TEXAS GUARDIANSHIP MANUAL

2024

Texas Guardianship Manual
2024 Edition

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2024 Edition

Austin 2024

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Preface

The State Bar of Texas and the members of the manual committee are excited to publish this 2024 edition of the *Texas Guardianship Manual*. Since the first edition was published in 1982, Texas guardianship law has changed dramatically, making the need for an updated, user-friendly manual vital to Texas attorneys practicing in this area of the law. The goal of the manual remains the same—to provide an easily readable practice manual addressing situations that commonly arise in a Texas guardianship practice.

The format of the manual should enable practitioners to quickly determine when a guardianship may be necessary, whether there is a less restrictive alternative, the type of proceeding to be filed, and how to proceed once a particular type of guardianship or an appropriate alternative has been chosen. Because the appointment of an attorney ad litem is required in all guardianship proceedings, guidance has been provided on fulfilling that role. The fundamentals of guardianship proceedings are covered; however, it is not intended to imply that certain suggested actions are practice standards or compulsory in all proceedings. Therefore, practitioners should remain alert to unusual aspects of a particular case and refer to other sources for answers to questions not addressed in this manual.

Members of the State Bar of Texas, several Texas judges, and the staff of the Texas Bar Books Department of the State Bar have contributed their expertise and a significant amount of time to the production and updating of this manual over the years. We must start by acknowledging James E. Brill, who invented the *Texas Probate System*—widely used by practitioners in this state—and who served as a consultant to the original *Texas Guardianship Manual*. Equal acknowledgment and appreciation are due Sharon B. Gardner, who chaired this committee from 1993 until 2010 and whose contributions are still reflected in the manual. Mr. Brill and Ms. Gardner set the standard for this and all future committees. In addition, much thanks are due the numerous judges, practitioners, and State Bar staff who have contributed to the manual for over forty years.

But each edition is a reflection of the time and expertise of returning and new committee members. We sincerely appreciate the continued service of Committee Chair Sarah Patel Pacheco, as well as Judge Christine Butts, Kathleen Beduze, Ray Black, Steven D. Fields, Terry Hammond, Brendan Harvell, Craig Hopper, Lisa H. Jamieson, Dyann McCully, Judge G. Quentin McGown, Kevin Alter, Travis Weaver, Tara Zinn, and the committee's newest member, Judge Jason Cox. Additionally, we would like to recognize David Foor, who assisted with case law updates. The generosity of these individuals in giving of their talents and time to the 2024 edition is greatly appreciated.

And while all of the committee members' contributions were invaluable, we would be remiss if we did not recognize the unique role of the Honorable Steve M. King, former presiding judge of Tarrant County Probate Court Number One. Judge King devoted significant time and

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talent to past editions of the manual. He willingly reviewed past editions with a judicial eye, and his extensive experience, insights, and coordination of the various associate editors were invaluable.

But this new edition and the many previous editions would not have been possible without the hard work, encouragement, and often prodding of the staff of the State Bar of Texas. It is impossible to give enough credit to members of the Texas Bar Books staff. From organizing meetings to legal research and writing, the Texas Bar Books team has provided support to the committee, and the manual is in great part a reflection of their hard work and dedication to this project and guardianship practitioners.

Furthermore, the authors and the State Bar of Texas gratefully acknowledge the Washington Supreme Court's Pattern Forms Committee for granting permission to use and modify several forms for this manual.

Finally, practitioners are encouraged to make sure they apprise themselves of statutory changes and participate in the many CLE opportunities offered by the State Bar of Texas relating to guardianship and elder law. The committee anticipates providing a new edition, and your suggestions for inclusions or revisions are encouraged. They should be directed to the Texas Bar Books Department of the State Bar of Texas. It is the committee's hope that the *Texas Guardianship Manual* will continue to be a valuable tool for all Texas guardianship practitioners.

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Summary of Contents

A detailed chapter table of contents immediately precedes each chapter.

Introduction

Overview of how to use the manual and features available in the online and downloadable digital versions of the manual

1 Ethics and Professional Conduct

Discussion of the regulation of lawyers and law practice and accountability for professional responsibility, with emphasis on guardianship practice

2 Temporary Guardianships and Other Emergency Relief

Practice notes and forms for the creation of temporary guardianships and for emergency injunctive relief

3 Alternatives to Guardianship and Preguardianship Planning

Practice notes and related forms addressing alternatives to guardianship

4 Creating Guardianships

Practice notes and forms to guide the practitioner in the creation of permanent guardianships

5 Guardianships of Veterans and the VA Fiduciary Program

Practice notes and related forms concerning the special requirements for the administration of veterans benefits and interaction with the VA Fiduciary Program

6 Guardians and Attorneys Ad Litem

Practice notes and forms relating to the appointment and duties of guardians and attorneys ad litem

7 Inventory, Safekeeping, and Creditors

Practice notes and related forms for the initial management of guardianship assets

8 Administration

Practice notes and supporting forms providing a thorough discussion of the administration of a guardianship

9 Modification, Restoration, and Successor Guardians

Practice notes and forms for the modification of an established guardianship

10 Litigation

Practice notes and related forms addressing the unique considerations in contested guardianship issues

11 Guardianship Management Trusts

Practice notes and forms for the creation of management trusts

12 Public Benefits

Practice notes and form addressing public benefits available in guardianships

13 Foreign Guardianships

Practice notes and forms adressing interstate guardianship issues

14 Final Accounts and Closing Guardianships

Practice notes and forms for the final settlement and closing of a guardianship

15 Compliance, Show-Cause Order, Removal, and Reinstatement

Practice notes discussing compliance requirements, methods for ensuring compliance, and consequences of noncompliance in guardianships

16 Mental Health and Involuntary Commitment

Practice notes discussing mental-health considerations and involuntary commitment in the creation and administration of guardianships

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Introduction

The *Texas Guardianship Manual*, 2024 edition, is more than a form book. It is a practice guide for attorneys in Texas who handle guardianship matters. The manual is organized by the logical sequence of events that would occur while following a matter from beginning to end. Each chapter contains a detailed table of contents; each contains practice notes concerning the topic of the chapter. The forms take up the greater part of most chapters. The uniform format of practice notes and forms is designed to enhance readability and ready reference and to accommodate easier word-processing use of the forms. Note that nothing in this manual is intended to suggest that the matters discussed are compulsory or set practice standards. Rather, this manual offers ideas based on a review of the current state of Texas law and recent cases and claims involving attorneys practicing in the guardianship area in Texas.

§ 1 Practice Notes

The practice notes are short synopses of the law, designed to serve as a primer to the basic matters involved in a particular chapter. These notes are, at most, black-letter law and do not try to resolve questions in controversial areas. For the attorney experienced with guardianship matters, these notes should serve as a reminder of some of the basics; for the attorney not so experienced, they should provide an orientation to the major matters with which the attorney needs to be concerned when contemplating a particular cause of action.

Although the notes are not intended as a treatise on guardianship matters, they contain much important information that must be understood before the forms may be used responsibly.

§ 2 Forms

The forms (except those promulgated by governmental agencies) were prepared by members of a committee of experts in the guardianship field, and great care has gone into their preparation. The forms represent the best thinking of the practicing attorneys on the committee. Perfection, however, is hard to achieve, and each attorney using these materials must depend on his or her own expertise and knowledge of the law; there is no substitute in a particular case for the legal mind. Thus, care should be taken to ensure that any form used fits the case and treats the problems of that case.

1. Optional content

Within major sections of the text of forms, optional paragraphs or items are usually identified by boxed instructions. Because the manual can cover only relatively common guardianship situations, language needed to address an atypical issue in a particular case may not appear in the form. The user must take care both to eliminate language appearing in the form that is not appropriate for the particular case and to add any language needed for the particular case that does not appear in the form.

2. Typeface conventions

Two typefaces are used in the forms. Material in Times Roman (like most of this page) is appropriate for inclusion in a finished form. In contrast, Arial type is used for boxed instructions. When Arial type is used within the form itself (rather than in a box), it appears in **boldface** for emphasis.

3. Bracketed material

Several types of bracketed material appear in the forms.

Choice of terms. In a bracketed statement such as "[he/she]," the user must choose between the

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terms or phrases within the brackets. The choices are separated by forward slash marks.

Optional words. In a phrase such as "appeared in person [and by attorney]," the user must determine whether to include the phrase "and by attorney."

Substitution of terms. In a bracketed statement such as "[**name of ward**]," the user is to substitute the name of the ward rather than typing the bracketed material verbatim.

Instructions for use. Material such as "[**include if applicable:** . . .]" and "[**specify venue facts**]" provides instructions for completing the finished form and should not be typed verbatim in the document. Bracketed instructions at the beginning of almost all the forms refer the user to section 3 of this introduction for instructions about composing the caption of the form.

Subtitles. The titles of some forms are followed by a bracketed subtitle that is not to be typed as part of the form title. In the title "Proof of Facts [Minor]," for example, the bracketed word simply distinguishes the form from another similarly titled form in the same chapter for ease of reference.

4. Blank lines

Signature lines appear as blank lines. Spaces for dates, times, and amounts that would be filled in *after* the document is prepared also appear as blank lines. If an actual date, time, or amount should be inserted in the form when it is prepared, "[**date**]," "[**time**]," or "$[**amount**]" appears instead.

5. Language in boxes

Language in boxes is not to be included in the finished document but constitutes instructions, usually either telling the user whether to use the form language following the box, describing what information should be included at that point in the finished document or attached to it, or providing cautionary reminders about use of the form language.

6. Form numbers

Forms are numbered in sequence within each chapter. All forms begin with the number of the chapter, which is followed by a hyphen and the number of the form within the chapter. This system is used to permit future expansion of any chapter without requiring the rearrangement of the entire book.

7. Captions

An example of the caption that should precede the form title is not reprinted in most of the forms that require it. Typical case styles are discussed in section 3 below.

8. Digital versions

The *Texas Guardianship Manual* is available in two digital versions: online and downloadable. The online version, available by subscription, is accessible on a variety of platforms including PC, mobile phones, and tablets. The downloadable version contains the entire text of the manual as a single Adobe Acrobat PDF file.

Features of both versions include downloadable State Bar of Texas–copyrighted forms from the manual as editable Word files, as well as printable or downloadable PDF files of forms available from various agencies. In both versions, applicable Texas and federal case and statute citations in the practice notes and forms instructions are linked to case reports and main code sections cited via Fastcase online. Both versions are searchable and hyperlinked to allow for easy, rapid navigation to topics of interest.

Caveat: Note that the Word files of forms included in the digital versions contain instructional language as hidden text. Be aware that this language will be included in your completed forms unless you specifically delete it.

For more information about the online version, visit **www.texasbarpractice.com/texas-bar**

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-books-online. For more information about the digital download including usage notes, see the material at the end of this introduction titled "How to Download This Manual."

§ 3 Captions of Forms

1. Court designations for caption of petition

Although no statute or rule prescribes the form for identifying in the caption the state court in which the petition is filed, the court and county should be named. If one of several courts may hear the case, as in counties with several district courts and county courts at law, the caption should have a blank on which the clerk can write the appropriate number when the petition is filed. The court designations set out below are recommended for captions.

District Court

IN THE DISTRICT COURT
OF _____ COUNTY, TEXAS
_____ JUDICIAL DISTRICT

Constitutional County Court

IN THE COUNTY COURT
OF _____ COUNTY, TEXAS

Unnumbered County Court at Law

IN THE COUNTY COURT AT LAW
OF _____ COUNTY, TEXAS

Numbered County Court at Law

IN THE COUNTY COURT AT LAW
NUMBER _____ OF
_____ COUNTY, TEXAS

2. Appearance of caption

The generally accepted appearance for captions in Texas pleadings has the cause number at the top center of the first page, the parties on the left, the court designation on the right, and a dividing line between the two, as set out below. Some counties may reverse the appearance of the court and cause number.

No. 00-12345

PAUL PAYNE	§	IN THE DISTRICT COURT
Plaintiff	§	
	§	OF TRAVIS COUNTY, TEXAS
v.	§	
	§	
DON DAVIS	§	
Defendant	§	345th JUDICIAL DISTRICT

---

§ 4 Corrections and Updates

In drafting the manual, the members of the committee devoted a great deal of effort to making it error-free, but it undoubtedly contains some errors. We would appreciate your pointing out any errors you find in the manual, as well as any revisions you believe are advisable. Please mail any corrections or suggestions to the following address:

Director, Texas Bar Books
State Bar of Texas
P.O. Box 12487
Austin, Texas 78711-2487
books@texasbar.com

Periodic updating of the manual is planned to reflect changes in the law. It is also expected that, over time, additional topics will be covered and the scope of coverage of existing topics will be expanded. We welcome your suggestions about new topics that you would find helpful. Please send your suggestions to the address shown above.

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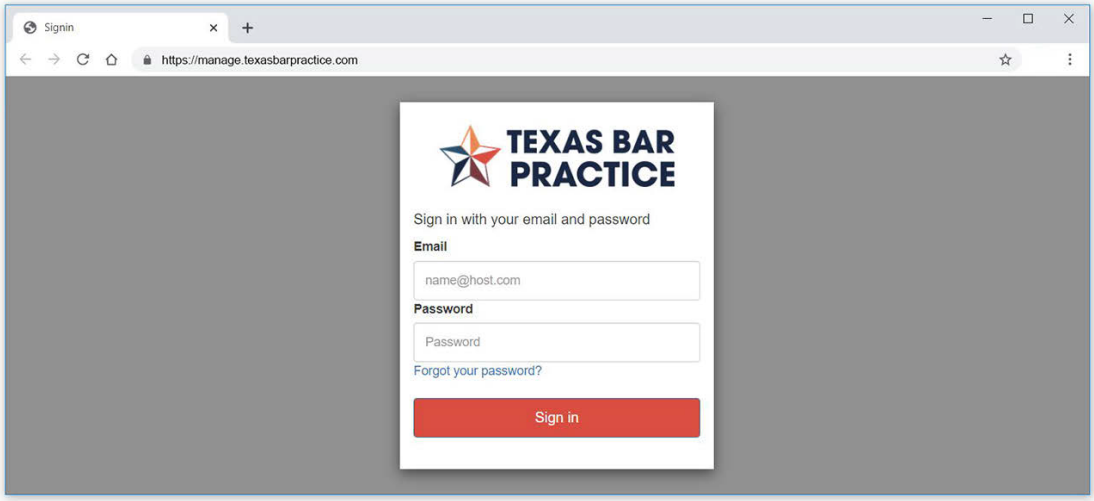
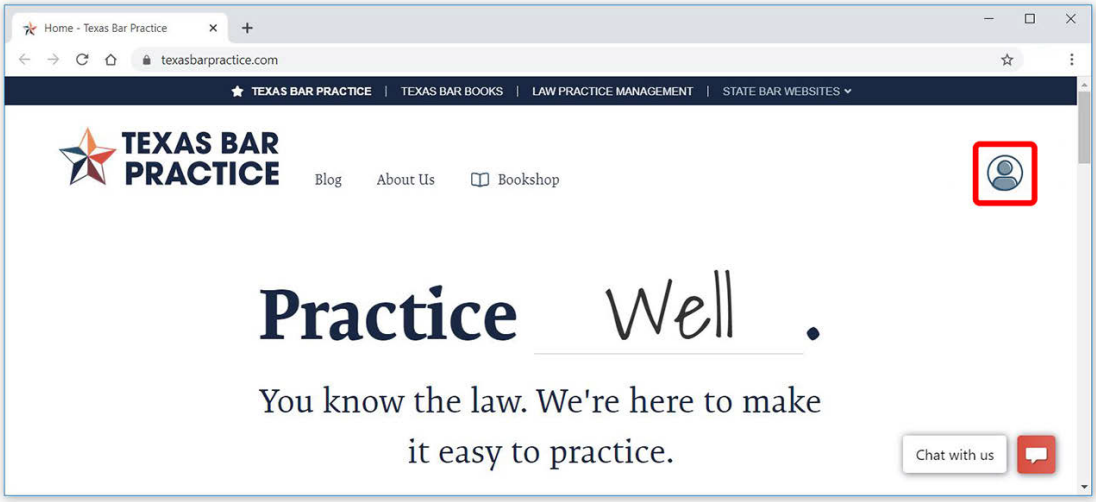


   Once logged in, you should see the user icon in the upper right-hand corner of the page.



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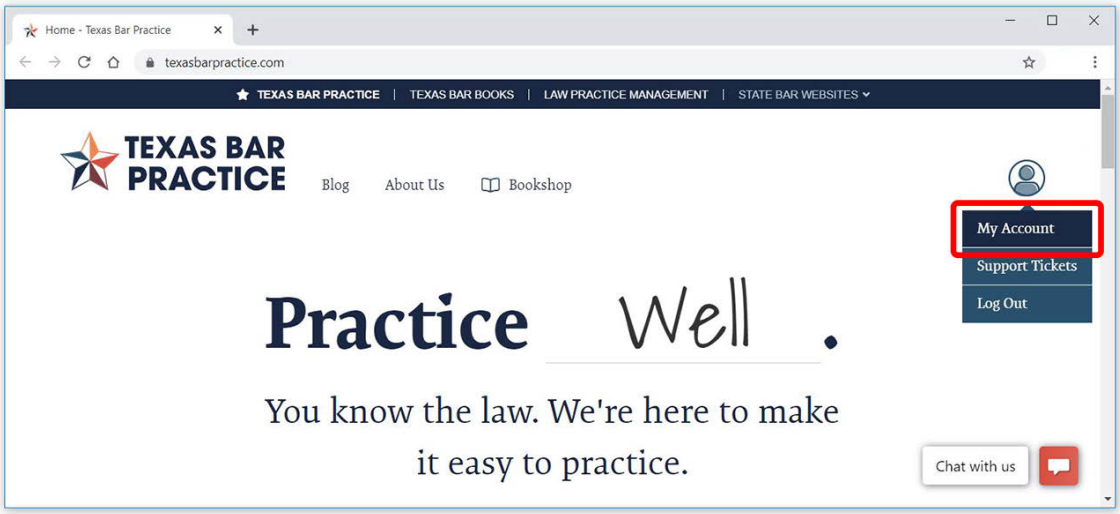
2. Go to your account:



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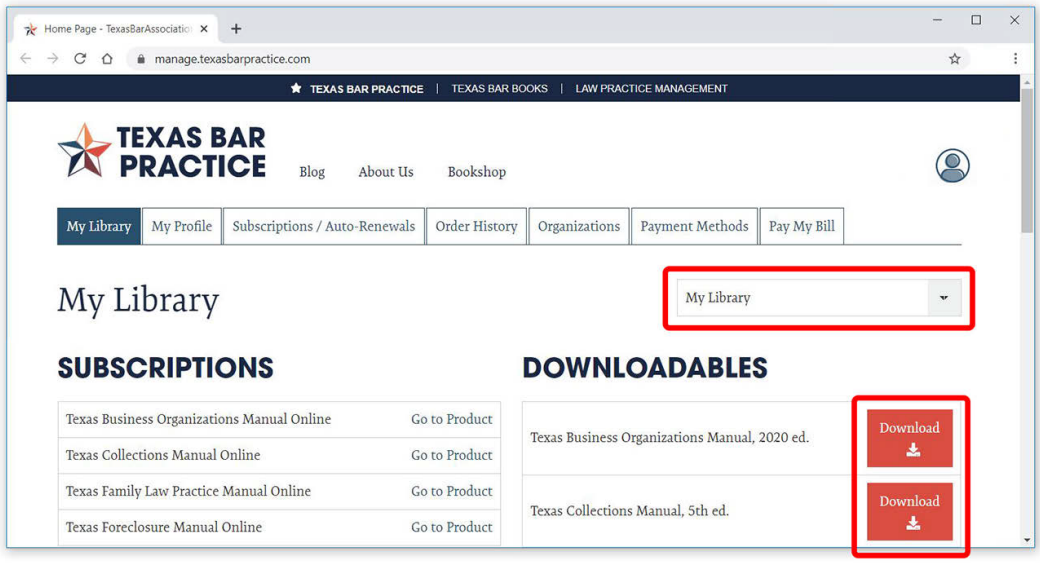

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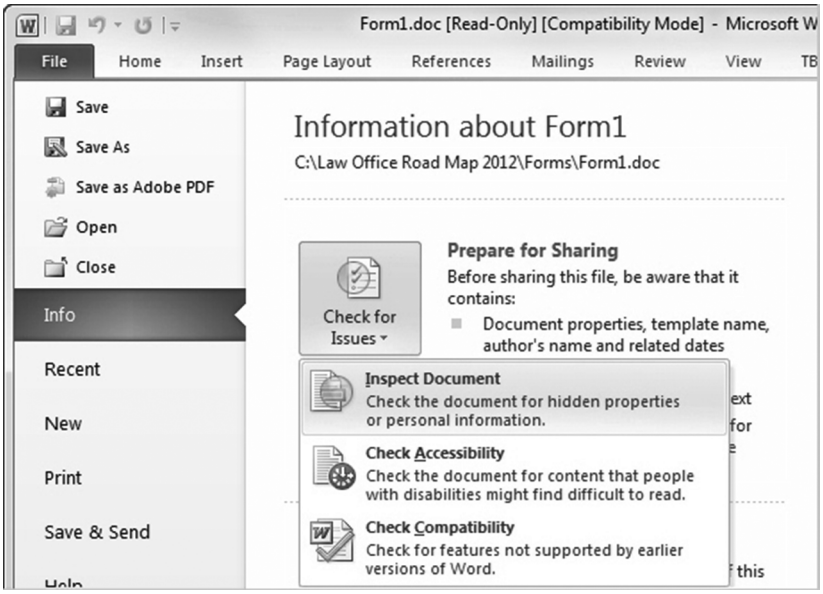
- *WordPerfect:* To remove metadata from forms saved as WordPerfect files (version X3 or later), launch the "Save Without Metadata" tool (File > Save Without Metadata, or Alt + F + M).

Using Word version 2007 or later, to remove personal information, hidden text, and other metadata before filing or sharing a document electronically, launch the "Inspect Document" tool.

1. Go to File > Info > Check for Issues > Inspect Document (Alt + F + I + I + I).



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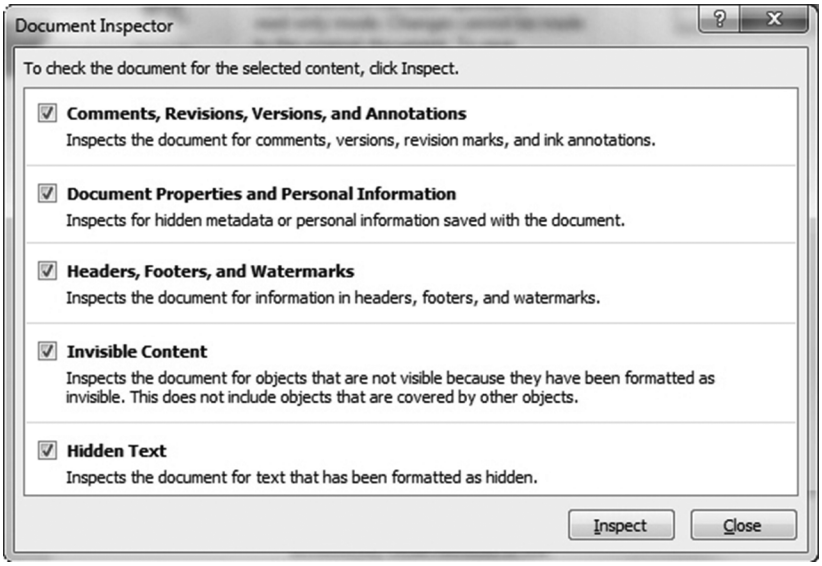
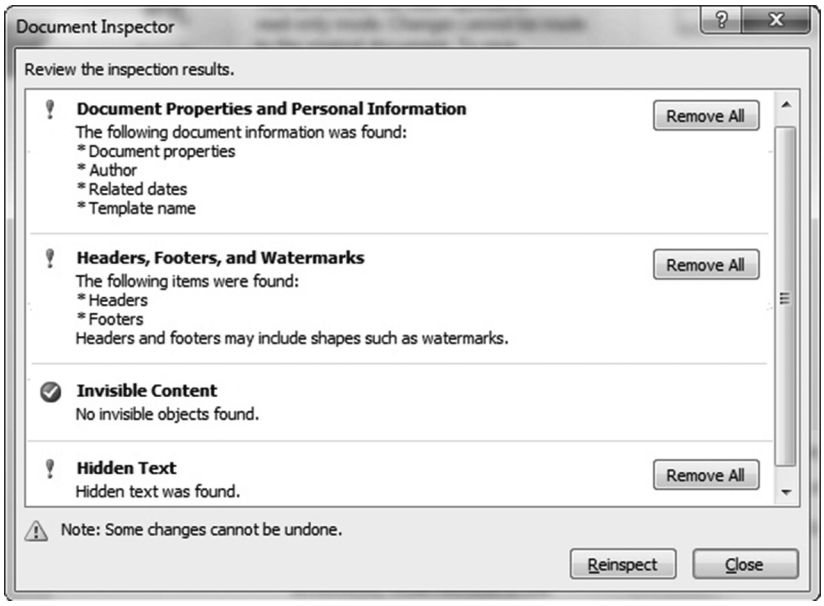
2. In the "Document Inspector" window that opens, select the categories desired by checking the appropriate boxes (be certain to check the "Hidden Text" box to ensure that any remaining red, hidden instructional text in the document will be also be detected) and click the "Inspect" button.



3. In the second "Document Inspector" window that opens, review and remove any metadata found as desired.



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Ethics and Professional Conduct

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Chapter 1

Ethics and Professional Conduct

I. Introduction

§ 1.1 Scope of Chapter

This chapter generally addresses the oversight of attorneys and law practice, accountability for professional responsibility, and liability for professional malpractice in Texas, with emphasis on guardianship practice. Probate attorneys practicing in the area of guardianship must address possible competing interests between the guardian and the ward. By studying the ethical standards to which attorneys must adhere, the attorney may understand and help the client understand how to address these concerns.

II. The Profession and Its Regulation

§ 1.2 The State Bar Act

The State Bar of Texas is an administrative agency of the judicial department. Tex. Gov't Code § 81.011(a). The Supreme Court of Texas exercises administrative control over the bar, Tex. Gov't Code § 81.011(c), and has the power to make rules for the administration of the bar and the discipline of state bar members. Tex. Gov't Code § 81.024. Disciplinary jurisdiction is divided into grievance districts. Grievance committees in each district investigate any alleged ground for discipline of an attorney and take action appropriate under the disciplinary rules. Tex. Gov't Code § 81.072.

§ 1.3 State Bar Rules

Rules governing the State Bar were initially adopted by the members of the State Bar of Texas and thereafter promulgated by the Supreme Court of Texas on February 22, 1940, and subsequently amended several times. The rules are located in volume 3B of the Texas Government Code in title 2, subtitle G, appendix A, and may also be found in *Texas Rules of Court—State* (West 2022). Article X deals with discipline and suspension of attorneys; its contents, entitled the Texas Disciplinary Rules of Professional Conduct, are discussed at section 1.5 below.

§ 1.4 Texas Rules of Disciplinary Procedure

The Texas Rules of Disciplinary Procedure are located in volume 3B of the Texas Government Code in title 2, subtitle G, appendix A-1, and at **www.legalethicstexas.com/resources/rules/texas-rules-of-disciplinary-procedure**. The rules provide these sanctions for professional misconduct: disbarment; resignation in lieu of discipline; indefinite disability suspension; suspension for a term certain; probation of suspension, in which probation may be concurrent with the period of suspension, on reasonable terms appropriate under the circumstances; interim suspension; public reprimand; and private reprimand. *See* Tex. Rules Disciplinary P. R. 1.06FF*, reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A-1.

The term *sanction* may also include a requirement of restitution and the payment of reasonable attorney's fees and direct expenses. Tex. Rules Disciplinary P. R. 1.06FF.

§ 1.5 Texas Disciplinary Rules of Professional Conduct

The Texas Disciplinary Rules of Professional Conduct are located in volume 3B of the Texas Government Code in title 2, subtitle G, appendix A, article X, section 9, following section 84.004 of the Government Code. The rules are also available at **www.legalethicstexas.com/resources/rules/texas-disciplinary-rules-of-professional-conduct**. The disciplinary rules are all mandatory. The aspirational goals are grouped in the preamble rather than intermingled with mandatory rules within the body of the Code. Substantial commentary after each rule provides historical background and interpretational guidance.

Judicial decisions in Texas regarding ethical violations are referenced in the annotations to the Texas Disciplinary Rules of Professional Conduct.

A member of the State Bar of Texas can request a formal ethics opinion from the Professional Ethics Committee. To request an opinion, the member must submit a written request that includes (1) a summary of the background facts in the hypothetical situation; (2) the question(s) presented; (3) a discussion of applicable authority, including the specific disciplinary rules involved and relevant case law, prior opinions, or opinions from other jurisdictions; and (4) a statement that any questions presented are not in litigation. The request should be submitted to the designated person within the office of the chief disciplinary counsel. The ethics opinions issued by the Professional Ethics Committee provide interpretations of the rules and the Texas Code of Professional Responsibility (the predecessor to the rules). These ethics opinions are published in the *Texas Bar Journal* and are available at **www.legalethicstexas.com/resources/opinions**.

Informal explanations of the rules may be obtained by calling the office of the chief disciplinary counsel of the State Bar. A consultation with a staff member of the disciplinary counsel's office may be not only informative but also probative of good faith should a question later arise. The telephone number of the attorney ethics line is 1-800-532-3947.

§ 1.6 Texas Lawyer's Creed

Adopted by the Texas Supreme Court and Texas Court of Appeals in 1989, the Texas Lawyer's Creed is a mandate to the legal profession that goes beyond disciplinary rules and standards. The Texas Disciplinary Rules of Professional Conduct are cast in terms of "shall" and "shall not" and are merely a minimum standard of professional conduct. The Texas Lawyer' Creed recognizes that professionalism requires more than mere compliance with these imperatives. The Creed addresses an attorney's most important relationships in his practice of law: the attorney and our legal system, the attorney and client, the attorney and other lawyers, and the attorney and judge.

The Creed requires an attorney to advise clients of the contents of the Creed when undertaking representation. The full text of the Texas Lawyer's Creed can be found at **www.legalethicstexas.com/resources/rules/texas-lawyers-creed** and in *Texas Rules of Court—State* (West 2022).

§ 1.7 Texas Code of Ethics and Professional Responsibility for Paralegals

The Code of Ethics and Professional Responsibility adopted by the board of directors of the Paralegal Division of the State Bar of Texas can be found at **https://txpd.org**.

§ 1.8 American Bar Association's Model Rules of Professional Conduct

The text of the Model Rules, approved by the American Bar Association House of Delegates, can be found at **www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html**.

§ 1.9 The ACTEC Commentaries

Unfortunately, neither the Model Rules of Professional Conduct (MRPC) nor the official comments to them are designed to specifically address all of the professional responsibilities of lawyers engaged in trusts and estates practices. The MRPC and its official comments primarily address areas of practice that are more clearly adversarial, and the situations encountered when dealing with families in an estate planning or disability planning setting typically do not fit into this category.

Recognizing the need to fill this gap, the American College of Trusts and Estates Counsel (ACTEC) has developed commentaries on selected rules to provide much-needed guidance.

Although the commentaries refer specifically to the MRPC, their content is also usually applicable to the Code of Professional Responsibility, which remains in effect in some states and, like the MRPC, does not provide sufficient guidance to trusts and estates lawyers. The commentaries generally seek to identify various ways in which common problems can be dealt with, without expressly mandating or prohibiting particular conduct by trusts and estates lawyers.

The ACTEC Commentaries may be found online at **http://actecfoundation.org/trust-and-estate-professional-resources/professional-conduct-rules-for-trust-and-estate-practitioners/**.

[Section 1.10 is reserved for expansion.]

III. Professional Responsibility

§ 1.11 Professional Misconduct

§ 1.11:1 Definitions and Sanctions

Professional misconduct that subjects an attorney to disciplinary action includes violation of a disciplinary rule and violation of the barratry statute. Tex. Penal Code § 38.12.

On proof of conviction of a felony involving moral turpitude or of a misdemeanor involving theft, embezzlement, or fraudulent misappropriation of money or property, suspension pending appeal is mandatory. An attorney who receives probation will be suspended rather than disbarred. Tex. Gov't Code § 81.078(b). On proof of final conviction, the attorney will be disbarred. Tex. Gov't Code § 81.078(c); *see also* Tex. Rules Disciplinary P. R. 8.05.

Moral turpitude is inherently immoral conduct that is willful, flagrant, or shameless and that shows a moral indifference to the opinion of the good and respectable members of the community. *Searcy v. State Bar of Texas*, 604 S.W.2d 256, 258 (Tex. App.—San Antonio 1980, writ ref'd n.r.e.).

The term *misconduct* is defined in both the Texas Rules of Disciplinary Procedure and the Texas Disciplinary Rules of Professional Conduct. Tex. Rules Disciplinary P. R. 1.06CC states that professional misconduct includes—

1. acts or omissions by an attorney, individually or in concert with another person or persons, that violate one or more of the Texas Disciplinary Rules of Professional Conduct;
2. attorney conduct that occurs in another state or in the District of Columbia and results in the disciplining of an attorney in that other jurisdiction, if the conduct is professional misconduct under the Texas Disciplinary Rules of Professional Conduct;
3. violation of any disciplinary or disability order or judgment;
4. engaging in conduct that constitutes barratry as defined by Texas law;
5. failure to comply with section 13.01 of the Texas Rules of Disciplinary Procedure relating to notification of an attorney's cessation of practice;
6. engaging in the practice of law either during a period of suspension or when on inactive status;
7. conviction of a serious crime or being placed on probation for a serious crime with or without an adjudication of guilt ("Serious crime" means barratry; any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of these crimes. Tex. Rules Disciplinary P. R. 1.06GG); and
8. conviction of an intentional crime or being placed on probation for an intentional crime with or without an adjudication of guilt ("Intentional crime" means any serious crime that requires proof of knowledge or intent as an essential element or any crime involving misapplication of money or other property held as a fiduciary. Tex. Rules Disciplinary P. R. 1.06V).

Tex. Rules Disciplinary P. R. 1.06CC.

Tex. Disciplinary Rules Prof'l Conduct R. 8.04(a), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9), states that an attorney shall not—

1. violate the disciplinary rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not the violation occurred in the course of an attorney-client relationship;
2. commit a serious crime or commit any other criminal act that reflects adversely on the attorney's honesty, trustworthiness, or fitness as an attorney in other respects ("Serious crime" means barratry; any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of these crimes. Tex. Disciplinary Rules Prof'l Conduct R. 8.04(b));
3. engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
4. engage in conduct constituting obstruction of justice;
5. state or imply an ability to influence improperly a government agency or official;
6. knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;
7. violate any disciplinary or disability order or judgment;

8. fail to timely furnish to the chief disciplinary counsel's office or a district grievance committee a response or other information as required by the Texas Rules of Disciplinary Procedure, unless he in good faith timely asserts a privilege or other legal ground for failure to do so;

9. engage in conduct that constitutes barratry as defined by Texas law;

10. fail to comply with Tex. Rules Disciplinary P. R. 13.01 relating to notification of an attorney's cessation of practice;

11. engage in the practice of law when the attorney is on inactive status or when the attorney's right to practice has been suspended or terminated, including but not limited to situations in which an attorney's right to practice has been administratively suspended for failure to timely pay required fees or assessments or for failure to comply with article XII of the State Bar Rules relating to mandatory continuing legal education; or

12. violate any other Texas laws relating to the professional conduct of attorneys and to the practice of law.

Tex. Disciplinary Rules Prof'l Conduct R. 8.04(a).

The presence of an attorney-client relationship is not a necessary element in a charge of a violation of rule 8.04, as it is under many other disciplinary rules. These forms of misconduct are prohibited regardless of whether they involve the practice of law.

§ 1.11:2 Examples of Misconduct

An attorney's attempt to get a client to sign a false affidavit was professional misconduct under former DR 1-102(A)(3)–(5), and this violation, standing alone, warranted suspension for two years, even though it (that is, "attempted perjury") might not be a violation of the Penal Code. *Archer v. State*, 548 S.W.2d 71, 76 (Tex. App.—El Paso 1977, writ ref'd n.r.e.); *see also Searcy v. State Bar of Texas*, 604 S.W.2d 256 (Tex. App.—San Antonio 1980, writ ref'd n.r.e.); *Muniz v. State*, 575 S.W.2d 408 (Tex. App.—Corpus Christi–Edinburg 1978, writ ref'd n.r.e.).

§ 1.12 Responsibility to Clients with Diminished Capacity

§ 1.12:1 New Rule Provides Range of Options

Amendments in 2021 to the Disciplinary Rules of Professional Conduct added rule 1.16 addressing clients with diminished capacity. The amended rules eliminate rule 1.02(g), which previously addressed the scope of representation and protective action that could be taken when working with a client with diminished capacity or one that "lacks legal competence." Former rule 1.02(g) generally limited the attorney to seeking a guardianship or other protective order for the client. Rule 1.16 now gives an attorney a range of options, including informal consultations that current rules may otherwise prohibit, such as "consulting with individuals or entities" to "take action to protect the client" and seeking court action where appropriate. The rule and its comments advise the lawyer to consider the totality of the circumstances and then take appropriate action, considering the scope and severity of incapacity and the degree of threatened harm.

Note that the decision of *Franks v. Roades*, 310 S.W.3d 615 (Tex. App.—Corpus Christi–Edinburg, 2010, no pet.) (decided prior to the amended rule), has created some confusion relating to an attorney ad litem's role in a guardianship. *Franks* involved a situation in which an attorney who believed his client was incapacitated and in need of a guardian pursued a guardian over her objection and represented the guardian. The attorney was found not to have breached his duty of loyalty to his client because of rule 1.02(g) of the Texas Disciplinary Rules of Professional Conduct. But the attorney in *Franks* was not the

proposed ward's attorney ad litem and thus did not involve a court-appointed attorney refusing to defend his client in a situation where the issue of capacity was central to the attorney's appointment.

Since the decision in *Franks*, however, the rules have been amended to include rule 1.16, which provides greater guidance on these particular issues.

