

**TRENDS IN LITIGATING AND ADMINISTERING
GUARDIANSHIPS**

**The Probate Section of the Dallas Bar Association
March 22, 2016**

**Mark R. Caldwell
Burdette & Rice, PLLC
4851 LBJ Freeway, Suite 601
Dallas, Texas 75244
Telephone: 972-991-7700
Fax: 972-991-8654
Email: mark@dallasprobateattorneys.com
Website: www.dallasprobateattorneys.com**

**Co-Authored by J. Ellen Bennett
Burdette & Rice, PLLC
4851 LBJ Freeway, Suite 601
Dallas, Texas 75244
Telephone: 972-991-7700
Fax: 972-991-8654
Email: ellen@dallasprobateattorneys.com
Website: www.dallasprobateattorneys.com**



Mark R. Caldwell

Shareholder

Mark R. Caldwell was born on June 29, 1979 at Beaufort Naval Hospital in Beaufort, South Carolina where his father flew F-4 Phantoms at the nearby Marine Corps air station (although his mother had the more difficult job of raising three children). After having lived on the East Coast, West Coast and in Hawaii, he attended Eastfield Community College in Mesquite, Texas before transferring to Southern Methodist University, where he earned a full academic scholarship. One year later, he attended the London School of Economics as a General Course Student. Mark earned his law degree from New England School of Law in Boston, Massachusetts in 2005. He entered private practice as a litigator in a boutique probate and trust firm, representing executors, guardians, and beneficiaries in complex estate and trust litigation. He has also represented fiduciaries in all phases of estate, trust, and guardianship administration. Mark enjoys the investigatory aspects of estate and trust litigation, including reviewing and analyzing medical, financial, and suspicious property records and transactions. Mark is committed to developing and maintaining strong, personal relationships with his clients. He endeavors to offer smart, pragmatic and cost-effective legal advice. Mark believes that the strongest winning position is one that is simple, direct, and understandable and he realizes that estate and guardianship litigation often involves substantial damage to family relationships. While he strives to advocate strong, aggressive positions for clients, Mark also strives to resolve disputes in an ethical and reasonable manner that, if desired, does not preclude the opportunity for reconciliation.

Mark is married and has three children. He enjoys living an active life-style, traveling and spending time with his family.

Representative Experience

- Recovered significant settlement in case involving fraud on the community and breach of fiduciary duty through the use of a power of attorney.
- Obtained favorable jury verdict in a guardianship case involving an elderly ward.
- Successfully defeated claim that will was executed without testamentary capacity on summary judgment.
- Obtained temporary injunctions and temporary guardianships in cases involving the abuse of a power of attorney.
- Obtained partial summary judgment against Trustee for breach of fiduciary duty.
- Represents guardians, executors, and administrators in all phases of guardianship and estate administration.
- Routinely serves as attorney ad litem and guardian ad litem in guardianship cases.
- Routinely serves as temporary guardian and guardian in guardianship cases and as temporary administrator and administrator in decedents' estates.

Public Speaking & Publications

- Author/Speaker: State Bar of Texas: “Injunctive Relief – The Lethal Preemptive Strike in Probate, Trust, and Guardianship Litigation” – 39th Annual Advanced Estate Planning and Probate Course (2015)
- Co-Author/Speaker: State Bar of Texas: “Elder Exploitation” – Advanced Guardianship Law (2015)

- Co-Author/Speaker: Travis County Bar Association: “Winning the Battle & the War: A Remedies-Centered Approach to Litigation Involving Durable Powers of Attorney” (2015)
- Co-authored, Properly Performing Annual Accounts in Guardianships and Management Trusts Where One or Both Spouses are Incompetent, Real Estate, Probate, & Trust Law Reporter, Volume 52, No. 4 (2014).
- Served as Moderator for the Guardianship and Ad Litem Attorney Certification Course, sponsored by the Dallas Bar Association Probate, Trusts & Estate Section, Dallas County Probate Courts and the Dallas Volunteer Attorney Program to train lawyers in the representation of guardians of indigent wards, and the role and responsibilities of the Attorney Ad Litem (2014).
- Winning the Battle and the War; A Remedies—Centered Approach to Litigation Involving Durable Powers of Attorney; 64 Bay. L. Rev. 435 (Spring 2012).
- Author/Speaker: “An Introduction to Guardianships” – Texas Department of Assistive & Rehabilitative Services (DARS), Dallas, Texas (Fall 2010; Spring 2011).
- Co-authored and presented article, “Proof of Facts and Common Evidentiary Problems Encountered in Contested Probate Proceedings,” at the Seventh Probate Litigation Seminar, sponsored by the Tarrant County Probate Bar Association (September 2010).
- Author, A Good Deed Repaid: Awarding Attorney’s Fees in Contested Guardianship Proceedings; 51 S. Tex. L. Rev. 439 (Winter 2009).

Community and Bar Association Involvement

- Board of Directors and Vice President, City of Sachse Economic Development Corporation (2010-2014)
- Member, Charter Review Commission, City of Sachse (2012-2013)
- Dallas Bar Association; Probate and Trust Section Member; Trial Skills Section Member
- Dallas Association of Young Lawyers; Elder Law Section Member
- Board of Directors, St. Thomas More Society
- Dallas Bar Mentor Program; Participated as Mentee; Mentor, Edward V. Smith III
- Organized and leads an ongoing monthly probate study group featuring prominent guest speakers and court staff

Awards and Recognition

- Board Certified Estate Planning and Probate Law – Texas Board of Legal Specialization
- Named Rising Star by the Texas Super Lawyers (2014, 2015)

Education

- General Course, The London School of Economics, London, England (2001-2002)
- B.A., *magna cum laude*, Southern Methodist University, Dallas, Texas (2002)
- J.D., New England Law | Boston, Boston, Massachusetts (2005)



Ellen Bennett

Shareholder

Ellen Bennett is a shareholder with the law firm of Burdette & Rice, PLLC, in Dallas, Texas. Ellen's practice focuses on disputes and litigation concerning estates, trusts, and guardianships. She also advises personal representatives, trustees, and guardians through the administration process. Ellen received her Doctor of Jurisprudence in 2009 from the University of Missouri School of Law and received her Bachelor of Arts from the University of North Texas in 2002, with a degree in English. She was selected as a 2016 Rising Star by Texas Monthly.

Representative Experience

- Successfully defended a holographic will against a purported common law spouse
- Obtained positive settlements in representing beneficiaries of estates in cases against bad-acting executors and administrators
- Favorably defended fiduciaries in response to allegations of breach of fiduciary duty
- Successfully defended a proposed ward against allegations of incapacity in a permanent guardianship proceeding
- Defeated unsuitable applicant who sought guardianship of alleged incapacitated elderly person
- Represents executors, administrators, and guardians in all phases of estate administration
- Represents beneficiaries and heirs of estates to protect inheritance rights
- Routinely serves as attorney ad litem and guardian ad litem in guardianship cases
- Routinely serves as temporary guardian and guardian in guardianship cases and as temporary administrator and administrator in decedents' estates

Public Speaking & Publications

- Co-presented Planning to Avoid Power of Attorney Litigation, UT CLE, Galveston, Texas, August 2013
- Co-authored and presented Planning to Avoid Power of Attorney Litigation, Texas Trust School, July 2013
- Ins and Outs of Attorney's Fees in Four Metropolitan Counties, presented to Collin County Probate Bar Association and Denton County Probate Bar Association, 2013
- Co-authored Attorney's Fees in Dallas County Probate Courts, Dallas Bar Association Headnotes, April 2012 issue
- Co-authored When There's No Will, Is There a Way?, Dallas Bar Association Headnotes, January 2011 issue
- Co-authored Responsibilities of a Guardian, State Bar of Texas Guardianship Certification Course, DVAP, Dallas, Texas, May 2010

- Mentoring and Pro Bono Experiences, Summer Associates Luncheon, Dallas Bar Association, June 2010
- Co-authored Select ad Litem Issues in Probate Litigation, Tarrant County Probate Litigation Seminar, Fort Worth, Texas, September 2010

Community and Bar Association Involvement

- Dallas Bar Association, Probate and Trust section member, Trial Skills section member, Dallas Association of Young Lawyers
- Dallas Women Lawyers' Association
- Member, College of the State Bar of Texas

TABLE OF CONTENTS

I. INTRODUCTION – A FUNDAMENTAL PARADIGM SHIFT 1

 A. Anticipated Trends 2

 1. Alternatives to Guardianship Must Be Analyzed 2

 2. Limited Guardianships May Be “Over Limited” 2

 3. Courts Will Take Action to Limit the Costs of Contested Guardianship Proceedings 3

II. THE ALTERNATIVE TO GUARDIANSHIP ANALYSIS 3

 A. Alternatives to Guardianship 3

 B. Supports and Services 4

 C. Supported Decision Making Agreement (POA *Lite* or a Financial HIPPA?) 4

III. AN OUNCE OF PREVENTION *MAY BE* WORTH A POUND OF CURE – UTILIZING LEAST RESTRICTIVE ALTERNATIVES TO AVOID GUARDIANSHIP 4

IV. ELDER ABUSE – AN EVER INCREASING PHENOMENON 5

 A. Financial Exploitation 5

 B. Physical Neglect 5

 1. Mandatory Reporting – Tex. Hum. Res. Code § 48.051 5

 2. Criminal Penalties for Failing to Report or Making False Reports 6

V. THE DEVIL IS IN THE DETAILS – TOP TEN ISSUES TO CONSIDER WHEN ESTABLISHING A GUARDIANSHIP 6

 A. The Applicant’s Attorney Must Now Be Certified (1054.021) 6

 B. Intervention by Interested Person – The “Mother May I Rule” (1055.003) 6

 C. Our Applications are Getting Longer (1101.001) 7

 D. Don’t Forget About Notice (1051.104) 7

 E. The “New” Doctor’s Letter (1101.103) 8

 F. Qualification – Traps for the Unwary (1104.351 – 1104.358) 8

 G. Standing – Clear as Mud (1055.001) 9

 H. Winning Hearts and Minds – Cooperate with the Court Investigator! 9

 I. Attorney’s Fees & Expenses and Costs 10

 1. Attorney’s Fees and Expenses 10

 2. Costs 10

 J. Our Orders are Getting Longer Too – Tips and Trends in Drafting the Order Appointing Guardian (1101.151 – 1101.153) 11

VI. YOU ARE NOT OUT THE WOODS YET – TOP TEN ISSUES TO CONSIDER IN ADMINISTERING A GUARDIANSHIP 13

 A. Qualifying Promptly and Other Bond Considerations 13

 B. Monthly Allowance (1156.001 – 1156.052) 14

 C. Consider Obtaining Authority to Implement an Investment Plan 14

 D. Consider Performing a Medicaid Analysis 15

 E. Gifts and Transfers 15

 F. More Restrictive Placements Now Generally Require Advanced Court Permission (1151.051) 16

 G. The Big Question – Aging in Place vs. Residential Care/Assisted Living Facility 16

 H. Access to the Ward – Cooperation and Communication are Key (1151.055) 17

 I. Duty to Inform Relatives (1151.056) 18

 J. Handling Guardianships Where One or Both Spouses are Incompetent 18

VII. CONCLUSION 19

I. INTRODUCTION – A FUNDAMENTAL PARADIGM SHIFT

In 2015, the Texas Legislature overhauled substantial portions of the Texas Estates Code (“TEC” or the “Code”). Many of these changes have had, and will continue to have, a major impact on how guardianships are established and administered. If guardianship law has represented a significant part of your practice, many of the rules you have relied on have changed. For those new to the guardianship practice, you have arrived just in time to become familiar with these changes along with the rest of us.

