you are facing a contested guardianship over who will hold or control funds, you may consider placing the funds in the registry of the Court. *See* § 887 of the Texas Probate Code. This section sets forth the requirements for placing funds up to $100,000.00 into the registry. This sum is usually less than any trust company will accept and less than would be judicially economic to charge a trust fee to handle. Section 887(f) provides a mechanism whereby if circumstances change or a Court order is obtained, the funds, or a part of them, can be withdrawn.

2. UGMA/UTMA

Also, to avoid a fight of who controls a minor's funds, the parties can agree on the creation of an UGMA/UTMA. The provisions are governed by state statute, and not by a trust instrument. To set up such account, one needs only to agree on a custodian and transfer funds to such account.

One caveat to these funds is that they are considered to be the child's assets for financial and educational purposes. Thus, they may affect eligibility for assistance and scholarships. Some portion of the child's funds may have to be contributed toward his or her education.

III. AVOIDING GUARDIANSHIP OF THE PERSON

A. Consent for Medical Treatment - Surrogate Decision Making

Surrogate decision making is a relatively new procedure under Texas Law. This law allows certain enumerated individuals to make medical decisions for incapacitated individuals in hospitals and nursing homes without the necessity of a guardianship. *Texas Health and Safety Code, § 313.004.* The statute provides that if an adult patient in a hospital or nursing home is comatose, incapacitated, or otherwise mentally or physically incapable of communication, then an adult surrogate who has decision making capacity and is willing to consent to medical treatment on behalf of the patient may consent to medical treatment on behalf of the patient. The proposed adult surrogate decision maker must be appointed in the following order of priority:

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 before the patient became incapacitated, the patient's nearest relative, or a member of the clergy.

This process can obviously reduce the need for temporary and permanent guardianships created only for medical consent purposes.

In a contested guardianship, many times the applicant and/or attorney ad litem fail to review all available medical. Perhaps there is nothing in the medical that satisfies item (5) above, but there could be. For example, if, within the medical, prior to incapacity, the proposed Ward has filled out a form or written a note reflecting a surrogate decision maker, this identification could eliminate the need for a guardian of the person, especially if the person identified is willing and qualified to be the surrogate decision maker. It may not even be a family member, but might be a person on whom all rivaling parties

can agree. Agreeing on a surrogate decision maker is one way to resolve a trial on the contested issue of a guardian of the person.

B. Surrogate Decision - Making for Mentally Retarded Persons

This specialized surrogate decision making procedure was enacted for persons suffering mental retardation; who receive care in an intermediate care facility; and, who lack the capacity to make major medical or dental treatment decisions. An adult surrogate with decision-making capacity may consent on behalf of the client, i.e. a person suffering mental retardation. The statute provides a specific list of persons who may serve as a surrogate in these situations, all of whom must be actively involved and related to the patient. *Tex. Health & Safety Code Ann. §597.041(Vernon Supp. 2000).*

A treatment decision may be made by a surrogate consent committee established pursuant to law in the absence of an actively involved relative. *See Tex. Health & Safety Code Ann. §597.042 & 597.043 (Vernon Supp. 2000).* It is important to note that the 75th Texas Legislature, made changes to current Texas law on surrogate consent committees for treatment in ICF-MR (Intensive Care Facility - Mental Retardation) facilities. The amendments, inter alia,

1. require a nurse to be included among the health care professionals qualified to serve on the surrogate consent committee;
2. deleted the requirement that the Texas Department of Mental Health and Retardation notify pro bono attorney programs of the intent to review an application for treatment decisions;
3. require an application for treatment decision to provide a description of generally accepted alternatives to the proposed treatment; and,
4. require the committee to set a date on which the consent to continue the treatment expires.

In settling contested guardianship, be advised it is <u>rarely</u> necessary to appoint a guardian of the person <u>or</u> estate for a mentally retarded person. Any governmental benefits they receive are handled by the appointed payee. The Social Security Administration is quick to advise anyone that they do not feel bound by the state letters of guardianship and may choose the payee as they see fit. Further, surrogate decision making for a mentally retarded person, particularly by family, is widely accepted.

Another reason to avoid a guardianship for mentally retarded persons is that the annual reports and accountings are ignored more frequently in these types of guardianships than in others. The consequences of a failure to file the annual accountings are grim and can be detrimental to the continuum of care needed by the mentally retarded person. There are very few compelling reasons to seek a guardian of a mentally retarded person.

C. Implied Consent for Emergency Care

Consent to medical treatment is unnecessary under certain limited circumstances. Hospital trauma rooms would never successfully treat patients if a written consent form had to be obtained for every emergency room patient prior to treatment. The *Texas Health and Safety Code §773.008* provides that:

Consent for emergency care of an individual is not required if:

1. the individual is:
   a) unable to communicate because of an injury, accident, or illness or is unconscious; and
   b) suffering from what reasonably appears to be a life threatening injury or illness;
2. a court of record orders the treatment of an individual who is in an imminent emergency to prevent the individual's serious bodily injury or loss of life; or,
3. the individual is a minor who is suffering from what reasonably appears to be a life threatening injury or illness and whose parents, managing or possessory conservator or guardian is not present.

Texas Health & Safety Code § 773.008 (Vernon Supp. 2000).

D. Durable Power of Attorney for Health Care

The durable power of attorney is the legal empowerment of a person other than the principal to make decisions for the principal when the principal becomes incapacitated. The authority for utilization of a Durable Power of Attorney for Health Care is found in *Texas Health and Safety Code § 166.152*. The Durable Power of Attorney for Health Care Act enables a person to appoint a representative to assume responsibility for health related decisions in the event of future incapacitation. Health care decisions include consent, refusal to consent, or withdrawal of consent to health care, treatment, service or procedures to maintain, diagnose or treat an individual's physical or mental condition. *Texas Health and Safety Code § 166.152*. In a complete estate planning package, a person will execute this document in the sincere hope of avoiding a guardianship in the future.

1. Statutory Requirements

Statutory requirements must be followed in order to execute a valid Durable Power of Attorney for Health Care. Items to be included are, inter alia;

a) designation of your agent and, if desired, an alternate;
b) limitations on what your agent has authority to do;
c) the duration of the Durable Power of Attorney for Health Care; and,
d) the inclusion of a disclosure statement.

For a complete list of the requirements and contents of the disclosure statement, *see Texas Health and Safety Code § 166.163*.

The power of attorney is effective upon its execution and delivery to the agent, unless it is otherwise revoked or the principal regains the capacity to make health care decisions for himself. If the document includes an expiration date, and on that date the principal lacks the capacity to make health care decisions, the power to make health care decisions continues to be effective. *Texas Health and Safety Code § 166.152*.

2. Witnesses

The power of attorney must be signed by the principal in the presence of at least two (2) or more subscribing witnesses who, at the time of execution, are not the:

a) agent;
b) the principal's health or residential care provider or the provider's employee;
c) the principal's spouse or heir;
d) a person entitled to any part of the estate of the principal on their death, under will or deed, or by operation of law; or,
e) any other person who has any claim against the estate of the principal. *Texas Health and Safety Code § 166.154*.

3. Execution

The principal must sign the power of attorney or, if he is physically unable to sign, then another person may sign the durable power of attorney with the principal's name, in the principal's presence and, at his express direction. *Texas Health and Safety Code §166.154*.

4. Disclosure Statement

A durable power of attorney for health care is not effective unless the principal, before executing the durable power of attorney for health care, **signs** a statement that the principal has received a disclosure statement and understood its contents. *Texas Health and Safety Code § 166.162*. (emphasis added)

5. Agent's Exercise of Authority

An agent under a power of attorney for health care may make any health care decision the principal could make if competent. The agent can act upon the written

certification by the attending physician that the principal lacks capacity to make his own health care decisions. *Texas Health and Safety Code § 166.152(a)(b)*.

6. Basis for Treatment Decision

The agent may make any necessary health care decisions after consultation with the attending physician and other health care providers according to the agent's knowledge of the principal's wishes, including the principal's religious and moral beliefs; or, according to the agents assessment of the principals best interests if the agent does not know the principal's wishes. *Texas Health and Safety Code § 166.152(e)*.

7. Objection by the Principal

The agent's direction to a health care provider will not be honored, whether or not the principal has the capacity to make health care decisions, if the principal makes known his objections to the treatment, or the withholding of treatment. *Texas Health and Safety Code § 166.152(c)*.

8. Revocation

The power of attorney for health care may be revoked by oral or written notification at any time by the principal to the agent, a licensed or certified health or residential care provider, or by any other act evidencing a specific intent to revoke the power. This may be done without regard to the principal's mental state, competency, or capacity to make health care decisions. Additionally revocation occurs upon the execution of a subsequent power of attorney for health care or upon the principal's divorce from his agent/spouse. *Texas Health and Safety Code § 166.155.*

The Durable Power of Attorney for Health Care is a commonly used tool to avoid a guardianship. The prudent probate practitioner will offer to draft one for the client needing a will, or other estate planning. Additionally, federal law now requires health care providers, e.g. nursing homes, to notify all incoming patients of these instruments and allow them an opportunity to review and execute same. *Omnibus Budget Reconciliation Act of 1987.* See, *Texas Health and Safety Code§ 166.159*.

In a contested guardianship, it may be the agent or a person in conflict with the agent, seeking the guardianship. One type of contested guardianship is when the incapacitated person still has good days and is in total denial of the need for assistance. Sometimes the need to obtain a guardianship can be resolved by a third party, trusted by all, acting as a middle person, along with the cooperation of the physician and other health care providers. For example, if the proposed incapacitated person is resisting non-emergency medical care, the attorney ad litem may be able to use the pending guardianship as leverage to get his client to the doctor and obtain the doctor's assistance in obtaining needed treatment. If a safety net is put in place, the trial on the guardianship of the person can be put on hold while the family attempts to work through the healthcare issues. This is an additional resolution tool to a contested guardianship when there is not abuse or exploitation by the agent.

Another type of contested guardianship of the person is when one party is seeking to dethrone the agent. The attorney ad litem or guardian ad litem has all of the power needed to determine through medical records, doctors and care providers if the agent is acting in the best interest of the principal. The ad litem will also explore the goals of the applicant in attempting to set aside the healthcare power of attorney, *i.e.* (i) lack of capacity at execution; (ii) abuse; (iii) neglect; or (iv) living arrangements and/or care providers (just to name a few). If it is determined that the agent is acting appropriately, the lesser restrictive alternative than a guardianship should be upheld. *Tex. Prob. Code § 602.* The expense, annual report, and bonding requirements are not needed if the power of attorney is serving its purpose. Two methods of settling the contested guardianship short of trial are: (1) a motion for summary judgment as to the validity of the power of attorney and the acts of the principal; and (2) a motion for security for costs. *Tex. Prob. Code 622*. These are discussed later in this article.

E. The Texas Natural Death Act

The Texas Natural Death Act has been redesignated as Subchapter B of Chapter 166, *Texas Health and Safety Code§ 166.031 through 166.051*.

Living wills are intended to document in advance a patient's preferences concerning the administration of mechanical or artificial means of life support in the event of a terminal illness or irreversible condition. The Texas "right to die" statute is another guardianship avoidance mechanism. The statute allows a person to direct in writing that life-sustaining measures not be taken when a terminal condition exists. The Natural Death Act serves a more extensive purpose than to simply validate a living will and inform the maker of its required contents. The statute provides guidance for oral directives, executing a directive on behalf of a minor and dealing with the interests of incapacitated persons. The Act further provides guidance to health care providers regarding their duties and obligations under the statute. *Texas Health & Safety Code § 166.032*.

1. Written Directive to Physicians

The Texas form of the Directive to Physicians can be found in the Texas Health & Safety Code § 166.033. The patient may direct that, if the attending physician determines that his death is imminent or will result within a relatively short time without the application of life sustaining procedures, then in such event the patient may direct such measures be withheld or withdrawn.

2. Execution

The declarant must sign the directive in the presence of two (2) witnesses who are not:

a) related to the declarant by blood or marriage;
b) entitled to any part of the declarant's estate;
c) the attending physician or an employee of the attending physician;
d) the employee of or patient in a health care facility in which the declarant is a patient; or,
e) a person or persons who at the time of execution has a claim against the declarant. Texas Health & Safety Code § 166.032.

3. Physician's Notification

The declarant should notify the attending physician of the existence of a written directive whereupon it is to become part of his medical record. Another person may inform the physician of the existence of the directive if the declarant is comatose, incompetent or otherwise incapable of communication. *Texas Health & Safety Code § 166.032(d)*.

4. Guidance Use Upon Oral Directive

The Texas Health and Safety Code §166.034, allows a competent adult patient to issue a directive by a non-written means of communication. It must be done in the presence of the attending physician and two (2) witnesses. Thereafter, an entry must be made in the medical records of the content of the oral directive and the witnesses names must be entered in the medical record.

5. A Minor's Directive

A minor may have a directive executed on their behalf by the following persons:

a) the minor's adult spouse;
b) the minor's parents; or,
c) the legal guardian.

Undoubtedly, it is improbable that any guardian would assume the liability of executing a directive on behalf of a minor. The minor's wishes would need to be extremely clear due to the liability issue of not acting in the ward's best interest. There is also the issue of what action, if any, should health care personnel take when one parent

elects to execute a directive and the other does not. See, *Texas Health and Safety Code §166.035*.

6. Decision Making When No Directive Exists

Probate practitioners and guardians will find no guidance on the withholding or withdrawing of life sustaining procedures in the Texas Probate Code. *Texas Health and Safety Code, § 166.039,* is your guide. The family and its physician can obviate any intervention by the court if all parties in interest are in agreement, regardless of the patient's failure to execute a directive.

7. Federal Counterpart

The Federal Patient Self-Determination Act became effective in 1991 and offers additional credence to the *Texas Health and Safety Code §166.039*. The federal statute is too extensive for its comprehensive discussion herein, but its salient features require that a patient be informed in writing of its existence upon admission to a health care facility and that the patient has the right to execute an advanced directive. See *42 U.S.C. §§1396(a)(2), 1396(a)(57).*

To avoid a potential contest on the validity of a Directive to Physicians, it is advisable that the estate planner not deviate greatly from the basic format. Directives are accepted in most of the fifty states. If, however, a lot of contingencies and extra provisions are added, the directive may not be honored state to state. If there is family dissention, this throws the decision to the Courts by means of a (i) temporary guardianship; (ii) contested Do Not Resuscitate hearing; or (iii) contested permanent guardianship. The withholding of nutrition is also an area of controversy and such desires should be discussed in advance, before a directive with a provision to withhold nutrition is executed.

Also, many planners include the Directive to Physicians in the Durable Power of Attorney for Healthcare. There is not criticism of this, only a word of caution. The durable powers of attorney for healthcare are not as widely accepted state to state as the Directive to Physicians. The probability is higher that the directive, if not a part of the power of attorney, will be honored.