§ 1.12:2 When Protective Action Is Appropriate

The new rule indicates an attorney may take reasonable protective actions if the attorney believes a client has diminished capacity and is at risk of substantial physical, financial, or other harm unless action is taken. The rule states that the attorney "shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." Tex. Disciplinary Rules Prof'l Conduct R. 1.16. The rule provides a nonexhaustive list, including consulting with others that have the ability to take action to protect the client; seeking the appointment of a guardian ad litem, attorney ad litem, amicus attorney, or conservator when appropriate; or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client. Tex. Disciplinary Rules Prof'l Conduct R. 1.16. The comments to the rule provide a list of factors that should be considered when determining the extent of the client's diminished capacity: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of the decision; the substantive fairness of the decision; and the consistency of a decision with the lawyer's knowledge of the client's long-term commitments and values. Tex. Disciplinary Rules Prof'l Conduct R. 1.16 cmt. 2. When considering protective action, the attorney should consider the client's values and wishes, to the extent known; the client's best interests; interfering with the client's decision-making autonomy to the least extent possible; maximizing client capacities; and respecting the client's family and social connections. Tex. Disciplinary Rules Prof'l Conduct R. 1.16 cmt. 5. Comments to the rule note that if it becomes necessary to disclose confidential information to protect the client's best interests, the attorney should consider whether it would be "prudent" to seek the client's consent. The attorney should disclose such information only in "compelling" cases, and the authority to do so is "limited and extends no further than is reasonably necessary to facilitate protective action." Tex. Disciplinary Rules Prof'l Conduct R. 1.16 cmt. 5. The attorney should also consider whether the disclosure of information relating to the client's condition could impact the client's interests. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.16 cmt. 9. Comments to the rule also address the provision of legal assistance in circumstances in which an attorney-client relationship has not been established. In an emergency situation, if a person with seriously diminished capacity is threatened with "imminent and irreparable harm," the attorney may take legal action even when unable to establish a client-lawyer relationship when the person or another person acting in good faith on their behalf has consulted with the attorney. The attorney should act only when he has a reason-able belief that the person has no other lawyer, agent, or representative available. The attorney's actions should be limited to that which will "maintain the status quo" or "otherwise avoid imminent and irreparable harm." Tex. Disciplinary Rules Prof'l Conduct R. 1.16 cmt. 10. In such a case, confidences should be kept as if the attorney were dealing with a client, and the nature of the relationship should be disclosed as relevant to any tribunal or counsel involved. The attorney should also "regularize the relationship" or pursue other protective solutions as soon as possible. Tex. Disciplinary Rules Prof'l Conduct R. 1.16 cmt. 11. The comments stress that, regardless of a client's diminished capacity, the attorney remains obligated to treat the client with attention and respect. Tex. Disciplinary Rules Prof'l Conduct R. 1.16 cmt. 3.

§ 1.13 Attorney's Fees

§ 1.13:1 Determination of Proper Fee

Tex. Disciplinary Rules Prof'l Conduct R. 1.04 cmt. 1 provides that an attorney in good conscience should not charge or collect more than a reasonable fee, but it goes on to acknowledge that a standard of "reasonableness" is too vague to be an appropriate standard in a disciplinary action. The comment then notes that Tex. Disciplinary Rules Prof'l Conduct R. 1.04(a) adopts, for disciplinary purposes only, a clearer standard: the attorney is subject to discipline for an illegal or unconscionable fee.

A fee is unconscionable if a competent attorney could not form a reasonable belief that the fee is reasonable. The factors set out as guidelines for ascertaining the reasonableness of a particular fee are—

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the attorney;
3. the fee customarily charged in the locality for similar legal services;
4. the amount involved and the results obtained;
5. the time limitations imposed by the client or by the circumstances;
6. the nature and length of the professional relationship with the client;
7. the experience, reputation, and ability of the attorney or attorneys performing the services; and
8. whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

Tex. Disciplinary Rules Prof'l Conduct R. 1.04(b). These factors are not exclusive.

Rule 1.04 has been cited by Texas courts in determining the reasonableness of a particular fee. *See Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 818 (Tex. 1997); *Braswell v. Braswell*, 476 S.W.2d 444, 446 (Tex. App.—Waco 1972, writ dism'd). The Texas Supreme Court has held that factors listed in rule 1.04 also apply to determine the reasonableness of a guardian ad litem's fee. *Garcia v. Martinez*, 988 S.W.2d 219, 222 (Tex. 1999).

In a federal court action decided under Texas law, a client sued his attorney, alleging that the $25,000 fee charged for representation in a criminal action was excessive. The Fifth Circuit reversed and remanded for the jury to decide whether the attorney breached his fiduciary duty to the client and whether, in consideration of former DR 2-106 and other appropriate factors, the fee was clearly excessive. *Nolan v. Foreman*, 665 F.2d 738, 741 (5th Cir. 1982).

According to Tex. Disciplinary Rules Prof'l Conduct R. 1.04(c), when the attorney has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, *preferably in writing*, before or within a reasonable time after commencing the representation. This practice will not only prevent later misunderstanding but will also promote good attorney-client relations. Many persons who desire legal services have had little or no experience with attorney's fees, and therefore the

attorney should explain fully the reasons for the particular fee arrangement. Careless fee setting accounts for a large volume of complaints to grievance committees.

Because of the confidential nature of the attorney-client relationship, courts carefully scrutinize all contracts for attorney compensation. "There is a presumption of unfairness or invalidity attaching to the contract, and the burden of showing its fairness and reasonableness is on the attorney." *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964).

For additional discussion on attorney's fees, see section 10.10 in this manual.

§ 1.13:2 Fee Splitting—Forwarding Fee for Client Referral

The rules allow fee splitting, with some limitations. Under Tex. Disciplinary Rules Prof'l Conduct R. 1.04(f), the following conditions must be met:

1. The division is in proportion to the professional services performed by each attorney or made between attorneys who assume joint responsibility for the representation.
2. The client consents in writing to the terms of the arrangement before the time of the association or referral proposed. The consent must include (a) the identity of all lawyers or law firms who will participate in the fee-splitting arrangement, (b) whether fees will be divided based on the proportion of services performed or by attorneys agreeing to assume joint responsibility for the representation, and (c) the share of the fee that each attorney or firm will receive or, if the division is based on the proportion of services performed, the basis on which the division will be made.
3. The aggregate fee does not violate rule 1.04(a).

Tex. Disciplinary Rules Prof'l Conduct R. 1.04(f).

As always, there is an overarching requirement that the aggregate fee is not illegal or unconscionable. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(a).

Any agreement that allows an attorney or firm to associate other counsel in representing a person, or to refer the person to other counsel for representation, that results in such an association with or referral to a different firm or an attorney in a different firm must be confirmed by an arrangement conforming to rule 1.04(f). Consent by a client or prospective client without knowledge of the information described above about the terms of the arrangement does not constitute a confirmation. No attorney may collect or seek to collect fees or expenses in connection with any such agreement that is not confirmed in that way except for the reasonable value of legal services provided to the person and the reasonable and necessary expenses actually incurred on behalf of the person. Tex. Disciplinary Rules Prof'l Conduct R. 1.04(g).

§ 1.13:3 Attorney's Liens

Nature of Lien: Often attorneys mistakenly believe that clients' attempts to dismiss them can be denied on an attorney's lien theory. Under Tex. Disciplinary Rules Prof'l Conduct R. 1.15(a)(3), an attorney who is discharged by a client must withdraw from employment. If the attorney has spent money on the case without being reimbursed or has earned a fee at the time of dismissal, he may be able to exercise an attorney's lien on the client's properties and papers still in his possession. *Griffith v. Geffen & Jacobsen, P.C.*, 693 S.W.2d 724, 728 (Tex. App.—Dallas 1985, no writ).

In Texas, a lien for attorney's fees has a common-law rather than statutory basis. To perfect and maintain the lien, the attorney must have actual possession of the client's property and must make a demand for payment. *Smith v. State*, 490 S.W.2d 902, 910 (Tex. App.—Corpus Christi–Edinburg 1972, writ ref'd n.r.e.).

Assertion of Lien May Be Unethical: Retaining a client's property and papers may be unethical either because the attorney's lien is unenforceable or because enforcement could damage or prejudice the former client's legal rights. Tex. Comm. on Prof'l Ethics, Op. 411 (1984); Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 395 (1979).

Under Tex. Disciplinary Rules Prof'l Conduct R. 1.15(d), an attorney withdrawing from representation must take all reasonable steps to avoid foreseeable prejudice to the rights of the client. Thus, if assertion of an attorney's lien would result in foreseeable prejudice to the client, the lien should not be exercised.

When clients request payment or delivery of funds or other property to which they are entitled, attorneys have a duty to comply promptly. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.15(d). One attorney was suspended from practice for three months for refusing to return a client's files after repeated requests. *Hebisen v. State*, 615 S.W.2d 866 (Tex. App.—Houston [1st Dist.] 1981, no writ).

In *Smith*, the State Bar of Texas sued to disbar an attorney, partially on the basis that he had willfully refused to relinquish certain documents to his former client after being discharged. The attorney finally succeeded, at a second trial, in having specific issues and instructions concerning an attorney's right to assert a possessory lien submitted to the jury. However, the second jury also found that he was not asserting such a lien but was instead willfully and wrongfully refusing to relinquish a client's documents. *Smith v. State*, 523 S.W.2d 1 (Tex. App.—Corpus Christi–Edinburg 1975, writ ref'd n.r.e.).

In *Robinson v. Risinger*, 548 S.W.2d 762, 766 (Tex. App.—Tyler 1977, writ ref'd n.r.e.), the court stated:

> An attorney should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client as a result of his withdrawal. . . . [The attorney should give] due notice of his withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm.

The Fifth Circuit has held that under former DR 9-102(B)(4) a client has a right to the return of papers on request if the attorney cannot claim an attorney's lien. The court reasoned that, although a client's remedy for an attorney's violation of this right would be a damage action sounding in tort, the fact that the client cast the violation in terms of breach of contract would not preclude damages if the client could prove the violation. *Nolan v. Foreman*, 665 F.2d 738, 742–43 (5th Cir. 1982). *But see Martin v. Trevino*, 578 S.W.2d 763, 770 (Tex. App.—Corpus Christi–Edinburg 1978, writ ref'd n.r.e.) (violation of former Code of Professional Responsibility will not give rise to private cause of action). However, in a later decision, this same court stated that the appellee might seek recovery in a private cause of action against the appellant's attorney whose violation of the Code of Professional Responsibility rendered a postjudgment settlement agreement void and unenforceable. *Quintero v. Jim Walter Homes, Inc.*, 709 S.W.2d 225, 233 (Tex. App.—Corpus Christi–Edinburg 1985, writ ref'd n.r.e.).

§ 1.13:4 Withholding Services Until Fee Is Paid

Late payment or nonpayment of a fee does not justify withholding services from a client. If the client substantially fails to fulfill an obligation to the attorney regarding the attorney's services, including an obligation to pay the attorney's fee as agreed,

the only recourse is to withdraw from representation. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(b)(5). Before withdrawal is proper, the attorney must obtain permission from any court before which he has acted as attorney of record for that client and must take reasonable steps to avoid foreseeable prejudice to the client's rights. These steps include giving reasonable warning that the attorney will withdraw unless the obligation is fulfilled, allowing time to employ other counsel, surrendering to the client all papers and property to which the client is entitled, and refunding any advance payments of fee not yet earned. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(b)(5), (d).

An attorney may condition acceptance of employment on advance payment but may not condition completion of legal services on payment of unpaid portions of the fee. A client's failure to pay for the attorney's services does not relieve the attorney of the duty to perform completely and on time unless the attorney withdraws from representation in a manner that does not prejudice the client's legal rights. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.15.

§ 1.14 Conflicts of Interest

§ 1.14:1 Conflicts Between Interests of Attorney and Client

Generally: An attorney has a strong fiduciary relationship to the client that precludes any conflict of interest. "The relation of attorney and client is one of *uberrima fides*. . . . The integrity of such relationship should be carefully observed and scrupulously upheld at all times." *Smith v. Dean*, 240 S.W.2d 789, 791 (Tex. App.—Waco 1951, no writ).

Refusing to Accept Employment: If the interests of the client and the attorney may conflict, the attorney must refuse that employment. Tex. Disciplinary Rules Prof'l Conduct R. 1.06 states in part:

> (a) A lawyer shall not represent opposing parties to the same litigation.
>
> (b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:
>
> (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or
>
> (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.
>
> (c) A lawyer may represent a client in the circumstances described in (b) if:
>
> (1) the lawyer reasonably believes the representation of each client will not be materially affected; and
>
> (2) each affected or potentially affected client consents to such represent-ation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

Tex. Disciplinary Rules Prof'l Conduct R. 1.06(a)–(c).

The attorney's duty to withdraw because of conflict also prevails when a court has appointed an attorney to represent an indigent client. In *Haley v. Boles*, 824 S.W.2d 796 (Tex. App.—Tyler 1992, no writ), a trial judge had appointed an attorney to represent a criminal defendant. The attorney filed a motion to withdraw, alleging that a conflict of interest would arise from his representation because his law partner's wife was the district attorney. The trial court denied the motion, and the attorney filed

an application for writ of mandamus. In conditionally granting the writ, the court of appeals noted that the propriety of attorney-spouses representing opposing parties in a criminal case was a case of first impression but that, if there is impropriety in spouses representing adversaries, the disqualification extends to the partners and associates of the spouse. The court also concluded that there was at least the appearance of tension and that the appearance of independence of trial counsel is diminished in these circumstances. Although the court expressly limited its ruling to the representation of indigent defendants in criminal cases by court-appointed counsel, the relevance of the case to guardianship practice is apparent from the frequent appointment of attorneys to act as attorneys ad litem.

Former Clients: An attorney may permissibly acquire an interest adverse to that of a former client only on a showing that acquiring the interest did not require breaching any confidence, taking any unfair advantage, or using any information acquired in the attorney-client relationship. *Waters v. Bruner*, 355 S.W.2d 230, 233 (Tex. App.—San Antonio 1962, writ ref'd n.r.e.).

In *Merrell v. Fanning & Harper*, 597 S.W.2d 945 (Tex. App.—Tyler 1980, no writ), the court held that a law firm had no duty to protect a former client's property that was the subject of a writ of execution issued to the firm under a judgment against the former client for unpaid attorney's fees. Because the attorney-client relationship had ended well before the litigation began, the firm had no duty to protect the property sold to satisfy the judgment.

Acquiring Interest in Litigation: Tex. Disciplinary Rules Prof'l Conduct R. 1.08(h) states that an attorney shall not acquire a proprietary interest in the cause of action or subject matter of litigation the attorney is conducting for a client, except that the attorney may acquire a lien granted by law to secure the attorney's fee or expenses and contract in a civil case with a client for a contingent fee that is permissible under Tex. Disciplinary Rules Prof'l Conduct R. 1.04.

The rule is preventive, for it may be violated even without a showing that a client has suffered actual harm. The rule prohibits attorneys from acquiring proprietary interests in the subject matter of litigation in order to avoid the possibility of adverse influence on the attorney and harm to the client. *State v. Baker*, 539 S.W.2d 367, 373 (Tex. App.—Austin 1976, writ ref'd n.r.e.), *disapproved on other grounds by Cosgrove v. Grimes*, 774 S.W.2d 662, 665 (Tex. 1989). In *Baker*, the attorney was disciplined for purchasing property on the client's behalf at a sheriff's sale and thereafter using title to the property to secure fees for himself without notice to and consent of the client.

Loans to Clients: Tex. Disciplinary Rules Prof'l Conduct R. 1.08(d) provides that an attorney shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that an attorney may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter, and an attorney representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

Business Ventures with Clients: Tex. Disciplinary Rules Prof'l Conduct R. 1.08(a) provides that an attorney shall not enter into a business transaction with a client unless the transaction and terms on which the attorney acquires the interest are fair and reasonable to the client and are fully disclosed in a manner that can be reasonably understood by the client, the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction, and the client consents in writing thereto.

Tex. Disciplinary Rules Prof'l Conduct R. 1.08(j) defines the term *business transactions* as excluding standard commercial transactions between the attorney and the client for products or services that the client generally markets to others. Tex. Disciplinary Rules Prof'l Conduct R. 1.08 cmt. 2 reiterates this exclusion, noting that the general prohibition does not apply to stan-

dard commercial transactions between the attorney and client for products or services that the client generally markets, such as banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In these transactions the attorney has no advantage in dealing with the client, and the restrictions in Tex. Disciplinary Rules Prof'l Conduct R. 1.08(a) are unnecessary and impracticable.

The rule departs from former DR 5-104(A), which forbade an attorney to enter into a business transaction with a client if they had differing interests and if the client expected the attorney to exercise his professional judgment to protect the client, unless the client consented after disclosure. The rule does not refer to the exercise of the attorney's professional judgment or to the client's expectations. Business transactions are flatly prohibited unless the attorney strictly complies with Tex. Disciplinary Rules Prof'l Conduct R. 1.08(a), which appears to require written consent of the client regardless of his expectations.

Exceptions for Nonprofit and Limited Pro Bono Legal Services: Newly enacted Tex. Disciplinary Rules Prof'l Conduct R. 6.05 creates a narrow exception to the conflict rules when an attorney provides limited advice and brief assistance on a pro bono basis. As applicable in the rule, "'limited pro bono legal services'" means legal services that are: "(1) provided through a pro bono or assisted pro se program sponsored by a court, bar association, accredited law school, or nonprofit legal services program; (2) short-term services such as legal advice or other brief assistance with pro se documents or transactions, provided either in person or by phone, hotline, internet, or video conferencing; and (3) provided without any expectation of extended representation of the limited assistance client or of receiving any legal fees in that matter." The imputation provisions of Tex. Disciplinary Rules Prof'l Conduct R. 1.06, 1.07, and 1.09 will not apply to other attorneys in the firm if the attorney providing the limited or pro bono services does not disclose the confidential information of the pro bono client to others in the firm and if that information is maintained in such a manner that is not accessible to the attorneys in the firm. The comment to the rule explains that in certain pro bono settings in which limited assistance is offered, the attorney does not have the opportunity to check for conflicts as normally would be required. This has often deterred participation in these pro bono programs. The exception does not apply if the attorney is aware that a conflict exists. *See* Tex. Disciplinary Rules Prof'l Conduct R. 6.05.

§ 1.14:2 Conflicts of Interest Among Clients

Conflicts Created by Multiple Representation: An attorney may not accept or continue employment when two or more of the attorney's clients might have interests that are conflicting, inconsistent, diverse, or otherwise discordant. *Lott v. Ayres*, 611 S.W.2d 473, 476 (Tex. App.—Dallas 1980, writ ref'd n.r.e.).

Tex. Disciplinary Rules Prof'l Conduct R. 1.06 provides—

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or

(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such represent-ation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

Tex. Disciplinary Rules Prof'l Conduct R. 1.06.

An attorney may properly represent both buyer and seller in real estate transactions when all parties agree after full disclosure of the facts. One court held such representation proper under these circumstances: The purchasers were satisfied with the attorney's handling of the original transaction; they were aware of the attorney's position as trustee; and they understood that as trustee he had power to sell the property in case of default. *Dillard v. Broyles*, 633 S.W.2d 636 (Tex. App.—Corpus Christi–Edinburg 1982, writ ref'd n.r.e.), *cert. denied*, 463 U.S. 1208 (1983).

Conflicts Created by Prior Representation: Tex. Disciplinary Rules Prof'l Conduct R. 1.09 provides that, without prior consent, an attorney who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client in which the other person questions the validity of the attorney's services or work product for the former client, or if the representation in reasonable probability will involve a violation of Tex. Disciplinary Rules Prof'l Conduct R. 1.05, or if it is the same or a substantially related matter.

The fact that the lawyer has no recollection of the initial consultation or the matter disclosed in the meeting is of no consequence. The former client is entitled to a conclusive presumption that he imparted confidences and secrets. *In re Z.N.H.*, 280 S.W.3d 481, 485 (Tex. App.—Eastland 2009, no pet.).

The issue of what constitutes a "substantial relation" in this regard has arisen in some cases. In *Lott v. Lott*, 605 S.W.2d 665, 668 (Tex. App.—Dallas 1980, writ dism'd), the court held that an attorney's representation of a husband and wife in a personal injury action involving the wife's injuries did not preclude his representation of the wife in a divorce action filed while the first suit was pending.

Similarly, the court did not find a sufficient relation to create a conflict when an attorney represented a clinic in a contract dispute against a doctor to whom he had previously given advice on the status of an out-of-state divorce decree. *Braun v. Valley Ear, Nose & Throat Specialists*, 611 S.W.2d 470, 472 (Tex. App.—Corpus Christi–Edinburg 1980, no writ).

§ 1.15 Confidentiality

§ 1.15:1 Confidences and Secrets of Clients

Tex. Disciplinary Rules Prof'l Conduct R. 1.05 imposes on attorneys the duty to maintain their clients' confidences and secrets. The rule is couched in terms of "confidential information," which includes both "privileged information" and "unpriv-

ileged client information." "Privileged information" is information of a client protected by the attorney-client privilege of Tex. R. Evid. 503 or by the principles of attorney-client privilege governed by Fed. R. Evid. 501. "Unprivileged client information" means all information relating to a client or furnished by the client, other than privileged information, acquired by the attorney during the course of or by reason of the representation of the client.

An attorney may reveal confidential information under these circumstances:

1. When the attorney has been expressly authorized to do so in order to carry out the representation.
2. When the client consents after consultation.
3. To the client, the client's representatives, or the members, associates, and employees of the attorney's firm, except when otherwise instructed by the client.
4. When the attorney has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.
5. To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the attorney in a controversy between the attorney and the client.
6. To establish a defense to a criminal charge, civil claim, or disciplinary complaint against the attorney or the attorney's associates based on conduct involving the client or the representation of the client.
7. When the attorney has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.
8. To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the attorney's services had been used.
9. To secure legal advice about the attorney's compliance with the Texas Disciplinary Rules of Professional Conduct.
10. When the attorney has reason to believe it is necessary to do so in order to prevent a client from dying by suicide.

Tex. Disciplinary Rules Prof'l Conduct R. 1.05(c).

An attorney may reveal unprivileged client information when the attorney is impliedly authorized to do so in order to carry out the representation or when the attorney has reason to believe it is necessary to do so in order to carry out the representation effectively, to defend the attorney or the attorney's employees or associates against a claim of wrongful conduct, to respond to allegations in any proceeding concerning the attorney's representation of the client, or to prove the services rendered to a client, or the reasonable value of the services, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client. Tex. Disciplinary Rules Prof'l Conduct R. 1.05(d). Comment 17 to rule 1.05 also notes that an attorney representing a client with diminished capacity should also review rule 1.16, which under limited circumstances allows the disclosure of confidential information to protect the client's interests. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.16(c).

Further, an attorney *shall* reveal confidential information when it clearly establishes that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, and the revelation of the information reasonably appears necessary to prevent the client from committing the act. Tex. Disciplinary Rules Prof'l Conduct R. 1.05(e). An attorney shall also reveal confidential information when required to do so by Tex. Disciplinary Rules Prof'l Conduct R. 3.03(a)(2), 3.03(b), or 4.01(b). *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.05(f). Rules 3.03(a)(2) and 4.01(b)

require an attorney to disclose information when necessary to avoid assisting a criminal or fraudulent act. Rule 3.03(b) requires "reasonable remedial measures, including disclosure of the true facts" if an attorney has offered material evidence and later learns of its falsity.

The rule 1.05 comments note that when death or serious bodily harm is likely to result, revelation of confidential information is required. In all other situations, the attorney's obligation is to dissuade the client from committing the crime or fraud or to persuade the client to take corrective action. When the threatened crime or fraud is likely to have the less serious result of substantial injury to the financial interests or property of another, the attorney is not required to reveal preventive information, but may do so. Comment 14 notes:

> Although preventive action is permitted by paragraphs (c) and (d), failure to take preventive action does not violate those paragraphs. But see paragraphs (e) and (f). Because these rules do not define standards of civil liability of lawyers for professional conduct, paragraphs (c) and (d) do not create a duty on the lawyer to make any disclosure and no civil liability is intended to arise from the failure to make such disclosure.

The same statement is *not* made with regard to paragraphs (e) and (f).

§ 1.15:2 Obtaining Confidences

Recording One's Own Conversations: Either of two individuals having a telephone conversation may record it without violating the Federal Communications Act, 47 U.S.C. § 605. *See Rathbun v. United States*, 355 U.S. 107 (1957). This general rule has been applied to conversations between spouses. *See Kotrla v. Kotrla*, 718 S.W.2d 853 (Tex. App.—Corpus Christi–Edinburg 1986, writ ref'd n.r.e.). However, a Texas attorney has been publicly reprimanded for involving a nonattorney in the installation of a device to record telephone conversations of her estranged husband. The attorney also engaged in third-party recordings of telephone conversations without the knowledge or consent of the parties engaged in the conversations. It is noted, however, that the telephone calls did not involve any clients. 52 Tex. B.J. 234 (1989).

The American Bar Association has previously taken the position that no attorney should record any conversation, whether by tape or other electronic device, without the consent or prior knowledge of all parties. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 337 (1974). The former Code of Professional Responsibility took a similar position. Except under extraordinary circumstances, former Ethical Considerations 1-5 and 9-6 prohibited an attorney from tape-recording a conversation with another person without first informing that person. Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 392 (1978) (overruling Ethics Op. 84 (1953)).

But in 2001, the American Bar Association's Standing Committee on Ethics and Professional Responsibility (the "ABA Committee") withdrew its Formal Opinion 337 and issued Formal Opinion 01-422 (June 24, 2001). In that opinion, the ABA Committee ruled that a lawyer may record his telephone conversations without disclosure to other parties to the calls, provided that the recording is not in violation of applicable law and is not contrary to a representation by the lawyer that the conversation is not being recorded. The ABA Committee noted that it was divided on whether to permit a lawyer to make an undisclosed recording of a telephone conversation with a client but indicated that such recordings were generally inadvisable. In doing so, the ABA Committee recognized that there are legitimate reasons a lawyer may electronically record conversations with a client or third party, including to aid memory, keep accurate records, gather information from potential witnesses, and to protect the lawyer from false accusations. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-422 (2001).

In 2006, the Texas Committee on Professional Ethics issued Opinion 575, indicating it did not believe that an "undisclosed recording of a telephone conversation by a party to the conversation can be termed to involve 'dishonesty, fraud, deceit or misrepresentation' within the meaning of Rule 8.04(a)(3)." The committee noted that because "an undisclosed recording of a telephone conversation by a party to the conversation is not a crime under Texas or Federal law, there appears to be no other provision of the Texas Disciplinary Rules of Professional Conduct that could be said to be violated by such an undisclosed recording." Therefore, it found that a Texas attorney's "undisclosed recording of his telephone conversation with another person should not be held to violate Rule 8.04(a)(3)." But the opinion did mandate several qualifications, including (1) recordings of clients should be for the "legitimate interest" of the lawyer or client, (2) any recordings should be safeguarded to protect confidential information, (3) recordings should not violate the other laws that may apply, such as the laws of another state, and (4) any recordings should not be contrary to a representation made by the attorney. If these conditions are met, an undisclosed recording of telephone conversations by a Texas attorney is no longer per se a violation of the Texas Disciplinary Rules of Professional Conduct. *See* Tex. Comm. on Prof'l Ethics, Op. 575 (2006).

Recording Conversations to Which One Is Not a Party—Federal Regulations: The Omnibus Criminal Control Act, at 18 U.S.C. § 2511(1), precludes the interception of a wire, oral, or electronic communication. "Intercept" is defined at 18 U.S.C. § 2510(4) as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device."

Recording Conversations to Which One Is Not a Party—State Statutes: The Texas Penal Code provides a second-degree felony punishment (confinement in the Texas Department of Criminal Justice for a term of two to twenty years and a fine of not more than $10,000) for one who "intentionally intercepts, endeavors to intercept, or procures another person to intercept or endeavor to intercept a wire, oral, or electronic communication." Tex. Penal Code § 16.02(b)(1), (f). The terms *intercept*, *oral communication*, and *wire communication* have the meanings given them in article 18A.001 of the Texas Code of Criminal Procedure. Tex. Penal Code § 16.02(a). The article 18A.001 definitions are virtually the same as those in the federal act (without the references to interstate commerce or communications). *See* 18 U.S.C. § 2510; Tex. Code Crim. Proc. art. 18A.001.

The Texas Civil Practice and Remedies Code authorizes civil action by a party to a communication against a person who intercepts, tries to intercept, or employs or obtains another to intercept or try to intercept the communication or who uses or divulges information he knows or reasonably should know was obtained by interception of the communication. Tex. Civ. Prac. & Rem. Code § 123.002(a)(1), (a)(2). "Communication" means speech uttered by a person or information including speech that is transmitted in whole or in part with the aid of a wire or cable. Tex. Civ. Prac. & Rem. Code § 123.001(1). "Interception" means the aural acquisition of the contents of a communication through the use of an electronic, mechanical, or other device that is made without the consent of a party to the communication. Tex. Civ. Prac. & Rem. Code § 123.001(2).

§ 1.16 Commingling Funds

§ 1.16:1 Keeping Clients' Funds in Separate Account

An attorney must hold funds and other property belonging in whole or in part to clients or third persons that are in the attorney's possession in connection with a representation separate from the attorney's own property. These funds must be kept in a separate account, designated as a "trust" or "escrow" account, maintained in the state in which the attorney's office is situated or elsewhere with the consent of the client or third person. Other client property must be identified as such and appropriately

safeguarded. The attorney must keep complete records of account funds and other property and preserve them for five years after termination of the representation. Tex. Disciplinary Rules Prof'l Conduct R. 1.14(a).

On receiving funds or other property in which a client or third person has an interest, an attorney must promptly notify the client or third person. Except as stated in Tex. Disciplinary Rules Prof'l Conduct R. 1.14 or otherwise permitted by law or by agreement with the client, an attorney must promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, on request by the client or third person, promptly render a full account regarding the property. Tex. Disciplinary Rules Prof'l Conduct R. 1.14(b).

When in the course of representation an attorney is in possession of funds or other property in which both the attorney and another person claim interests, the attorney must keep the property separate until there is an account and severance of their interest. All funds in a trust or escrow account may be disbursed only to those persons entitled to receive them by virtue of the representation or by law. If a dispute arises concerning their respective interests, the attorney must keep the portion in dispute separate until the dispute is resolved, and the undisputed portion must be distributed appropriately. Tex. Disciplinary Rules Prof'l Conduct R. 1.14(c).

In *Archer v. State*, 548 S.W.2d 71 (Tex. App.—El Paso 1977, writ ref'd n.r.e.), the court upheld a two-year suspension of an attorney's license as a proper sanction for commingling funds. The jury found that the attorney had deposited a client's funds in a general business account. The court held that a fraudulent, willful, or culpable intent was not necessary to invoke the suspension and that the client's consent did not absolve the attorney from liability. The purpose of former DR 9-102, said the court, was to guard against loss of a client's funds that may occur even with "good intentions." *Archer*, 548 S.W.2d at 74.

§ 1.16:2 Retainer Fees

Attorneys must distinguish between true retainer fees (payments to compensate an attorney for his commitment to provide certain services and to forgo other employment opportunities) and advance payment retainer fees (advance payments for services to be performed). True retainer fees are earned when received and may be deposited in the attorney's account. Former DR 2-110 required the attorney to promptly refund an equitable portion of the true retainer fee if he was discharged or withdrew before losing other employment opportunities. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(d) merely requires an attorney to refund any advance payment of a fee that has not been earned. Retainer fees are not mentioned in Tex. Disciplinary Rules Prof'l Conduct R. 1.14, but clearly they should be used with caution. Nonrefundable retainers, though not inherently unethical, pose many potential problems and must be used with caution. Tex. Comm. on Prof'l Ethics, Op. 431 (1986). Guardianship fees, including the payment of retainers, are subject to the approval of the probate court.

§ 1.17 Advertising

§ 1.17:1 Background

In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Supreme Court held that it was unconstitutional to prohibit attorneys from advertising prices charged for uncontested divorces, simple adoptions, uncontested personal bankruptcies, changes of name, and routine services, as long as the advertising is not false, deceptive, or misleading.

However, in *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), the Supreme Court ruled that certain restrictions on targeted direct-mail solici-tation imposed by the Florida Bar did not violate the First Amendment free-speech guarantees as applied to

commercial speech. This case further refines the "intermediate scrutiny" framework applied to regulation of commercial speech and upholds the right of state bar associations to restrict certain forms of advertising by attorneys.

§ 1.17:2 Texas Advertising Guidelines

The following practice notes briefly summarize salient parts of the rules adopted by the Supreme Court of Texas relating to advertising, but attorneys planning any form of advertising or solicitation, including on websites, should examine the advertising rules closely and direct any inquiries to the State Bar of Texas Advertising Review Department. A packet of information containing the Lawyer Advertising Rules, an application form, and other informative materials may be obtained from the department, and attorneys may seek guidance about interpretations of the rules from department staff. The telephone number for the Advertising Review Department is 1-800-566-4616.

Communications about Services: The rules specifically prohibit making or sponsoring false or misleading communications about attorneys' services or qualifications. A communication is considered false or misleading if it contains a material misrepresentation of fact or law, or if it omits a fact necessary to make the statement as a whole not misleading. The rule is applicable to all communications about an attorney's services, including advertisements and solicitation communications. *See* Tex. Disciplinary Rules Prof'l Conduct R. 7.01. Any statement or disclaimer required by the rules, must be sufficiently clear so that it can be reasonably understood by an ordinary person and made in each language used in the communication. Tex. Disciplinary Rules Prof'l Conduct R. 7.01(d).

Firm Names and Letterhead: Tex. Disciplinary Rules Prof'l Conduct R. 7.01(c) permits the practice of law under a trade name or a name that is not false or misleading. A firm name may include the names of current members of the firm and of deceased or retired members. This may also include members from a predecessor firm if there has been a succession in the firm identity. Tex. Disciplinary Rules Prof'l Conduct R. 7.01(c). If an attorney is holding a public office, the firm may not include his name during any substantial period in which the attorney is not regularly and actively practicing with the firm. Tex. Disciplinary Rules Prof'l Conduct R. 7.01(c). If a law firm has a practice in multiple jurisdictions, the same name or professional designation may be used in each jurisdiction. The letterhead of the firm for a Texas office must indicate which attorneys listed are not licensed to practice in Texas. Tex. Disciplinary Rules Prof'l Conduct R. 7.01(c). An attorney may state or imply that he practices in a partnership or business entity only when accurate. Tex. Disciplinary Rules Prof'l Conduct R. 7.01(f).

Prohibited Payments: Attorneys may not pay referral fees to nonattorneys, although they may pay for advertising and for the expenses of an attorney referral service. An attorney may enter a referral agreement with another attorney or nonattorney professional that does not otherwise violate the disciplinary rules if the reciprocal referral agreement is nonexclusive, clients are informed of the existence and nature of the agreement, and the attorney uses independent professional judgment in making the referrals. Tex. Disciplinary Rules Prof'l Conduct R. 7.03(e). Attorneys may not, for the purpose of securing employment, pay, give, or advance or offer to pay, give, or advance anything of value to a prospective client or other person, except for amounts allowed under Tex. Disciplinary Rules Prof'l Conduct R. 1.08(f) and ordinary social hospitality of nominal value. Tex. Disciplinary Rules Prof'l Conduct R. 7.03(c).

Advertisements in Public Media: Tex. Disciplinary Rules Prof'l Conduct R. 7.02 governs advertisements of legal services. As defined by the rules, an advertisement is "a communication substantially motivated by pecuniary gain that is made by or on behalf of a lawyer to members of the public in general, which offers or promotes legal services under circumstances where the lawyer neither knows nor reasonably should know that the recipients need legal services in particular matters." Tex. Disci-

plinary Rules Prof'l Conduct R. 7.01. The rule requires that an advertisement of legal services publish the name of at least one attorney who is responsible for the content of the advertisement. The advertisement must also identify the lawyer's location of primary practice. Tex. Disciplinary Rules Prof'l Conduct R. 7.02(a).

An attorney may indicate he does or does not practice in a particular field of law. An advertisement may not, however, include a statement that indicates that the attorney has been certified or has been designated as or is a member of an organization having a special competence. The rule allows for two exceptions:

1. a lawyer who has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised, may state with respect to each such area, "Board Certified, area of specialization—Texas Board of Legal Specialization"; and
2. a lawyer who is a member of an organization the name of which implies that its members possess special competence, or who has been certified or designated by an organization as possessing special competence in a field of practice, may include a factually accurate, non-misleading statement of such membership or certification, but only if that organization has been accredited by the Texas Board of Legal Specialization as a bona fide organization that admits to membership or grants certification only on the basis of published criteria which the Texas Board of Legal Specialization has established as required for such certification.

Tex. Disciplinary Rules Prof'l Conduct R. 7.02(b).

If contingent fees are advertised, the advertisement must state whether the client will be required to pay court costs and whether the client will be responsible for other expenses. Tex. Disciplinary Rules Prof'l Conduct R. 7.02(c).

If a fee or range of fees is advertised, the attorney is expected to honor those prices for the period during which the advertisement is expected to be in circulation or for the time stated in the advertisement. However, quoted prices are not expected to be honored for longer than one year after the date of publication. Tex. Disciplinary Rules Prof'l Conduct R. 7.02(d). If an advertisement includes a verdict secured and the attorney knows the verdict was later reduced or reversed, or the case was settled for less, the attorney must state in each advertisement, with equal or greater prominence, the amount that was ultimately received by the client. Tex. Disciplinary Rules Prof'l Conduct R. 7.01(g).

Prohibited Written, Electronic, or Digital Solicitations: Tex. Disciplinary Rules Prof'l Conduct R. 7.03 governs "[r]egulated telephone, social media, or other electronic contact." This is defined as "telephone, social media, or electronic communication initiated by a lawyer, or by a person acting on behalf of a lawyer, that involves communication in a live or electronically interactive manner." Tex. Disciplinary Rules Prof'l Conduct R. 7.03(a)(1). An attorney may not solicit, in person or by regulated telephone, social media, or other electronic means, professional employment from a nonclient. Tex. Disciplinary Rules Prof'l Conduct R. 7.03(b). The rule provides exceptions if the target of the communication is another attorney; a person who has family, close personal, or prior business or professional relationship with the attorney; or a person known to be an experienced user of the type of legal services involved for business matters. Tex. Disciplinary Rules Prof'l Conduct R. 7.03(b).

