To Apply for Guardianship or Not – Where is the Edge?[1]

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I. SCOPE OF ARTICLE

While the law on guardianship proceedings and the various alternatives continue to expand, guardianship practitioners and their clients continue to grapple with the more practical decision of when to pursue a guardianship proceeding. Because there is limited legal authority which addresses the circumstance when it is preferable to seek a guardianship instead of pursing one of the many alternatives to a guardianship, it is difficult to develop a technical outline on this topic. Thus, the following outline is intended to discuss some of the legal standards and issues relevant to the decision of whether to seek guardianship, followed by some practical observations of situations when a guardianship may be beneficial.

References to the "Probate Code" and "Section" are to the Texas Probate Code, except as otherwise stated.

II. OVERVIEW OF TEXAS GUARDIANSHIPS

A. A Little History

For decades, the statutes that regulated decedents' estates also governed guardianships. These sections did not address the specific needs of individuals subject to a guardianship or allow the courts and guardians the flexibility to custom tailor a guardianship to the particular needs and limitations of each person. In fact, prior to 1983 Texas generally recognized only two types of guardianships: temporary and permanent. *See Breaux v. Allied Bank of Texas,* 699 S.W.2d 599, 602 (Tex.App.—Houston[14th Dist.] 1985, writ ref'd n.r.e.) (discusses types of guardianships prior to 1983).

By 1983, Texas enacted former Section 130A which, for the first time, statutorily recognized "limited" guardianship proceedings – i.e., "an incapacitated person is not presumed to be incompetent and retains all legal and civil rights and powers except those granted to the limited guardian." *Id. at* 699 S.W.2d at 602 (*citing former* TEX. PROB. CODE ANN. § 130A (Vernon Supp. 1985)). A decade later, in a continued effort to modernize the guardianship structure, the Texas legislature completely revamped the Probate Code. This resulted in the 1993 removal of the guardianship statutes from their inclusion with decedents' estates. When this occurred, the concept of "limited" guardianship proceedings was also expanded. In every subsequent legislative session, we have seen some revisions or additions to the guardianship sections of the Texas Probate Code.

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B. Current Public Policy Regarding Texas Guardianships

Although there is no statutory definition of a "guardianship," Section 602 provides that the policy and purpose of a guardianship is to grant another person or entity limited authority over an incapacitated person to the extent required by such person's mental and/or physical limitations. Following the 1993 statutory revisions, the Code expressly provides that a guardian's authority should be limited to that necessary to promote and protect the incapacitated person. Likewise, a guardianship now must encourage the maintenance and development of self-reliance and independence of the incapacitated person. TEX. PROB. CODE ANN. § 602 (Vernon 2003). This requirement is reflected in the requirement that a person "retains all legal and civil rights and powers except those designated by court order as legal disabilities by virtue of having been *specifically* granted to the guardian." TEX. PROB. CODE ANN. § 675 (Vernon 2003) (emphasis added).

III. TYPES OF GUARDIANSHIP PROCEEDINGS

A. **Overview.**

The type and scope of the various guardianship proceedings is a significant factor in determining if a guardianship should be sought. While a detailed discussion of guardianship proceedings is beyond the scope of this outline, a brief discussion of these matters follows.

B. Person vs. Estate.

1. Guardianship of the Person

Section 767 grants the guardian of the person the right and duty to provide care to and control of the person, subject to any limitations set by the court. Specifically, Section 767 provides that the guardian of the person has the right to have physical possession of the person and to establish the person's legal domicile, the duty of care, control, and protection of the person and to provide the person with clothing, food, medical care, shelter, and the power to consent to medical, psychiatric, and surgical treatment *other than* in-patient psychiatric commitment of the person. *See* TEX. PROB. CODE ANN. § 767(1)-(4) (Vernon 2003).

If a person is found to lack the capacity to handle any of his or her personal matters, the guardian would have full authority to handle such matters and the person is presumed to have no legal right to make such decisions. If, however, a person is not found to be totally incapacitated (either expressly by the court or pursuant to the current presumption discussed *supra*) to handle his personal affairs, a person retains all civil rights and powers not expressly revoked or granted to a guardian of his person. *See* TEX. PROB. CODE ANN. § 675 (Vernon 2003).

2. Guardianship of the Estate

Section 768 provides that a guardian of the estate is entitled to the possession and management of all property belonging to the person, to collect all debts, rentals, or claims that are due to the person, to enforce all obligations in favor of the person, and to bring and defend suits by or against the person, subject to the provisions of the Probate Code. TEX. PROB. CODE ANN. § 768 (Vernon 2003).

If a person is found to lack the capacity to handle any and all of his or her financial matters, the guardian would have full authority to handle such matters and the person is presumed to have no legal right to bind his estate. If, however, a person is not found to be totally incapacitated (either expressly by the court or pursuant to the current presumption discussed *supra*) to handle his estate, a person may retain certain civil rights and powers relating to his estate. *See* TEX. PROB. CODE ANN. § 675 (Vernon 2003).

