THE ROLE OF THE AD LITEM IN GUARDIANSHIP PROCEEDINGS

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CHAPTER 14

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Volunteer Legal Services of Central Texas, Pro Bono Award - 2001 & 1993
# THE ROLE OF THE AD LITEM IN GUARDIANSHIP PROCEEDINGS

## TABLE OF CONTENTS

I. SCOPE OF ARTICLE ................................................................. 1

II. APPOINTMENT OF ATTORNEY AD LITEM AND GUARDIAN AD LITEM .............. 1
   A. Overview .............................................................................. 1
   B. Statutory Authority ............................................................ 1

III. ATTORNEY AD LITEM .......................................................... 1
   A. Overview of the Role of the Attorney Ad Litem ..................... 1
   B. Appointment of the Attorney Ad Litem .................................. 2
   C. Duties of the Attorney Ad Litem .......................................... 2
      1. Be an Advocate .............................................................. 2
      2. Statutory Duties ............................................................. 3
         a. Meeting a Ward ......................................................... 3
         b. Request/Receive Medical History/Records ....................... 3
         c. Review Application and Court File ............................... 3
      3. Duties not Enumerated in the Statutes ................................. 3
         a. File Answer .............................................................. 3
         b. Contact Proposed Ward’s Physician ............................... 3
         c. Request Medical Examination ..................................... 3
         d. Meet and Confirm Age of Minor .................................. 4
         e. Arrange For Proposed Ward to Attend Hearing ............... 4
         f. Verify Applicant’s Eligibility ....................................... 4
         g. Confidentiality .......................................................... 4
         h. Prepare for Hearing ................................................... 4
         i. Communications ....................................................... 4
   D. Additional Considerations in Contested Guardianship .................... 5
      1. Demand Jury .............................................................. 5
      b. Suitability to Serve ...................................................... 5
      c. Selection Between Suitable Persons ................................. 5
   2. Communicate ....................................................................... 5
   3. File Pleadings ..................................................................... 5
   4. Obtain & Designate Experts .............................................. 5
   5. Interview Witnesses .......................................................... 5
   6. Object to Hearsay ............................................................ 5
   7. Document File ...................................................................... 6
   8. Consider Whether To Close Hearing .................................... 6
   9. Consider Whether to Seek Continuance ................................. 6
   10. Security for Costs ............................................................ 6
   11. Verify Medical Disclosure ............................................... 6
   E. Duties After Determination of Incapacity .................................. 6
   F. Payment of Fees and Expenses .......................................... 7
III. GUARDIAN AD LITEM ................................................................. 7
   A. Overview of the Role of the Guardian Ad Litem ........................................... 7
   B. Appointment ......................................................................................... 8
   C. Duties of the Guardian Ad Litem .......................................................... 8
      1. Investigate Need for Guardianship ....................................................... 8
      2. Initiate Permanent Guardianship Proceeding if Necessary ....................... 8
      3. Initiate Temporary Guardianship Proceeding if Necessary ....................... 8
      4. Restoration proceedings ...................................................................... 9
   D. Payment of Fees and Expenses .......................................................... 10

VI. MEDICAL AND RELATED EVIDENTIARY ISSUES ............................... 10
   A. General Means to Obtain Medical Evidence ........................................... 10
      1. Form Doctor’s Letter ........................................................................... 10
      2. Independent Medical Examination ...................................................... 11
   B. Privileges and Exceptions ................................................................. 12
      1. Doctor/Patient Privilege ...................................................................... 12
         a. General Rule .................................................................................... 12
         b. Waiver of Privilege ........................................................................ 12
      2. Mental Health Privilege ...................................................................... 12
         a. General Rule .................................................................................... 12
         b. Waiver of Privilege ........................................................................ 12
      3. Exceptions To Privilege ........................................................................ 12
         a. Guardianship Miranda Warning ....................................................... 12
         b. Prepare Medical Experts In Advance ............................................... 13
      4. Options If Guardianship Miranda Not Given ....................................... 13
   C. Confidentiality of State and County Agency Reports ......................... 13
      1. Human Resources Code Section 48.101................................................. 13
         a. General Rule: Not Discoverable ....................................................... 13
         b. Exception ......................................................................................... 14
   D. Questions for the Medical Expert Regarding Capacity ....................... 14

V. CONSIDERATIONS IN PREPARING FOR THE HEARING ....................... 16
   A. Address Any Physical Problems of Proposed Ward ............................... 16
      1. Overview ............................................................................................. 16
      2. Consider Medications ......................................................................... 16
      3. Consider Treatable Physical Condition ............................................... 16
   B. Discovery ............................................................................................... 16
   C. Proposed Ward’s Appearance and Demeanor ....................................... 17
   D. Getting Proposed Ward to Courthouse ............................................... 17
   E. Money Management ............................................................................ 18
   F. Plea to the Judge .................................................................................. 18
   G. Ward’s Presence in Courtroom ............................................................ 18
   H. Preference of Ward .............................................................................. 18

APPENDIX .............................................................................................. 20
# THE ROLE OF THE AD LITEM IN GUARDIANSHIP PROCEEDINGS

## TABLE OF AUTHORITIES

### Cases

<table>
<thead>
<tr>
<th>Case</th>
<th>Citations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chapa v. Hernandez, 587 S.W.2d 778</td>
<td>5</td>
</tr>
<tr>
<td>(Tex. Civ. App.--Corpus Christi 1979, no writ)</td>
<td></td>
</tr>
<tr>
<td>Coastal States Gas Producing Co. v. Locker, 436 S.W.2d 592</td>
<td>11</td>
</tr>
<tr>
<td>(Tex. Civ. App.--Houston [14th Dist.] 1968, no writ)</td>
<td></td>
</tr>
<tr>
<td>Dawson v. Garcia, 666 S.W.2d 254 (Tex. App.--Dallas 1984, no writ)</td>
<td>11</td>
</tr>
<tr>
<td>Executors of Tartt’s Estate v. Harpold, 531 S.W.2d 696 (Tex. Civ. App.--Houston [14th Dist.] 1975, writ ref’d n.r.e.)</td>
<td>7</td>
</tr>
<tr>
<td>In re Guardianship of Dahl,</td>
<td>5</td>
</tr>
<tr>
<td>590 S.W.2d 191, 198 (Tex. App.--Amarillo 1979, writ ref’d n.r.e.)</td>
<td></td>
</tr>
<tr>
<td>Krause v. White, 612 S.W.2d 639, 643</td>
<td>5</td>
</tr>
<tr>
<td>(Tex. App.--Houston [14th Dist.] 1981, writ ref’d n.r.e.)</td>
<td></td>
</tr>
<tr>
<td>Phillips Petroleum, 702 S.W.2d 672</td>
<td>11</td>
</tr>
<tr>
<td>(Tex. App.--Houston [14th Dist.] 1985, writ ref’d n.r.e.)</td>
<td></td>
</tr>
<tr>
<td>Pleasant Hills Children’s Home v. Nida, 596 S.W.2d 947</td>
<td>11</td>
</tr>
<tr>
<td>(Tex. Civ. App.--Fort Worth 1980, no writ)</td>
<td></td>
</tr>
<tr>
<td>Roark v. Mother Francis Hosp., 862 S.W.2d 643 (Tex. App.--Tyler 1993, no writ)</td>
<td>8, 11</td>
</tr>
<tr>
<td>Subia v. Texas Dept. of Human Servs.,</td>
<td>14</td>
</tr>
<tr>
<td>750 S.W.2d 827 (Tex. App.--El Paso 1988, no writ)</td>
<td></td>
</tr>
<tr>
<td>Ulrickson v. Hawkins, 696 S.W.2d</td>
<td></td>
</tr>
<tr>
<td>704 (Tex. App.--Fort Worth 1985, writ ref’d n.r.e.)</td>
<td>5</td>
</tr>
<tr>
<td>Woodruff v. Boyd, 891 S.W.2d 689 (Tex. App.--Dallas 1994, writ denied)</td>
<td>8</td>
</tr>
</tbody>
</table>