The comments to the rule note that a "solicitation communication" is one "substantially motivated by pecuniary gain." Therefore, an attorney employed by a nonprofit organization may contact members of the organization for limited purposes. *See* Tex. Disciplinary Rules Prof'l Conduct R. 7.01(b)(1). This rule prohibits an attorney from sending communications that involve coercion, duress, overreaching, intimidation, or undue influence. Tex. Disciplinary Rules Prof'l Conduct R. 7.03(c). The rule also prohibits attorneys from sending a communication to a prospective client if the communication is misleading or

designed to resemble a legal pleading or other legal document or is not plainly marked or designated an "ADVERTISEMENT." Exceptions are allowed if the target of the communication is another lawyer; a person that attorney has a family, close personal, or prior business or professional relationship with; or a person that the attorney knows to be an experienced user of the type of legal services involved for business matters. Tex. Disciplinary Rules Prof'l Conduct R. 7.03(d). Communications authorized by law, such as notice to members of a class in a class action litigation, are not prohibited by this rule. Tex. Disciplinary Rules Prof'l Conduct R. 7.03(g). Communications to the general public, such as a billboard, are not considered a solicitation. *See* Tex. Disciplinary Rules Prof'l Conduct R. 7.03 cmt. 2.

Filing Requirements: With certain exceptions, an attorney must file a copy of the advertisement or solicitation communication, a completed lawyer advertising and solicitation communication application, and filing fee to the Advertising Review Committee of the State Bar. This must be filed no later than ten days after the advertisement is disseminated or ten days after the date a solicitation communication is sent. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(a); *see* Tex. Disciplinary Rules Prof'l Conduct R. 7.05. A preapproval may be requested not fewer than thirty days prior to the first date of dissemination. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(c). A finding of noncompliance is not binding in a disciplinary proceeding or action. A finding of compliance is binding, however, in favor of the attorney with regard to the materials submitted for preapproval if the material fairly and accurately described the advertised or solicited communication as later produced. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(c).

Advertising Regarding Medications or Medical Devices: Texas Government Code section 81.151, enacted by the Eighty-sixth Legislature in 2019, creates restrictions on television advertising for legal services relating to medications and medical devices. The statute provides guidelines on restricted language and mandates the use of certain warnings and disclosures. A violation of the provision is actionable under chapter 17, subchapter E, of the Texas Business and Commerce Code. *See* Tex. Gov't Code §§ 81.151, 81.155.

Prohibited Employment: Tex. Disciplinary Rules Prof'l Conduct R. 7.06 generally prohibits an attorney from accepting or continuing employment if the employment was procured by conduct prohibited by the advertising rules, certain criminal conduct, or barratry.

Jurisdiction: Tex. Disciplinary Rules Prof'l Conduct R. 8.05 designates who will be subject to discipline by the State Bar of Texas for violation of the Texas advertising guidelines. Under rule 8.05, in certain cases, an attorney admitted in Texas may be disciplined for advertisements made in other jurisdictions.

§ 1.18 Attorney as Witness

An attorney who finds it necessary to testify as a witness should first consult rule 3.08, which provides:

(a) A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client, unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

(3) the testimony relates to the nature and value of legal services rendered in the case;

(4) the lawyer is a party to the action and is appearing pro se; or

(5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer shall not continue as an advocate in a pending adjudicatory proceeding if the lawyer believes that the lawyer will be compelled to furnish testimony that will be substantially adverse to the lawyer's client, unless the client consents after full disclosure.

(c) Without the client's informed consent, a lawyer may not act as advocate in an adjudicatory proceeding in which another lawyer in the lawyer's firm is prohibited by paragraphs (a) or (b) from serving as advocate. If the lawyer to be called as a witness could not also serve as an advocate under this Rule, that lawyer shall not take an active role before the tribunal in the presentation of the matter.

Tex. Disciplinary Rules Prof'l Conduct R. 3.08.

However, disqualification is a severe remedy. *In re Sanders*, 153 S.W.3d 54, 57 (Tex. 2004). "Mere allegations of unethical conduct or evidence showing a remote possibility of a violation of the disciplinary rules will not suffice" to merit disqualification. *Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 656 (Tex. 1990). The party requesting disqualification must demonstrate that the opposing lawyer's dual role as attorney and witness will cause the party actual prejudice. *Ayres v. Canales*, 790 S.W.2d 554, 558 (Tex. 1990); *see also In re Frost*, No. 12-08-00154-CV, 2008 WL 2122597 (Tex. App.— Tyler May 21, 2008) (mem. op.). Finally, a lawyer should not seek to disqualify an opposing lawyer by unnecessarily calling that lawyer as a witness. Tex. Disciplinary Rules Prof'l Conduct R. 3.08 cmt. 10.

§ 1.19 Technological Competence

The Supreme Court has amended the comment to rule 1.01, which addresses competent and diligent legal representation, to address technological competency. The revised comment indicates that each lawyer "should strive to become and remain proficient and competent in the practice of law, *including the benefits and risks associated with relevant technology*." Tex. Disciplinary Rules Prof'l Conduct R. 1.01 cmt. 8 (emphasis added). The comment is similar to a change made in the American Bar Association's model rule in 2012. *See* **www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1/**.

§ 1.20 Duty to Report Professional Misconduct

Rule 8.03 of the Texas Disciplinary Rules of Professional Conduct requires attorneys to make a report when a substantial question arises about another lawyer's "honesty, trustworthiness or fitness." An attorney is also required to self-report in the event of certain convictions or if the attorney is placed on probation, or if the attorney has been disciplined by the attorney regulatory agency of another jurisdiction or by a federal court or federal agency:

8.03 Reporting Professional Misconduct

(a) Except as permitted in paragraphs (c) or (d), a lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority.

(b) Except as permitted in paragraphs (c) or (d), a lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) A lawyer having knowledge or suspecting that another lawyer or judge whose conduct the lawyer is required to report pursuant to paragraphs (a) or (b) of this Rule is impaired by *chemical dependency on alcohol or drugs or by mental illness may report that person to an approved peer assistance program rather than to an appropriate disciplinary authority*. If a lawyer elects that option, the lawyer's report to the approved peer assistance program shall disclose any disciplinary violations that the reporting lawyer would otherwise have to disclose to the authorities referred to in paragraphs (a) and (b).

(d) This rule does not require disclosure of knowledge or information otherwise protected as confidential information:

(1) by Rule 1.05 or

(2) by any statutory or regulatory provisions applicable to the counseling activities of the approved peer assistance program.

(e) A lawyer who has been convicted or placed on probation, with or without an adjudication of guilt, by any court for barratry, any felony, or for a misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property—including a conviction or sentence of probation for attempt, conspiracy, or solicitation—must notify the chief disciplinary counsel within 30 days of the date of the order or judgment. The notice must include a copy of the order or judgment.

(f) A lawyer who has been disciplined by the attorney-regulatory agency of another jurisdiction, or by a federal court or federal agency, must notify the chief disciplinary counsel within 30 days of the date of the order or judgment. The notice must include a copy of the order or judgment. For purposes of this paragraph, "discipline" by a federal court or federal agency means a public reprimand, suspension, or disbarment; the term does not include a letter of "warning" or "admonishment" or a similar advisory by a federal court or federal agency.

Tex. Disciplinary Rules Prof'l Conduct R. 8.03 (emphasis added).

§ 1.21 Peer Assistance Program Alternative; Texas Lawyers' Assistance Program

The Texas Lawyer's Creed states that a lawyer must "abide by the Texas Disciplinary Rules of Professional Conduct" and "professionalism requires more than merely avoiding the violation of laws and rules." The Texas Lawyer's Creed—A Mandate for Professionalism, *reprinted in Texas Rules of Court—State* 735 (West 2022). The rule and the alternative method of reporting under rule 8.03(c) reflect the values of the Texas Lawyer's Creed; rule 8.03(c) allows attorneys to help each other in certain circumstances without involving the disciplinary process. Under rule 8.03(c), in the case of impairment by chemical dependency on alcohol or drugs or by mental illness, the report may be made to an approved peer assistance program rather than to the appropriate disciplinary authority. Tex. Disciplinary Rules Prof'l Conduct R. 8.03(c). The only approved peer assistance program to which lawyers may make reports under rule 8.03(c) is the Texas Lawyers' Assistance Program (TLAP). *See* Tex. Health & Safety Code § 467.001(1)(A); Board of Directors Meeting Minutes, Jan. 20–21, 1989, State Bar of Texas. TLAP is available to lawyers, judges, and law students twenty-four hours a day, seven days a week, at 1-800-343-TLAP (8527). Information about attorney wellness and other related information is also available on TLAP's website, **www.tlaphelps.org**. If a lawyer is required to report under rule 8.03(a), that is, if he has knowledge "or suspect[s]" another lawyer is "impaired by chemical dependency on alcohol or drugs or by mental illness," the report may instead be made to TLAP and discharges the reporting lawyer's duty to report. *See* Tex. Health & Safety Code § 467.005(b); Tex. Disciplinary Rules Prof'l Conduct R. 8.03(c). "Mental illness" encompasses Alzheimer's disease, dementia, and other cognitive disorders. American Psychiatric Association, *Diagnostic & Statistical Manual of Mental Disorders* 591 (5th ed. 2013).

Calling TLAP about a fellow lawyer in need is a way to help an attorney with a problem without getting that attorney into disciplinary trouble. The confidentiality of TLAP participants' information is ensured under Tex. Health & Safety Code § 467.007 and by TLAP policy. All communications by any person with the program (including staff, committee members, and volunteers) and all records received or maintained by the program are strictly protected from disclosure. TLAP does not report lawyers to disciplinary authorities. While the majority of calls to TLAP are self-referrals, referrals may also come from partners, associates, office staff, judges, court personnel, clients, family members, and friends. TLAP is respectful and discreet in its efforts to help impaired lawyers who are referred, and TLAP never discloses the identity of a caller trying to get help for another attorney. Furthermore, the Texas Health and Safety Code provides that any person who "in good faith reports information or takes action in connection with a peer assistance program is immune from civil liability for reporting the information or taking the action." Tex. Health & Safety Code § 467.008.

Approximately half of all assistance provided by TLAP is given to attorneys suffering from anxiety, depression, or burnout. Additionally, TLAP helps lawyers, law students, and judges suffering problems such as prescription and other drug use, eating disorders, gambling addictions, cognitive impairment, codependency, and many other serious issues.

Once a lawyer, law student, or judge is connected to TLAP, the resources that can be provided directly to that person include—

1. direct peer support from TLAP staff attorneys;
2. self-help information;
3. connection to a trained peer support attorney who has overcome the particular problem at hand and who has signed a confidentiality agreement;
4. information about attorney-only support groups such as Lawyers Concerned for Lawyers (weekly meetings for alcohol, drug, depression, and other issues) and monthly wellness groups (professional speakers on various wellness topics in a lecture format), which take place in major cities across the state;
5. referrals to lawyer-friendly and experienced therapists, medical professionals, and treatment centers; and
6. assistance with financial resources needed to get help, such as the Sheeran-Crowley Memorial Trust, which is available to help attorneys in financial need with the costs of mental-health or substance abuse care.

[Sections 1.22 through 1.30 are reserved for expansion.]

I. Professional Malpractice

§ 1.31 Nature of Legal Malpractice Action

Legal malpractice is typically based on negligence because such claims arise from an attorney's alleged failure to exercise ordinary care. *See Cosgrove v. Grimes*, 774 S.W.2d 662, 665 (Tex. 1989); *see also Goffney v. Rabson*, 56 S.W.3d 186, 190 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (regardless of labeling, claim based on attorney's failure to exercise degree of care, skill, and diligence equal to that an attorney would commonly possess and exercise is legal malpractice claim based on negligence). The weight of authority in Texas holds that a legal malpractice action is a common-law tort arising from an attorney's negligence that breaches a duty to represent a client competently and that proximately causes damages to the cli-

ent. *See Woodburn v. Turley*, 625 F.2d 589 (5th Cir. 1980); *Oldham v. Sparks*, 28 Tex. 425 (1866); *Gabel v. Sandoval*, 648 S.W.2d 398 (Tex. App.—San Antonio 1983, writ dism'd).

There is some Texas authority for breach-of-contract malpractice actions based on an attorney's breach of agreement to perform legal services. *See Bolton v. Foreman*, 263 S.W.2d 618 (Tex. App.—Galveston 1953, writ ref'd n.r.e.); *Kruegel v. Porter*, 136 S.W. 801 (Tex. App. 1911), *aff'd*, 155 S.W. 174 (Tex. 1913). With the advent of advertising and specialization by attorneys in Texas, the historical basis for the courts' reluctance to hold attorneys liable on an implied or express warranty theory may slowly erode.

The issue of whether the claims are claims for legal malpractice or something else is a question of law for the court to determine. *Murphy v. Gruber*, 241 S.W.3d 689, 692 (Tex. App.—Dallas 2007, pet. denied). For a discussion of the differentiation between legal malpractice and breach of fiduciary duty, see *Gallagher v. Wilson*, No. 2-09-376-CV, 2010 WL 3377787 (Tex. App.—Fort Worth Aug. 26, 2010, no pet.).

§ 1.32 Elements of Legal Malpractice

§ 1.32:1 Attorney-Client Relationship and Duty

To recover for legal malpractice, a plaintiff must prove four elements, which are—

1. the attorney owed a duty of care to the plaintiff (generally, this is shown by the presence of an attorney-client relationship between the plaintiff and the attorney);
2. the attorney violated that duty;
3. the attorney's negligence was the proximate cause of injury to the plaintiff; and
4. damages.

See Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989) (citing *McKinley v. Stripling*, 763 S.W.2d 407 (Tex. 1989)); *see also Alexander v. Turtur & Associates, Inc.*, 146 S.W.3d 113 (Tex. 2004); *Abetter Trucking Co. v. Arizpe*, 113 S.W.3d 503, 508 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

Tex. Disciplinary Rules Prof'l Conduct R. 1.01 states that an attorney shall not accept or continue employment in a legal matter that he knows or should know is beyond his competence unless another attorney competent to handle the matter is associated (with the client's prior informed consent) or the advice or assistance of the attorney is required in an emergency and the attorney limits the advice and assistance to that which is reasonably necessary under the circumstances. The rule further provides that an attorney shall not neglect a legal matter entrusted to him or "frequently" fail to carry out completely the obligations that the attorney owes his clients. "Neglect" is defined as inattentiveness involving conscious disregard for the responsibilities owed a client.

In *Cook v. Irion*, 409 S.W.2d 475, 477 (Tex. App.—San Antonio 1966, no writ), *disapproved on other grounds by Cosgrove*, 774 S.W.2d at 665, the court set out the general duties of an attorney in representing a client:

> Ordinarily when an attorney engages in the practice of the law and contracts to prosecute an action in behalf of his client, he impliedly represents that (1) he possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exert his best judg-

ment in the prosecution of the litigation entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause.

§ 1.32:2 Negligent Breach of Duty

Neglect Is Not Negligence: Neglect of a legal matter involves indifference and consistent failure to carry out the obligation that the attorney has assumed to the client or conscious disregard for responsibilities owed the client. Neglect is usually evidenced by more than a single act or omission. 61 A.B.A. J. 986 (1975) (A.B.A. Informal Op. 1273).

Good-Faith Errors in Judgment: The "error-in-judgment" rule was substantially rewritten in *Cosgrove v. Grimes*, 774 S.W.2d 662 (Tex. 1989). Cosgrove initially retained an attorney (Bass) to sue for a personal injury claim arising from an automobile accident. Bass left town and, according to Cosgrove, told Cosgrove he had turned the case over to attorney Grimes. However, Grimes testified that he first heard of the case when Cosgrove came to his office a mere five days before the statute of limitations was to have run. Cosgrove gave Grimes the information about the accident, including its location and the person to sue (one Timothy Pur-nell). Grimes testified that he found Cosgrove to be an intelligent man on whom he could rely for the basic facts. Suit was filed on the basis of the information. It later was discovered that Purnell was the passenger, not the driver, and that the petition stated the wrong location of the accident. Both the decision of the court of appeals (*Cosgrove v. Grimes*, 757 S.W.2d 508 (Tex. App.—Houston [1st Dist.] 1988)) and that of the supreme court detail the application of the error-in-judgment rule.

The rule, commonly known as the good-faith defense, has historically excused an attorney for any error in judgment if he acted in good faith and in an honest belief that the act or advice was well founded and in the best interests of the client. *See Cook v. Irion*, 409 S.W.2d 475 (Tex. App.—San Antonio 1966, no writ), *disapproved by Cosgrove*, 774 S.W.2d at 665. In *Cook*, the plaintiffs' attorneys in a personal injury action sued only one of three potential defendants. An instructed verdict was granted against the plaintiffs after the two-year statute of limitations expired. In an appeal from the legal malpractice action, the court concluded that the good-faith defense applied and that the appellants had failed to establish the attorneys' negligence.

The good-faith exception has been applied to an attorney's failure to dispose of a client's nonvested military retirement benefits in a divorce action and to warn him of a possible later partition action based on the unclear law at the time. *Medrano v. Miller*, 608 S.W.2d 781 (Tex. App.—San Antonio 1980, writ ref'd n.r.e.), *disapproved by Cosgrove*, 774 S.W.2d at 665. It has been held inapplicable in the following disciplinary proceedings: violating a disciplinary rule prohibiting receiving compensation from anyone other than one's client (*State v. Baker*, 539 S.W.2d 367 (Tex. App.—Austin 1976, writ ref'd n.r.e.), *disapproved by Cosgrove*, 774 S.W.2d at 665); violating disciplinary rules against commingling (*Archer v. State*, 548 S.W.2d 71 (Tex. App.—El Paso 1977, writ ref'd n.r.e.)); and making false statements that suit had been filed and failing to file suit before the running of the statute of limitations (*Hicks v. State*, 422 S.W.2d 539 (Tex. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.), *disapproved by Cosgrove*, 774 S.W.2d at 665).

A review of the early cases involving the rule indicates quite clearly that it has been held to be a subjective test. However, *Cosgrove* mandates that the proper standard is the objective exercise of professional judgment:

> There is no subjective good faith excuse for attorney negligence. A lawyer in Texas is held to the standard of care which would be exercised by a reasonably prudent attorney. The jury must evaluate his conduct based on the information the attorney has at the time of the alleged act of negligence. In some instances an attorney is required to

> make tactical or strategic decisions. Ostensibly, the good faith exception was created to protect this unique attorney work product. However, allowing the attorney to assert his subjective good faith, when the acts he pursues are unreasonable as measured by the reasonably competent practitioner standard, creates too great a burden for wronged clients to overcome. The instruction to the jury should clearly set out the standard for negligence in terms which encompass the attorney's reasonableness in choosing one course of action over another.
>
> If an attorney makes a decision which a reasonably prudent attorney *could* make in the same or similar circumstance, it is not an act of negligence even if the result is undesirable. Attorneys cannot be held strictly liable for all of their clients' unfulfilled expectations. An attorney who makes a reasonable decision in the handling of a case may not be held liable if the decision later proves to be imperfect. The standard is an objective exercise of professional judgment, not the subjective belief that his acts are in good faith.

Cosgrove, 774 S.W.2d at 664–65. The court then specifically disapproved all cases to the contrary, including *Cook*, 409 S.W.2d 475; *Medrano*, 608 S.W.2d 781; *Baker*, 539 S.W.2d 367; and *Hicks*, 422 S.W.2d 539. *Cosgrove*, 774 S.W.2d at 665.

No Ensuring Desired Result: The duty to use reasonable care, diligence, and skill does not include ensuring or guaranteeing the desired result. *Cosgrove*, 774 S.W.2d at 665; *Great American Indemnity Co. v. Dabney*, 128 S.W.2d 496, 501 (Tex. App.—Amarillo 1939, writ dism'd judgm't cor.).

§ 1.32:3 Proximate Cause

To constitute malpractice, the attorney's negligent breach of duty must proximately cause the client's damages. *See Patterson & Wallace v. Frazer*, 79 S.W. 1077 (El Paso 1904, no writ). The two components of proximate cause are cause-in-fact and foreseeability. *Berly v. D&L Security Services & Investigations, Inc.*, 876 S.W.2d 179, 182 (Tex. App.—Dallas 1994, writ denied). Cause-in-fact means that the attorney's acts or omissions were a substantial factor in bringing about the injury that would not otherwise have occurred. *See Two Thirty Nine Joint Venture v. Joe*, 60 S.W.3d 896, 909 (Tex. App.—Dallas 2001), *rev'd on other grounds*, 145 S.W.3d 150 (Tex. 2004). Foreseeability of harm means that the attorney could anticipate that his actions could injure another. *Two Thirty Nine Joint Venture*, 60 S.W.3d at 909. Foreseeability does not require that the attorney anticipate the particular injury that eventually occurs. *Brown v. Edwards Transfer Co.*, 764 S.W.2d 220, 223 (Tex. 1988).

When the client claims that some failure by the attorney caused an adverse result in prior litigation, the client must produce evidence from which a jury may reasonably infer that the attorney's conduct caused the damages alleged. *Haynes & Boone v. Bowser Bouldin, Ltd.*, 896 S.W.2d 179, 181 (Tex. 1995), *abrogated by Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007). Thus, the client must prove that the initial suit would have been successful but for the attorney's negligence and must show the amount that could have been collected on a successful judgment. *Jackson v. Urban, Coolidge, Pennington & Scott*, 516 S.W.2d 948, 949 (Tex. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.). Mere conjecture, guess, or speculation is not sufficient to establish that the attorney's actions proximately caused the client's injury. For example, in the 2007 decision of *Baker Botts v. Cailloux*, 224 S.W.3d 723 (Tex. App.—San Antonio 2007, pet. denied), the appellate court reversed a trial court judgment in favor of the client-plaintiff, finding that causation was not proven at trial.

In *Baker Botts,* the client was incapacitated and her attorney-in-fact sued the law firm and others claiming that, but for its actions, the client would not have signed a disclaimer. None of the trial witnesses had any knowledge of the client's "true wishes or intentions." *See Baker Botts*, 224 S.W.3d at 734. The court held that, at best, any assumption of what the client would have done is based on nothing more than conjecture. *See Baker Botts*, 224 S.W.3d at 734. Likewise, in *Longaker v. Evans*, 32 S.W.3d 725 (Tex. App.—San Antonio 2000, pet. withdrawn by agr.), the appellate court rejected as mere specula-

tion any assumption as to the deceased client's motives or intent when she terminated a trust whose proceeds would have benefited her son but instead went to the brother "advising" her to terminate the trust. In *Longaker*, the court noted that "while there is much speculation that the trust termination was not the result of [the decedent's] free act, there is no competent evidence that [the beneficiary] wrongfully influenced or otherwise induced [the decedent] to do anything she did not otherwise intend to do." *Longaker*, 32 S.W.3d at 734. Instead, "all indications are it was what [the decedent] wanted and there is no evidence of a contrary intent." *Longaker*, 32 S.W.3d at 735. In the absence of competent evidence demonstrating the deceased client never intended to divest her son of the trust assets, the court determined that it was improper to make that assumption. *Longaker*, 32 S.W.3d at 734–35. The court therefore held there was no evidence of causation or damages. *Longaker*, 32 S.W.3d at 734–35.

Some courts have held that, as a general rule, expert testimony is needed to prove causation in a legal malpractice case. *See Turtur & Associates, Inc. v. Alexander*, 86 S.W.3d 646, 652 (Tex. App.—Houston [1st Dist.] 2001), *rev'd on other grounds*, 146 S.W.3d 113 (Tex. 2004); *Onwuteaka v. Gill*, 908 S.W.2d 276, 281 (Tex. App.—Houston [1st Dist.] 1995, no writ). When a layperson would ordinarily be competent to make a determination on causation, however, expert testimony is not required. *See Turtur*, 86 S.W.3d at 652 (expert testimony not required if causal connection is obvious); *Arce v. Burrow*, 958 S.W.2d 239, 252 (Tex. App.—Houston [14th Dist.] 1997), *rev'd on other grounds*, 997 S.W.2d 229 (Tex. 1999) (citing *Delp v. Douglas*, 948 S.W.2d 483, 495 (Tex. App.—Fort Worth 1997), *rev'd on other grounds*, 987 S.W.2d 879 (Tex. 1999)) (adopting rule previously applied in medical malpractice cases that expert testimony not required in cases where layperson competent to determine causation).

Note, however, that the determination of proximate cause differs in cases of malpractice involving the negligent handling of an appeal. Although the issue of proximate cause is usually a question of fact, the supreme court has determined that in a case of appellate legal malpractice it is a question of law. *Millhouse v. Wiesenthal*, 775 S.W.2d 626, 628 (Tex. 1989).

§ 1.32:4 Client Must Be Damaged

Amount of Damages: Another essential element of a malpractice action is that the client must sustain damage as a result of the attorney's negligence. *Fireman's Fund American Insurance Co. v. Patterson & Lamberty, Inc.*, 528 S.W.2d 67, 69–70 (Tex. App.—Tyler 1975, writ ref'd n.r.e.).

On proof that the attorney's negligence proximately caused the client's damage, proper recovery is the amount the client would have recovered from the original defendant. *See Schlosser v. Tropoli*, 609 S.W.2d 255 (Tex. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.) (upholding $100,000 judgment against attorney who allowed case to be dismissed for want of prosecution). The plaintiff in a legal malpractice case must also demonstrate that the alleged damages, including attorney's fees, were proximately caused by the breach of a duty by the defendant. *See Judwin Properties, Inc. v. Griggs & Harrison*, 911 S.W.2d 498, 507 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

In a malpractice action by a husband for the attorney's failure to raise the issue of retirement benefits and secure the benefits for the husband at the time of the divorce, the court found that the plaintiff had suffered no damage. The husband was in no worse position because of the subsequent partition of the benefits than he would have been if the benefits had been properly divided in the divorce suit eight years before. *Medrano v. Miller*, 608 S.W.2d 781, 784 (Tex. App.—San Antonio 1980, writ ref'd n.r.e.), *disapproved on other grounds by Cosgrove v. Grimes*, 774 S.W.2d 662, 665 (Tex. 1989).

If the attorney is found liable, any payment collected from the original defendant is credited against damages assessed against the attorney. *See Fireman's Fund*, 528 S.W.2d at 70.

If a judgment is entered against a client because of the attorney's negligence, the client may recover the amount of the judgment from the attorney even if the client has not yet paid the judgment. *Montfort v. Jeter*, 567 S.W.2d 498, 499–500 (Tex. 1978).

Recovery in a malpractice action is not limited to actual damages but may also include damages for mental anguish and exemplary damages. *See Montfort*, 567 S.W.2d at 499–500.

Requirement of Actual Damages: The client must suffer actual damage in order to recover from a negligent attorney. In *Philips v. Giles*, 620 S.W.2d 750 (Tex. App.—Dallas 1981, no writ), the court upheld an attorney's plea in abatement in a malpractice suit on the grounds that the client-plaintiff's suit was premature. In the client's divorce, the attorney had negotiated a settlement in which the husband agreed to pay the wife $500,000 in monthly installments over five years, and the attorney allegedly told the wife she would owe no taxes on the settlement. After the wife's accountant told her that the monthly payments were taxable, she began paying taxes and sought reimbursement from the attorney. The appellate court held the malpractice action premature since no actual tax liability had been established. *See also Cosgrove*, 774 S.W.2d at 665–66 (damages based on amount of damages that could have been recovered from defendant in underlying suit but for attorney's inadequate representation); *Ballesteros v. Jones*, 985 S.W.2d 485 (Tex. App.—San Antonio 1998, pet. denied) (damages based on difference between settlement received and best settlement possible, but for attorney's inadequate representation).

Deciding when an action is premature, however, is not always straightforward. In *Bailey v. Travis*, 622 S.W.2d 143 (Tex. App.—Eastland 1981, writ ref'd n.r.e.), the court upheld a summary judgment for the attorney in a malpractice action. Travis had represented Bailey in a case, but Bailey hired a different attorney to appeal that case. While appeal was pending, Travis successfully sued Bailey for attorney's fees from the first case. Bailey later sued Travis for malpractice in the first trial, but Travis successfully moved for summary judgment on the basis that, under Tex. R. Civ. P. 97, the malpractice action should have been filed as a compulsory counterclaim when Travis sued Bailey for attorney's fees. In upholding the summary judgment, the appeals court held that Bailey had been damaged as a result of the alleged malpractice at the time he filed his answer in Travis's suit for fees. Accordingly, said the court, "Bailey's claim . . . had ripened into an enforceable cause of action, even though the full extent of his damages might not have been known." *Bailey*, 622 S.W.2d at 144. See section 1.34:1 below for a discussion of when a cause of action accrues.

§ 1.32:5 Additional Meritorious Action

In addition to establishing the defendant-attorney's primary negligence, the plaintiff-client must often prove an additional meritorious lawsuit in a legal malpractice action to establish that he would have prevailed in the suit that is the subject of the malpractice action. The plaintiff-client must establish that the underlying cause of action was meritorious, that it would have resulted in a favorable judgment but for the attorney's negligence, and that the judgment could have been collected. *See Lynch v. Munson*, 61 S.W. 140 (Galveston 1901, no writ).

§ 1.32:6 Breach-of-Contract Action

Most Texas courts have not allowed the plaintiff to divide or fracture claims arising out of an attorney's alleged bad legal advice or improper representation into separate claims for negligence, breach of contract, or fraud. *See Murphy v. Gruber*, 241

S.W.3d 689, 692–97 (Tex. App.—Dallas 2007, pet. denied) (discussion of Texas law precluding fracturing legal malpractice claims into multiple causes of action); *Aiken v. Hancock*, 115 S.W.3d 26, 28–29 (Tex. App.—San Antonio 2006, pet. denied) (affirming summary judgment on plaintiff's claims of DTPA violations and breach of fiduciary duty and concluding that claims should not have been divided and were "thinly veiled" claims of legal malpractice); *Goffney v. Rabson*, 56 S.W.3d 186, 190–94 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (discussion and application of Texas law precluding "dividing legal malpractice claims" into claims of breach of contract, DTPA violations, and breach of fiduciary duty).

Rather, the courts have held that the "real issue remains one of whether the professional exercised that degree of care, skill, and diligence that professionals of ordinary skill and knowledge commonly possess and exercise." *Averitt v. PriceWaterhouseCoopers L.L.P.*, 89 S.W.3d 330, 333 (Tex. App.—Fort Worth 2002, no pet.); *see also Kimleco Petroleum, Inc. v. Morrison & Shelton*, 91 S.W.3d 921, 924 (Tex. App.—Fort Worth 2002, pet. denied) ("Generally, courts do not allow a case arising out of an attorney's alleged bad legal advice or improper representation to be split out into separate claims for negligence, breach of contract, or fraud, because the real issue remains one of whether the professional exercised that degree of care, skill, and diligence that professionals of ordinary skill and knowledge commonly possess and exercise. . . . Regardless of the theory a plaintiff pleads, as long as the crux of the complaint is that the plaintiff's attorney did not provide adequate legal representation, the claim is one for legal malpractice.") (internal citation omitted); *Ersek v. Davis & Davis, P.C.*, 69 S.W.3d 268, 274–75 (Tex. App.—Austin 2002, pet. denied) (policy reasons behind rule precluding the fracturing of legal malpractice claims); *Goffney*, 56 S.W.3d at 190–94; *Sledge v. Alsup*, 759 S.W.2d 1, 2 (Tex. App.—El Paso 1988, no writ).

Therefore, when the complaint is essentially that the attorney did not provide adequate legal representation, the claim is one for legal malpractice. *See Greathouse v. McConnell*, 982 S.W.2d 165, 172 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); *see also Averitt*, 89 S.W.3d at 334 (cause of action based on attorney's alleged failure to perform professional service is tort rather than breach of contract, regardless of whether written contract providing for professional services existed between attorney and client).

§ 1.33 Who Can Sue for Legal Malpractice

§ 1.33:1 No Private Actions Under Texas Disciplinary Rules of Professional Conduct

The Texas Disciplinary Rules of Professional Conduct exist solely as professional sanctions and do not create a private cause of action for malpractice. Comment 15 in the preamble states: "These rules do not undertake to define standards of civil liability of lawyers for professional conduct. Violation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached."

In *Martin v. Trevino*, 578 S.W.2d 763 (Tex. App.—Corpus Christi–Edinburg 1978, writ ref'd n.r.e.), the physician in a medical malpractice action filed a counterclaim against the attorney representing the plaintiff and alleged that the attorney knew the plaintiff's claim was frivolous, in violation of former DR 7-102(A). The court dismissed the counterclaim for failure to state a cause of action, because the remedy provided in the Texas Code of Professional Responsibility is a public, not a private, one; it entitles the physician to file a grievance complaint but not a malpractice action. *But see Quintero v. Jim Walter Homes, Inc.*, 709 S.W.2d 225, 233 (Tex. App.—Corpus Christi–Edinburg 1985, writ ref'd n.r.e.) (appellant should seek recovery in private cause of action against appellee's attorney whose violation of Texas Code of Professional Responsibility rendered postjudgment settlement agreement unenforceable). (Effective January 1, 1990, the Texas Code of Professional Responsibility was repealed and replaced with the Texas Disciplinary Rules of Professional Conduct.)

§ 1.33:2 Privity Generally Required

Texas law does not extend an attorney's liability for negligence beyond the client to third persons. *Bryan & Amidei v. Law*, 435 S.W.2d 587, 593 (Tex. App.—Fort Worth 1968, no writ). In the United States, the requirement of privity in the legal malpractice context originated in *National Savings Bank v. Ward*, 100 U.S. 195 (1879). In *Ward*, the defendant-attorney issued a certificate to his client stating that the client had good title to a tract of real property. The client was able to obtain a loan from the plaintiff, Savings Bank, based on the erroneous certificate. The client, however, "was insolvent and had no title whatever to the premises." *Ward*, 100 U.S. at 196. When the client defaulted on the loan, Savings Bank sued the attorney for malpractice. The trial court held that privity of contract, "arising from an actual employment of the defendant by the plaintiffs, is necessary to enable the latter to maintain the action." *Ward*, 100 U.S. at 196.

In *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780 (Tex. 2006), the Texas Supreme Court held that a personal representative of a deceased client has the requisite privity to maintain an estate-planning malpractice claim against a decedent's estate-planning attorney for negligence relating to the estate plan. In deciding whether the malpractice claim survives the client's death, the court reasoned that an estate planner's negligence results in the improper depletion of a client's estate. Therefore, this type of claim involves injury to the decedent's property. *See* Tex. Est. Code § 22.028 (defining the "personal property" of an estate to include interests in goods, money, and choses in action); *see also Cleveland v. United States*, No. 00-C-424, 2000 WL 1889640, at *3 (N.D. Ill. Dec. 28, 2000) (tort claim for financial loss resulting from estate-planning malpractice deemed action for damage to personal property); *Williams v. Adams*, 193 S.W. 404, 405 (Tex. App.—Texarkana 1917, writ ref'd) (tort claim alleging fraud, which resulted in financial loss to plaintiff, survived death of defendant because it involved wrongful acquisition of property). When an attorney's malpractice results in financial loss, the aggrieved client is fully compensated by recovery of that loss and the client may not recover damages for mental anguish or other personal injuries. *See Douglas v. Delp*, 987 S.W.2d 879, 885 (Tex. 1999). Thus, estate-planning malpractice claims seeking recovery for pure economic loss are limited to recovery for property damage. *See also O'Donnell v. Smith*, 197 S.W.3d 394 (Tex. 2006).

But in *Chapman Children's Trust v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 441–42 (Tex. App.—Houston [14th Dist.] 2000, pet. denied), an appellate court held that neither a trust nor an estate is a legal entity and, therefore, neither should be considered the client (because trusts were not clients, trusts have "no right of recovery, under any cause of action," as a matter of law, for conduct in connection with its representation of trustee).

In *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787 (Tex. 1999), the court held that, although persons not in privity with an attorney cannot sue the attorney for legal malpractice, a nonclient may sue an attorney for negligent misrepresentation without regard to the nonclient's lack of privity with the attorney.

§ 1.34 Defenses to Legal Malpractice

§ 1.34:1 Statute of Limitations

In Texas, malpractice claims are tort actions governed by the two-year statute of limitations, Tex. Civ. Prac. & Rem. Code § 16.003. If the suit is brought on a legitimate breach-of-contract theory based on a contractual relationship, it is governed by the four-year statute of limitations, Tex. Civ. Prac. & Rem. Code § 16.051. However, malpractice actions have been barred by the two-year statute even though the pleadings were couched in breach-of-contract language and filed within four years of the alleged malpractice. *See Woodburn v. Turley*, 625 F.2d 589 (5th Cir. 1980); *Gabel v. Sandoval*, 648 S.W.2d 398 (Tex. App.—San Antonio 1983, writ dism'd); *Citizens State Bank v. Shapiro*, 575 S.W.2d 375 (Tex. App.—Tyler 1978, writ ref'd n.r.e.).

Beginning of Period: As a general rule, the statute of limitations begins to run in legal malpractice actions when the tort occurs. This rule has been interpreted variously as the time the negligence occurs, *Crawford v. Davis*, 148 S.W.2d 905 (Tex. App.—Eastland 1941, no writ), and as the time the plaintiff's damages are sustained as a result of the negligence, *Atkins v. Crosland*, 417 S.W.2d 150 (Tex. 1967). The current rule is the one stated in *Atkins*, that the period begins when "the force wrongfully put in motion produces the injury, the invasion of personal or property rights accruing at that time." *Atkins*, 417 S.W.2d at 153.

In a malpractice action for failing to secure an express lien in a deed and thus subordinating the client's lien, the court determined that the limitations period began when the faulty deed was filed, not when the plaintiff later suffered damage as a result of the negligence. *Cox v. Rosser*, 579 S.W.2d 73 (Tex. App.—Eastland 1979, writ ref'd n.r.e.).