Significant change occurred in three areas. Alternatives to guardianship, including supports and services, are now clearly as important an analysis as the traditional “less restrictive alternatives.” Likewise, proportional powers should now be implemented to prevent guardianships that are too expansive. Finally, litigating a contested guardianship may be a bit more challenging than before. In hindsight, the Legislature’s intention, or at least the effect, should be easy enough to see – limit the number of guardianships, tailor their scope, and limit the economic impact of “nuclear” guardianship litigation.

The first major set of changes involved requiring Texas courts to consider “alternatives to guardianship” when establishing a permanent guardianship.¹ Essentially, in establishing a guardianship, the court is now required to find by clear and convincing evidence that alternatives to guardianship and supports and services that would avoid the need for guardianship

¹ This analysis may also be applicable in a temporary guardianship. The Texas Estates Code is unclear as to whether the court, in establishing a temporary guardianship, must find that alternatives to guardianship and supports and services that would avoid the need for guardianship were considered but were determined not to be feasible (the “Alternative to Guardianship Analysis”). See e.g. TEC § 1101.101. TEC § 1251.102 (entitled “Applicability of Guardianship Provisions”) states that the provisions of this title (i.e., Title 3, Guardianship and Related Procedures) relating to the guardianship of the persons and estates of incapacitated persons apply to the temporary guardianship of the persons and estates of incapacitated persons, to the extent the provisions may be made applicable. For example, TEC § 1054.001 states that in a proceeding under this title for the appointment of a guardian, the court shall appoint an attorney ad litem to represent the proposed ward’s interests. TEC § 1054.004 requires an attorney ad litem to discuss with the proposed ward whether there are alternatives to guardianship that would meet the needs of the proposed ward and avoid the need for the appointment of a guardian. Finally, the Alternative to Guardianship Analysis appears, at least arguably, to be embedded in the Court’s determination of whether immediate action should be taken. See TEC § 1251.010.

were considered but were determined not to be feasible (the “Alternative to Guardianship Analysis”).² The Alternative to Guardianship Analysis appears throughout the Code. For example, TEC § 1101.101 requires the court when establishing a guardianship to find, *by clear and convincing evidence*, that alternatives to guardianship and supports and services that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible (this is the same evidentiary standard applicable to determining whether a proposed ward is incapacitated). TEC § 1054.004 requires an attorney ad litem to discuss with the proposed ward whether any alternatives to guardianship exist that would meet the needs of the proposed ward and avoid the need for the appointment of a guardian. Similarly, TEC § 1054.054 requires a guardian ad litem to investigate whether a guardianship is necessary and to evaluate whether alternatives to guardianship would meet the needs of the proposed ward and avoid the need for the appointment of a guardian. These changes were presumably made, at least in part, to attempt to honor the proposed ward’s prior estate planning documents and/or to utilize other least restrictive statutory mechanisms, thereby possibly reducing the number of “full guardianships” being created in Texas.

The second set of changes concerned additional requirements to ensure that the powers conferred on a guardian are proportional to the ward’s actual mental or physical limitations and are granted only as necessary to promote and protect the well being of the ward. The court must “design the guardianship to encourage development or maintenance of maximum self-reliance and independence in the incapacitated person.” See TEC § 1001.001. For example, the physician’s certificate under TEC § 1101.103 (the “Doctor’s Letter”) now requires the physician to: (1) state whether improvement in the proposed ward’s physical and mental functioning is possible and if so, to state the period in which the proposed ward should be reevaluated (to determine whether a guardianship is still necessary); and (2) state (if a guardianship is necessary) whether specific powers or duties of the guardian should be limited if the proposed ward receives supports and services.³ If the Doctor’s Letter stated that improvement in the ward’s physical condition or mental functioning is *possible* and specified a period of less than a year after which the ward should be reevaluated to determine whether there is a continued necessity for the guardianship, then the order appointing a guardian must include the date by which the guardian must submit to the court an updated

² TEC § 1101.101.

³ See also TEC §1101.153.

Doctor's Letter.⁴ The ward is now presumed to retain the capacity to make personal decisions regarding his or her residence.⁵ To remove this right (along with the right to vote, drive, and marry) the order appointing a guardian with full authority must include a finding that the proposed ward does not have the capacity to do these actions.⁶ In a partial incapacity case, the order appointing a guardian must state whether the proposed ward lacks the capacity, or lacks sufficient capacity with supports and services, to make personal decisions regarding residence, voting, operating a motor vehicle and marriage.⁷

The final set of significant changes to the Code were more procedural. For example, an interested person now must obtain court permission to intervene in a guardianship proceeding.⁸ Additional notice provisions were also added in an attempt to keep family members better informed during the administration of a guardianship. Finally, certain attorney's fees and costs provisions were strengthened in an effort to minimize the ever-increasing cost that protracted guardianship litigation can have on a proposed ward's estate.

A. Anticipated Trends

At least three prevailing trends will likely emerge from the recent legislative changes. First, as a precondition to establishing a guardianship, courts will expect the parties, including the attorney ad litem, to analyze whether there are any alternatives to guardianship and explain why they are not feasible. Second, in cases where a limited guardianship is appropriate, the supports and services analysis may result in the guardianship being overly limited. Finally, because a contested guardianship can impose a substantial cost on the ward's estate, courts will likely utilize many of the cost-saving and cost shifting provisions in the Code.

1. Alternatives to Guardianship Must Be Analyzed

Courts will expect parties to explain whether there are alternatives to guardianship and/or supports and services that can avoid the need for a guardianship.⁹ In fact, the applicant (or the attorney ad litem) should be prepared to illicit testimony on these issues at the prove-up hearing or any trial. Applicants should also consider consulting with the court investigator (in those counties that have them), as they routinely investigate whether any alternatives to guardianship exist, and if so, whether they are feasible. We may also

see expert witnesses (including care managers) opine about the feasibility of certain alternatives to guardianship and/or supports and services. Some courts may strongly, and perhaps even stubbornly, favor utilizing alternatives to guardianship over establishing a traditional guardianship.

However, the more thorough the court and the parties perform the Alternative to Guardianship Analysis, the higher the costs of the guardianship proceeding. The costs of the attorney ad litem and guardian ad litem will increase to the extent their jobs become more complex and inherently involve greater amount of time than before.

Moreover, just because an alternative to guardianship exists does not mean it should always be utilized. After all, guardianships are often needed to address two common situations: (1) where the proposed ward is being financial exploited; and (2) where the proposed ward's family cannot effectively cooperate on the management of the proposed ward's financial affairs and health care decisions. So in the end, the more dysfunctional the dynamic, the less likely the court may be to consider utilizing an alternative to guardianship (for fear the situation that prompted the guardianship application may repeat itself or only get worse).

Conversely, where alternatives to guardianship are utilized to avoid (or partially avoid) establishing a guardianship, then in many cases, the future risk that "something could go wrong" will remain with a private individual as opposed to be managed in a court supervised and bonded structure. It seems likely that litigation involving powers of attorney and trusts will remain steady (if not increase) as a result of these powers being utilized more frequently as an alternative to guardianship. Ironically, utilizing alternatives to guardianship may engender the very same type of litigation a guardianship proceeding would have avoided.

2. Limited Guardianships May Be "Over Limited"

Second, because the powers conferred on a guardian should be proportional to, or commensurate with, the ward's actual mental or physical limitations and should be granted only as necessary to promote and protect the well-being of the ward,¹⁰ we will probably see the creation of very limited guardianships in those cases where the ward is only partially incapacitated. Everyone should appreciate this, but the policy clash between limited guardianships and complete solutions will likely take center stage.

The supports and services analysis – particularly the requirement in a limited guardianship that the court must find the specific powers retained by the ward with

⁴ TEC § 1101.153.

⁵ TEC § 1001.001.

⁶ TEC § 1101.151.

⁷ TEC § 1101.101(c).

⁸ TEC § 1055.003.

⁹ TEC § 1101.101.

¹⁰ TEC § 1001.001.

and without the necessity for supports and services¹¹ – may yield some very limited guardianships.

It is quite possible for someone to be able to perform their ADLs and make medical decisions, yet lack the ability to manage their financial affairs and vice versa. Since mental capacity is task specific, there is not a diagnosis that always causes a specific type of impairment in every individual. The behaviors of the particular individual have to be analyzed.

Even with dementia, the impact on the proposed ward's ability to make medical decisions and financial decisions may not necessarily be equal. As medical/personal decisions are frequently here and now decisions, there may be less impact and therefore less need for a guardian with those types of decisions, as compared to financial decisions that may be much more future oriented (*i.e.*, needing to save money for a decade of living expenses).

Another common diagnosis that could relate to someone having the ability to make medical decisions and performing their ADLs but not the ability to make financial decisions would be bipolar disorder, particularly someone who experiences frequent mania. When the potential ward is in a manic state, he might have a history of spending frivolously to the point of giving away a large portion of his wealth (if wealthy), accruing significant debt, or spending his disability check in the first few days of the month, so that he ends up not being able to pay his rent or meet his basic needs (due to financial reasons). Yet that ward could still care for himself and would be able to continue to do so, if somebody was in charge of his finances (and just handed him pocket money each day). That proposed ward might be able to retain the right to manage a personal bank account with the necessity of supports and services.

With a chronic mental illness like schizophrenia, there may be more need for a guardian of the person than a guardian of the estate. For example, the proposed ward with schizophrenia may be incapable of making a proper decision about his residence because he believes that the TV in the boarding home is watching him or that his neighbor is sending gamma rays into his home via the satellite dish, yet he appropriately spends his limited funds from his SSI check, and has obsessive personality characteristics and paranoia that cause him to be aware of every penny. The same might be the case with regard to accepting medical treatment.

With the supports and services analysis, we may see significantly limited guardianships being established to manage tough borderline cases, including those involving certain types of mental illness. This could mark a significant change in

guardianship practice, where guardianship has traditionally been viewed as inappropriate to deal with mental illness.

Unfortunately, the inclination to limit guardianships on the front end may actually necessitate additional (and perhaps frequent) adjustments to the guardian's powers in the administration phase. The court must already annually review guardianships to determine if they should be modified.¹² If the guardianship was "over-limited" when established, the court may have to tinker with the guardian's powers to address the ward's ever fluid and dynamic financial and physical needs. Not only does exploring and analyzing whether a guardianship can be avoided (or substantially limited in cases of partial incapacity) on the front end cost more, but in many cases additional costs will be shifted to the administration phase when it becomes apparent that additional powers are necessary because, for example, the ward loses the ability to effectively utilize supports and services.