F. School Admission Procedures

A guardianship of the person may not be created solely for the purpose of enrollment in a school or school district other than the one in which the student is a resident. *Tex. Prob. Code § 684(b)(3)*. However, at times it is clear that the reverse of this statute is in the best interest of the child. For example, a child may need temporary residential schooling or have need for a private school to meet his or her needs. These schools are often <u>not</u> in the school district where the child resides. Hence, to ease the burden for all concerned, the Texas Legislature has authorized a school district board of trustees to adopt admission guidelines to accomplish this goal and prevent the need to create a guardianship. *Texas Education Code § 21.031 (d).*

G. Treatment of Chemically Dependent Persons - Commitment Statutes

The statutory schemes for commitment of the chemically dependent, the mentally ill, and the mentally retarded can often substitute for a guardianship in most circumstances. *See Tex. Health & Safety Code §462.001*. However, it should be noted that in most situations a guardian has no authority to place a ward into an in-patient psychiatric facility unless the ward is under the age of sixteen years. *Tex. Prob. Code§ 770*.

Even with a permanent guardianship in place, guardians of persons over the age of sixteen must go through the same involuntary commitment process that any interested person goes though to commit a person. Thus, a guardianship of the person of someone whose issues are mostly substance abuse (coupled with incapacity) are rarely successful. They can, however, be useful for placement in a safer environment or away from the living situation in place.

IV. ELDER ABUSE ISSUES

As baby boomers become older, the economy crashes, and our elders live longer than ever expected, the issues associated with their care become more complex. When care for our elders becomes more and more expensive, elder abuse, physical, financial and emotional, can be expected to increase. Elder abuse is never justified, and it arises in may areas of life.

A. Payee Abuse

Social Security is an area ripe for abuse. Even in guardianship settings, unless the Social Security funds are mixed with guardianship funds, there is no accounting to the Court. A form is sent once a year by Social Security, but it requires no backup nor does it require an itemization of expenditures. This freedom leads to the ability of individual payees of mentally and physically disabled persons to withhold and convert their funds. This is particularly true since anyone can apply to be representative payee. In fact, the Federal Government can refuse to appoint a court guardian as payee, should they so choose.

B. Facility Payee

Problems also occur when a person cannot handle their funds and lives in a facility. If there is no family, the facility can apply to become the payee. Thus, while the facility is a payee, no one is monitoring the level of care given to the incapacitated with the funds received.

C. Nursing Home Issues

1. Drug Risks

Studies have shown that there be side effects, perhaps deadly, with drugs such as Seroquel, Risperdal and Zyprexa. Still nursing homes say these drugs prevent residents from hurting each other and themselves. Many physicians and facilites say it is a double-edged sword. While it may make the patient's days better, it could ultimately kill them. In nursing homes, resources are strained, most are understaffed, and there are limited resources for handling of agitated patients. Some form of sedative is typically prescribed to curb aggressiveness and agitation.

2. Rights of the Elderly

Even with no family and an institution as payee, an elderly person retains certain rights, sometimes known as a Bill of Patient Rights. With no family, there is no one to monitor and enforce the rights enumerated in Human Res. Code § 102.003. This issue cannot be resolved without volunteers or governmental agencies monitoring these rights.

D. Runaway Court Appointees

Most court appointees have good intent and take pride in their role. For some Applicants and Contestants, the fight to be guardian now becomes the fight with the guardian. In studies on family issues with court-appointed guardians, third parties experience a tough time interacting with the family and balancing the competing sides. Some issues with court-appointed guardians include:

1. Non-responsiveness to calls;
2. No phone to call family on health issues;
3. No cooperation from facility to family because they are not in charge;
4. No removal from the facility, even for lunch and outings;
5. Allegation of family upsetting the patient to limit visits;
6. No notice of closing of accounts and relocation of assets, even if family name is on account;
7. No medical information or input, even if you were the prior care provider;
8. Not listed to notify in death or emergency.

These "problems" can all be corrected, but it takes patience from the family, who began the fight, or participated in it, and the court-appointed guardian.

V. AVOIDING GUARDIANSHIP OF THE ESTATE

A. The Durable Power of Attorney

A power of attorney establishes an agency relationship between the principal and an agent who acts on the principal's behalf. A durable power of attorney may be executed pursuant to Chapter XII of the Texas Probate Code when a client needs or wants someone to act on their behalf with respect to property and financial matters. *Tex. Prob. Code § 481.*

A non-durable power of attorney terminates on the disability or incapacity of the principal at common law. Ironically, the cessation occurs at the very time the power of attorney is most needed. The Texas Legislature in 1971 introduced the "durable" power of attorney, wherein the powers of the agent do not terminate on the principal's disability or incapacity. A power of attorney becomes "durable" by the addition of the words, "This power of attorney shall not terminate on the disability or incapacity of the principal." *Tex. Prob. Code §482(3).* The durable power of attorney, although frequently executed, has not been very effective in the past because third parties are reluctant to rely upon them. Accordingly, there have been several attempts over the years to modernize the durable power of attorney to promote its effective use. One problem has always resolved around uniformity. Another problem is obviously the power and potential for misuse. The Texas Legislature has recently made modifications which include, the strikeout form; the agent's ability to make gifts; and, third parties protection through written certification that the principal is mentally incapacitated.

1. Statutory Form

The statutory form has been widely disseminated and used without any professional advice or input. The Texas Legislature has determined that it should be made more user friendly and made several important changes.

The requirement of the principal's social security number has been eliminated. This is consistent with the attempted elimination of social security numbers in all applications for the probate of estates and in guardianship matters. Caveat: This rule does not apply when making Application to Probate Will as Muniment of Title.

Previously, the form required the maker to initial each power conferred or the all encompassing power. Experience suggested that this procedure created confusion and uncertainty in laymen and made the form susceptible to fraud. The new form, referred to as the Strikeout Form, requires the maker to strike out a power to eliminate same. *See, Tex. Prob. Code §490.*

2. Ability to Make Gifts

The power to make gifts is specifically identified and this power must be expressly initialed. The statutory gifting power is limited to the $11,000 annual exclusion. If a person wants to give a broader gifting power, it has to be specifically set out. *Tex. Prob. Code §490.*

The ability of the agent to make gifts is of particular interest. The agent does not have the ability to make a will, amend, or revoke an existing will. However, the agent is authorized to make gifts, thereby reducing the principal's estate and indirectly affecting the terms of a will. It is extremely important that the durable power of attorney expressly authorize the agent to make gifts because of their impact on the estate's value at death and possible adverse tax consequences. Conversely, gifts made pursuant to a power of attorney which does not expressly provide a gift making power can be considered revocable transfers and be included in the decedent's gross estate. *See* I.R.C. § 2038; *Estate of Casey v. Commissioner*, 91-2 U.S.T.C. 60,091(4th Cir. 1991).

Obviously, the ability to make gifts can be the catalyst for a contested guardianship. For example, if the principal's will leaves the majority of her estate to her grandchildren, the agent has no children, yet is a child of the principal, the agent may choose to gift to the agent and agent's siblings. This may or may not conflict with the principal's past

giving history. If it does, and the siblings with children are unhappy, a contested guardianship can be the result.

One possibility for settling a contested guardianship is to enter into a family settlement agreement eliminating the gifting provision of the power of attorney, or agreeing on the terms and scope of future gifting. If there is no misuse of funds, the estate is preserved by no future attorney's fees and expenses for annual accountings. Also, the family settlement agreement can include the mandatory sharing of financial information so that all the family has a comfort level. After all, the family is spending money which can be used to care for the incapacitated person, and spending their own future inheritance in many instances.

3. Springing Powers

The modified durable power of attorney includes specific instructions regarding procedures to follow for springing powers of attorney. The statute also provides that the durable power of attorney can be immediately effective or only upon disability. *Tex. Prob. Code §490(B)*.

4. Third Party Protection

Third parties are wary of springing powers, hence, most practitioners recommend powers that are immediately effective. However, if a client insists on utilizing a springing power, the practitioner must provide relevant and specific instructions for its creation.

Formerly, the statute made no provision by which third parties could determine if the principal was disabled nor did it provide physician protection for providing a required medical opinion. Regardless of these drawbacks, experience evidenced that many practitioners and clients preferred springing powers. Consequently, a third party is fully protected when presented with the agent's affidavit that the principal is incapacitated.

5. Practical Problems in the Use of Durable Powers

The durable power of attorney can be a useful, uncomplicated and inexpensive arrangement by which a third party can handle financial transactions on behalf of an incapacitated person. However, because the durable power of attorney's effectiveness often depends on another's willingness to recognize it, the funded revocable trust may be a preferred alternative. There is little obligation on any institution to honor a power of attorney.

The durable power of attorney is a recent legal hybrid. Questions still remain regarding the permissible scope of authority that can be delegated to and exercised by a power of attorney. Huff, The Power of Attorney - -Durable and Nondurable: Boon or Trap? 11 U. Miami Inst. Est. Plan. § 300 (1977).

By contrast, the law of trusts and trust administration is well established. The Texas Trust provides clear rules and grants flexible powers to deal with the principal's assets. A trustee holds legal title to the trust assets and has unquestioned authority to deal with them, unless the trust is revoked or litigation over its validity ensues.

Despite the statutory changes made in the Durable Power of Attorney form by the 75th Texas Legislature encouraging third parties to honor it, there still may be some hesitation. Consequently, consider inserting the following clause in the power of attorney:

> Authorization To Sue Third Parties Who Fail To Act Pursuant To Power Of Attorney. If any third party, including by way of description but without limitation, stock transfer agents, title insurance companies, banks, credit unions, and savings and loan associations, with whom my agent seeks to transact business refuses to recognize my agent's authority to act on my behalf pursuant to this power of attorney, I authorize my agent to sue and recover from such third party all resulting damages, costs, expenses and attorney's fees

> that are incurred because of such failure to act. The cost, expenses and attorney's fees incurred in bringing such action shall be charged against my general assets, to the extent that they are not recovered from said third party.

Since September 11, 2001, this clause may have added teeth. For example, due to the volatile stock market, brokerage institutions reviewing this clause could easily take the position the loss to the principal by doing nothing, could far exceed their exposure in honoring the power of attorney.

The following clause may also be inserted allowing the agent to create a revocable management trust. This clause assumes you have full confidence in your agent:

> Power To Create and Transfer Assets Into Trust. To convey any and all assets of my estate consisting of any property, real, personal, or mixed, of whatever kind, wheresoever located and whensoever acquired, into such trust or trusts as my agent shall deem proper, irrespective of whether said trust is now in existence or hereinafter established. My agent shall be empowered to create and transfer assets to a revocable management trust for my benefit which will revert to my estate at my death on such terms as my agent shall deem to be in my best interest.

These two (2) drafting considerations may create a more effective durable power of attorney when the statutory form is not completely appropriate.

6. Practical Considerations

a) The durable power of attorney should be re-executed/renewed every couple of years. Relationships change, people become incapacitated and, of course, people pass away. Failure to at least review a power of attorney can result in a guardianship to avoid the agent under your power of attorney. (For example, your agent is an ex-girlfriend, ex-boyfriend, or ex-business partner, at your incapacity.)

b) The principal's signature on the power of attorney should be notarized so that it may be recorded in the public record and certified copies obtained for individuals who insist on having an "original" before recognizing the agent's authority. Recordation is required for real property transactions. *Tex. Prob. Code § 489*. It is wise, however, not to record until needed for the transaction.

c) Many banks and stock brokers have power of attorney forms that they prefer to have their clients use. The appropriate forms should be obtained from these institutions so the agent can facilitate any future transactions with them. Be careful to review the sometimes overly broad indemnity provisions that purport to indemnify institutions from their own conduct.

d) The power of attorney should provide that it cannot be revoked except through a written, notarized revocation of record. This statement in the power of attorney may ease the concerns of a third party who otherwise may be reluctant to deal with the agent. This same consideration can also cause confusion if the power of attorney is not recorded, but the revocation is recorded. If this is the case, attach a copy of the revoked power of attorney to the revocation, so parties have adequate notice of what document is being revoked.

7. Dissolution of Marriage

Please note that if the principal is divorced from the agent who has been appointed, or if the marriage is annulled, the powers to the agent terminate on the date the divorce or

annulment is granted. *Tex. Prob. Code § 485A.* Common sense dictates that if you are in the process of a divorce, the revocation of any powers of attorney should be a top priority. The power of attorney is not terminated by separation or the filing for divorce.

8. Knowledge and Good-Faith Reliance

Anytime a principal revokes a power of attorney, he or she should provide the revocation to each and every third party who might have the power of attorney or who might be asked to honor the revoked power of attorney. Sections 486 and 487 of the Texas Probate Code give broad protection to persons acting in good faith under a power of attorney.

B. Contested Guardianships and the Durable Power of Attorney

1. Execution of a Durable Power of Attorney

Many contested guardianships arise over misuse or perceived misuse of powers of attorney. However, a durable power of attorney can also be used to settle contested guardianships. For example, if the medical indicates impaired judgment as to only certain things, and yet, for example, states the proposed incapacitated person can hire counsel, this indicates contractual capacity. Note that it takes a higher degree of mental capacity to execute a power of attorney than to execute a last will and testament.

If the proposed incapacitated person has a high degree of trust for someone who is not a litigant, and the trustworthiness can be verified, all parties may agree to a durable power of attorney to that person. The proposed incapacitated person should be examined by a competent physician near the date of settlement and execution and safeguards such as periodic accounting to the family should be put in place. Then, the lesser restrictive alternative does not become a larger problem than the contested guardianship.

2. Limitation of Powers of Attorney

If the contestants in a guardianship proceeding are not inextricably entrenched in winning at all costs, consider a family settlement agreement which limits the use of the power of attorney. For example, if healthcare costs and personnel are an issue, the settlement can outline a budget and persons who will not be paid for healthcare. The family settlement agreement is attached to the power of attorney, provided to all who have or will ever rely on the power of attorney, and the settlement as an attachment to the power of attorney is recorded in the deed records in all applicable counties.

Note that the use of this tool is limited. Institutions who are already suspicious of powers of attorney may refuse to rely on the power of attorney with limitations. Further, unless worded so as to not be ambiguous, third parties may become confused as to which provisions of the power of attorney remain in effect and which do not. It is only when the financial institutions express willingness to honor this method to end litigation, will it work.

C. The Revocable Transfer In Trust

The funding of a revocable trust by a competent person can offer one the most effective means of managing an estate in the event of future incapacity. The revocable trust can be used to both avoid the possibility of a guardianship and the need to probate one's estate.

A revocable trust should be fully funded to operate most efficiently. Essentially, all of the trustor's assets are transferred into the trust and the trust's terms typically direct the trustee to care for the trustor or trustee during the remainder life. Upon the last trustor's death, the remaining assets are delivered to the trustor's children and/or other beneficiaries, or pass to the trustor's estate. *See*, Chapter 112, *Tex. Prop. Code § 112.001*.

1. Inter Vivos Transfer in Trust

An inter vivos transfer in trust occurs when the trustor transfers legal title to his assets, during his lifetime, to a third party trustee. Real property must be conveyed by deed, stocks assigned, savings accounts re-titled, etc. The inter vivos transfer in trust technique requires the trustor to transfer legal title to the trustee and retain the equitable title in himself or assign the same to a third party beneficiary.

