DUTIES OF THE AD LITEM IN GUARDIANSHIP CASES

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Houston Bar Association
2010 Guardianship Ad Litem in Probate Court
& Elder Law Institute
Houston, Texas
January 28-29, 2010

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I. DISTINGUISHING BETWEEN AN ATTORNEY AD LITEM AND A GUARDIAN AD LITEM

Any discussion of the role of an ad litem in a guardianship proceeding must necessarily begin with a clarification of the two types of ad litems. Many practitioners are familiar with the role of an ad litem in district court cases where an attorney is called upon to represent the interests of a minor with respect to the settlement of a personal injury or wrongful death matter. However, in the context of guardianship cases, the role of an ad litem differs. There are a number of instances where the probate code requires that the court appoint an *attorney ad litem*. As will be discussed herein, the attorney ad litem represents the interests (or some might say, wishes) of the proposed ward or minor. On the other hand, when the Court appoints a *guardian ad litem*, the role is not necessarily as an advocate for the wishes of the proposed ward but rather the *best interests* of the proposed ward. Obviously, the wishes and the best interests of the proposed ward or minor may differ markedly. So, the threshold question to ask is: to which role am I being appointed? This will determine your course of action.

II. ATTORNEY AD LITEM IN THE CONTEXT OF A GUARDIANSHIP

A. Who is an Attorney Ad Litem?

An *attorney ad litem* is, by definition, an attorney who is appointed by a court to represent and advocate on behalf of a proposed ward, an incapacitated person, or an unborn person in a guardianship proceeding. Tex. Prob. Code § 601(1) (West 2009). When a party files an application for guardianship, the Probate Code requires that the proposed ward be appointed an attorney ad litem. Tex. Prob. Code § 646(a) (West 2009).

B. How Does One Become Eligible to Serve as an Ad Litem in Probate Court?

In order to be eligible to be appointed as an ad litem in the probate courts, an attorney must be certified by the State Bar of Texas as having completed a course on guardianship law sponsored by the State Bar of Texas or its designee. Tex. Prob. Code Ann. § 646(b); 647A (West 2009). The course is a three hour course and can be completed either by attending a seminar or by viewing a video of a recent seminar. [Note: The 79th Texas Legislature added an additional certification course for those wishing to be appointed attorney ad litem for a child in proceedings under Sections 262 and 263 of the Family Code. In order to act as an ad litem for a minor under these chapters, you must complete a different three-hour course than that required under §647A.] The Houston Bar Association, for example, keeps tapes of the seminars and the videos can be viewed by making arrangements with the bar association and paying a fee. The videos are tapes of a recent guardianship program, so they are also three hours in length. After you have completed the course and your information is submitted to the state bar, the state bar will issue a certification in the form of a letter which should then be presented to any courts for which you wish to be considered for appointment. A certificate issued under Section 647A expires on the *second anniversary* of the date the certificate is issued. Tex. Prob. Code Ann. §647A(c) (West 2009). However, a new certificate obtained by a person who previously has been issued a certificate under Section 647A expires on the *fourth anniversary* of the date the new certificate is issued if the person has been certified *each of the four years immediately preceding the date the new certificate* is issued. Tex. Prob. Code Ann. §647A(e) (West 2009).

A person whose certificate has expired must obtain a new certificate to be eligible for appointment as an attorney ad litem or guardian ad litem. Tex. Prob. Code Ann. § 646(c)(West 2009).

C. What Are the Duties of an Attorney Ad Litem?

As mentioned, the attorney ad litem is the attorney for the proposed ward, whether it be a minor or an adult incapacitated person. Thus, the attorney ad litem advocates for the rights of the proposed ward (or unborn person), his client. Even though this client did not choose you to be his or her attorney, the attorney ad litem, nonetheless, owes the same duties as he or she would to any other client. *Coleson v. Bethan*, 931 S.W.2d 706 (Tex. App.-Fort Worth 1996, no writ) (once probate court appoints attorney ad litem, attorney becomes legal representative for ward and attorney-client relationship is established); *Estate of Tartt v. Harpold*, 531 S.W.2d 696 (Tex. Civ. App.-Houston [14th Dist.] 1975, writ ref'd n.r.e.)

(attorney ad litem has duty to defend rights of his involuntary client with the same vigor and astuteness he would employ in defense of clients who had employed him.)

Section 647 of the Texas Probate Code, entitled, "Duties of Attorney Ad Litem" states:

(a) An attorney ad litem appointed under Section 646 of this code to represent a proposed ward shall, within a reasonable time before the hearing, interview the proposed ward. To the greatest extent possible, the attorney shall discuss with the proposed ward the law and facts of the case, the proposed ward's legal options regarding disposition of the case, and the grounds on which guardianship is sought.

(b) Before the hearing, the attorney shall review the application for guardianship, certificates of current physical, medical, and intellectual examinations, and all of the proposed ward's relevant medical, psychological, and intellectual testing records.

Tex. Prob. Code Ann. § 647 (West 2009).

The following is a summary of both statutory and non-statutory or suggested duties of the attorney ad litem in a guardianship proceeding:

1. Interview the Proposed Ward

The first and foremost duty is the quite novel concept of actually meeting with your client! Obviously, this meeting should occur prior to the hearing on either a temporary or permanent guardianship so that the ad litem can discuss the application, the allegations of incapacity, the applicant, and any other relevant issues. In order to ensure effective communication, Section 646(d) of the Probate Code provides that, at the time of the appointment of the attorney ad litem, the court *shall* also appoint a language interpreter or a sign interpreter if necessary to ensure effective communication between the proposed ward and the attorney. Tex. Prob. Code Ann. § 646(d) (West 2009). With some exception, the disciplinary rules provide that a lawyer shall abide by a client's decisions concerning the objectives and general methods of representation. Texas Disciplinary Rules of Professional Conduct Section 1.02(a)(1) (West 2009).

The meeting with the proposed ward allows the ad litem to "eyeball" his client so as to make his or her own evaluation of their capacity and their living conditions. Although one should zealously represent the proposed ward and their stated wishes, Section 1.02(g) of the Texas Disciplinary Rules of Professional Conduct provides that a lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client. Texas Disciplinary Rules of Professional Conduct Section 1.02(g) (West 2009).

In the case of a guardianship of a minor, the attorney ad litem should try to meet with the minor in the home environment, if possible, and also verify that the proposed ward is, in fact, under the age of eighteen. Further, the ad litem should confirm that the application has not been brought solely for the purpose of enabling the minor to establish residency for enrollment in a school or school district for which the minor is not otherwise eligible. *See* Tex. Prob. Code. Ann. §684(b)(3) (West 2009).

2. Review and Evaluate Medical Records and Doctor's Letter

The attorney ad litem shall be supplied with copies of all of the current records in the case and may have access to all of the proposed ward's relevant medical, psychological, and intellectual testing records. Tex. Prob. Code Ann. § 646(a) (West 2009). Further, the attorney ad litem shall review the application for guardianship, certificates of current physical, medical, and intellectual examinations, and all of the proposed ward's relevant medical, psychological, and intellectual testing records. Tex. Prob. Code Ann. § 647(b) (West 2009). Therefore, if the records are not provided by the applicant's attorney, the attorney ad litem should either go to the medical provider and review the records or subpoena a copy of the records, if necessary. Always be sure to take a copy of your order of appointment. Generally, once the medical provider sees the court order, they will cooperate in allowing a review of the records.

In light of the limitations to disclosure of medical records imposed under the Health Insurance Portability and Accountability Act, 45 C.F.R. 164.512(e)(1)(I) ("HIPAA"), most court orders appointing attorney ad litem now include language specifically authorizing the ad litem to be given access to the proposed ward's medical, psychological and intellectual testing records, and authorizes the entity to disclose the protected health information to the ad litem. An attorney ad litem or guardian ad litem is also considered to be a patient's "legally authorized representative" under the statute governing disclosure of health care information. *See* Tex. Health & Safety Code Ann. §§ 241.151(5) & 241.152(a) (West 2009).