3. Courts Will Take Action to Limit the Costs of Contested Guardianship Proceedings

Third, courts will likely closely guard and monitor contested guardianship proceedings to ensure that "nuclear war" does not erupt, with the main casualty being the ward's estate. Thus, courts may show a strong inclination toward appointing guardians ad litem and entertaining motions in limine and motions relating to many of the cost and/or fee shifting provisions found in the Code (*i.e.*, motions for security for costs). Ironically, litigating these "high stakes" cost/fee-shifting motions may end up substantially increasing the costs of the guardianship proceeding on the ward's estate, especially where rulings are not obtained before attending mediation (which typically results in a settlement whereby everyone agrees to have their fees paid out of the ward's estate).

II. THE ALTERNATIVE TO GUARDIANSHIP ANALYSIS

In establishing a guardianship, the court is now required to find by *clear and convincing* evidence that alternatives to guardianship and supports and services that would avoid the need for guardianship were considered but were determined not to be feasible. In addition, when a limited guardianship is appropriate, the ability of the proposed ward to utilize supports and services directly affects the specific powers and duties given to the guardian (*i.e.*, whether such powers should be limited).¹³

A. Alternatives to Guardianship

The Code defines the phrase "alternatives to

¹¹ TEC § 1101.152.

¹² See TEC § 1201.052.

¹³ TEC § 1101.103.

guardianship” broadly. It includes the: (1) execution of a medical power of attorney under Chapter 166, Health and Safety Code; (2) appointment of an attorney in fact or agent under a durable power of attorney as provided by Subtitle P, Title 2; (3) execution of a declaration for mental health treatment under Chapter 137, Civil Practice and Remedies Code; (4) appointment of a representative payee to manage public benefits; (5) establishment of a joint bank account; (6) creation of a management trust under Chapter 1301; (7) creation of a special needs trust; (8) designation of a guardian before the need arises under Subchapter E, Chapter 1104; and (9) establishment of alternate forms of decision-making based on person-centered planning.¹⁴

B. Supports and Services

The phrase “supports and services” appears to be a game changer when it comes to the way we think of guardianships. Supports and services means available formal and informal resources and assistance that enable an individual to: (1) meet the individual’s needs for food, clothing, or shelter; (2) care for the individual’s physical or mental health; (3) manage the individual’s financial affairs; or (4) make personal decisions regarding residence, voting, operating a motor vehicle, and marriage.¹⁵ Because it appears that a proposed ward can retain certain powers (a) with the necessity for supports and services and (b) without the necessity for supports and services,¹⁶ it seems as though it is possible for someone to meet the definition of incapacity and yet effectively avoid a guardianship (or at least substantially limit it).

C. Supported Decision Making Agreement (POA Lite or a Financial HIPPA?)

In addition to the laundry list found in TEC § 1002.0015, another least restrictive alternative to guardianship is the Supported Decision Making Agreement (“SDMA”). An SDMA is primarily utilized by adults with disabilities who need assistance with decisions regarding daily living but who are not considered incapacitated persons for purposes of establishing a guardianship.¹⁷ As used in Chapter 1357, “supported decision-making” means “a process of supporting and accommodating an adult with a disability to enable the adult to make life decisions, including decisions related to where the adult wants to live, the services, supports, and medical care the adult wants to receive, whom the adult wants to live with, and where the adult wants to work, without impeding the self-determination of the adult.” In essence, the SDMA appears to be the legislature telling Texas

adults with disabilities, “You can have help.” The statutory form specifically states the “supporter is not allowed to make decisions for me.”¹⁸ The supporter is “only authorized to assist.”¹⁹

An adult with a disability may authorize the supporter to: (1) provide supported decision-making, including assistance in understanding the options, responsibilities, and consequences of the adult’s life decisions, without making those decisions on behalf of the adult with a disability; (2) subject to § 1357.054, assist the adult in accessing, collecting, and obtaining information that is relevant to a given life decision, including medical, psychological, financial, educational, or treatment records, from any person; (3) assist the adult with a disability in understanding the information described by Subdivision (2); and (4) assist the adult in communicating the adult’s decisions to appropriate persons.²⁰

It is unclear exactly how these forms will work in practice since the supporter is only allowed to *assist* the adult: “access, collect, or obtain information”; “understand [his or her] options”; and “communicate [his or her] decision”. In other words, will third parties require that the supporter be physically present when rendering this assistance?

III. AN OUNCE OF PREVENTION MAY BE WORTH A POUND OF CURE – UTILIZING LEAST RESTRICTIVE ALTERNATIVES TO AVOID GUARDIANSHIP

In many instances, proper estate planning may substantially reduce the need for a guardianship of the person and/or the estate. But, family dynamics being what they are, no estate-planning document can completely eliminate the risk that a guardianship might one day be necessary to address a breakdown in the plan, for example, where a power struggle ensues between the designated agent and other family members over a disagreement in the agent’s care decisions or money management. Things do not always work out as originally intended.

In addition, financial exploitation and neglect often occur at the hands of those that the elderly trust the most – their family. Even more disturbing is the fact that such family members utilize the very powers entrusted to them under an alternative to guardianship, such as a power of attorney or trust, to commit such abuse.

In these authors’ experience, there is no greater measure that can be taken to reduce the risk of a guardianship proceeding destroying well-intended estate planning documents than facilitating and maintaining communication between family members.

¹⁴ TEC § 1002.0015.

¹⁵ TEC § 1002.031.

¹⁶ See e.g. TEC § 1101.152(2-a).

¹⁷ TEC § 1357.003.

¹⁸ TEC § 1357.056.

¹⁹ TEC § 1357.054.

²⁰ TEC § 1357.051.

Sharing information freely is usually the best way to calm fears or suspicions that someone is doing something wrong. In addition, it communicates that “it’s not all about control” for the attorney-in-fact. Consideration should be given in financial powers of attorney regarding authorizing the attorney-in-fact to disseminate the principal’s financial information to the principal’s immediate family members and/or likely beneficiaries of the principal’s estate (i.e. monthly statements, etc.).

IV. ELDER ABUSE – AN EVER INCREASING PHENOMENON

A. Financial Exploitation

According to one 2011 study, the annual financial loss by victims of elder financial abuse was estimated to be at least \$2.9 billion dollars, a 12% increase from the \$2.6 billion estimated in 2008.²¹ Financial exploitation of the elderly is perhaps one of the fastest growing problems in society today. This problem may only grow worse by the fact that, statistically, the pool of elderly victims will only increase. Between 2012 and 2050, the United States will experience considerable growth in its older population.²² According to the U.S. Census, in 2050, the population aged 65 and over is projected to be 83.7 million, almost double its estimated population of 43.1 million in 2012.²³

While the sheer number of potential elder exploitation victims will increase substantially in the future, many potential victims face special challenges that only exacerbate their susceptibility to elder exploitation:

The number of Americans with Alzheimer’s disease and other dementias will escalate rapidly in coming years as the baby boom generation ages. By 2050, the number of people age 65 and older with Alzheimer’s disease may nearly triple, from 5 million to as many as 16 million, barring the development of medical breakthroughs to prevent, slow or stop the disease.²⁴

The phrase “financial exploitation of the elderly” conjures up thoughts of dilapidated and disreputable nursing homes, elaborate reverse mortgage scams,

²¹ The Metlife Study of Elder Financial Abuse (June 2011), available online at: <https://www.metlife.com/assets/cao/mmi/publications/studies/2011/mmi-elder-financial-abuse.pdf>.

²² See An Aging Nation; The Older Population in the United States, Jennifer M. Ortman, Victoria A. Velkoff, and Howard Hogan, (May 2014), pg. 1; available online at: <http://www.census.gov/prod/2014pubs/p25-1140.pdf>.

²³ *Id.*

²⁴ See http://www.alz.org/alzheimers_disease_facts_and_figures.asp#quickFacts.

telemarketing fraud, or phony “You’ve already won _____” sweepstakes perpetrated by strangers; the unfortunate reality is that many elderly people are exploited at the hands of those that they trust the most – their family and/or their caregivers. Exploitation or abuse by family members and/or caregivers in a domestic setting can be the most difficult to detect and quite frankly, the most difficult to accept. The difficulty in detection is due, in large part, to the fact that it comes in such subtle forms. For example, family members or caregivers may skim unattended cash, use credit cards to make innocuous purchases for gas and food, take blank checks out of checkbooks, and/or steal jewelry, electronics, and personal information. Once their conduct is discovered, these perpetrators offer the most convenient justifications for their behavior, such as, “They wanted me to have it” or “I deserve something for having to do everything for them.”

Other signs of elder exploitation can be more conspicuous and can include: (1) Sudden changes in bank accounts or banking practice; (2) Unexplained withdrawals of significant sums of money by a person accompanying the victim; (3) Adding additional names on a bank signature card; (4) Unapproved withdrawal of funds using an ATM card; (5) Sudden changes in a will or other financial documents, sometimes ambiguously described as “asset protection”; (6) Unexplained missing funds or valuables; (7) Providing substandard care; (8) Having a significant amount of unpaid bills despite having enough money; (9) Forged signature for financial transactions or for the titles to property; (10) Sudden appearance of previously uninvolved relatives claiming their rights to a person’s affairs and possessions; (11) Unexplained sudden transfer of assets; and/or (12) Providing unnecessary services.²⁵

B. Physical Neglect

The elderly often suffer physical neglect at the hands of those they trust the most – their children. Unfortunately, there is an inherent conflict of interest in having to budget mom or dad’s resources. The more money that is used to pay their costs of care, the less that is available on death to inherit. Physical neglect can be especially troubling in the case of a “frugal ward” who, as they become more and more incompetent, lose the ability to appreciate the line between living frugally and self-neglect.

1. Mandatory Reporting – Tex. Hum. Res. Code § 48.051

Generally, a person who has cause to believe that an elderly or disabled person is in a state of abuse, neglect, or exploitation, has a mandatory duty to report

²⁵ See http://www.dfps.state.tx.us/everyonesbusiness/PDFs/Financial-Exploitation_Eng.pdf.

such activity immediately to the Department of Protective and Regulatory Services.²⁶ The duty applies to everyone with knowledge of the possible abuse, neglect, or exploitation, including attorneys, without exception, even if such knowledge is obtained during the scope of the person's employment or whose professional communications are generally confidential.²⁷

The report should can be made either orally or in writing and must include: (1) the name, age, and address of the elderly or disabled person; (2) the name and address of any person responsible for the elderly or disabled person's care; (3) the nature and extent of the elderly or disabled person's condition; (4) the basis of the reporter's knowledge; and (5) any other relevant information.²⁸

2. Criminal Penalties for Failing to Report or Making False Reports

Knowingly failing to report elder abuse, neglect, or exploitation is a Class A misdemeanor.²⁹ A Class A misdemeanor is punishable by: (1) a fine not to exceed \$4,000; (2) confinement in jail for a term not to exceed one year; or (3) both such fine and confinement.³⁰ A person also commits a Class A misdemeanor if the person knowingly or intentionally reports information that the person knows is false or lacks factual foundation.³¹

V. THE DEVIL IS IN THE DETAILS – TOP TEN ISSUES TO CONSIDER WHEN ESTABLISHING A GUARDIANSHIP

A. The Applicant's Attorney Must Now Be Certified (1054.021)

An attorney for an applicant in a guardianship proceeding must now be certified, meaning he or she must complete the four-hour ad litem certification course, with one hour devoted to alternatives to guardianship and supports and services.³² For this reason, it is always a good practice to check the qualification of opposing counsel in any contested guardianship proceeding. Certification may be checked at:

https://www.texasbar.com/am/customsource/wrap_per/members/onlinetools/ApprovedGuardianshipAttorneys.asp

To preserve an objection to an applicant's counsel not being duly qualified under TEC §1054.201, a timely motion to strike the opposing party's

²⁶ See TEX. HUM. RES. CODE §§ 48.051 and 48.002.