### Statutes

<table>
<thead>
<tr>
<th>Statute</th>
<th>Citations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 22.01 of the Texas Government Code</td>
<td>2</td>
</tr>
<tr>
<td>Section 642 of the Texas Probate Code</td>
<td>10</td>
</tr>
<tr>
<td>Section 694B of the Texas Probate Code</td>
<td>10</td>
</tr>
<tr>
<td>Section 81.114 of the Texas Government Code</td>
<td>2</td>
</tr>
</tbody>
</table>
# Rules

Section 1.02(g) of the Texas Disciplinary Rules of Professional Conduct ........................................ 2, 3
Tex. R. Civ. P. 13 ........................................................................................................................................ 11
Tex. R. Evid. 509 (b)(1) .......................................................................................................................... 13
Tex. R. Evid. 509 (b)(2) .......................................................................................................................... 13
Tex. R. Evid. 509(f) .................................................................................................................................. 13
Tex. R. Evid. 509(f)(1) ............................................................................................................................ 13
Tex. R. Evid. 510 (d)(2) .......................................................................................................................... 13
Tex. R. Evid. 510(b) .................................................................................................................................. 13
I. SCOPE OF ARTICLE

This article discusses the appointment, role, and duties of the attorney ad litem and guardian ad litem, and issues that arise in every guardianship. Every guardianship is initially a “contested” guardianship. At a minimum, the court must appoint an attorney ad litem to advocate for the proposed ward. In some cases the attorney ad litem needs only to ensure the applicant does his or her job and meets their burden of proof. Other guardianships, however, are more complex as the issues of capacity and/or suitability may be dispute. This article is intended to provide practical tips to ad litems in carrying out his or her duties.

All references to sections will refer to the Texas Probate Code unless otherwise noted.

II. APPOINTMENT OF ATTORNEY AD LITEM AND GUARDIAN AD LITEM

A. Overview

The positions of guardian and attorney ad litems are among the most misunderstood in all of Texas law. The confusion exists because the same titles are used in the Texas Rules of Civil Procedure, the Probate Code, the Texas Family Code, and other statutes, for positions whose duties are substantially different. Attorneys who are comfortable with the role of guardian or attorney ad litem in one context may completely misunderstand the duties and responsibilities in another situation.

Under the Texas Probate Code, an attorney ad litem represents the proposed ward, while a guardian ad litem considers the ward’s best interests in making various recommendations to the court.

B. Statutory Authority

The principal basis for the appointment of a guardian or attorney ad litem is statutory, either in the Probate Code or the Rules of Civil Procedure. There is sparse case law concerning the role of the guardian ad litem and attorney ad litem in civil cases, although some cases exist concerning the necessity of the appointment of a guardian ad litem, and the fees charged and awarded. Almost no authorities exist with respect to the duties, obligations, responsibilities, and liabilities of a guardian ad litem in civil court. The reason for the lack of case law is fairly obvious, in that guardians ad litem are generally appointed to approve a settlement and attorneys ad litem are appointed to represent absent parties. An appeal is likely to occur only in cases in which a dispute over guardian ad litem fees, charged or awarded, has arisen.

III. ATTORNEY AD LITEM

A. Overview of the Role of the Attorney Ad Litem

An attorney ad litem is an attorney appointed by a court to represent and advocate on behalf of a proposed ward, an incapacitated person, or an unborn person in a guardianship proceeding. TEX PROB. CODE ANN. § 601(1) (Vernon Supp. 2002). In order to be eligible for appointment as an attorney ad litem, an attorney must be certified by the State Bar of Texas as having successfully completed a course of study of guardianship law and procedure sponsored by the State Bar. For certification, the State Bar currently requires the completion of a three (3) hour CLE course. This can be fulfilled by either attending an actual seminar or by video. Local bar associations often offer the video. Once the certification is
obtained, it should be forwarded to the local court(s) having jurisdiction over guardianship matters. Section 646(b)-(d) also requires re-certification every two (2) years if the guardianship course has significantly changed since the attorney last completed the course.

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

B. Appointment of the Attorney Ad Litem

An attorney ad litem is appointed pursuant to Section 646. The court must appoint an attorney ad litem to represent the interests of the proposed ward in a guardianship proceeding for the appointment of a guardian. See TEX. PROB. CODE ANN. § 646 (Vernon Supp. 2002).

C. Duties of the Attorney Ad Litem

1. Be an Advocate

The attorney ad litem is the proposed ward’s attorney. His or her job is to advocate for the proposed ward. Thus, the attorney ad litem for the proposed ward must decide whether to actively contest the application, or to simply ensure that the applicant and his or her counsel make a prima facie case. The question is easy when the proposed ward is in a persistent vegetative state after a traumatic brain injury; or is suffering from advanced Alzheimer’s related senile dementia. When the proposed ward is only occasionally confused, or is refusing medical treatment that is discretionary, the role of the attorney ad litem is much more acute. If the proposed ward is opposed to the guardianship, the attorney ad litem must oppose it. That is his or her job. An attorney ad litem is not appointed as "window-dressing" to an immutable procedure.

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

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

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

Finally, it is no longer appropriate to file a report of attorney ad litem with the court. The attorney ad litem is an advocate. If the attorney ad litem files a report, this may cause him or her to become a fact witness.
2. Statutory Duties

Section 647 sets out an attorney ad litem’s basic duties which include the following:

a. Meeting a Ward

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

b. Request/Receive Medical History/Records

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

c. Review Application and Court File

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

3. Duties not Enumerated in the Statutes

In addition to the basic statutory duties, an attorney ad litem should consider the following actions.

a. File Answer

An attorney ad litem should file a general denial prior to the hearing.

b. Contact Proposed Ward’s Physician

An attorney ad litem should speak to the ward’s doctor or other care provider if the proposed ward is an incapacitated person.

c. Request Medical Examination

An attorney ad litem should apply for an independent mental and/or physical exam if he or she believes the medical information is inadequate or incorrect. See discussion infra and sample Application For Independent Medical Examination.
d. Meet and Confirm Age of Minor

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

e. Arrange For Proposed Ward to Attend Hearing

The attorney ad litem should make an initial determination regarding whether the proposed ward is able to attend the hearing. If possible, the proposed ward should attend the hearing. If the proposed ward is not able to attend the hearing, the attorney ad litem should be prepared, either by personal knowledge or by calling the proposed ward’s physician or other appropriate witness, to testify why the proposed ward’s presence in the courtroom is not in the proposed ward’s best interest. There are several methods that can be utilized to prove why the proposed ward’s presence at the hearing would not be in his best interest. These may include:

- Incorporating into the doctor’s letter the medical reasons why the proposed ward’s presence is inappropriate.
- Preparation of a written statement by the ad litem for his client to sign expressing his desire not to appear.
- Tape-record the proposed ward’s statement (with permission) for the court.
- Arrange for a telephonic appearance if the proposed ward is physically unable to attend.
- Testimony by the ad litem of the proposed ward’s lack of desire or ability to attend.

f. Verify Applicant’s Eligibility

The attorney ad litem should attempt to determine whether the person seeking to be appointed guardian is appropriate and eligible. See Tex. Prob. Code Ann. §§ 642, 681 (Vernon Supp. 2002). He or she should also check the extent and nature of the proposed ward’s estate (this will also be useful in setting the bond) and discover if the applicant owes money to or has taken financial advantage of the proposed ward.

g. Confidentiality

An attorney ad litem should maintain client confidences.

h. Prepare for Hearing

The attorney ad litem should notify the proposed ward in advance of the hearing of the position he or she intends to advocate in court. He should also prepare the proposed ward to testify, if necessary. See discussion infra.

i. Communications

The attorney ad litem must avoid ex parte communications with the court.
D. Additional Considerations in Contested Guardianship

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

1. Demand Jury

If appropriate, the attorney ad litem should demand a jury trial in writing and pay the jury fee. Pursuant to Section 685, the proposed ward is entitled to request a jury trial. See TEX. PROB. CODE ANN. § 685 (Vernon Supp. 2002). Issues that may be tried to a jury include the following:

- Proposed Ward’s capacity. See Krause v. White, 612 S.W.2d 639, 643 (Tex. App.–Houston [14th Dist.] 1981, writ ref’d n.r.e.) (issue of mental capacity in temporary guardianship tried to jury); In re Guardianship of Dahl, 590 S.W.2d 191, 198 (Tex. App.–Amarillo 1979, writ ref’d n.r.e.) (issue of mental capacity in permanent guardianship tried to jury).
- An applicant’s suitability to serve. See Ulrickson v. Hawkins, 696 S.W.2d 704, 708 (Tex. App.–Fort Worth 1985, writ ref’d n.r.e.).