The failure to transfer legal title of all the trustor's assets to the trustee at the time of funding can result in undue complications upon the disability or death of the trustor because record title will appear in the trustor's name upon his death or disability. Hence, an apparent conflict over title will arise between the trustee and the probate or guardianship estates.

Continuous maintenance and funding are the primary drawbacks to any trust. Houses are sold, others bought, bank accounts are closed, others opened, and many times there is a failure to title the property in the trust, or convey it. If property remains outside the trust at incapacity and there is no funding vehicle, *i.e.* power of attorney, then the failure to fund becomes grounds necessitating a guardianship.

2. The Revocable Declaration of Trust

Many trustor's may experience emotional distress through the realization that they have transferred all of their assets to a third party trustee, even if it is family. The transfer often represents an admission in the trustor's mind that he can no longer manage his own affairs thereby contributing to a feeling of uselessness. Conversely, some people simply do not want to turn control of their assets over to another person. One way to solve these problems is to appoint the trustor as the initial trustee of the trust and he can continue to manage the trust assets as long as circumstances allow. Succinctly stated, the trustor creates an inter vivos declaration of trust. *Tex. Prop. Code § 112.008.* A third party trustee, e.g. friend or family member, succeeds as trustee upon resignation, incapacity or death and continues the management of the trust assets in accordance with the terms of the trust agreement.

a) Trustor as Trustee

Texas law permits the trustor to be the initial trustee so long as there is a separation of legal and equitable title. This can be accomplished by the trustor retaining an equitable life estate in his assets and giving the equitable remainder interest to the ultimate beneficiaries. The fact that the trust is revocable and that the interest of the equitable remaindermen can be terminated by the trustor does not affect the validity of the trust. See *Tex. Prop. Code § 112.033* and *Westerfeld v. Huckaby, 474 S.W. 2d 180 (Tex. 1972).* However, it should be noted that some states do not permit the trustor to be the sole trustee of his own trust. *Scott, The Law Of Trusts § 99 (4th ed. 1987).* It is advisable for the trustor to "retitle" the trust property to facilitate the successor trustee's ability to subsequently transfer the trust property to the remaindermen and/or to avoid probate.

b) Future Incapacity of Trustor

Whenever the trustor is the initial trustee or a co-trustee of the trust, it is critically important to clearly define at what point in time his role as a trustee ceases because of incapacity. Additionally, the trustor's incapacity can be the triggering event that divests the trustor of legal title and vests same in the successor trustee. However, from a practical perspective, it is important that the trust agreement define a procedure for "certifying" the trustor's incapacity so that the successor trustee knows when his role begins; and, to assure third parties that the successor trustee is the proper representative of the trust. A "certification" example may be a doctor's

letter certifying the trustor's incapacity or two doctor's certifications, depending on the trustor's comfort level.

3. Revocable Trust Implementation

The following planning factors related to the revocable trust should be taken into consideration if it is the key document to avoid using a guardianship.

a) Separation of Legal and Equitable Title

Although Texas law permits the trustor to retain extensive interests and powers in the trust estate, it is still necessary to have a separation of legal and equitable title. For example, the trustor cannot be the sole beneficiary of the trust if he is also the trustee. Consequently, if the trustor is the trustee and sole beneficiary, no trust has been created. Hence, the trust document must reflect an interest in third parties and not in the trustor's estate. *Tex. Prop. Code §§ 112.033 and 112.034.*

b) Expressly Revocable or Irrevocable

Texas follows the minority rule that trusts are deemed to be revocable unless expressly made irrevocable. Accordingly the practitioner should not rely on rules of construction but expressly state in the document that the trust is either revocable or irrevocable. *Tex. Prop. Code § 112.051.*

c) Spendthrift Provision

While a spendthrift provision is not effective to protect a retained interest of the trustor from the trustor's creditors, it should be effective to protect the trust estate from the beneficiary's creditors. Therefore, it is advisable to include a spendthrift provision. *Tex. Prop. Code § 112.035.*

d) After Acquired Property

The competent trustor should execute a durable power of attorney specifically authorizing the agent to fund the trust with after acquired property in the event the principal is unable to do so personally. This is an important step because the trustor may not have funded the trust with all his assets at its creation or he simply may acquire assets thereafter, and forget to fund them into the trust.

e) Coordination With Non-Probate Assets

Generally, every asset of the trustor's estate will not be placed in trust. Hence, care should be taken to insure that the disposition of the non-trust assets is coordinated with the trust assets. For example, the trustor can execute a "pour over" will per *§58A Tex. Prob. Code* and a beneficiary designation for life insurance and retirement benefits can be made to the trustee of the revocable trust.

f) Trustee Powers and Duties

Care should be taken in drafting the trustee's duties and powers provisions in the trust because the trustee is a fiduciary to all the trust's beneficiaries and not just the trustor. The inclusion of exoneration provisions may or may not be appropriate depending on whether the trustor desires to protect the trustee from potential liability, or whether the more important goal is to protect the trustee from potential liability. See, Chapter 113, *Tex. Prop. Code.*

g) Rules of Construction

The fact that a settlor retains the power of revocation over the inter vivos trust does not make the disposition of assets testamentary in nature. *Restatement (Second), Trusts, §57.* Texas has adopted the view that beneficiaries own a defeasible equitable interest in the trust property and not a mere expectancy. *Bogert, Law of Trust and Trustees, §104.* See Schmidt v. Schmidt, 261 S.W. 2d 892 (Tex. Civ. App. 1953, writ ref'd); Wilkerson v. Mcleary, 647 S.W. 2d 79 (Tex. App.- - Beaumont 1983); Westerfield v. Huckaby 474 S.W. 2d 191 (Tex. 1972); *Tex. Prop. Code §112.032.*

Accordingly, the rules of construction unique to wills do not apply to revocable trusts. For example, *Tex. Prob. Code § 69*, allows that a devise to a former spouse in a will executed prior to the divorce is void. However, a spouse's interest in a revocable trust is not automatically voided by divorce unless the trust instrument expressly so provides, or if the divorce decree divests the spouse of any future rights to the trust assets. *Tex. Prob. Code § 68* allows that a devise to a beneficiary who predeceases the testator passes to the deceased beneficiary's lineal descendants. This "anti-lapse" rule does not apply to revocable trusts. A deceased beneficiary's interest in the revocable trust may pass to the deceased heirs depending on the exact terms of the trust. Careful drafting is necessary to insure that the trustor's intent is evidenced in the trust instrument.

4. Irrevocable Issue

Many trusts contain language setting forth events that render the trust irrevocable. For example, the triggering event could be (1) death of one trustor; (2) death of the primary beneficiary; and/or (3) the incapacity of trustor or beneficiary. Thus, one way to avoid a guardianship could include only a careful reading of an existing trust to see if it can be rendered irrevocable.

If incapacity is a triggering device to both replace the trustee and render the trust irrevocable, then at least one issue could be resolved.

Also, if there is a distrust of the successor trustee, then all litigants could agree on a third party trustee or a corporate trustee to avoid the distrust. A motivating factor is to avoid the expense of protracted guardianship litigation, and a decrease of assets from which to inherit.

Additionally, if a trust exists, by family settlement agreement, and/or court order, any funds held outside the trust can be funded into the trust and protected. Other trusts are discussed later in this paper.

D. Management of Community Property When Spouse Is Declared Incapacitated

If one spouse is judicially declared incapacitated, the other spouse in the capacity of the competent spouse has full power to manage, control, and dispose of the entire community estate without the necessity of a guardianship. *Tex. Prob. Code § 883.* The competent spouse is allowed to exercise such management powers without any court or guardianship supervision if all of the incapacitated spouse's estate is community property. The community manager's authority is broad and extends to beneficiary re-designation under insurance plans previously purchased by the incapacitated spouse with community funds. See *Salvato v. Volunteer State Life Insurance Co.*, 424 S.W.2d 1 (Tex. Civ. App. - - Houston 1968, no writ). However, the competent spouse is subject to the laws of fiduciary responsibility to the incapacitated spouse. *See Mazique v. Mazique*, 742 S.W. 2d 805 (Tex. App. - Houston [1st Dist.] 1987).

1. Competent Spouse Must Not Be Disqualified

The competent spouse may be given the right to manage the community estate under *Tex. Prob. Code § 883* if the spouse is not otherwise disqualified to be appointed a guardian under *Tex. Prob. Code § 681*. Aside from the disqualifications stated in *§ 681*, a spouse may also be disqualified to serve because of a conflict of interest. In the case of *Dobrowolski v. Wyman*, 397 S. W. 2d 930 (Tex. App. - - San Antonio 1965, no writ), the husband was disqualified to serve as guardian of his wife's estate because of a conflict that arose when the husband took the position that some of the marital assets were his separate property.

2. Conflict Resolved Between Texas Probate Code §§ 883 & 884

A spouse under old law could be disqualified to serve as guardian and arguably disqualified to manage the community assets under *§ 883*. However, pursuant to the old *Tex. Prob. Code § 884* the competent spouse still appeared to have the right of possession to all the community assets to the exclusion of a guardian appointed for the incapacitated spouse. The Texas Legislature resolved this issue of community asset management and *§*

884 now says if qualified as a community administrator under *§ 883*, the spouse can demand the community from the guardian.

While it is true the capacitated spouse has a fiduciary duty to the other spouse, it is hard to enforce this duty when the capacitated spouse has moved outside the jurisdictional limits of the court, with all the assets. The community administration, by its nature, will always have troubling aspects.

Conversely, if the spouse is attempting to avoid a guardianship, a demand for the community may be a successful method of defeating the guardianship. This is especially true if all of the property is community, the spouse has handled the affairs of the family, and the applicant shows no disqualification of the spouse.

3. Competent Spouse Should Plan For The Future

The incapacitated spouse must be judicially determined to be totally incapacitated before *Tex. Prob. Code § 883* applies. See *Tex. Prob. Code §§ 675 & 693*. A guardian of the estate will be required if the spouse has a separate property estate, and has no estate plan in place for incapacity.

When the competent spouse is authorized to act under *Tex. Prob. Code § 883*, that spouse can exercise powers to plan for the incapacitated spouse's future protection. The competent spouse can create and fund a trust during their lifetime for their mutual benefit and the trust can provide for continued management of trust assets if the competent spouse should predecease the other.

E. Payment of Claims

Whenever a debtor wishes to pay a liquidated debt, e.g. a vendor's lien note, owing to an incapacitated person with no guardian of the estate, the debtor may pay the amount owing into the registry of the probate court and receive a receipt signed by the probate clerk. *Tex. Prob. Code§ 887*. The amount deposited cannot exceed $50,000. The incapacitated person's *unestranged* spouse or the person having actual custody of the creditor may apply to the court for withdrawal of the funds for the use and benefit of the incapacitated creditor. However, a bond is required. *Tex. Prob. Code § 887(c).* This provision is generally used for the receipt of insurance proceeds or when an administration with minor heirs is ready to be closed and the parties in interest want to avoid a guardianship.

F. Minor's Property Sold Without Guardianship

Parents and managing conservators of minors may apply to the court to sell the minor's real or personal property without the necessity of a guardianship when the value of the minor's interest in the property does not exceed $100,000.00. *Tex. Prob. Code § 889(a).* Proceeds from the sale shall be deposited into the registry of the court and may be withdrawn in accordance with *Tex. Prob. Code § 887(c)*. Thus, the minor is not without access to the funds for uses not in conflict with the parents' duty of support.

G. Ward's Property Sold Without Guardianship of the Estate

This procedure applies when a ward has a guardian of the person but not of the estate. Succinctly stated, the applicant may apply to the court to sell the ward's real or personal property without the necessity of a guardianship of the estate when the value of the property to be sold does not exceed $100,000.00. *Tex. Prob. Code § 890.* Any proceeds shall be placed in the court's registry and may be subsequently withdrawn pursuant to *Tex. Prob. Code § 887*.

H. Receivership

The probate court can enter an order, with or without an application, appointing a suitable person as a receiver to take charge of the estate when the estate of an incapacitated person appears in danger and there is no guardian and one is not necessary to protect the estate. The court shall require the receiver to give bond and shall enter such specific orders as it deems necessary for the protection, conservation and

preservation of the estate. The Court on application may direct the distribution of income or corpus to provide for the education, clothing or subsistence of the incapacitated person during the receivership. *Tex. Prob. Code §885*.

I. Appearance By Next Friend

A person, as next friend, may institute a lawsuit on behalf of an incapacitated person who has no legal guardian. *Tex. R. Civ. P. 44.* The next friend, with court approval and the posting of a bond, may take possession of any funds or personal property recovered. *Tex. Prop. Code §142.002*. The Clerk of the Court or next friend may invest such funds in an interest bearing account; and, the next friend may safe-keep the funds with a bank in order to lower the bond amount. The next friend may also petition the court for the creation of a trust for the benefit of a minor. *Tex. Prop. Code §142.005.* However, a *§142* Trust cannot be created when there is a guardianship over a minor or incapacitated person. See *Rodriguez v. Gonzalez*, 830 S.W. 2d 799 (Tex. App. – Corpus Christi 1992, no writ). A court may not restrict the terms of a §142 Trust beyond the restrictions contained within the statutory provisions. See *Aguilar v. Garcia*, 880 S.W.2d 279 (Tex. App. – Houston [14th Dist.] 1994) wherein the court determined that the trial court abused its discretion in limiting the types of expenditures to be made out of a § 142 Trust.

A common contested guardianship occurs over the control of the personal injury case. If the case is filed by the next friend and an applicant is successful in gaining guardianship of the estate, the struggle is between the next friend and guardian. It is likely that the guardian will prevail since Rule 44 of the Texas Rules of Civil Procedure only allows a next friend to act when the incapacitated person has no guardian. To ensure that the personal injury case is secure, an attorney should possibly seek a guardianship if no estate planning vehicles are in place. If the Court approves your contract and authorizes the guardian to proceed, your lawsuit is more secure. *See Tex. Prob. Code §§ 772 through 774.*

J. Changed Circumstances

Changed circumstances may require that a guardianship is no longer necessary. The two most common situations occur when:

1. the estate under guardianship is less than $50,000 and maintaining the guardianship would be burdensome, hence, the proceeds may be placed in the court's registry. *Tex. Prob. Code §745(a)(5);* and,
2. the estate of a minor ward consists only of cash or cash equivalents in an amount of $25,000 or less. The guardianship of the estate may be terminated and the assets paid to the county clerk and the clerk shall manage the funds as provided by Section 887 of the Probate Code. *Tex. Prob. Code §§745(a)(7) and 745(c).*

Another, less common situation, is the restoration of the incapacitated person. See sections 694A through 694K of the Texas Probate Code. The restoration sections have been completely rewritten by the legislature and now give more access to the court to the incapacitated person. In an attempt to settle a contested restoration proceeding, a critical factor will be the medical. When restoration is sought, either party should immediately seek an independent mental examination so that the capacity can be assessed.