²⁷ TEX. HUM. RES. CODE ANN. § 48.051(B).

²⁸ TEX. HUM. RES. CODE ANN. § 48.051(d).

²⁹ TEX. HUM. RES. CODE ANN. § 48.052.

³⁰ TEX. PENAL CODE ANN. § 12.21.

³¹ TEX. HUM. RES. CODE ANN. § 48.053.

³² TEC §1054.201.

application, or a motion to disqualify the opposing party's counsel, should suffice or else it is probably waived.³³ Because of these concerns, it may also be helpful to include a statement in an application to appoint a permanent or temporary guardian that the applicant's counsel is properly certified.

B. Intervention by Interested Person – The “Mother May I Rule” (1055.003)

An interested person may intervene in a guardianship proceeding only by filing a timely motion to intervene that is served on the parties.³⁴ The motion must state the grounds for intervening in the proceeding and must be accompanied by a pleading that sets out the purpose for which the intervention is sought.³⁵

The court has the discretion to grant or deny the motion and, in exercising that discretion, must consider whether: (1) the intervention will unduly delay or prejudice the adjudication of the original parties' rights; or (2) the proposed intervenor has such an adverse relationship with the ward or proposed ward that the intervention would unduly prejudice the adjudication of the original parties' rights.³⁶

TEC § 1055.003 applies to all *interested persons*. That term is defined broadly to include: (1) an heir, devisee, spouse, creditor, or any other person having a property right in or claim against an estate being administered; or (2) a person interested in the welfare of an incapacitated person.³⁷ Texas courts have stated, in other contexts, that an intervention is an equitable motion filed by a non-party voluntarily seeking to become a party in a pending suit to protect the nonparty's own rights.³⁸ Conceivably, TEC § 1055.003 would require all “non-parties” to comply with its requirements. Those class of persons listed in TEC § 1051.104 who are required to receive a copy of the application for guardianship and notice are probably not “parties” in the strict sense, at least not until they appear in the guardianship proceeding.³⁹ Thus, those class of persons may have to now request permission to intervene in a pending guardianship proceeding. Attorneys ad litem and guardians ad litem should be

³³ See e.g. *Guardianship of Lynch*, 35 S.W.3d 162 (Tex. App.—Texarkana 2000, no writ)(dealing with failure to object to attorney ad litem's certification).

³⁴ TEC § 1055.003.

³⁵ *Id.*

³⁶ *Id.*

³⁷ TEC § 1002.018.

³⁸ *In re Roberts*, 04-12-00160-CV, 2012 WL 2835204, at *2 (Tex. App.—San Antonio July 11, 2012); citing *State & County Mut. Fire Ins. Co. v. Kelly*, 915 S.W.2d 224, 226 n. 1 (Tex. App.—Austin 1996, no writ).

³⁹ TEC § 1051.104(c)(“Failure of the applicant to comply with subsections (a)(2)-(9) does not affect the validity of a guardianship created under this title.”).

familiar with § 1055.003, as the failure to timely raise the protections in the statute may constitute waiver.

TEC § 1055.003 also applies to a “guardianship proceeding” defined to include a matter or proceeding related to a guardianship or any other matter covered by this title, including: (1) the appointment of a guardian of a minor or other incapacitated person, including an incapacitated adult for whom another court obtained continuing, exclusive jurisdiction in a suit affecting the parent-child relationship when the person was a child; (2) an application, petition, or motion regarding guardianship or a substitute for guardianship under this title; (3) a mental health action; and (4) an application, petition, or motion regarding a trust created under Chapter 1301.⁴⁰ Consequently, TEC § 1055.003 essentially requires court permission by almost anyone desiring to intervene in any type of guardianship (or alternative to guardianship) case.

Finally, although TEC § 1055.003 does not specify what constitutes a “timely motion”, the language in subsection (c)(1) presumably implies that a “timely motion” is one that does not unduly delay or prejudice the adjudication of the original parties’ rights. In addition, while neither the Code nor TEC § 1055.003 defines “parties”, Texas courts have long held that a “party” is one by or against whom a suit is brought while all others who may be incidentally or consequentially affected were “persons interested” but not parties.⁴¹ Thus it would appear that the parties requiring notice of a § 1055.003 motion would be the active litigants (the proposed ward and all applicants and contestants), as opposed to those persons referenced in § 1051.104, who would not be parties in the strict sense of the term. It appears that the correct procedure to object to a motion to intervene and for the failure to file one is a motion to strike.⁴²

C. Our Applications are Getting Longer (1101.001)

The importance of the sworn guardianship application cannot be minimized, since the application starts the process of obtaining a guardianship. It is essential to include all of the required statutory elements in the application, particularly the new requirements. Basic, extensive information must be provided, including:

- biographical and identifying information of the ward and proposed guardian;
- facts of the ward’s incapacity and, need for guardianship, and extent of powers of the

guardian requested;

- circumstances of the ward’s estate if a guardianship of the estate;
- whether the ward has any powers of attorney;
- the name and address of the person or institution who has care of the ward.⁴³

In addition to the basic information, the new statutory provisions found in TEC § 1101.001(3-a) and (3-b) require statements about alternatives to guardianship, specifically:

- whether alternatives to guardianship and available supports and services to avoid guardianship were considered; and
- whether any alternatives to guardianship and supports and services available to the proposed ward considered are feasible and would avoid the need for a guardianship.

Additionally, good practice dictates a couple of other items to include in the application. As referenced above, the attorney signing the application should probably include a statement that he or she is certified as a guardian ad litem in compliance with TEC § 1054.201. Next, to facilitate the efficient administration of a guardianship estate, an applicant should consider including a request for a monthly allowance in the application.⁴⁴

D. Don’t Forget About Notice (1051.104)

TEC § 1051.104 imposes somewhat involved notice requirements on a guardianship applicant. These notice requirements present a pitfall for less than vigilant applicants. To comply with the requirements, the applicant must mail a copy of the application, as well as a written notice, by certified mail, return receipt requested (or other mail that provides proof of delivery) to certain persons that includes the information required in the citation. TEC § 1051.102 sets forth the specific contents that must be included in the citation.

The notice must be provided to certain members of the ward’s family set forth in TEC § 1101.001(11) for minor proposed wards and TEC § 1101.001(13) for adult proposed wards. For minor proposed wards, the applicant must provide notice to the proposed ward’s parents and adult siblings. For adult proposed wards, the applicant must provide notice to the proposed ward’s spouse, parents, siblings, and children. If the proposed ward has no living family in those categories of relatives, then the applicant must provide notice to the adult relatives within the third degree of consanguinity to the proposed ward. A reference table

⁴⁰ TEC § 1002.015.

⁴¹ See *In re E. L. P.*, 636 S.W.2d 579, 581 (Tex. App.—San Antonio 1982, no writ); citing *Doe v. Roe*, 600 S.W.2d 378 (Tex. Civ. App.—Eastland 1980, writ ref’d n. r. e.) and cases cited therein.

⁴² TRCP 60.

⁴³ TEC § 1101.001.

⁴⁴ See TEC § 1156.001 – 1156.052.

showing relatives within the third degree of consanguinity may be found in **Appendix A**.

In addition to providing notice to certain family members, the applicant must provide notice to the administrator of a nursing home or other care facility, and to the operator of a residential facility, where the proposed ward resides. If the applicant is aware of a power of attorney signed by the proposed ward, the applicant must provide notice to the agent appointed under that document. Where the validity of a power of attorney is questioned, the better practice is to send notice to all agents listed in the purported power of attorney.

Finally, TEC § 1052.104 requires the applicant to provide notice to a person designated to serve as the proposed ward's guardian, either in a declaration of guardian or in a probated will or written declaration of the proposed ward's last surviving parent.

Once the applicant receives the green cards or other proof of delivery of the notices, the applicant must file an affidavit of notice with the court. The affidavit must include copies of the notices provided, as well as proofs of delivery. The affidavit must state:

(A) that the notice was mailed; and

(B) the name of each person to whom the notice was mailed, if the person's name is not shown on the proof of delivery.

While the Code provides that an applicant's failure to provide notice to every family member except adult children of the ward is not fatal to the establishment of a guardianship, prudent practice demands strict adherence to the notice requirements of TEC § 1051.104.

E. The "New" Doctor's Letter (1101.103)

Unless intellectual disability forms the basis for the proposed ward's alleged incapacity, the court may not grant an application to create a guardianship for an incapacitated person, other than a minor or person for whom it is necessary to have a guardian appointed only to receive funds from a governmental source, unless the applicant presents to the court a written letter or certificate from a physician licensed in this state that conforms to TEC § 1101.103 (the "Doctor's Letter"). There are several items of new information that must now be included in the Doctor's Letter.

The Doctor's Letter must, among other things, now provide: an evaluation of the proposed ward's physical condition and mental functioning and summarize the proposed ward's medical history if reasonably available; and in providing this evaluation, state whether improvement in the proposed ward's physical condition and mental functioning is possible and, if so, state the period after which the proposed

ward should be reevaluated to determine whether a guardianship continues to be necessary.⁴⁵

In addition, the Doctor's Letter must now also state how or in what manner the proposed ward's ability to make or communicate responsible decisions concerning himself or herself is affected by the proposed ward's physical or mental health, including the proposed ward's ability to:

(A) understand or communicate;

(B) recognize familiar objects and individuals;

(C) solve problems;

(D) reason logically; and

(E) administer to daily life activities with and without supports and services.

Finally, the Doctor's Letter must: describe the precise physical and mental conditions underlying a diagnosis of a mental disability; state whether the proposed ward would benefit from supports and services that would allow the individual to live in the least restrictive setting; and state whether a guardianship is necessary for the proposed ward and, if so, whether specific powers or duties of the guardian should be limited if the proposed ward receives supports and services.

It is important to note that TEC § 1101.103 implies that the court has the power to require *additional* information to be included in the Doctor's Letter, as subsection (7) states "include any other information required by the court."

F. Qualification – Traps for the Unwary (1104.351 – 1104.358)

Clearly, a guardian must be "qualified" to serve. A qualified guardian must:

- Not be a minor or otherwise incapacitated;⁴⁶
- Not be someone who is incapable of prudently managing and controlling the person and estate of the ward because of the guardian's inexperience, lack of education, or other good reason;⁴⁷
- Not be someone the court finds unsuitable;⁴⁸
- Not be someone whose conduct is notoriously bad;⁴⁹
- Not be someone who is indebted to the proposed ward (unless they pay the debt before appointment)⁵⁰
- Not be someone who asserts a claim adverse to the proposed ward or the proposed ward's

⁴⁵ TEC § 1101.103(3) and (3-a).