When an attorney negligently advised a client to execute a release that inadvertently surrendered the client's entire cause of action, the limitations period began when the client detrimentally relied on the attorney's advice and signed the release. The times when the advice was given and when the damage occurred were not controlling. *Pack v. Taylor*, 584 S.W.2d 484 (Tex. App.—Fort Worth 1979, writ ref'd n.r.e.); *see also Zidell v. Bird*, 692 S.W.2d 550 (Tex. App.—Austin 1985, no writ) (discussing rule for determining when negligence cause of action accrues).

"Discovery Rule": Before 1988, courts had declined to extend the "discovery rule" to legal malpractice actions. In 1988, the supreme court imposed the discovery rule in legal malpractice actions. *See Willis v. Maverick*, 760 S.W.2d 642 (Tex. 1988). Used most frequently in medical malpractice actions, the rule begins the limitations period when the plaintiff discovers an injury if the plaintiff could not know of the injury at the time it occurred.

Statute Tolled While Underlying Lawsuit Appealed: When an attorney allegedly commits malpractice while providing legal services in the prosecution or defense of a claim that results in litigation, the statute of limitations on the malpractice claim against the attorney is tolled until all appeals on the underlying claim are exhausted or the litigation is otherwise finally concluded. *Apex Towing Co. v. Tolin*, 41 S.W.3d 118, 119 (Tex. 2001). Limitations are tolled for the second cause of action because the viability of the second cause depends on the outcome of the first. *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154 (Tex. 1991).

Fraudulent Concealment: In *Anderson v. Sneed*, 615 S.W.2d 898 (Tex. App.—El Paso 1981, no writ), the court considered the effect of fraudulent concealment by the attorney on the running of the period of limitations. In a personal injury case, the client's cause of action against the attorney arose two years after the date of the client's accident, for on that date the client's personal injury suit was barred by limitations. The client did not file the legal malpractice action within two years from the time his cause of action actually accrued against the attorney, but the appeals court remanded the case to the trial court to determine whether the attorney had fraudulently concealed his negligence from the plaintiff. The running of the statute is tolled when the attorney fraudulently conceals the negligence from the client. *McClung v. Johnson*, 620 S.W.2d 644 (Tex. App.—Dallas 1981, writ ref'd n.r.e.); *see also Crean v. Chozick*, 714 S.W.2d 61 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.) (client's allegations that attorney failed to disclose legal effect of signed requests for admissions raised material fact issue on concealment, thus tolling statute of limitations).

§ 1.34:2 Good-Faith Defense

The good-faith defense is the equivalent of the error-in-judgment rule. See section 1.32:2 above.

§ 1.35 Potential Areas for Legal Malpractice

§ 1.35:1 Attorney's Fees

"[A]t least 20 percent and perhaps in excess of 30 percent of all malpractice claims and counterclaims arise directly or indirectly from disputes over fees." Jeffrey M. Smith, *The Pitfalls of Suing Clients for Fees*, 69 A.B.A. J. 776, 778 (1983). "Our experience indicates that from ten to fifteen percent of all legal malpractice claims are direct or indirect results of fee disputes. Many times the attorney who sues for fees spends more nonbillable hours in defense of a negligence counterclaim than the original suit for fees was worth." Texas Lawyer's Insurance Exchange advertisement, 46 Tex. B.J. 215 (1983).

§ 1.35:2 Failure to Convey Settlement Offer to Client

Under Tex. Disciplinary Rules Prof'l Conduct R. 1.02(a), an attorney must inform clients of offers of settlement made by the opposing party. *See also* Tex. Disciplinary Rules Prof'l Conduct R. 1.02 cmts. 2, 3.

In *Smiley v. Manchester Insurance & Indemnity Co.*, 375 N.E.2d 118, 122–23 (Ill. 1978), an attorney's failure to convey a settlement agreement to his client was found to be negligence as a matter of law.

§ 1.35:3 Failure to Timely Pursue Client's Claim

An attorney who negligently lets the statute of limitations run on a client's cause of action becomes liable for any amount the client could have collected from the original defendant. *Patterson & Wallace v. Frazer*, 79 S.W. 1077 (Tex. App. 1904, no writ); *Fox v. Jones*, 14 S.W. 1007 (Tex. Ct. App. 1889).

§ 1.36 Procedures to Help Avoid Malpractice Actions

The procedures described below can help reduce the chances of facing a malpractice claim.

§ 1.36:1 Calendaring System

To avoid missing important deadlines, every firm should have an effective calendaring system that includes all cases the firm handles, not just those in the litigation section. Deadlines are crucial to all types of law practice. For example, one attorney postponed drafting a will for so long that the testator died, and the expected beneficiary sued for malpractice. *See Estate of Arlitt v. Paterson*, 995 S.W.2d 713 (Tex. App.—San Antonio 1999, pet. denied). When a tickler system is set up so that every file comes up for regular review, problems like this can be avoided. Files coming up for review may need no action other than being "re-tickled," but the review provides the attorney a good occasion to write the client that things are proceeding as expected or to explain why no immediate action is necessary. The system also provides incentive to make progress on files that are not urgent and that would otherwise remain idle for too long.

§ 1.36:2 Engagement and Nonengagement Letters

As with any representation, a well drafted engagement letter and fee agreement can both provide protection to the attorney and be beneficial to the client. The agreement should set out the scope of the engagement as well as the method of calculating and collecting fees. If entering into a joint representation of, for example, co-applicants for guardianship, the agreement should

also discuss potential conflicts of interest and the expected course of action in the event of an actual future conflict. The agreement may also contain dispute resolution provisions. See form 1-1 in this chapter for a sample engagement letter and fee agreement.

Attorneys should always write nonengagement letters when they decline or withdraw from employment and should keep a permanent file of these letters. This practice can eliminate many potential malpractice actions based on claims that an attorney failed to pursue a claim for a client.

§ 1.36:3 File Retention

As a conservative estimate, files should be kept intact for four years after a matter is completed, because most malpractice claims are filed within two to four years of that time. Some files should be kept for even longer, however, such as those involving a minor and those in which the client was particularly troublesome. Also, files concerning clients who refused legal advice should be retained and should contain a copy of the letter to the client detailing the advice given, reasons for the advice, and confirmation that the client declined to accept the advice. Records of clients' trust accounts must be maintained for at least five years after final disposition of the underlying matter. Tex. Rules Disciplinary P. R. 15.10; *see also* Tex. Disciplinary Rules Prof'l Conduct R. 1.14(a).

§ 1.36:4 Supervision of Support Staff and New Associates

Attorneys need to supervise their support staff and new associates closely; if, for example, a law clerk arrives at the wrong answer to an important question, the attorney is the one who will take the wrong action and then face a possible malpractice suit. Clerks should be told to document their research so that its accuracy can be verified, and new secretaries should be responsible for filing petitions only if the attorney is certain that they know where and by when to file them. In short, all personnel must know both substantively and procedurally what their jobs require. Careful screening and interviewing of applicants can help, of course, as can hiring only professional secretaries and paralegals.

§ 1.36:5 Avoiding Overload

Many malpractice suits result from mistakes made during periods of personal stress, and some attorneys let themselves become overextended or burdened with too many cases and other responsibilities so that they lose both perspective and effectiveness. For their clients' sake as well as their own, many attorneys would be wise to slow down the pace and offer each other support when signs of stress, such as abuse of alcohol or other drugs, become evident. The Texas Lawyers' Assistance Program, which may be contacted at 1-800-343-8527, is an excellent resource for obtaining immediate peer support for attorneys whose lives or practices are suffering because of physical or mental illness, including substance abuse or emotional distress. See section 1.21 above.

§ 1.37 Standard of Care for Specialists

All Texas attorneys, whether specialized or not, appear now to be under the same standard of care. However, attorneys who have been board certified as specialists in Texas and who hold themselves out to the public as specialists may eventually be held to a higher standard, perhaps the same standard of care as that applied to similar specialists.

Texas courts have held in medical malpractice cases that specialists must exercise the same degree of skill as similar specialists, rather than the skill of a general practitioner. *King v. Flamm*, 442 S.W.2d 679 (Tex. 1969).

At least one other jurisdiction has held legal specialists to a higher standard of care than the ordinary practitioner. In *Wright v. Williams*, 47 Cal. App. 3d 802, 810, 121 Cal. Rptr. 194, 199 (1975), a case involving a maritime law specialist, the California court of appeals held:

> One who holds himself out as a legal specialist performs in similar circumstances to other specialists but not to general practitioners of the law. We thus conclude that a lawyer holding himself out to the public and the profession as specializing in an area of the law must exercise a skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field.

§ 1.38 Standard of Care for Guardian Ad Litem

The court of appeals held in *Byrd v. Woodruff*, 891 S.W.2d 689 (Tex. App.—Dallas 1994, writ dism'd by agr.), that a guardian ad litem appointed under Tex. R. Civ. P. 173 (amended in 2005) has, in some cases, fiduciary duties to the minor and can be held liable for a breach of those duties. Although recognizing that the relationship of the guardian ad litem to the controversy is only that of an appointee of the court and not that of a participant, the Dallas court held that a person acting as guardian ad litem may be held liable for negligence in performing his duty. The court noted that a guardian is charged with the duty to properly and prudently manage and control the ward and the ward's estate, citing former section 110(g) of the Texas Probate Code, and that a personal representative has a fiduciary duty to maintain and preserve the estate's assets. Further, the guardian ad litem has a duty to evaluate the damages suffered by the minor, the adequacy of the settlement, the proposed apportionment of settlement proceeds among the interested parties, the proposed manner of disbursement of the settlement proceeds, and the amounts of attorney's fees charged by the minor's attorney. *Byrd*, 891 S.W.2d at 707.

The *Byrd* court rejected the theory that the guardian ad litem is an officer of the court and therefore under the protection of judicial immunity from civil liability. Rather, the guardian ad litem is the personal representative of the minor's interests whose actions and decisions are not under the direction of the court. The court reasoned that if the guardian ad litem were granted complete judicial immunity, the minor would be denied any protection against acts of incompetence or bad faith committed by his guardian ad litem.

As a result, a guardian ad litem who has replaced a minor's next friend can be liable in a civil action for damages resulting from a breach of his duties as a personal representative of the minor. *Byrd*, 891 S.W.2d at 710.

Note that since the facts under *Byrd* arose, Texas Probate Code section 681 (now Tex. Est. Code §§ 1104.351–.358) was enacted and section 110 was repealed. In addition to Tex. R. Civ. P. 173.1–.7, Texas Estates Code chapter 1054, subchapter B, now authorizes the appointment of guardians ad litem. This section specifically states that a guardian ad litem is an officer of the court. Tex. Est. Code § 1054.054(a). See section 1.41 below for discussion of a claim against an attorney for the next friend in the same case.

Further, the court in *Delcourt v. Silverman*, 919 S.W.2d 777 (Tex. App.—Houston [14th Dist.] 1996, writ denied), held that a guardian ad litem appointed under Texas Family Code section 11.10 (now section 107.002) is absolutely immune from liability for actions taken pursuant to and within the scope of employment, provided that the appointment contemplates the ad litem's acting as an extension of the court. However, under Family Code section 107.009, a guardian ad litem may be liable for civil damages arising from an action taken, a recommendation made, or an opinion given with conscious indifference, with

reckless disregard to the safety of another, in bad faith, or with malice or that is grossly negligent or willfully wrongful. Tex. Fam. Code § 107.009.

The Texas legislature has enacted protection for guardians ad litem serving under Estates Code section 1054.051, 1102.001, or 1202.054. The statute provides that a guardian ad litem who is appointed to represent the interests of an incapacitated person in a guardianship proceeding involving the creation, modification, or termination of a guardianship is not liable for civil damages arising from a recommendation made or an opinion given in the capacity of guardian ad litem unless such recommendation or opinion is willfully wrongful, given with conscience indifference or reckless disregard to the safety of another, given in bad faith or with malice, or grossly negligent. Tex. Est. Code § 1054.056.

§ 1.39 Standard of Care for Attorney Ad Litem

The Texas Disciplinary Rules of Professional Conduct address the dilemma an attorney faces if a client is suffering from a mental disability. If an attorney believes his client has diminished capacity and action is required to protect the client, the attorney may take reasonable protective action. Tex. Disciplinary Rules Prof'l Conduct R. 1.16. This may include consulting with others that have the capacity to protect the client and, when appropriate, seeking the appointment of a guardian ad litem, attorney ad litem, amicus attorney, or conservator. The attorney may also submit an information letter to the court with jurisdiction to initiate guardianship proceedings for the client. Tex. Disciplinary Rules Prof'l Conduct R. 1.16.

Practice Pointer: Note that the Disciplinary Rules of Professional Conduct were amended in 2021, adding rule 1.16. The new rule calls on the attorney to "as far as reasonably possible, maintain a normal client-lawyer relationship with the client" when the client's capacity to make decisions is diminished. The amendments eliminated rule 1.02(g), which required the attorney to take protective action in circumstances in which the client lacked legal competence and action was needed to protect the client. See section 1.21 above.

An attorney is permitted to reveal confidential information in order to comply with a court order, a disciplinary rule, or other law. Tex. Disciplinary Rules Prof'l Conduct R. 1.05(c)(4). The attorney may reveal unprivileged client information if it is necessary to represent the client effectively. Tex. Disciplinary Rules Prof'l Conduct R. 1.05(d)(2)(i). These rules do not, however, prohibit an attorney ad litem from defending the client in a guardianship proceeding, since the disability already has been brought to the court's attention.

Furthermore, to the extent that a guardian or other advocate becomes aware of any specific acts of abuse, neglect, or exploitation, he is required to report it to the Texas Health and Human Services Commission and Texas Department of Family and Protective Services. *See* Tex. Hum. Res. Code § 48.051. Section 48.051(c) provides that the duty imposed to report the abuse, neglect, or exploitation includes a person "whose knowledge concerning possible abuse, neglect, or exploitation is obtained during the scope of the person's employment or whose professional communications are generally confidential, including an attorney, clergy member, medical practitioner, social worker, employee or member of a board that licenses or certifies a professional, and mental health professional." *See* Tex. Hum. Res. Code § 48.051. Therefore, not only is a guardian required to report such abuse, neglect, or exploitation, but so are an attorney ad litem, guardian ad litem, and employee of the ward's trust as well. The required report may be made orally or in writing but must include the following:

1. the name, age, and address of the elderly or disabled person;
2. the name and address of any person responsible for the elderly or disabled person's care;
3. the nature and extent of the elderly or disabled person's condition;

4. the basis of the reporter's knowledge; and
5. any other relevant information.

See Tex. Hum. Res. Code § 48.051(d).

A guardian or other person is subject to criminal charges if he fails to report the abuse, neglect, or exploitation as required by Human Resources Code section 48.051. *See* Tex. Hum. Res. Code § 48.052(a). If a failure to report is discovered, he may be charged with a class A misdemeanor or, in some instances, a state jail felony. *See* Tex. Hum. Res. Code § 48.052(a).

If the victim was a resident of a nursing home, the guardian or other person should also contact the Department of Health and Human Services at 1-800-458-9858.

Although Tex. Est. Code § 1001.001 recognizes that a guardianship should be designed to encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person, an attorney ad litem representing a disabled client in a guardianship must still counsel the client to the extent possible, advise him of his legal rights, and determine if a preference exists about the selection of a guardian. In general, the attorney ad litem is required to discuss with the client to the greatest extent possible the law and facts of the case, the ward's legal options regarding disposition of the case, the grounds on which the guardianship is sought, and whether alternatives to guardianship would meet the ward's needs and avoid the need for the appointment of a guardian. Tex. Est. Code § 1054.004(a).

§ 1.40 Ex Parte Contacts

An attorney or a guardian ad litem who is an attorney is subject to the Texas Disciplinary Rules of Professional Conduct. According to the rules, a communication is considered ex parte if the contact is made for the purpose of influencing the court concerning the matter other than—

1. in the course of official proceedings in the case;
2. in writing if the attorney or guardian ad litem promptly delivers a copy of the writing to opposing counsel or to the adverse party if that party is not represented by an attorney; or
3. orally on adequate notice to opposing counsel or to the adverse party if that party is not represented by an attorney.

Tex. Disciplinary Rules Prof'l Conduct R. 3.05(b).

Similarly, the Texas Code of Judicial Conduct prohibits a judge from ex parte communications with attorneys or parties involved in a case. Tex. Code Jud. Conduct, Canon 3B(8), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. B.

§ 1.41 Responsibility of Guardian's Attorney to Ward

Overview: The age-old question of who is the client has become increasingly complicated in recent years. Generally, the attorney-client relationship is a contractual relationship whereby the attorney agrees to render professional services for the client. *Parker v. Carnahan*, 772 S.W.2d 151, 156 (Tex. App.—Texarkana 1989, writ denied). The resulting contract may be either expressed or implied from the actions of the parties. Once established, the attorney-client relationship imposes numerous duties on the attorney. These include the duties to use the utmost good faith in dealings with the client, to maintain the confidences of the client, and to use reasonable care in rendering professional services to the client. *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi–Edinburg 1991, writ denied); *see also Yaklin v. Glusing, Sharpe & Krueger*,

875 S.W.2d 380, 383 (Tex. App.—Corpus Christi–Edinburg 1994, no writ). For a discussion of representing clients with diminished capacity, see sections 1.21 and 1.39 above.

Possible Existence of Attorney-Client Relationship: An issue has arisen in recent years concerning whether an attorney representing a guardian also represents the ward. At least one Texas court has recognized that a guardian's retention of an attorney for a ward establishes an attorney-client relationship as between the attorney and the ward. *See Daves v. Commission for Lawyer Discipline*, 952 S.W.2d 573 (Tex. App.—Amarillo 1997, writ denied). In *Daves*, the parents of a minor retained an attorney to file an application to be appointed the minor's legal guardians. The parents then also sought permission from the guardianship court to allow the attorney to represent the minor ward in pursuing a cause of action for personal injuries. After the settlement of a fee and other disputes with the parents' prior attorney, the attorney was charged with violating the Texas Disciplinary Rules of Professional Conduct and subsequently suspended from the practice of law. The violations included conflicts of interest in the representation of both the parents and the minor ward.

The attorney first alleged that he had no attorney-client relationship with the minor ward as a matter of law because he was not "court-appointed." *Daves*, 952 S.W.2d at 576. The appellate court, however, held that comment 12 to then current rule 1.02 of the Disciplinary Rules of Professional Conduct does not provide that an attorney must be court-appointed to represent a person under a disability. *Daves*, 952 S.W.2d at 577 (comments to rule 1.02 apply only to that particular rule and not to the other rules, including those regarding conflicts of interest). The court further held, regardless of rule 1.02, that the actions of the attorney and the parents clearly demonstrated that the attorney was representing the minor ward. The court held that "[t]he attorney-client relationship may be implied if the parties by their conduct manifest an intent to create such a relationship." *Daves*, 952 S.W.2d at 577. Finally, the court held that even if rule 1.02 did apply, the parents, as coguardians, had a duty to the minor ward to protect the child's legal interests, and they retained the attorney to assist them in pursuing the minor ward's claims. Therefore, even though retained by the parents, the attorney "had a duty not only to the Parents as co-guardians, but also to the Child whose claims he was asserting, and the attorney-client relationship was established between the Child and [the attorney] under comment 12 to Rule 1.02." *Daves*, 952 S.W.2d at 577.

The possible existence of an attorney-client relationship between the guardian's attorney and the ward could also be argued based on Texas decisions that have found an attorney-client relationship existed between a minor child and the attorney retained by the child's next friend. In *Byrd v. Woodruff*, 891 S.W.2d 689 (Tex. App.—Dallas 1994, writ dism'd by agr.), a minor's parents, as next friend, retained an attorney to pursue a cause of action relating to personal injuries incurred by the minor child. The court also appointed a guardian ad litem to represent the minor's best interests. A settlement was ultimately reached, and the minor's settlement proceeds were to be placed in a trust for the benefit of the minor. The court approved the proposed settlement. On reaching majority, the emancipated minor sued the attorney for negligence, legal malpractice, and breach of fiduciary duty. *Byrd*, 891 S.W.2d at 697. The trial court granted the attorney's motion for summary judgment, resulting in the dismissal of the emancipated minor's claims. Reversing the trial court, the court of appeals held that the attorney acted as the minor's attorney, and an attorney-client relationship existed between the attorney and the minor. As such, the attorney "had a duty to protect [the minor's] interests." *Byrd*, 891 S.W.2d at 701. This duty included seeing that the minor's assets were properly managed and protected for her benefit. The appellate court further held that the attorney could be liable for a third party's negligence or wrongful conduct when the conduct is foreseeable. *Byrd*, 891 S.W.2d at 701; *see also Broughton v. Humble Oil & Refining Co.*, 105 S.W.2d 480, 485 (Tex. App.—El Paso 1937, writ ref'd) (attorney retained by agent deemed to be attorney of principal's selection). See section 1.38 above for a discussion of the claim against the guardian ad litem in *Byrd*.

Although a Texas case directly on point has yet to be decided as of the publication date of this edition, Texas could follow the lead of other states that have recognized the existence of an attorney-client relationship between the attorney and both the guardian and the ward. *Schwartz v. Cortelloni*, 685 N.E.2d 871 (Ill. 1997) (holding that attorney represented ward by representing guardian in sale of ward's property interest); *see Fickett v. Superior Court*, 558 P.2d 988, 990 (Ariz. Ct. App. [Div. 2] 1976) (rejecting attorney's claim of no privity, court found that attorney who undertakes to represent guardian of incompetent person assumes relationship not only with guardian but also with ward). Like Texas, those states follow the general rule that an attorney owes a duty only to the person who is his client. However, those states have recognized that an exception must exist when an attorney is hired by a client specifically for the purpose of benefiting a third party. *See Schwartz*, 685 N.E.2d at 875. In determining whether a duty is owed to a third party, the key factor to be considered is whether the attorney acted at the direction or on behalf of the client for the benefit of the third party. *Schwartz*, 685 N.E.2d at 876; *Pelham v. Griesheimer*, 440 N.E.2d 96, 99 (Ill. 1982).

Possible Duties Regardless of Privity: Texas law has long held that if an attorney acting for his client participates in fraudulent activities, his actions are "foreign to the duties of an attorney." But for years the issue was that either fraud was excluded from the attorney immunity defense or was an exception to it. Some courts of appeals have broadly held that the attorney immunity defense does not extend to an attorney's knowing participation in fraudulent activities on his client's behalf. *E.g., Toles v. Toles*, 113 S.W.3d 899, 911 (Tex. App.—Dallas 2003, no pet.); *Querner v. Rindfuss*, 966 S.W.2d 661, 666 (Tex. App.—San Antonio 1988, pet. denied) ("An attorney . . . is liable if he knowingly commits a fraudulent act or knowingly enters into a conspiracy to defraud a third person"). But other courts have provided a limited exception when the claims involve situations where the attorney's "knowing commission of a fraudulent act" is "outside the scope of his legal representation of the client." *See Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 483 (2015). In *Cantey Hanger, LLP*, the Texas Supreme Court finally adopted the more limited recognition and held that fraud is not an exception to attorney immunity. Rather, the defense does not extend to fraudulent conduct that is outside the scope of an attorney's legal representation of his client. Thus, an attorney who pleads the affirmative defense of attorney immunity has the burden to demonstrate that his alleged wrongful conduct, regardless of whether it is labeled fraudulent, is part of the discharge of his duties to his client. *E.g., Cantey Hanger, LLP* at 483 (citing *Dixon Financial Services, Ltd. v. Greenberg, Peden, Siegmyer & Oshman, P.C.*, No. 01-06-00696-CV, 2008 WL 746548, at *9 (Tex. App.—Houston [1st Dist.] Mar. 20, 2008, pet. denied); *see also Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 408 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (holding that claim against an attorney for conspiracy to defraud was not actionable if "the complained-of actions involve the filing of lawsuits and pleadings, the providing of legal advice upon which the client acted, and awareness of settlement negotiations—in sum, acts taken and communications made to facilitate the rendition of legal services to [the client]").

Therefore, depending on the facts of the case, an attorney could be held liable for fraud, conversion, conspiracy, unjust enrichment, breach of fiduciary duty, and constructive fraud. *Querner*, 966 S.W.2d at 670. But a claim of fraud will require a showing of the attorney's knowing participation. *See Cantey Hanger, LLP*, 467 S.W.3d at 483. Each claim must, however, be considered in light of the actions shown to have been taken by the attorney to determine whether he can be held liable for such actions. If the facts show that the attorney actively engaged in fraudulent conduct in furtherance of some conspiracy or otherwise, the attorney can be held liable. *Querner*, 966 S.W.2d at 666.

Similarly, the attorney may also be held liable if the facts show that an informal fiduciary or confidential relationship exists. *Querner*, 966 S.W.2d at 667. The supreme court has recognized the difficulty of formulating a definition of the term *fiduciary* that is sufficient to cover all cases. *Crim Truck & Tractor Co. v. Navistar International Transportation Corp.*, 823 S.W.2d 591, 593 n.3 (Tex. 1992). In Texas, certain informal relations may give rise to a fiduciary duty. These informal fiduciary relation-

ships have been called “confidential relationships” and may arise “where one person trusts in and relies upon another, whether the relation is a moral, social, domestic or merely personal one.” Confidential relationships exist in those cases “in which influence has been acquired and abused, in which confidence has been reposed and betrayed.” The existence of confidential relationships is usually a question of fact. *Crim Truck & Tractor Co.*, 823 S.W.2d at 594.

The unique relationship between the attorney representing the guardian and the ward raises issues concerning whether the guardian could be held liable to the ward in the absence of an attorney-client relationship. Consider the following hypothetical situation: A wife has been serving as guardian for her husband for years. The wife asks the attorney representing her as guardian to seek authority for her to withdraw all the community property from the estate of the husband ward under chapter 1353 of the Texas Estates Code, which allows for management of the community estate outside of court supervision and control. *See* Tex. Est. Code ch. 1353. The attorney knows that the wife is considering divorcing her husband and believes she will attempt to dispose of all community assets before divorce.

In this situation, the attorney has sufficient knowledge to be aware that the wife is seeking to manage and dispose of the ward’s assets outside the guardianship. If the attorney is successful in helping the wife gain unsupervised control of the community estate, does the attorney expose himself to claims of fraudulent conduct, conversion of the ward’s assets, and conspiracy, as well as allegations that an informal fiduciary or confidential relationship existed between the attorney and the ward? If so, does the attorney breach his fiduciary duty to the ward?

Consider another increasingly common situation in which the guardian is about to convert or has converted the ward’s assets. Does the attorney have a duty to advise the court of the theft? Rule 1.05(c)(7) and (8) of the Disciplinary Rules of Professional Conduct authorizes the disclosure, because conversion is a criminal or fraudulent act. *See* Tex. Disciplinary Rules Prof’l Conduct R. 1.05. The rules do not, however, mandate disclosure. This raises the question whether the special relationship between the attorney and the guardian imposes such a duty in light of the attorney’s ability to advise the court presiding over the guardianship and thus avoid or mitigate any damages.

Until this issue is decided by the supreme court, practitioners should be aware that certain actions could increase the potential exposure to such claims. For example, if the attorney signed the pleadings as attorney for the guardianship, it could be argued that he intended to represent the guardianship rather than the individual serving as guardian. *See Querner*, 966 S.W.2d 661. In *Querner*, the appellate court noted the fact that the attorney, even though retained by an executor, characterized his representation as “the attorney for the estate,” which raised a fact question whether there was privity or a fiduciary relationship between the attorney and the beneficiaries of the estate. *Querner*, 966 S.W.2d at 667.

[Sections 1.42 through 1.50 are reserved for expansion.]

II. Texas Deceptive Trade Practices–Consumer Protection Act (DTPA) Liability

§ 1.51 Application of Act to Legal Services

In 1993 the legislature added a professional services exemption to the Texas Deceptive Trade Practices–Consumer Protection Act (DTPA), thus reversing a case-law trend toward holding that professional services are subject to liability under the DTPA. *See DeBakey v. Staggs*, 612 S.W.2d 924 (Tex. 1981) (attorney’s unconscionable conduct actionable under DTPA); *Melody*

Home Manufacturing Co. v. Barnes, 741 S.W.2d 349 (Tex. 1987) (breach of implied warranty to repair in good and workmanlike manner actionable under DTPA); *but see Dennis v. Allison*, 698 S.W.2d 94 (Tex. 1985) (implied warranties do not include professional conduct). The Texas Business and Commerce Code provides that "[n]othing in this subchapter shall apply to a claim for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill." Tex. Bus. & Com. Code § 17.49(c).

But the section also provides exceptions to the exemption. The following acts would bring professional services back into the DTPA: an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion; a failure to disclose information in violation of Tex. Bus. & Com. Code § 17.46(b)(24); an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion; a breach of an express warranty that cannot be characterized as advice, judgment, or opinion; or a violation of section 17.46(b)(26). Tex. Bus. & Com. Code § 17.49(c). These exceptions apply to an action against both a professional rendering services and any entity that could be held vicariously liable for the professional's conduct. Tex. Bus. & Com. Code § 17.49(d).

§ 1.52 Statute of Limitations

All DTPA actions must be brought within two years of the date on which the act or practice occurred or within two years after the consumer discovered or reasonably should have discovered the act or practice. This period may be extended for 180 days if the plaintiff proves that failure to timely commence the action was caused by the defendant's knowingly engaging in conduct calculated to induce the plaintiff to refrain from or postpone commencing the action. Tex. Bus. & Com. Code § 17.565.

[Sections 1.53 through 1.60 are reserved for expansion.]

III. Grievances

§ 1.61 Grievance Procedure

A grievance may be filed with the State Bar of Texas by any person who believes that a rule of professional conduct has been violated by an attorney. In most cases, grievances must be filed within four years from the time of the alleged act of misconduct. *See* Tex. Rules Disciplinary P. R. 17.06.

When a complainant signs the grievance form, the attorney-client privilege is waived in order for the chief disciplinary counsel to investigate the complaint. *See* Tex. R. Evid. 503(d)(3); Tex. Disciplinary Rules Prof'l Conduct R. 1.05.

When the chief disciplinary counsel's office receives a grievance, an initial review is made to determine whether the grievance alleges facts that, if true, would constitute a violation of the Texas Disciplinary Rules of Professional Conduct. If the grievance does not allege such facts, it is dismissed as an inquiry, and the attorney will receive notification from the chief disciplinary counsel's office. There is no action required on the attorney's part when this occurs. If the grievance alleges facts that would constitute professional misconduct, the attorney will be notified of the complaint and given thirty days to respond to the allegations. The chief disciplinary counsel's office will review the response and investigate the facts to determine whether there is just cause to proceed into litigation. If just cause is not found, the case is set before a summary disposition panel for dismissal. If the panel does not agree the case should be dismissed, it will move forward. If just cause is found, the attorney

will then be notified of the rule violations and given twenty days to notify the chief disciplinary counsel's office whether he elects to have the complaint heard in a district court of proper venue, with or without a jury, or by an evidentiary panel of a grievance committee. It is very important that the attorney respond timely. Failure to timely file an election is conclusively deemed as an affirmative election to proceed to an evidentiary panel hearing. An attorney should consider retaining counsel to advise him as these new processes must be strictly adhered to.

The respondent or the Commission for Lawyer Discipline may appeal the judgment of the evidentiary panel to the Board of Disciplinary Appeals. Tex. Rules Disciplinary P. R. 2.23. An appeal from the decision of the board on an evidentiary proceeding is to the Supreme Court of Texas in accordance with Tex. Rules Disciplinary P. R. 7.11. Tex. Rules Disciplinary P. R. 2.27. If the complaint is heard in a district court, the judgment may be appealed as in civil cases generally. Tex. Rules Disciplinary P. R. 3.15.

[Sections 1.62 through 1.70 are reserved for expansion.]

IV. Language Considerations in Guardianship Matters

§ 1.71 Person First Respectful Language

Recent legislative measures have been passed with the intent to guide legislators in their use of language when drafting statutes regarding persons with disabilities. The legislation directs the legislature and the legislative council to avoid the use of certain language and to instead focus on "person first" language. *See* Tex. Gov't Code ch. 392.

The Person First Respectful Language Initiative notes that "language used in reference to persons with disabilities shapes and reflects society's attitudes toward persons with disabilities. Certain terms and phrases are demeaning and create an invisible barrier to inclusion as equal community members." Tex. Gov't Code § 392.001. The initiative suggests preferred terms and phrases for new and revised laws by requiring the use of language that places the person before the disability. Similarly, practitioners should consider the use of language as directed by the statute, which suggests eliminating the use of the following terms: *disabled*, *developmentally disabled*, *mentally disabled*, *mentally ill*, *mentally retarded*, *handicapped*, *cripple*, and *crippled*. Such language should be replaced as appropriate with the following terms: *persons with disabilities*, *persons with developmental disabilities*, *persons with mental illness*, and *persons with intellectual disabilities*. *See* Tex. Gov't Code § 392.002. While the new language is preferred, any statutes and resolutions that fail to use the preferred terms are not rendered invalid.

Form 1-1

This letter is furnished only as a basic example and should not be used as a standard form. The attorney must be careful to tailor the details of the letter to the facts of the particular case.

Engagement Letter and Fee Agreement

[**Date**]

[**Name and address of client**]

Re: Engagement of [**name of firm**] for the rendition of legal services regarding the guardianship of [**name of proposed ward**], an incapacitated person

[**Salutation**]

This letter confirms your agreement to retain this firm to represent you in the referenced matter and sets forth our agreement.

Scope of Representation. This engagement is limited to matters relating to the appointment of [**name of client**] as guardian of the person and estate of [**name of proposed ward**], an incapacitated person. Specifically, our representation of you with respect to this matter will include advising and assisting you with the filing of an application seeking [temporary guardianship/permanent guardianship/temporary and permanent guardianship/[and] creation of a trust under chapter 1301 of the Texas Estates Code] for [**name of proposed ward**]. Our services may also include advising you regarding the administration of the guardianship, if appointed, so that you may properly carry out your duties and responsibilities as guardian. Our representation will not, however, extend to tax matters or tax compliance matters.

Note that in order to enable us to render effective legal services, you must agree to keep us apprised of all facts and developments relating to this matter. This is very important, as any

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advice we give must be based on accurate and complete facts and information. Of course, we shall also keep you informed as to the progress of the case, and every effort will be made to expedite this matter promptly and efficiently according to the highest legal and ethical standards.

> The following text is optional, but advising the client of these requirements may help to avoid future fee disputes. This could alternatively be included in separate correspondence to the proposed client.

Guardianship Qualifications

Before we proceed with seeking your appointment as a guardian, you should be aware of the eligibility requirements and the potential reasons that a person would be found to be "ineligible" to be appointed as a guardian. Specifically, sections 1104.351–.358 of the Texas Estates Code provide that a person may not be appointed as a guardian if he is—

1. under the age of eighteen;

2. an incapacitated person;

3. a person who, because of inexperience, lack of education, or any other good reason, is incapable of properly and prudently managing and controlling the incapacitated person or his estate;

4. a person, institution, or corporation found unsuitable by the court;

5. a person whose conduct is notoriously bad (such as having been convicted of a felony);

6. a person who is a party or whose parent is a party to a lawsuit concerning or affecting the welfare of the incapacitated person, unless the court (a) determines that the lawsuit of the person who has applied to be appointed guardian is not in conflict with the lawsuit of the

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incapacitated person or (b) appoints a guardian ad litem to represent the interests of the incapacitated person throughout the litigation of the lawsuit;

7. a person indebted to the incapacitated person, unless the person pays the debt before appointment;

8. a person asserting a claim adverse to the incapacitated person or his property;

9. a person disqualified by the incapacitated person in a declaration signed by the incapacitated person, prior to his incapacity;

10. a person not certified to serve as a guardian as required by Texas Estates Code chapter 1104, subchapter F;

11. a nonresident of the state of Texas 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

12. a person found to have committed family violence who is subject to a protective order issued under chapter 85 of the Texas Family Code that protects the proposed ward.

You should advise us immediately if any of these disqualifications apply to you. Based on our understanding that you are qualified to serve, we will prepare an application for appointment of a guardian of the person and estate on your behalf, on receipt of the signed agreement and retainer.

You should also be aware of the possibility that a third party could contest your application to be appointed as guardian. The general rule is that anyone has standing to initiate or complain about actions relating to a guardianship of an incapacitated person. Also, the court could appoint a third party as guardian, either at your request or the request of another.

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Continue with the following.

Legal Fees and Expenses

In consideration of our representation, you agree to pay attorney's fees, based on the standard hourly rates (billed in [**specify**] of an hour increments) of the attorney working on this matter, as such hourly rates may be adjusted from time to time. [That hourly rate is currently $[**amount**] per hour./More than one attorney will be assisting with respect to this matter, and the attorneys all have varying hourly rates. A summary schedule showing the range of hourly rates is as follows: [**insert rates**].]

In addition, you agree to pay for reasonable expenses incurred by us in the performance of our work, such as travel expenses, delivery expenses, long-distance telephone charges, deposition costs, filing fees, printing and reproduction costs, and other similar expenditures (collectively, the "Related Expenses").

From time to time, we will bill you for legal services rendered pertaining to the matter and Related Expenses incurred by us in handling the matter during the period covered by the invoice. You agree to pay all invoices on a current basis within ten days following the mailing of each invoice.

Retainer

In order to commence work on this matter, we request an initial retainer of $[**amount**]. [**Explain how retainer will be charged**]. Note that the retainer is not an estimate of our fees and Related Expenses. It is difficult to predict exactly how much time will be required to complete the legal work regarding this matter. We will devote the time that we deem necessary to carry out the representation.

Furthermore, if the case becomes more involved, [we will no longer represent you in this matter if [**specify circumstances**]/our role will be limited if this matter becomes litigated/

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we may request the payment of an additional retainer or retainers in the amount of $[**amount**] or more and, if so requested, you must promptly deposit the additional retainer or retainers with us before [**specify, e.g.** we make an appearance in any litigation]]. [**Include if applicable:** The additional retainer is to be held by us (without liability to you for interest) until the conclusion of the case (or other termination of our representation under this agreement) and may be applied to litigation expenses incurred during the course of the litigation. On conclusion of the work or other termination of our representation under this letter, any excess funds in the trust account remaining from the retainer (after application to all charges by us provided for in this letter) will be refunded to you.]