K. Section 867 Management Trust

There is the creation of a § 867 Management Trust. A management trust may be established upon the guardian's application to the court or, if the guardianship is not created, the ad litem's application. The court may enter an order creating a trust to manage funds for the ward's benefit. The court must find that the creation of the trust is in the ward's best interest and the order shall direct the guardian to deliver all or part of the assets to a trust company or, a state or national bank that has trust powers in this state. Furthermore, the order shall include relevant terms, conditions, and limitations on the trust. *Tex. Prob. Code §867.*

A guardian ad litem may also make application and an individual may act as trustee when no corporate fiduciary is willing to serve; the trust is $50,000 or less; and, the court finds it is in the ward's best interest.

These court-created trusts can be an appropriate tool to avoid some of the constraints and problems inherent to guardianships. The most compelling reason for a management trust is the broad investment opportunities that trustees have under the Texas Trust Code. Additionally, professional management by a corporate trustee will often inure to the benefit of a ward's estate because of the fiduciary's expertise in investment planning.

In contested guardianships, many are driven by the desire to control the funds of the incapacitated person. A § 867 trust can be used to take the funds out of the contest as an issue. The Court will favor corporate control and protection. Once all parties are convinced that no one individual will be controlling the funds, the contest may settle. The contesting parties may settle on a guardian of the person if each party is assured the corporate trustee will not be personally benefiting the guardian.

VI. ATTORNEY CONFLICTS IN SMALL COMMUNITIES

A. Introduction

Even if you practice in a large city, chances are the attorneys who practice strictly in the area of guardianship and elder law are a small unit. Even smaller is usually the certified list of attorneys to accept court appointments and serve in various capacities. See Section 647A of the Texas Probate Code.

B. If you narrow the scope to a small community, you typically have even less of a field of attorneys in the guardianship/elder law field. Additionally, in some smaller jurisdictions, the courts do not have the manpower to monitor compliance with the mandated certification. Thus, ad litems serve having not been certified. This may lead to service issues, failure to comply with legal duties, and violation of the proposed incapacitated's constitutional rights. These violations need not be malicious or intentional.

C. Another conflict arises in small communities. This is the conflict when the community is small and the lawyer is viewed as the "family" lawyer. Thus, one lawyer may have created mother and father's business and estate plan, handled the children's bankruptcy, divorce or incorporation, and may continue to advise peripheral family members and referrals of the original mother and father contact.

The multiple roles of one small community attorney can include:

1. Mother;
2. Father;
3. Corporation of Parents and Children;
4. Business partner of mother;
5. Estate plan for child and wife;
6. Pre-nuptial for another child;
7. Divorce of child.

And, the list can go on. The problem occurs when, for example, the business partner seeks advice to get out of the partnership because of fear of father's capacity loss, or child seeks advice to have father declared incapacitated. Now, the attorney faces the attorney/client privilege with all of the players. He or she now finds himself in an irreconcilable and probably unwaivable conflict. This is why an engagement letter and the scope of representation defined becomes so important. It also becomes critical to know when to withdraw and/or seek court intervention to protect various clients.

VII. WAYS TO REDUCE LIABILITY DURING THE ENGAGEMENT

A. Be Clear Who The Attorney Represents

The existence of an attorney-client relationship may be either express or implied from the parties' conduct. *See Perez*, 822 S.W.2d at 265. Once established, the attorney-client relationship gives rise to corresponding duties on the attorney's part. For example, an attorney representing a guardian should be careful to never create the impression that he or he represents a spouse, creditor or other third party.

These impressions can be formed via meetings, letters and other communications with third parties. Ways to reduce such potential claims include the following:

- Any meetings should be preceded with a statement that the attorney only represents _____ (spell it out);
- A written notice of non-representation can be give to any person in the initial letter or contact;
- A written acknowledgement of no representation may be requested before any meetings with the third parties;
- The attorney should not answer any questions regarding any third parties rights;
- Documents to be signed by the third party should not be prepared by the attorney, if possible; and
- Documents to be signed by the third party and prepared by someone other than his or her attorney should confirm that the drafter does not represent such person and that the signor has been advised to seek independent counsel before signing.

While the preceding list is not exclusive or even mandatory, these reflect efforts to reduce claims made in actual proceeding over the past few years.

B. Be Clear and Careful in All Written Communications with Clients

Decisions related to guardianship issues are often not black and white. Rather, the advice provided often depends on financial and personal factors that differ from case to case. For example, a client with a substantial estate may elect to have a simple non-taxed-planned will when most would opt for tax planning. Likewise, in litigation, one client's litigation tolerance may be substantially different than another's tolerance.

1. Use Correspondence to Confirm and Clarify

As the objectives of clients may differ in hindsight, it is often advisable to confirm in writing ones advice on significant issues. For example, in the guardianship area the correspondence forwarding drafts and final documents provides an opportunity to confirm the client's objectives, including any decision not to take advantage of certain statements or to use them. In a litigation matter, a letter forwarding a draft of a settlement agreement may discuss the client's decisions to settle and potential recovery if the client elected not to settle and the case proceeds to trial.

2. Practice Safe Emailing

Finally, care should be taken in email correspondence with anyone. This form of communication is rapidly becoming the norm with many attorneys. For many clients, it has become desirable as it invites a quick response and they believe is less costly than calling the attorney. While a short response to some inquires is appropriate, many times the inquiry does not include all the relevant information and the response does not include the detailed analysis that the attorney would include a more formal communication. Also, continued email communications have a tendency to inhibit the formation of a strong attorney-client relationship. Be especially cautious in receiving and responding to family members in a guardianship matter. Attorneys can subject themselves to difficulty in responding to threats, inquiries or criticism from non-clients.

C. Be Careful in All Written Communications with Family and Third Parties

It is common when representing a fiduciary to communicate with family and/or creditors. As discussed previously, these contacts may create a claim that the family, creditor, etc., believed that the attorney represented them. Thus, it is suggested that any written communication with any potential non-client reiterate (i) who the attorney represents, and (ii) that the attorney does not represent the recipient.

Furthermore, it is advisable for an attorney to avoid preparing legal documents, such as waivers, disclaimers, etc., for non-clients. But, given the realities of the guardianship area, it is sometimes necessary for the fiduciary's attorney to prepare such documents to expedite his or her appointment or the settlement of the guardianship. If the attorney is providing the non-client a document for execution, the correspondence should clearly suggest that the recipient have the document reviewed by his or her own counsel.

Likewise, it is advisable to include in the document an acknowledgement of non-representation. It is notable the lending industry has been requiring these statements and acknowledgements in real estate closings for number of years. For example, a Section 145 designation may include the following provisions:

> I further acknowledge that X Firm has prepared this Designation on behalf of its client, Mr. Y, as the proposed Guardian of the Person and Estate of _____, and does not represent me in this matter. I further acknowledge that I am aware that I may retain my own counsel to advise me regarding this Designation and/or the Guardianship.

D. Advise Client of Client's Fiduciary Duties and Potential Liability

The attorney for a proposed guardian should explain to the potential fiduciary his or her powers, duties and potential liability prior to his or her appointment, if possible. In these discussions, it is important to impress upon the potential or new appointee the possibility of being sued as a result of their fiduciary appointment. It is advisable to then follow-up with a letter confirming these discussions and reducing them to writing.

E. Avoid Making Alleged Representations and Use Disclaimers of Reliance When Appropriate

It is common for other parties to request that a fiduciary make express representations to verify certain facts or conditions. Representations may be used to confirm assets, liabilities, past events or other matters that an interested party deems relevant to a guardianship such as health matters or budgets. While such information is needed or even mandatory to meet certain fiduciary duties, the attorney for the fiduciary should avoid being the one making such representations. When he or he makes such representations and it turns out to be incorrect, the attorney may face claims of negligent misrepresentation.

Furthermore, in any written documents that may be prepared by the attorney for the fiduciary and signed by a third party, it is suggested to include a statement that the attorney and/or his law firm does not represent the other parties. For example, a settlement agreement may include the following provision:

> Each Party confirms and agrees _____, and the law firm of _____, solely represent A and B and do not and has never represented any other Party and have not provided any other Party legal advice or services, information or made any representation to any other Party.

The Texas Supreme Court has sanctioned the use of such disclaimers of reliance to reduce potential claims based on reliance or negligent misrepresentation. *See Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997); *Atlantic Lloyds Insurance Company v. Butler*, 137 S.W.3d 199 (Tex. App.—Houston [1st Dist.] 2004, pet. filed July 6, 2004)(disclaimer of reliance in settlement agreement conclusively negated other parties alleged reliance on any representations or lack of disclosure by other parties). A disclaimer of reliance may provide as follows:

> Each party confirms and agrees that such party (i) has relied on his or her own judgment and has not been induced to sign or execute this Agreement by promises, agreements or representations not expressly stated herein, (ii) has freely and willingly executed this Agreement and hereby expressly disclaims reliance on any fact, promise, undertaking or representation made by the other party, save and except for the express agreements and representations contained in this Agreement, (iii) waives any right to additional information regarding the matters governed and effected by this Agreement, (iv) was not in a significantly disparate bargaining position with the other party, and (v) has been represented by legal counsel in this matter [*or has voluntarily and of his or her own judgment waived his or her right to seek counsel*].

F. Theft by a Client

Attorneys representing guardians generally advise their clients of their fiduciary duties at the time of their appointment and assist those clients in complying with the provisions of the Texas Probate Code during the period of their administration. But, the realities of practicing law teach us that not all clients are perfect and not all clients follow their attorney's advice. When those clients are acting as a fiduciary, the client's actions may become a reflection on his or her attorney. Furthermore, the client may have unknowingly used the attorney's services to further the client's fraudulent conduct.

For example, a person may engage an attorney to obtain his or her appointment as a guardian and then use those guardianship assets for his or her personal benefit. Upon discovering the nefarious conduct, which can be characterized as financial exploitation and abuse, the attorney representing the guardian must decide whether he or he can continue to represent the person and, regardless, whether they can do anything ethically to rectify or mitigate the damage cause by the acts.

In deciding on a course of action, it is important to recognize that there is no clear authority that requires the disclose information gained from attorney-client communications regarding theft of fiduciary property, or fraud on the fiduciary estate. Rule 1.05 provides as follows:

> (c) A lawyer may reveal confidential information:
>
> . . .
>
> (7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.
>
> (8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

See TEX. R. DISCIPLINARY P. 1.05, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon Supp. 2008) (emphasis added).

The comments to Rule 1.05 also indicate, however, that full protection of client information is not justified when a client plans to or engages in criminal or fraudulent conduct or where the culpability of the attorney's conduct is involved. The comments elaborate on several situations where an attorney may disclose client communications. First, the attorney may reveal information relating to the representation in order to avoid assisting a client's criminal or fraudulent conduct, and Rule 1.05(c)(4) permits doing so. Second, an attorney has a duty to not use false or fabricated evidence, and Rule 1.05(c)(4) permits revealing information necessary to comply with this rule. Third, the attorney may have been unknowingly involved in past conduct by the client that was criminal or fraudulent. In this circumstance, the attorney's services were made an instrument of the client's crime or fraud and, therefore, the comments state that the "lawyer has a legitimate interest both in rectifying the consequences of such conduct and in avoiding charges that the lawyer's participation was culpable." *Id.* cmt 12.

Rule 1.05(c)(6) and (8) give the attorney the discretion to reveal both unprivileged and privileged information in order to serve those interests. Finally, when an attorney learns that a client intends prospective conduct that is criminal or fraudulent, his or her knowledge of the client's purpose may enable the attorney to prevent commission of the prospective crime or fraud. The comments state that "[w]hen the threatened injury is grave, the attorney's interest in preventing the harm may be more compelling than the interest in preserving confidentiality of information." *Id*. at cmt 13. Rule 1.05(c)(7) grants the attorney the professional discretion, "based on reasonable appearances, to reveal both privileged and unprivileged information in order to prevent the client's commission of any criminal or fraudulent act." *Id.* Finally, comment 13 to Rule 1.05 provides that:

> The lawyer's exercise of discretion under paragraphs (c) and (d) involves consideration of such factors as the magnitude, proximity, and likelihood of the

> contemplated wrong, the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the client's conduct in question. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer believes necessary to the purpose. Although preventive action is permitted by paragraphs (c) and (d), failure to take preventive action does not violate those paragraphs. But see paragraphs (e) and (f). Because these rules do not define standards of civil liability of lawyers for professional conduct, paragraphs (c) and (d) do not create a duty on the lawyer to make any disclosure and no civil liability is intended to arise from the failure to make such disclosure.

See TEX. R. DISCIPLINARY P. 1.05, comment 14, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon Supp. 2008).

At a minimum, the attorney should consider resigning as attorney of record. This often signals the court and the other parties that a problem exists that requires closer scrutiny. This also allows the attorney to comply with comment 21 to Rule 1.05 which provides that "[i]f the attorney's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the attorney must withdraw, as stated in Rule 1.15(a)(1)." *Id.* at cmt 21.

G. Consider the Possible Rights of Successor Guardian

Attorneys representing a fiduciary should be aware that an issue exists regarding the right and privity of a successor fiduciary to the agents of the prior fiduciary. When a fiduciary has been removed or died, a successor fiduciary is generally imposed with a duty to redress his or her predecessor's actions. When counsel represents a fiduciary, the question then becomes whether the successor is entitled to the predecessor's legal files. While the Texas Supreme Court decision of *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996), seems to imply that the attorney only represented that fiduciary/client, no Texas court has clearly addressed this issue in the context of an estate, or guardianship and at least one trial court has ordered the turn over of the prior attorney's files.

Until this issue is decided, an attorney for a former fiduciary should request the consent of the client or the client's representative's before releasing his or her files to a successor fiduciary. If consent cannot be obtained, the attorney should require a court order compelling the turn over.

VIII. MULTI-STATE OR MULTI-COUNTY JURISDICTIONS

A. Introduction

The venue statutes in Texas and certain other states allow venue over a guardianship in the county in which the proposed ward is found. *See* Texas Probate Code Section ____. Other states have similar statutes. So, for the institution of a guardianship of the person, there is no timeframe that the person must be present. The guardianship of the estate poses a different set of questions and conflicts.

For adult issues, you have persons migrating from state to state, long distance care arrangements, wandering, elder kidnapping, voluntary vacating personal care and nursing homes, real property residences in several jurisdictions and demands placed upon the elderly by children and others. According to the Alzheimer's Association, there are 55 different adult guardianship systems, and the only data on existing guardianships is from 1987, and indicates over 400,000 guardianships at that time in existence.

B. Scenario on Problems

Take a situation where mother's homestead is real property located in Texas. In order to get care for her failing health, she travels to Oklahoma to stay with her daughter and transfers her financial assets to Oklahoma. The daughter takes advantage of mother in Oklahoma and son moves mother to New York to rescue her. He institutes a guardianship in New York. The daughter files in Oklahoma as to the estate

stating all assets are there. A concerned sister files a guardianship in Texas stating that her sister lives there and had no intent or capacity to change her domicile. Thus, the multi-jurisdictional fight is on.