2. Communicate

The attorney ad litem should communicate with counsel and, if appropriate, with the prior permission of counsel, meet the opposing parties to gather information. See discussion infra.

3. File Pleadings

If appropriate, the attorney ad litem should file necessary pleadings, including discovery requests. See discussion infra.

4. Obtain & Designate Experts

If appropriate, the attorney ad litem should obtain opinions outside the scope of his or her expertise. See discussion infra.

5. Interview Witnesses

If appropriate, the attorney ad litem should interview doctors, nurses, social workers, pastors, priests, rabbis, hairdressers, and other potential witnesses. See discussion infra.

6. Object to Hearsay

If appropriate, the attorney ad litem should object to the applicant’s doctor’s letter as hearsay. This will force the applicant to arrange for a medical expert to attend the hearing. This allows the attorney ad litem the opportunity to cross-exam the medical expert regarding his or her examination of the proposed ward and the basis of the expert’s opinions. Out of courtesy and to avoid an unnecessary hearing, the
attorney ad litem should inform the other parties if he or she intends to object to the letter on the basis of hearsay.

7. **Document File**

If appropriate, the attorney ad litem should document his or her file so that they are ready for trial.

8. **Consider Whether To Close Hearing**

Sections 685 and 875 of the Texas Probate Code provide that the ward or the ward’s attorney may request a closed hearing. Such requests should be timely made and in writing so as to preserve the record.

9. **Consider Whether to Seek Continuance**

The hearing to confirm the appointment of a temporary guardian may be extended pursuant to an agreement. The ad litem’s consent to the extension is mandatory. **TEX. PROB. CODE ANN. § 875(f)(2) (Vernon Supp. 2002).** If personal citation has not been delivered to the ward, a continuance is mandated. The continuance may be for the entire period of the temporary guardianship, however, this is not the best practice.

10. **Security for Costs**

If appropriate, the attorney ad litem should consider whether security for the attorney ad litem’s costs should be posted. **See TEX. PROB. CODE ANN. § 622 (Vernon Supp. 2002).** If the attorney ad litem perceives that either the application or the contest is totally frivolous, he or she can file a motion for security for costs. If filed, the parties will generally consider their pleadings and decide whether the risk of having to post security is worth going forward.

11. **Verify Medical Disclosure**

If appropriate, the attorney ad litem should consider whether the medical professional that examined the proposed ward made adequate disclosure prior to the medical examination. If the health professional fails to make this disclosure, the attorney ad litem should consider whether it would be beneficial to move to exclude all of the medical expert’s testimony. **See discussion infra.**

E. **Duties After Determination of Incapacity**

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

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

The court shall order the payment of a fee set by the court as compensation to the attorneys, mental health professionals, and interpreters appointed under Sections 646 and 687 of this code, as applicable, to be taxed as costs in the case. If after examining the proposed ward’s assets the court determines the proposed ward is unable to pay for services provided by an attorney, a mental health professional, or an interpreter appointed under Sections 646 and 687 of this code, as applicable, the county is responsible for the cost of those services. See TEX. PROB. CODE ANN. § 622 (Vernon Supp. 2002).

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

III. GUARDIAN AD LITEM

A. Overview of the Role of the Guardian Ad Litem

The term “guardian ad litem” means a person who is appointed by a court to represent the best interests of an incapacitated person in a guardianship proceeding. TEX. PROB. CODE ANN. § 601(11) (Vernon Supp. 2002). A guardian ad litem is an officer of the court and must consider the best interests of the ward or proposed ward. Section 681(4) also provides for the appointment of a guardian ad litem where the court determines that (i) the person who has applied to be appointed guardian is also a party to a lawsuit concerning or affecting the proposed ward’s welfare and (ii) the appointment of a guardian ad litem to represent the best interests of the proposed ward throughout the litigation will avoid a possible conflict. The guardian ad litem shall protect the incapacitated person in a manner that will enable the court to determine what action will be in the best interests of the incapacitated person. See TEX. PROB. CODE ANN. § 645 (Vernon Supp. 2002).

Attorneys serving as a guardian ad litem should be aware that it could be argued that he or she may owe a fiduciary duty to the proposed ward or ward depending on his or her role in the proceeding. Until a few years ago, the Texas courts had not addressed the issue of an attorney's potential liability for serving as a guardian ad litem. One of the first cases to address this issue is Woodruff v. Boyd, 891 S.W.2d 689 (Tex. App.-Dallas 1994, writ denied). In Woodruff, the court addressed these issues and a careful reading by any attorney considering acting as an ad litem is highly recommended. In short, the decision finds that (i) a guardian ad litem's role establishes a fiduciary relationship with the ward, (ii) a guardian ad litem is not an agent of the court and therefore is not granted judicial immunity, and (iii) no attorney-client relationship exists between a guardian ad litem and a ward. Id. at 708-711; see also Roark v. Mother Francis Hosp., 862 S.W.2d 643, 647 (Tex. App.--Tyler 1993, no writ) (the court of appeals recognized the different roles and affirmed a trial court's refusal to award any fees to the guardian ad litem that were based on his performance of duties as plaintiffs' attorney).
B.  Appointment

The court may appoint a guardian ad litem to represent the interests of an incapacitated person in a guardianship proceeding. Any party or the attorney ad litem may seek the appointment of a guardian ad litem. The court may also appoint a guardian ad litem on its own motion. This appointment is, however, discretionary.

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

C.  Duties of the Guardian Ad Litem

While the amendments to the Probate Code clearly define the standard that must be followed by a guardian ad litem, there is not a clear definition of the separate or different duties of the guardian ad litem as opposed to the attorney ad litem.

1.  Investigate Need for Guardianship

Some judges appoint a guardian ad litem in those situations in which there is no applicant readily apparent, and the Court Investigator has determined that the guardianship proceeding must go forward, because there is not a less restrictive alternative. In this situation, the guardian ad litem should determine whether it is in the best interest of the proposed ward to have a guardianship proceeding commenced.

2.  Initiate Permanent Guardianship Proceeding if Necessary

If the facts indicate that the proposed ward requires the appointment of a guardian, the guardian ad litem should attempt to contact members of the proposed ward's family to ascertain if a potential guardian can be found. The guardian ad litem should determine if the proposed guardian has counsel to prepare the application. If no potential guardian can be found, or if the proposed guardian does not have counsel, the guardian ad litem should prepare, pursuant to Texas Probate Code Section 683, an application for guardianship, requesting that the court appoint either the family member or another person as guardian.

3.  Initiate Temporary Guardianship Proceeding if Necessary

If the facts indicate that the proposed ward requires the immediate appointment of a guardian, the guardian ad litem should consider seeking the appointment of a temporary guardian of ward’s person and/or estate.