C. Temporary vs. Permanent.

1. Temporary Guardianships

In certain limited circumstances, a court may appoint a temporary guardian if it is presented with "substantial evidence" that a person *may* be incapacitated and requires the immediate appointment of a

guardian. TEX. PROB. CODE ANN. § 875(a)(Vernon 2003 & Supp. 2010). The intended purpose of a temporary guardianship is to protect the person's health and well being, and/or preserve the estate until it can pass into the hands of a permanent guardian, the situation giving rise to the temporary guardianship is resolved by a less restrictive alternative, or the court has the opportunity to determine whether the person is not incapacitated.

To balance the civil rights of the person alleged to be incapacitated with the ability to protect him or her, the Probate Code limits both the circumstances under which a temporary guardian can be appointed and the powers and duties of the temporary guardian. A court is only to grant a temporary guardian "those powers and duties that are necessary to protect the respondent against the imminent danger shown.". *Id*. at 875(g) (emphasis added). Even following a temporary guardian's appointment, the person subject to a temporary guardianship is *not* presumed to be incapacitated. TEX. PROB. CODE ANN. § 875(a)(Vernon 2003 & Supp. 2010).

2. Permanent Guardianships

The majority of guardianships are "permanent" guardianships. A permanent guardianship requires that a court find, by clear and convincing evidence, that (i) the person is an incapacitated person; (ii) it is in the best interest of the person to have the court appoint a person as guardian of the person; and (iii) the rights of the person or the person's property will be protected by the appointment of a guardian. *See* TEX. PROB. CODE ANN. § 684(a) (Vernon 2003). Before appointing a permanent guardian, the court must also find by a preponderance of the evidence that an adult person is totally without capacity to "care for himself or herself and to manage the individual's property, or the individual lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself or to manage the individual's property." Id. at § 684(b). If the need for a guardianship is disputed, the proposed ward is entitled to a trial, either to the court or (if he or she requests) to a jury. Upon the conclusion of the trial, the court may appoint a permanent guardian of the individual's person and/or estate with either full or limited authority. *See* discussion *infra.*

D. Limited vs. Total.

If it is determined that a person lacks the capacity to handle some, but not all, of the tasks necessary to care for himself or herself or to manage his or her property, a court may appoint a guardian with "limited" powers and permit the person to retain certain rights commensurate with his or her abilities. *See* TEX. PROB. CODE ANN. § 693(b) (Vernon 2003). Until a court finds that a person is totally incapacitated and grants the guardian "full authority" over the individual's person and estate, it is presumed that he or she has retained all rights not expressly granted to his or her guardian. *See* TEX. PROB. CODE ANN. § 675 (Vernon 2003). (Note, as discussed previously, Texas has not always recognized this presumption. Therefore, reliance on decisions prior to 1983 regarding a person's rights and powers should be utilized with caution.)

1. Limited or Partial Guardianships

A court may expressly create a limited or partial guardianship. A limited guardianship may also be created by default if the applicant fails to request a finding that the person is totally incapacitated or that the guardian be granted "full authority." This arises as Section 675 provides that a person "retains all legal and civil rights and powers except those designated by court order as legal disabilities by virtue of having been *specifically* granted to the guardian." TEX. PROB. CODE ANN. § 675 (Vernon 2003) (emphasis added). Therefore, a limited guardianship may be created by only seeking a guardianship of an individual's person without expressly seeking a guardianship of the person's estate. It may also be created upon a finding by the court that the alleged incapacitated person lacks capacity to handle his or her financial matters but a least restrictive alternative exists, i.e., a power of attorney, trust, etc.

2. Total or Full Guardianships

The court may create a total or full guardianship upon a finding that a person is unable to perform *any* task necessary to care for himself or herself, or his or her property. In order to appoint a permanent guardian, the court must first find by clear and convincing evidence that the person is an "incapacitated person." TEX. PROB. CODE ANN. § 693 (Vernon 2003). The Probate Code defines an incapacitated person as "an adult individual who, because of a physical or mental condition, is substantially unable to provide food, clothing, or shelter for himself or herself, to care for the individual's own physical health, or to manage the individual's own financial affairs." TEX. PROB. CODE ANN. § 601(14) (Vernon 2003).

Similar to a limited guardianship, a total or full guardianship may be granted over an individual's person and/or estate. The creation of a total or full guardianship of the person or estate does not automatically result in the presumption that a person lacks the capacity to act with regard to the other. Therefore, the appointment of a full guardianship over a person's estate does not result in the loss of the person's legal right to make medical decisions and vice versa. To determine whether the person retained any rights to make personal or financial decisions, it is imperative to carefully review the order of appointment to determine what findings the court made.

IV. RECOGNIZE APPLICABLE STANDARDS OF CAPACITY

A. General Overview.

To date, Texas courts have not adopted a single, bright-line test to determine whether an individual has capacity to engage in certain transactions. Rather, the applicable standard of capacity or incapacity is dependent on the specific facts or transactions contemplated by the individual. Thus, an individual may have capacity to engage in certain transactions, but not others. The most frequently encountered standards of capacity are discussed below.