Document Retention

This firm reserves the right and privilege to destroy a client's file [**years (not less than five)**] years from the date the file is closed. You are entitled to receive and make copies of any of the documents during that period of time, at your expense. Any documents obtained from you during our work on this matter will be returned to you at file closing or before that if requested. You may pick up the documents at our office, or we will arrange to have them shipped back to you at your expense. They may not be retained and stored beyond what is described above. Your signature accepting this agreement acts as an acknowledgment of our procedures relating to document retention.

Other Representation

You agree that our representation of you will not disqualify us from any representation adverse to you in matters that are not substantially related to the work handled for you under this agreement.

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Governing Law

The agreement shall be governed by the laws of the state of Texas and shall not be modified except by written agreement signed by all parties.

Attorney-Client Privileged Communication

You acknowledge and understand that our communications are protected by the attorney-client privilege. This privilege belongs to you. These communications should be kept confidential as to third parties that are not part of the attorney-client relationship. Disclosure of privileged attorney-client communications to third parties during the pendency of this matter could compromise our representation of you and hurt your case.

No Guarantee of Success

You acknowledge that we have not made any representations as to the ultimate success of the case or favorable outcome of the claims that may be advanced relating to any legal matter. You further acknowledge that any statement made by us regarding the successful outcome of any claim or defense of any claim is an opinion only and not a representation, warranty, or guarantee.

Rights and Responsibilities of Attorneys and Clients

One of the most important considerations in accepting an engagement is whether it will put the attorney or firm in conflict with any existing client interest. If such a conflict is discovered, we may be disqualified from continuing our representation in this matter. It is very important that you reconsider all the interests involved to be certain that you have advised us fully as to any possible conflicts of interest. If we determine that a conflict of interest does exist, we will notify all affected clients and will proceed in a manner consistent with the ethical standards contained in the Texas Disciplinary Rules of Professional Conduct.

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We must advise you that our representation is subject to our right to withdraw from representing you for any reason at our sole discretion. Additionally, while we are confident that none of the following will ever be a problem in our representation of you, the Texas Disciplinary Rules of Professional Conduct require us to advise you that we may withdraw at any time from representing a client if—

1. a client insists on presenting a claim or defense that is not warranted under existing law and cannot be supported by good-faith argument for an extension, modification, or reversal of existing law;

2. a client seeks to pursue an illegal, fraudulent, or criminal course of conduct;

3. a client insists that the firm pursue a course of conduct that is illegal, repugnant, imprudent, or that is prohibited under the Disciplinary Rules, or with which the firm has a fundamental disagreement;

4. a client, by other conduct, renders it unreasonably difficult for the firm to carry out its employment;

5. a client insists the firm engage in conduct that is contrary to the judgment and advice of the firm but not prohibited under the Disciplinary Rules;

6. a client fails substantially to fulfill an obligation to the firm regarding the firm's services, including an obligation to pay attorney's fees or expenses as agreed, and the client has been given reasonable warning that the firm will withdraw unless the obligation is fulfilled; or

7. other good cause for withdrawal exists.

All rights afforded under this agreement are cumulative. Any forbearance shown by either party in the exercise of these rights is not a waiver of those rights. Any express or

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implied waiver of rights with regard to any event or default that occurs shall under no circumstances be deemed a waiver of rights with regard to any subsequent event or default.

The Texas Supreme Court and courts of appeals have adopted the Texas Lawyer's Creed as a mandate to the legal profession in Texas. The creed requires our firm to advise you of the contents of the creed when undertaking to represent you. A copy of the Texas Lawyer's Creed is attached to this engagement letter for your review.

Facsimile and Electronic Transmission

By signing this agreement, you represent that you have been notified that we often use facsimile transmissions and electronic mail transmissions as forms of communication. It is possible that such transmissions may be intercepted by third parties. If you do not agree to the use of such transmissions, please notify us in writing.

We are delighted you have selected us for this engagement. While we cannot guarantee a particular outcome in your case, we do promise to do our very best on your behalf.

Your signature at the end of this document evidences your agreement to the terms of this engagement letter. We sincerely appreciate this opportunity to be of service to you.

Very truly yours,

[**Name of law firm**]

By:_____
[**Name of attorney**]

I, [**name of client**], hereby agree to the engagement of [**name of firm**] with respect to guardianship of the person and estate of [**name of proposed ward**], an incapacitated person, and I agree to the conditions and terms of the foregoing document pertaining to the represen-

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tation by [**name of firm**], including the payment of fees and expenses charged by [**name of firm**].

_____
[**Name of client**]
Date: _____

Notice to Clients

Texas law requires that all attorneys provide their clients with the following notice about the existence of the attorney grievance process: "The State Bar of Texas investigates and prosecutes professional misconduct committed by Texas attorneys. Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar Office of General Counsel will provide you with information about how to file a complaint. For more information, please call 1-800-932-1900. This is a toll-free telephone call."

The Texas Lawyer's Creed

I am a lawyer. I am entrusted by the People of Texas to preserve and improve our legal system. I am licensed by the Supreme Court of Texas. I must therefore abide by the Texas Disciplinary Rules of Professional Conduct, but I know that professionalism requires more than merely avoiding the violation of laws and rules. I am committed to this creed for no other reason than it is right.

Our Legal System

A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.

1. I am passionately proud of my profession. Therefore, "My word is my bond."

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2. I am responsible to assure that all persons have access to competent representation regardless of wealth or position in life.

3. I commit myself to an adequate and effective pro bono program.

4. I am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.

5. I will always be conscious of my duty to the judicial system.

Lawyer to Client

A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate means to protect and advance the client's legitimate rights, claims, and objectives. A lawyer shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest.

1. I will advise my client of the contents of this Creed when undertaking representation.

2. I will endeavor to achieve my client's lawful objectives in legal transactions and in litigation as quickly and economically as possible.

3. I will be loyal and committed to my client's lawful objectives, but I will not permit that loyalty and commitment to interfere with my duty to provide objective and independent advice.

4. I will advise my client that civility and courtesy are expected and are not a sign of weakness.

5. I will advise my client of proper and expected behavior.

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6. I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive conduct.

7. I will advise my client that we will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party.

8. I will advise my client that we will not pursue tactics which are intended primarily for delay.

9. I will advise my client that we will not pursue any course of action which is without merit.

10. I will advise my client that I reserve the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect my client's lawful objectives. A client has no right to instruct me to refuse reasonable requests made by other counsel.

11. I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.

Lawyer to Lawyer

A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer's conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.

1. I will be courteous, civil, and prompt in oral and written communications.

2. I will not quarrel over matters of form or style, but I will concentrate on matters of substance.

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3. I will identify for other counsel or parties all changes I have made in documents submitted for review.

4. I will attempt to prepare documents which correctly reflect the agreement of the parties. I will not include provisions which have not been agreed upon or omit provisions which are necessary to reflect the agreement of the parties.

5. I will notify opposing counsel, and, if appropriate, the Court or other persons, as soon as practicable, when hearings, depositions, meetings, conferences or closings are canceled.

6. I will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided legitimate objectives of my client will not be adversely affected.

7. I will not serve motions or pleadings in any manner that unfairly limits another party's opportunity to respond.

8. I will attempt to resolve by agreement my objections to matters contained in pleadings and discovery requests and responses.

9. I can disagree without being disagreeable. I recognize that effective representation does not require antagonistic or obnoxious behavior. I will neither encourage nor knowingly permit my client or anyone under my control to do anything which would be unethical or improper if done by me.

10. I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses. I will not be influenced by any ill feeling between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.

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11. I will not take advantage, by causing any default or dismissal to be rendered, when I know the identity of an opposing counsel, without first inquiring about that counsel's intention to proceed.

12. I will promptly submit orders to the Court. I will deliver copies to opposing counsel before or contemporaneously with submission to the Court. I will promptly approve the form of orders which accurately reflect the substance of the rulings of the Court.

13. I will not attempt to gain an unfair advantage by sending the Court or its staff correspondence or copies of correspondence.

14. I will not arbitrarily schedule a deposition, court appearance, or hearing until a good faith effort has been made to schedule it by agreement.

15. I will readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party.

16. I will refrain from excessive and abusive discovery.

17. I will comply with all reasonable discovery requests. I will not resist discovery requests which are not objectionable. I will not make objections nor give instructions to a witness for the purpose of delaying or obstructing the discovery process. I will encourage witnesses to respond to all deposition questions which are reasonably understandable. I will neither encourage nor permit my witness to quibble about words where their meaning is reasonably clear.

18. I will not seek Court intervention to obtain discovery which is clearly improper and not discoverable.

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19. I will not seek sanctions or disqualification unless it is necessary for protection of my client's lawful objectives or is fully justified by the circumstances.

Lawyer and Judge

Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.

1. I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.

2. I will conduct myself in Court in a professional manner and demonstrate my respect for the Court and the law.

3. I will treat counsel, opposing parties, the Court, and members of the Court staff with courtesy and civility.

4. I will be punctual.

5. I will not engage in any conduct which offends the dignity and decorum of proceedings.

6. I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage.

7. I will respect the rulings of the Court.

8. I will give the issues in controversy deliberate, impartial and studied analysis and consideration.

9. I will be considerate of the time constraints and pressures imposed upon the Court, Court staff and counsel in efforts to administer justice and resolve disputes.

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Chapter 2

Temporary Guardianships and Other Emergency Relief

I. Temporary Guardianships

§ 2.1 Purpose of Temporary Guardianship

If there is insufficient time to create a permanent guardianship, the court shall appoint a temporary guardian, with limited power, as the circumstances require, when presented with substantial evidence that a person is a minor or adult incapacitated person and the court has probable cause to believe that the immediate appointment of a guardian is required. Tex. Est. Code § 1251.001. A temporary guardianship created for immediate necessity may not remain in effect for more than sixty days. Tex. Est. Code § 1251.151. Theoretically, this should allow sufficient time to complete all the formalities and notice requirements to create a permanent guardianship.

Many courts are reluctant to create a temporary guardianship for immediate necessity if other remedies are available that will allow the status quo to be reasonably kept until the notice requirements of a permanent guardianship can be completed. If the primary concern is that the proposed ward needs to be protected from his own bad choices or the exploitation of others, it is often more appropriate to seek immediate injunctive relief when filing the initial guardianship application. See part II in this chapter.

§ 2.2 Procedure and Standing to Bring Application

Temporary and permanent guardianships have certain different procedural requirements. But all permanent guardianship provisions regarding a party's standing also apply to temporary guardianships. Tex. Est. Code § 1251.102. Thus, anyone who has the right to commence a permanent guardianship proceeding and be appointed permanent guardian may also commence a temporary guardianship proceeding and be appointed temporary guardian. See section 4.16 in this manual. Similarly, anyone disqualified to be appointed permanent guardian is also disqualified to be appointed temporary guardian. See section 4.12.

§ 2.3 Jurisdiction and Venue

§ 2.3:1 Jurisdiction

Original jurisdiction for a guardianship proceeding is in a statutory probate court. Tex. Est. Code § 1022.002(c). The following counties in Texas hold a statutory probate court: Bexar, Collin, Dallas, Denton, El Paso, Galveston, Harris, Hidalgo, Tarrant, and Travis. The county court will have original jurisdiction of a guardianship proceeding in a county in which there is no statutory probate court or a county court at law exercising original probate jurisdiction. Tex. Est. Code § 1022.002(a).

In counties without a statutory probate court or a county court at law exercising original probate jurisdiction, contested guardianship proceedings originally filed in a constitutional county court may, on a judge's motion, and must, on motion of any party, be transferred to district court or assigned to a statutory probate court. Tex. Est. Code § 1022.003(a)(2). Alternatively, the judge shall request the assignment of a statutory probate court judge on the motion of any party or may also do so on the

judge's own motion. Tex. Est. Code § 1022.003(a)(1). A court exercising original probate jurisdiction also has jurisdiction of all matters related to the guardianship proceeding. Tex. Est. Code § 1022.001. *See also In re Guardianship of Peterson*, Nos. 01-15-00567-CV, 01-15-00586-CV, 2016 WL 4487511, at *5 (Tex. App.—Houston [1st Dist.] Aug. 25, 2016, no pet.) (mem. op.) ("[A] probate court retains jurisdiction to settle an estate so long as a justiciable controversy remains.").

The provisions of the Texas Estates Code applicable to guardianships also apply to temporary guardianships "to the extent the provisions may be made applicable." Tex. Est. Code § 1251.102. Additionally, "[t]o the extent applicable and not inconsistent with other provisions of [the Estates Code], the laws and rules governing estates of decedents apply to guardianships." Tex. Est. Code § 1001.002.

§ 2.3:2 Venue

For an adult incapacitated person, the proper venue to initiate a guardianship proceeding is either (1) the county in which the proposed ward resides or is located on the date the guardianship application is filed or (2) the county in which the proposed ward's principal estate is located. Tex. Est. Code § 1023.001(a).

The proper venue to initiate a guardianship proceeding over a minor child is (1) the county in which both the minor's parents reside; (2) if the parents live in different counties, the county where the sole managing conservatorship parent resides or, if the parents have joint custody, the county where the parent with the greater period of physical possession of and access to the minor resides; (3) if only one parent is living and has custody, the county of that parent's residence; (4) if both parents are dead and the minor was in the custody of the deceased parent, the county where the last surviving parent having custody resided; or (5) if both parents died in a common disaster and there is no evidence the parents died other than simultaneously, the county where both parents resided at the time of death if they resided in the same county. Tex. Est. Code § 1023.001(b).

§ 2.4 Obtaining Proof of Medical Emergency or Incapacity

To create a temporary guardianship for immediate necessity, the court must determine that there is substantial evidence that the proposed ward is an incapacitated person, that there is imminent danger that the proposed ward's health or safety will be seriously impaired, or that the proposed ward's estate will be seriously damaged or dissipated unless immediate action is taken. Tex. Est. Code § 1251.010(a). Although a doctor's certificate under Texas Estates Code section 1101.103 would be useful to include with the application, the substantial evidence of incapacity may come from other sources. As this is a temporary solution necessitated by emergency concerns, there is a lesser burden for medical evidence. Because of this lesser burden, a person for whom a temporary guardian is appointed may not be presumed to be incapacitated. Tex. Est. Code § 1251.002; *see In re Kelm*, 569 S.W.3d 232, 240 (Tex. App.—Houston [1st Dist.] 2018, no pet.).

§ 2.5 Preparing and Filing Application and Order

A sworn written application for the appointment of a temporary guardian must be filed before the appointment is made. Tex. Est. Code § 1251.003(a).

On the filing of the application, the court will appoint an attorney ad litem to represent the proposed ward if independent counsel has not been retained. Tex. Est. Code § 1251.004; *see also* Tex. Est. Code § 1054.007(b) (attorney ad litem entitled to reasonable compensation for services rendered). An attorney ad litem is directed to discuss with the proposed ward whether alternatives to a guardianship would meet the needs of the proposed ward and avoid the need for the appointment of a guard-

ian. Tex. Est. Code § 1054.004(a)(4). Before any hearing, the ad litem should also discuss with the proposed ward the ad litem's opinion regarding whether a guardianship is necessary and, if so, the ad litem's recommendation regarding specific limitations to the guardian's powers or duties. Tex. Est. Code § 1054.004(c).

§ 2.5:1 Contents of Application

The Texas Estates Code requires the sworn application to state—

1. the name and address of the proposed ward;
2. the alleged imminent danger to the proposed ward or the proposed ward's property;
3. the type of appointment and the particular protection and assistance being requested;
4. facts supporting the allegations and requests;
5. the name, address, and qualification of the proposed temporary guardian;
6. the name, address, and interest of the applicant; and
7. if applicable, that the proposed temporary guardian is a private professional guardian who is certified under subchapter C, chapter 155, of the Texas Government Code and has complied with the requirements of subchapter G, chapter 1104, of the Estates Code.

Tex. Est. Code § 1251.003(b). See form 2-1 in this chapter.

§ 2.5:2 Scheduling Hearing on Application

The sworn application should be presented to the court promptly so that it may issue an order setting a date certain to hear the application, if it has not already done so. *See* Tex. Est. Code § 1251.006. A hearing on the temporary guardianship application is required; there are no longer ex parte guardianships in Texas.

§ 2.5:3 Notice

The clerk must issue notice to be served on the proposed ward and the proposed ward's appointed attorney and on the proposed temporary guardian named in the application, if that person is not the applicant. Tex. Est. Code § 1251.005.

The proposed ward must be personally served with the application and notice of hearing, and a copy of the notice must be provided to the attorney ad litem or independent counsel. *See In re Guardianship of Bernsen*, No. 13-19-00592-CV, 2021 WL 4467598, at *5 (Tex. App.—Corpus Christi–Edinburg Sept. 30, 2021, no pet. h.) (proposed ward need not be personally served with amended application for guardianship). If the proposed ward is not personally served with notice of the temporary guardianship proceeding until *after* the appointment of a temporary guardian, any such order will be considered void. *Farr v. Barnes*, No. 04-19-00895-CV, 2020 WL 6048770, at *3 (Tex. App.—San Antonio Oct. 14, 2020, no pet.) (when proposed ward not served with notice of temporary guardianship proceeding until *after* appointment of temporary guardian, trial court erred by granting appellants' rule 91a motions to dismiss, and appellate court reversed all orders, including the award of attorney's fees). Note, however, that even if a temporary guardian is appointed without prior notice to the proposed ward, the appointment of a temporary guardian becomes moot once a permanent guardian is appointed. *In re Guardianship of Phillips*, No. 01-14-01004-CV, 2016 WL 3391249, at *3 (Tex. App.—Houston [1st Dist.] June 16, 2016, no pet.).

The notice must describe the rights of the parties and the date, time, place, purpose, and possible consequences of a hearing on the application and contain a statement notifying a person interested in the estate or welfare of a ward that he may file a request to be notified of filings. Tex. Est. Code § 1251.005. A copy of the application (form 2-1 in this chapter) must be attached to the notice. Tex. Est. Code § 1251.005(c).

The notice must be served on the proposed ward before a hearing is held on the application for temporary guardianship. *See* Tex. Est. Code § 1251.005; *Farr*, 2020 WL 6048770, at *3 (order appointing temporary guardian void for lack of jurisdiction because proposed ward not served before hearing).

§ 2.5:4 Hearing

The initial hearing appointing a temporary guardian must be held within ten days of the filing of the application unless the respondent or the respondent's attorney consents to an extension for up to thirty days after the filing of the application. Tex. Est. Code § 1251.006. The proposed ward is entitled to prior notice of the hearing, to be present, and to be represented by an attorney. Tex. Est. Code § 1251.008. Generally, the proposed ward is represented by the attorney ad litem; however, he may also retain other counsel to represent him.

There is no right to a jury trial under a temporary guardianship. *See* Tex. Est. Code § 1251.010 (temporary guardian will be appointed if the "court determines that the applicant has established" the requisite grounds).

The attorney ad litem should arrange for the proposed ward to attend the hearing or be prepared to explain his nonappearance to the court. At the hearing, the burden of proof is on the person alleging the incapacity. Tex. Est. Code § 1101.101(b).

The proposed ward and his attorney have the right to present evidence, to confront and cross-examine witnesses, and to request a closed hearing. Tex. Est. Code § 1251.008. This includes, most importantly, medical evidence demonstrating the need for a temporary guardianship. However, medical evidence is not required for the appointment of a temporary guardian.

At the conclusion of the hearing, the court shall enter an order appointing a temporary guardian if it finds substantial evidence that the proposed ward is a minor or an incapacitated person, that there is imminent danger to the proposed ward's physical health or safety, or that the proposed ward's estate will be seriously damaged or dissipated unless immediate action is taken. Tex. Est. Code § 1251.010(a). Substantial evidence is that which reasonable minds could have viewed as supporting the finding. *Southwest Texas Leasing Co. v. Bomer*, 943 S.W.2d 954 (Tex. App.—Austin 1997, no writ). Only those powers necessary to protect the ward against the imminent danger shown may be granted. The reasons for the temporary guardianship and the powers and duties of the temporary guardian must be described in the order of appointment. Tex. Est. Code § 1251.010. The order creating the temporary guardianship should also clearly state the term of the guardianship (maximum of sixty days unless contested), the amount of bond required, and a direction to the clerk to issue a certificate of appointment to the person appointed after the person qualifies according to law. Tex. Est. Code §§ 1251.012, 1251.101, 1251.151. See form 2-2 in this chapter.

§ 2.6 Qualification

A temporary guardian must qualify in the same form and manner required of a permanent guardian under the Texas Estates Code. Tex. Est. Code § 1251.052(a). See section 4.16 in this manual.

§ 2.7 Effect of Application for Temporary Guardianship

A person for whom a temporary guardian has been appointed retains all rights and powers not specifically granted to the temporary guardian by court order. Tex. Est. Code § 1251.001(b). The appointment of a temporary guardian is not an adjudication of incapacity. Tex. Est. Code § 1251.002.

§ 2.8 Motion to Dismiss Temporary Guardianship

The proposed ward or the proposed ward's attorney may move to dismiss the application for temporary guardianship on one day's notice to the applicant. The court must hear and determine the motion expeditiously. Tex. Est. Code § 1251.007.

The court has the authority to *remove* a temporary guardian and terminate a temporary guardianship on evidence that doing so is within the ward's best interest. *In re Guardianship of Fuller*, No. 06-06-00104-CV, 2007 WL 1345858, at *1 (Tex. App.—Texarkana May 9, 2007, no pet.), *citing Douglas v. Proctor*, 559 S.W.2d 912, 913 (Tex. App.—Waco 1977, no writ).

§ 2.9 Duration of Temporary Guardianship

A temporary guardianship for immediate necessity may not remain in effect for more than sixty days unless a temporary guardian is appointed pending a contest on the application. Tex. Est. Code §§ 1251.051, 1251.151. *See also In re Guardianship of Berry*, 105 S.W.3d 665, 666 (Tex. App.—Beaumont 2003, no pet.) (temporary guardian appointment moot once permanent guardian appointed); Tex. Est. Code § 1251.153(a) (court will order temporary guardian to deliver estate to person legally entitled to possess guardianship estate). See forms 2-3 and 2-4 in this chapter.

A temporary guardianship pending contest (see section 2.13 below) expires at the conclusion of the hearing contesting the application, on the date a permanent guardian qualifies, or on the nine-month anniversary of the date the temporary guardian qualifies, unless the term is extended by court order after a motion and hearing. Tex. Est. Code § 1251.052(b).

§ 2.10 Final Account

At the expiration of a temporary guardianship—whether contested or not—the temporary guardian must file a sworn account with the court. The final report must list all the property that has come into the temporary guardian's possession or control and any sales of the property and must include a full exhibit and account of his acts as temporary guardian. Tex. Est. Code § 1251.152. Generally, the account should be in the same form and contain the same information as the final account of a permanent guardian, limited by the scope of the temporary guardian's authority. *See* Tex. Est. Code § 1204.102. See forms 2-7 through 2-9 in this chapter.

After reviewing the account and exhibits, the court will order the temporary guardian to deliver the remaining property in the guardianship to the person or entity legally entitled to take possession of the estate assets. Tex. Est. Code § 1251.153. See form 2-10. Once the court approves the final account, the temporary guardian may be discharged and the sureties released, upon proof of proper delivery of the estate assets, as provided in the order of discharge. Tex. Est. Code §§ 1251.152, 1251.153.

§ 2.11 Payment of Fees

A temporary guardian is entitled to payment of attorney's fees from the ward's estate. Tex. Est. Code § 1251.013; *see also* Tex. Est. Code § 1002.010. Notably, this applies to a living ward as well as one who died during the pendency of a guardianship proceeding. *McIntyre v. McIntyre*, No. 14-18-00609-CV, 2019 WL 4511323, at *2 (Tex. App.—Houston [14th Dist.] Sept. 19, 2019, no pet.) (mem. op) (because individual was a ward, court could award attorney's fees to temporary guardian from "available funds of [ward's] property although [ward] was deceased").

§ 2.12 Closure

On entry of the order approving the account and directing delivery of the assets of the temporary guardianship, the guardian should arrange for delivery of the assets to the person legally entitled to possess them. If possible, the guardian should request a signed receipt. See form 2-15 in this chapter. However, some courts will order delivery of the assets to the permanent guardian before the filing and approval of the final account.

After delivery, an application to discharge the temporary guardian and release the bond should be filed with the court. See form 2-11. The signed receipt or other evidence of delivery of estate assets should be attached as an exhibit. The court will review the application and, if it determines that the temporary guardian has complied with the court's prior order, enter an order discharging the temporary guardian and releasing the bond. See form 2-12 and section 14.2:4 in this manual.

§ 2.13 Temporary Guardianship Pending Contest

A second type of temporary guardianship is the temporary guardianship pending contest. If an application for a temporary guardianship, for the conversion of a temporary guardianship to a permanent guardianship, or for a permanent guardianship is contested, the court, on its own motion or on that of any interested party, may appoint a temporary guardian without issuing additional citation if it finds the appointment necessary to protect the proposed ward or the proposed ward's estate. Tex. Est. Code § 1251.051. See forms 2-3 and 2-4 in this chapter.

A temporary guardianship pending contest continues until the contest is concluded or the nine-month anniversary of the temporary guardian's qualification, whichever is earlier. The temporary guardianship pending contest may be extended past the nine-month anniversary by court order after a hearing on a filed motion to extend the term. Tex. Est. Code § 1251.052(b).

[Sections 2.14 through 2.20 are reserved for expansion.]

II. Emergency Relief

§ 2.21 Temporary Restraining Order; Temporary Injunction

The primary purpose of injunctive relief is to halt wrongful acts, which is at the very core of probate and trust litigation. The specific purpose of a temporary injunction is to preserve the status quo of the subject matter of the litigation until a final hearing can be held on the merits of the case. *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004); *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). The status quo is defined as "the last actual, peaceable, noncontested status which preceded the pending controversy." *RP&R, Inc. v. Territo*, 32 S.W.3d 396, 402 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

Injunctive relief works to fulfill the equitable maxim that "no right shall be left without a remedy." *See Kuechler v. Wright*, 40 Tex. 600, 637 (1874). Its purpose is to "halt wrongful acts that are either threatened or in the course of accomplishment." *Wiese v. Heathlake Community Ass'n,* 384 S.W.3d 395, 399 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

The Texas Supreme Court has explained that a temporary injunction is an extraordinary remedy, which should not issue as a matter of right. *Walling v. Metcalfe*, 863 S.W.2d 56, 57–58 (Tex. 1993). It is, nonetheless, an underused remedy in many probate proceedings that can be used to impede a pattern of bad behavior.

In most cases, a request for injunctive relief begins with a request for a temporary restraining order, which is then followed by a request for a temporary injunction. Thereafter, any request for permanent injunctive relief can generally be awarded in a final judgment entered in the case.

§ 2.22 Hearing and Issuance of Order

A temporary restraining order can be entered with or without notice to the opposing party or counsel. A temporary injunction is entered after a full evidentiary hearing. A temporary restraining order or temporary injunction is not effective unless and until the applicant posts either a surety bond or cash in lieu of a surety bond.

§ 2.23 Court's Discretion

Whether to grant or deny a temporary injunction is within the trial court's sound discretion. *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993). A reviewing court should reverse an order granting injunctive relief only if the trial court abused that discretion. *Walling*, 863 S.W.2d at 58. A trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law, *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 661 (Tex. 2009), or when it acts without reference to any guiding rules or principles, *Cires v. Cummings*, 134 S.W.3d 835, 838–39 (Tex. 2004). In conducting an abuse-of-discretion review, the reviewing court must consider the whole record. *Mercedes-Benz Credit Corp. v. Rhyne*, 925 S.W.2d 664, 666 (Tex. 1996). The reviewing court must not substitute its judgment for the trial court's judgment unless the trial court's action was so arbitrary that it exceeded the bounds of reasonable discretion. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

§ 2.24 Period of Enforcement

A temporary restraining order aims to prevent irreparable harm for fourteen days until the court may conduct a hearing on the motion for temporary injunction. *See In re Texas Natural Resource Conservation Commission*, 85 S.W.3d 201, 205 (Tex. 2002).

A temporary restraining order can last for up to twenty-eight days if, and only if, within the original fourteen-day period of the temporary restraining order, (1) the court, for good cause shown, extends the temporary restraining order for a similar "like period" or (2) the party against whom the temporary restraining order was granted consents to the extension of the order. Tex. R. Civ. P. 680. "Good cause shown" has been held to include issues in effectuating service on the defendant and needing additional time to gather evidence required for use at the temporary injunction hearing. Only one extension can be granted unless additional extensions are unopposed by the enjoined party.

A temporary injunction, once entered, is in effect until final trial on the merits of the case.

§ 2.25 Injunctive Relief Under Texas Estates Code and Texas Property Code

There are three primary sources of authority for injunctive relief: the Texas Rules of Civil Procedure, the Texas Civil Practice and Remedies Code, and other "remedial" statutes. *See* Tex. R. Civ. P. 680; Tex. Civ. Prac. & Rem. Code § 65.011. This section focuses solely on the probate court's authority and direction, pursuant to the Texas Estates Code and Texas Property Code, to issue injunctions to preserve the assets of an estate and to prevent potential dissipation of those assets.

To obtain injunctive relief and preserve the status quo until a final hearing can be held on the merits of the case, a party must ordinarily show (1) the existence of a wrongful act, (2) the existence of imminent harm, (3) the existence of irreparable injury, and (4) the absence of an adequate remedy at law. *Jim Rutherford Investments, Inc. v. Terramar Beach Community Ass'n*, 25 S.W.3d 845, 849 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *see Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204–05 (Tex. 2002).

There are two general types of injunctive relief: prohibitory and mandatory. *RP&R, Inc. v. Territo*, 32 S.W.3d 396, 400 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Prohibitory injunctions prohibit a party from continuing a certain conduct, while mandatory injunctions require another party to act affirmatively rather than refrain from certain conduct. *RP&R, Inc.*, 32 S.W.3d at 400. Most temporary injunctions issued in probate proceedings are prohibitive.

§ 2.26 Application

An application for temporary restraining order or temporary injunction must include the following required elements.

§ 2.26:1 Cause of Action

A cause of action is defined in the injunctive context as a "factual situation that entitles one person to obtain a remedy in court from another person." *Seghers v. Kormanik*, No. 03-13-00104-CV, 2013 WL 3336845, at *4 (Tex. App.—Austin June 26, 2013, no pet.) (mem. op.). In the probate context, the most common causes of action pleaded in support of seeking injunctive relief are breach of fiduciary duty, misrepresentation, conversion, and fraud. A claim under the Uniform Declaratory Judgments Act to request a court to "declare [the] rights, status, and other legal relations" of the parties is also similarly used to support the request for temporary injunctive relief in the probate context. *See* Tex. Civ. Prac. & Rem. Code § 37.003(a). Simply stated, the applicant must have a valid cause of action against the party seeking to be enjoined.

§ 2.26:2 Probable Right of Recovery

Probate courts possess clear authority and jurisdiction to protect both the named assets of a trust and the probable assets of a trust. The Texas Supreme Court has evaluated the charge given to probate courts in Texas and found that the courts possess the authority and direction to issue injunctions to preserve the assets of an estate and to prevent potential dissipation of those assets.

In *Lucik v. Taylor*, the supreme court held:

> Here, as in *English v. Cobb*, the protection from dissipation or transfer of the potential assets of the estate of Lucik directly bears on the ultimate collection and distribution of such properties pursuant to his effective will. As such, the injunctive relief related to a matter "*incident to an estate*" and was within the injunctive powers of the Probate Court of Dallas County.

Lucik v. Taylor, 596 S.W.2d 514, 516 (Tex. 1980) (emphasis added). *See also Smith v. Lanier*, 998 S.W.2d 324, 336 (Tex. App.—Austin 1999, pet. denied) ("A court has the inherent power to order the surrender of property held by any party to the suit. This inherent power enables the court to preserve its own ability to render effective relief and give effect to its judgment.") (internal citations omitted).

A probable right of recovery may be proved by an allegation of the existence of a right and presenting evidence tending to show that the right is being denied. An applicant is not required to establish that he will prevail upon final trial, as the only question before the court in a temporary injunction setting is whether the applicant is entitled to the preservation of the status quo, pending a final trial on the merits.

As such, the proper question to ask to determine the probable right of recovery is whether the party seeking injunctive relief is entitled to status quo pending final trial. *Walling v. Metcalfe*, 863 S.W.2d 56, 57–58 (Tex. 1993).

§ 2.26:3 Probable, Imminent Injury

An applicant's burden of proof regarding the injury is whether the purported harm is likely to recur in the near future. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). This burden is required to fulfill the clear purpose of injunctive relief: to halt wrongful acts in the course of accomplishment. *See Wiese v. Heathlake Community Ass'n*, 384 S.W.3d 395, 399 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

§ 2.26:4 Irreparable Injury: No Adequate Remedy at Law

The general burden of proof is to show that there is no adequate remedy at law for the injured applicant's damages; "in other words, that it cannot be adequately compensated in damages . . . or the damages cannot be measured by any certain pecuniary standard." *Twyman v. Twyman*, No. 01-08-00904-CV, 2009 WL 2050979, at *4 (Tex. App.—Houston [1st Dist.] July 16, 2009, no pet.).

However, Texas courts are split about whether, in a fiduciary case, an inadequate remedy at law must be proved to obtain injunctive relief, because equitable remedies (that is, injunctive relief) are available in cases involving breach of fiduciary duty, but so are legal remedies (that is, money damages). As such, there is a strong argument that, as long as the fiduciary relationship is ongoing, a beneficiary should be entitled to the correct performance of the relationship. *See, e.g., 183/620 Group Joint Venture v. SPF Joint Venture*, 765 S.W.2d 901, 903–04 (Tex. App.—Austin 1989, writ dism'd w.o.j.).

As is common in all areas of the law, there are exceptions to showing that there is no adequate remedy at law. Specifically, when injunctive relief is sought under Texas Property Code section 114.008, there are exceptions to this element. *See Twyman*, 2009 WL 2050979, at *5 (trustee's past behavior justified temporary injunction because "allowing [the trustee] continued access to the Trust funds could lead to more withdrawals that would not be repaid" and because the trust would not be protected from "loss for additional amounts [the trustee] would be able to withdraw if a temporary injunction were not granted"). It is well established that a court can grant temporary injunctive relief to stop the depletion of trust assets. *See Minexa Arizona v. Staubach*, 667 S.W.2d 563, 567–68 (Tex. App.—Dallas 1984, no writ) (holding "[t]he fact that damages may be subject to the most precise calculation becomes irrelevant if the defendants in a case are permitted to dissipate funds specific that would otherwise be available to pay a judgment" when "[s]ome of these funds have allegedly been dissipated by the fiduciaries holding them, while the fiduciaries are seeking to place the remaining funds beyond the jurisdiction of the Texas court"); *Gatlin v. GXG, Inc.*, No. 05-93-01852-CV, 1994 WL 137233, at *7 (Tex. App.—Dallas Apr. 19, 1994, no writ)

(not designated for publication) (evidence was "sufficient to justify the trial court's conclusion that, if not restrained, Gatlin might continue to divert and conceal assets in his possession pending trial"); *Callahan v. Lipscomb*, 412 S.W.2d 346, 348 (Tex. App.—San Antonio 1967, writ ref'd n.r.e.) ("There is also evidence that appellants are authorized to write checks and draw on the bank account of Pobrecito, Inc., which withdrawals could cause loss and injury to the ultimate beneficiaries of the estate of Mae H. Hausman in the event that it is finally determined that such estate has property rights and interests in Pobrecito.").

The first exception is for actions that are recurrent or continuous. *Sinclair Refining Co. v. McElree*, 52 S.W.2d 679, 681–82 (Tex. App.—Dallas 1932, no writ) (neither at equity nor under the statute did appellee's right to injunctive relief depend on a showing that there existed no adequate remedy at law). The Dallas court of appeals explained, as follows:

> The doctrine even under principles of equity, uninfluenced by statutory enactment, is stated in 32 C.J. § 36, p. 56, as follows: "As a general rule, where an injury committed by one against another is continuous or is being constantly repeated, so that complainant's remedy at law requires the bringing of successive actions, that remedy is inadequate and the injury will be prevented by injunction. The fact that an injured person has the right of successive actions for the continuance of the wrong does not make it an adequate remedy at law which bars the jurisdiction of a court of equity to grant an injunction to restrain the continuance of the injury."

Sinclair Refining Co., 52 S.W.2d at 681.

Another exception to showing that there is "no adequate remedy at law" is if such damages are unique and cannot be replaced using traditional money damages. *See Patrick v. Thomas*, No. 2-07-339-CV, 2008 WL 1932104, at *2 (Tex. App.—Fort Worth May 1, 2008, no pet.) (enjoining sale of rare horses), *citing* 103 Harv. L. Rev. 687, 705–06 (1990) (stating that if certain goods cannot be replaced by money, then money damages are not adequate remedy for their loss and harm to them may be considered irreparable); *Trickey v. Gumm*, 632 S.W.2d 167 (Tex. App.—Waco 1982, no writ) (one element to consider in determining question of irreparable injury is whether there may be loss of substantial equity in property); *Texas Industrial Gas v. Phoenix Metallurgical Corp.*, 828 S.W.2d 529, 533 (Tex. App.—Houston [1st Dist.] 1992, no writ) (inability to respond in damages).

§ 2.27 Injunctive Relief Under Texas Rules of Civil Procedure

Rules 680 through 693 of the Texas Rules of Civil Procedure generally govern the requirements to obtain injunctive relief. These rules should be reviewed together, as they are interrelated to the process required to obtain injunctive relief and must be complied with when seeking injunctive relief in the probate context.

Rule 693 emphasizes the applicability of injunctive relief in fiduciary litigation. Specifically, rule 693 states that the principles, practice, and procedure governing courts of equity shall govern proceedings in injunctions when the same are not in conflict with the rules or the provisions of the statutes. Tex. R. Civ. P. 693. Because fiduciary duties are equitable in nature, it follows that equitable remedies, such as injunctive relief, are available for breaches of fiduciary duty.