One of the primary, if not the most important, documents for the applicant in a guardianship proceeding is the statement or report of the doctor who performed the mental status evaluation. This document is ordinarily attached to the application for guardianship. Section 687(a) of the Texas Probate Code provides that, with a few delineated exceptions, the court may not grant an application to create a guardianship for an incapacitated person unless the applicant presents to the court a written letter or certificate from a physician licensed in this state that is dated *not earlier than the 120th day* before the date of the filing of the application and based on an examination the physician performed *not earlier than the 120th day* before the date of the filing of the application. Tex. Prob. Code Ann. § 687(a) (West 2009).

The Texas Legislature amended the requirements of the physician's letter effective September 1, 2009. Now, the letter or certificate must:

(1) describe the nature, degree, and severity of incapacity, including functional deficits, if any, regarding the proposed ward's ability to:(A) handle business and managerial matters;

(B) manage financial matters;

(C) operate a motor vehicle;

(D) make personal decisions regarding residence, voting, and marriage; and

(E) consent to medical, dental, psychological, or psychiatric treatment;

(2) provide an evaluation of the proposed ward's physical condition and mental function and summarize the proposed ward's medical history if reasonably available;

(3) 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 person's physical or mental health, including the proposed ward's ability to:

(A) understand or communicate;

(B) recognize familiar objects and individuals;

(C) perform simple calculations;

(D) reason logically; and

(E) administer to daily life activities;

(4) state whether any current medication affects the demeanor of the proposed ward or the proposed ward's ability to participate fully in a court proceeding;

(5) describe the precise physical and mental conditions underlying a diagnosis of a mental disability, and state whether the proposed ward would benefit from supports and services that would allow the individual to live in the least restrictive setting;

(6) in providing a description under Subdivision (1) of this subsection regarding the proposed ward's ability to operate a motor vehicle and make personal decisions regarding voting, state whether in the physician's opinion the proposed ward:

(A) has the mental capacity to vote in a public election; and

(B) has the ability to safely operate a motor vehicle; and

(7) include any other information required by the court.

Tex. Prob. Code Ann. § 687(a) (West 2009).

If the attorney ad litem is not provided a copy of the doctor's letter, he or she should ask the applicant's attorney to furnish a copy. The doctor's letter will usually be the only medical evidence of incapacity at the hearing. Other considerations regarding the admissibility of the medical evidence will be discussed below in the section on contested guardianships.

The ad litem should note that there are different evidentiary requirements if the basis for the proposed ward's incapacity is mental retardation. If the basis of the proposed ward's alleged incapacity is mental retardation, the court may not grant an application to create a guardianship for the proposed ward unless the applicant presents to

the court:

(1) a written letter or certificate that:

(A) complies with the above-stated requirements; and

(B) states that the physician has made a determination of mental retardation in accordance with Section 593.005 of the Texas Health and Safety Code; or

(2) both:

(A) written documentation showing that, not earlier than 24 months before the date of the hearing, the proposed ward has been examined by a physician or psychologist licensed in this state or certified by the Department of Aging and Disability Services to perform the examination, in accordance with rules of the executive commissioner of the Health and Human Services Commission governing examinations of that kind; and

(B) the physician's or psychologist's written findings and recommendations, including a statement as to whether the physician or psychologist has made a determination of mental retardation in accordance with Section 593.005 of the Texas Health and Safety Code .

Tex. Prob. Code Ann. § 687(c) (West 2009).

3. Review Court's File

While Section 647 of the Texas Probate Code mandates that the attorney ad litem review the application for guardianship, it is often times helpful to travel to the clerk's office and pull the original file. A review of the file will also enable the ad litem to see the court investigator's report and check to see that service upon the ward has been perfected. Upon filing of an application for guardianship, notice shall be issued and served pursuant to Section 633 of the Texas Probate Code.

a. Personal Service

Section 633(c) requires *personal service* of the application upon each of the following:

(1) a proposed ward who is 12 years of age or older;

(2) the parents of a proposed ward if the whereabouts of the parents are known or can be reasonably ascertained;

(3) any court-appointed conservator or person having control of the care and welfare of the proposed ward;

(4) a proposed ward's spouse if the whereabouts of the spouse are known or can be reasonably ascertained; and

(5) the person named in the application to be appointed guardian, if that person is not the applicant.

Service may be waived by all of the foregoing except for the proposed ward. Tex. Prob. Code Ann. § 633(e) (West 2009). Therefore, the attorney ad litem or guardian ad litem cannot waive service upon the proposed ward. It is the applicant's job to get the ward personally served prior to the hearing. In fact, the Court may not hear the guardianship until the Monday following ten (10) days after proper service is perfected and all proper notices are given. § 633(f) (West 2009).

b. Notice by Certified Mail

Section 633(d) of the Texas Probate Code provides that the following are entitled to notice of the application by *certified mail, return receipt requested.*:

(1) all adult children of a proposed ward;

(2) all adult siblings of a proposed ward;

(3) the administrator of a nursing home facility or similar facility in which the proposed ward resides;

(4) the operator of a residential facility in which the proposed ward resides;

(5) a person whom the applicant knows to hold a power of attorney signed by the proposed ward;

(6) a person designated to serve as guardian of the proposed ward by a written declaration under Section 679 of this code, if the applicant knows of the existence of the declaration;

(7) a person designated to serve as guardian of the proposed ward in the probated will of the last surviving parent of the ward; and

(8) a person designated to serve as guardian of the proposed ward by a written declaration of the proposed ward's last surviving parent, if the declarant is deceased and the applicant knows of the existence of the declaration; and

(9) each person named as next of kin in the application for guardianship as required by Section 682(10) or (12) of this code.

Tex. Prob. Code Ann. § 633(d) (West 2009).

The applicant must also file with the Court a copy of the referenced notices along with an affidavit. Tex. Prob. Code Ann. § 633(d-1) (West 2009). While the court's guardianship coordinator ordinarily confirms proper service prior to the hearing, the attorney ad litem should confirm with the applicant's attorney prior to the hearing that all service and notice requirements have been met. Otherwise, the court cannot enter an order of appointment.

4. File an Answer

Although not specifically mentioned in the code, the attorney ad litem should file an answer prior to the hearing. An application for guardianship is essentially a form of lawsuit to determine the mental capacity of the proposed ward and request the appointment of a legal guardian. Normally, a general denial is sufficient. However, if the ward chooses to contest the matter, or if the attorney ad litem believe that the medical evidence is insufficient to show incapacity by clear and convincing evidence, or if the applicant either lacks standing or is disqualified, then a contest should also be filed. While the contest can be combined with the answer, a separate pleading is often filed. The specifics of a contest will be discussed below.

5. Evaluate the Applicant for Issues of Standing and Qualification

a. File a Motion in Limine If the Applicant Lacks Standing

As mentioned previously, if it comes to the attention of the attorney ad litem that the applicant may lack standing to bring the guardianship due to an adverse interest, the probate code specifies that the matter is addressed pursuant to a motion in limine. Tex. Prob. Code Ann. § 642 (West 2009). The probate code motion in limine differs markedly from the normal "trial" motion in limine wherein the attorney is seeking to exclude certain matters from the hearing of the jury. In the Section 642 motion in limine, the party is seeking to exclude the applicant on the basis that he has an adverse interest to the proposed ward and therefore does not have "standing" to bring the application.

The ward, or other members of the ward's family, are often the best source of information as to whether there exists any adverse interest between the ward and the applicant. However, keep in mind that other family members are often at odds with the applicant and will seek to defeat the application simply because they do not want this individual to serve as guardian. Accordingly, those contesting the appointment must also be evaluated to see if they have standing. Under Section 642(b) of the Probate Code, a person who has an interest that is adverse to a proposed ward or incapacitated person may not do any of the following:

(1) file an application to create a guardianship for the proposed ward or incapacitated person;

(2) contest the creation of a guardianship for the proposed ward or incapacitated person;

(3) contest the appointment of a person as a guardian of the person or estate, or both, of the proposed ward or incapacitated person; or

(4) contest an application for complete restoration of a ward's capacity or modification of a ward's guardianship.

Tex. Prob. Code Ann. § 642(b) (West 2009).