⁴⁶ TEC § 1104.351.

⁴⁷ TEC § 1104.351.

⁴⁸ TEC § 1104.352.

⁴⁹ TEC § 1104.353(a). There are certain crimes listed in TEC § 1104.353(b) the conviction of which render the proposed guardian presumed to be unqualified.

⁵⁰ TEC § 1104.354(2)

property;⁵¹

- Not be someone who is a party (or whose parent is a party) to a lawsuit concerning or affecting the welfare of the proposed ward, unless the court determines that the lawsuit is not in conflict with the lawsuit claim of the proposed ward; or appoints a guardian ad litem to represent the interests of the proposed ward throughout the litigation of the ward's lawsuit claim;⁵²
- Not disqualified under a declaration of guardian the ward properly executed;⁵³
- Be certified as a private professional guardian under certain circumstances;⁵⁴
- Either a Texas resident or appoint a resident agent;⁵⁵
- Not be someone under a protective order for having committed family violence.⁵⁶

G. Standing – Clear as Mud (1055.001)

The standard for determining a person's standing to file a guardianship application under TEC § 1055.001(b) is distinct from the standard for determining whether a person is disqualified from serving as guardian under TEC § 1104.354.⁵⁷ As one Texas court recently noted, "the standards are different because standing under TEC § 1055.001(b)(1) is a threshold requirement that must be met to simply proceed with an application which is unlike the merits-based determination of which person should be appointed as guardian."⁵⁸ For example, a person who is indebted to a proposed ward is disqualified from serving as guardian unless the debt is paid before the appointment; however, being indebted to the proposed ward does not automatically deprive a person of standing to apply for a guardianship.⁵⁹

A person who has an interest that is adverse to a proposed ward or incapacitated person lacks standing to contest the creation of a guardianship or the

appointment of a person as guardian for the proposed ward.⁶⁰ The probate court must "determine by motion in limine the standing of a person who has an interest that is adverse to a proposed ward of incapacitated person." TEC § 1055.001(c). "The issue of whether a party has standing to participate in a guardianship proceeding is a question of law."⁶¹

Because the Texas Estates Code does not define what constitutes an interest adverse to the proposed ward, at least one appellate court has examined how the term has been applied in different guardianship cases.⁶² Ultimately, for the *Gilmer* court, the standing inquiry involved analyzing whether the interest rose to such a level as to be against the well-being of the propose ward.⁶³

H. Winning Hearts and Minds – Cooperate with the Court Investigator!

On the filing of an application for guardianship, a court investigator is required to investigate the circumstances alleged in the application to determine whether a less restrictive alternative to guardianship is appropriate.⁶⁴ But the court investigators do more than participate in the Alternative to Guardianship Analysis. They are the eyes and ears of the court.

A court investigator is required to perform the following "general duties": (1) supervise a court visitor program, and, in that capacity, serve as the chief court visitor; (2) investigate a complaint received from any person about a guardianship and report to the judge, if necessary; and (3) perform other duties as assigned by the judge or required by this title.⁶⁵

Additionally, a court investigator shall file with the court a report containing the court investigator's findings and conclusions after conducting their investigation.⁶⁶ In a contested case, the court investigator shall provide copies of the report of the court investigator's findings and conclusions to the attorneys for the parties before the earlier of: (1) the seventh day after the date the court investigator completes the report; or (2) the 10th day before the date the trial is scheduled to begin. Disclosure to a jury

⁵¹ *Id.*

⁵² TEC § 1104.354(1)

⁵³ TEC § 1104.355.

⁵⁴ TEC § 1104.356.

⁵⁵ TEC § 1104.357.

⁵⁶ TEC § 1104.358.

⁵⁷ *In re Guardianship of Gilmer*, 04-14-00362-CV, 2015 WL 3616071, at *7 (Tex. App.—San Antonio June 10, 2015, no pet.)

⁵⁸ *Id.*

⁵⁹ *In re Guardianship of Gilmer*, 04-14-00362-CV, 2015 WL 3616071, at *7 (Tex. App.—San Antonio June 10, 2015, no pet.) (citing *In re Guardianship of Miller*, 299 S.W.3d 179, 188–89 (Tex. App.—Dallas 2009, no pet.); *Betts v. Brown*, No. 14–99–00619–CV, 2001 WL 40337, at *4 n.2 (Tex. App. — Houston [14th Dist.] Jan. 18, 2001, no pet.) (not designated for publication).

⁶⁰ TEC § 1055.001(b)(2), (3).

⁶¹ *In re Guardianship of Benavides*, No. 04-13-00197-CV, 2014 WL 667525, at *1 (Tex. App. – San Antonio Feb. 19, 2014, pet. denied) (mem. op.) (citing *In re Guardianship of Miller*, 299 S.W.3d 179, 188 (Tex. App. – Dallas 2009, no pet.).

⁶² *In re Guardianship of Gilmer*, 04-14-00362-CV, 2015 WL 3616071, at *8 (Tex. App.—San Antonio June 10, 2015, no pet.).

⁶³ *Id.*

⁶⁴ TEC § 1054.151.

⁶⁵ TEC § 1054.152.

⁶⁶ TEC § 1054.153.

of the contents of a court investigator's report is subject to the Texas Rules of Evidence.⁶⁷

The court investigators also investigate whether proposed applicants are properly qualified. The Code provides a procedure whereby the criminal histories of proposed guardians (even proposed temporary guardians) are to be obtained, reviewed, and taken into consideration when determining who to appoint as guardian. (Unfortunately, this can, however, have only a limited effect on identifying elderly predators, as many types of elder exploitation do not, and will not, show up on the criminal radar).

While many court investigators are reluctant to choose sides in a contested guardianship proceeding, they are required to investigate the facts of the case and report those facts (whether good or bad for a particular side) to the court. In these authors' experience, the testimony of a court investigator can play a role in the court's determination of bad faith and without just cause under TEC § 1155.151(c)(which effects who pays the costs of the guardianship proceeding). This is why it is critical for an applicant's attorney to advise the applicant to always cooperate with the court investigator and respond to their questions and concerns in a timely and adequate manner.

I. Attorney's Fees & Expenses and Costs

1. Attorney's Fees and Expenses

To understand how attorney's fees and expenses are generally handled, it is helpful to start with TEC § 1155.054. "Costs" will be covered in a moment.

Presently, an applicant must "succeed" to recover attorney's fees and expenses out of the proposed ward's estate. In this context, "succeeding" means establishing a guardianship or creating a management trust. Despite the legislative changes, "succeeding" does not include utilizing an alternative to guardianship. Interestingly, TEC § 1155.054 does not require that the applicant be the person appointed to recover attorney's fees and expenses from the proposed ward's estate.⁶⁸

There are two key limitations or conditions on any award of attorney's fees and expenses. One, the court must affirmatively find that the applicant acted in good faith and for just cause in filing and prosecuting the application. *See Caldwell, A Good Deed Repaid; Awarding Attorney's Fees in Contested Guardianship Proceedings*, 51 So. Tex. L. Rev. 439 (2009) for a possible definition of "good faith and for just cause" in this context. Two, the fees must be reasonable and necessary and in amounts the court considers equitable and just.⁶⁹

In certain instances, the court may award the payment of attorney's fees from a source other than the proposed ward's estate. The court may authorize amounts that otherwise would be paid from the ward's estate or the management trust to instead be paid from the county treasury if: (1) the ward's estate or management trust is insufficient to pay the amounts; and (2) funds in the county treasury are budgeted for that purpose.⁷⁰ The court may authorize the payment of attorney's fees from the county treasury only if the court is satisfied that the attorney to whom the fees will be paid has not received, and is not seeking, payment for the services described by that subsection from any other source.⁷¹

TEC § 1155.104 includes a powerful fee shifting provision that can serve as a disincentive to certain applicants to unnecessarily prolong or hinder a guardianship proceeding. If the court finds that a party in a guardianship proceeding acted in bad faith or without just cause in prosecuting or objecting to an application in the proceeding, the court may require the party to reimburse the ward's estate for all or part of the attorney's fees awarded under this section and shall issue judgment against the party and in favor of the estate for the amount of attorney's fees required to be reimbursed to the estate.⁷²

2. Costs

Now, on to costs. The general cost statute is a fun and complex maze. If you run into a cost issue, read, and then re-read TEC § 1155.151.

TEC § 1155.151 governs how costs are generally paid in a guardianship proceeding. Costs are specifically defined to include the cost of any guardians ad litem, attorneys ad litem, court visitors, mental health professionals, and court appointed interpreters.⁷³ The costs attributable to the services of any guardians ad litem, attorneys ad litem, court visitors, mental health professionals, and court appointed interpreters shall be paid at any time after the commencement of the proceeding as ordered by the court.⁷⁴

In a guardianship proceeding, the court costs of the proceeding (including those previously mentioned) shall be paid out of the following sources:

- (1) out of the guardianship estate;
- (2) out of the management trust, if a management trust has been created for the benefit of the ward under Chapter 1301 and the court determines it is in the ward's best interest;

⁶⁷ *Id.*

⁶⁸ TEC § 1155.054(a).

⁶⁹ TEC § 1155.054(a).

⁷⁰ TEC § 1155.054(b).

⁷¹ TEC § 1155.054(e).

⁷² TEC § 1155.054(d).

⁷³ TEC § 1155.151(a-1).

⁷⁴ TEC § 1155.151(b).

(3) by the party to the proceeding who incurred the costs; or

(4) out of the county treasury.⁷⁵

There are a few additional conditions about being “reimbursed” out of the ward’s estate or management trust: (1) the assets of the estate or trust must be sufficient; and (2) the person or entity applying for reimbursement must not have been ordered by the court to pay all or a part of the costs for having been found to have acted in bad faith or without just cause in prosecuting or objecting to an application in the proceeding.⁷⁶

Numerous requirements and conditions were added in situations where a party tries to claim he or she is “unable to pay”, presumably to cut down on fraud and the unnecessary depletion of the county resources. A party may not have to pay costs, but only if that party filed, on the party’s own behalf, an affidavit of inability to pay the costs under Texas Rules of Civil Procedure 145 that shows the party is unable to afford the costs, if no guardianship estate or no management trust has been created for the ward’s benefit or the assets of the guardianship estate or management trust, as appropriate, are insufficient to pay the costs.⁷⁷ There is now a litany of “safe-harbor” facts that can be included in an affidavit of inability to pay to make it sufficient.⁷⁸ An affidavit of inability to pay costs filed under Texas Rules of Civil Procedure 145 can be contested, and the court, at a hearing, must review the contents of and attachments to the affidavit and any other evidence offered at the hearing and make a determination as to whether the person or entity is unable to afford the costs. If the court finds that the person or entity is able to afford the costs, the person or entity must pay the court costs. Except with leave of court, no further action in the guardianship proceeding may be taken by a person or entity found able to afford costs until payment of those costs is made.⁷⁹

Costs are only paid out of the county treasury if:

(a) there is no guardianship estate or management trust or the assets of the guardianship estate or management trust, as appropriate, are insufficient to pay the costs; and (b) the party to the proceeding who incurred the costs filed, on the party’s own behalf, an affidavit of inability to pay the costs under Texas Rules of Civil Procedure 145 that shows the party is unable to afford the costs.⁸⁰

Certain individuals and entities are exempt from paying costs. The following are not required to pay

court costs on the filing of or during a guardianship proceeding: (1) an attorney ad litem; (2) a guardian ad litem; (3) a person or entity who files an affidavit of inability to pay the costs under Rule 145, Texas Rules of Civil Procedure, that shows the person or entity is unable to afford the costs; (4) a nonprofit guardianship program; (5) a governmental entity; and (6) a government agency or nonprofit agency providing guardianship services.⁸¹ But, if at any time after a guardianship of the estate or management trust under Chapter 1301 is created there are sufficient assets of the estate or trust, as appropriate, to pay the amount of any of the foregoing costs, the court shall require the guardian to pay out of the guardianship estate or management trust, as appropriate, to the court clerk for deposit in the county treasury the amount of any of those costs.⁸² Again, this provision ensures the county only pays their “share” of the costs when the ward’s resources are truly insufficient.