§ 2.27:1 Application

Rules 680 and 683 address the specific requirements for issuance of a temporary restraining order. These include, but are not limited to, a specific pleading, supported by affidavit or verified petition, that defines the injury and demonstrates that the applicant will suffer immediate, irreparable harm before the other party can be provided notice and before a hearing can be

conducted. Rule 683 reinforces that an injunctive order (whether a temporary restraining order or temporary injunction) is binding only on the parties to the action, their officers, agents, servants, employees, and attorneys, and on those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise. *See Ex parte Jackman*, 663 S.W.2d 520, 523 (Tex. App.—Dallas 1983, no writ) (oral notification by applicant's attorney to enjoined party of injunction contents satisfied requirements of rule 683).

The actual temporary restraining order must—

1. include the date and hour signed;
2. state a specifically defined injury and why it was irreparable and why the order was issued ex parte;
3. state that it expires on a date not to exceed fourteen days, unless otherwise extended for a maximum of twenty-eight days, as discussed above; and
4. state the date and time for the temporary injunction hearing.

Tex. R. Civ. P. 680.

§ 2.27:2 Bond

Rule 684 addresses the requirement to post a personal surety bond. In lieu of a surety bond, a party may instead deposit cash. Tex. R. Civ. P. 14c; *Adobe Oilfield Services, Ltd. v. Trilogy Operating, Inc.*, 305 S.W.3d 402, 404 (Tex. App.—Eastland 2010, no pet.).

§ 2.27:3 Citation and Writ of Injunction

Rules 686 through 689 address the issuance of the required citations and writs of injunction. Under rule 686, when the request for injunctive relief is included in a new lawsuit, the clerk of the court issues a citation—as in all civil cases—which shall be served and returned in the same manner as ordinary citations. Tex. R. Civ. P. 686. But when an applicant obtains a temporary restraining order in conjunction with filing the new lawsuit, only one citation is needed when the temporary restraining order and underlying lawsuit are served together. Tex. R. Civ. P. 686. Rule 687 details the requirements of a "writ of injunction," which is prepared by the court clerk. A writ of injunction mimics the contents of the order (temporary restraining order or temporary injunction) signed by the judge, except for the court's findings justifying issuance of the injunction. Rule 689 addresses service of a writ of injunction.

§ 2.27:4 Contempt

Rule 692 includes the enforcement mechanism for injunctions and provides that disobedience of an injunction is punishable as contempt. A court has the ability to issue a writ of attachment or show-cause order in the case of disobedience.

§ 2.28 Injunctive Relief Under Texas Civil Practice and Remedies Code

Sections 65.001 through 65.045 of the Texas Civil Practice and Remedies Code set forth the general statutory authority for trial courts to grant injunctive relief. Section 65.011 authorizes the issuance of a writ of injunction if—

(1) the applicant is entitled to the relief demanded and all or part of the relief requires the restraint of some act prejudicial to the applicant;

(2) a party performs or is about to perform or is procuring or is allowing the performance of an act relating to the subject of pending litigation, in violation of the rights of the applicant, and the act would tend to render the judgment in that litigation ineffectual;

(3) the applicant is entitled to a writ of injunction under the principles of equity and the statutes of this state relating to injunctions;

(4) a cloud would be placed on the title of real property being sold under an execution against a party having no interest in the real property subject to execution at the time of sale, irrespective of any remedy at law; or

(5) irreparable injury to real or personal property is threatened, irrespective of any remedy at law.

Tex. Civ. Prac. & Rem. Code § 65.011; *see Guillermo Benavides Garza Investment Co. v. Benavides*, No. 04-13-00453-CV, 2014 WL 3339555, at *2 (Tex. App.—San Antonio July 9, 2014, no pet.) (mem. op.).

Additionally, section 37.005 of the Civil Practice and Remedies Code permits an interested person to request the court to direct the administrators, executors, or trustees to do or abstain from doing any particular act in their fiduciary capacity. Tex. Civ. Prac. & Rem. Code § 37.005.

[Sections 2.29 and 2.30 are reserved for expansion.]

I. Mental-Health Commitments

§ 2.31 Mental-Health Commitments

Mental-health commitments are covered under the Texas Health and Safety Code and not the Texas Estates Code. The commitment and hospitalization of clients or attorneys suffering from mental illness in Texas is civil and not criminal in nature.

In general, individuals who are a danger to themselves or others, who cannot take care of themselves properly, or who are off of their medication are good candidates for mental-health commitments. For additional discussion of mental-health issues and commitments, see chapter 16 in this manual.

§ 2.32 Definitions

The term *mental illness* is defined as an illness, disease, or condition that either (1) substantially impairs a person's thought, perception of reality, emotional process, or judgment or (2) grossly impairs behavior as demonstrated by recent disturbed behavior. This definition does not include a person suffering from epilepsy, dementia, substance abuse, or intellectual disability. Tex. Health & Safety Code § 571.003(14). However, a person who suffers from a mental illness along with another condition is still subject to commitment under the Code.

The term *mental health facility* is defined as—

1. an inpatient or outpatient mental health facility operated by the Texas Department of State Health Services (DSHS), a federal agency, a political subdivision, or any person;

2. a community center or a facility operated by or under contract with a community center;
3. part of a general hospital in which diagnosis, treatment, and care for persons with mental illness is provided; or
4. another entity designated by DSHS to provide mental-health services.

Tex. Health & Safety Code § 571.003(12); *see* Tex. Health & Safety Code § 571.003(9).

§ 2.33 Commitment Process

The commitment process must be broken down into three parts so that it can be better understood: (1) emergency detention, (2) protective custody, and (3) commitment. Each part in the process serves the purpose of protecting a person who constitutes a danger to himself or others.

§ 2.33:1 Emergency Detention without Warrant (Peace Officer)—Section 573.001

A warrantless detention is the preferred method of emergency detention because of the very nature of a situation requiring such intervention. The Texas Health and Safety Code requires an officer to have sufficient reason to believe (1) that a person is mentally ill, (2) that because of such illness, a substantial risk of harm to himself or others exists unless immediate restraint is employed, and (3) that there is not sufficient time to obtain a warrant before taking the person into custody. Tex. Health & Safety Code § 571.001(a). If an officer encounters a person who truly meets the criteria for emergency detention, there should never be time to secure a warrant. A peace officer without a warrant may take into custody any such person suffering from mental illness, may transport the person to the nearest appropriate inpatient mental-health facility—or a mental-health facility deemed suitable by the local mental-health authority if an appropriate inpatient mental-health facility is not available—and may immediately file an application with the facility for the person's detention. Tex. Health & Safety Code §§ 571.001(d), 573.002. No detention is permitted in a private facility without the consent of the head of the facility. Tex. Health & Safety Code § 573.021(e).

§ 2.33:2 Emergency Detention with Warrant—Section 573.011

Any adult may file an application for the emergency detention of another person. Tex. Health & Safety Code § 571.011. If the application is granted, a warrant is issued. However, before issuance of an emergency warrant is approved, there must be adequate and credible information presented so that a reasonable decision may be formulated to protect the rights of the individual against the rights of society in general. The determination of what may be adequate and credible information is very difficult and can be accomplished only on a case-by-case basis. The sole purpose of the issuance of such warrants is to protect the individual or others when a substantial imminent risk of serious harm exists and immediate intervention or restraint is necessary to prevent injury. Thus, both the facts that form the basis for the requested warrant and the person who furnished these facts must play a key role in the decision-making process. Therefore, the court can require the applicant to appear and be examined in order to attest to the adequacy and credibility of the information furnished.

The applicant must have reason to believe and must believe all four of the following: (1) the person evidences mental illness, (2) there exists a substantial risk of serious harm to himself or others, (3) such risk of harm is imminent unless the person is restrained, and (4) such belief is based on specific recent behavior, overt acts, attempts, or threats. In the application, the applicant must state and describe the following in detail: (1) the basis for the risk of harm; (2) the behavior, acts, attempts, or threats that form the basis of the applicant's belief; and (3) the relationship of the applicant to the individual. Any other available relevant information may accompany the application. Tex. Health & Safety Code § 573.011.

§ 2.33:3 Protective Custody

The application for court-ordered mental-health services is filed before or with the motion for an order of protective custody. The hearing on the application for court-ordered mental-health services is commonly referred to as the "final hearing." The hearing on the motion for an order of protective custody is commonly referred to as the "probable cause" hearing.

Preliminary Examination: A person accepted for a preliminary examination may be detained in custody for not longer than forty-eight hours after the time the person is presented to the facility unless a written order for protective custody is obtained. The forty-eight-hour period includes any time the patient spends waiting in the facility for medical care before the person receives the preliminary examination. A physician shall examine the person as soon as possible within twelve hours after the time the person is apprehended by the peace officer or transported for emergency detention by the person's guardian. Tex. Health & Safety Code § 573.021(b), (c).

Emergency Admission and Detention: A person may be admitted to a facility for emergency detention only if the physician who conducted the preliminary examination of the person makes a written statement that is acceptable to the facility and states that after a preliminary examination it is the physician's opinion that (1) the person is a person with mental illness, (2) the person evidences a substantial risk of serious harm to the person or to others, (3) the described risk of harm is imminent unless the person is immediately restrained, and (4) emergency detention is the least restrictive means by which the necessary restraint may be accomplished. The written statement must include a description of the nature of the person's mental illness and a specific description of the risk of harm the person evidences that may be demonstrated either by the person's behavior or by evidence of severe emotional distress and deterioration in the person's mental condition to the extent that the person cannot remain at liberty. The statement must also set out the specific detailed information from which the physician formed the opinion. Tex. Health & Safety Code § 573.022(a).

Motion and Order for Protective Custody: A motion for an order of protective custody, commonly referred to as an "OPC," may be filed only in the court in which an application for court-ordered mental-health services is pending. The motion may be filed by the county or district attorney or on the court's own motion. The motion must state that the judge or county or district attorney has reason to believe and does believe that the proposed patient meets the criteria authorizing the court to order protective custody and the belief is derived from (1) the representations of a credible person, (2) the proposed patient's conduct, or (3) the circumstances under which the proposed patient is found. The motion must be accompanied by a certificate of medical examination for mental health prepared by a physician who has examined the proposed patient not earlier than the third day before the day the motion is filed. Tex. Tex. Health & Safety Code § 574.021.

The judge or designated magistrate may issue an order of protective custody if the judge or magistrate determines that a physician has stated the physician's opinion and the detailed reasons for the physician's opinion that the proposed patient is a person with mental illness and the proposed patient presents a substantial risk of serious harm to the proposed patient or others if not immediately restrained pending the hearing. The determination that the proposed patient presents a substantial risk of serious harm may be demonstrated by the proposed patient's behavior or by evidence of severe emotional distress and deterioration in the proposed patient's mental condition to the extent that the proposed patient cannot remain at liberty. Tex. Health & Safety Code § 574.022(a), (b).

When a protective custody order is signed, the judge or designated magistrate shall appoint an attorney to represent a proposed patient who does not have an attorney. Tex. Health & Safety Code § 574.024(a).

Probable Cause Hearing: A hearing must be held to determine if there is probable cause to believe that a proposed patient under a protective custody order presents a substantial risk of serious harm to the proposed patient or others to the extent that the proposed patient cannot be at liberty pending the hearing on court-ordered mental-health services and a physician has stated the physician's opinion and the detailed reasons for the physician's opinion that the proposed patient is a person with mental illness. Tex. Health & Safety Code § 574.025(a).

The hearing must be held not later than seventy-two hours after the time that the proposed patient was detained under a protective custody order. Tex. Health & Safety Code § 574.025(b).

Continued Detention or Release: The magistrate or associate judge shall order that a proposed patient remain in protective custody if the magistrate or associate judge determines after the hearing that an adequate factual basis exists for probable cause to believe that the proposed patient presents a substantial risk of serious harm to himself or others to the extent that he cannot remain at liberty pending the hearing on court-ordered mental-health services. Tex. Health & Safety Code § 574.026(a). The magistrate or associate judge shall order the release of a person under a protective custody order if the magistrate or associate judge determines after the probable cause hearing that no probable cause exists to believe that the proposed patient presents a substantial risk of serious harm to himself or others. Tex. Health & Safety Code § 574.028(a), (b). If certain requirements are not met, the facility administrator shall discharge the proposed patient. Tex. Health & Safety Code § 574.028.

Release after Hearing: The court shall enter an order denying an application for court-ordered temporary or extended mental-health services if after a hearing the court or jury fails to find, from clear and convincing evidence, that the proposed patient is mentally ill and meets the applicable criteria for court-ordered mental-health services.

If the court denies the application, the court shall order the immediate release of a proposed patient who is not at liberty. Tex. Health & Safety Code § 574.033.

§ 2.33:4 Involuntary Commitment

Under Texas Health and Safety Code sections 574.034(a) and 574.035(a), the necessary elements for involuntary inpatient commitment are that the proposed patient is mentally ill, and as a result—

1. is likely to cause serious harm to himself;
2. is likely to cause serious harm to others; or
3. the proposed patient—
    a. is suffering severe and abnormal mental, emotional, or physical distress;
    b. is experiencing substantial mental or physical deterioration of the ability to function independently, which is exhibited by the inability, except for reasons of indigence, to provide for basic needs, including food, clothing, health, or safety; and
    c. is unable to make a rational and informed decision about whether to submit to treatment.

Tex. Health & Safety Code § 574.034(a). To receive extended inpatient services, it must also be shown that the proposed patient's condition is expected to continue for more than ninety days and the patient has received court-ordered inpatient mental-health services for at least sixty consecutive days during the preceding twelve months. Tex. Health & Safety Code § 574.035(a)(3), (a)(4).

§ 2.34 Evidentiary Standard for Involuntary Commitment

The burden of proof shall be to prove each element of the applicable criterion by clear and convincing evidence. Tex. Health & Safety Code §§ 574.034(a), 574.035(a); *see Addington v. Texas*, 441 U.S. 418 (1979). "Clear and convincing evidence" is defined as that measure of proof that produces a firm belief or conviction in the mind of the fact finder as to the truth of the allegations sought to be established. *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979). Clear and convincing evidence is an intermediate evidentiary standard that requires more than a preponderance of the evidence but less than a reasonable-doubt standard. *Addington*, 588 S.W.2d at 570. It is the state's burden to meet the elements for commitment. *In re J.S.C.*, 812 S.W.2d 92, 94 (Tex. App.—San Antonio 1991, no writ). The state defends the commitment and its validity.

The clear and convincing evidence necessary for an order for inpatient mental-health services must include expert testimony and evidence of a recent overt act or a continuing pattern of behavior that tends to confirm either (1) the likelihood of serious harm to the proposed patient or others or (2) the proposed patient's distress and the deterioration of ability to function. Tex. Health & Safety Code §§ 574.034(d), 574.035(e); *In re Breeden*, 4 S.W.3d 782 (Tex. App.—San Antonio 1999, no pet.). In a hearing for temporary inpatient mental-health services, the evidence of the recent overt act or continuing pattern of behavior may be waived. Tex. Health & Safety Code § 574.034(d).

§ 2.35 Voluntary Admission of Adults—Section 572.001

Any individual eighteen years of age or older may request to be admitted on a voluntary basis to an inpatient mental facility. Guardians of adults have no authority to voluntarily admit a person to an inpatient psychiatric facility. Once a person has been voluntarily admitted, no application for court-ordered mental-health services may be filed unless a written request for release has been filed with the head of the facility or it is determined that the individual meets the criteria for court-ordered services and (1) is absent without authorization or (2) refuses or is unable to consent to appropriate treatment. Tex. Health & Safety Code § 572.005. Should a voluntary patient request to leave the facility, he may still be detained in the facility for a short period before the release.

The amount of time a voluntary patient may be detained after request to leave is limited. *See* Tex. Health & Safety Code § 572.004. Within four hours of the patient's request for discharge, the facility must notify the responsible physician. Tex. Health & Safety Code § 572.004(b). If the physician has a reasonable cause to believe that the patient might meet the criteria for court-ordered mental-health services or emergency detention, the physician must examine the patient within twenty-four hours of the patient's filed request for discharge. Tex. Health & Safety Code § 572.004(d). If the physician believes that the patient meets the criteria for detention, the physician should either discharge the patient or file an application for court-ordered mental-health services or emergency detention no later than 4:00 P.M. on the succeeding business day after the examination. Tex. Health & Safety Code § 572.004(d).

§ 2.36 Application for Forced Medication—Section 574.104

A physician may file an application for an order to authorize the administration of a psychoactive medication regardless of the patient's refusal if—

1. the physician believes that the patient lacks the capacity to make a decision regarding the administration of the psychoactive mediation;
2. the physician determines that the medication is the proper course of treatment for the patient;

3. the patient is under an order for mental-health services; and

4. the patient verbally or by other indication refuses to take the medication voluntarily.

Tex. Health & Safety Code § 574.104(a).

The application must state—

1. that the physician believes that the patient lacks the capacity to make a decision regarding administration of the psychoactive medication and the reasons for that belief;

2. each medication the physician wants the court to compel the patient to take;

3. whether an application for court-ordered mental-health services under section 574.034, 574.0345, 574.035, or 574.0355 has been filed;

4. whether a court order for inpatient mental-health services for the patient has been issued and, if so, under what authority it was issued;

5. the physician's diagnosis of the patient; and

6. the proposed method for administering the medication and, if the method is not customary, an explanation justifying the departure from the customary methods.

Tex. Health & Safety Code § 574.104(b).

§ 2.37 Hearing on Application for Forced Medication

A hearing on an application for an order to authorize the administration of a psychoactive medication may be held on the same date as the application or not later than thirty days after the filing of the application. Tex. Health & Safety Code § 574.104(d).

The court may grant one continuance on a party's motion for good cause shown. The court may grant more than one continuance only with the agreement of the parties.

Form 2-1

[Caption. See § 3 of the Introduction in this manual.]

Application for Appointment of Temporary Guardian of [Person/Estate/Person and Estate]

[**Name of applicant**], Applicant, files this Application for Appointment of Temporary Guardian of [Person/Estate/Person and Estate] of [**name of proposed ward**], Proposed Ward, an incapacitated person in need of a temporary guardian, and shows the court the following:

1. Proposed Ward is a [male/female], [**age**] years old, born [**date of birth**]. Proposed Ward currently resides at [**address, city, county**] County, Texas, [and/but] may be served with citation at [that address/[**address, city, county**] County, Texas].

Select one of the following.

2. Applicant is the [**relationship**] of Proposed Ward and resides at [**address, city, county**] County, Texas. The last three digits of Applicant's Social Security number are [**numbers**] and the last three digits of Applicant's Texas driver's license number are [**numbers**]. Applicant desires to be appointed temporary guardian of the [person/estate/person and estate] of Proposed Ward. Applicant is not ineligible by law to act as temporary guardian.

Or

2. Applicant is not related to Proposed Ward and resides at [**address, city, county**] County, Texas. Applicant is a private professional guardian who is certified under subchapter C of chapter 155 of the Texas Government Code and has complied with the requirements of section 1104.303 of the Texas Estates Code. Applicant desires to be appointed temporary guardian of the [person/estate/person and estate] of Proposed Ward. Applicant's taxpayer identification number is [**number**].

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Continue with the following.

Only those powers specifically granted may be exercised. It is important to be explicit, precise, and inclusive based on the circumstances of the case.

3. Applicant requests the Court to grant the following powers and authority: [**specify**].

It is important to be specific and precise and to support with facts that will justify the powers requested. The court must, under Tex. Est. Code § 1251.001(2), find probable cause to support its order.

4. The facts and reasons that support the requested powers are as follows: [**specify**].

The facts and circumstances must give rise to adequate reason for the action. Suspicion will not support a finding of probable cause; the danger to the person or property must be imminent, and there must be substantial evidence of incapacity.

5. The imminent danger to the person and property of Proposed Ward that requires immediate action is as follows: [**specify**].

Select as applicable.

The description of the estate must be adequate for the court to determine what assets will be under the applicant's control and what the value will be for bonding purposes. Tex. Est. Code § 1101.001(b)(9). Most courts will require this information in a sworn affidavit. The affidavit can be avoided if the information is placed in the sworn pleading.

6. Proposed Ward's estate is of the approximate value of $[**amount**] and consists of the following: [**specify**].

It is important for the court to be advised as soon as possible of any special needs of the proposed ward in order to provide the person with the proper assistance.

7. Proposed Ward has no funds to pay for these proceedings.

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8. Proposed Ward requires a [**specific language or dialect, e.g.,** Castilian Spanish] interpreter to assist in these proceedings.

9. Applicant has brought this proceeding in good faith and for just cause for the purpose of having a guardian appointed and requests [his/her] attorney's fees and expenses from Proposed Ward's estate under section 1155.054 of the Texas Estates Code.

Continue with the following.

Applicant, [**name of applicant**], prays that notice of this application be given as required by law; that the Court appoint [an attorney ad litem/an attorney ad litem and a guardian ad litem] to represent the [person/estate/person and estate] of [**name of proposed ward**], an alleged incapacitated person; that the Court set a hearing date on the application; and that, on hearing, Applicant be appointed temporary guardian of [**name of proposed ward**].

Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

VERIFICATION

STATE OF TEXAS)

COUNTY OF [**county**])

BEFORE ME, the undersigned notary public, on this day personally appeared [**name**], who being by me duly sworn on [his/her] oath deposed and said that [he/she] has read the

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above and foregoing [**title of document**] [and exhibits] and that the matters contained therein are within [his/her] personal knowledge and are true and correct.

_____

SWORN TO AND SUBSCRIBED BEFORE ME on _____.

_____
Notary Public, State of Texas

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Form 2-2

The term of the applicant's appointment may not exceed sixty days. It is important to set out the specific powers and authority conferred in the order. Also, the Texas Estates Code permits only absolutely necessary powers or authority to be granted. An application for temporary guardianship takes precedence over all matters except older matters of the same type.

[Caption. See § 3 of the Introduction in this manual.]

Order Appointing Temporary Guardian of [Person/Estate/Person and Estate]

On [**date**] the Court considered the Application for Appointment of Temporary Guardian of [Person/Estate/Person and Estate] of [**name of proposed ward**], Proposed Ward, a proposed incapacitated person, by [**name of applicant**], Applicant. The Court, after considering the application and evidence submitted by Applicant and the attorney ad litem appointed for Proposed Ward and/or the guardian ad litem appointed for Proposed Ward and/or independent counsel retained by Proposed Ward, makes the following findings and orders:

1. This Court has jurisdiction over the subject matter and parties herein and venue of this proceeding is proper in this Court.

2. There is substantial evidence that [**name of proposed ward**], Proposed Ward, is an incapacitated person.

3. There exists an imminent danger that the physical health or safety of Proposed Ward will be seriously impaired unless immediate action is taken.

4. There is an immediate need for the appointment of a temporary guardian.

5. Alternatives to guardianship that would avoid the need for the appointment of a temporary guardian have been considered and determined not to be feasible.

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6. Proposed Ward has been personally served with notice of this proceeding prior to the entry of this order.

7. All prerequisites of law have been met.

8. It would be in the best interest of Proposed Ward that a temporary guardian be appointed to protect Proposed Ward.

9. [**Name of applicant**] is a suitable person to act as temporary guardian of the [person/estate/person and estate] and is not disqualified by law from acting as such.

The Court further finds by substantial evidence:

10. Supports and services available to Proposed Ward that would avoid the need for the appointment of a temporary guardian have been considered and determined not to be feasible.

IT IS THEREFORE ORDERED that [**name of applican**t] is appointed as Temporary Guardian of the [Person/Estate/Person and Estate] of [**name of proposed ward**], Proposed Ward, for a period of sixty days from the date of this appointment.

Select as applicable.

IT IS FURTHER ORDERED that [**name**] of [**address, city, state**], an attorney licensed to practice before this Court, is appointed as guardian ad litem to represent the best interests of [**name of proposed ward**].

And/Or

IT IS FURTHER ORDERED that [**name**] of [**address, city, state**] is appointed as [**name of proposed ward**]'s interpreter to assist [**name of proposed ward**] in these proceedings.

Select one of the following.

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IT IS FURTHER ORDERED that the costs of this proceeding, including but not limited to filing fees and court costs, any fees for the attorney ad litem, guardian ad litem, court visitor, investigator, or interpreter, and for medical or psychological services or testing ordered by this Court pursuant to sections 1054.055, 1054.105, 1155.151, 1102.005, 1101.103, and 1101.104 of the Texas Estates Code, be paid by [**county**] County, Texas.

Or

IT IS FURTHER ORDERED that all fees and expenses be taxed as costs to be paid out of [**name of proposed ward**]'s estate on further order of this Court.

Continue with the following.

IT IS FURTHER ORDERED that the temporary guardian shall have the following specific powers over [**name of proposed ward**]: [**specify**].

IT IS FURTHER ORDERED that the following legal and civil rights and powers are removed from Proposed Ward:

Include any of the following, as applicable.

1. the right to vote;

2. the right to travel;

3. the right to make any gifts of real or personal property;

4. the power to drive and obtain a driver's license;

5. the power to execute a directive to physicians (living will);

6. the power to execute a power of attorney;

7. the power to execute any and all legal documents or contracts; and

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8. the power to marry.

IT IS FURTHER ORDERED that Temporary Guardian shall execute and file with the Court a surety bond in the amount of $[**amount**], conditioned and approved as required by law and that upon filing the bond and oath, the clerk of this Court shall issue Letters of Temporary Guardianship to [**name of applicant**] as Temporary Guardian of [**name of proposed ward**].

IT IS FURTHER ORDERED that the powers of any agent under a medical power of attorney in effect for [**name of proposed ward**] are hereby suspended.

SIGNED on _____.

_____
JUDGE PRESIDING

NOTICE TO ANY PEACE OFFICER OF THE STATE OF TEXAS: YOU MAY USE REASONABLE EFFORTS TO ENFORCE THE RIGHT OF A GUARDIAN OF THE PERSON OF A WARD TO HAVE PHYSICAL POSSESSION OF THE WARD OR TO ESTABLISH THE WARD'S LEGAL DOMICILE AS SPECIFIED IN THIS ORDER. A PEACE OFFICER WHO RELIES ON THE TERMS OF A COURT ORDER AND THE OFFICER'S AGENCY ARE ENTITLED TO THE APPLICABLE IMMUNITY AGAINST ANY CIVIL OR OTHER CLAIM REGARDING THE OFFICER'S GOOD FAITH ACTS PERFORMED IN THE SCOPE OF THE OFFICER'S DUTIES IN ENFORCING THE TERMS OF THIS ORDER THAT RELATE TO THE ABOVE-MENTIONED RIGHTS OF THE COURT-APPOINTED GUARDIAN OF THE PERSON OF THE WARD. ANY PERSON WHO KNOWINGLY PRESENTS FOR ENFORCEMENT AN ORDER THAT IS INVALID OR NO LONGER IN EFFECT COMMITS AN OFFENSE THAT MAY BE PUNISHABLE BY CONFINEMENT IN JAIL FOR AS LONG AS TWO YEARS AND A FINE OF AS MUCH AS $10,000.

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Form 2-3

[Caption. See § 3 of the Introduction in this manual.]

Application to Appoint Temporary Guardian Pending Contest

[**Name of temporary guardian**], Applicant, temporary guardian of the [person/estate/person and estate] of [**name of ward**], Ward, [a minor/an adult proposed incapacitated person], files this Application to Appoint Temporary Guardian Pending Contest and shows in support the following:

1. On [**date**] this Court appointed Applicant as temporary guardian of the [person/estate/person and estate] of Ward. The temporary guardianship remained in effect until [**date**].

2. On [**date**], [**name of applicant**] filed an application for appointment of permanent guardian of the [person/estate/person and estate] of Ward, alleging that it is in the best interests of Ward that the temporary guardianship be made permanent. On [**date**], [**name**] filed a contest to [**name of applicant**]'s application for appointment of permanent guardianship and, in addition, filed an application for appointment of permanent guardian. The contest remains unresolved.

3. Under section 1251.051 of the Texas Estates Code, when an application to convert a temporary guardianship to a permanent guardianship is challenged or contested, the Court may appoint a temporary guardian whose term expires at the hearing contesting the application or on the date a permanent guardian qualifies.

For these reasons, Applicant, temporary guardian of the [person/estate/person and estate] of [**name of ward**], [a minor/an adult proposed incapacitated person], requests that a temporary guardian pending contest be appointed under section 1251.051 of the Texas Estates Code and that they be granted all further relief to which they may be entitled.

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Respectfully submitted,

_____

[**Name**]
Attorney for Movant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Certificate of Service

I certify that a true copy of this Application to Appoint Temporary Guardian Pending Contest was served in accordance with rule 21a of the Texas Rules of Civil Procedure on this the _____ day of _____.

_____

[**Name of attorney**]

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Form 2-4

[Caption. See § 3 of the Introduction in this manual.]

Order Appointing Temporary Guardian Pending Contest

On [**date**], the Court considered the Application to Appoint Temporary Guardian Pending Contest filed by [**name of applicant**], temporary guardian of the [person/estate/person and estate] of [**name of ward**], [a minor/an adult proposed incapacitated person]. After hearing and considering the Application and evidence submitted, the Court finds that—

1. a need exists for the appointment of a temporary guardian of the [person/estate/person and estate] of [**name of ward**], [a minor/an adult proposed incapacitated person], pursuant to section 1251.051 of the Texas Estates Code;

2. [**name of ward**] has no legal guardian of their person or estate;

3. this Court has jurisdiction of this cause;

4. this Court has venue since [**name of ward**] resides in [**county**] County, Texas;

5. due notice of the Application has been given as required by law; and

6. that the rights of [**name of ward**] will be protected by such appointment.

IT IS THEREFORE ORDERED that [**name of applicant**] is appointed temporary guardian pending contest of the [person/estate/person and estate] of [**name of ward**] under section 1251.051 of the Texas Estates Code when that person has qualified according to law.

IT IS FURTHER ORDERED that the temporary guardian have the following powers and authority: [**specify**].

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IT IS FURTHER ORDERED that, pursuant to HIPAA regulations (45 C.F.R. § 164.512(e)(1)(i)) (2002), that the health-care organization or physician presented with the order shall give the temporary guardian pending contest of the [person/estate/person and estate] of [**name of ward**] complete access to [**name of ward**]'s protected health information including, but not limited to, medical records, psychological records, and intellectual testing records that are dated within the last twelve months from the date of this order and up to and including protected health information to the present date this order is presented.

IT IS FURTHER ORDERED that [**name of applicant**] file a bond in the amount of $[**amount**] and take an oath of office.

IT IS FURTHER ORDERED that the clerk attach a certificate to this order showing compliance after [**name of applicant**] takes their oath and gives bond in the amount of $[**amount**] as temporary guardian pending contest of the [person/estate/person and estate] of [**name of ward**].

IT IS FURTHER ORDERED that this order and the appointment of said temporary guardian pending contest of the [person/estate/person and estate] shall continue in full force and effect until the settlement or resolution of the pending contest, or until further order of this Court, and that, upon the expiration of this appointment, the temporary guardian pending contest is directed to file with this Court an account, verified by sworn affidavit, of all actions of the temporary guardian.

Select as applicable.

IT IS FURTHER ORDERED that the former appointment of [**name of guardian**] as temporary guardian of the [person/estate/person and estate] of [**name of ward**], a [minor/proposed incapacitated person], [will/will not] terminate on the qualification of the temporary guardian pending contest appointed by this order [**include if applicable:** and the surety of their bond as former temporary guardian of the [person/estate/person and estate] of [**name of ward**]

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in the amount of $[**amount**] will be discharged on approval of the final account required by law].

And/Or

IT IS FURTHER ORDERED that [**name of guardian**], as former temporary guardian of the [person/estate/person and estate] of [**name of ward**], a [minor/proposed incapacitated person], account for their actions, including any funds previously received by them in their account as temporary guardian pending contest of the [person/estate/person and estate] of [**name of ward**], a [minor/proposed incapacitated person].

And/Or

IT IS FURTHER ORDERED that [**name of applicant**] is found to be in good faith, and there is just cause for the purpose of having a temporary guardian appointed for [**name of ward**].

IT IS FURTHER ORDERED that all powers of attorney allegedly executed by [**name of ward**] shall be suspended. No designated agent shall have the power to act during the temporary guardianship.

SIGNED on _____.

_____
JUDGE PRESIDING

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Form 2-5

[Caption. See § 3 of the Introduction in this manual.]

Motion to Extend Hearing on Temporary Guardianship

[**Name of movant**], attorney ad litem for [**name of proposed ward**], Proposed Ward, files this Motion to Extend Hearing on Temporary Guardianship under section 1251.006 of the Texas Estates Code and shows the Court the following:

1. This Court has currently set the hearing on the temporary guardianship for [**date**] at [**time**].

2. An extension of time of no greater than thirty days after the filing of the application is needed for appointment of the temporary guardian because [**state the reason[s] the extension is necessary**].

3. The attorney ad litem requests this Court to extend the hearing on the temporary guardianship until [**date**] at [**time**].

4. The attorney ad litem represents to the Court that it is in the best interests of Proposed Ward that the Court extend the hearing.

5. This motion is sought not for delay only but so that justice may be done.

The attorney ad litem requests that the Court grant this motion and extend the date for the hearing on the temporary guardianship and for all further relief to which they may be entitled.

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Respectfully submitted,

_____

[**Name**]
Attorney Ad Litem
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 2-6

[Caption. See § 3 of the Introduction in this manual.]

Order Extending Hearing on Temporary Guardianship

On [**date**] the Court considered the Motion to Extend Hearing on Temporary Guardianship filed by [**name of movant**], attorney ad litem for [**name of ward**]. The Court finds that extending the hearing date is in the best interests of [**name of ward**].

State if applicable the court's reason(s) that it is in the ward's best interests to extend the hearing date.

IT IS THEREFORE ORDERED that the hearing on the application for temporary guardianship is extended until [**date**].

SIGNED on _____.

_____
JUDGE PRESIDING

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Form 2-7

[Caption. See § 3 of the Introduction in this manual.]

Final Account of Temporary Guardian

[**Name of temporary guardian**], Temporary Guardian, temporary guardian of the estate of [**name of ward**], [a minor/an incapacitated person], files this final sworn account in accordance with section 1251.152 of the Texas Estates Code and represents to the Court as follows:

1. [**Name of temporary guardian**] was appointed as temporary guardian of this estate by order of this Court dated [**date**] and qualified as such on [**date**], as required by law. This temporary guardianship should be closed because [**name**] was appointed permanent guardian of the estate of [**name of ward**], [a minor/an incapacitated person], by order of this Court dated [**date**], and they qualified as required by law on [**date**].

2. This account covers the period from [**date**] through [**date**].

3. The following is a list of all property of this estate that has come into the possession of Temporary Guardian during the period of accounting:

Real Property

Description	Community or Separate	Value
Total		

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Stocks, Bonds & Securities

Description	Community or Separate	Value
Total		

Cash

Description	Community or Separate	Value
Total		

Jointly Owned Property

Description	Community or Separate	Value
Total		

Miscellaneous Property

Description	Community or Separate	Value
Total		

TOTAL ESTATE VALUE_____ $[**amount**]

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4. The following is a return of all sales made by Temporary Guardian:

Description	Community or Separate	Value
Total		

5. A full exhibit and account of all other financial transactions of Temporary Guardian is as follows:

Receipts

Description	Received Date	Community or Separate	Value
Total			

Disbursements

Description	Court Approved	Payment Date	Community or Separate	Amount
Total				

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6. The following property belonging to this estate remains in possession of Temporary Guardian:

Real Property

Description	Community or Separate	Value
Total		

Stocks, Bonds & Securities

Description	Community or Separate	Value
Total		

Cash

Description	Community or Separate	Value
Total		

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Jointly Owned Property

Description	Community or Separate	Value
Total		

Miscellaneous Property

Description	Community or Separate	Value
Total		

TOTAL ESTATE VALUE_____ $[**amount**]

7. The property remaining in possession of Temporary Guardian, as described above, should be delivered to

Select one of the following.

[**name**] as permanent guardian of the estate of [**name of ward**], [a minor/an incapacitated person].

Or

[**name[s]**], the person[s] entitled to receive the ward's estate.

Continue with the following.

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8. The foregoing is a true and complete list, return, exhibit, and account of this estate as required by section 1251.152 of the Texas Estates Code, and Temporary Guardian is ready to deliver the property remaining on hand to the persons entitled to possession.

9. Temporary Guardian requests the Court to enter an order discharging them from this estate, discharging the surety on their bond from further liability, and declaring the temporary guardianship of this estate closed, conditioned on the filing of a receipt from [the permanent guardian/the person[s] entitled to receive the ward's estate].

If funds or assets are held in safekeeping, the following paragraph should be used to distribute the assets.

10. Temporary Guardian requests the Court to enter an order that [**name of holder**], which presently has [funds/assets] of this estate under safekeeping in account number [**number**], on receipt of a certified copy of this order deliver these [funds/assets] directly to [**name**].

Continue with the following.

11. Temporary Guardian requests the Court to enter an order approving this Final Account and directing delivery of the estate property remaining on hand to [[**name**], as permanent guardian of the estate,/the person[s]] who [is/are] entitled to receive such property on hand, discharging the surety on Temporary Guardian's bond from further liability, and declaring the temporary guardianship of this estate closed conditioned on the filing of a receipt for the assets from the person or persons entitled to possession.

Respectfully submitted,

_____

[**Name**]
Temporary Guardian

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[**Name**]
Attorney for Temporary Guardian
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Guardian's Affidavit

BEFORE ME, the undersigned authority, on this day personally appeared [**name of affiant**], who swore on oath that the following facts are true:

"I am the guardian in the foregoing Final Account for Final Settlement. I have personal knowledge of the allegations and facts stated in it, and the contents and exhibits are true, complete, and correct.

"This account contains a correct and complete statement of the matters pertaining to the estate of the ward. The bond premium on this estate has been paid.

Select one of the following.

"No tax returns have been filed on behalf of the ward."

Or

"I have filed the following tax returns on behalf of the ward: [**specify**]. [I have paid the following taxes owed by the ward during the guardianship: [**specify amount, date paid, and governmental entity paid**]]."/There are no taxes currently owed by the ward."]

Or

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"The following tax returns are delinquent in filing: [**specify amount, date due, and reason for delinquency**]."