Additionally, when a temporary or permanent guardianship is contested, the guardian ad litem should consider seeking the appointment a temporary guardian pending contest if the facts indicate that the proposed ward’s person and/or estate may be in imminent danger.
Temporary guardianships pending contest are governed by Section 875(k) of the Probate Code, which provides:

If an application for a temporary guardianship, for the conversion of a temporary guardianship to a permanent guardianship, or for a permanent guardianship is challenged or contested, the court, on the court’s own motion or on the motion of any interested party, may appoint a new temporary guardian without issuing additional citation if the court finds that the appointment is necessary to protect the proposed ward or the proposed ward’s estate. A temporary guardian appointed under this subsection must qualify in the same form and manner required of a guardian under this code. The term of the temporary guardianship expires at the conclusion of the hearing challenging or contesting the application or on the date a permanent guardian the court appoints for the proposed ward qualifies to serve as the ward’s guardian.


The court must find that the appointment is necessary to protect the ward or his estate, and that there is substantial evidence of incapacity. Id. The presence of imminent danger, however, is not an essential element in this determination. To the extent the court will allow the selection, it is best if the parties agree to a third party to serve pending contest. Such agreement will not be construed by the court as a tacit admission for the necessity of a guardian. The court may however, take judicial notice of arguments made in temporary guardianship proceedings and in any subsequent proceedings. Id.

Form: Attached as Exhibit A is a sample Application for Appointment of Temporary Guardian Pending Contest Pursuant to Texas Probate Code 875(k).

Form: Attached as Exhibits B and C are sample Motion to Extend Temporary Guardianship Pending Contest Pursuant to Texas Probate Code Section 875(k) and related Order.

4. Restoration proceedings

A guardian ad litem may also be appointed in a restoration hearing. The guardian ad litem should meet the ward, contract the ward’s medical advisors and prepare a report of his or her findings to the court. The report should inform the court whether it is in the best interest of the ward to be restored. Effective September 1, 1999, the restoration statutes provide as follows:

- A ward may initiate the process by an informal letter.
- Anyone has standing to bring the action or contest it, except as set out in Section 642 of the Texas Probate Code (except those with an adverse interest).
- Except for good cause shown, a subsequent action for restoration may not be filed for 1 year.
- Application requirements set out in Section 694B of the Texas Probate Code are similar to those for a guardianship including listing names and addresses of the ward’s spouse, children and siblings, or next of kin, if the ward is over 60 years of age.
The Role of the Ad Litem in Guardianship Proceedings  Chapter 14

- The court must appoint an attorney ad litem that only represent the ward in that restoration or modification proceeding.
- The court shall only hear “relevant” evidence. This presumably means that the Court will not look at remote medical evidence.
- The applicant has the burden of proof, which is by a preponderance of the evidence.
- A doctor’s certificate must be provided within 120 days of filing the application or after the application but before the date of the hearing.
- The ward may retain private counsel. That lawyer will be reimbursed from the ward’s estate if the court concludes that the attorney “had a good-faith belief that the ward had the capacity to retain the attorney’s services.”
- These changes apply to all applications “in which a final determination on the application has not been made” prior to September 1, 1999.


D. Payment of Fees and Expenses

Similar to an attorney ad litem, a guardian ad litem is entitled to reasonable compensation for services in the amount set by the court to be taxed as costs in the proceeding. If a guardian ad litem is appointed under Section 681(4) of the Probate Code, the fees and expenses of the guardian ad litem are costs of the litigation proceeding that made the appointment necessary. Be aware of the opinion of Roark v. Mother Francis Hosp., 862 S.W.2d 643 (Tex. App.--Tyler 1993, writ denied), which held as follows:

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

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

VI. MEDICAL AND RELATED EVIDENTIARY ISSUES

A. General Means to Obtain Medical Evidence

1. Form Doctor’s Letter

Unless the proposed ward is a minor, the court must be provided with current medical evidence of the person’s incapacity prior to the appointment of a guardian. It is generally advisable to obtain a letter or certificate from a doctor licensed in Texas, prior to the filing of the guardianship application. This allows
the attorney to sign the pleading with a good faith belief that the application is not groundless or frivolous. 


If possible, a copy of the letter or certificate, stating the doctor’s observations and conclusions, should be attached to the original application or guardianship. The original letter will be submitted in evidence to the court at the hearing. The physician’s letter should conclude that the proposed ward is either partially or totally incapacitated and generally describe the tasks they are no longer capable of performing. The examination, giving rise to the diagnosis and the creation of resulting letter or certificate, must occur within 120 days of the filing of the application. TEX. CODE ANN. § 687(a) (Vernon Supp. 2002); see Trimble, supra. (admission and reliance on doctor’s letter dated more than 120 days before application not reversible error). Because courts differ on the form of the doctor’s letter and the details required, it is advisable to have the doctor’s letter meets the minimum requirement of all potential courts. For example, doctor’s letters filed in certain courts must now be supported by an affidavit by the physician confirming that the doctor’s letter is true and correct to the best of the doctor’s knowledge.

If the proposed ward’s incapacity is based on mental retardation, he should be examined by a physician or psychologist licensed in Texas or certified by the Texas Department of Mental Health and Mental Retardation to perform such examinations. Otherwise, documentation must be filed with the court that shows the proposed ward has been examined according to the rules adopted by the Texas Department of Mental Health and Mental Retardation not more than six (6) months prior to the date of the hearing. The examining doctor must submit his or her written findings and recommendations to the court.

Unless successfully excluded, the physician’s letter will be offered and admitted as evidence of the proposed ward’s incapacity to the court. In many cases, this alone may be deemed to be sufficient medical evidence to establish a guardianship. When capacity is an issue, however, the attorney ad litem or contestant will likely (and should) object to the letter on the basis of hearsay. If the potential for a contest exists as to the issue of incapacity, the applicant for guardianship should retain a psychiatrist or neurologist with court experience to examine and report on the proposed ward, and to testify as to the proposed ward’s incapacity.

2. Independent Medical Examination

It may be necessary to seek a court ordered examination by a physician to obtain an independent medical evaluation of the proposed ward. TEX. CODE ANN. § 687 (Vernon Supp. 2002). This is often the most effective means to obtain the required medical when the proposed ward is uncooperative or the requisite consent cannot be obtained to waive the patient/physician privilege. It is also a means for the ad litem to obtain a second opinion. If an independent medical exam is sought, an application should be filed with the court setting out the requested scope of the examination and any requested limitations. If someone other than the attorney ad litem requests the exam, it is advisable to request that the court direct the court appointed physician to release a copy of the doctor’s report to the requesting party.

Form: Attached as Exhibits D and E are a sample Motion for Independent Medical Examination and related Order.
B. Privileges and Exceptions

1. Doctor/Patient Privilege

   a. General Rule

   Communications between an individual and his or her physician are privileged and may not be disclosed by the physician without the patient’s consent. TEX. R. EVID. 509 (b)(1). Further, a patient’s records, including any diagnosis, evaluation or treatment, are confidential and may not be disclosed without proper consent. TEX. R. EVID. 509 (b)(2).

   b. Waiver of Privilege

   The patient or any representative of the patient may waive the privilege. TEX. R. EVID. 509(f)(1). Consent must be in writing and signed by the patient or his or her representative. An authorized representative may include the patient’s guardian or attorney ad litem in the guardianship hearing. TEX. R. EVID. 509(f) (Note, however, Rule 509 refers to Chapter V instead of Chapter XIII of the Texas Probate Code.)

2. Mental Health Privilege

   a. General Rule

   All communications, including all records, between an individual and their physician or other professional related to a patient’s mental health, are privileged, unless the patient or the patient’s authorized representative waives the privilege. TEX. R. EVID. 510(b). Further, Section 576.005 of the Health and Safety Code was recently amended to provide that “[r]ecords of a mental health facility that directly or indirectly identify a present, former, or proposed patient are confidential unless disclosure is permitted by other state law.” TEX. HEALTH & SAFETY CODE ANN. § 576.005 (Vernon Supp. 2002).

   b. Waiver of Privilege

   The patient or any representative of the patient may waive the privilege. TEX. R. EVID. 510 (d)(2). The consent must be in writing and may be signed by the patient or the patient’s representative. A representative may include any person bearing the written consent of the patient, or the patient’s guardian. Id.