B. Capacity as it Relates to Financial Transactions and Contracts.

In Texas, a person has "mental capacity" to contract if, at the time of contracting, he "appreciated the effect of what [he] was doing and understood the nature and consequences of [his] acts and the business [he] was transacting." *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 845 (Tex. 1969); *see also Bach v. Hudson*, 596 S.W.2d 673, 675-76 (Tex.Civ.App.--Corpus Christi 1980, no writ); *Board of Regents of the Univ. of Tex. v. Yarbrough*, 470 S.W.2d 86, 90 (Tex.Civ.App.--Waco 1971, writ ref'd n.r.e.). The requisite mental capacity depends on the contemplated transaction. A person may have sufficient capacity to enter into certain contracts, agreements, etc., but not others. Mental capacity, or a lack thereof, may be shown by circumstantial evidence, including:

- a person's outward conduct, "manifesting an inward and causing condition;"
- any pre-existing external circumstances tending to produce a special mental condition; and
- the prior or subsequent existence of a mental condition from which a person's mental capacity (or incapacity) at the time in question may be inferred.

See Bach, 596 S.W.2d at 676.

The question of whether a person, at the time of contracting, knows or understands the nature and consequences of his actions is generally an issue for the trier of fact. *See Fox v. Lewis*, 344 S.W.2d 731, 739 (Tex.Civ.App.--Austin 1961, writ ref'd n.r.e.). However, allegations that a person is merely nervous, appears tense or anxious, or has personal problems, is not sufficient to raise a fact issue as to whether a person lacked capacity. *See Schmaltz v. Walder*, 566 S.W.2d 81, 83 (Tex.Civ.App.--Corpus Christi 1978, writ ref'd n.r.e.); *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 845 (Tex. 1969). Rather, relevant evidence may include "evidence of prior actions, conduct, utterances, and transactions of a person whose mental capacity is in question." *Bach*, 596 S.W.2d at 677 (*citing Miguez v. Miguez*, 221 S.W.2d 293, 295-96 (Tex.Civ.App.--Beaumont 1949, no writ); *Carr v. Radkey*, 393 S.W.2d 806

(Tex. 1965); *Buhidar v. Abernathy*, 541 S.W.2d 648, 651 (Tex.Civ.App.--Corpus Christi 1976, writ ref'd n. r. e.)).

C. Capacity as it Relates to Guardianships.

For guardianship purposes, Section 601 of the Probate Code defines an incapacitated person to include "an adult individual who, because of a physical or mental condition, is substantially unable to provide food, clothing, or shelter for himself or herself, to care for the individual's own physical health, or to manage the individual's own financial affairs." TEX. PROB. CODE ANN. § 601(14) (Vernon 2003). Evidence of a physical or mental condition must be based on reoccurring acts or occurrences within the preceding six (6) month period and not based on a single action or occurrence. *See* TEX. PROB. CODE ANN § 684(c) (Vernon 2003).

D. Capacity as it Relates to Testamentary Instruments.

Section 57 of the Probate Code mandates that the test for testamentary capacity includes the requirement that the testator be of "sound mind." TEX. PROB. CODE ANN. § 57 (Vernon 2003). Sound mind is referred to both commonly and in Texas case law as testamentary capacity even though Section 57 does impose other requirements. The sound mind element of testamentary capacity means that at the time the testator signs the will, he or she has sufficient mental capacity to:

- *understand* the business in which he or she is engaged;
- *know* the general nature and extent of his or her property;
- *understand* the effect of the act of making a will;
- *know* the persons to whom he or she wishes to give their property to and the persons dependent upon him or her for support; and
- *collect* in his or her mind the elements of business to be transacted in executing the will and hold them long enough to perceive their obvious relationship to each other and to form a reasonable judgment about them.

See Tieken v. Midwestern State Univ., 912 S.W.2d 878 (Tex.App.—Fort Worth 1995, no writ) (emphasis added) (*citing Prather v. McClelland*, 13 S.W. 543, 546 (Tex. 1890)); *see also McNaley v. Sealy*, 122 S.W.2d 330 (Tex.Civ.App.—Austin 1938, writ dism'd); *Horton v. Horton*, 965 S.W.2d 78, 85 (Tex.App.—Fort Worth 1998, no writ) (courts generally limit evidence regarding a testator's capacity to the time period surrounding the will execution).

It is generally accepted that less mental capacity is required to make a valid will than to make a valid contract. *See Rudersdorf v. Bowers*, 112 S.W.2d 784 (Tex.Civ.App.—Galveston 1937, writ dism'd w.o.j.); *Hamill v. Brashear*, 513 S.W.2d 602 (Tex.Civ.App.—Amarillo 1974, writ ref'd n.r.e.). The tests regarding capacity to contract are generally not applied in determining the question of testamentary capacity. *See Venner v. Layton*, 244 S.W.2d 852 (Tex.Civ.App.—Dallas 1951, writ ref'd n.r.e.). There remains some authority, however, suggesting otherwise. A few Texas courts have held that the legal standards for determining the existence of mental capacity for purposes of executing a will are substantially the same as the mental capacity for executing a contract. *Bach v. Hudson*, 596 S.W.2d 673 (Tex.Civ.App.—Corpus Christi 1980) (discussed *supra*).