If the court finds that a party in a guardianship proceeding acted in bad faith or without just cause in prosecuting or objecting to an application in the proceeding, the court may order the party to pay all or part of the costs of the proceeding. Moreover, if the party found to be acting in bad faith or without just cause was required to provide security for the probable costs of the proceeding under § 1053.052, the court shall first apply the amount provided as security as payment for costs ordered by the court under this subsection. If the amount provided as security is insufficient to pay the entire amount ordered by the court, the court shall render judgment in favor of the estate against the party for the remaining amount.⁸³

Finally, to the extent that TEC § 1155.151 conflicts with the Texas Rules of Civil Procedure or other rules, § 1155.151 controls.

J. Our Orders are Getting Longer Too – Tips and Trends in Drafting the Order Appointing Guardian (1101.151 – 1101.153)

Because the findings required to be included in an order appointing a guardian are found in more than one section in the Code, drafting an order appointing a guardian requires examining several different Code sections which will necessarily depend on the type of guardianship that is being established (*i.e.*, whether a guardianship is being established for someone who is totally incapacitated or only partially incapacitated). A guardianship for someone who is totally incapacitated is referred to herein as a “Full Guardianship” and a guardianship for someone who is only partially incapacitated is referred to herein as a “Limited Guardianship.”

⁷⁵ TEC § 1155.151(a)(1)-(4).

⁷⁶ TEC § 1155.151(d).

⁷⁷ TEC § 1155.151(a)(3).

⁷⁸ TEC § 1155.151(a-3).

⁷⁹ TEC § 1155.151(a-4).

⁸⁰ TEC § 1155.151(a)(4).

⁸¹ TEC § 1155.151(a-2).

⁸² TEC § 1155.151(e).

⁸³ TEC § 1155.151(c).

This author recommends starting with TEC § 1101.101, which outlines the *general* findings and proof required. Note the different evidentiary standards: certain findings must be made by *clear and convincing* evidence while others must be made by the *preponderance of the evidence*.

For both Full Guardianships or Limited Guardianships, the court must find by *clear and convincing* evidence that alternatives to guardianship that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible and supports and services available to the proposed ward that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible.⁸⁴ In other words, the Alternative to Guardianship Analysis is elevated to the same evidentiary standard as incapacity. From there, the sections that must be consulted will depend on whether a Full Guardianship or Limited Guardianship is being created.

For a Limited Guardianship, one of 2015 legislative changes to § 1101.101 now mandates that if the court finds by a preponderance of the evidence that the proposed ward lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself or to manage his or her property, then the order must specifically state whether the proposed ward lacks the capacity, or lacks sufficient capacity with supports and services, to make personal decisions regarding residence, voting, operating a motor vehicle, and marriage.⁸⁵ Other changes to the order appointing a guardian in a Limited Guardianship include requiring the court to take the concept of supports and services into account when finding that the ward is partially incapacitated.⁸⁶ Another significant change includes requiring the court to find and specify the “specific rights and powers retained by the person: (a) with the necessity for supports and services; and (b) without the necessity for supports and services.”⁸⁷ In other words, this requirement seeks to analyze what things the ward can do for himself or herself without the assistance of supports and services and what tasks must the ward have supports and services to do.

As mentioned above, it is interesting to note that in a Limited Guardianship, the order must specify the specific powers, limitations, or duties of the guardian with respect to the person’s care or the management of the person’s property by the guardian and the specific rights and powers retained by the person.⁸⁸ For many years, it seemed the common wisdom in drafting an order for a Full Guardianship was not to specify the

specific powers granted to the guardian or to spell out the powers removed from the ward. Such orders were necessarily significantly shorter. But even when creating a Full Guardianship, TEC § 1101.151(b)(6) requires (whenever a guardianship of the person is established) that the rights of the guardian of the person *as specified in § 1151.051(c)(1)*, be set forth in the order. That section defines the general powers and duties of guardians of the person. Presumably, this additional language was mandated, at least in part, to assist the guardian in dealing with third parties. In recent years, at least in Dallas County, similar language is being included in Full Guardianships of the estate with respect to the powers of the guardian of the estate and the rights removed from the ward. The justification for this seems to be to engender maximum cooperation and reliance by third-parties.

The main changes to the order in a Full Guardianship include requiring the court to find that the ward does *not* have the capacity to operate a motor vehicle, make personal decisions regarding residence, and to vote in a public election.⁸⁹

The final step in drafting an order appointing a guardian is to check TEC § 1101.153 last, which is entitled “General Contents of Order Appointing Guardian.” Note that if the letter or certificate under § 1101.103(b)(3-a) stated that improvement in the ward’s physical condition or mental functioning is possible and specified a period of *less than a year* after which the ward should be reevaluated to determine continued necessity for the guardianship, an order appointing a guardian must include the date by which the guardian must submit to the court an updated letter or certificate containing the requirements of § 1101.103(b).⁹⁰

A word about powers of attorney. If after executing a durable power of attorney, a court appoints a guardian of the estate for the principal, the powers of the attorney in fact terminate, by operation of law, when the guardian qualifies.⁹¹ An attorney in fact’s powers, however, are not *automatically* suspended on the appointment of a temporary guardian of the estate.⁹²

In contrast, a medical power of attorney (“MPOA”) is generally revoked by: (1) oral or written notification at any time by the principal to the agent or a licensed or certified health or residential care provider or by any other act evidencing a specific intent to revoke the power, without regard to whether the principal is competent or the principal’s mental state; (2) execution by the principal of a subsequent

⁸⁴ TEC § 1101.101(a)(D) and (E).

⁸⁵ TEC § 1101.101(c).

⁸⁶ TEC § 1101.152(a).

⁸⁷ TEC § 1101.152(2-a).

⁸⁸ TEC § 1101.152.

⁸⁹ TEC § 1101.151(b)(5)

⁹⁰ TEC § 1101.153.

⁹¹ TEC § 751.052(a).

⁹² TEC § 751.052(b).

medical power of attorney; or (3) the divorce of the principal and spouse, if the spouse is the principal's agent, unless the medical power of attorney provides otherwise.⁹³

An MPOA can also be effectively revoked or trumped in other ways. The Texas Health and Safety Code specifically requires affirmative action to revoke a medical power of attorney as it provides: (a) On motion filed in connection with a petition for appointment of a guardian or, if a guardian has been appointed, on petition of the guardian, a probate court shall determine whether to suspend or revoke the authority of the agent; (b) The court shall consider the preferences of the principal as expressed in the medical power of attorney.⁹⁴ However, § 166.156 also provides that during the pendency of the court's determination under Subsection (a), the guardian has the sole authority to make any health care decisions unless the court orders otherwise. If a guardian has not been appointed, the agent has the authority to make any health care decisions unless the court orders otherwise.⁹⁵

If the applicant is not the same person as the attorney in fact under the MPOA, the better practice is to include a request in the application that all powers of attorney be revoked and language achieving the same in the order.

VI. YOU ARE NOT OUT THE WOODS YET – TOP TEN ISSUES TO CONSIDER IN ADMINISTERING A GUARDIANSHIP

A. Qualifying Promptly and Other Bond Considerations

With limited exceptions, both a guardian of the estate and a guardian of the person must give a bond.⁹⁶ Corporate fiduciaries are not required to give a bond.⁹⁷

If there is one saying you have heard once, you have heard it a thousand times: make sure the prospective guardian of the estate can pre-qualify for the likely bond before the prove-up hearing! There is nothing worse than having a client appointed as the guardian of the estate only to then have to have the court appoint another suitable guardian because the original guardian could not qualify for a bond. The provisions relating to bonds can be found in TEC §§ 1105.151 – 1105.163. The judge usually sets the amount of the bond for the guardian of the estate at the prove-up hearing. The bond should be in an amount sufficient to protect the guardianship and the guardianship's creditors.⁹⁸

⁹³ Texas Health and Safety Code § 166.155.

⁹⁴ Texas Health and Safety Code § 166.156.

⁹⁵ *Id.*

⁹⁶ TEC § 1105.101.

⁹⁷ *Id.*

⁹⁸ TEC § 1105.152.

The applicant's attorney should be prepared to submit or elicit evidence of the following at the prove-up hearing:

- (1) the amount of cash on hand and where that cash is deposited;
- (2) the amount of cash estimated to be needed for administrative purposes, including the operation of a business, factory, farm, or ranch owned by the guardianship estate, and administrative expenses for one year;
- (3) the revenue anticipated to be received in the succeeding 12 months from dividends, interest, rentals, or use of property belonging to the guardianship estate and the aggregate amount of any installments or periodic payments to be collected;
- (4) the estimated value of certificates of stock, bonds, notes, or other securities of the ward, and the name of the depository in which the stocks, bonds, notes, or other securities are deposited;
- (5) the face value of life insurance or other policies payable to the ward or the ward's estate;
- (6) the estimated value of other personal property that is owned by the guardianship, or by a person with a disability; and
- (7) the estimated amount of debts due and owing by the ward.⁹⁹

With certain exceptions, the judge shall set the amount of a bond of a guardian of an estate in an amount equal to the sum of: (1) the estimated value of all personal property belonging to the ward; and (2) an additional amount to cover revenue anticipated to be derived during the succeeding 12 months from:

- (A) interest and dividends;
- (B) collectible claims;
- (C) the aggregate amount of any installments or periodic payments, excluding income derived or to be derived from federal social security payments; and
- (D) rentals for the use of property.¹⁰⁰

⁹⁹ TEC § 1105.153.

¹⁰⁰ TEC § 1105.154

The judge is further required to reduce the amount of the original bond in proportion to the amount of cash or the value of securities or other assets: (1) authorized or required to be deposited by court order; or (2) voluntarily deposited by the guardian or the sureties on the guardian's bond as provided in §§ 1105.156 (Safe-keeping agreement) and 1105.157(a)(discussing method by which guardian may deposit his or her own cash in lieu of a bond).¹⁰¹

The Code limits how long an applicant has to file and obtain court approval of his or her bond. Except in cases where a guardian is appointed for a proposed ward before the proposed ward's 18th birthday, an oath must be taken and subscribed and a bond must be given and approved before:(1) the 21st day after the date of the order granting letters of guardianship; or (2) the letters of guardianship are revoked for a failure to qualify within the period allowed.¹⁰² Another person may be appointed as guardian to replace a guardian who fails to give the bond required by the court within the statutory period.¹⁰³ The court may remove a guardian who fails to qualify by filing a required bond without a hearing and without a determination that removal is in the ward's best interest.¹⁰⁴

B. Monthly Allowance (1156.001 – 1156.052)

It is always great to accomplish as much as possible at the hearing proving up a guardianship to minimize expenses of administration. One way to achieve this goal is to obtain court approval of the monthly allowance at the same time the guardianship is being established.