3. Exceptions To Privilege

   a. Guardianship “Miranda” Warning

   Rule 510(d)(4) allows physicians and other mental health professionals to disclose the proposed ward’s medical information provided the professional previously informs the proposed ward that anything he or she might say to them would not be privileged and, thus, “can and will be held against him.” TEX. R. EVID. 510(d)(4). Specifically, Rule 510(d)(4) provides that:
(4) when the judge finds that the patient after having been previously informed that communications would not be privileged, has made communications to a professional in the course of a court-ordered examination relating to the patient’s mental or emotional condition or disorder, providing that such communications shall not be privileged only with respect to issues involving the patient’s mental or emotional health. On granting of the order, the court, in determining the extent to which any disclosure or all or any part of any communication is necessary, shall impose appropriate safeguards against unauthorized disclosure;

Id. (emphasis added).

This disclosure is necessary even if the exam is court ordered. See Subia v. Texas Dept. of Human Servs., 750 S.W.2d 827, 830-31 (Tex. App.–El Paso 1988, no writ).

b. Prepare Medical Experts In Advance

If a medical doctor or expert fails to give the required disclosure, the expert’s entire testimony will generally be excluded as privileged. Accordingly, experts should be sufficiently warned of these requirements prior to evaluating the ward. Furthermore, it is advisable to include a statement in the doctor’s letter or medical report confirming that the expert gave the proposed ward the required disclosure and, if possible, that the proposed ward consented to the release of information in writing.

4. Options If Guardianship Miranda Not Given

To secure the admissibility of the testimony of an expert where the proper warning was not given, counsel should argue that Subia, supra, is a mental commitment case depriving a person of their liberty by placing them in a locked facility and thus, is inapplicable to a guardianship proceeding. The express wording of Rule 510, however, somewhat contradicts this argument. Further, since mental commitment files are sealed and guardianship files are public record, one could argue that the warning is not be required in guardianships. Where one has an existing temporary guardianship of the person or is an acting agent-in-fact, arguably that person or entity could also waive the privilege under Rule 510 of the Texas Rules of Evidence, as discussed in VI.B.1.b, supra.

It is customary when contesting medical testimony to take the opposing witness on voir dire prior to being questioned on examination to determine if the disclosure was made and the privilege was waived. If not, move to strike further testimony of the witness.

C. Confidentiality of State and County Agency Reports

1. Human Resources Code Section 48.101

a. General Rule: Not Discoverable

Certain agencies, such as Adult Protective Services or Child Protective Services may have information relevant to the issue of an applicant’s eligibility to serve or contest a guardianship proceeding. There are, however, confidentiality requirements with respect to those records of state and county agencies. Section 48.101 of the Human Resources Code deems the following information confidential and not subject to disclosure:
• A report of abuse, neglect, or exploitation made under Human Resource Code, Chapter 48;
• The identity of the person making the report; and
• All files, reports, records, communications, and working papers used or developed in an investigation made under, or relating to, services provided pursuant to Human Resource Code, Chapter 48.


b. Exception

Courts may order disclosure of the confidential information in certain situations. Section 48.101 allows a court, including a court where a guardianship is pending, to direct the release of the records if it determines their disclosure is essential to the administration of justice and will not endanger the life or safety of any individual who (i) is the subject of a report of abuse, neglect, or exploitation; (ii) makes a report of abuse, neglect, or exploitation; or (iii) participates in an investigation of reported abuse, neglect, or exploitation. TEX. HUM. RES. CODE ANN. § 48.101(c) Vernon Supp. 2002).

If it appears the disclosure of a report may be relevant to a disputed issue in a guardianship, the party seeking it must prepare and file a motion with the court requesting its release and a hearing on the motion. The movant must give the department or investigating state agency and each interested party notice of the motion and hearing. After the hearing and an in camera review of the information, the court may direct the release of the report if it determines the disclosure is (i) essential to the administration of justice, and (ii) will not endanger the individual discussed above.

Procurement of the agency reports will be delayed several weeks by the notice and filing requirements. Accordingly, an application for their disclosure should be filed prior to the guardianship hearing to ensure sufficient time exists to receive and review them.

Form: Attached as Exhibits F & G are a sample Motion to Review Confidential Records and related Order.

D. Questions for the Medical Expert Regarding Capacity

An ad litem should be prepared with questions for the proposed medical experts. The following is a list of sample questions to be directed to the physician witness in a contested guardianship proceeding:

(1) State your full name for the Court.
(2) How are you employed?
(3) Are you licensed to practice medicine in the State of Texas?
(4) Is your license on file with the appropriate authority in this County?
(5) What is your professional address?
(6) What medical school did you attend?
(7) Where did you do your internship and residency?
(8) Did you complete a fellowship?
(9) Are you a member of any professional associations?
(10) Are you associated with any hospitals?
(11) Have you brought your Curriculum Vitae with you?
(12) Is it true, correct, and accurate in every respect?
(13) Are you Board Certified?
(14) When did you obtain your board certification?
(15) In what areas are you board certified?
(16) In the field of [psychiatry, neurology, etc] do you treat patients who, because of a physical or mental condition are substantially unable to provide, food, clothing, or shelter for themselves, or to care for their own health or financial affairs?
(17) Did you utilize your training and expertise in your examination of the proposed ward?
(18) Do you know (proposed ward)?
(19) When did you have an occasion to treat the proposed ward? (Question the expert as to each meeting.)
(20) Did you disclose to the proposed ward that you would be testifying as to his capacity?
(21) Did the proposed ward waive the disclosure of the examination in writing?
(22) Was the examination less that 120 days prior to the guardianship application?
(23) Did you examine the proposed ward?
(24) What did the exam consist of?
(25) What type of tests were administered?
(26) What were the results of the examination?
(27) What was the diagnosis?
(28) Did you consult with any other physician in this matter?
(29) Did you review any tests, reports or opinions of any other doctors?
(30) Did those assist you in reaching your opinions?
(31) Do you have an opinion on whether the proposed ward is able to be present in the courtroom for a hearing?
(32) Is the proposed ward on medication and, if so, please describe the type of medication and dosage?
(33) Based on reasonable medical probability, do you have any opinion about whether the proposed ward is incapacitated?
(34) What is your opinion?
(35) Do you recommend the appointment of a legal guardian for the proposed ward?
(36) Have you ever treated the proposed guardian for any psychiatric problems?
(37) Based on reasonable medical probability, do you have an opinion whether the proposed ward is totally incapacitated/partially incapacitated?
(38) Based on reasonable medical probability, do you believe in the future that the proposed ward’s diagnosis is likely to improve or change?
(39) If partially incapacitated, (go through check list of what proposed ward is incapable of)?

These questions by no means represent an exhaustive list.
V. CONSIDERATIONS IN PREPARING FOR THE HEARING

A. Address Any Physical Problems of Proposed Ward

1. Overview

Medication and physical conditions can sometimes lead to a proposed ward suffering from “temporary” incapacity. These can result in the proposed ward exhibiting all the classic signs of long-term incapacity that can lead to a guardianship. A brief discussion of some of the more common causes is discussed below.

2. Consider Medications

The test for capacity occurs on the day of the hearing. If the proposed ward is on medication now and has returned to normal behavior, don’t miss the opportunity to point this out to the Court. Ask the doctor about the ward’s capacity today. Also, a supervised living environment will sometimes resolve the medication problem. If the proposed ward can be supervised and stay on medication, the fact finder may be persuaded that this can be accomplished without a guardianship.

3. Consider Treatable Physical Condition

A proposed ward may have a physical problem, such as vitamin B deficiencies, which causes confusion, cataracts, hearing loss, loss of teeth, etc. It is important not to overlook the report on the physical exam. If the proposed ward has not had a complete physical recently, try to get the proposed ward to submit to a complete physical. It may reveal the underlying causes of the dementia or potential incapacity, and yield clues as to how it might be controlled or mitigated.