The issue of what constitutes an adverse interest is discussed below.

b. Attempt to Disqualify the Applicant if He or She Does Not Meet the Statutory Requirements

The attorney ad litem must also distinguish between standing and qualification. An applicant may have standing to bring the application but may still, nonetheless, be disqualified from serving as guardian if he or she cannot fulfill the statutory requirements. Section 681 of the Probate Code. provides that a person may not be appointed

guardian if the person is:

(1) a minor;

(2) person whose conduct is notoriously bad;

(3) an incapacitated person;

(4) a person 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:

(A) determines that the lawsuit claim of the person who has applied to be appointed guardian is not in conflict with the lawsuit claim of the proposed ward; or

(B) appoints a guardian ad litem to represent the interests of the proposed ward throughout the litigation of the ward's lawsuit claim;

(5) a person indebted to the proposed ward unless the person pays the debt before appointment;

(6) a person asserting a claim adverse to the proposed ward or the proposed ward's property, real or personal;

(7) a person who, because of inexperience, lack of education, or other good reason, is incapable of properly and prudently managing and controlling the ward or the ward's estate;

(8) a person, institution, or corporation found unsuitable by the court;

(9) a person disqualified in a declaration made under Section 679 of this code;

(10) a nonresident person who has not filed with the court the name of a resident agent to accept service of process in all actions or proceedings relating to the guardianship; or

(11) a person who does not have the certification to serve as guardian that is required by Section 697B of the Texas Probate Code.

Tex. Prob. Code Ann. § 681 (West 2009).

Accordingly, the attorney ad litem will want to question the applicant or other persons with knowledge of relevant facts as to whether the applicant falls into any of the referenced categories, preferably prior to the hearing. One of the more common issues is that involving indebtedness to the ward. On many occasions, an adult child has borrowed money from their parent or the parent has bought them certain items. Unless the items can be shown to have been gifts, the applicant would have to re-pay any debt to the ward before appointment. Therefore, indebtedness is one of the few items in Section 681 that can be cured to regain qualification.

c. Presumed Unsuitability

It is presumed not to be in the best interest of the ward to appoint a person as guardian of the ward if the person has been finally convicted of:

-any sexual offense;
-sexual assault;
-aggravated assault;
-aggravated sexual assault;
-injury to a child;
-injury to an elderly individual;
-injury to a disabled individual;
-abandoning or endangering a child; or
-incest.

Tex. Prob. Code Ann. § 678 (West 2009).

d. Proposed Ward's Preference

The proposed Ward may have executed a pre-designation of guardian before need arises pursuant to Section 679 of the Texas Probate Code. However, this person must be found not to be disqualified and that it is in the proposed Ward's best interest for this person to be appointed before the Court can appoint that person as guardian, despite the ward's wishes. Tex. Prob. Code Ann. § 679(f) (West 2009).

Further, Section 689 of the Texas Probate Code compels the court to make a reasonable effort to consider the incapacitated person's preference as to the selection of his or her guardian and shall give due consideration to the preference indicated by the incapacitated person. Tex. Prob. Code Ann. § 689 (West 2009). Note that the Court is only compelled to make a "reasonable effort" to "consider" the proposed ward's preference and is not bound by the proposed ward's preference if the Court finds that person to be disqualified or otherwise unsuitable.

6. Request an Independent Medical Examination, if Necessary

If the attorney ad litem has any concern about the quality of the medical evidence brought forth by the applicant, or the qualifications of the examining doctor, or if the attorney ad litem believes that the ward may not be incapacitated, he or she can seek a court-ordered mental examination.

Section 687(b) of the Texas Probate Code provides that, if the court determines it is necessary, the court may appoint the necessary physicians to examine the proposed ward. The court must make its determination with respect to the necessity for a physician's examination of the proposed ward at a *hearing* held for that purpose. Tex. Prob. Code Ann. § 687(b) (West 2009). Not later than the *fourth day* before the date of the hearing, the applicant shall give to the proposed ward and the proposed ward's attorney ad litem written notice specifying the purpose and the date and time of the hearing. *Id.* A physician who examines the proposed ward, other than a physician or psychologist who examines the proposed ward under Subsection (c) (2) of Section 687, shall make available to an attorney ad litem appointed to represent the proposed ward, for inspection, a written letter or certificate from the physician that complies with the requirements of Section 687(a). *Id.*

7. Arrange for the Ward to be Present at the Hearing, if Feasible

Section 685(a) of the Texas Probate Code provides that a proposed ward *must* be present at a hearing to appoint a guardian unless the court, on the record or in the order, determines that a personal appearance is *not necessary*. Tex. Prob. Code Ann. § 685(a) (West 2009) Often, due to the proposed ward's condition or the fact that they are confined to a hospital or nursing home, the proposed ward's appearance at the hearing is not feasible. Other times, the proposed ward requests that he or she not be required to be in attendance, especially if there is no opposition to the guardianship or to the applicant. Normally, if the foregoing circumstances exist, the attorney ad litem will make a statement at the inception of the hearing and request that the ward's appearance be waived. The Court must then determine whether the appearance of the ward should be waived. The Court rarely denies a request for waiver of the ward's appearance. This dialogue regarding the ward's attendance should take place on the record. On the other hand, if the ward is willing and able to attend the hearing, the attorney ad litem should assist in making arrangements for the ward to be present. Often the applicant is willing to bring the proposed ward to court the morning of the hearing. If he or she is unwilling to do so, this should raise a flag to the attorney ad litem about how concerned the applicant is about the proposed ward's well-being. In the case of a guardianship brought by the county, such as the Harris County Guardianship Program, often the social worker will make arrangements to have the proposed ward picked up and brought to the hearing.

8. Assist the Court in Determining the Proper Amount of the Bond or Consider Moving for the Creation of a Management Trust

a. Amount of Bond

In the event of a guardianship of the estate, the applicant will have to post bond in order to qualify as guardian and receive his letters of guardianship. Tex. Prob. Code Ann. § 703 (West 2009) The ad litem should attempt to ensure that the bond set by the Court is sufficient. Section703(c) of the Probate Code provides the mechanism for determining the proper amount of the bond. Briefly, the Court will consider evidence of the amount of cash on hand, the revenue anticipated to be received in the succeeding 12 months, the estimated value of stocks, bonds, notes and securities, and the estimated amount of debts due and owing to the ward. The ad litem should also inquire about the applicant's credit history or try to verify if the applicant has already been pre-approved by the bonding company. There are occasions when the applicant may be suitable to serve as guardian but may be unable to qualify for a bond.

b. Safekeeping Agreement Can Reduce Bond

In order to save the ward's estate the expense of reimbursement of the bond premium, especially in cases involving a minor where the amount of the estate is not large, the attorney ad litem should consider the imposition of a safekeeping agreement under Section 703(e) of the Texas Probate Code. Briefly, under such an arrangement,

the institution holding the funds agrees in writing to hold the funds, and increases thereof, in safekeeping and will not allow any withdrawals unless presented with a court order authorizing the withdrawal. The benefit of this arrangement is that (1) the funds are protected from easy access; and (2) the amount of the bond will be reduced commensurate with the amount in safekeeping thus reducing the amount of bond premium the ward's estate must reimburse to the guardian.

9. Consider Deposit Into Court Registry

Section 745(c) of the Texas Probate Code also provides for the deposit into the court's registry an estate of $100,000.00 or less, and thereafter managed per Section 887 of the Texas Probate Code.

10. Consider Section 867 Management Trust

The attorney ad litem or guardian ad litem may also consider whether the ward is better off with a management trust set up under the authority of Section 867 of the Texas Probate Code. Often, when there is a dispute among family members regarding the guardianship of an estate or where there is some distrust of the applicant for guardianship of the estate, a management trust is a preferable alternative. However, Section 867 was drafted primarily to address two situations: Where a guardianship of a minor involves a large estate that, absent a trust, will be turned over to the ward at the age of eighteen; and where a guardianship for an incapacitated person involves such a large sum of money that a corporate fiduciary's investment expertise is warranted. *See* Commentary to Section 867 of the Texas Probate Code in *Johanson's Texas Probate Code Annotated* (West 2009).

A Section 867 Trust can be created upon the application of a guardian, an attorney ad litem, a guardian ad litem, or a person interested in the welfare of an alleged incapacitated person who does not have a guardian of the estate. Tex. Prob. Code Ann. § 687(a-1) (West 2009). The court need not appoint a guardian prior to creating the trust. If an application to create a §867 trust is filed when no guardianship exists, the safeguards in place to protect the alleged incapacitated person apply (i.e. appointment of ad litem, determination of incapacity by clear and convincing evidence). Tex. Prob. Code Ann. § 687(b-3) (West 2009). If during the course of the hearing on the application to create the trust, the court determines that a guardian should instead (or in addition) be appointed, no separate guardianship application is required. Tex. Prob. Code Ann. § 687(b-4) (West 2009). In any event, the Court must find that the creation of the trust is in the proposed ward's best interests. Tex. Prob. Code Ann. § 687(b-1) (West 2009).