The issue of whether a person has testamentary capacity is usually a question of fact. *See Smith v. Welch*, 285 S.W.2d 823 (Tex.Civ.App.—Texarkana 1955, writ ref'd n.r.e.). No particular standard is prescribed. *See Farmer v. Dodson*, 326 S.W.2d 57 (Tex.Civ.App.—Dallas 1959); *see also Brown v. Mitchell*, 12 S.W. 606 (Tex. 1889); *Garrison v. Blanton*, 48 Tex. 299 (1877); *Wilson v. Estate of Wilson*, 593 S.W.2d 789 (Tex.Civ.App.—Dallas 1979); *Anderson v. Clingingsmith*, 369 S.W.2d 634 (Tex.Civ. App.—Fort Worth 1963, writ ref'd n.r.e.); *Nowlin v. Trottman*, 348 S.W.2d 169 (Tex.Civ.App.—Amarillo 1961, writ ref'd n.r.e.); *Green v. Dickson*, 208 S.W.2d 119 (Tex.Civ.App.—Galveston 1948, writ ref'd n.r.e.).

It is notable that although lack of testamentary capacity may appear to imply lack of intelligent mental power, it is not necessary for a person to be highly intelligent to dispose of his or her property by will. *See Bell v. Bell*, 237 S.W.2d 688 (Tex.Civ.App.—Amarillo 1951, no writ); *Lowery v. Saunders*, 666 S.W.2d 226 (Tex.Civ.App.—San Antonio 1984, writ ref'd n.r.e.). Rather, lack of education or proof of illiteracy has little, if any, bearing on mental capacity to make a will. *Oliver v. Williams*, 381 S.W.2d 703 (Tex.Civ.App.—Corpus Christi 1964, no writ).

E. Presumptions Of Capacity Or Lack Of Capacity.

1. No Adjudication of Incapacity.

a. *Presumption of Capacity.*

Generally, mental capacity is determined at the time the document at issue is executed or the person enters into a transaction. Therefore, unless a person has been adjudicated to be incapacitated when the attorney is retained, the trust was created, the will was executed, etc., the law presumes sufficient mental capacity to enter into the transaction. *See Estate of Galland v. Rosenberg*, 630 S.W.2d 294, 297 (Tex.Civ.App.--Houston [14th Dist.] 1981, writ ref'd n.r.e.).

b. Presumption of Capacity Can Be Rebutted.

The presumption of capacity may be overcome with relevant and credible evidence. An adjudication that a person was totally or partially incapacitated entered *after* the date of the will or contract, however, is generally not admissible as evidence on the question of capacity. *See Carr v. Radkey*, 393 S.W.2d 806 (Tex. 1965). For example, in *Stephen v. Coleman*, the testator signed his will three days before being adjudicated incompetent. The subsequent adjudication did not raise any presumption of lack of testamentary capacity. *See Stephen v. Coleman*, 533 S.W.2d 444 (Tex.Civ.App.—Fort Worth 1976, writ ref'd n.r.e.).

2. Adjudication of Incapacity.

a. *Presumption of Incapacity.*

An adjudication of the testator's incapacity prior to the execution of a will or contract is typically admissible on the issue of the testator's mental capacity. *See Haile v. Holtzclaw*, 414 S.W.2d 916 (Tex. 1967). For example, when the adjudication remains in effect on the date the will was executed, the testator will generally be presumed to lack testamentary capacity. *See Bogel v. White*, 168 S.W.2d 309 (Tex.Civ.App.—Galveston 1942, writ ref'd). This presumption may be overcome by evidence of the requisite capacity. *Id.* at 311.

b. Presumption of Incapacity Can Be Rebutted.

A determination of incapacity does not, however, automatically result in a person lacking sufficient capacity to execute any document or instrument or enter into any transaction. Each of these proposed actions must be determined based on the particular facts, circumstances, time frames, and abilities of the person subject to a guardianship. As previously discussed, under the current guardianship laws, persons under a temporary guardianship are presumed to retain all rights not granted to the temporary guardian. *See* TEX. PROB. CODE ANN. § 875(b) (Vernon 2003 & Supp. 2010). Similarly, a person subject to a permanent guardianship is presumed to retain all rights not expressly granted to his or her guardian. *See* TEX. PROB. CODE ANN. § 675 (Vernon 2003).

F. Effect on Determination of Lack of Capacity on Contract.

1. Effect of Inability to Overcome Presumption of Incapacity.

If it is determined that a contract was "executed by a person who does not have the mental capacity to contract, the contract is voidable; and if such person signed a contract without sufficient mental capacity to understand the nature and consequences thereof, the contract is not binding and may be set aside." *See Schmaltz v. Walder*, 566 S.W.2d 81, 83 (Tex.Civ.App.--Corpus Christi 1978, writ

ref'd n.r.e.). Likewise, a determination that a will was executed at a time the testator lacked capacity will result in its failure to be admitted to probate or its probate to be set aside. *See* discussion *supra*.