B. Discovery

Discovery is an effective tool to determine another party’s motivations in seeking or contesting a guardianship. It also allows one to ascertain whether such party has an adverse interest to the proposed ward that would disqualify him or her from seeking or contesting the guardianship.

It is important to follow the new discovery rules enacted effective January 1, 1999. Thus, a party should promptly send his or her request for disclosure and follow-up with other discovery that does not exceed the new limitations. Use the discovery means to investigate a party’s standing, any adverse interests, any disqualifications and opposition to other party’s entitlement or qualifications. When defending against a guardianship, attempt to determine whether the proponent has recently engaged in personal or business transactions that tacitly admit the proposed ward has capacity. Such transactions may include accepting a check signed by the proposed ward or acting under a power of attorney recently executed by the proposed ward.

Finally, if any party is actively asserting that the proposed ward has capacity, notice the proposed ward’s deposition.
Form: Attached as Exhibit I is a sample Request for Disclosures.

C. Prepare Proposed Ward for Hearing

Discuss courtroom attire with the proposed ward prior to the hearing. An unfavorable impression is likely made on a judge when the proposed ward comes to court in a bathrobe, house shoes or other inappropriate attire. If the individual has been in a hospital, attire will likely be a problem. Nonetheless, a clean-shaven, well-dressed individual makes a better impression. Be certain the proposed ward’s fingernails and toenails have been groomed. Bathing and cleanliness is always a plus.

As discussed previously, one should also determine whether the proposed ward needs a hearing aid or eyeglasses. An elderly person may appear incapacitated, when their true problem is hearing or sight related.

The attorney defending against a guardianship should also review with the ward questions that evidence capacity that are frequently included in a mini-mental status examination. Samples of such questions include:

1. What is today’s date?
2. Who is the President of the United States?
3. What medications do you take?
4. What is the day of the week?
5. Why are we at the courthouse today?
6. What is your lawyer’s name?
7. What did you eat for breakfast?
8. Where do you live?
9. What is your phone number?
10. Do you have children?

Many times long-term memory is better than short-term. At the beginning of questioning, the proposed ward may be asked to remember three simple objects, such as a pen, book and car. Before passing the proposed ward, ask if he remembers the three objects. This will evidence short-term memory. If you want to focus on long-term memory, ask the proposed ward about significant events in history such as World War II.

D. Getting Proposed Ward to Courthouse

If possible, the proposed ward should drive himself, take a taxi, or ride the bus to the courthouse. It will create a favorable impression when he is able to testify regarding how he arrived at the courthouse by himself, or if he was able to find the court by himself. Note, this can backfire if the proposed ward loses his way or has a car accident. Also remember, if the proposed ward was the subject of a temporary guardianship, his driver’s license may have been revoked, so he may not drive.
E. Money Management

Since guardianships often deal with the ability to handle financial affairs, consider having the proposed ward count change on the witness stand. The proposed ward bringing his checkbook register, if one exists, could prove his ability to keep records. If he filed an income tax return, have him bring it to court to show he was taking care of business.

F. Plea to the Judge

If the proposed ward is elderly, it may be beneficial for the proposed ward to tell the Judge how he feels about the guardianship proceeding. Judges are moved more by what the proposed ward has to say than what their lawyers do.

G. Ward’s Presence in Courtroom

Section 685 of the Probate Code requires the proposed ward’s presence in the courtroom at the hearing. If he does not attend, the court must make a finding of why his presence was “not necessary” on the record or may enter its determination in the order. Tex. Prob. Code Ann. § 685 (Vernon Supp. 2002). Generally, the duty to bring the proposed ward to the courtroom or to explain his non-appearance rests with the attorney ad litem. Several methods may be utilized to prove why his presence at the hearing would not be in his best interest. Some examples include:

1. Incorporate into the doctor’s letter the medical reason the proposed ward’s presence would be inappropriate;
2. Prepare a written statement by the ad litem for his client to sign expressing his desire not to appear;
3. Tape record (with permission) the proposed ward’s statement to the court;
4. Arrange for a telephonic appearance if the proposed ward is physically unable to attend and the court will allow it;
5. The ad litem testifying as to the proposed ward’s lack of desire or ability to attend.

H. Preference of Ward

Probate Code Section 689 compels the court to make a reasonable effort to consider the incapacitated person’s preference as to the selection of his or her guardian. It further mandates due consideration of the preference indicated unless inconsistent with other provisions of the chapter. This preference may be communicated through the attorney ad litem’s answer, through the proposed ward’s testimony (in open court or via deposition testimony), or by written designation. The statute does not indicate whether a previous designation of guardian in the event of later incapacity overrides a current designation or preference.
APPENDIX

TO

ROLE OF THE AD LITEM IN GUARDIANSHIP PROCEEDINGS
EXHIBIT A

[STYLE]

APPLICATION FOR APPOINTMENT OF
TEMPORARY GUARDIAN PENDING CONTEST
PURSUANT TO TEXAS PROBATE CODE SECTION 875(k)

TO THE HONORABLE COURT:

_________ ("Applicant") makes and files this, his Application for Appointment of Temporary Guardian of the Person and Estate of ______________ Pending Contest pursuant to Section 875(k) of the Texas Probate Code, and would respectfully show the Court the following:

1. _______________ ("Proposed Ward"), is an adult __male, whose date of birth is ________________, and currently resides in ______, ______ County, Texas, and may be served with citation at ______.

2. Applicant is the _______ [relationship] of Proposed Ward and resides at ________________, ______ County, Texas. Applicant desires to be appointed Temporary Guardian of the Person and Estate of Proposed Ward Pending Contest. Applicant is eligible to be so appointed.

3. This Court has jurisdiction and venue over this proceeding because Proposed Ward resides in ______ County, Texas, and the principal part of Proposed Ward’s property is situated in ______ County, Texas.

4. Pursuant to Section 633(c) of the Texas Probate Code, the following persons will be served by citation:

[insert a listing of the names and address of the Proposed Ward (if twelve years of age or older), Proposed Ward’s parents, Proposed Ward’s spouse, court-appointed conservator or person having
control of the care and welfare of the Proposed Ward, and the person named to serve as guardian if that person is not the applicant.]

5.

Pursuant to Section 633(d) of the Texas Probate Code, the following persons will receive this application by certified mail, return receipt requested:

[insert a listing of the names and address of the all adult siblings and children of the Proposed Ward, the administrator of a nursing home facility or similar facility where the Proposed Ward resides, the operator of a residential facility in which the Proposed Ward’s resides, the agent under a power of attorney signed by the Proposed Ward, and any person designated to serve as the Proposed Ward’s guardian in a written declaration.]

6.

Proposed Ward is totally incapacitated, or it is alleged that the Proposed Ward is totally incapacitated.

7.

Proposed Ward has expressed that it is h__ preference that Applicant serve as guardian as authorized by the Texas Probate Code. The Court Investigator has stated in h__ report that Proposed Ward wants Applicant to serve as h__ guardian. Applicant is eligible to serve as Temporary Guardian of the Person and Estate Pending Contest and requests this Court give due consideration to Proposed Ward’s preference pursuant to Section 689 of the Texas Probate Code. Applicant requests appointment and is qualified to be appointed as Temporary Guardian of the Person and Estate Pending Contest of Proposed Ward.

8.

Alternatively, Applicant requests that a qualified neutral third party be appointed Temporary Guardian of the Estate Pending Contest and that Applicant be appointed Temporary Guardian of the Person Pending Contest of Proposed Ward.

9.

A necessity exists for the appointment of a Temporary Guardian of the Person and Estate of Proposed Ward Pending Contest. Although all parties except the attorney ad litem have admitted such
incapacity, a contest has been filed to Applicant’s right to serve, delaying the appointment of a permanent guardian.