The advantage of a Section 867 Trust is that it may eliminate the need for a guardian of the estate and the costs associated with the administration of the guardianship estate. While the bank or trust company will charge a management fee, normally a percentage of the amount turned over, such fees are generally less than those associated with a guardianship of the estate.

Section 867 of the Texas Probate Code was amended to allow for persons or entities other than financial institutions to be appointed if the court finds that it is in the ward's best interest. Tex. Prob. Code Ann. § 687(c) (West 2009).

If the value of the trust's principal is more than $150,000 , the court may appoint a person or entity other than a financial institution in accordance to serve as trustee of the trust only if the court, in addition to the finding of best interest, finds that the applicant for the creation of the trust, after the exercise of due diligence, has been unable to find a financial institution in the geographic area willing to serve as trustee. Tex. Prob. Code Ann. § 867(d) (West 2009).

The following are eligible for appointment as trustee under Section 867 (c) or (d):

(1) an individual, including an individual who is certified as a private professional guardian;

(2) a nonprofit corporation qualified to serve as a guardian; and

(3) a guardianship program.

Tex. Prob. Code Ann. § 687(e) (West 2009).

11. Explore Whether Less Restrictive Alternatives Are Available

Section 602 of the Texas Probate Code encourages the use of less restrictive alternatives to guardianship when available.

a. Alternatives to Guardian of the Estate

Some, but not all, alternatives to a guardianship of an *estate* to be considered include:

1. Durable Power of Attorney.

The ad litem should inquire as to whether the proposed ward executed a power of attorney under Sections 481 et seq. of the Probate Code while he or she had capacity to do so. If so, the ad litem should examine the circumstances under which it was drafted. Beware of powers of attorney that were dated just prior to the filing of the guardianship that may have been obtained by fraudulent or less than truthful means. Also, be aware the ward can easily revoke or be "encouraged" to revoke a power of attorney by a disgruntled family member who wants control of the estate. Therefore, the fact that a power of attorney may exist does not automatically defeat the purpose of a guardianship of an estate. In fact dueling" powers of attorney are often what lead to the filing of a guardianship. The law regarding Durable Powers of Attorney is set for in Sections 481-506 of the Texas Probate Code.

2. Spousal Management of Community Property.

If the proposed ward's estate consists of his or her one-half community interest, is there a spouse who has the capacity to manage the estate? Section 883 of the Texas Probate Code provides for the non-incapacitated spouse to manage the entire community estate. Tex. Prob. Code Ann. § 883(a)(1) (West 2009). The issue here is generally whether the other spouse truly has the capacity to manage the community estate without an administration. If so, the spouse is presumed to be suitable and qualified to serve as community administrator. Tex. Prob. Code Ann. § 883(b) (West 2009).

3. Payment to the Clerk.

Section 887 of the Texas Probate Code provides a mechanism for $100,000.00 or less of a debt due to an incapacitated person to be paid to the County clerk. This is usually beneficial where a minor ward inherits funds and is nearly the age of 18. A deposit into the registry of the Court prevents the costs associated with a guardianship, especially the bond premium. In fact, a court may not appoint a guardian of the estate of a minor when a payment of claims is made under Section 887 of the Texas Probate Code. Tex. Prob. Code Ann. § 684(d) (West 2009).

4. Veterans Benefits Fiduciary.

38 U.S.C. §5502(a)(1) provides for the appointment of a person to manage a veteran's pension benefits.

5. Representative Payee.

42 U.S.C. §1383(a)(2) provides for the Social Security Administration to appoint a person to manage social security benefits. Often in cases of a mentally retarded adult, the ward will have no assets of any significance other than his or her social security benefits. The guardian of the person can manage these assets without becoming the guardian of the estate if he or she is the person appointed by Social Security Administration representative payee. There is a very simple accounting form required to be sent yearly to the Social Security Administration, but nothing compared to the full-blown accounting required by the Texas Probate Code for guardians of the estate.

6. Medicaid Qualification Trust [MillerTrust].

42 U.S.C. §1396p provides a mechanism for a person or ward to qualify for Medicaid in a nursing home where their income exceeds program approval.

7. Section 142 Trust.

Section 142 of the Texas Property Code provides for the investment of funds stemming from a judgment. This is very useful in cases where a minor recovers damages under a wrongful death cause of action. However, Section 142 trusts apply where there is no legal guardian. Tex. Prop. Code Ann § 142.001(a) (West 2009).

b. Alternatives to Guardian of the Person

Some, but not all, alternatives to a guardianship of a *person* to be considered include:

1. **Medical Power of Attorney.**

Sections 166.151 to 166.166 of the Texas Health and Safety Code provides for an agent to make

health care decisions for the principal. As with the durable power of attorney, the attorney ad litem should inquire whether the proposed ward executed such a power of attorney prior to the incapacity and otherwise examine the circumstances of the execution. If there is some suspicion about the validity of the medical power of attorney, the probate court has authority to determine whether to suspend or revoke the authority of the agent; Tex. Health & Safety Code §166.156(a) (West 2009).

Note that the Legislature modified the statute to eliminate the necessity of two witnesses as long as the document is notarized. Health & Safety Code §166.154(b) (West 2009). Notwithstanding the existence of a Medical Power of Attorney, Section 313.004(a) of the Health and Safety Code lists individuals who qualify as adult surrogates who may make certain medical decisions for comatose or incapacitated patients. These surrogates may make these decisions without the written consent of the incapacitated patient, so long as it is "based on knowledge of what the patient would desire, if known." Tex. Health & Safety Code Ann. § 313.004 (c) (West 2009).

2. **Directive to Physicians ("Living Will")**.

Section 166.031 et seq. of the Texas Health and Safety Code provides a resolution to life sustaining or termination issues. Again, the attorney ad litem should inquire whether the proposed ward executed such a document prior to the incapacity.

Note that the Legislature modified the statute to eliminate the necessity of two witnesses as long as the document is notarized. Health & Safety Code §166.032(b-1) (West 2009).

3. **Out of Hospital Do Not Resuscitate Order.**

Section 166.082 et seq. of the Texas Health and Safety Code provides a resolution to life termination issues.

Note that the Legislature modified the statute to eliminate the necessity of two witnesses as long as the document is notarized. Health & Safety Code §166.082(b) (West 2009).

4. **Rights and Duties of a Parent.**

Section 151.001 of the Texas Family Code provides a substantive listing of parental rights without the necessity of a guardianship.

5. **Support for a Minor or Adult Disabled Child.**

Section 154.301 et seq. of the Texas Family Code provides for post-majority support of a disabled child if the disability existed when the ward was a minor.

12. Request the Appointment of a Guardian Ad Litem, if Necessary

In those instances where the attorney ad litem is uncertain whether the proposed ward has sufficient capacity to make an informed decision regarding his or her best interests, it is advisable for the attorney ad litem to request the appointment of a *guardian ad litem* under Section 645 of the Texas Probate Code. You will recall that the guardian ad litem advocates for the proposed ward's best interests even if it is not consistent with the proposed ward's expressed wishes or if the ward cannot express his or her wishes. The appointment of a guardian ad litem could alleviate the need for the filing of a contest. The role of the guardian ad litem is discussed in more detail below. The attorney ad litem is not required to choose a position to advocate when he is unable to determine what the ward's interests are. *See In the Interest of D.L.B.*, 943 S.W.2d 175 (Tex. App.-San Antonio 1997, no writ).

13. Advocate for a Finding of Partial Incapacity to Allow the Ward to Continue to Perform Certain Tasks

The attorney ad litem should carefully examine the doctor's letter filed in support of the guardianship to see if there are any areas of capacity the doctor has checked off. If so, the attorney ad litem should seek to curtail the powers of the guardian so that the proposed ward retains the authority to do those tasks he or she has capacity to perform. Section 693(b) of the Texas Probate Code provides for the proposed ward to retain powers in areas of functional capacity.