Continue with the following.

_____

[**Name of affiant**]
Affiant

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

Attach exhibit(s).

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Form 2-8

Temporary Guardian's Affidavit

[**Name of temporary guardian**], temporary guardian of the estate of [**name of ward**], [a minor/an incapacitated person], appeared in person before me today and stated under oath:

"My name is [**name of temporary guardian**]. I am competent to make this affidavit. The facts stated within this affidavit are within my personal knowledge and are true and correct.

"I am the temporary guardian of the estate of [**name of ward**], [a minor/an incapacitated person]. This final account contains a true, correct, and complete statement of the matters to which this final account is related. The bond premiums for this temporary guardianship have been paid. All tax returns for the ward during this temporary guardianship have been filed.

"The temporary guardian has paid all taxes owed by the ward during this temporary guardianship as follows:"

Name of Taxing Authority	Date Paid	Amount Paid

If the temporary guardian is unable to pay all or part of the taxes owed, substitute a detailed statement indicating why the taxes have not been or cannot be paid.

_____
[**Name**]
Temporary Guardian

SIGNED under oath before me on _____.

_____
Notary Public, State of Texas

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Form 2-9

Bank Certificate and Verification of Funds on Deposit

The undersigned officer of the financial institution named below hereby certifies that, at the close of business on [**date**], unencumbered cash and assets of this estate in the amounts shown below were on deposit in this institution to the credit of [**name of temporary guardian**] as temporary guardian of the [estate/person and estate] of [**name of ward**].

Account Description	Account Number	Amount
1. Checking		
2. Savings		
3. CDs		
4. Treasury Bonds		
5. [Specify other]		
Total		

_____

[**Name of officer**]
[**Name and address of financial institution**]

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Form 2-10

In most cases the recipient of the estate will be the successor guardian, but if the ward has died or been discharged or there is no successor guardian, the proper person's name should be used.

[Caption. See § 3 of the Introduction in this manual.]

Order Approving Final Account of Temporary Guardian

On [**date**], the Court considered the Final Account of Temporary Guardian. After examining the final account and considering the evidence in its support, the Court finds—

1. that citation has been fully served upon all persons interested in this temporary guardianship estate;

2. that the Court has jurisdiction of this proceeding and of the subject matter as required by law;

3. the Court has now been fully advised on all items of the account and possession of cash and other assets kept in safekeeping as well as those on deposit having been duly proved as required by law;

4. the Court is satisfied that the facts stated in the account are true, correct, and complete;

5. that the Account for Final Settlement has been audited and settled by the Court, complies with the law in every respect, and should be approved as filed;

6. that all claims, debts, and expenses have been paid or are approved and should be paid and that this temporary guardianship estate has been fully administered; and

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7. that all of the property belonging to this temporary guardianship estate and still remaining on hand, after payment of all court-approved debts and expenses, shall be delivered to the persons entitled to receive the same.

IT IS THEREFORE ORDERED that the Account for Final Settlement is hereby APPROVED and ordered of record.

IT IS FURTHER ORDERED that any property belonging to this temporary guardianship estate and remaining in the hands of [**name of temporary guardian**], as temporary guardian, shall be delivered to [**name and address**].

IT IS FURTHER ORDERED that [**name of temporary guardian**] shall be discharged and this temporary guardianship estate is CLOSED.

SIGNED on this _____ day of _____.

_____
JUDGE PRESIDING

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Form 2-11

[Caption. See § 3 of the Introduction in this manual.]

Application to Close Estate and Discharge Temporary Guardian of [Person/Estate/Person and Estate]

This Application to Close Estate and Discharge Temporary Guardian of [Person/Estate/Person and Estate] is filed by [**name of applicant**], who shows the Court the following:

1. This Court has previously entered its order approving the account for final settlement of this estate and has ordered [**name of temporary guardian**], Temporary Guardian, to deliver the property remaining on hand after payment of debts and expenses to those persons entitled to receive the property as identified in the final account.

2. Temporary Guardian has fully complied with the order, and there is no property of this estate remaining in possession of Temporary Guardian. The signed receipt[s] of the person[s] who [has/have] received the property [is/are] attached to this application.

Temporary Guardian requests the Court to enter an order discharging Temporary Guardian from [his/her] trust, discharging Temporary Guardian's surety on [his/her] bond from further liability, and declaring this guardianship of the [person/estate/person and estate] to be closed.

Respectfully submitted,

_____

[**Name**]
Temporary Guardian

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_____

[**Name**]
Attorney for Temporary Guardian
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 2-12

[Caption. See § 3 of the Introduction in this manual.]

Order Closing Estate and Discharging Temporary Guardian

On [**date**] the Court considered the Application to Close Estate and Discharge Temporary Guardian of [Person/Estate/Person and Estate]. After reviewing the application and supporting receipts, the Court finds that the account for final settlement has previously been approved; that the temporary guardian of the [person/estate/person and estate] has distributed all the property of the estate remaining after the payment of all debts and expenses; that this estate has now been fully administered, and there is no property remaining on hand for distribution; and that this guardianship should be closed.

IT IS ORDERED that [**name of temporary guardian**], temporary guardian of the [person/estate/person and estate], is hereby discharged from [his/her] trust; that [**name of surety**], the surety on the bond of the temporary guardian, is hereby discharged from further liability under the bond; and that this guardianship of the [person/estate/person and estate] is hereby closed.

SIGNED on _____.

_____
JUDGE PRESIDING

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Form 2-13

[Caption. See § 3 of the Introduction in this manual.]

Motion to Release Temporary Guardian's Cash Bond

This Motion to Release Temporary Guardian's Cash Bond is filed under section 1105.159 of the Texas Estates Code by [**name of movant**], Movant, temporary guardian of the [person/estate/person and estate] of [**name of ward or proposed ward**], who shows the Court the following:

Movant has fully complied with the orders of this Court and has filed [his/her] final report of the temporary guardian of the [person/estate/person and estate].

Movant filed [his/her] cash bond in the amount of $[**amount**] on [**date**], in accordance with this Court's order of [**date**], and attaches hereto a copy of the receipt and a notice to judge of deposit into registry of court of cash in lieu of corporate bond as Exhibit [**exhibit number/ letter**].

Movant requests this Court to release the cash bond held in the registry of the Court, along with all interest, to [**name of movant**] in care of the law firm of [**name of firm**] at [**address, city, state**] or its agents.

Movant, temporary guardian of the [person/estate/person and estate] of [**name of ward or proposed ward**], prays that this Court order the clerk of [**county**] County to release the cash bond in the amount of $[**amount**], along with all interest, to [**name of movant**] in care of the law firm of [**name of firm**] at [**address, city, state**] or its agents.

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Respectfully submitted,

_____

[**Name**]
Attorney for Movant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach exhibit(s).

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Form 2-14

[Caption. See § 3 of the Introduction in this manual.]

Order Releasing Temporary Guardian's Cash Bond

On [**date**] the Court considered the Motion to Release Temporary Guardian's Cash Bond filed by [**name of movant**], Movant, temporary guardian of the [person/estate/person and estate] of [**name of ward or proposed ward**], an incapacitated person. The Court finds that—

1. Movant did enter on and has since faithfully performed [his/her] duties as the temporary guardian;

2. the guardianship has been administered in accordance with the laws of the state of Texas and the Texas Estates Code;

3. all orders of this Court relating to Movant's trust as the temporary guardian have been in all respects fully complied with by Movant; and

4. the guardianship has been closed.

IT IS ORDERED that the clerk of [**county**] County release from the registry of the Court the cash bond in the amount of $[**amount**], along with all interest, to [**name of movant**] in care of the law firm of [**name of firm**] at [**address, city, state**] or its agents.

SIGNED on _____.

_____
JUDGE PRESIDING

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Form 2-15

Receipt

The undersigned hereby acknowledges receipt of the property described below from [**name of temporary guardian**], temporary guardian of the estate of [**name of ward**], [a minor/ an adult incapacitated person], in full and complete satisfaction of that portion of this estate to which the undersigned is entitled:

Account Description	Amount
1. Real Property	
2. Stocks, Bonds & Securities	
3. Cash	
4. Jointly Owned Property	
5. Miscellaneous Property	
Total	

SIGNED on [**date**].

_____

[**Name of recipient**]
[**Address, city, state**]
[**Telephone**]

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Chapter 3

Alternatives to Guardianship and Preguardianship Planning

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Chapter 3

Alternatives to Guardianship and Preguardianship Planning

§ 3.1 Scope of Chapter

This chapter identifies various alternatives to the appointment of a guardian for a proposed ward's person or estate. These summaries are intended only to inform the attorney of possible alternatives, and sources outside this manual should be consulted if it is determined that one of these alternatives may be an appropriate option.

Note that as of September 1, 2015, consideration of alternatives to guardianships is not only advisable, it is also required. The guardianship sections of the Texas Estates Code include a policy statement requiring the use of less restrictive alternatives to guardianship if such are available and appropriate. *See* Tex. Est. Code § 1001.001. If the appointment of a guardian is warranted, any guardianship must encourage the development or maintenance of maximum self-reliance and independence of the proposed ward. Tex. Est. Code § 1001.001. However, the court, the applicant, the ad litem, and the fact finder are required to determine if a less restrictive alternative is available and appropriate prior to the appointment of a guardian. Tex. Est. Code §§ 1054.001, 1054.054, 1101.001(b), 1101.101.

The Estates Code also provides a statutory definition of "alternatives to guardianship," which offers a nonexclusive list of alternatives:

1. medical power of attorney (see section 3.12 below);
2. durable power of attorney (sections 3.9, 3.10);
3. declaration for mental-health treatment (section 3.22);
4. representative payee (sections 3.3, 3.4);
5. joint bank account (convenience account) (section 3.2);
6. guardianship management trust (chapter 1301 guardianship management trust) (chapter 11 in this manual);
7. special needs trust (section 3.25:5);
8. preneed designation of guardian (section 3.20); and
9. person-centered decision-making (supported decision-making agreement) (section 3.11).

Tex. Est. Code § 1002.0015.

In addition, the ability of the proposed ward to take advantage of available supports and services to enhance capacity must be considered at every stage of the guardianship process, from investigation into the potential need for a guardianship to modification or restoration of an existing guardianship. *See* Tex. Est. Code § 1002.031. See also section 3.33 below.

§ 3.2 Bank Accounts

A joint account established in the name of the client, before incapacity, and the name of one or more responsible individuals will permit one person to write checks on or withdraw funds from another's checking or savings account. Tex. Est. Code ch.

113. A "convenience account," which permits the cosignatories to draw off the account during the depositor's life to benefit the depositor or to pay his obligations, may also be considered. Tex. Est. Code § 113.004(1). Under this option, the convenience signer has no ownership rights in the account, before or after the death of the depositor, nor does the convenience signer have any right to pledge the assets of the account.

Under proper circumstances, convenience signers may also be added to other multiparty accounts, such as joint tenancy with right of survivorship, pay-on-death, or trust accounts, without granting ownership rights to the convenience signer. Tex. Est. Code § 113.106. But access should not be obtained solely based on the consent of a person who lacks capacity to give valid consent. Therefore, when authorization does not predate the proposed ward's incapacity, this option may be limited to situations where another person, such as an attorney-in-fact, can give the required authorization.

§ 3.3 Appointment of Representative Payee for Receipt of Social Security Benefits

Many elderly and disabled persons receive Social Security retirement income or Supplemental Security Income (SSI) benefits. The Social Security Administration (SSA) provides for the appointment of a "representative payee" to receive the appropriate benefits on behalf of the retired or disabled person if that person is unable to process or manage the funds. *See* 42 U.S.C. § 1383(a)(2); 20 C.F.R. §§ 416.601–.665. No legal determination of incapacity is required. 20 C.F.R. § 416.601. The appointment of a guardian is also not required.

The power of a court-appointed guardian of the estate to receive and manage these benefits is subordinate to that of a representative payee. The SSA may deny a court-appointed guardian of the estate the right to receive the ward's Social Security and SSI benefits and may appoint another individual as representative payee.

If guardianship is needed only because the disabled person cannot process or manage a Social Security or SSI check, guardianship can often be avoided by having a representative payee appointed. The local SSA office can provide application forms and further information about the representative payee program for Social Security retirement and SSI payments.

§ 3.4 Department of Veterans Affairs Fiduciary Program

Similar to the appointment of a representative payee to receive benefits on behalf of a retired or disabled person, the Department of Veterans Affairs Fiduciary Program allows the appointment of a person to handle the administration of a veteran's pension benefits without the appointment of a guardian. *See* 38 U.S.C. § 5502; *see also* Department of Veterans Affairs, Fiduciary, **www.benefits.va.gov/fiduciary**. See chapter 5 in this manual for further discussion of veterans benefits and guardianships of veterans.

§ 3.5 Payment of Employees Retirement System Funds to Parent of Minor

Texas Employees Retirement System (ERS) funds owed a minor may be paid directly to and managed by the beneficiary's parent. Tex. Att'y Gen. Op. No. H-1214 (1978). The attorney general's opinion relies on two provisions as support for this conclusion. First, a parent has authority to manage the estate of a minor child without court appointment of a guardian. Tex. Fam. Code § 151.001(a)(4). A parent may also receive, hold, and disburse funds for the minor's benefit. Tex. Fam. Code § 151.001(a)(8). Thus, a parent may receive and manage a minor child's ERS benefits without guardianship administration. Tex. Att'y Gen. Op. No. H-1214. If the sole property of a minor consists of a right to receive ERS funds, guardianship of the minor may be avoided, and these funds may be paid directly to the parent to be managed for the benefit of the minor.

§ 3.6 Managing and Possessory Conservatorship for Minor

In suits affecting the parent-child relationship, defined by Tex. Fam. Code § 101.032(a), state district courts are empowered to appoint managing and possessory conservators for minor children. Tex. Fam. Code §§ 153.005–.006. The rights and duties of nonparent possessory conservators are prescribed by Tex. Fam. Code § 153.376. A nonparent managing conservator's rights include the right to physical possession of the minor; the duty to care for, control, protect, and provide support and education for the minor; and the power to consent to medical treatment for, make decisions of legal significance concerning, and receive, hold, and disburse funds for the support of the minor. For cases pending on or filed after September 2019, the nonparent managing conservator has the right to apply for, renew, and maintain possession of the minor's passport. Tex. Fam. Code § 153.371.

The statutory rights and duties of a managing conservator have been held to be equivalent to the rights, powers, and duties of guardians of the person. *See In re Guardianship of Henson*, 551 S.W.2d 136, 139 (Tex. App.—Corpus Christi–Edinburg 1977, writ ref'd n.r.e.). Although a detailed account of use of the preemptive appointment of a managing conservatorship in lieu of guardianship is beyond the scope of this manual, it should be considered if a parent is terminally ill and wishes to settle the conservatorship premortem. Tex. Fam. Code § 153.007 provides for agreed conservatorships. *See also* Tex. Fam. Code § 161.005 (termination of parental rights).

§ 3.7 Temporary Authorization to Consent to Voluntary Inpatient Mental-Health Services for Child

This procedure, added by the Texas legislature in 2019, allows designated adult nonparent family members (grandparent, adult sibling, or adult uncle or aunt) with actual custody of a minor to seek a court order for temporary authorization to consent to voluntary inpatient mental-health services for that child. Tex. Fam. Code ch. 35A; Tex. Health & Safety Code § 572.001(a–1).

The petition is filed and heard in district court and must be accompanied by a sworn certificate of medical examination for mental illness prepared by a physician who has examined the child not earlier than the third day before the date the petition is filed. Tex. Fam. Code § 35A.003(7); Tex. Health & Safety Code § 572.001(a–1).

The certificate must contain the physician's opinion, specifying the child is a person (1) with mental illness or who demonstrates symptoms of a serious emotional disorder and (2) who presents a risk of serious harm to himself or others if not immediately restrained or hospitalized. Tex. Fam. Code § 35A.003(7)(A), (7)(B).

The petition must also explain why the filer cannot get documented permission from a parent, conservator, or guardian of the child. Tex. Fam. Code § 35A.003(8).

After a hearing and notice as specified in the statute, the court may grant authority for the applicant to give consent for voluntary inpatient mental-health services. Tex. Fam. Code § 35A.005.

The order expires on the earlier of the date the applicant requests that the child be discharged, the date the physician determines the child no longer meets the required criteria, or the tenth day after the date the order is issued. However, if the petitioner obtains an order for temporary managing conservatorship before the tenth day after the date the order was issued, the order expires on the earlier of the date the petitioner requests the child be discharged or the date the physician determines the child no longer meets the required criteria. Tex. Fam. Code § 35A.005(d), (e).

§ 3.8 Authorization Agreement for Nonparent Relative

A parent may authorize a grandparent, adult sibling, or adult aunt or uncle to have decision-making authority for a minor child in regard to health care, insurance coverage, school enrollment, school activities, driver's education, employment, and application for public benefits. *See* Tex. Fam. Code ch. 34. This essentially authorizes the designee to do anything a guardian of the person could do. See form 3-1 in this chapter.

§ 3.9 Durable Power of Attorney

A statutory durable power of attorney is commonly used as it is the form generally accepted by third parties. But Texas also recognizes powers of attorney other than those granted by the statutory form. To use it to avoid a guardianship, however, the power of attorney must be durable.

A "durable power of attorney" means a writing or other record that meets the requirements of Texas Estates Code section 751.0021(a) or is described by section 751.0021(b). The requirements include that the writing or record designate another person as agent and grant authority to that agent to act in the place of the principal, regardless of whether the term "power of attorney" is used, and be signed by an adult principal or in the adult principal's conscious presence by another adult directed by the principal to sign the principal's name on the instrument. The writing must contain the words "This power of attorney is not affected by subsequent disability or incapacity of the principal," "This power of attorney becomes effective on the disability or incapacity of the principal," or similar words indicating the agent's authority notwithstanding the principal's subsequent disability or incapacity. Tex. Est. Code §§ 751.002(4), 751.0021.

On the qualification of a court-appointed permanent guardian of the estate for a ward who is the principal who executed a power of attorney, the powers and authority granted to the agent named in the power of attorney are automatically revoked. Tex. Est. Code § 751.133(a). On the qualification of a temporary guardian of the estate for the principal, the powers and authority granted to the agent are automatically suspended for the duration of the guardianship. Tex. Est. Code § 751.133(b).

§ 3.10 Statutory Durable Power of Attorney

In 1993, the Texas legislature originally created a statutory durable power of attorney under the Texas Probate Code. Now chapter 752 of the Texas Estates Code sets forth the form for a statutory durable power of attorney. See form 3-2 in this chapter. A person may use a statutory power of attorney to grant an attorney-in-fact or agent powers with respect to a person's property and financial matters. A power of attorney in substantially the form found in chapter 752 is considered a statutory durable power of attorney. The validity of a power of attorney as meeting the requirements of a statutory durable power of attorney is not affected by the fact that one or more of the categories or optional powers listed in the form are not initialed or the form includes specific limitations on or additions to the attorney-in-fact or agent's powers. Tex. Est. Code § 752.002. A person is not required to use the statutory form, but to be considered a statutory form, it must be in substantially the form set forth in chapter 752. Sections 752.101 through 752.115 of the Estates Code set forth the powers that are given in the statutory power of attorney. Many banks and brokerage firms will accept only the form of power of attorney included in chapter 752 or one that looks substantially similar to it.

Over the years, several significant statutory amendments have been adopted, which have improved the powers and accountability of the agent. These include the following:

1. The power of attorney terminates in certain designated circumstances or when the document provides a specific termination date or is revoked. Tex. Est. Code § 751.131.

2. A principal is bound by the agent's acts as if the principal had performed the act. Tex. Est. Code § 751.051.
3. When a guardian is appointed, the agent can be made to account for all actions under the power of attorney no matter when the actions were taken. Tex. Est. Code § 751.104.
4. Any person who, in good faith, relies on the power of attorney without notice of the termination of an agent's authority is protected. Tex. Est. Code § 751.134.
5. The agent may execute a certification to establish the existence of this good-faith reliance. This certification is permitted to state the principal's specific disability or incapacity. Tex. Est. Code § 751.203.
6. The power of attorney must be recorded only if it covers real property. *See* Tex. Est. Code § 751.151.
7. Appointment of a spouse as agent is automatically revoked on divorce or annulment unless the power of attorney provides otherwise. Tex. Est. Code § 751.132.
8. Appointment of co-agents is recognized, and, unless otherwise indicated, each co-agent may exercise authority independently of the other. Tex. Est. Code § 751.021.
9. An agent is entitled to reimbursement of expenses and reasonable compensation unless the power of attorney provides otherwise. Tex. Est. Code § 751.024.

Many of the recent improvements, effective September 1, 2017, make the Texas Durable Power of Attorney laws more similar to the Uniform Durable Power of Attorney Act. Most importantly, third parties are required to accept a power of attorney unless they meet the exceptions allowed under section 751.206 of the Estates Code. Tex. Est. Code § 751.201.

Practice Pointer: Some banks and brokerage firms will accept only their own power of attorney form. Until the new durable power of attorney laws referenced above have been tested, have your clients check with their banks and brokerage firms and, if this is the case, also have the clients execute those forms as well as the statutory durable power of attorney form.

§ 3.11 Supported Decision-Making Agreements

Somewhat similar to a power of attorney, a supported decision-making agreement is an agreement regarding activities of daily living ("ADLs") between (1) an adult with disabilities, but who is not incapacitated, and (2) a "supporter" who is willing to assist in—

1. understanding the options, responsibilities, and consequences of the life decisions, without actually making those decisions for the disabled adult and without impeding the adult's self- determination;
2. obtaining the relevant information necessary to make decisions (health, financial, or educational—the adult may execute Health Insurance Portability and Accountability Act or similar releases to facilitate the information gathering);
3. understanding the information gathered; and
4. communicating those decisions to the appropriate persons.

Tex. Est. Code § 1357.051.

"Life decisions" could include decisions regarding obtaining food and clothing and residence and cohabitation choices; the supports, services, and medical care to be received; financial management assistance; and workplace choices.

Such an agreement extends until terminated by either party or by the terms of the agreement. The agreement will also terminate if the Texas Department of Family and Protective Services validates findings of abuse, neglect, or exploitation by the supporter against the adult or the supporter is found criminally liable for such actions. The qualification of a temporary or permanent guardian of the person or estate of the adult with a disability will also terminate the agreement. Tex. Est. Code § 1357.053(b)(3). See form 3-3 in this chapter for the statutory form of a supported decision-making agreement. *See also* Tex. Est. Code § 1357.053.

A permissive form is supplied in the statute. The agreement must be signed by both the disabled adult and the supporter in the presence of either two or more subscribing witnesses (above age fourteen) or a notary public. Tex. Est. Code § 1357.055.

The supporter owes to the adult with a disability fiduciary duties as listed in the form provided by section 1357.056(a), regardless of whether that form is used for the supported decision-making agreement. Tex. Est. Code § 1357.052(b). The relationship between an adult with a disability and the supporter with whom the adult enters into a supported decision-making agreement (1) is one of trust and confidence and (2) does not undermine the decision-making authority of the adult. Tex. Est. Code § 1357.052(c). The supporter's fiduciary duties are (1) acting in good faith, (2) acting within the authority granted in the agreement, (3) acting loyally and without self-interest, and (4) avoiding conflicts of interest. Tex. Est. Code § 1357.056(a).

§ 3.12 Medical Power of Attorney

A medical power of attorney allows an individual to designate an agent to consent to medical treatment. *See* Tex. Health & Safety Code § 166.151. This power of attorney can be either notarized or witnessed by two qualified witnesses. Tex. Health & Safety Code § 166.154. As of January 1, 2018, the disclosure statement previously required as a separate document is part of the statutory form. The statutory form is still required. Tex. Health & Safety Code § 166.164. See form 3-4 in this chapter for the statutory form as of January 1, 2018. The medical power can be revoked—

1. by oral or written notification by the principal to the agent or health-care provider "or by any other act evidencing a specific intent to revoke the power," without regard to the principal's capacity;
2. by the execution of a subsequent power of attorney; or
3. if the agent is a spouse and the marriage to the principal is dissolved, annulled, or declared void, unless the power provides otherwise.

Tex. Health & Safety Code § 166.155.

Texas is one of only five states that will not permit the use of nonstatutory medical powers of attorney. See discussion at section 3.16 below.

§ 3.13 Directive to Physicians

In 1999, the Texas legislature consolidated the statutory provisions for directives to physicians and medical powers of attorney into chapter 166 of the Texas Health and Safety Code. A directive to physicians allows one to designate, before the need arises, instructions on the use or withholding of life-sustaining procedures. The Code provides a specific form but does not mandate its use. Tex. Health & Safety Code § 166.033. See form 3-6 in this chapter. The form is entitled "Directive to Physicians and Family or Surrogates." Some attorneys and clients find the form's division of medical conditions into categories—irreversible and terminal—confusing. An irreversible condition is one wherein a person cannot make decisions for himself or

take care of himself, that may be treated but not cured, and that is fatal without life-sustaining treatment. Examples of an irreversible condition are Alzheimer's disease or a severe brain injury that will not improve. A terminal condition refers to one with a life expectancy of less than six months. Tex. Health & Safety Code § 166.033.

A person must not be incapacitated at the time the directive is executed. Tex. Health & Safety Code § 166.032. The directive must be signed in the presence of two witnesses or notarized. *See* Tex. Health & Safety Code §§ 166.032(b), (b–1), 166.036(a).

Under the statute, one witness must not be related to the declarant by blood or by marriage, not be entitled to a part of the declarant's estate, not have a claim against the patient, not be the attending physician or the employee of the attending physician, not be involved in providing direct patient care, and not be an officer, director, partner, or business office employee of the health-care facility in which the patient is located. Tex. Health & Safety Code § 166.033.

If a patient has not executed a directive and is incompetent or incapable of communication, the attending physician and the patient's legal guardian or an agent appointed under a medical power of attorney may make a decision on whether to use life-sustaining procedures on the patient. Tex. Health & Safety Code § 166.039(a). If there is no legal guardian or agent, the attending physician and one of the following persons in the following priority may decide to withhold or withdraw life-sustaining procedures: the patient's spouse, reasonably available adult children, parents, or the patient's nearest living relatives. Tex. Health & Safety Code § 166.039(b).

The directive need not be recorded to be effective, is effective on execution, and may be revoked at any time without regard to the declarant's mental state or competency. Tex. Health & Safety Code § 166.042.

Any health-care provider who acts in compliance with a directive is not liable if the acts are done in good-faith reliance on the directive. Also, a provider who is unaware of the directive cannot be liable for acting contrary to it. Tex. Health & Safety Code § 166.045. Instructions in a directive supersede any conflicting instructions given by a guardian or agent under a durable power of attorney for health care if the directive is executed at a later time. Tex. Health & Safety Code § 166.008.

A surrogate decision maker, physician, or medical treatment provider who acts in good faith will not be subject to either criminal or civil liability for the acts. Tex. Health & Safety Code § 166.160.

§ 3.14 Consent of Nonparent Under Family Code

The Texas Family Code provides that when a parent is unavailable to consent to dental, medical, psychological, and surgical treatment of a child, a person authorized by statute may consent to such treatment. Tex. Fam. Code § 32.001(a). A parent may also delegate authority to consent to others not authorized by statute. See form 3-7 in this chapter.

§ 3.15 Surrogate Decision Making

§ 3.15:1 Incapacitated Individuals and Inmates

Incapacitated individuals in a hospital or nursing home, receiving services through a "home and community support services agency," or who are adult inmates of a county or municipal jail may have nonemergency medical decisions made without the necessity of a guardianship. *See* Tex. Health & Safety Code §§ 313.001–.007.

"Incapacity" is defined as "lacking the ability, based on reasonable medical judgment, to understand and appreciate the nature and consequences of a treatment decision, including the significant benefits and harms of and reasonable alternatives to any proposed treatment decision." Tex. Health & Safety Code § 313.002(5).

Any medical treatment consented to under the surrogate decision-making statute must be based on knowledge of what the patient would desire, if known. Tex. Health & Safety Code § 313.004(c).

Decision-Maker Priority: Decision-making priority is given in the following order, to (1) the patient's spouse; (2) an adult child of the patient, with the waiver and consent of all other qualified adult children of the patient to act as the sole decision maker; (3) a majority of the patient's reasonably available adult children; (4) the patient's parents; (5) the individual clearly identified to act for the patient by the patient before the patient became incapacitated; (6) the patient's nearest living relative; or (7) a member of the clergy. Tex. Health & Safety Code § 313.004(a).

Surrogate decision making does not (1) replace the authority of a guardian or of an agent under a medical power of attorney, (2) authorize treatment decisions for a minor unless the disabilities of minority have been judicially removed, or (3) authorize patient transfers under Texas Health and Safety Code chapter 241. *See* Tex. Health & Safety Code § 313.003.

Limitations on Types of Consent: The surrogate decision maker cannot consent to (1) voluntary inpatient mental-health services, (2) electro-convulsive treatment, (3) the appointment of another surrogate decision maker, (4) emergency decisions, or (5) end-of-life decisions (extending or withdrawing life support). Tex. Health & Safety Code §§ 313.003(a)(1), 313.004(d). Additionally, if the patient is an adult inmate of a county or municipal jail, a surrogate decision maker may not consent to (1) psychotropic medication, (2) involuntary inpatient mental-health services, or (3) psychiatric services calculated to restore competency to stand trial. Tex. Health & Safety Code § 313.004(e).

Limitations on Period of Consent for Inmate: A surrogate decision maker for an adult inmate may consent to medical treatment on behalf of the inmate patient only for the earlier of 120 days from the day after the date the surrogate decision maker agrees to act or the date the inmate is released from jail. Following the period of consent, only the patient or the patient's appointed guardian (of the person) may consent to medical treatment. *See* Tex. Health & Safety Code § 313.004(f). Presumably, surrogate decision making would be available if the patient then otherwise qualified under the surrogate decision-maker statute.

Withdrawal of Life Support: If there is no directive to physicians and there is no guardian, making a treatment decision that may include withholding or withdrawing life-sustaining treatment is to be made pursuant to Health and Safety Code section 166.039. The protocol for such a decision is, in descending order of availability—

1. the attending physician and the patient's legal guardian or agent under a medical power of attorney;
2. the attending physician and either—
    a. the patient's spouse;
    b. the patient's reasonably available adult children;
    c. the patient's parents; or
    d. the patient's nearest living relative; or
3. the attending physician and another physician who is not involved in the treatment of the patient or who is a representative of an ethics or medical committee of the health-care facility in which the person is a patient.

Tex. Health & Safety Code § 166.039(a), (b), (e).

Documenting Consent: The attending physician is required to—

1. describe the patient's incapacity in the patient's medical record;
2. describe the proposed medical treatment;
3. make a reasonably diligent effort to contact or cause to be contacted the persons eligible to serve as surrogate decision makers; and
4. document the efforts to contact those persons in detail in the patient's medical record.

Tex. Health & Safety Code § 313.005(a), (b).

If a surrogate decision maker consents to medical treatment on behalf of the patient, the attending physician records the date and time of the consent and signs the patient's medical record. The surrogate decision maker countersigns the medical record or signs an informed consent form. Tex. Health & Safety Code § 313.005(c).

The statute provides for the surrogate consent to be given other than in person, provided that the consent is documented in the patient's medical record, signed by the staff member receiving the consent, and countersigned by the surrogate decision maker as soon as possible. Tex. Health & Safety Code § 313.005(d).

Costs of Treatment: The statute does not make the surrogate decision maker liable for the cost of treatment. The result is the same as if the patient had consented to the treatment. Tex. Health & Safety Code § 313.006.

Limitations on Liability: The surrogate decision maker, attending physician, hospital, nursing home, home and community support services agency, and their agents are not subject to criminal or civil liability or professional liability, provided all the parties are acting in good faith and the medical treatment consented to does not constitute a failure to exercise due care. Tex. Health & Safety Code § 313.007.

Disputes regarding the right to act as a surrogate decision maker are to be resolved by courts with probate jurisdiction. Tex. Health & Safety Code § 313.004(b).

§ 3.15:2 Persons with Intellectual Disabilities

Surrogate decision making for persons with intellectual disabilities is a more specialized form of surrogate decision making that allows an individual surrogate decision maker, a surrogate consent committee, and an interdisciplinary team to interact to make major medical and dental decisions (including the administration of psychotropic medications and behavior interventions) and release medical records for persons who reside in an intermediate care facility for intellectually disabled persons. The statute also allows other nonmedical decisions to be made by the committee or surrogate decision maker. *See* Tex. Health & Safety Code ch. 597; 26 Tex. Admin. Code §§ 261.281–.295.

Practice Pointer: House Bill 1481, passed in the 2011 legislature, is the Texas implementation of its federal counterpart Rosa's Law (Pub. L. No. 111-256, 124 Stat. 2643–2645 (2010)), which directs the legislature and state agencies to replace, as appropriate, the term *mental retardation* with the term *intellectual disability*. *See* Acts 2011, 82d Leg., R.S., ch. 272 (H.B. 1481), eff. Sept. 1, 2011 (adding Tex. Gov't Code ch. 392). Although H.B. 1481 took effect in September 2011, all of the relevant statutes may not yet have been updated to reflect this change. Practitioners should use care to track existing statutory

language in order to be compliant with the current statutes. See section 1.71 in this manual for additional discussion on the use of "person first language."

§ 3.16 End-Stage Planning and Palliative Care—Statement of Intent

With or without legal assistance, a person may express his wishes and desires about treatment decisions as disability or death approaches. Statutes underlying the various advance directive documents include reference to the patient's wishes or intent, if known, and Texas law requires that the patient's wishes, if known, are to be followed. *See, e.g.*, Tex. Health & Safety Code §§ 166.039, 166.152(e)(1), 313.004(c).

A careful statement of the person's intent with regard to end-of-life treatment choices, surrogate decision making, and palliative care choices, even if not fully compliant as a medical power of attorney or directive to physicians, may still function as a clear statement of the patient's intent. An excellent approach would be to execute the statutory medical power of attorney and directive to physicians and attach them to the statement of intent. By providing a clear outline of the patient's wishes, the statement of intent may help address potential uncertainties regarding end-stage planning and palliative care that may not be addressed in other directives prescribed by statute. The statement of intent may provide useful guidance when another authorized directive does not cover a specific circumstance or is unclear regarding the patient's wishes. Practitioners should use caution to ensure that other directives and advance planning documents authorized by the client are consistent with the client's statement of intent.

A statement-of-intent document is included as form 3-8 in this chapter for illustrative and discussion purposes. It is similar to "Five Wishes," a copyrighted end-stage planning document that combines a health-care power of attorney, a directive to physicians, and end-stage planning statements. (See **www.fivewishes.org**.) "Five Wishes" meets the legal requirements for end-stage planning documents in forty-two states but is widely used in all fifty states. However, because of statutory restrictions in Texas, "Five Wishes" cannot be used in Texas. See discussion at section 3.12 above. The included form is in keeping with the actions of forty-six other states that encourage the use of nonstatutory forms to show the intent of the individual concerned. For Texas, New Hampshire, Ohio, and Wisconsin, the bare bones power of attorney will not work. Although there is no case law upholding the use of the included form, it is clear that under the Directive to Physicians Act, the Medical Power of Attorney Act, and the Consent to Medical Treatment Act the wishes of the principal-patient are to control. If an adult qualified patient has not executed or issued a directive to physicians and is incompetent or otherwise mentally or physically incapable of communication or if the patient does not have a legal guardian or an agent under a medical power of attorney, treatment decisions must be based on knowledge of what the patient would desire, if known. Tex. Health & Safety Code § 166.039(c). The agent under a medical power of attorney, after consultation with the attending physician and other health-care providers, shall make a health-care decision according to the agent's knowledge of the principal's wishes, including the principal's religious and moral beliefs. Tex. Health & Safety Code § 166.152(e)(1). The Consent to Medical Treatment Act requires that any medical treatment consented to must be based on knowledge of what the patient would desire, if known. Tex. Health & Safety Code § 313.004(c).

The sample form provides a broad range of circumstances and issues that can be addressed in the statement of intent, but it is not exhaustive. The form should be adapted as necessary to accurately reflect the person's wishes in specific circumstances, including the specification of certain time frames and percentages relating to medical treatment (for example, no CPR is to be performed unless it is done within seven minutes of cardiac arrest). Although completing a statement of intent does not require legal assistance, persons completing the form are encouraged to do so in consultation with an attorney and the client's doctors. Any completed form must be based specifically on the person's expressed intent.

Note: In the 2019 session of the Texas legislature, the State Bar of Texas Real Estate, Probate & Trust Law Section attempted to secure legislation to make the statutory form of medical power of attorney optional so people could use other forms, such as the "Five Wishes" document, the ABA's simple form, or some other form as a stand-alone document. The proposed legislation met with significant opposition from the Texas Medical Association and the Texas Hospital Association. It did not pass into law. William D. Pargaman, *Is There Meat in Those Beans? The 2019 Texas Estate and Trust Legislative Update*, *in* State Bar of Tex. Prof. Dev. Program, Legislative Update 2019: Estate and Trust Law (2019).

§ 3.17 Do-Not-Resuscitate Orders

§ 3.17:1 Out-of-Hospital Do-Not-Resuscitate Order

A person who is terminally ill or the legally authorized representative for such a person may direct that health-care professionals operating in an out-of-hospital situation not initiate or continue certain life-sustaining procedures. Tex. Health & Safety Code §§ 166.081–.102. Only certain designated life-sustaining procedures may be the subject of the order. Tex. Health & Safety Code § 166.081(6)(A). This directive must be executed on a form specified by the Texas Board of Health, and, among other requirements, it must include—

1. a title that readily identifies the document as an out-of-hospital do-not-resuscitate (DNR) order;
2. a statement that the directive was prepared and signed by the person's attending physician; and
3. places for the names and signatures of two qualified witnesses or the notary public's acknowledgment and for the name and signature of the attending physician.

Tex. Health & Safety Code § 166.083.

The directive is effective on execution and need not be recorded, and there is no advantage to the client in creating a public record. Tex. Health & Safety Code § 166.082(g). Any health-care provider who acts in compliance with and in good-faith reliance on such an order cannot be subjected to criminal or civil liability. In addition, if the health-care provider is not aware of the order, or if the DNR identification device is not present, there is no liability for acting contrary to the order. Tex. Health & Safety Code §§ 166.094–.096.