This is only one multi-jurisdictional scenario. Other scenarios include:

1. Moving a ward out of the guardianship origin state and needing to transfer the guardianship to the new state with no legal mechanism in place.
2. Husband cares for mentally incapacitated spouse and husband passes away. Son moves mother to his home state, which finds she does not meet the jurisdictional requirements for a guardianship where the son lives.
3. A man is traveling to see his cousin. While in cousin's state, he has a stroke which renders him mentally incapacitated. His cousin does not step in to seek guardianship. The social worker at the hospital attempts to institute a guardianship, but the court says no residency. She then contacts a social service in the man's home state, who attempts the guardianship in his home state. That state, unfortunately says the man has no mental capacity to possess an intent to return home.

What can we do to help judges, lawyers, family and guardians deal with these problematic issues?

C. UAGPPJA

In 2007, the Uniform Law Commission instituted the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act to seek to clarify jurisdiction and provide a procedure for the involvement of more than one state, and to enhance communication between states. The UAGPPJA was drafted to address three issues:

- determining which states has jurisdiction to appoint a guardian;
- transferring an existing guardianship from one state to another; and
- giving full faith and credit to a guardianship order from another state.

D. Possible Ancillary Advantages of UAGPPJA

No law or interstate agreement is without problems. However, the Uniform Act has the possibility of reducing elder abuse. Some of the possible ways the Act can help are:

- It reduces "throwing grandma in a station wagon," *i.e.*, establishing a guardianship under the guise of a visit.
- A court can deny jurisdiction and award damages for unjustifiable conduct.
- Allows for considering elder abuse issues in forum determination.
- Allows a determining by the court of its ability to monitor the guardianship if granted.
- The Act allows free and open communication between Courts to discuss abusive conduct and qualification.
- Allows notice to be broadened to notice in what might be perceived as person's home state.
- Courts can learn about criminal activity in other states.
- There are interstate transfer procedures in place to expedite transfer from an abusive situation.
- The Act allows for registration of a guardianship from one state and allow valid actions of the guardian in another state.

It is important to note that this Act has a lot of support. It is being backed by organizations such as the National Guardianship Foundation, the National Academy of Elder Law Attorneys and the ABA Commission on Law and Aging. It will be interesting to see how many states adopt the UAGPPJA.

IX. SETTLING CONTESTED GUARDIANSHIPS

A. Mediation of a Contested Guardianship

In the practice of probate, 90% of all cases settle prior to trial. Unlike the insurance company litigation, guardianship litigation is usually expensive to an individual, usually the proposed incapacitated

person, and expensive emotionally, many times forever destroying familial relations. Yet few litigators consider mediation and family settlement agreements in guardianships. Since a person is presumed to have capacity until adjudicated, many things are possible in settlement. Once a court has ruled or a jury has decided, many options for settlement are gone. Contrary to popular belief, money is not required to change hands to settle, so even the contested guardianship of the person can be settled in a binding agreement. *See Rose v. Pfister*, 607 S.W.2d 587, 590 (Tex. Civ. App. – Houston [1st Dist.] 1980, no writ).

B. Necessary Parties and Binding Everyone

One problem in settling a contested guardianship is including everyone who has equal standing to involve themselves in the guardianship. If everyone is not involved, you could settle the immediate problem and have another contestant involved before the ink is dry on the document. The guardian ad litem should be included in the negotiations. The attorney ad litem represents the incapacitated, but is not a party to the litigation or necessary to sign a settlement.

Also, many times the parties will try to settle a potential will contest while they are settling the guardianship. Until September 1, 1999, the doctrine of virtual representation was limited to judicial proceeding. Thus, parties were forced to initiate a "proceeding" to bind minors and unborn beneficiaries. This was necessary because section 115.013 of the Texas Trust Code provides that unborn and unascertained beneficiaries may be virtually represented by another party having a substantially identical interest in the proceeding. *See* TEX. PROB. CODE ANN. § 115.013(c)(4) (Vernon 1995). Parties to a settlement agreement involving unborn or unascertained beneficiaries were often forced to initiate a friendly suit (assuming a lawsuit is not currently pending) to approve the proposed settlement. *See Robinson v. Nat'l Cash Register Co.*, 808 F.2d 1119 (5th Cir. 1987) (no party may be bound by judgment if non-party's and party's interest is so closely aligned that party is non-party's "virtual representative").

Effective September 1, 1999, parties will for the first time be allowed to invoke the virtual representation doctrine outside a court proceeding. Provided the agreement does not purport to modify or terminate a trust, parties can enter into out-of-court agreements, including fiduciary releases and other agreements, and bind minor, unborn or unascertained beneficiaries.

C. Payment of Attorney's Fees

One bargaining tool in settling a contested guardianship is the fee issue. For example, if the time to amend pleadings has passed, and good faith has not been pled, then attorney's fees may be denied to that party. There is a good chance that at trial, the person who failed to plead will not recover their fees.

Additionally, based on the size of the guardianship estate, the court has wide latitude to award or deny fees and expenses as the court finds reasonable and necessary. *Tex. Prob. Code § 665B.* If settling, all parties should agree that the applicants are "in good faith" in the agreement. Any settlement should also provide for how the fees are paid if the court fails to approve the fees.

D. Motion in Limine for Adverse Interest

A strong negotiating tool is the motion in limine pursuant to § 642 of the Texas Probate Code. If you are successful in showing an applicant or contestant to a guardianship has an adverse interest, they may not (1) file an application to create a guardianship; (2) contest the creation of a guardianship; (3) contest the person to be guardian; and (4) contest the restoration of an incapacitated person. The most important points are (i) the motion in limine is a trial on the merits; and (ii) the court decides as opposed to a jury.

The filing of a motion in limine with merit can be a catalyst to the settlement of a contested guardianship prior to trial. The person with the alleged adverse interest has to consider that the judge may find he or she has an adverse interest and deny all of his attorney's fees and expenses, as well as striking his or her pleadings. As a settlement tool, the person with the alleged adverse interest can be offered input into the terms of the guardianship and the payment or partial payment of their fees and expenses.

E. Motion for Security for Cost

Many judges are reluctant to grant security for costs. Sometimes it is perceived as a comment on the merits of a person's position. If the Court is inclined to grant costs, the amount awarded usually is limited to the attorney ad litem's fees. The applicable portion of Section 622 reads as follows:

> (b) When a person other than the guardian, attorney ad litem, or guardian ad litem files an application, complaint, or opposition in relation to a guardianship matter, the clerk may require the person to give security for the probable costs of the guardianship proceeding before filing. A person interested in the guardianship or in the welfare of the ward, or an officer of the court, at any time before the trial of an application, complaint, or opposition in relation to a guardianship matter, may obtain from the court, on written motion, an order requiring the person who filed the application, complaint, or opposition to give security for the probable costs of the proceeding. The rules governing civil suits in the county court relating to this subject control in these cases.

In an attempt to settle, the Motion for Security for Costs should inform the Court (1) of the evidence against the person who should pay costs; (2) the lack of assets of the proposed incapacitated person to pay the ad litem or applicant's fees; and (3) estimate the fees and expenses. Sometimes filing the motion will begin settlement discussions.

F. Motions for Summary Judgment

The old adage is that judges have a fear of granting summary judgments. If all questions are matters of law, and the summary judgment is well drafted and disposes of any issue of fact, the summary judgment should be granted. Litigants do not often use summary judgments to end contested guardianships, and if they try to use them, they aren't always thoroughly researched. Summary judgments are appropriate, for example, (1) when the debt of the applicant is obvious; (2) when the adverse interest of the applicant or contestant cannot be controverted; (3) when there is no evidence of the invalidity of the designation of guardian; (4) when the agent under the power of attorney has not acted at all and capacity at execution is not in question; and (5) when the applicant cannot overcome disqualification.

Just the filing of a Motion for Summary Judgment can bring the parties to the negotiation table. If the negotiation fails, your discovery may be more focused by the response to the summary judgment in which the respondent must produce fact issues to overcome the motion.

G. Appointment of Guardian

As a part of my settlement where a person is incapacitated, a guardian will be appointed. You will want to include a waiver by the adverse party. The waiver can be forever or conditional. For example, if a qualified guardian is not serving and/or a corporate refuses to serve, then the adverse party may be allowed to seek appointment as guardian. A successor guardian is an issue that should not be overlooked in the settlement of a contested guardianship.

H. Medical Information and Decision Making

Family members are sometimes more amenable to allow one person to act as guardian when they feel that the persons not appointed will continue to play a role in future healthcare matters. Many family members will request or demand access to a ward's physician and medical records to independently verify that the ward is receiving good care. Litigants are more likely to settle if the party who is not appointed guardian has input on (i) all major treatment decisions; (ii) all proposed changes of residence; (iii) changes of physicians; and (iv) any decision involving the election to use hospice care. There should also be an agreement that the guardian will use all efforts to communicate with each party by designated telephone and/or pager numbers with respect to these issues.

I. Funeral and Pre-Need Issues

Since a guardian has all of the power to the exclusion of other family, decisions at death can also become an emotional issue. Sometimes if these issues are addressed by settlement, there is a comfort level to all.

1. There can be an agreement as to the obituary wording, the funeral home, the church, the presiding official, who will give the eulogy, the cemetery, and the arrangements as a part of the settlement.
2. Issues as to burial plots can also be settled. The parties can decide in advance who is buried on the side of the incapacitated person, who is next, and that the family owning the spaces will not sell them without offering them first to the other family members.

J. Estate Management Issues of Spouse

Clearly, a spouse is usually in a position of power and priority, absent disqualification or adverse interest. There are several ways in which the spouse can manage the incapacitated estate: as court appointed guardian of the estate, (i) the spouse will manage ward's estate, (ii) a revocable trust will be created via a power of attorney, (iii) the spouse will manage all community property pursuant to Section 883 of the Texas Probate Code, (iv) the community estate will be partitioned between the spouses and all future earnings will constitute such spouse's separate property, or (v) the estate will be managed under a valid power of attorney. All relevant issues as to the spouse should be addressed in any settlement of a contested guardianship.

K. Disclosure and Characterization of Estate Assets

Many times more than one person has purportedly controlled an incapacitated person's assets. If there is no spouse, no party may be in a position to know that all assets are intact, and each party is suspicious of the other.

The disclosure or lack of obligation to disclose may be a settling tool. If a party will not enter into a disclosure provision, it may indicate the need for discovery into the acts of that party. Or, to get the guardianship resolved, the parties may omit the disclosure provision if the non-disclosing party waives their right to serve. Either way, the disclosure or waiver of disclosure should be a part of any settlement.

Also, there may be claims by a capacitated spouse to separate property. The tracing responsibility is on the spouse claiming separate property if it was acquired during marriage or is commingled. The alleged separate property can be used as a bargaining tool in a contested guardianship to remove control from the spouse by way of a trust or other family member serving as guardian.

L. Gifts and Transfers

Hotly contested issues in a contested guardianship include gifts at a time the medical indicates incapacity and transfers of property for lack of adequate consideration at a time when the person may have lacked capacity. The person claiming the gifted or transferred property runs the risk of a guardian seeking approval to sue to regain the property. The retention of all or part of the gift or transfer can be less expensive than a jury trial or bench trial on the guardianship and then a second lawsuit to recover the property.

M. Future Contests and Litigation

Contested guardianships may arise when one party has what they hope will be the last will and testament of the proposed incapacitated person and wishes to make sure another will is not executed. The other party may wish to institute a guardianship because they suspect a will is in existence which is infavorable to them. In the process of a contested guardianship, all parties realize the financial and emotional expense of litigation, yet realize a will contest is a guarantee of the death of the incapacitated person. A decision on which will is valid, who will serve as executor, who gets assets which pass outside

the estate and other estate issues can potentially settle a contested guardianship, or be included in the settlement of a contested guardianship.

Likewise, there may be a guarantee of a future fight over the management and/or sale of a business. The person fighting to maintain control over a business which is owned primarily by the incapacitated person, has a lot to lose. Guidelines to management and/or how and to whom the business is sold can assist all parties in settling the contested guardianship. All settlements are usually subject to court approval.

X. ENFORCEMENT AND DRAFTING OF SETTLEMENTS

A. Enforcement

Family settlement agreements are highly favored by Texas courts. A settlement agreement will not be disturbed because of ordinary mistake of law or fact, and will be upheld when all parties have the same knowledge or a means to obtain the same knowledge provided there is no fraud, misrepresentation, concealment or other unequitable conduct. *See Crossley v. Staley*, No. 07-98-0060-CV, 1999 WL 51812 (Tex. App. – Amarillo February 5, 1999). Furthermore, the unilateral mistake of law of the party to a settlement agreement is not grounds to avoid the agreement. *See Crossley* at *5 *citing Atkins v. Womble*, 300 S.W.2d 688, 703 (Tex. Civ. App. – Dallas 1957, writ ref'd n.r.e.).

The issue whether an agreement is binding or legally enforceable is a question of law. *See Montanaro*, 946 S.W.2d at 430 *citing Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 814 (Tex. App. – Houston [1st Dist.] 1987, writ ref'd n.r.e.), cert. dism'd. Therefore, unless there is ambiguity or unless surrounding facts and circumstances demonstrate a factual issue as to the settlement agreement, the issue whether the agreement fails for lack of an essential term is a question of law to be determined by the court. *See Browning v. Holloway*, 620 S.W.2d 611, 615 (Tex. Civ. App. – Dallas 1981, writ ref'd n.r.e.). In reaching its determination, the court will decide whether all the essential terms were included in settlement agreement and all conditions precedent to the enforcement of the agreement have occurred.

If, however, the agreement is ambiguous that creates an unresolved issue of fact, the party challenging the agreement may be entitled to a jury trial on any unresolved fact issues. For example, in *Martin v. Black*, 909 S.W.2d at 196, the court considered whether a term sheet reached at mediation and signed by all parties was an enforceable settlement agreement. At issue was the final term which provided that "the parties' understandings are subject to securing documentation satisfactory to the parties." Id. at 194. The court held that a question of fact existed regarding whether the parties intended the execution of formal documentation to be a *condition precedent* to the formation of a contract or a *memorialization* of an *existing contract*. *Id. citing Foreca, S.A. v. GRD Development Co. Inc.*, 758 S.W.2d 744, 746 (Tex. 1988).

A party to a written settlement agreement may seek to enforce the agreement under general contract law. This right applies to both Rule 11 agreements, *see Stevens v. Snyder*, 874 S.W.2d at 243, and mediation agreements. *See Cadle Co. v. Castle*, 913 S.W.2d 627, 630 (Tex. App. – Dallas 1995, writ denied).

The party seeking to enforce the agreement will typically bring suit to enforce the contract alleging breach of contract or seeking specific performance. *See Stevens*, 874 S.W.2d at 243. The original petition should contain a short statement of the cause of action sufficient to provide fair notice of the claim, including a statement regarding the contractual relationship between the parties and the substance of the settlement agreement. *See Id*. at 631 *citing Air & Pump Co. v. Almaquer*, 609 S.W.2d 309, 313 (Tex. Civ. App. – Corpus Christi 1980, no writ).

At trial, the plaintiff must be prepared to prove "(1) a contract existed between the parties; (2) the contract created duties; (3) the defendant breached a material duty under the contract; and (4) the plaintiff sustained damage." *Id*. at 631 *citing Snyder v. Eanes Indep. Sch. Dist.*, 860 S.W.2d 692, 695 (Tex. App. – Austin 1993, writ denied).