D. The Contested Guardianship

If it appears that a contest of the guardianship is warranted, or if one is filed by a third party such as a competing family member, there are additional considerations for the attorney ad litem. The following are areas of consideration:

1. Demand for Jury?

The attorney ad litem should evaluate whether a jury trial would be in the best interests of the proposed ward. Section 643 of the Probate Code provides that a party in a contested guardianship proceeding is entitled, on request, to a jury trial. Tex. Prob. Code Ann §643 (West 2009). If the attorney ad litem determines that a trial by jury is more appropriate than a bench trial, the attorney ad litem should file a written demand for jury and tender the appropriate jury fee in a timely fashion. *See* Tex. R.Civ. P 216 (West 2009). Timely request for a jury plus timely payment of the jury fee are essential to preserving a right to trial by jury. *Whiteford v. Baugher*, 818 S. W. 2d 423, 425 (Tex. App.-Houston [1st Dist.] 1991, writ denied); *Higgonbotham v. Collateral Protection, Inc.*, 859 S. W. 2d 487 (Tex. App.--Houston [1st Dist.] 1993, writ denied) (the trial court does not abuse its discretion in denying a tardy request for a jury trial where defendant did not pay the jury fee and thereby waived right to a jury trial).

Rule 245 of the Texas Rules of Civil Procedure provides that a party is entitled to *forty-five days* notice of the *first* setting unless they agree otherwise; provided, however, that the Court may reset a contested case to a later date on any reasonable notice to the parties or by agreement of the parties. Tex. R. Civ. P. 245 (West 2009). Non-contested cases may be tried or disposed of at any time whether set or not. *Id.*

It appears that a proposed ward would be entitled to a jury trial in either an application for temporary or permanent guardianship based upon the foregoing statutes in addition to Article 5, Section 10 of the Texas Constitution. However, with respect to a temporary guardianship, if there is going to be an application for permanent guardianship, it may not be economical to proceed to a jury trial on the temporary guardianship when the same issues (other than imminent danger) would have to be re-tried in the permanent guardianship. However, this is not to suggest that the ad litem should concede the temporary guardianship if the ward wants to oppose it. *See* discussion of temporary guardianships below. Keep in mind, however, that Section 875(k) of the Texas Probate Code provides authority for the Court to appoint a temporary guardian *pending contest* which can extend the appointment of the temporary guardianship until the resolution of the contest.

2. Discovery

A contested guardianship will proceed just like any other lawsuit. More than likely, the Court will enter a scheduling order setting the deadlines for discovery, motions, etc. Accordingly, the ad litem should consider conducting some discovery, such as sending Requests for Disclosures, to determine the persons with knowledge of relevant facts and the experts the applicant intends to use. Sending Requests for Disclosures can also be an effective trial tool in that, if the applicant fails to list his witnesses or experts in his response and fails to supplement his list thirty days prior to trial, the ad litem can seek to exclude the testimony. Furthermore, if there are issues as to the applicant's standing or qualifications, the ad litem should also consider sending Requests for Production of Documents and Interrogatories to flesh out issues such as adverse claims or interests, lawsuits involving the applicant, debts owed to the ward, and other suitability issues. Furthermore, the ad litem should also seek all relevant medical records through subpoena or discovery.

3. Issue of Applicant or Contestant's Standing

As previously discussed, one of the areas of contest may be the applicant's standing. Under Section 642(b) of the Probate Code, a person who has an interest that is adverse to a proposed ward or incapacitated person may not file or contest an application. The ad litem may use a motion in limine, discussed previously herein, to attempt to eliminate either an applicant or contestant if they have an adverse interest to the proposed ward. What exactly is an adverse interest? Unfortunately, the Probate Code does not specifically define adverse interest and there are no published opinions on the issue. However, the 14th Court of Appeals, in an unpublished opinion in *Betts v. Brown,* (2001 WL 40337) applied issues of standing of personal representatives of decedent's estates by analogy, concluding that an

interest is adverse to the proposed ward under Section 642 when that interest "does not promote the well-being of the ward." The interest must adversely affect the welfare or well-being of the proposed ward. The Court also stated that "adverse interest" under Section 642 must mean something different than the items enumerated under Section 681 regarding qualifications of the ward.

4. Issue of Applicant's Qualifications

Even if the applicant has standing to proceed with the application, the ad litem should also address issues of qualification. As previously discussed, Section 681 sets out the list of those individuals that are disqualified to serve as guardian. The ad litem should review that list and seek to determine whether there is evidence of the applicant's disqualification. Since the applicant must show himself or herself qualified to act, the ad litem can raise the issue of disqualification at the hearing, although it is a good idea to have pled lack of qualification in your answer, contest or motion.

5. Medical Evidence Issues

a. The Doctor's Form Letter

The ad litem should ensure that the doctor's letter supporting the application was dated within 120 days of the application and based upon an examination that was conducted within 120 days of the application. Tex. Prob. Code Ann. § 687(a). The doctor's letter will often be the only medical evidence of incapacity at the hearing. However, if the ad litem is contesting the guardianship, the ad litem should then object to the doctor's letter on the basis of hearsay. If the contest is only as to who should serve as the guardian and not to incapacity, then the ad litem may consider waiving the hearsay objection. Out of courtesy, the ad litem ought to inform the applicant's attorney prior to the hearing that he or she will be objecting to the doctor's letter so that the applicant can make arrangements to bring the doctor "live" to the hearing.

b. The Guardianship "Miranda" Warning

As a general rule, any medical records or communications between an individual and a physician are privileged, *see* Tex. R. Evid. 509 & 510, and any consent to disclosure needs to be in writing, *see* Tex. R. Evid. 509(f)(1). However, there is an exception to this writing requirement when the patient (1) after having been informed that communications will not be privileged; (2) has made communications; (3) in a court-ordered examination relating to the patient's mental or emotional health. Tex. R. Evid. 510(d)(4) (West 2009).

Once the doctor appears at the hearing, the ad litem should then proceed to examine the doctor about whether he gave the proposed ward appropriate warning. If the physician failed to give the appropriate warning, the ad litem should move to strike the doctor's testimony. The warning is also applicable in court-ordered examinations. *Subia v. Texas Dept. of Human Services,* 750 S.W.2d 827,830-31 (Tex. App.-El Paso 1988, no writ).

c. The Expert's Qualifications and Relevance and Reliability of Testimony

Assuming the doctor gave the appropriate warning, the ad litem should also address the issue of the doctor's qualifications as an expert witness. The ad litem should be familiar with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993), and its progeny, through which a new standard for admissibility of expert testimony has been established. *Daubert* held that the proffered expert testimony must be scientific knowledge which will assist the trier of fact to understand the evidence or determine a fact in issue. *Id.* at 589. To constitute "scientific knowledge," the testimony must be reliable. *Id.* In addition, the evidence must be relevant. Scientific evidence is relevant when there is "a valid scientific connection to the pertinent inquiry as a precondition to admissibility." *Id.* at 592. The Court also enumerated four factors to be considered in determining relevance and reliability:

(1) whether a theory or technique can be and has been tested;

(2) whether the theory or technique has been subjected to peer review and publication;

(3) the technique's known or potential rate of error; and

(4) the general acceptance of the theory or technique by the relevant scientific community. *Id.*

at 591-94.

Texas has adopted *Daubert* in *E.I. du Pont de Nemours and Co. v. Robinson,* 923 S.W. 2d 549 (Tex. 1995). Further, the United States Supreme Court has made it clear in *Kumho Tire Corp., Ltd. v. Carmichael,* 526 U.S. 137, 119 S. Ct. 1167 (1999) that the *Daubert* standard applies to all expert testimony.

The ad litem should examine whether the doctor supporting the guardianship had specialized knowledge of issues of psychology and neurology. The ad litem should inquire about the doctor's experience relating to geriatric psychiatric and related sciences. The Texas Supreme Court has made it clear that medical experts are not automatically qualified simply because they possess a medical degree. *See Broders v. Heise,* 924 S.W. 2d 148, 153 (Tex. 1996) (excluding the testimony of emergency room doctor to establish relationship between patient's head injury and death.) The offering party must show that the expert has "knowledge, skill, experience, training or education" regarding the specific issue before the Court which would qualify the expert to give an opinion in that particular subject. *Id.*

6. Be Aware of the Different Burdens of Proof

a. Clear and Convincing

Most civil cases must be proved by a preponderance of the evidence. However, Section 684(a) of the Texas Probate Code provides that the following must be proved by *clear and convincing evidence:*

(1) that the proposed ward is an incapacitated person;

(2) that it is in the best interest of the proposed ward to have a guardian; and

(3) that the rights of the proposed ward or the proposed ward's property will be protected by the appointment of a guardian.