The Code implies that the court may set a monthly allowance for a ward in the court's order appointing a guardian.¹⁰⁵ However, even if an applicant offers testimony at the prove up hearing about the amount of money needed to educate and maintain the ward and the ward's property, unless supporting documents are filed, the court's auditor will not have anything to go on when reviewing the annual accountings.

It is a good practice to attempt to discern the ward's monthly budget in the initial interview of the applicant. There are two options in cases where the information is reasonably available to the applicant before receiving letters of guardianship. First, an applicant can file an application for monthly allowance shortly before the hearing. Alternatively, an applicant can include a section seeking a monthly allowance in the original application.

The second option is probably preferred for a variety of reasons, including ensuring that the court investigator has an opportunity to review the information before the prove up hearing. Plus, if increase in the monthly allowance is needed, the guardian can go back and "can cut and paste" the original information from the initial application into the new application seeking the increase.

While some courts will approve a broad allowance "in an amount up to but not exceeding \$X" without any reference to the categories that comprise the total allowance, the trend seems to be to require a break down of the allowance by category of expenditures. The order will then state, "the Guardian of the Estate is authorized to spend up to \$X per month for the items listed in the application."

The categories of expenditures for a particular ward will vary from case to case but generally may include: rent, utilities, medical, food, transportation, etc. For higher functioning wards with larger estates, other categories could include life-enhancing activities such as entertainment and certain types of life-enhancing hobbies. If permission to spend money on entertainment is sought, it is generally a good practice to try to explain the particular types of entertainment the ward enjoys. In other words, state whether the entertainment consists of attending movies, watching sporting events, going to museums, eating at restaurants, etc. A category for a modest cash allowance may also be appropriate if the ward is high functioning.

In reality, as long as the guardian does not exceed the monthly allowance during an annual accounting period, courts do not strictly check the amounts expended category by category.

C. Consider Obtaining Authority to Implement an Investment Plan

TEC § 1161.001 charges a guardian of the estate to invest the ward's assets, if those assets are not needed to support the ward or the ward's dependents, or unless otherwise ordered by the court. The Code applies the prudent investor standard to the guardian's decision to invest the ward's assets. The guardian must consider all relevant factors, including the ward's age, the general condition and nature of the ward's estate, and other resources available to the ward.¹⁰⁶

In examining a guardian's prudent decision making, the court considers the investment plan as a whole (similar to the Uniform Prudent Investor Act), rather than looking at an isolated investment.¹⁰⁷

The Code provides a list of "safe harbor" assets that a guardian may consider appropriate investments. Those investments include:

¹⁰¹ *Id.*

¹⁰² TEC § 1105.003.

¹⁰³ TEC § 1105.111.

¹⁰⁴ TEC § 1203.051; *Theford v. White*, 37 S.W.3d 494, 499 (Tex. App.—Tyler 2000, no pet.).

¹⁰⁵ TEC § 1156.001.

¹⁰⁶ TEC § 1161.002(a).

¹⁰⁷ TEC § 1161.002(b).

- (1) Federal bonds;
- (2) Certain tax-supported bonds;¹⁰⁸
- (3) FDIC-backed share or share accounts of federal or Texas savings and loan association or savings bank;
- (4) certain collateral bonds;
- (5) FDIC-backed CDs for a term of one year or less.¹⁰⁹

The investment standard is not inflexible, however. The Code also provides that the default standard, including the guardian's duty to invest, can be modified or entirely eliminated if the court finds it to be in the best interest of the ward and the ward's estate.¹¹⁰

The guardian has a year from the date the estate receives the property to invest it.¹¹¹ The guardian has one year from the date he or she receives letters to invest property existing at the time the estate is created, and if the estate receives property later on, one year from the date the property is received.¹¹² Moreover, if the guardian's retention of the ward's property is part of an overall investment plan, a court may authorize continued retention.¹¹³ A guardian's obligation to manage a ward's assets prudently is not mitigated for retained assets.¹¹⁴

The court may order a guardian, on its own motion or on the motion of an interested person, to show cause why a guardianship estate is not invested properly.¹¹⁵ The court may hold a hearing on the appropriateness of the investments and appoint a guardian ad litem for representing the ward's best interests relative to the investments.¹¹⁶

The penalty for a guardian who fails to invest guardianship estate properly should give a cautious fiduciary pause. TEC § 1161.008 provides for remedies in addition to those ordinarily available to the ward. The guardian and the surety are both liable for "principal and the greater of:

(1) the highest legal rate of interest on the principal during the period the guardian failed to invest or lend the assets; or

(2) the overall return that would have been made on the principal if the principal were invested in the manner provided by [the Code]."¹¹⁷

¹⁰⁸ TEC § 1161.004(b) limits the types of tax-supported bonds that are considered appropriate investments.

¹⁰⁹ TEC § 1161.003.

¹¹⁰ TEC § 1161.005.

¹¹¹ TEC § 1161.006(a).

¹¹² TEC § 1161.006(a).

¹¹³ TEC § 1161.006(c).

¹¹⁴ TEC § 1161.006(b).

¹¹⁵ TEC § 1161.007(a).

¹¹⁶ TEC § 1161.007(b) and (e).

¹¹⁷ TEC § 1161.008(a).

Additionally, the guardian and the surety are both liable for attorney's fees, costs, and litigation expenses incurred in enforcing the guardian's duty to invest.¹¹⁸

D. Consider Performing a Medicaid Analysis

Medicaid provides long-term care and attendant benefits to the aged, blind, and disabled indigent. Some guardians will want to consider applying on the ward's behalf to receive Medicaid benefits. To qualify for Medicaid, the ward must have relatively very little property, and the qualification process involves exhaustive inquiries into the ward's property. Generally, not counting homestead and nominal personal property, an unmarried ward may not have more than \$2,000 in countable assets, and a married ward may not have more than \$3,000 when both spouses live in a nursing home.

The rules for Medicaid qualification are a complex labyrinthine. A wrong or uninformed decision can significantly affect the ward's care and place of living. For a fiduciary saddled with the duty of maximizing the ward's assets and caring for the ward, it is usually preferable to rely on the counsel of a professional who practices in the area of Medicaid benefits. Therefore, a newly appointed guardian should consider filing an application to retain elder law counsel to review whether the guardian should request court approval to pursue strategies to qualify for Medicaid benefits.

E. Gifts and Transfers

The Code allows a guardian of an estate to apply to a court for permission to establish a limited estate plan for the ward. When the ward has available principal or income that is not needed for the ward's or the ward's family's support, § 1162.001 allows a guardian to create an estate plan for the purpose of minimizing income, estate, inheritance, or other taxes payable out of the ward's estate, or to qualify the ward for government benefits. The court must approve such gifts and transfers, which may be outright or in trust, and must be to one of the following transferees:

(1) tax-exempt charitable organization in which the ward would reasonably have an interest;

(2) ward's spouse, descendant, or other person related to the ward by blood or marriage who is identifiable at the time of the court order for the transfer; and

(3) devisee under the ward's last validly executed will, trust, or other beneficial instrument, if the instrument exists.

Additionally, if the guardian is a person who qualifies as a transferee under paragraphs (2) and (3) above, then the guardian is not disqualified from receiving gifts and transfers under § 1162.001.

¹¹⁸ TEC § 1161.008(b).

The application must be sworn, and the applicant must provide notice to the individuals listed in § 1162.006. The court may appoint a guardian ad litem to protect the ward or an interest party.¹¹⁹ Once a court grants an application under § 1162.001, then § 1162.004 allows a guardian to make certain periodic gifts without further application to the court, if the court finds it to be in the ward's best interest.

The guardian may also apply to make contributions of the ward's funds to corporations, trusts, or community chests, funds, or foundations, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or nonprofit federal, state, county, or municipal projects operated exclusively for public health or welfare under § 1162.051. The court must hear the application and may enter an order if the court finds the following under § 1162.053:

(1) the amount of the proposed contribution stated in the application will probably not exceed 20 percent of the ward's net income for the current calendar year;

(2) the net income of the ward's estate for the current calendar year exceeds, or probably will exceed, \$25,000;

(3) the full amount of the contribution, if made, will probably be deductible from the ward's gross income in determining the net income of the ward under applicable federal income tax laws and rules;

(4) the condition of the ward's estate justifies a contribution in the proposed amount; and

(5) the proposed contribution is reasonable in amount and is for a worthy cause.

F. More Restrictive Placements Now Generally Require Advanced Court Permission (1151.051)

TEC § 1151.051 now contains newly enacted provisions dealing with placing the ward in a "more restrictive" care facility. Under the newly enacted language, a guardian of the person may place the ward in a more restrictive care facility without notice and without a hearing in the case of an *emergency* (which is not defined in the statute).

Otherwise, a guardian of the person may only place the ward in a more restrictive care facility if the guardian provides notice of the proposed placement to the court, the ward, and any person who has requested notice and after:

(1) the court orders the placement at a hearing on the matter, if the ward or another person objects to the proposed placement before the eighth business day after the person's receipt of the notice; or

(2) the seventh business day after the court's receipt of the notice, if the court does not schedule a

¹¹⁹ TEC § 1162.008.

hearing, on its own motion, on the proposed placement before that day.¹²⁰

Interestingly, TEC § 1151.051(e) does not state the method of notice to be given (i.e. certified mail, return receipt requested, personal service, etc.). The general service by mail statute, TEC § 1051.052, states that a "guardian shall issue a notice required to be given by the guardian by registered or certified mail and shall serve the notice by mailing the original notice by registered or certified mail. TEC § 1051.003 indicates what must be generally included in a citation or notice. Subsection (c) further states, "A notice required to be given by a guardian must be in writing and signed by the guardian in the guardian's official capacity."

G. The Big Question – Aging in Place vs. Residential Care/Assisted Living Facility

The guardian of the person must make a decision with regard to the living arrangements of the ward. Sometimes this involves leaving the ward in the residential care or assisted living facility where they resided when the guardianship was established. Other times, it involves assessing whether the ward can continue to live in his or her own home.

All things being equal, the vast majority of adults ages 65 and older prefer to age in place in their own home and community.¹²¹ Aging in place allows the ward to preserve and maintain social networks and familiar routines in a familiar environment and can help maintain cognitive orientation. This option also avoids the disruption, disorientation and confusion often associated with a move and allows the ward to maintain a sense of security, independence, and privacy. On the other hand, residential facilities can offer increased supervision and personal care services, including meals and housekeeping, without the added worry of home maintenance. Residential facilities also offer a social environment where the ward can participate in activities that provide intellectual stimulation and socialization. The guardian will need to assess the ward's functional abilities and areas of limitation and anticipate changing healthcare and nursing needs to determine the appropriate level of care required for the ward's needs.