10. Imminent danger exists which necessitates the appointment of a Temporary Guardian Pending Contest in accordance with Section 875 of the Texas Probate Code. Substantial evidence exists that Proposed Ward’s physical well-being may be impaired and that Proposed Ward’s estate may be wasted, as enumerated more specifically in the Paragraphs below.

11. Proposed Ward is unable to make reasonable and informed decisions in matters concerning health or estate. In support of the immediate need for the appointment of a guardian, Applicant attaches as Exhibits A and B, respectively, and incorporates by this reference, the physician’s letter of ______________, Applicant’s expert, and the physician’s letter of Attorney Ad Litem’s expert, ________________.

12. This Court should appoint a Temporary Guardian of the Estate Pending Contest to assist Proposed Ward so that he may have an opportunity to actually have interests adequately represented.

13. Applicant requests the Court grant the following limited powers and authority to the Temporary Guardian of the Estate Pending Contest:

   a. To take control of Proposed Ward’s financial affairs to determine the status and extent of assets;

   b. To take possession of Proposed Ward’s assets and other documents wherever located, including the contents of Proposed Ward’s safe deposit boxes;

   c. To take such actions as may be necessary or proper to collect the proceeds of any insurance policy or policies (of whatever nature) or any annuity contract or contracts and social security proceeds that may be owing to Proposed Ward;

   d. To file an individual income tax return, if necessary, and to file any other necessary income tax returns for Proposed Ward for periods of time subsequent to the Temporary Guardian of the Estate’s appointment and during the Temporary Guardianship and to pay
such income taxes as may be owing in connection therewith, to prepare and file any and all inventories (and other reports and matters as may be necessary) in any Court having jurisdiction of Proposed Ward’s Estate or in connection with said tax returns;

e. To pay all ad valorem taxes, current or delinquent, which may be or become owing by Proposed Ward; and

f. To incur expenditures for the protection of Proposed Ward’s property, and to apply to this Court for authority to expend estate funds on an as needed basis to pay expenses of the Temporary Guardianship, subject to further court approval.

14. Applicant requests the Court grant the following powers and authority to the Temporary Guardian of the Person Pending Contest:

a. To make medical decisions and engage the services of medical providers and nurses, including eye and dental care providers, for the care and benefit of Proposed Ward, as allowed by the Texas Probate Code.

b. To provide food, clothing, and shelter for the Ward, including arranging for care at ________.

15. Based on the physicians’ letters, Proposed Ward’s estate is in imminent danger if a Temporary Guardian of the Estate Pending Contest is not appointed. There is no one who has legal authority to consent to medical treatment, as Proposed Ward is incapable of giving informed consent, and there is no one authorized to collect life insurance proceeds or social security benefits on Proposed Ward’s behalf. A Temporary Guardian of the Person and Estate Pending Contest should be appointed.

16. Applicant brings this Application for the appointment as Temporary Guardian of the Person and Estate Pending Contest or, in the alternative, as Temporary Guardian of the Person Pending Contest in good faith and for just cause. Applicant, therefore, respectfully requests the Court find that h__ attorneys have acted in good faith and for just cause in their representation of Applicant, and that h__ attorneys’ fees related to this Application, the hearing thereon, and the establishment of the requested guardianship be approved and paid out of Proposed Ward’s guardianship estate.
WHEREFORE, PREMISES CONSIDERED, Applicant prays that this Court appoint Applicant, __________, Temporary Guardian Pending Contest of the Person and Estate of ____________________________, of the outcome of the contest or, in the alternative, that this Court appoint Applicant, ____________, Temporary Guardian Pending Contest of the Person of ______________________ and a qualified neutral third party Temporary Guardian Pending Contest of the Estate of ________________; that the appointment of the attorney ad litem be continued; that a time for a hearing on this Application be set; that attorney fees be awarded against the Proposed Ward’s estate; that a trial on the permanent guardianship be set; that notice and citation be issued as required by law; and for such other and further relief to which Applicant may show himself justly entitled.

Respectfully submitted,

By: ____________________________
[Attorney Information]

Attorney for Applicant

THE STATE OF TEXAS §

§

COUNTY OF ______ §

BEFORE ME, the undersigned authority, on this day personally appeared __________, Applicant in the foregoing Application for Appointment of Temporary Guardian Pending Contest, known to me to be the person whose name is subscribed to the above and foregoing Application and on his oath stated that such Application contains a correct and complete statement of the matters to which it relates and all the contents thereof are true, complete and correct to the best of Applicant’s knowledge.

____________________________
[Applicant]

SWORN TO AND SUBSCRIBED BEFORE ME on this the ____ day of ______________, 20__. 

(SEAL)

____________________________
NOTARY PUBLIC IN AND FOR 
THE STATE OF TEXAS
I, ________________, hereby certify that a true and correct copy of the foregoing instrument was forwarded to:

by certified mail, return receipt requested, in accordance with the Texas Rules of Civil Procedure on this ________ day of ________, 20__. 

_____________________________
EXHIBIT B

[STYLE]

MOTION TO EXTEND TEMPORARY GUARDIANSHIP PENDING
CONTEST PURSUANT TO TEXAS PROBATE CODE SECTION 875(k)

TO THE HONORABLE COURT:

Movant, __________________, Temporary Guardian of the Person and Estate of __________, an Incapacitated Person, ("Ward") files this Motion to Extend Temporary Guardianship Pending Contest Pursuant to Texas Probate Code Section 875(k), and shows the Court the following:

1. On __________, this Court appointed __________ as Temporary Guardian of the Person and Estate of Ward. The temporary guardianship remained in effect until __________.

2. On __________, __________ filed his Application for Appointment of Permanent Guardian of the Person and Estate of Ward, since it is in the best interest of the Ward that the temporary guardianship be made permanent. On or about __________, __________ filed his contest to __________’s Application for Appointment of Permanent Guardianship, and in addition, filed his own Application for Appointment of Permanent Guardian. The contest remains unresolved.

3. Pursuant to Texas Probate Code Section 875(k), when an application to convert a temporary guardianship to a permanent guardianship is challenged or contested, this Court shall appoint a temporary guardian whose term expires after sixty (60) days from the original date of appointment of the temporary guardian, or at the hearing to appoint a permanent guardian, whichever is later.

WHEREFORE, PREMISES CONSIDERED, ________________, Temporary Guardian of the Person and Estate of ________________, an Incapacitated Person, prays that this temporary guardianship be extended pursuant to Section 875(k) of the Texas Probate Code; that __________ remain as temporary guardian of the person and estate of Ward pending contest; and for such other and further relief to which Movant may show himself justly entitled.
Respectfully submitted,

By: __________________________
   [Attorney Information]

Attorney for Movant

CERTIFICATE OF SERVICE

I, _________________, do hereby certify that a true and correct copy of the foregoing instrument was forwarded to:

by certified mail, return receipt requested, on this the ____ day of ________________, 200__.
EXHIBIT C

[STYLE]

ORDER EXTENDING TEMPORARY GUARDIANSHIP PENDING CONTEST

On this day came on to be considered the Motion of Movant, ________________, Temporary Guardian of the Person and Estate of ________________, an Incapacitated Person, to extend the Temporary Guardianship Pending Contest pursuant to Texas Probate Code Section 875(k), and the Court is of the opinion and finds that there exists a necessity to extend the temporary guardianship, and that ________________ should remain as temporary guardian of the Person and Estate of ________, an Incapacitated Person. It is therefore,

ORDERED, that ________________ remain as Temporary Guardian of the Person and Estate of Ward pending contest, pursuant to Texas Probate Code Section 875(k). It is further,

ORDERED, that the temporary guardian shall have the following powers:

a. To take control of Proposed Ward’s financial affairs to determine the status and extent of h__ assets.

b. To take possession of Proposed Ward’s assets and other documents wherever located.

c. To make medical decisions regarding placement and to facilitate treatment for Proposed Ward’s benefit as allowed by the Texas Probate Code, and for h__ to have complete access to all past, current, and future medical records of Proposed Ward to assist h__ in making such decisions;

d. To engage the services of medical providers, nurses, psychiatrists, neurologists including eye care and dental care providers, all for the care and benefit of Proposed Ward; and

e. To provide food, clothing, and shelter for Proposed Ward, including arranging for care at skilled nursing facilities.