Tex. Prob. Code § 684(a) (West 2009).

"Clear and convincing" evidence is "that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *State v. Addington,* 588 S.W.2d 569, 570 (Tex. 1979). This is an intermediate standard, falling between the preponderance standard of ordinary civil proceedings and the reasonable doubt standard of criminal proceedings.

b. Preponderance of the Evidence

Section 684(b) of the Texas Probate Code provides that the Court must also find the following by a *preponderance of the evidence:*

(1) that the Court has venue;

(2) that the person to be appointed guardian is eligible to act and is entitled to be appointed;

(3) If a guardian is appointed for a minor that the guardianship is not created for the primary purpose of enabling the minor to establish residency for enrollment in a school or school district for which the minor is not otherwise eligible for enrollment; and,

(4) That the proposed ward is totally without capacity to care for himself and to manage his property, or the proposed ward lacks the capacity to do some, but not all, of the tasks necessary to care for himself or to manage his property.

Tex. Prob. Code § 684(b) (West 2009).

The application must prove each and every element to meet his or her burden of proof. Tex. Prob. Code § 684 (c) (West 2009). Further, a determination of incapacity of an adult proposed ward, other than a person who must have a guardian appointed to received funds due the person from any governmental source, must be evidenced by recurring acts or occurrences with the preceding six-month period and not by isolated instances of negligence or bad judgment. *Id.*

7. Appeal the Judgment, if Necessary

An attorney ad litem must exhaust all remedies available to his client and, if necessary, represent his client's interest on appeal. *Cahill v. Lyda,* 826 S.W.2d 932 (Tex. 1996). However, an appellate court will not reverse an order appointing guardian absent a showing that the probate court abused its discretion. *Cox v. Young,* 405 S.W.2d 430 (Tex. Civ. App.-Eastland 1966, writ ref'd n.r.e.);

Trimble v. Texas Department of Protective & Regulatory Service, 981 S.W.2d 211 (Tex. App.-Houston [14th Dist.] 1998, no writ).

E. Temporary Guardianships

1. Overview of the Process

The Texas Probate Code has special provisions relating to temporary guardianships codified at Section 875 et seq. On the filing of an application for temporary guardianship, the Court shall appoint an attorney ad litem to represent the proposed ward in the guardianship proceedings in which independent counsel has not been retained by or on behalf of the proposed ward. Tex. Prob. Code §875(d) (West 2009). An order appointing a temporary guardian used to be entered *ex parte* upon presentation to the Court of substantial evidence that a person is a minor or incapacitated person, and the Court has probable cause to believe that the person or person's estate, or both, requires the immediate appointment of a guardian. Tex. Prob. Code §875(a) (West 2009). While the standard remains the same, the 2003 legislature changed the statute to provide that a hearing date is be set and held within ten days, unless the respondent or respondent's attorney consents to postpone the hearing. Tex. Prob. Code § 875(f) (West 2009). In any event, the hearing must be held within 30 days of the date of the filing of the application. *Id.*

2. The Hearing

At the hearing, the proposed ward has the right to:

(a) receive prior notice;

(b) have representation by counsel;

(c) be present;

(d) present evidence and confront and cross-examine witnesses; and

(e) request a closed hearing. Tex. Prob. Code §875(f)(1) (West 2009).

3. Motion to Dismiss

The proposed ward may also file a motion to dismiss the application for temporary guardianship on one day's notice to the party who filed the application. Tex. Prob. Code § 875(f)(5) (West 2009).

4. Burden of Proof at Hearing

Assuming the temporary guardianship is not dismissed and a hearing is held, the attorney ad litem should be aware of the burden of proof upon the applicant. To affirm the temporary guardianship, the Court must determine:

(a) That there is substantial evidence (not "clear and convincing" as in a permanent guardianship) that the proposed ward is a minor or incapacitated person;

(b) There is *imminent danger* that the physical health or safety of the proposed ward will be seriously impaired; or

(c) That the proposed ward's estate will be seriously damaged or dissipated unless immediate action is taken.

Tex. Prob. Code § 875(g) (West 2009).

5. Powers of Temporary Guardian; Duration

The Court shall assign to the temporary guardian only those powers and duties that are necessary to protect the proposed ward against the imminent danger. Tex. Prob. Code § 875(g) (West 2009). The court shall set a bond, and the reasons for the temporary guardianship and the powers and duties of the temporary guardian must be described in the order of appointment. *Id.* The guardianship can run only for a period of sixty days from the date of the application unless a contest is filed, then the Court may appoint the person as temporary guardian pending contest under Section 875(k) of the Texas Probate Code. Tex. Prob. Code § 875(h) (West 2009).

6. Order Appointing Temporary Guardian Not Adjudication of Incapacity

Section 874 to the Texas Probate Code provides the person for whom a temporary guardian is appointed may *not* be presumed to be incapacitated. Tex. Prob. Code § 874 (West 2009)(emphasis added).

7. Fees and Costs

Attorney's fees and costs are assessed under Sections 665A, 665B or 669 of the Texas Probate Code in the same manner as in permanent guardianships. This issue of attorney's fees is discussed in more detail below.

8. Considerations for the Attorney Ad Litem

The attorney ad litem should consider the same issues set forth in the discussion regarding permanent guardianships, especially those relating to notice, standing, and the qualifications of the guardian. However, the attorney ad litem should also be aware of the additional requirement of a showing of imminent danger to the proposed ward or serious damage or dissipation of the ward's estate. This is a finding apart from substantial evidence of incapacity that must be shown. If there is not a true emergency, the Court will normally prefer that the applicant proceed with an application for permanent guardianship. Many times, the applicant intends to file an application for permanent guardianship anyway, so it is less costly to the ward and a more judicious use of resources to have only one proceeding. Also, recall that there are certain medical decisions that may be made by a surrogate decision-maker without the inception of guardianship proceedings. *See* Tex. Health & Safety Code § 313.004 (West 2009).

F. Other Guardianship Matters Necessitating Appointment of Attorney Ad Litem

1. Restoration or Modification Proceeding

Section 694C of the Texas Probate Code provides that the Court shall appoint an attorney ad litem to represent a ward in a proceeding for the complete restoration of the ward's capacity or for the modification of the ward's guardianship. Tex. Prob. Code § 694C (a) (West 2009). The issue as to who may institute the restoration proceeding is addressed in the discussion regarding the role of the guardian ad litem.

At the hearing, the Court shall consider only evidence regarding the ward's mental or physical capacity *at the time of the hearing* that is relevant to the restoration of capacity or modification of the guardianship. Tex. Prob. Code § 694D(a) (West 2009).

The party who files the application has the burden of proof at the hearing. Tex. Prob. Code § 694D(b) (West 2009).

Before ordering a settlement and closing of the guardianship, the Court must find *by a preponderance of the evidence* that the ward is no longer partially or fully incapacitated. Tex. Prob. Code § 694E (West 2009) Before expanding the powers and duties of the guardian, the Court must find *by a preponderance of the evidence* that the current nature and degree of the ward's incapacity warrants a modification and that some or all of the ward's rights need to be further restricted. *Id.* Before limiting the powers and duties of the guardian, the Court must find *by a preponderance of the evidence* that the current nature and degree of the ward's incapacity warrants a modification and that some or all of the ward's rights need to be restored. *Id.* Note that incapacity must be shown by "clear and convincing" evidence to establish a guardianship, but to modify or dissolve a guardianship, lack of incapacity must only be shown by a "preponderance of the evidence."

The court may not order a restoration or modification without a written letter or certificate of a physician dated not earlier than the 120th day before the date of the filing of the application containing the information set forth in Section 694F of the Texas Probate Code. Tex. Prob. Code § 694F (West 2009). The court also has the power to order an examination of the ward; this examination is to comport with the directives of Section 687. Tex. Prob. Code § 694F(b) (West 2009).