Ultimately, the guardian must decide which option is both affordable and best suited to the individualized needs of the ward. This consideration must be balanced with a number of factors besides the ward's personal preference, most importantly, the ward's available

¹²⁰ TEC § 1151.051(e).

¹²¹ AARP PPI, *What is Livable? Community Preferences of Older Adults*, April 2014, available at http://www.aarp.org/content/dam/aarp/research/public_policy_institute/liv_com/2014/what-is-livable-report-AARP-ppi-liv-com.pdf.

resources. In 2015, the national median rate for home health aide services was \$20 per hour.¹²² Based on an estimated 44 hours per week, the median annual cost for home health aide services was almost \$45,800 and the annual median cost for adult day care (at \$69 per day for 5 days per week) was nearly \$18,000.¹²³ In comparison, the national median cost for an assisted living facility was \$3600 per month, totaling \$43,200 per year.¹²⁴ The national median cost for a nursing facility was \$91,250 for a private room (\$250/day) and \$80,300 for a semi-private room (\$220/day).¹²⁵

In Texas, the median annual rates for home health aide services was \$42,603 (at approximately \$19/hour), adult day care was \$9,100 (at \$35/day), \$42,540 for an assisted living facility (\$3,545 per month), \$51,100 for a semi-private room in a nursing home (\$140/day), and \$68,620 for a private room in a nursing home (\$188/day).¹²⁶

In some cases, the ward may have family or friends willing to serve as unpaid caregivers, allowing many to age in place without depleting the available resources. To the extent the ward's functional abilities decline and their need for more intensive care increases, however, additional paid caregivers may be required, increasing the financial burden.

Although Medicare or Medicaid (or in some cases private insurance) may help defray long-term care expenses, funding from these sources can be limited. Thus, the guardian must carefully balance the costs and the available resources to determine how to provide the highest level of care for the longest period possible. Those that require round the clock care are especially difficult cases when the ward prefers to age in place and resources are limited. The cost of round the clock home health aides may consume the financial resources in a shorter period of time and necessitate a later move to a Medicaid facility. The same resources may cover an assisted living facility for an extended length of time.

If a move is involved, the guardian should consider ways to ease the transition. For some individuals, a slow and deliberate transition may be best where they have a chance to visit and familiarize themselves with

the idea and the new surroundings before making a move. The ward may ultimately be more accepting and less apprehensive if he or she preserves a degree of choice in the matter. On the other hand, if it is expected to be difficult or traumatic for the ward, a quick transition may be best. Keep in mind that the initial decision does not necessarily have to be the final decision and can often be reevaluated if necessary.

There are a variety of options and facilities to consider. Whatever the ultimate decision, there is no substitute for a thoughtful, reasoned evaluation.

H. Access to the Ward – Cooperation and Communication are Key (1151.055)

We now have a newly enacted provision that substantially limits the power and discretion of a guardian of the person to restrict certain relatives of the ward from having access to the ward.

At common law, the guardian of the person has broad powers to restrict access. Texas courts have said that it is not only the right, but it is the duty of the guardian of the person, to assume charge and control of the person of her ward, and to see that the ward is humanely treated and properly supported.¹²⁷ Moreover, under TEC § 1151.051, the guardian of the person has the statutory power and duty to “take charge of the person of the ward.” Embedded in these concepts is the inherent power to restrict or eliminate influences which are negative and harmful to the ward's person. Even the Ward's “Bill of Rights” contemplates the guardian being able to restrict access, as TEC § 1151.351 provides ample statutory authority to restrict a relative's access to a ward as that section specifically states in relevant part that, unless limited by a court or otherwise restricted by law, a ward is authorized to the following:

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

(16) to unimpeded, private, and uncensored communication and visitation with persons of the ward's choice, except that if the guardian determines that certain communication or visitation causes substantial harm to the ward: (A) the guardian may limit, supervise, or restrict communication or visitation, but only to the extent necessary to protect the ward from substantial harm; and (B) the ward may request a hearing to remove any restrictions on communication or visitation imposed by the guardian under Paragraph (A).

¹²² Genworth, *Genworth 2015 Cost of Care Survey*, April 2015, available at: https://www.genworth.com/dam/Americas/US/PDFs/Consumer/corporate/130568_040115_gnw.pdf.

¹²³ *Id.*; Kaiser Family Foundation, *Medicaid and Long-Term Services and Supports: A Primer*, December 2015, available at <http://kff.org/medicaid/report/medicaid-and-long-term-services-and-supports-a-primer/>.

¹²⁴ Genworth, *Genworth 2015 Cost of Care Survey*, April 2015, available at: https://www.genworth.com/dam/Americas/US/PDFs/Consumer/corporate/130568_040115_gnw.pdf.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *McCaffity v. Ramsey*, 274 S.W.2d 194, 197 (Tex. Civ. App.—Dallas 1954), writ refused NRE (Feb. 9, 1955).

Given the apparent broad powers conferred on a guardian of the person to limit or restrict access to the ward, TEC § 1151.055 basically operates like a remedy for the ward's spouse, the ward's parents, the ward's siblings, and the ward's children to the extent the guardian of the person has denied them access to the ward. These individuals may now file an application with the court to establish visitation or communication with the ward. Unfortunately, TEC § 1151.055 does nothing to address visitation and/or access issues in a contested guardianship proceeding pre-appointment as it contemplates personally serving the "guardian of a ward" and prohibiting the "guardian of a ward" from restricting access.

Except when the ward's health is in decline or when the ward's death may be imminent, the court is required to schedule a hearing on the application not later than the 60th day after the date an application is filed.¹²⁸ The court may grant a continuance of a hearing under this section for good cause. If an application states that the ward's health is in significant decline or that the ward's death may be imminent, the court is required to conduct an emergency hearing as soon as practicable, but not later than the 10th day after the date the application is filed.¹²⁹

An applicant must personally serve the guardian of a ward with a copy of the application and citation to appear at least 21 days before the date of a normal hearing and as soon as practicable in the case of an emergency hearing.¹³⁰

The court has several options in issuing an order on a § 1151.055 application. The order may:

(1) Prohibit the guardian of a ward from preventing the applicant access to the ward if the applicant shows by a preponderance of the evidence that: (A) the guardian's past act or acts prevented access to the ward; and (B) the ward desires contact with the applicant; and

(2) Specify the frequency, time, place, location, and any other terms of access.¹³¹

In deciding whether to issue or modify an order issued under this section, the court:

(1) shall consider: (A) whether any protective orders have been issued against the applicant to protect the ward; (B) whether a court or other state agency has found that the applicant abused, neglected, or exploited the ward; and (C) the best interest of the ward; and

(2) may consider whether: (A) visitation by the applicant should be limited to situations in which a third person, specified by the court, is present; or (B) visitation should be suspended or denied.¹³²

Finally, § 1151.055 comes with some pretty sharp teeth. The court may, in its discretion, award the prevailing party in any action brought under this section court costs and attorney's fees, if any. Moreover, the court costs or attorney's fees awarded under this subsection may not be paid from the ward's estate.¹³³ In other words, if a guardian of the person is going to make the judgment call to deny a spouse, parent, child, or sibling of the ward access to the ward, that guardian better have some strong evidence that such access and/or contact is against the ward's best interest.

I. Duty to Inform Relatives (1151.056)

This newly enacted provision requires a guardian to keep certain of the ward's relatives apprised of the ward's health condition and residence. The relatives who are entitled to this information are the same relatives entitled to notice under TEC 1101.001(b)(13)(A)-(D).¹³⁴ Those relatives may, by written request, opt out of the notice, and the guardian is required to file the request with the court.¹³⁵

The guardian is required to inform relatives if the ward:

(1) dies, and if so, of the ward's funeral arrangements and final resting place;

(2) is admitted to a medical facility for acute care for a period of three days or more;

(3) changes residences;

(4) is staying at a location other than the ward's residence for a period that exceeds one calendar week.¹³⁶

In limited circumstances, the guardian may apply to the court for permission not to provide the required notice to a particular relative.¹³⁷ Those circumstances include if the guardian is unable to locate a relative who is entitled to notice; if the court or a state agency has found that the relative abused, neglected, or exploited the ward; or if it is not in the ward's best interest for the relative to receive notice.¹³⁸

J. Handling Guardianships Where One or Both Spouses are Incompetent

More and more frequently, Texas courts are creating dual guardianships or management trusts, where one or more third parties act as guardian or trustee for: (1) spouses who are both incompetent; or (2) for one incompetent spouse, while the other spouse is unable to serve as community administrator. These "dual guardianships" present special administration

¹²⁸ TEC § 1151.055(c).

¹²⁹ TEC § 1151.055(d).

¹³⁰ TEC § 1151.055(e).

¹³¹ TEC § 1151.055(f).

¹³² TEC § 1151.055(g).

¹³³ TEC § 1151.055(h).

¹³⁴ TEC § 1151.056(a).

¹³⁵ TEC § 1151.056(e).

¹³⁶ TEC § 1151.056(b) and (c).

¹³⁷ TEC § 1151.056(e), (f), and (g).

¹³⁸ TEC § 1151.056(g).

issues, particularly with respect to which property each fiduciary has the power to manage, which property is liable for tortious and nontortious debts incurred by each spouse, and how to account for differences in income received and expenditures made from each spouse's estate or trust.

Often, the spouses have had a lengthy marriage and have managed the bulk of their marital property as "joint management community property" through joint accounts or jointly titled assets. TEC §§ 1301.053, 1353.003, 1353.004, and 1353.005 effectively bifurcate the marital estate in this instance, as a guardianship estate can have only one ward and a court-created management trust can only have one beneficiary.¹³⁹ TEC §§ 1353.003–1353.005 create exclusive rights to possess and administer separate sole-management community property estates.¹⁴⁰

The Code, though, is clear. Where one spouse is incompetent and subject to either a community administration or a guardianship of the estate, assets are divided, but no partition of the marital community property occurs.¹⁴¹ Because the marital estate remains intact, but divided and subject to liability for necessities, it is important for any such guardian or trustee to understand general community property rules to properly identify the assets the guardian or trustee has the power to control, to avoid unnecessary damage to existing estate plans, and to properly prepare inventories and annual accounts.

While the complexity of administering dual guardianships, and the related accounting and community property issues, is beyond the scope of this paper, a more detailed discussion of these issues can be found in the article entitled "*Properly Performing Annual Accounts in Guardianships or Management Trusts Where One or Both Spouses are Incompetent*" by Mark R. Caldwell and Edward L. Rice, Real Estate, Probate and Trust Law Reporter, Vol. 52, No. 4 (2014).

VII. CONCLUSION

Whether the 2015 legislative changes will have the effect of actually limiting the number or scope of guardianships established in Texas remains to be seen, but two things remain fairly certain: (1) the conditions that necessitate the need for guardianships seem to be remaining constant (if not increasing); and (2) a guardianship still affords the most complete remedy to address the host of issues (many of them unforeseen) that an incapacitated person and/or their estate will face.

¹³⁹ See TEC §1301.053.

¹⁴⁰ See TEC §1301.053 and 1301.054.

¹⁴¹ TEC §1353.001.

APPENDIX A

Table of Consanguinity

Showing degrees of relationship