SIGNED this the ____ day of ________________, 200__.  

______________________________
JUDGE PRESIDING
APPROVED AS TO FORM:

By: __________________________
    [Attorney Information]

Attorney for Movant
EXHIBIT D

[STYLE]

MOTION FOR INDEPENDENT MENTAL EXAMINATION

TO THE HONORABLE COURT:

Movant, [Name], in the above entitled and numbered cause, makes this [his/her] Motion for Independent Mental Examination and in support thereof would respectfully show the Court the following:

1. Movant believes it is in the best interest of [Name of Proposed Ward] (“Proposed Ward”) to be evaluated by an independent psychiatrist in this proceeding.

2. Movant believes that it would be in Proposed Ward’s best interest, pursuant to Section 687 of the Texas Probate Code for the Court to order a complete independent mental examination of Proposed Ward, a party to this proceeding, to be conducted by a Court designated board certified geriatric psychiatrist, for the purpose of determining Proposed Ward’s present mental state and for assessment of her care and rehabilitation needs.

3. Based on the facts, there is good cause shown for a compulsory independent mental examination of Proposed Ward.

4. Movant therefore requests the Court to designate the time, place, manner, conditions, and scope of the examination to be conducted by the psychiatrist named by the Court to make such examination of Proposed Ward. Movant also asks this Court to order all parties to supply the psychiatrist with all of Proposed Ward’s medical records from [select relevant date], to the present in their possession or that of their attorney. [If applicable, __________ should also be ordered to turn over all of the caretakers daily
long of medications.] It is further requested that the report of the examining psychiatrist be provided to the Court and all counsel of record.

5.

Movant requests that the cost of such examination be paid by ______________ as it is beneficial to Proposed Ward to have the facts of her mental status determined.

6.

Movant request that the examination be conducted with no one present other than the court appointed psychiatrist and his or her staff and medical advisors, and that no one communicate with the psychiatrist prior to the issuance of his or her report, other than to provide the medical records by letter with copy to all counsel of record.

WHEREFORE, PREMISES CONSIDERED, Movant prays that the Court order Proposed Ward be examined by a board certified geriatric psychiatrist designated by this Court for the purpose of undergoing an independent mental examination pursuant to Section 687 of the Texas Probate Code to determine [his/her] mental status; that the Court order the medical to be turned over; that no one be present except the psychiatrist and his or her staff and medical advisors; that the Court order such examination to be paid by ______________; and for such other and further relief to which Movant may show [himself/herself] justly entitled.

Respectfully submitted:

By: 
[Attorney Information]
Attorneys for Movant
CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was forwarded to the following:

by hand delivery, certified mail, return receipt requested, or facsimile on this ____ day of __________, 200__.

-----------------------------------
EXHIBIT E

[STYLE]

ORDER FOR INDEPENDENT MENTAL EXAMINATION

On this day came to be considered the Motion for Independent Mental Examination filed herein by [Name of Movant], and the Court, after hearing the evidence and having considered such motion and the applicable law, finds that good cause has been shown for the granting to such motion pursuant to Section 687 of the Texas Probate Code. It is therefore,

ORDERED, ADJUDGED, and DECREED that _________________________ a board certified geriatric psychiatrist status, is hereby appointed by the Court to make an examination of [Name of Proposed Ward] as to [his/her] mental status on or before ____________, 20__ [must include date], and that such psychiatrist should render his/her findings in a written report to this Court on or before ____________, 20__. It is further,

ORDERED, that all parties and their counsel shall deliver all medical records, from [relevant date] to the present, including the caretaker’s daily log of medication, to the psychiatrist within three (3) days of the date of this Order. It is further,

ORDERED, that no one will be present other than Dr. __________ and [his/her] medical staff and medical advisors during the examination, and that no one communicate with Dr. __________ other than by cover letter with the medical records, with copy to all counsel.

ORDERED, that the cost of such examination and report shall be paid to said psychiatrist by ________________.

SIGNED this ______ day of _____________, 20__.

JUDGE PRESIDING
APPROVED AS TO FORM ONLY:

By: __________________________
    [Attorney Information]

Attorneys for Movant
EXHIBIT F

[STYLE]

APPLICATION FOR DISCLOSURE OF CONFIDENTIAL RECORDS

TO THE HONORABLE PROBATE COURT NO. __:

_________________, Guardian of the Person and Estate of ____________, an Incapacitated Person, respectfully requests this Court’s permission to seek confidential records of Adult Protective Services pertaining to __________ and in support thereof would show the Court as follows:

1.

___________ is the Court appointed Guardian of the Person and Estate of __________, an Incapacitated Person. Currently, there exists a contest to Guardian’s appointment by the Ward’s ______, who has asserted a prior right to serve as guardian. Guardian believes that _________ is disqualified to serve as guardian.

2.

As part of an evidentiary hearing that this Court held on __________, testimony was elicited from __________, a specialist with Adult Protective Services of the state of Texas. The written records formed the underlying basis of __________’s testimony and are confidential pursuant to Section 48.083 of the Human Resource Code, a copy of which is attached as Exhibit A and incorporated by this reference. An exception exists, however, to the confidentiality requirements in a guardianship proceeding upon a showing of cause. See Section 48.083 of the Texas Human Resource Code. Because the care and treatment of __________ is in issue, and because _________’s prior conduct in providing care for __________ is also in issue in this case, Guardian believes that good cause exists to permit the confidential records to be disclosed in this proceeding to Guardian and the parties thereto regarding ____________.
WHEREFORE, PREMISES CONSIDERED, Guardian prays that he be entitled to review the records of the Department of Human Resources regarding __________, the Ward herein; and for such other and further relief to which Guardian may show himself justly entitled.

Respectfully submitted,

[attorney information]

Attorneys for Applicant

CERTIFICATE OF SERVICE

I, ________________, hereby certify that a true and correct copy of the foregoing instrument was forwarded to:

by certified mail, return receipt requested, on this ____ day of ______________, 20__.
EXHIBIT G

[STYLE]

ORDER GRANTING REVIEW OF CONFIDENTIAL RECORDS

On the ____ day of _________________, 20__, the Court considered the Motion of __________, Guardian of the Person and Estate of __________, an Incapacitated Person, to review confidential records of Adult Protective Services pertaining to ____________ and the Court after reviewing the pleadings finds that Guardian has shown good cause why ______ he should be granted authority to review the confidential records. It is therefore,

ORDERED, that ______________, Custodian of Records of Adult Protective Services, produce for inspection records pertaining to ____________ that are identified, identifiable, and unredacted in the courtroom of Probate Court No. __________________ of ______ County, Texas, on the ______ day of ________________, 20__, at ______ o’clock __.m. It is further,

ORDERED, that no copies of such records shall be made.

SIGNED this ________ day of ______________________, 20__.

__________________________
JUDGE PRESIDING

APPROVED AS TO FORM:

[attorney information]

Attorneys for Applicant
REQUESTS FOR DISCLOSURE

[Name] files [his/her] First Set of Requests for Disclosure pursuant to Rule 194 of the Texas Rules of Civil Procedure as amended effective January 1, 1999. Pursuant to Rule 194, you are requested to disclose, within (30) thirty days of service of this Request, the information or material described to the offices of [Name]’s counsel, ________________.

Respectfully submitted,

By: ________________________________
[Attorney Information]

Attorneys for [Name]

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing instrument was forwarded to:

by hand delivery, facsimile and/or certified mail, return receipt requested, on this ____ day of ____________, 200__.  

__________________________________