It is essential that (1) the settlement is not ambiguous; (2) the settlement does not have a condition precedent to its enforcement, and (3) the settlement is not conditioned upon a more refined

document. After the expense of litigation and reaching a settlement, no party wants to go through the expense of litigating the settlement, except of course, the party who wants out of it.

As a general rule, a party to a settlement agreement has four (4) years to seek to set aside the agreement, on the basis of fraud or otherwise. *See Johnston v. Barnes*, 71 S.W.2d 164, 165 (Tex. App. – Houston [14th Dist.] 1986, no writ); *see also* Helen Wils, STATUTES OF LIMITATION IN PROBATE AND TRUST LITIGATION, 23rd Adv. Est. Plan. & Prob. Course.

B. Drafting

Many times settlement discussions occur over a period of days or at mediation. It may be late into the day when pen is put to paper to draft a settlement. It is advisable to prepare a settlement early on in the discussions which contains all of what we called the miscellaneous provisions. This planning in advance assures that at least some basics are included. Then, you are left to only draft "the deal." However, no matter how careful or how many eyes look at the settlement, there is always room for error. In guardianships, the basic goals are not as complicated (usually) as a will contest or trust lawsuit, where modification and tax issues can take up pages.

First, outline the basic terms of the "deal" in their simplest form. Then, outline the goals of your client. Finally, outline potential problem areas. This can be done quickly as all parties usually know their own case. Then, put pen to paper and flesh out the agreement. Following is a checklist (not meant to be exhaustive, but only helpful) to use in drafting a guardianship settlement.

1. Parties
   - State all names
   - State all relevant capacities (i.e. executor, trustee, etc.)
   - Define appropriately (make sure definition includes all capacities)
   - State any ad litems joining as parties
2. Recitals
   - Identify guardianship matters at issue
   - State facts giving rise to contest or dispute
   - State facts evidencing each settling party's standing and validity of his or her claim
   - Identify pending legal action, including court, style of case, etc.
   - State settlement to avoid continued litigation and buy peace
3. Definitions and scope
   - Define claims
   - Define relevant entities and persons included in settlement, i.e. trusts, businesses, etc.
   - State what claims or matters, if any, are excluded from agreement
   - Define relevant terms – including successor, affiliates, predecessors, litigation, transactions, etc.
4. Recite consideration
   - Good and valuable
5. Appointment of guardian
   - General issues
     - ⇒ Will guardian be appointed – person and/or estate
     - ⇒ If not, ward competent or less restrictive means
     - ⇒ Validity of POA, trust, etc., HCPOA
     - ⇒ If guardian appointed, who will be appointed guardian – person and/or estate
     - ⇒ Hearing and who will attend
     - ⇒ Waiver by anyone with priority to serve permanent/limited
     - ⇒ Who serves as representative payee for social security
     - ⇒ Provision to appoint future guardians
     - ⇒ Notice of future appointments
     - ⇒ Bond requirements

- ⇒ Guardian's compensation
- ⇒ Continued appointment of ad litem(s)
- ⇒ Who prepares paperwork and time frame to do so
- ⇒ Parties' right to be involved in future hearings
- ⇒ Living arrangements
- ⇒ Funeral arrangements – right to plan

- Property issues
  - ⇒ Arrangements as to ward's community or separate property
  - ⇒ Rights to spouse to manage community property – 883 or otherwise
  - ⇒ Partition or exchange agreement
  - ⇒ Guardian's authority to manage community estate
  - ⇒ Annual gifting – allowed and notice requirements
  - ⇒ Notice of sales or significant transfers
  - ⇒ Guardian's compensation
  - ⇒ Payment of fees and expenses
  - ⇒ Coordination with any trust or other entities'
  - ⇒ Rights of parties to access and audit guardian's books and records
  - ⇒ Expenses to be paid by guardian versus wife, trustee or other third party
  - ⇒ Right to divorce ward
  - ⇒ Homestead rights
  - ⇒ Who pays ad litem and applicant's fees and expenses

6. Termination or modification of guardianship
   - Termination
     - ⇒ Basis for termination
     - ⇒ Who prepares paperwork and pleadings
     - ⇒ Payment of any debt, obligations and taxes
     - ⇒ Ad litem's consents
     - ⇒ Doctor's letter or other medical opinion
   - Modification
     - ⇒ How guardianship will be modified
     - ⇒ Basis for modification
     - ⇒ Doctor's letter or other medical opinion
     - ⇒ What powers will ward have
     - ⇒ What powers will guardian have
7. Representations
   - Capacity of parties
   - Disclosure of assets
   - Authority to act in stated capacity
   - Discharge any reliance on statement by any other party's attorney or advisor
   - Include disclaimer of reliance other than expressly stated in written settlement agreement
8. Release and indemnities
   - Release claims
   - Limitations in release of parties and/or attorney or other advisors
   - Exclude obligations under settlement agreement from release
   - Verify all required parties are releasing and being released in all desired capacities
   - Verify successor, affiliates and predecessor are released, if desired
   - Verify all agents, heirs, etc. are bound
   - Indemnities for third party claims

9. Disposition of litigation
    - Dismissal with or without prejudice
    - Time to dispose
    - Who is responsible for preparation of paperwork
    - Who must execute written waivers
    - Who must withdraw/dismiss contests
    - Rights of counsel to review
    - Whether parties must attend hearing
10. Remedies in default
    - Settlement agreement enforced as contract
    - Settlement agreement to be incorporated in judgment and enforced accordingly
    - Right to attorneys fees and expenses
11. Miscellaneous
    - Agreement supersedes any oral or prior agreements (exclude any agreements to remain in effect)
    - Applicant for guardianship was in good faith and just cause
    - Agreement must be modified in writing
    - Choice of law
    - Incorporate exhibits
    - Advice of own counsel
    - Whether agreement can be executed in multiple counterparts
    - Whether facsimile signature same as original
    - Where future notices should be sent
    - Confidentiality agreement
    - Heading and titles are for descriptive purposes only
    - Agreement to mediate/arbitrate future disputes
    - Effective date
    - Court approvals, if any
    -

XI. WARD'S ABILITY TO EXERCISE CERTAIN PERSONAL RIGHTS AND POWERS WHILE SUBJECT TO A GUARDIANSHIP

A. General Overview

Historically a person subject to a guardianship was presumed to lose his or her rights to engage in most transactions and make most decisions. The 1983 and more recently the 1993 amendments to the Probate Code have reversed this presumption. Now, 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. *See* TEX. PROB. CODE ANN. § 675 (Vernon 2003).

Therefore, a starting place to determine what a ward can (and cannot do) is the application for guardianship and related orders entered by the court. These should be thoroughly reviewed to determine the following:

- The term of guardianship sought – temporary or permanent;
- The type of guardianship sought – estate and/or person;
- Whether the applicant requested that the court find the ward totally incapacitated;
- Whether the medical evidence admitted into evidence established the ward lacked all ability or found that he or she could handle certain matters;
- The findings made by the court in appointing a guardian;
- The type of guardianship granted by the court– temporary or permanent;
- The scope of guardianship granted by the court – estate and/or person; and

- Whether the powers were enumerated or global.

These should be reviewed in light of the intended action by the ward. A discussion of some of the more commonly encountered possible actions follows.

B. Wills & Similar Estate Planning Documents

1. General Overview.

Issues involving a ward's estate plan may be a motivating force behind the pursuit of a guardianship but generally are not directly addressed in the guardianship proceeding. The guardian can, however, take certain actions that affect the ward's estate plan. For example, non-probate accounts may be closed on the purported basis that the guardian is required to collect all assets, or that the funds were needed for the ward's care. *See generally Plummer v. Estate of Plummer*, 51 S.W.3d 840 (Tex. App. 2001)(attorney-in-facts who cashed in principal's certificates of deposit with third party designated beneficiary and deposited funds in new checking account acted within their delegated authority based on testimony that they needed liquid assets to pay the nursing home expenses of principal).

Furthermore, as to assets on hand at the time of the guardianship or subsequently received by gift, devise, inheritance, etc., the guardian of the estate may retain such assets for one year from the date of receipt of the property (without additional court approval) without regard to diversification of investments and without liability for any depreciation or loss resulting from the retention. *See* TEX. PROB. CODE ANN. § 855A (Vernon 2003 & Supp. 2004). In certain circumstances (yet to be determined), the guardian may seek authority to continue to retain the property for more than one year if the retention can be justified as part of an "investment plan." Newly enacted Section 855B requires the guardian to file an "investment plan" within 180 days of the guardian's appointment that addresses the long-term investment plan and identifies assets that should be retained. Section 855B(c) does not, however, provide any protection for specifically bequeathed or non-probate assets as it expressly provides as follows:

> (c) The fact that an account or other asset is the subject of a specific or general gift under a ward's will, if any, or that a ward has funds, securities, or other property held with a right of survivorship does not prevent:
>
> (1) a guardian of the estate from taking possession and control of the asset or closing the account; or
>
> (2) the court from authorizing an action or modifying or eliminating a duty with respect to the possession, control, or investment of the account or other asset.

See TEX. PROB. CODE ANN. § 855B(c) (Vernon 2003 & Supp. 2004).

Given the current landscape has increased the incentive for using a guardianship to meddle in a ward's estate plan, it is anticipated that the issue of a ward's right to execute a new will in a guardianship will need to be addressed on an increasing basis. The issue of a right (or lack thereof) of a ward to execute estate-planning documents raises a number of legal and ethical issues.

Unlike many actions, a guardian cannot execute a will on behalf of a ward. Furthermore, an adjudication of incapacity does not automatically render a ward unable to execute a will or other testamentary document. To the contrary, the standard for testamentary capacity may be less than that required to avoid a guardianship. The creation of a total guardianship is, however, *prima facia* 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 or evidence that the guardianship was limited and did not restrict the ward's right to execute a will. *Clement v. Rainey*, 50 S.W.2d 359 (Tex.Civ.App.—Texarkana 1932, writ ref'd). A qualified psychiatrist or neurologist can often determine the ward's testamentary capacity or ability to execute a will.

In the event a ward is determined to be totally incapacitated, the chances on any testamentary document signed by ward being admitted to probate are significantly reduced. When, however, a ward is found partially incapacitated, the ward's ability to execute a valid will may be affected by 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 ability to execute a will.

2. Seeking Permission/Clarification for Ward to Execute a Will.

When the right of a ward to execute a will is in doubt, and he or she desire to execute a new will, the ward has two options. One is to simply execute a new will or codicil without seeking express court authority and let his or her named executor deal with the various potential objections and presumptions. By doing so, it delays the issue and avoids a specific finding from the court that the ward lacks capacity to execute a will.

Alternatively, the ward or the guardian can seek clarification from the court whether the ward has the capacity and/or the right to do so. There are two advantages for doing so. First, it potentially removes the presumption that the ward lacked the capacity to execute the will if he or she is found to have the requisite capacity to execute a will. Second, it allows the ward to engage an independent lawyer to draft the required documents without concerns that the lawyer may face ethical complaints relating to the representation. The disadvantage is that the court may instead find the ward lacks capacity to execute a will.

3. Ward's Right to Engage Counsel.

While a ward will often arguably retain the right to execute a will, he or she will often lack the right to engage counsel to draft the document. Thus, the ward's desires may be frustrated as most lawyers will be hesitant to agree to an engagement with a person adjudicated to be incapacitated. Furthermore, even if they agree to the engagement, the lawyer may have no way to compel payment. *Breaux*, 699 S.W.2d at 604 (estate planning services were not necessities for which ward could contract).

The practical, albeit public solution, is for either the ward and/or his or her guardian to seek court authority for the ward to engage estate planning counsel. To do so, the court may require a showing that the ward has the requisite testamentary capacity. A qualified psychiatrist or neurologist may establish this. *See* discussion *supra.* If the court is willing to enter an order expressly finding that the ward has testamentary capacity, the finding can be used to either avoid or rebut the presumption of incapacity established under Texas common law addressing the former Texas statutes.

Note, it is strongly suggested that the ward engage independent counsel. A claim of undue influence may arise if counsel for the guardian drafts the ward's will or the guardian is in any way involved in the estate planning discussions. Furthermore, the ward may have sufficient capacity to execute a will but still lack sufficient capacity to properly waive any potential conflicts of interest.

A sample Application to Retain Estate Planning Counsel and related order is attached as Exhibit A and B to this outline.

C. Marriage

1. General Overview.

The issue of the right (or lack thereof) of a ward to marry has been raised with increasing frequency in the last few years. The issue of marriage is, however, more complicated than whether he or she has the capacity to execute a will. It appears that there is no clear required level of capacity to marry. As to the concept of marriage as it relates to a ward's desires for love and affection, one could argue that the requisite capacity is relatively low. The capacity to understand the resulting marital property rights and obligations is arguably closer to contractual capacity. The Texas Probate Code does not expressly address the issue of a ward entering into a marriage. The only statutory guidance is found in Section 6.108 of the Texas Family Code, which provides as follows:

> (a) The court may grant an annulment of a marriage to a party to the marriage on the suit of the party or the party's guardian or next friend, if the court finds it to be in the party's best interest to be represented by a guardian or next friend, if:
>
> (1) at the time of the marriage the petitioner did not have the mental capacity to consent to marriage or to understand the nature of the marriage ceremony because of a mental disease or defect; and

(2) since the marriage ceremony, the petitioner has not voluntarily cohabited with the other party during a period when the petitioner possessed the mental capacity to recognize the marriage relationship.

(b) The court may grant an annulment of a marriage to a party to the marriage if:

(1) at the time of the marriage the other party did not have the mental capacity to consent to marriage or to understand the nature of the marriage ceremony because of a mental disease or defect;

(2) at the time of the marriage the petitioner neither knew nor reasonably should have known of the mental disease or defect; and

(3) since the date the petitioner discovered or reasonably should have discovered the mental disease or defect, the petitioner has not voluntarily cohabited with the other party.

See TEX. FAM. CODE ANN. § 6.108 (Vernon 2003).

It is this author's opinion that the creation of a total guardianship is *prima facia* evidence that the ward is not competent to consent to marriage. This may be arguably overcome with evidence that the ward has the capacity to understand the rights and duties of a spouse or evidence that the guardianship was actually limited and did not restrict the ward's right to marry. No Texas court has clearly considered this issue to date.

As with all rights, when a ward is found partially incapacitated, the ward's right to marry 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 may retain the right to marry but an argument could be made to the contrary based on the interpretation of the powers granted to the guardian.

2. Seeking Permission/Clarification of Ward's Right to Marry.

When the right of a ward to marry is in doubt, and he or she desires to marry, it is advisable to seek permission and/or clarification from the court. Either the ward or the guardian may seek clarification from the court as to whether the ward has the capacity and/or the right to do so. Before doing so, there are two issues that should be considered.

First, is there evidence of the ward's desire to marry and his or her capacity to understand the concept of marriage? A qualified psychiatrist or neurologist can often determine the ward's capacity or ability to enter into the marriage and understand the resulting commitment.