2. Contract Voidable Not Void.

A contract with an incapacitated person is *voidable* at the election of the incapacitated person or his or her authorized representative. It is not automatically void. *See Price v. Golden*, 2000 WL 1228681 (Tex. App.—Austin 2000, no writ)(not designated for publication) citing *Williams v. Sapieha*, 61 S.W. 115, 116 (Tex. 1901); *Knox v. Drews*, 202 S.W.2d 335, 337 (Tex.Civ.App.--Austin 1947, writ dism'd); *Breaux*, 699 S.W.2d at 603; *Gaston v. Copeland*, 335 S.W.2d 406, 409 (Tex.Civ.App.--Amarillo 1960, writ ref'd n.r.e.).

Unlike a contract that is void, a voidable contract continues in effect until active steps are taken to disaffirm it. *See Price v. Golden*, 2000 WL 1228681 *citing Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 689 (Tex. 1989) (voidable contract may be valid and subsisting, interference with which may be tortious); *Missouri Pac. Ry. Co. v. Brazil*, 10 S.W. 403, 406 (Tex. 1888) (voidable contract "only obligatory until in some manner repudiated or annulled"); *Chilton Ins. Co. v. Pate & Pate Enters., Inc.*, 930 S.W.2d 877, 888 (Tex.App.--San Antonio 1996, writ denied) (misrepresentation renders contract voidable by innocent party; innocent party cannot excuse non-performance after treating the contract as continuing after other party committed material breach); BLACK'S LAW DICTIONARY 1573-74 (6th ed. 1990).

Thus, the failure of a guardian or other legal representative to disaffirm a contract entered into by a incapacitated person or ward may allow the enforcement of the contract. *See Breaux*, 699 S.W.2d at 603 *citing Knox v. Drews*, 202 S.W.2d 335 (Tex.Civ.App.--Austin 1947, writ dism'd). The act of disaffirming the contract must be distinct and unequivocal. *See Breaux*, 699 S.W.2d at 603 *citing Hatton v. Bodan Lumber Co.*, 123 S.W. 163, 168 (Tex.Civ.App. 1909, writ ref'd). *See* discussion *infra.*

G. Potential Disabilities.

A disability is generally defined as a limitation on a person's ability to perform socially defined roles and tasks within a sociocultural and physical environment. *See* Michael Lichtenstein, M.D., M.Sc., *Capacity - The Medical Perspective,* STATE BAR OF TEXAS ELDER LAW COURSE, Chpt. 10 (2000). Disability is the "gap between the person's capabilities and the environment's demand." *See Id.* at Page 3. While a person's disability will not always result in incapacity, the ability to recognize the most frequently encountered conditions and disorders may be a factor in deciding if a guardianship as appropriate. The following is a brief overview of capacity and potential disorders that may impact the decision of whether to seek guardianship. *See also* Richard C. Simons, M.D., UNDERSTANDING HUMAN BEHAVIOR IN HEALTH AND ILLNESS (3d ed. 1985) (discusses various personality disorders).

1. Mental Incapacity.

As discussed previously, mental capacity relates to the requisite ability to appreciate the effect of a choice and understand the nature and consequences of such choice. The ability to make such choices is contingent on the process used to reach his or her decision. Generally, a person has the requisite mental capacity when they are able to reach their decision as a result of the following four (4) step process:

- Understanding the relevant information regarding the choice;
- Appreciating the likely consequences of each choice;
- Manipulating the information rationally; and
- Communicating a stable decision.

See Lichtenstein, *Capacity - The Medical Perspective* at Page 6.

This four-step process must be applied to each decision. Therefore, a person may have sufficient mental capacity to make certain decisions, but not others. This is the logical result of the application of this process to choices or decisions that involve varying levels of complexity and consequences. *See Id.*

Potential mental incapacity can result from a number of disorders, diseases, and conditions. Although a thorough discussion is beyond the scope of this outline, common causes of mental incapacity include:

- Dementing disorders such as Alzheimer's, dementia, etc.;
- Cerebrovascular diseases such as strokes, and multi-in-farct dementia;
- Depression;
- Alcohol and drugs;
- Vitamin deficiency such as Vitamin B12 or Folic Acid;
- Thyroid imbalances or diseases; and
- Diseases that affect the central nervous system such as syphilis and AIDS.

See Lichtenstein, *Capacity - Medical Perspective* at Page 9.

2. Manic and Bipolar Disorders.

Persons with manic or bipolar disorders are particularly difficult because they can interact well in certain settings. A person who is both manic and depressive will have large mood swings, ranging from irrational fears and hopelessness to unwarranted giddiness. In mania, the person is expansive, euphoric and full of good humor. But, when criticized, the person becomes irritable, argumentative and threatening. In the depressive mode, the person is sad, tearful, hopeless in the extreme, and even suicidal. At times they may lack the requisite capacity to handle certain matters or be susceptible to influence or poor decisions. Whether they meet the standard of incapacity for a guardianship is often difficult to prove.