2. Guardian's Final Accounting

When the ward is deceased and there is no executor or administrator of the ward's estate, or when the ward is a nonresident, or the ward's residence is unknown, the court may appoint an attorney ad litem to represent the interests of the ward with respect to an accounting filed by the guardian and allow the attorney a reasonable fee from the ward's estate. Tex. Prob. Code § 755 (West 2009).

G. Issue of Proposed Ward's Right to Private Counsel

The Probate Code has a built-in protection for the ward's right to personal and financial freedom by

mandating the appointment of an attorney ad litem to represent his or her interest in the guardianship. As discussed, the attorney owes the proposed ward the same duties he would otherwise owe a private client. However, there is no statutory language addressing the ward's retention of private counsel, except with respect to a restoration proceeding discussed below. Clearly, the proposed ward has every right to retain the counsel of his or her choice. *See* Tex. R. Civ. P. 7. The tricky part, however, is whether the proposed ward had the mental capacity to retain the attorney with respect to the guardianship.

In *Oldham v. Calderon,* 1998 WL 104819, an unpublished case of out of the 14th Court of Appeals, the trial court allowed the ward to substitute private attorneys in place of the court-appointed attorney ad litem in representing her in the guardianship proceeding. The trial court allowed the private attorneys' fees to be paid out of the ward's estate. This action was affirmed on appeal, stating:

> A guardianship proceeding threatens the personal and financial freedoms of a proposed ward, and those freedoms must be ably defended. Moreover, a trial court can make the most rational decision concerning appointment of a guardian only where the interests of the proposed ward are vigorously represented. Therefore, to the extent appellees could work more effectively with [her own attorneys] in this case than an attorney selected by the court, her estate was benefitted, not harmed, by their involvement. *Id.* at 3.

Oldham does not address, however, the issue of whether the proposed ward may retain an attorney *in addition to* the attorney ad litem selected by the Court. Again, the concern is whether the ward has the requisite mental capacity to do so. There is a strong possibility that such attorney selected by the proposed ward may be met with a Motion to Show Authority filed by the applicant, the guardian ad litem, or attorney ad litem pursuant to Rule 12 of the Texas Rules of Civil Procedure. Under such rule, a party may file a sworn motion citing the attorney to appear and show his authority to act on the client's behalf. If the attorney fails to show such authority, the attorney is barred from representing the proposed ward in the proceeding. Tex. R. Civ. P. 12 (West 2009).

With respect to a restoration or modification proceeding, the ward may retain his or her own attorney. Tex. Prob. Code § 694K(a). The attorney may be compensated out of the ward's estate *only if* the Court finds that the attorney had a good faith belief that the ward had the capacity necessary to retain the attorney's services. Tex. Prob. Code §694K(b) (West 2009).

III. GUARDIAN AD LITEM IN THE CONTEXT OF A GUARDIANSHIP

A *guardian ad litem* is, by definition, a person who is appointed by a court to represent the best interests of an incapacitated person in a guardianship proceeding. Tex. Prob. Code §601(12) (West 2009).

As previously discussed, a guardian ad litem differs from an attorney ad litem in that the guardian ad litem is an officer of the Court protecting the proposed ward in a manner that will enable the Court to determine what action will be in the best interests of the proposed ward. Tex Prob. Code §645(c) (West 2009). Even though the guardian ad litem is not acting as the attorney for the proposed ward, there is authority which holds that the guardian ad litem nonetheless owes the proposed ward a fiduciary duty. *See Byrd v. Woodruff,* 891 S. W. 2d 689 (Tex. App.-Dallas, writ dism'd) (guardian ad litem participates in judicial proceedings as personal representative of a minor who, upon reaching majority, can sue guardian ad litem for breach of fiduciary duty.)

There are several instances where the Court appoints a guardian ad litem. In some situations, where the Court is presented with some evidence in the form of incapacity, usually from a letter to the court by a family member, friend, neighbor, or health care provider, the Court will appoint a guardian ad litem to determine whether it is in the best interest of the proposed ward to proceed with a formal application for guardianship. If the guardian ad litem cannot find a suitable family member to proceed with the application, the guardian ad litem will file the application for guardianship and request that either he or some other qualified individual be appointed as guardian. Sometimes, the Court will appoint the guardian ad litem to be the guardian.

When there is a contested guardianship, either by a third party or because the ward objects to the

guardianship, a guardian ad litem can be appointed to advocate for the best interests of the proposed ward. The Court will look to the guardian ad litem to offer guidance as to a resolution of the contest. In these instances, the guardian ad litem will usually file a report of guardian ad litem, making a recommendation as to how the matter should be resolved in the proposed ward's best interests.

Other authority for the appointment of a guardian ad litem can be found in Section 681 of the Texas Probate Code, which lists the persons who are disqualified to serve as guardian. Section 681(4) lists a person who is party to a lawsuit affecting the proposed ward as one who is disqualified to serve as guardian unless the Court determines that the claim of the applicant is not in conflict with that of the proposed ward or the Court appoints a guardian ad litem to represent the interests of the proposed ward in the litigation. (Note that Section 645(e) of the Texas Probate Code allows the Court to appoint the attorney ad litem to serve as guardian ad litem under 681(4) in the interest of judicial economy.

With respect to restoration or modification proceedings, upon receipt of an informal letter from the ward requesting restoration or modification, the Court is required to appoint a guardian ad litem or court investigator who must then investigate whether it is appropriate to file an application for modification and restoration. Tex. Prob. Code § 694A(c) (West 2009).

IV. MEDIATION - ALTERNATIVE DISPUTE RESOLUTION IN GUARDIANSHIPS

A. Reasons to Mediate

There are several methods of dispute resolution that are alternatives to a trial. Mediation is by and far the most commonly used method of alternative dispute resolution. The Court will normally encourage or even order the parties to mediate a contested case. Mediation is a viable solution to resolving a contested matter. There are several reasons to attempt to resolve a contested guardianship. Some of those reasons are as follows:

1. Addresses Parties' Privacy Concerns

While a court can order a closed hearing in a guardianship, most court proceedings are matters of public record. Further, even in a closed hearing, witnesses must testify in front of strangers regarding sometimes sensitive family matters. Because the comments made in mediation are confidential, and because no one can be called upon to testify about what happened in the mediation, a mediation offers a somewhat private method of resolving a volatile family dispute. Furthermore, in cases where capacity is a close call, the attorney ad litem can help reduce or eliminate embarrassment to the proposed ward that may occur in having to appear in Court to determine his or her mental capacity.

As discussed, the Court may appoint a guardian ad litem to assist the Court in making the capacity determination or to decide between competing applicants for guardianship. On most occasions, a guardian ad litem will make a written report to the court, which is filed as a matter of public record, wherein the guardian ad litem will detail his or her view of the facts surrounding the ward's mental capacity or the advantages and disadvantages of the various applicants. This necessarily involves a candid assessment by the guardian ad litem. In the context of a mediation, the guardian ad litem may agree to withhold a formal written report, if allowable, or to file a more general report, if the parties reach a settlement that meets the guardian ad litem's approval. This will help alleviate concerns that the family's "dirty laundry" will be forever memorialized in a court document signed by an officer of the Court.

2. Salvages Family Relationships and Defuses Emotional Fireworks

Most lawsuits involve, by definition, a form of conflict between the parties. In the case of a guardianship, the party applying for guardianship is, perhaps rightly so, attempting to limit or prohibit the proposed ward's ability to tend to his or her own affairs. Many times, this is a cause of strain in the relationship between the applicant and the proposed ward. Furthermore, many contested guardianships are filed by other family members who are attempting to prevent the applicant from serving as the guardian and to have the Court appoint them or a third party as guardian. To say that these situations sometimes involve "name-calling" is an understatement.

While a mediation rarely concludes with all the parties "kissing and making up" in the hallway on

the way out, many mediations are concluded with what is known as a "family settlement agreement" wherein the family outlines their agreement with respect to the guardian, where the ward may live, visitation rights of the other family members, and other matters affecting the future of the family relationship. This is many times preferable to proceeding to trial where the Court will be forced to decide on one guardian and will not be inclined to address peripheral issues that may be of great importance to the family members.