Second, the guardian and, to the extent possible, the ward should consider the property issues and spousal duties that arise due to the marriage. For example, how will community property be managed, who will control the separate and community property estates, will each waive any community property rights, how will the duties of support be addressed, how will the estate be handled in the event of death and/or divorce, will a surviving spouse claim a homestead and/or family allowance in the event of either spouse's death, what if the ward has a "roving eye", etc.??

3. Consider Negotiating a Premarital Agreement.

While a ward may arguably have the capacity to understand the personal aspects of a marriage, he or she will often lack the capacity to understand the property issues. Thus, the involvement of a guardian will be generally required to address any property and financial issues. If the guardian supports the marriage, he or she may seek permission from the court to either negotiate a premarital agreement or other direction. If the guardian does not support the marriage, the ward (or a guardian ad litem) may seek an order compelling the guardian to consent to the marriage and, if appropriate, negotiate a marital agreement or seek a finding that one is not required.

The following is a partial listing of the various considerations and issues when negotiating and drafting a premarital agreement on behalf of a ward or guardian:

- A representation by the competent future spouse that he or she is aware of the ward's guardianship and potential limitations;
- Whether it will be a community "free" marriage;

- Confirmation that the guardian will continue to manage all the ward's property, including any potential community property;
- Who will be responsible for each future spouse's debts and limits on spousal obligations;
- Confirmation that the competent future spouse will not obtain credit based on any of the ward's estate;
- Each future spouse's tax liabilities and whether the competent future spouse and the guardian will file joint or separate returns;
- Whether the competent future spouse will waive any alleged right to seek the guardian's removal and his or her appointment;
- Potential waiver of Section 883 rights and claims;
- Support during marriage;
- Whether any funds will be distributed to the competent future spouse for living expenses, upon what basis, and any duties of accountability;
- How any community property would be divided in the event of divorce;
- Any contractual testamentary obligations of either future spouse;
- Rights and/or waiver of homestead;
- Rights and/or waiver of family allowance and exempt property claims at either future spouses' death;
- Rights and/or waiver as to either future spouse's ERISA plans;
- Waiver of potential tort claims;
- Recognition of the guardian's right to enter into the agreement on behalf of ward; and
- Representation that no one will claim the agreement or marriage is invalid due to the ward's incapacity adjudication.

A sample Application For Authority To Execute Premarital Agreement And For Ward To Ceremonially Marry and related order is attached as Exhibit C and D to this outline.

D. Divorce

1. General Overview.

While a majority of the jurisdictions to address the issue currently allow a guardian to bring or maintain a dissolution action on behalf of a ward, only a portion of those jurisdictions allow such an action to be initiated by the guardian. The remaining jurisdictions require either: (1) an express statute or rule authorizing the action; or (2) some degree of competency on the part of the ward to express a desire for a dissolution. See *In re Marriage of Denowh ex rel. Deck*, 78 P.3d 63 (Mont. 2003)(*citing In re Marriage of Burgess* 302 Ill.App.3d 807 (Ill. 1998). Even though the decisions of the various courts are not necessarily in accord, a majority of the courts to address this issue have based their decisions on their respective state's statutory authority. *See In re Marriage of Denowh ex rel. Deck*, 78 P.3d at 65) (c*iting Phillips v. Phillips*, 45 S.E.2d 621 (Ga. 1947); *Johnson v. Johnson*, 170 S.W.2d 889 (Ky. 1943); *In re Marriage of Drew*, 503 N.E.2d 339 (Ill 1986) *cert. denied* 483 U.S. 1001, 1075 S.Ct. 3222, 97 L.Ed.2d 729 (1987); *In re Marriage of Burgess*, 725 N.E.2d 1266 (Ill. 2000)). Other states have held that a guardian may not seek to dissolve a ward's marriage. *See In re Marriage of Denowh ex rel. Deck*, 78 P.3d at 65 (the relationship between spouses is highly personal and to "allow a guardian to bring an action to dissolve his or her ward's marriage would be to allow a guardian to interfere in his or her ward's personal relationships.").

Texas, however, appears to follow the minority view that a guardian may petition for divorce on behalf of the ward notwithstanding the fact that there is no statute that expressly authorizes a guardian to do so. *See Stubbs v. Ortega*, 977 S.W.2d 718, 724 (Tex.App—Fort Worth 1998, writ denied) ("Texas public policy does not prohibit authorizing a guardian to petition for divorce on behalf of her mentally incapacitated ward"); *Wahlenmaier v. Wahlenmaier*, 750 S.W.2d 837, 838 (Tex.App.—El Paso 1998, writ denied)(Section 576.001 of the Texas Health and Safety Code "gives every person who has a mental

incapacity every right and privilege guaranteed by our constitution and laws, it must include a right to obtain a divorce. It follows that, since the person may not be able to act for themselves, a court appointed guardian ad litem or next friend must be able to exercise those rights for a mentally ill person."); *see also Nelson v. Nelson*, 118 N.M. 17, 878 P.2d 335, 341 (1994)("a guardian of an adult incompetent ward may initiate divorce proceedings on behalf of the ward"); *Ruvalcaba v. Ruvalcaba*, 174 Ariz. 436, 850 P.2d 674, 683-84 (1993) (a guardian may bring a dissolution action on behalf of the incapacitated ward pursuant to his general powers to act on the ward's behalf).

2. Seek Authority for Ward To Divorce

The basis for a divorce may arise from a number of facts and circumstances. In guardianship proceedings, a divorce is often sought on one of two grounds: (i) it is requested by the ward, or (ii) the guardian believes it would be in the ward's best interest.

The ward may desire a divorce and request that the guardian pursue such an action. If the guardian is the person the ward seeks to divorce, it is this author's opinion that the ward may retain counsel for the purpose of bringing the issue to the court's attention. *See* discussion *infra.* Another option is for an interested person to intervene for purposes of raising the issue with the court. Generally, the court will appoint a guardian ad litem to investigate the issue.

When a divorce is requested by the ward, the guardian or third party should confirm via medical experts and otherwise that the ward has sufficient capacity to understand the concept of divorce and its effect. The guardian or third party should also confirm that the ward is not being pressured to seek a divorce by a third party. For example, a child may "convince" his or her parent that they want a divorce to alter the ward's estate plan by voiding any gifts to the other spouse. Again, a qualified psychiatrist or neurologist can often determine the ward's capacity or ability to understand these matters and confirm that it is not the result of pressure or third party influence. Once it is confirmed the ward understands the resulting effect it will have on him or her personally, the guardian may then seek authority to pursue a divorce, retain qualified counsel, and attempt to negotiate a property settlement.

Alternatively, the guardian may seek to divorce a ward on the basis that it is in the ward's best interest. It remains unclear what evidence a guardian is required to present to obtain court authority to seek a divorce. In *Stubbs v. Ortega*, the appellate court reviewed the application based on the terms of a prior partition agreement negotiated between the ward's guardian and the competent spouse. The agreement provided that the guardian may seek a divorce in the event of physical abuse by the competent spouse or upon a showing of "good cause" as determined by the probate court. 977 S.W.2d at 718. On appeal, the appellate court held that sufficient evidence to support the trial court's conclusion that, per the parties' contract, good cause existed to allow the guardian to petition for ward's divorce. *See Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965)(assertion evidence is "insufficient" to support fact finding means evidence supporting finding is so weak or evidence to contrary is so overwhelming that answer should be set aside and new trial ordered). The appellate court made clear, however, that they were not determining "whether sufficient grounds existed on which to grant a divorce between the [couple], whether a guardian may sue for divorce on behalf of her ward without authorization from the probate court, or the rights of a husband to stay married to his incapacitated spouse." *Stubbs*, 977 S.W.2d at 718. Therefore, an issue remains whether a guardian can seek a divorce over the ward's objection.

E. Seeking Restoration

1. Ward's Right To Seek Restoration

Although always assumed, in 1999, the Texas legislature enacted Probate Code § 694A, *et seq.* to confirm the right of a ward to seek his or her restoration. Section 694A(a) provides that:

> (a) A ward or any person interested in the ward's welfare may file a written application with the court for an order:
>
> (1) finding that the ward is no longer an incapacitated person and ordering the settlement and closing of the guardianship;

> (2) finding that the ward lacks the capacity to do some or all of the tasks necessary to provide food, clothing, or shelter for himself or herself, to care for the ward's own physical health, or to manage the ward's own financial affairs and granting additional powers or duties to the guardian; or
>
> (3) finding that the ward has the capacity to do some, but not all, of the tasks necessary to provide food, clothing, or shelter for himself or herself, to care for the ward's own physical health, or to manage the ward's own financial affairs and:
>
> (A) limiting the powers or duties of the guardian; and
>
> (B) permitting the ward to care for himself or herself or to manage the ward's own financial affairs commensurate with the ward's ability.

Id.

The request may be made in the form of a formal pleading or an informal letter to the court. *See* TEX. PROB. CODE ANN. § 694A(b) (Vernon 2003). On receipt of the request, the court is required to appoint a court investigator or a guardian ad litem to file an application for restoration or modification discussed above. The court is also required to appoint an attorney ad litem to represent the ward. *See* TEX. PROB. CODE ANN. § 694C (Vernon 2003).

Sample applications for restoration (partial and total) and related orders are attached as Exhibits E through G to this outline.

2. Ward's Right To Engage Counsel To Seek Restoration

The recent amendment to the Probate Code regarding restoration also clarified that a ward has the right to retain private counsel to represent him or her in seeking the restoration of his or her rights. *See* TEX. PROB. CODE ANN. § 694K (Vernon 2003). Section 694K provides that:

> (a) A ward may retain an attorney for a proceeding involving the complete restoration of the ward's capacity or modification of the ward's guardianship.
>
> (b) The court may order that compensation for services provided by an attorney retained under this section be paid from funds in the ward's estate only if the court finds that the attorney had *a good-faith* belief that the ward had the *capacity* necessary to retain the attorney's services.

Id. (emphasis added).

A sample application and related order for permission to represent ward is attached as Exhibits H and I to this outline.

3. Considerations Before Accepting Representation

As previously discussed, the right to represent a ward is not absolute. Therefore, an attorney who is considering representing a ward should use reasonable means to confirm the incapacitated person has the requisite capacity to retain counsel.

It is suggested that the attorney personally meet the potential client to determine whether the potential client appears to be acting independently, understands that he or she is seeking to retain the attorney to represent them, is generally oriented to time, place and person, and understands the basic financial arrangement and resulting obligations. If the court has appointed an attorney ad litem, it is suggested that permission be given by the proposed ward's court appointed counsel.

Furthermore, it is advisable to seek the opinion of the potential client's physician or a doctor qualified to render a medical opinion regarding the potential client's capacity to enter into a contract. If possible, the doctor should reduce his or her opinions to writing.

4. Challenging Attorney's Standing to Represent Ward

A guardian or any other interested person may challenge the authority of counsel to represent a ward. Lack of authority may be based on the client's inability to retain counsel. A guardian should disaffirm the contract and inform the attorney that the guardian believes the ward lacks the capacity to engage counsel. The exclusive procedural tool for challenging the authority of counsel is Rule 12 of the Texas Rules of Civil Procedure. *See Angelina County v. McFarland*, 374 S.W.2d 417, 423 (Tex. 1964);

Gulf Regional Educ. Television Affiliates v. University of Houston, 746 S.W.2d 803, 809 (Tex. App.–Houston [14th Dist.] 1988, writ denied); *Valley Int'l Properties, Inc. v. Brownsville Sav. & Loan Ass'n*, 581 S.W.2d 222 (Tex. Civ. App.–Corpus Christi 1979, no writ). A plea in abatement or a motion to dismiss will not suffice. *See Fulcher v. Texas State Bd. of Public Accountancy*, 571 S.W.2d 366, 372 (Tex. Civ. App.–Corpus Christi 1978, writ ref'd n.r.e.); *Cook v. City of Booker*, 167 S.W.2d 232, 233 (Tex. Civ. App.–Amarillo 1942, no writ).

The relevant section reads as follows:

> A party in a suit or proceeding pending in a court of this state may, by *sworn written motion* stating that he believes the suit or proceeding is being prosecuted or defended without authority, cause the attorney to be cited to appear before the court and show his authority to act. The notice of the motion shall be served upon the challenged attorney *at least ten days* before the hearing on the motion. At the hearing on the motion, the *burden of proof shall be upon the challenged attorney* to show sufficient authority to prosecute or defend the suit on behalf of the other party. Upon his failure to show such authority, the court shall refuse to permit the attorney to appear in the cause, and shall strike the pleadings if no person who is authorized to prosecute or defend appears. The motion may be heard and determined at any time before the parties have announced ready for trial, but the trial shall not be unnecessarily continued or delayed for the hearing.

TEX. R. CIV. P. 12 (emphasis added).

This rule has been used to question whether a party has the power or authority to hire an attorney. *See Gulf Regional Educ. Television Affiliates v. University of Houston*, 746 S.W.2d 803, 809 (Tex. App.–Houston [14th Dist.] 1988, writ denied). An adverse result under a Rule 12 challenge can be costly to a lawyer with no authority – he may not be paid. *See, e.g.*, *Breaux v. Allied Bank*, 699 S.W.2d 599 (Tex. App.–Houston [14th Dist.] 1985, writ ref'd n.r.e.). At least one attorney has been disbarred for allegedly representing an incapacitated person without authority. *See State Bar v. Kilpatrick*, 874 S.W.2d 656, 657 (Tex. 1994).

5. Payment of Legal Fees

An attorney who successfully defeats an application for guardianship or restores the ward can clearly look to his or her capacitated client for payment. However, attorneys who are unsuccessful in their attempts to restore a ward still may be entitled to their fees if the court finds that they have acted with a good faith belief that the proposed ward or ward had the capacity to retain the attorney's services. *See Oldham v. Calderon*, 1998 WL 104819; TEX. PROB. CODE ANN. § 694K (Vernon 2003).

One of the few opinions or cases to address this issue is the unpublished decision of *Oldham v. Calderon*, 1998 WL 104819. In *Calderon*¸ the party opposing the payment of the private attorney's fees argued that attorneys selected privately by proposed ward should only be paid if the guardianship application is defeated. The Houston Court of Appeals, however, equated this to mandating proposed wards to hiring private attorneys to contest a guardianship "on a contingent fee basis, i.e., whereby the attorney could be paid only if successful in avoiding appointment of a guardian." *Oldham v. Calderon*, 1998 WL 104819 at *3. The appellate court refused to adopt this position as it "would be contrary to the interest of both the proposed ward and her estate in that it could cause (i) fewer attorneys to be willing to accept the engagement under such constraints, and (ii) considerably higher fees to be charged to compensate the lawyer for the uncertainty of recovery." *Id.* Rather, the court held that the trial court could award attorney fees to private counsel, even if unsuccessful in defeating the guardianship. The trial court was authorized to do so because it "(a) was required to appoint an attorney ad litem to represent [the proposed ward's] interests and to compensate that attorney for doing so; and (b) allowed [private counsel] to fulfill the role of [the] attorney ad litem." *Id.*

Since the *Calderon* decision, Section 694K was enacted to provide some authority when representing wards seeking their restoration or a modification of their guardianship. Section 694K provides that the attorney is entitled to his or her fees if the "court finds that the attorney had a good-faith

belief that the ward had the capacity necessary to retain the attorney's services. *See* TEX. PROB. CODE ANN. § 694K (Vernon 2003); *see* discussion *supra.*

F. Contracts

1. General Rule

After a guardian of an estate has been appointed, the ward generally loses his legal right to enter into contracts. *See e.g. Breaux v. Allied Bank of Texas*, 699 S.W.2d 599 (Tex.App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.); *but see* discussion *supra*. A contract executed by a ward without the legal right to do so is, however, *voidable* but not void. *See* discussion *infra*.