3. Organic Brain Syndrome.

Organic Brain Syndrome ("OBS") is characterized by a temporary or permanent dysfunction of the brain. The direct cause of the dysfunction is unknown and this makes treatment with medication a hit or miss proposition. There is a loss of brain function in all OBS. The loss of function is opposite of the acquisition of functions during the person's growth; for example, the first brain function that is lost is the intellectual or cognitive function. The next functions that deteriorate are motor skills and consciousness. A person suffering from OBS may be difficult to identify because he or she may be having a good day at the first meeting or hearing. Only after significant interaction will signs of capacity issues become evident.

4. Chronic Alcoholism and Drug Dependency.

It is estimated that nearly 14 million Americans abuse alcohol, 1 in every 3 adults[1]. The International Classification of Disorders (ICD-10) uses the following criteria to diagnose alcoholism:

Men: 3 to 7 drinks almost every day or 7 or more drinks at least 3 times a week.
Women: 2 to 5 drinks almost every day or 5 or more drinks at least 3 times a week.

[1] Source, National Institute of Alcohol Abuse and Alcoholism

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The use of alcohol or drugs does not necessarily correlate to incapacity needed to appoint a guardian. But use can lead to permanent impairment or susceptibility to undue influence. It is very difficult to obtain guardianship when the incapacity is related to drug or alcohol use.

5. Dementia and Alzheimer Diagnosis.

Senile dementia is sometimes referenced as being age related. References to multi infarct disease, or mini strokes also indicate an impairment. From cross-examining psychiatrists, it appears that Alzheimer's or multi-infarct dementia is not reversible and is progressive, while some forms of dementia can be treated. Consideration should be given to a person's willingness to consider evaluation and treatment before filing a guardianship proceeding.

V. WHEN A GUARDIANSHIP PROCEEDING MAY BE ADVISABLE

A. General Overview.

As discussed previously, historically a person subject to a guardianship was presumed to lose his or her rights to engage in most transactions and make most decisions. The 1983 and more recently the 1993 amendments to the Probate Code have reversed this presumption. Now, Section 675 provides that an incapacitated person for whom a guardian is appointed retains all legal and civil rights and powers except those designated by court order as legal disabilities by virtue of having been specifically granted to the guardian. *See* TEX. PROB. CODE ANN. § 675 (Vernon 2003).

Therefore, before filing a guardianship, all of the following should be considered:

- The term of guardianship to be sought – temporary or permanent;
- The type of guardianship to be sought – estate and/or person;
- The scope of the incapacity -- totally versus partially incapacitated;
- Whether a guardianship will address the action sought to be taken by the guardian and/or sought to be stopped by the incapacitated person or third party;
- Will the benefit outweigh the cost.

A discussion of some of the more commonly encountered situations where a guardianship may be advisable follows.

B. When Authority is Needed To Make Medical Decisions.

As discussed previously, adjudication of incapacity as to an individual's person effectively results in a revocation of the person's ability to handle his or her personal matters. These include medical decisions, residential decisions, visitation decisions and other personal matters. *See* TEX. PROB. CODE ANN. § 675 (Vernon 2003).

But even without an adjudication, these decisions can be made by an agent under a medical power of attorney or by a person authorized to consent to medical treatment. *See* TEX. HEALTH & SAFELY CODE ANN. § 166.155, 313.004 (Vernon 2010). Both of these options have significant limitations. First, a condition of a medical agent acting is that the principal/patient must be incapacitated. *See* Id. And, when the principal/patient is of questionable capacity, some medical providers may be concerned about releasing medical information or following the agent's instructions. Furthermore, with regard to a medical power of attorney, Health & Safety Code Section 116.155 specifically provides that a medical power of attorney can be revoked by "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*." TEX. HEALTH & SAFELY CODE ANN. § 166.155 (Vernon 2010)(emphasis added). With regard to Health & Safety Code Section 313.004, it is generally not recognized in the private physician setting and all to often disputes exists between persons of equal priority.

In these circumstances, the appointment of a guardian of the person is a means to avoid questions over competing instructions, whether by the ward or a third party. Also, medical providers may be more willing to accept the ward as a patient or resident, as applicable.

C. When Authority Is Needed To Terminate or Supervise Communications with Exploiters and Abusive Persons.

As a person begins to loss capacity, they are often drawn to or manipulated by persons who are not acting in their best interests. Abusers can be spouses, children, grandchildren or others that have a financial interest in segregating and often alienating a person from those who are attempting to protect them. While some situations may be resolved by an APS investigation or criminal proceedings, many are only addressed by the appointment of a guardian.