Furthermore, mediations offer the parties a chance to "vent." This can be invaluable to getting a case settled. Many times, one family member is objecting to the other serving as guardian not because that person is truly disqualified, but because that person did something to offend them many years before. There is oftentimes long-standing anger, jealousy, sibling rivalry, and perceived favoritism. The Court will not be interested in and will severely limit the parties' opportunities to "vent" at the trial about these issues. In any event, as discussed above, the trial will likely be a public affair where the parties will be less likely to speak out, even if given the opportunity. A mediation can be a perfect forum for allowing all of these type of feelings to be aired and issues to be addressed. Often, after the parties have had a chance to rant and rave for a while, cooler heads prevail and, by the end of the day, the parties reach agreements as to key issues.

3. Allows the Parties to Fashion Their Own Agreement

As mentioned, the Court will not generally "split the baby" in a guardianship. The Court may appoint one person to be the guardian of the person and another to be the guardian of the estate, but the Court will rarely do that if the two appointed guardians will be in conflict with each other. Remember that the Court, and you as attorney ad litem, are concerned solely with the proposed ward's well-being. A mediation will present the parties with an opportunity to fashion an agreement with respect to who serves as the guardian. The Court will usually honor such agreements if they are in the ward's best interest and are "blessed" by the attorney ad litem and the guardian ad litem. The parties can also add other terms addressing where the ward will live, setting up a visitation schedule, resolving conflicts over ward's funds, etc. Mediation offers the flexibility that is missing in a "winner take all" courtroom setting.

4. Reduces the Cost to the Ward's Estate

While the mediator chosen or assigned to the case will receive a fee, and while the lawyers involved normally bill for each hour of the mediation, the mediation process can, nonetheless, eliminate costly and protracted litigation. At a minimum, the mediation may eliminate the need to conduct extensive formal discovery or subpoena expensive records. Many times the parties agree to a settlement simply to "stop the bleeding" of momma or daddy's estate (sometimes for the selfish reason that they want some to be left when momma or daddy passes.) As attorney ad litem, you share the concern that the ward's estate is not severely depleted by the contest. Even though the attorney ad litem should not shirk his or her duty to vigorously represent the ward's interest, the attorney ad litem should make every attempt to maximize the opportunity at mediation to reach an agreement that will serve the ward's needs and eliminate the contest.

B. Mediation Rules and Guidelines

Although mediation is less formal than a trial, there are rules and procedures that need to be followed. These include:

1. Good Faith Effort. For mediation to be effective, everyone must be actively involved. All parties must do their best to try and find common ground. If a party holds back information or doesn't commit fully to the process, it is unlikely that a solution can be found. Both the mediator and the court ask that the parties try to make a good faith effort to attempt to find common ground. When the parties are "involved" with the process, there is a better chance an agreement can be reached.

2. Confidentiality. Everything in mediation is completely confidential. Nothing can be revealed outside the mediation room. If no agreement is reached and the case goes to trial, nothing said or demonstrated in mediation can be used in the trial. The mediator himself cannot be called as witnesses by either side and cannot talk to the court about anything said or done in mediation. The parties have the guarantee of strictest confidence for anything said in the mediation

proceedings. Please note, however, that under state law any allegations of child abuse which are revealed during mediation must be reported to the appropriate court authorities.

3. Civility. Mediation is a process in which both sides need to speak and express their opinions. It is important that each side let the other speak freely and without interruptions.

4. Control. The parties have the authority to decide if they will settle. In a trial, the parties are confined to the rules of Civil Procedure, Evidence, and other rules. In a trial the judge makes all decisions regarding the law. The jury or the Judge decides the case. Mediation however, gives the parties the power to decide.

C. Mediation Procedures

Generally, the mediation process proceeds as follows:

1. Opening. The mediator will introduce himself and give an overview of the process.

2. Stating the Case. The mediator will ask each side to state their position and explain why they are in court.

3. Private Meetings. The mediator will generally meet with each side individually. This is known as a caucus. One party will be asked to move to another room, and then the mediator will meet with the other party.

4. Continuation. Throughout the process, the mediator may conduct several caucuses or other procedures to help both parties reach a resolution.

5. Resolution. When a resolution is reached, the parties will write up the agreement. This agreement will be legally binding and both sides are expected to follow the agreement.

6. Impasse. If the mediator feels that the process is not achieving its goals, he will call an impasse. This usually means that the mediation process is at an end and a trial will be scheduled. For this reason, we ask that you leave the final decision of whether to declare an impasse to the mediator who is best qualified to decide. Sometimes an impasse will be temporary and an agreement may still be reached. Sometimes a case will even settle after the mediation, but prior to trial. Mediation is not the exclusive means of reaching a settlement. However, mediation is often the best opportunity the parties have to bring their case to a resolution outside of court.

V. COSTS AND ATTORNEY'S FEES

A. Costs

The cost of the guardianship proceeding, including the cost of the guardian ad litem or court visitor, is paid out the guardianship estate, or, if the estate is insufficient to pay for the cost of the proceeding, the cost shall be paid out of the county treasury. Tex. Prob. Code § 669(a) (West 2009). However, if the court denies the application for guardianship based upon the recommendation of a court investigator, the applicant shall pay the cost of the proceeding. Tex. Prob. Code § 669(b) (West 2009).

B. Attorney's Fees

1. Attorney Ad Litem

Under Section 665A of the Texas Probate Code, the Court shall order the payment of a fee set by the court as compensation to the attorney ad litem appointed under Section 646 to be taxed as costs in the case. That is, the attorney ad litem is usually paid from the ward's estate. However, if the court determines that the ward is unable to pay for such services, the county is responsible for the costs of those services. Tex. Prob. Code § 665A (West 2009).

2. Guardian Ad Litem

Under Section 645 of the Texas Probate Code, the guardian ad litem is entitled to reasonable compensation for services in the amount set by the court to be taxed as costs in the proceeding. Tex. Prob. Code § 645(b) (West 2009). Note that if a guardian ad litem is appointed under Section 681(4) of the code, the fees and expenses of the guardian ad litem are costs of the litigation proceeding that made the appointment necessary. Tex. Prob. Code § 645(d) (West 2009).

3. Applicant for Guardianship

Under 665B of the Texas Probate Code, a court that creates the guardianship or Section 867

management trust, on the request of a person who filed an application, *may* authorize compensation of an attorney who represents the applicant at the hearing, *regardless of whether the person is appointed the ward's guardian* from either the ward's estate or the county treasury if the ward's estate is insufficient and the county treasury has budgeted funds for that purpose. Tex. Prob. Code § 665B(a) (West 2009). However, before the Court can award compensation under this section, the Court must find that the applicant acted in *good faith and for just cause* in the filing and prosecution of the application. Tex. Prob. Code § 665B(b) (West 2009). As is the general rule with proceeding for any type of recovery, you must have both *pleadings and proof.* Accordingly, the applicant should plead that the application is brought in good faith and for just cause in order to properly set up a claim for attorney's fees.

This is an important issue to the ad litem for two reasons: (1) if the applicant's attorney has not pled or proved good faith and just cause, you may be able to argue that his fees should not be paid out of the ward's estate or (2) if you are the guardian ad litem applying for guardianship, you should plead that your actions as applicant are in good faith and with just cause so as not to jeopardize your fees for proceeding with the application.

The Legislature amended the statute to permit the court to order payment of the applicant's attorney's fees from the county treasury as long as the attorney to whom the fees will be paid has not received, and is not seeking, payment for services from any other source. Tex. Prob. Code § 665B(c) (West 2009).

4. Ward's Private Attorney

As previously mentioned, a ward's attorney in a modification or restoration proceeding can be compensated from the ward's estate the if the Court finds that the attorney had a good faith belief that the ward had the capacity necessary to retain the attorney's services. Tex. Prob. Code § 694K(b) (West 2009).

VI. CONCLUSION

It is my hope that this article will provide a "road map" for those appointed to serve as an ad litem in a guardianship proceeding. As with any article, there are limitations and not every conceivable issue can be addressed. Therefore, to the extent that you may be unsure of how to handle a particular situation in which are involved, be sure to contact the court's guardianship coordinator, staff attorney, or if in the smaller counties, court auditor for guidance.

Finally, I hope that you can see from this discussion that an ad litem is not just "window dressing" in a guardianship case. Rather, the ad litem is often, in the words of the late Judge Russell Austin, the proposed ward's "last line of defense!"