2. Exceptions to General Rule

Both courts and the Restatement (Second) of Contracts recognize exceptions to the general rule. *See United Pacific Insu. Comp. v. Buchanan*, 765 P.2d. 23 (Wash. Ct. App. 1989).

First, the comments to Section 13 of the Restatement (Second) of Contract recognize that a ward may be capable of managing his or her own property if the ward regains his or her ability to reason or has a lucid interval and the guardianship has been effectively abandoned. *Id.* (*citing* Restatement (Second) of Contracts § 13 (1981).

Further, Texas court's recognize even a ward may contract for necessities. *See Breaux*, 699 S.W.2d at 604 (*citing Ferguson v. Fitze*, 173 S.W. 500 (Tex.Civ.App.—Galveston 1914, writ ref'd). Shelter, food and medical care may be considered necessities depending on the facts and circumstances. Necessities even include legal services but the retained attorney will have the burden of showing that the legal services rendered were in fact necessities. *Id.* (holding that estate planning services for ward were not necessities).

3. Dealing With the Voidable Contract

When a ward enters into a contract without the legal right to do so, the contract is voidable but not void. *See* discussion *supra*. The guardian has the option to disaffirm the contract and resulting obligation. *See Breaux*, 699 S.W.2d Ct. 603; *Price*, 2000 WL 1228681. The act of disaffirmation must be clear and unequivocal. *See Breaux*, 699 S.W.2d at 603. Appropriate acts of disaffirmance may be *via* a letter to the other party to the contract or third party involved in transactions. Furthermore, when the circumstances require, the guardian should consider filing a petition for declaratory judgment seek a finding that the contract has been voided.

G. Driving

Prior to 1999, the Texas Transportation Code Section 521.201 prohibited 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. *See former* TEX. TRANSP. CODE ANN. § 521.201 (Vernon 1999). In 1999, Section 521.201 was amended to recognize the presumption of limited guardianship and a ward's retained rights. Currently, Section 210.201(5) provides that the department may not issue any license to a person who:

> has been *determined by a judgment of a court to be totally incapacitated or incapacitated to act as the operator of a motor vehicle* unless the person has, by the date of the license application, been:
>
> (A) restored to capacity by judicial decree; or
>
> (B) released from a hospital for the mentally incapacitated on a certificate by the superintendent or administrator of the hospital that the person has regained capacity;

TEX. TRANSP. CODE ANN. § 521.201(5) (Vernon 1999)(emphasis added).

The Texas 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. If, however, the order does not find the ward to be totally incapacitated, the ward's right to drive is dependent on the specific findings of the court in its order appointing the guardian and, when the order is silent on this issue, it appears that the ward retains the right to drive!

H. Voting

Section 11.002 of the Texas Election Code defines 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 2003). Unlike the Texas Transportation Code, the Legislature has not clarified that a ward loses his or her right to vote only if the court finds him or her to be totally incapacitated or incapacitated to vote. *See* discussion *supra.*

Thus, it appears undisputed that if a ward is determined to be totally incapacitated, the ward loses his or her right to vote. When, however, a ward is found partially incapacitated, the ward's right to vote is arguably 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.

XII. WARD'S ABILITY TO BE SUBJECTED TO CERTAIN PROCEEDINGS

A. Compelling Ward's Deposition

The fact that a guardianship exists does not preclude the taking of a ward's deposition and does not automatically render a ward incapable of giving his deposition. *Mobil Oil Corp. v. Floyd*, 810 S.W.2d 321, 324 (Tex.App.—Beaumont 1991, no writ). Rather, the guardianship creates a rebuttable presumption that the ward is unable to testify. The question for the court is whether the ward is capable of being deposed. For purposes of discovery, the relevant inquiry is whether the ward is capable of understanding the oath, and can recall and narrate events. If medical or other evidence establishes this, a party may be able to examine a ward under oath for discovery purposes even though such deposition testimony may or may not be admissible at trial. *See Id.*

B. Criminal Proceedings Against A Ward

An adjudication of incapacity does not constitute a judicial determination or *prima facie* showing that the ward lacks the capacity to stand trial in a criminal proceeding. *Koehler v. State*, 830 S.W.2d 665 (Tex. App.—San Antonio 1992, no writ). In *Koehler*, the court noted the difference between the issues of capacity involved in a guardianship proceeding and a criminal proceeding.

In guardianship proceedings, the court found that it is "designed to protect a person who is, for any reason, mentally incapable of taking care of himself or his property. *Id.* at 666 (*citing former* TEX. PROB. CODE ANN. § 114 (Vernon 1980)). In contrast, "a proceeding to determine competency to stand trial contemplate a determination of whether a defendant in a criminal action has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as a factual, understanding of the charges brought against him." *Id.* at 666 (*citing former* TEX. CODE CRIM. PROC. ANN. art. 46.02 § 1 (Vernon 1979)). Therefore, the court held that an adjudication of incapacity for guardianship purposes under the Probate Code does not constitute a determination of that person's mental competency to stand trial against criminal charges. *Id.* at 666 (*citing former Leyva v. State*, 552 S.W.2d 158, 160 (Tex.Crim.App. 1977); *Ainsworth v. State*, 493 S.W.2d 517, 522 (Tex.Crim.App. 1973); *see also* TEX. REV. CIV. STAT. ANN. art. 5547-83(b) (Vernon 1958) (judicial determination person is mentally ill does not constitute determination or adjudication of mental competency)).

XIII. CONCLUSION

As we can see, as the elderly and incapacitated increase in number, the complexities of dealing with their needs, their care, their finances and the persons or entities who would take advantage of them is complex. We try to strike a balance between the rights and dignities of the elderly and protecting them from themselves and others. In our transient society, you add to the complexity that persons "live" in different states, have assets in different states, and seek care in yet other states, and the need for uniformity in state statutes on jurisdiction and venue in guardianships becomes a must. It is interesting to study the evolution of guardianship from little care for due process and rights of the proposed incapacitated, to numerous safeguards to the rights of the incapacitated that lead to more and more complex questions of how to balance rights and protection. It is hoped that this paper has provided some guidance.

Sec. 102.003. RIGHTS OF THE ELDERLY. (a) An elderly individual has all the rights, benefits, responsibilities, and privileges granted by the constitution and laws of this state and the United States, except where lawfully restricted. The elderly individual has the right to be free of interference, coercion, discrimination, and reprisal in exercising these civil rights.

(b) An elderly individual has the right to be treated with dignity and respect for the personal integrity of the individual, without regard to race, religion, national origin, sex, age, disability, marital status, or source of payment. This means that the elderly individual:

(1) has the right to make the individual's own choices regarding the individual's personal affairs, care, benefits, and services;

(2) has the right to be free from abuse, neglect, and exploitation; and

(3) if protective measures are required, has the right to designate a guardian or representative to ensure the right to quality stewardship of the individual's affairs.

(c) An elderly individual has the right to be free from physical and mental abuse, including corporal punishment or physical or chemical restraints that are administered for the purpose of discipline or convenience and not required to treat the individual's medical symptoms. A person providing services may use physical or chemical restraints only if the use is authorized in writing by a physician or the use is necessary in an emergency to protect the elderly individual or others from injury. A physician's written authorization for the use of restraints must specify the circumstances under which the restraints may be used and the duration for which the restraints may be used. Except in an emergency, restraints may only be administered by qualified medical personnel.

(d) A mentally retarded elderly individual with a court-appointed guardian of the person may participate in a behavior

modification program involving use of restraints or adverse stimuli only with the informed consent of the guardian.

(e) An elderly individual may not be prohibited from communicating in the individual's native language with other individuals or employees for the purpose of acquiring or providing any type of treatment, care, or services.

(f) An elderly individual may complain about the individual's care or treatment. The complaint may be made anonymously or communicated by a person designated by the elderly individual. The person providing service shall promptly respond to resolve the complaint. The person providing services may not discriminate or take other punitive action against an elderly individual who makes a complaint.

(g) An elderly individual is entitled to privacy while attending to personal needs and a private place for receiving visitors or associating with other individuals unless providing privacy would infringe on the rights of other individuals. This right applies to medical treatment, written communications, telephone conversations, meeting with family, and access to resident councils. An elderly person may send and receive unopened mail, and the person providing services shall ensure that the individual's mail is sent and delivered promptly. If an elderly individual is married and the spouse is receiving similar services, the couple may share a room.

(h) An elderly individual may participate in activities of social, religious, or community groups unless the participation interferes with the rights of other persons.

(i) An elderly individual may manage the individual's personal financial affairs. The elderly individual may authorize in writing another person to manage the individual's money. The elderly individual may choose the manner in which the individual's money is managed, including a money management program, a representative payee program, a financial power of attorney, a trust, or a similar method, and the individual may choose the least

restrictive of these methods. A person designated to manage an elderly individual's money shall do so in accordance with each applicable program policy, law, or rule. On request of the elderly individual or the individual's representative, the person designated to manage the elderly individual's money shall make available the related financial records and provide an accounting of the money. An elderly individual's designation of another person to manage the individual's money does not affect the individual's ability to exercise another right described by this chapter. If an elderly individual is unable to designate another person to manage the individual's affairs and a guardian is designated by a court, the guardian shall manage the individual's money in accordance with the Probate Code and other applicable laws.

(j) An elderly individual is entitled to access to the individual's personal and clinical records. These records are confidential and may not be released without the elderly individual's consent, except the records may be released:

(1) to another person providing services at the time the elderly individual is transferred; or

(2) if the release is required by another law.

(k) A person providing services shall fully inform an elderly individual, in language that the individual can understand, of the individual's total medical condition and shall notify the individual whenever there is a significant change in the person's medical condition.

(l) An elderly individual may choose and retain a personal physician and is entitled to be fully informed in advance about treatment or care that may affect the individual's well-being.

(m) An elderly individual may participate in an individual plan of care that describes the individual's medical, nursing, and psychological needs and how the needs will be met.

(n) An elderly individual may refuse medical treatment after the elderly individual:

(1) is advised by the person providing services of the possible consequences of refusing treatment; and

(2) acknowledges that the individual clearly understands the consequences of refusing treatment.

(o) An elderly individual may retain and use personal possessions, including clothing and furnishings, as space permits. The number of personal possessions may be limited for the health and safety of other individuals.

(p) An elderly individual may refuse to perform services for the person providing services.

(q) Not later than the 30th day after the date the elderly individual is admitted for service, a person providing services shall inform the individual:

(1) whether the individual is entitled to benefits under Medicare or Medicaid; and

(2) which items and services are covered by these benefits, including items or services for which the elderly individual may not be charged.

(r) A person providing services may not transfer or discharge an elderly individual unless:

(1) the transfer is for the elderly individual's welfare, and the individual's needs cannot be met by the person providing services;

(2) the elderly individual's health is improved sufficiently so that services are no longer needed;

(3) the elderly individual's health and safety or the health and safety of another individual would be endangered if the transfer or discharge was not made;

(4) the person providing services ceases to operate or to participate in the program that reimburses the person providing services for the elderly individual's treatment or care; or

(5) the elderly individual fails, after reasonable and appropriate notices, to pay for services.

(s) Except in an emergency, a person providing services may

not transfer or discharge an elderly individual from a residential facility until the 30th day after the date the person providing services provides written notice to the elderly individual, the individual's legal representative, or a member of the individual's family stating:

(1) that the person providing services intends to transfer or to discharge the elderly individual;

(2) the reason for the transfer or discharge listed in Subsection (r);

(3) the effective date of the transfer or discharge;

(4) if the individual is to be transferred, the location to which the individual will be transferred; and

(5) the individual's right to appeal the action and the person to whom the appeal should be directed.

(t) An elderly individual may:

(1) make a living will by executing a directive under the Natural Death Act (Chapter 672, Health and Safety Code);

(2) execute a durable power of attorney for health care under Chapter 135, Civil Practice and Remedies Code; or

(3) designate a guardian in advance of need to make decisions regarding the individual's health care should the individual become incapacitated.

Added by Acts 1983, 68th Leg., p. 5159, ch. 936, Sec. 1, eff. Sept. 1, 1983. Amended by Acts 1997, 75th Leg., ch. 475, Sec. 1, eff. Sept. 1, 1997.

COMPLEX FAMILY MATTERS IN GUARDIANSHIP
ADVANCED GUARDIANSHIP COURSE
Sponsored by the State Bar of Texas
Houston, Texas
March 6, 2006

A Dozen Reasons to Bring your Family Code to Probate Court

By Sharon B. Gardner
Crain, Caton & James, P.C.
1401 McKinney, Suite 1700
Houston, Texas 77010
(713) 658-2323

1. Child Support Obligations. If a divorce decree is silent as to whether a child support obligation survives death, the obligation will survive. TEX. FAM. CODE § 154.006—Now a class 4 claim (child support) but still reduce to judgment to file claim.

   -Divorce decree may provide that the obligor have life insurance to cover the support payment.

2. The effect of divorce on will provisions. Section 69 was amended to provide that all will provisions do not survive the divorce and are revoked including gift over to the non-relatives of the testator.

3. Qualified Community Administrations—Gone.

4. Managing Conservator is appointed guardian under Family Code 682, 604 and 606--ask for managing conservator instead of a guardian when there is a living parent.

5. Annulment of marriage after death based on mental incapacity can be done pursuant to Section 47A by following the annulment statute in the Family Code Chapter 6, Section 6.108 of the Family Code—this right survives after death under Section 47A of Probate Code.

6. Genetic Testing in Heirship. A probate judge now has jurisdiction and authority to order genetic testing in an heirship proceeding. TEX. FAM. CODE § 711.004.

7. Common Law Marriages. Proceedings must be brought in two years to establish or presumption of no marriage must be overcome—Agreement, cohabitation and holding our still elements.

8. Disabled Child. Support obligation of parents survive if child has legal disability. TEX. FAM. CODE § 154.001(4).

9. Uniform Parentage Act. TEX. FAM. CODE § 160.101. Wait to have your heirship until embryos implanted and born...ask that question in heirships.

10. Final Probate Orders. Order awarding homestead and/or determining abandonment of a homestead; order authorizing divorce are appealable. Don't wait.

11. Transferring Dispute over Custody Back to Family Court. Section 608 Contested guardianship of a minor.

12. Family Allowance. A surviving spouse is entitled to a family allowance even if she gets benefits under will. Non-probate assets not to be considered such as life insurance or her share of community property. *See Estateof Wolfe*, 268 S.W.3d 780 (Tex.App.—Fort Worth 2008, n.w.h.).