D. When It is Necessary To Prevent Person from Contracting To His Or Her Detriment.

Prior to an adjudication of incapacity, an adult is generally presumed to have capacity to contract. And, while an agent under a power of attorney may have the ability to act for an incapacitated principal, the agent's authority is not exclusive. Thus, the principal can also act in a manner that binds his or her estate but is not in their best interest because they lack insight into their limitations.

If a person is found to lack capacity to handle any and all of his or her financial matters, the guardian would have full authority to handle such matters and the person is presumed to have no legal right to bind his estate. *See* TEX. PROB. CODE ANN. § 768 (Vernon 2003)(provides that a guardian of the estate is entitled to the possession and management of all property belonging to the person, to collect all debts, rentals, or claims that are due to the person, to enforce all obligations in favor of the person, and to bring and defend suits by or against the person, subject to the provisions of the Probate Code)

If, however, a person is not found to be totally incapacitated (either expressly by the court or pursuant to the current presumption discussed *supra*) to handle his estate, a person may retain certain civil rights and powers relating to his estate. *See* TEX. PROB. CODE ANN. § 675 (Vernon 2003). The issue is then whether the retained rights will undermine the actions the guardian may need to take to protect the person. Assuming the person is found to lack the capacity to enter into contracts, they generally lose the legal right to enter into contracts. *See e.g. Breaux v. Allied Bank of Texas*, 699 S.W.2d 599 (Tex.App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.); *but see* discussion *supra*. But, a contract executed by a person without the legal right to do so is, however, *voidable* but not void. *See* discussion *infra*.

Thus, a guardianship of the estate or at least an adjudication of incapacity may be the only way to prevent a person from continuing to enter into transaction to his or her detriment. After such a finding, it is much more difficult for a third party to enter into a binding contract with the person with a few exceptions. *See United Pacific Insu. Comp. v. Buchanan*, 765 P.2d. 23 (Wash. Ct. App. 1989). One notable exception involves contracts for necessities. *See Breaux*, 699 S.W.2d at 604 (*citing Ferguson v. Fitze*, 173 S.W. 500 (Tex.Civ.App.—Galveston 1914, writ ref'd). Shelter, food and medical care may be considered necessities depending on the facts and circumstances. Necessities even include legal services but the retained attorney will have the burden of showing that the legal services rendered were in fact necessities. *Id.* (holding that estate planning services for a person were not necessities). Unless the contract falls within these exceptions, a guardianship or at a minimum an adjudication of incapacity would make any future contracts voidable and provide further protection to a person.

Likewise, an adjudication near the time of the contract may also be convincing to the third party not to seek to enforce the contact.

E. When It is Necessary To Stop The Driving.

Prior to 1999, Texas Transportation Code Section 521.201 prohibited the State Department of Highways and Public Transportation from issuing a driver's license to any person who has been adjudged mentally incapacitated and has not been restored to capacity by judicial decree. *See former* TEX. TRANSP. CODE ANN. § 521.201 (Vernon 1999). In 1999, Section 521.201 was amended to recognize the presumption of limited guardianship and a person's retained rights. Currently, Section 521.201(5) provides that the department may not issue a license to a person who:

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

TEX. TRANSP. CODE ANN. § 521.201(5) (Vernon 2007)(emphasis added).

In 2007, the Texas Probate Code was amended to require applications for guardianships to specifically address "the proposed incapacitated person's eligibility to hold or obtain a license to operate a motor vehicle under Chapter 521, Transportation Code." *See* TEX. PROB. CODE ANN. § 682(4)(B) (Vernon 2003 & Supp. 2010). Likewise, the order must specifically state if the person has the capacity to operate a motor vehicle. *See* TEX. PROB. CODE ANN. § 693(a)(5) (Vernon 2003 & Supp. 2010).

When a person continues to drive and his or her driving privileges cannot be revoked through other means, a guardianship of the person with the preceding finding may be beneficial even if he or she is not totally incapacitated.

F. When it is Necessary To Protect a Person Who Lacks Capacity To Marriage.

It appears that there is no clear required level of capacity to marry. As to the concept of marriage as it relates to a person's desire for love and affection, one could argue that the requisite capacity is relatively low. The capacity to understand the resulting marital property rights and obligations is arguably closer to contractual capacity. The Texas Probate Code does not expressly address the issue of a person entering into a marriage. The only statutory guidance is found in Section 6.108 of the Texas Family Code, which provides as follows:

> (a) The court may grant an annulment of a marriage to a party to the marriage on the suit of the party or the party's guardian or next friend, if the court finds it to be in the party's best interest to be represented by a guardian or next friend, if:
> (1) at the time of the marriage the petitioner did not have the mental capacity to consent to marriage or to understand the nature of the marriage ceremony because of a mental disease or defect; and
> (2) since the marriage ceremony, the petitioner has not voluntarily cohabited with the other party during a period when the petitioner possessed the mental capacity to recognize the marriage relationship.
> (b) The court may grant an annulment of a marriage to a party to the marriage if:
> (1) at the time of the marriage the other party did not have the mental capacity to consent to marriage or to understand the nature of the marriage ceremony because of a mental disease or defect;
> (2) at the time of the marriage the petitioner neither knew nor reasonably should have known of the mental disease or defect; and

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

See TEX. FAM. CODE ANN. § 6.108 (Vernon 2006).

It would appear that creation of a total guardianship is *prima facia* evidence that the person is not competent to consent to marriage. As with all rights, when a person is found partially incapacitated, the person's right to marry is dependent on the findings of the court in its order appointing the guardian. And, if the order is silent on this issue, it appears that the person may retain the right to marry but an argument could be made to the contrary based on the interpretation of the powers granted to the guardian.

G. When it is Necessary To Seek Divorce for Person.

An incapacitated person may be financially, emotionally and/or physically abused by a spouse and be unwilling to remove him or herself from the situation. While an agent under a general power of attorney may represent a person in litigation, the use of a power of attorney to seek a divorce may be questioned by the incapacitated principal, the spouse or the divorce court if it is done over the principal's objection.

In these situations, a guardianship may be one of the only means to protect the person. Once appointed, the guardian may seek to divorce a ward on the basis that it is in the ward's best interest. However it remains unclear what evidence a guardian is required to present to obtain court authority to seek a divorce.

In *Stubbs v. Ortega*, the appellate court reviewed the application based on the terms of a prior partition agreement negotiated between the person's guardian and the competent spouse. 977 S.W.2d 718, 724 (Tex.App—Fort Worth 1998, writ denied). The agreement provided that the guardian could seek a divorce in the event of physical abuse by the competent spouse or upon a showing of "good cause" as determined by the probate court. 977 S.W.2d at 718. On appeal, the appellate court held that sufficient evidence to support the trial court's conclusion that, per the parties' contract, good cause existed to allow the guardian to petition for the ward's divorce. *See also Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965)(assertion evidence is "insufficient" to support fact finding means evidence supporting finding is so weak or evidence to contrary is so overwhelming that answer should be set aside and new trial ordered). The appellate court made clear, however, that they were not determining "whether sufficient grounds existed on which to grant a divorce between the [couple], whether a guardian may sue for divorce on behalf of her ward without authorization from the probate court, or the rights of a husband to stay married to his incapacitated spouse." *Stubbs*, 977 S.W.2d at 718. Therefore, an issue still remains as to whether a guardian can seek a divorce over the person's objection.

Note that unlike some other states, Texas has not adopted a statute that expressly authorizes a guardian to file for divorce. *See Stubbs v. Ortega*, 977 S.W.2d at 718 ("Texas public policy does not prohibit authorizing a guardian to petition for divorce on behalf of her mentally incapacitated ward"); *Wahlenmaier v. Wahlenmaier*, 750 S.W.2d 837, 838 (Tex.App.—El Paso 1998, writ denied)(Section 576.001 of the Texas Health and Safety Code "gives every person who has a mental incapacity every right and privilege guaranteed by our constitution and laws, it must include a right to obtain a divorce. It follows that, since the person may not be able to act for themselves, a court appointed guardian ad litem or next friend must be able to exercise those rights for a mentally ill person."); *see also Nelson v. Nelson*, 118 N.M. 17, 878 P.2d 335, 341 (1994)("a guardian of an adult incompetent ward may initiate divorce proceedings on behalf of the ward"); *Ruvalcaba v. Ruvalcaba*, 174 Ariz. 436, 850 P.2d 674, 683-84 (1993) (a guardian may bring a dissolution action on behalf of the incapacitated person pursuant to his general powers to act on the person's behalf).

H. When it is Necessary To Limit Potential for Pressure or Manipulation of a Person to Execute New Estate Planning Documents.

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

But, an adjudication of incapacity does not automatically render a person unable to execute a will or other testamentary document. To the contrary, the standard for testamentary capacity may be less than that required to avoid a guardianship. The creation of a total guardianship is, however, *prima facia* evidence that the person was not competent to execute a will or similar document. This can be overcome with evidence that the person has testamentary capacity or evidence that the guardianship was limited and did not restrict the person's right to execute a will. *Clement v. Rainey*, 50 S.W.2d 359 (Tex.Civ.App.—Texarkana 1932, writ ref'd).

I. When it is Necessary To Protect An Incapacitated Person In a Lawsuit.

When an incapacitated person is being sued, the appointment of a guardianship may protect the person and/or his estate. While an agent under a power of attorney can defend and represent the person's interests, the effectiveness depends on the cooperation of the incapacitated principal. If he or she does not have insight into his or her limitations, the person may resist the agent's assistance and the other parties may be quick to take advantage of the situation.

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

VII. CONCLUSION.

As discussed at the onset, the foregoing discussion is intended to provide an overview of Texas law as it relates to the rights of adult persons subject to a guardianships and some practical suggestions when addressing a similar situation. The preceding does not purport to indicate that a guardianship is always advisable in the situations discussed. Rather, a guardianship and the resulting court supervision may provide a benefit to the incapacitated person. In the end, the most important factor is what would be in the incapacitated person's best interest.