§ 3.17:2 In-Hospital Do-Not-Resuscitate Order

An in-hospital do-not-resuscitate order authorized by Texas Health and Safety Code title 2, subtitle H, subchapter E, requires a health-care professional not to attempt cardiopulmonary resuscitation on a patient whose circulatory or respiratory function has ceased. The DNR order must be issued by the patient's attending physician, based on a written or oral expression of intent of a competent patient or pursuant to an advance directive or statement of intent from an agent under a medical power of attorney or a guardian. Tex. Health & Safety Code §§ 166.201, 166.203(a). The order takes effect as soon as it is issued, provided that it is included in the patient's medical record as soon as practicable. Tex. Health & Safety Code § 166.206(b).

If the health-care provider does not wish to honor the expression of intent and the expression of intent is not effectively withdrawn, the facility, after informing the patient, guardian, relatives of the patient, or agent under a medical power of attorney of "the benefits and burdens of cardiopulmonary resuscitation," may seek to transfer the patient to another doctor or facility. Tex. Health & Safety Code § 166.206.

A hospital's governing body is required to implement and enforce policies and procedures to comply with provisions relating to in-hospital DNR orders. *See* 25 Tex. Admin. Code § 133.41(f)(6)(G). The policies and procedures must include guidelines for the issuance and revocation of an in-hospital DNR order as indicated by the Health and Safety Code. *See* 25 Tex. Admin. Code § 133.41(f)(6)(G).

§ 3.18 Interventional Alternatives

§ 3.18:1 Emergency Care

No consent for treatment is required for a minor who is suffering from what reasonably appears to be a life-threatening injury or illness and whose parent, managing or possessory conservator, or guardian is not present. Tex. Health & Safety Code § 773.008(3). A similar provision applies to unconscious adults. Tex. Health & Safety Code § 773.008(1).

§ 3.18:2 Emergency Order for Protective Services

A person who lacks the capacity to consent to medical services and who is in a situation posing an immediate threat to his life or physical safety may, upon (1) the filing of a verified petition, (2) the appointment of an attorney ad litem, and (3) a finding of reasonable cause at a hearing for that purpose, be removed by Adult Protective Services. Tex. Hum. Res. Code § 48.208. If the court renders an order under certain circumstances in which a physician was unavailable to issue a medical report, the court shall order that the elderly person or person with a disability be examined by a physician not later than seventy-two hours after the time the provision for protective services begins. Tex. Hum. Res. Code § 48.208(d–1). Unless an order terminates pursuant to Tex. Hum. Res. Code § 48.208(e–1), the removal may last no longer than ten days but may be extended by the court for up to thirty days. The initial thirty-day extension is commonly referred to as the "first extension." The court may grant a second extension for not more than thirty days. The second extension can be a very valuable tool for avoiding guardianship as it allows the family or caregivers additional time to make arrangements to protect the elderly person or person with a disability. However, an application for temporary and permanent guardianship usually follows. This order should not be confused with a domestic violence protective order issuable under chapter 5 of the Texas Code of Criminal Procedure.

§ 3.18:3 Court-Ordered Mental-Health Services

In the case of a chronically mentally ill person, a temporary involuntary commitment may be preferable to a guardianship. A guardianship, with its attendant removal of functional rights and the requirement that it usually be in place for at least a year, may be too restrictive once the patient or ward has been stabilized with medication. Commitment provisions for persons who are chemically dependent, persons with intellectual disabilities, and persons with certain communicable diseases are also available in limited circumstances. *See* Tex. Health & Safety Code chs. 81, 462, 571, 574. For further discussion of mental-health services, see chapter 16 in this manual.

§ 3.18:4 Driving Issues—License Renewal in Person over Age Seventy-Nine and Retest Request

Texas drivers aged seventy-nine or older can no longer renew a driver's license by mail or electronic means; they must renew the license in person at an authorized license renewal station. Tex. Transp. Code § 521.274(b)(3). In addition, drivers aged eighty-five and older must renew every two years, rather than every six years. Tex. Transp. Code § 521.2711.

A potential ward who refuses to stop driving may be reported to the Texas Department of Transportation by a physician, family member, or peace officer if the person's driving capability is impaired. Information in the license renewal application or on the driving record may prompt a reexamination. The reexamination involves an interview and may also involve a vision test, a written test, or a driving test.

It is possible for the applicant in a guardianship or the ad litem to request the court to make a request to the Texas Department of Public Safety for the proposed ward to be retested under DPS regulations to determine the proposed ward's suitability to continue to drive. See form 3-9 in this chapter.

§ 3.18:5 Mental Illness Diversion Programs (Criminal Courts)

In a mental illness diversion program, typically implemented on the initiative of an individual judge, individuals with a documented mental-health problem who have committed crimes are treated as patients, not criminals. These programs vary by county as they are not statutorily mandated.

In these programs, individuals are placed on a strict, supervised probation with regular court check-in dates to document and receive progress updates. Psychiatrists and other professionals develop a mental-health treatment program, customized to meet the specific needs of the participants. Following completion of the program, the charges are dismissed and may be eligible for expunction.

§ 3.18:6 Release on Bail for Court-Ordered Outpatient Mental-Health Services

Persons accused of nonviolent offenses may be released on bail and transferred for court-ordered outpatient mental-health services, with the potential for dismissal of the charges upon successful completion of the outpatient program. Tex. Code Crim. Proc. art. 16.22.

§ 3.18:7 Intellectually Disabled Individuals—Release in Lieu of Arrest

A resident of a group home or intermediate care facility for persons with intellectual or developmental disabilities who is arrested by a peace officer may be released at his residence (the facility) if the officer believes confinement in a correctional facility is unnecessary to protect the person and other persons who reside at the residence and after reasonable efforts to consult with the staff of the facility. Tex. Code Crim. Proc. art. 14.035.

§ 3.19 School Admission Procedures

A school district may adopt guidelines to allow admission of nonresident children to attend school in that school district without the need for a guardianship. Tex. Educ. Code § 25.001(d).

Also, a school district may adopt guidelines to allow admission of nonresident children to school if a grandparent of the child resides in the school district and the grandparent provides "a substantial amount" of after-school care for the child. Tex. Educ. Code § 25.001(b)(9).

§ 3.20 Designation of Guardian in Event of Later Incapacity or Need for Guardian

A designation of guardian before a need arises may be executed before incapacity. Tex. Est. Code § 1104.202. A statutory form is provided, but the statutory form is not mandatory. This form should be filed with the application to appoint a guardian. In addition, this instrument may be used to designate those not desired to be appointed guardian. As of September 1, 2017, the form need only be notarized and not witnessed unless it is used to disqualify someone from serving as guardian. Tex. Est. Code §§ 1104.203, 1104.204. See form 3-10 in this chapter; but see section 9.5 in this manual and Tex. Est. Code § 1203.103. The designation may be revoked in the same manner as a will under section 253.002 of the Texas Estates Code. The designation need not be recorded to be effective, and there is no advantage to the client in doing so.

§ 3.21 Declaration of Appointment of Guardian for Children in Event of Death

The last surviving parent may direct the appointment of a guardian of the children. Tex. Est. Code §§ 1104.053(a), 1104.103(a), 1104.152. A statutory form is provided, but any form that clearly indicates the declarant's intention may be used; see form 3-11 in this chapter. The declaration must be attested to by two credible witnesses fourteen years of age or older and must have attached a self-proving affidavit signed by the declarant and witnesses. The declaration is effective on execution and may be revoked in the same manner as a will under section 253.002 of the Texas Estates Code. The declaration may be filed at any time after an application to appoint a guardian has been filed and does not need to be recorded to be effective. *See* Tex. Est. Code § 1104.156.

§ 3.22 Declaration for Mental-Health Treatment

A declaration may be made for mental-health treatment in the event of future incapacity. A statutory form is provided that makes these treatment designations effective. Tex. Civ. Prac. & Rem. Code § 137.011. See form 3-12 in this chapter.

Significant factors that affect this declaration include the following:

1. The declarant must not be incapacitated at the time the declaration is made.
2. A preference or instruction may consist of either a consent to or refusal of any treatment.
3. The declaration is effective on execution and expires three years after the date of execution or on revocation. But if the person is incapacitated on the expiration date, the declaration remains effective until the person is no longer incapacitated.
4. The declaration must be signed in the presence of two witnesses or must be signed by the principal and acknowledged before a notary public. Texas Civil Practice and Remedies Code section 137.003(b) lists persons who, because of their relationship to the declarant, may not serve as witnesses.
5. Any health-care provider who acts in compliance with the declaration is not subject to criminal or civil liability if the acts are done in good-faith reliance on the declaration. In addition, if the provider was not provided with a copy of the declaration and was unable to determine whether a declaration existed, there is no liability for acting contrary to it.
6. The declaration may be disregarded only if the person is under an involuntary commitment or if an emergency exists and the patient's instructions have not been effective in avoiding the emergency.

7. The instructions in the declaration supersede any conflicting instructions given by a guardian or agent under a durable power of attorney for health care.

See Tex. Civ. Prac. & Rem. Code §§ 137.001–.011.

§ 3.23 Payment of Claims Without Guardianship

§ 3.23:1 Payment of Funds to County Clerk; Withdrawal of Funds by Creditor

Any debtor may discharge debts to a minor, an incapacitated person, or a former ward by paying the owed funds to a county clerk. Tex. Est. Code §§ 1355.001, 1355.002. This provision eliminates the need for a guardianship proceeding. The right to receive such payment must be liquidated and uncontested in any pending lawsuit, and each payment must not exceed $100,000. Tex. Est. Code § 1355.001(a).

Payment to a resident minor or incapacitated person, referred to as the "creditor" in the statute, should be made in the county in which the creditor resides. Tex. Est. Code § 1355.001(c). Payment to a nonresident should be made in any county in which the nonresident creditor owns real property. If the nonresident creditor is not known to own real property in Texas, payment may be made in the county in which the debtor resides. Tex. Est. Code § 1355.002(c)(2). See form 3-13 in this chapter.

The receipt issued by the county clerk binds the creditor as of the date and to the extent of the payment. The clerk must immediately notify the court and the creditor of the payment. As soon as the money has been deposited, the clerk will invest it in accordance with court order for the account of the minor or the incapacitated person. Tex. Est. Code §§ 1355.001(d), (e), 1355.051. Not later than March 1 of each calendar year, the clerk will report to the court on the status of the investment. Tex. Est. Code § 1355.052.

The creditor's unestranged spouse, father, or mother may apply to the court to withdraw money for the use and benefit of the creditor. Tex. Est. Code §§ 1355.102, 1355.103. See forms 3-14 and 3-15. If there is no spouse and no parent alive and residing in Texas, the resident person with actual custody of the creditor may apply to withdraw the funds. Tex. Est. Code § 1355.102(a)(3). The person making withdrawal must give a bond in double the amount of money on deposit, conditioned on use of the money as directed by the court for the benefit of the creditor. Tex. Est. Code § 1355.103(b).

The custodian must file a sworn accounting with the county clerk when the money has been expended in accordance with the orders of the court. The court's approval of this accounting releases the custodian and the sureties on the custodian's bond from liability. Tex. Est. Code § 1355.104.

If the money is not withdrawn by a custodian, the creditor on whose behalf it was deposited may withdraw it when the creditor's disability is removed. If the person entitled to the money dies before it is withdrawn, that person's personal representatives or heirs may withdraw it. In either case, if the withdrawal is by the creditor, a subsequent personal representative of the creditor, or the creditor's heirs, the withdrawal may be without bond, simply by obtaining a court order directing the clerk to deliver the money to the person or persons entitled to it. Tex. Est. Code § 1355.105(a)–(c). A nonresident guardian seeking to withdraw the money may be required to provide proof that an adequate bond was provided in the foreign jurisdiction. Tex. Est. Code § 1355.105(b–1). See section 3.23:2 below for discussion on withdrawal of funds by a nonresident guardian.

Payment of claims of less than $10,000 to charitable institutions for the benefit of incapacitated inmates is also allowed. Tex. Est. Code §§ 1355.151, 1355.152.

§ 3.23:2 Payment of Funds to Court Registry; Withdrawal of Funds by Nonresident Guardian

When money is paid into a Texas court registry for a nonresident creditor, a nonresident guardian may withdraw the funds from the court registry for the nonresident creditor. Tex. Est. Code § 1355.105(c)(4); *see* Tex. Est. Code § 1355.002.

A nonresident creditor is a creditor who is a nonresident minor ward with a nonresident guardian of the estate appointed by a foreign court, a nonresident adult ward adjudged by a foreign court to be incapacitated and that has a nonresident guardian of the estate appointed by a foreign court, or a noresident former ward of a terminated Texas guardianship. *See* Tex. Est. Code § 1355.002.

The court may require the nonresident guardian to give proof of an adequate bond given in the foreign jurisdiction. Tex. Est. Code § 1355.105(b–1). The order presented must specify to whom the clerk is directed to deliver the money, and that person's identity and credentials must be proved to the court's satisfaction. Tex. Est. Code § 1355.105(c), (d).

Exemplified copies of the order of a foreign court appointing the guardian and current letters of guardianship issued in the foreign jurisdiction are required for the nonresident guardian to access the funds. Tex. Est. Code § 1355.105(d).

§ 3.24 Management of Funds

§ 3.24:1 Management of Funds Recovered for Minor or Incapacitated Person in Lawsuit Brought by Next Friend or Guardian Ad Litem

A next friend may represent and sue on behalf of minors and incapacitated persons who have no legal guardian. Tex. R. Civ. P. 44. A guardian ad litem may also represent the best interests of a minor. *See* Tex. Prop. Code § 142.001.

When a judgment is recovered in a lawsuit brought by a next friend, the court may enter an order authorizing the next friend or another person to take charge of the property recovered and administer it for the minor or incapacitated person. Tex. Prop. Code § 142.002. The person authorized to take charge of the property must execute a bond conditioned on his using it to benefit the owner under direction of the court and delivering it and its increase to the person entitled to receive it when so ordered by the court. Tex. Prop. Code § 142.002(b)(3). If the bond is executed by a solvent Texas surety company, it must be in an amount equal to the value of the money and property recovered; a bond not issued by a surety company must be in an amount double the amount of the recovery. Tex. Prop. Code § 142.002(b)(1).

A next friend is authorized to invest the recovered funds in interest-bearing time deposits in financial institutions insured by the Federal Deposit Insurance Corporation. Tex. Prop. Code § 142.004(a)(1)(B). On court order, the clerk of the court may invest the funds appropriately. Tex. Prop. Code § 142.004(a)(2). If the funds are deposited in a manner that prevents withdrawal from the financial institution without a court order, no bond will be required of the next friend with respect to the funds until they are actually withdrawn. Tex. Prop. Code § 142.004(b). Interest on such an account will be paid in the same manner as on accounts governed by chapter 117 of the Texas Local Government Code. Tex. Prop. Code § 142.004(d). On withdrawal of the funds the court may order them either transferred to a beneficiary who has recovered capacity or managed under different authority. Tex. Prop. Code § 142.004(c). See sections 3.25:3 and 3.25:4 below for a discussion of trusts created under chapter 142 of the Texas Property Code.

Practice Pointer: Attorneys proceeding in litigation representing a next friend should be aware that their contingent fee agreements are subject to attack if the next friend is not the guardian, whether court-appointed or natural. *Massey v. Galvan*, 822 S.W.2d 309 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

In *Stern v. Wonzer*, 846 S.W.2d 939, 947 (Tex. App.—Houston [1st Dist.] 1993, no writ), the contingent fee agreement was limited to one-third, including expenses, on the finding that next friends were subject to the same restrictions as guardians.

Practice Pointer: A dilemma may arise when a personal injury case settles and no consideration is given to the allocation of the award between the survival and wrongful death causes of action. This can lead to complicated tax issues as well as potential problems with creditors who have had their claims approved in the probate case and are waiting for the estate to receive its share of the survival cause of action. *See Texas Health Insurance Risk Pool v. Sigmundik*, 315 S.W.3d 12 (Tex. 2010); *Elliott v. Hollingshead*, 327 S.W.3d 824 (Tex. App.—Eastland 2010, no pet.).

§ 3.24:2 Texas ABLE Program

The Texas Achieving a Better Life Experience (ABLE) Program allows eligible Texas residents with disabilities to save funds in an ABLE account without jeopardizing their eligibility for federally funded means-tested benefits, such as Supplemental Security Income and Medicaid. Tex. Educ. Code § 54.901. An individual may save up to $15,000 per year to be used for disability-related expenses that assist the beneficiary in increasing or maintaining his health, independence, or quality of life. Tex. Educ. Code § 54.901; *see* **www.texasable.org**.

In addition to a parent, custodian, or other fiduciary, a guardian may exercise signature authority over such an account. Tex. Educ. Code § 54.910(b).

§ 3.25 Trusts

§ 3.25:1 Purpose and Function

Guardianship of an incapacitated person may sometimes be avoided through effective use of an inter vivos or testamentary trust.

§ 3.25:2 Inter Vivos Revocable Trust for Grantor

An inter vivos (or living) revocable trust may be created to plan for an individual's own needs in the event of later incapacity. Placing assets in trust provides a flexible method of handling financial affairs in case of later disability and may avoid the need for a future guardianship. A revocable trust may also be created by an attorney-in-fact when the power of attorney grants the agent the power to do so. Tex. Est. Code § 752.052. For general information on trusts, see Tex. Prop. Code ch. 112.

Often the individual will serve as initial trustee of an inter vivos trust that he establishes as grantor and will name a successor trustee to take charge if the grantor becomes incapacitated. Alternatively, the trust agreement may provide that the grantor initially act as advisor to the trustee, who is bound to follow the grantor's instructions in managing the trust property as long as the grantor remains capacitated. The trust instrument may set the terms for determining incapacity, usually by a letter or certificate from the grantor's attending physician.

A revocable trust offers no tax advantages to the grantor. Income from the trust is taxed to the grantor because it passes to him during his lifetime; at his death, the trust property will be taxed for federal estate tax purposes as part of his gross estate.

If an inter vivos trust is coupled with a durable power of attorney, the trust may be minimally funded when created. The durable power of attorney should give the agent power to transfer specified additional assets to the trust if the grantor becomes incapacitated. This arrangement avoids unnecessary trust management and fees and leaves the grantor's assets free until the need for trust administration actually arises. The grantor thus retains both legal and equitable title to his assets as long as he has capacity to manage them and yet is assured that his affairs will be properly managed without the need for a guardian if he later becomes incapacitated.

The trust agreement governing disbursement of income and principal should be drafted to meet both present and future needs of the grantor. A common trust provision is that, before disability, the trustee will pay over to the grantor what the grantor requests. Should disability occur, the trustee will pay over for the benefit of the grantor any income and principal necessary to support and maintain the grantor. The trust agreement may further provide for termination of the trust at the grantor's death and for delivery of the trust assets to the executor or administrator of the grantor's estate.

§ 3.25:3 Texas Property Code Section 142 Trusts

On application, a court with jurisdiction over a suit involving a beneficiary may establish a trust for the beneficiary for the management of funds accruing under the judgment. See form 3-16 in this chapter. The court must find that the establishment of a trust would best serve the interests of the beneficiary. The decree shall direct the clerk to deliver the funds owed to the beneficiary under the judgment to a financial institution as trustee. If the value of the principal is $50,000 or less, however, a person other than a financial institution may be appointed to serve as trustee if the court finds that it is in the beneficiary's best interests. If the value of the principal is greater than $50,000, a person other than a financial institution may be appointed to serve as trustee only if no financial institution is willing to serve and the court finds that it is in the best interests of the beneficiary. Tex. Prop. Code § 142.005. See forms 3-17, 3-18, and 3-19.

On the petition of a parent, next friend, guardian, conservator, or guardian or attorney ad litem of the beneficiary, the court may appoint a guardian ad litem to investigate whether the trustee should be removed for failing or refusing to make necessary distributions as required under the terms of the trust. The petitioner will be reimbursed for reasonable attorney's fees from the trust, up to $1,000. Tex. Prop. Code § 142.005(k), (*l*).

A trust under Texas Estates Code chapter 1301 may also be created as an alternative to a section 142 trust or as a less restrictive alternative to guardianship. A statutory probate court may, with the agreement of both parties, transfer a section 142 trust to a guardianship and modify the section 142 trust to a chapter 1301 trust in order to provide increased oversight of the trust for the protection of the beneficiary. Chapter 1301 trusts are discussed in chapter 11 of this manual.

§ 3.25:4 Mandatory Provisions for Texas Property Code Section 142 Trusts

Statutory requirements for a section 142 trust are as follows:

1. The beneficiary must be either (a) a minor or incapacitated person who has no legal guardian and is represented by a next friend or an appointed guardian ad litem or (b) a person with a physical disability. Tex. Prop. Code §§ 142.001(a), 142.005(o). If there is a legal guardian, the appropriate trust is one established under Texas Estates Code chapter 1301. See chapter 11 in this manual for further discussion of chapter 1301 trusts.

2. The trustee must be a financial institution, except as provided by Tex. Prop. Code § 142.005(m), (n). Tex. Prop. Code § 142.005(a).

3. A trustee that is a financial institution shall serve without bond. Tex. Prop. Code § 142.005(b)(5).

4. The beneficiary must be the sole beneficiary of the trust. Tex. Prop. Code § 142.005(b)(1).

5. The trust must provide for distributions of principal, income, or both as the trustee determines reasonably necessary for the health, education, support, or maintenance of the benefi-ciary. Medicine or treatments approved by a licensed physician may be conclusively presumed to be appropriate for the health of the beneficiary. Any income not distrib-uted shall be added to the principal of the trust. Tex. Prop. Code § 142.005(b)(2), (b)(3). See form 3-18 in this chap-ter.

Practice Pointer: If distributions are made using this standard, the beneficiary will not qualify for state Medicaid assis-tance. A departure from this standard distribution is permitted to incorporate "special needs" language necessary to maintain government benefits:

> Notwithstanding any other provision of this chapter, if the court finds that it would be in the best interests of the beneficiary for whom a trust is established under this section, the court may omit or modify any terms required by Subsection (b) if the court determines that the omission or modification is necessary or appropriate to allow the beneficiary to be eligible to receive public benefits or assistance under a state or federal program. This section does not require a distribution from a trust if the distribution is discretionary under the terms of the trust.

Tex. Prop. Code § 142.005(g). See section 3.25:5 below.

6. The trust must provide that the trustee receive reasonable compensation on application to and approval of the court. Tex. Prop. Code § 142.005(b)(6).

7. The following statutory language must be included on the first page of the trust instrument: "NOTICE: THE BENEFI-CIARY AND CERTAIN PERSONS INTERESTED IN THE WELFARE OF THE BENEFICIARY MAY HAVE REMEDIES UNDER SEC-TION 114.008 OR 142.005, PROPERTY CODE." *See* Tex. Prop. Code § 142.005(b)(7).

8. If the beneficiary is a minor who is not considered disabled, the trust terminates on the beneficiary's death, when the beneficiary reaches the age stated in the trust, or when he reaches the age of twenty-five, whichever occurs first. If the court finds that a minor beneficiary is disabled, the trust terminates on the death of the beneficiary. If the benefi-ciary is incapacitated, the trust terminates when the beneficiary regains capacity or on the death of the beneficiary. Tex. Prop. Code § 142.005(b)(4), (b)(4–a), (b)(4–b).

9. On termination, the remaining trust estate is distributed to the beneficiary or the representative of the estate of the deceased beneficiary. Tex. Prop. Code § 142.005(e).

Practice Pointer: If the trust is to qualify as a special needs trust under 42 U.S.C. § 1396p(d)(4)(A), it must provide for repayment to the state for Medicaid benefits paid on behalf of the beneficiary before distribution of assets to the beneficiary or his representative. Therefore the attorney should take care to provide for repayment as mandated by 42 U.S.C. § 1396p(d)(4)(A) and as permitted by Tex. Prop. Code § 142.005(g). See section 3.25:5 below.

§ 3.25:5 Self-Settled Special Needs Trusts Under 42 U.S.C. § 1396p(d)(4)(A)

A special needs trust qualifying under 42 U.S.C. § 1396p(d)(4)(A) may be created by applying to the court in which the lawsuit is pending for an order creating a trust under Texas Property Code section 142 or under chapter 1301 of the Texas Estates Code.

A severely injured person often will require Medicaid assistance to pay for continuing medical care. Proceeds from the settlement of a lawsuit may disqualify an individual from Medicaid eligibility because individuals whose resources exceed certain limits cannot qualify for Medicaid. Certain assets, however, will not count as resources in determining Medicaid eligibility. For example, assets placed in a trust for "supplemental needs" of an individual, including periodic payments from a structured settlement, should not affect Medicaid eligibility.

Purpose: The purpose of a special needs trust is to provide for the beneficiary's supplemental needs only; it may not be used for the beneficiary's basic support, including basic food and shelter.

Requirements: A self-settled special needs trust may be established by a parent, a grandparent, a legal guardian, or a court for an individual who is less than age sixty-five when the trust is created and who is disabled. The trust must provide for repayment to the state for Medicaid benefits paid on behalf of the beneficiary on termination of the trust. 42 U.S.C. § 1396p(d)(4)(A).

For an individual to be considered "disabled," he must be "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than twelve months"; or, in the case of a child under the age of eighteen, if the child suffers from any medically determinable physical or mental impairment of comparable severity as long as that child does not engage in substantial gainful activity. 42 U.S.C. § 1382c(a)(3)(A), (a)(3)(C).

This definition differs substantially from those of "incapacitated person" found in the Property Code and the Estates Code. Section 142.007 of the Property Code provides that "'incapacitated person' means a person who is impaired because of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or any other cause except status as a minor to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person." *See* Tex. Prop. Code § 142.007. The Estates Code defines an "incapacitated person" as—

1. a minor;
2. 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; or
3. a person who must have a guardian appointed to receive funds due the person from any governmental source.

Tex. Est. Code § 1002.017.

§ 3.25:6 Chapter 1301 Guardianship Management Trusts

Chapter 1301 guardianship management trusts are discussed in chapter 11 of this manual.

§ 3.25:7 Pooled Special Needs Trust Subaccounts

As an alternative to a chapter 1301 guardianship management trust, the court may order that a subaccount of a pooled trust be established for the benefit of (1) a minor or other incapacitated person, (2) an alleged incapacitated person, or (3) a disabled person who is not an incapacitated person. *See* Tex. Est. Code §§ 1302.001–.007. This type of trust meets the requirements of 42 U.S.C. § 1396p(d)(4)(C), which exempts it from the applicability of 42 U.S.C. § 1396p(d) in determining the eligibility of a person who is disabled for medical assistance.

Funds that are otherwise appropriate for a guardianship management trust may then be transferred to the subaccount. Such a transfer will preserve qualification for state medical assistance (Medicaid). This allows the funds to continue to be professionally managed even though the value of the trust is below the threshold of most bank trust departments.

In addition, assets in a guardianship management trust pursuant to Texas Estates Code chapter 1301 may also be transferred to a subaccount of a master pooled trust upon a determination by the court that it is in the best interests of the beneficiary of the trust. Tex. Est. Code § 1301.202(a).

The transfer of the trust assets to the pooled trust subaccount is treated as a continuation of the management trust and thus preserves the beneficiary's eligibility for medical assistance under chapter 32 of the Texas Human Resources Code. Tex. Est. Code § 1301.202(b).

The management trust may not be terminated until all such assets have effectively been transferred to the subaccount of the pooled trust. Tex. Est. Code § 1301.202(c).

The trustee or manager of the pooled trust may be required by the court to file an annual report with the court clerk. Tex. Est. Code § 1302.006(b). However, the report is not a guardianship-style accounting, and approval by the court is not mandated. Additionally, the trustee may assess its standard fees against the subaccount, rather than have its fees measured by the standard of guardianships. Tex. Est. Code § 1302.003(a).

The subaccount terminates on the earliest of the date of (1) the beneficiary's eighteenth birthday, if the beneficiary is not disabled on that date and was a minor at the time the subaccount was established; (2) the beneficiary's death; or (3) upon an order of the court terminating the subaccount. Tex. Est. Code § 1302.005(1). On termination, any assets remaining in the subaccount after reimbursement of any state Medicaid claims are payable to the beneficiary, if living and not incapacitated; otherwise the remaining assets are payable to the beneficiary's guardian, if the beneficiary is living and is incapacitated, or to the personal representative of the beneficiary's estate, if the beneficiary is deceased. Tex. Est. Code § 1302.005(2).

See forms 3-20 and 3-21 in this chapter.

§ 3.25:8 Testamentary Trust for Another

A testamentary trust may be created in a will for the benefit of a mentally or physically disabled family member. State statutes allow trustees great discretion in making disbursements from the trust for the benefit of the disabled person. For general information concerning trusts, see Tex. Prop. Code ch. 112.

Many attorneys recommend that the trust be administered jointly by a corporate trustee, such as a bank, and an individual, such as a close family member who is sensitive to the needs of the disabled person. A carefully drafted will with testamentary

trust provisions may avoid the need to establish a guardianship to administer that portion of the decedent's estate of which the disabled person is the beneficiary. Because many disabled persons receive government benefits, it may be necessary to carefully structure the testamentary trust to ensure that the disabled person will remain eligible for those benefits. Such trusts generally are referred to as "special needs" or "supplemental needs" trusts. See sections 3.25:5 and 3.25:7 above.

Practice Pointer: In certain situations, an existing testamentary trust may be judicially reformed to allow it to qualify as a "special needs" or "supplemental needs" trust or otherwise become a viable alternative to a guardianship.

§ 3.25:9 Trusts for Intellectually Disabled Persons

Certain trusts containing not more than $250,000 for the benefit of individuals in certain residential-care facilities may be established for intellectually disabled persons without disqualifying them from receiving state benefits and without the need for a guardianship. If a disabled person who is intellectually disabled is in a residential-care facility operated by the Texas Department of Aging and Disability Services or a state agency, governmental unit, or unit of local government and is the beneficiary of a trust, up to $250,000 of the corpus and income is not considered to be the property of the resident or his estate and is not liable for the resident's support, maintenance, or treatment in the residential-care facility, regardless of the resident's age. Tex. Health & Safety Code § 593.081. The trust must be created by written instrument, a copy of which must be provided to the Department of Aging and Disability Services. Tex. Health & Safety Code § 593.081(b). The department may request a current financial statement showing the value of the trust estate. Tex. Health & Safety Code § 593.081(c). If the trustee does not provide a financial statement, the department may petition a district court to order the trustee to provide a current financial statement. Tex. Health & Safety Code § 593.081(d). Failure of a trustee to comply with the court's order is punishable by contempt. Tex. Health & Safety Code § 593.081(e). Guardianships established under the Texas Estates Code, trusts established under chapter 142 of the Texas Property Code, funds in a patient's trust fund account in a residential-care facility, child support, an administration of a decedent's estate, and funds held in the registry of the court are not considered trusts and are not entitled to the exemption. Tex. Health & Safety Code § 593.081(f).

§ 3.26 Management of Community Property by Spouse

When a husband or wife is judicially declared to be incapacitated, the other spouse is given full power to manage the entire community estate of the couple without any court intervention. Tex. Est. Code § 1353.002(a). The spouse who is not incapacitated is presumed qualified to serve as the community administrator. Tex. Est. Code § 1353.002(b). If the incapacitated spouse owns separate property, it will be necessary to appoint a guardian of the estate to administer the separate property. Tex. Est. Code § 1353.003(a). Typically, the capacitated spouse applies to be named guardian of the person and recognized as community administrator.

On good cause shown or by motion of the court, the community administrator may be required to file an inventory and appraisement as well as an annual accounting. Tex. Est. Code §§ 1353.051–.052.

A community administrator may be removed after citation, notice, and hearing for the grounds specified in Texas Estates Code section 1353.101. *See* Tex. Est. Code § 1353.102.

Pursuant to Code section 1353.103, if the incapacitated spouse is restored, the authority of the community administrator ceases. Provisions for restoration are found in chapter 1202. *See* Tex. Est. Code ch. 1202, § 1353.103. See chapter 9 in this manual for discussion of restoration.

The rights of creditors and the duties and obligations of support are not affected by the administration of community property under this section, nor is the community property partitioned. Tex. Est. Code § 1353.001.

If a lawsuit or divorce proceeding is filed against the incapacitated spouse, the community administrator is required to inform the court in writing. Tex. Est. Code § 1353.053.

§ 3.27 Order of No Administration

In a situation where title to estate assets needs to be transferred to an incapacitated surviving spouse, incapacitated adult children, or minor children and the value of the assets does not exceed the amount to which the spouse and children would otherwise be entitled to as a family allowance, an application for order of no administration may be employed if there is otherwise no necessity for administration. Tex. Est. Code § 451.001. The procedure incorporates elements of a small estate affidavit and an application for a family allowance. The court may dispense with notice or may prescribe the quality and quantity of notice required. Tex. Est. Code § 451.002.

The court's order reads like the facilitation of payment language in a muniment of title proceeding and acts as authority to effect the transfer of the property involved. Tex. Est. Code § 451.003. Such an order may be revoked within one year if other information comes to light showing a necessity for administration. Tex. Est. Code § 451.004. See forms 3-22 and 3-23 in this chapter.

§ 3.28 Transfer Under Texas Uniform Transfers to Minors Act

A guardianship may be avoided through the use of the Texas Uniform Transfers to Minors Act, commonly referred to as TUTMA. Tex. Prop. Code ch. 141. A minor may receive property through inter vivos or testamentary gifts, or exercises of powers of appointment may be made to a minor. Tex. Prop. Code §§ 141.005–.008. The donor may designate a custodian to receive property on behalf of a minor. Tex. Prop. Code § 141.006. The Code specifies the required manner of making each type of gift. Tex. Prop. Code § 141.010(a). See form 3-24 in this chapter.

For example, a gift of a registered security may be made simply by registering it in the name of an adult or trust company as custodian for the minor under the Act or by delivering it. Tex. Prop. Code § 141.010(a)(1)(A). Similarly, gifts of money may be made by delivering the money to a broker or bank for credit to an account in the name of an adult or trust company custodian for the minor under the Act. Tex. Prop. Code § 141.010(a)(2). Gifts of life or endowment insurance policies or annuity contracts may be made either by registering the policy in the name of an adult or trust company as custodian for the minor under the Act or by assigning and delivering the policy or contract to the custodian. Tex. Prop. Code § 141.010(a)(3). Irrevocable powers of appointment and irrevocable present rights to future payments may be transferred by written notice that the right is transferred. Tex. Prop. Code § 141.010(a)(4). Real and tangible personal property may be transferred by executing and delivering the appropriate transfer instrument to the custodian. Tex. Prop. Code § 141.010(a)(5), (a)(6). If the gift is testamentary, the transfer may be accomplished by a provision in the donor's will giving the property to an adult as custodian for the minor. Tex. Prop. Code § 141.004(a). If the designated custodian dies or is unable or unwilling to serve, the donor's personal representative may designate an eligible successor custodian. Tex. Prop. Code § 141.006(c). The legal representative of a decedent may transfer property without a court order if the property is covered by the Act and the transfer is authorized in the governing will. Tex. Prop. Code § 141.006(a).

Gifts made under the Act are irrevocable, and legal title to the custodial property vests indefeasibly in the minor subject to the provisions of the Act. Tex. Prop. Code § 141.012(b).

During the minority of the donee, the custodian must prudently manage and invest the custodial property. Tex. Prop. Code § 141.013. The custodian must pay or expend for the benefit of the minor as much of the property as he deems advisable to support, maintain, educate, and benefit the minor, in a manner the custodian deems suitable. Tex. Prop. Code § 141.015.

When the minor attains the age of twenty-one, marries, or has his disabilities removed, the custodian must deliver the remaining property to the minor. Tex. Prop. Code § 141.021. If the minor dies before the custodianship is terminated, the custodian must deliver the remaining property to the minor's estate. Tex. Prop. Code § 141.021(3).

The custodian must keep records of all transactions with respect to the custodial property and make them available for inspection by a parent or legal representative of the minor or by the minor if he is fourteen years old or older. Tex. Prop. Code § 141.013(e). The custodian, if not the transferor, has a noncumulative election each calendar year to charge reasonable compensation. Tex. Prop. Code § 141.016. A third party acting in good faith has no liability for acting on instructions of a person acting as custodian. Tex. Prop. Code § 141.017. Additional transfers to custodianships in existence before September 1, 1995, shall be distributed to the beneficiary on his eighteenth birthday or earlier as prescribed in Tex. Prop. Code §§ 141.021, 141.025.

§ 3.29 Transfers of Property

§ 3.29:1 Sale of Property Without Guardianship—Minor

An application for the sale of real or personal property under Tex. Est. Code § 1351.001 permits a sale to take place without the appointment of a guardian of the person or estate. The value of the property to be sold may not exceed $100,000. The application may be made by either a parent or the managing conservator of a minor who has no court-appointed guardian. The court may appoint an attorney ad litem or guardian ad litem for a minor ward who does not have a parent or managing conservator willing or able to file an application on his behalf. The proceeds must be placed in the court registry and can be withdrawn only under the provisions of Tex. Est. Code ch. 1355. See forms 3-25 and 3-26 in this chapter.

The sale is usually in the form of a private sale, and the sale must be for cash. Tex. Est. Code § 1351.002(b)(5). As a general rule, these sales are already subject to an earnest-money contract, which should be made subject to the court's approval. The most important aspect of the sale is whether the ward will receive adequate consideration. Most courts will not approve a sale without an independent appraisal showing the sale is for adequate consideration. If real property is involved, most sales will be conducted through a title company, and a proposed closing statement should accompany the application. The clerk cannot adjust the order of sale to accept a deposit of less money than is shown on the order after it has been signed.

§ 3.29:2 Sale of Property Without Guardianship of Estate

Under Tex. Est. Code § 1351.052, the request for sale can be made only by a guardian of the person or by a guardian of the person or estate of a ward that has been appointed by a foreign court. This provision is similar to that of section 1351.001. This procedure may be used only if the total value of the property of the incapacitated person does not exceed $100,000. See forms 3-27 and 3-28 in this chapter. The proceeds must be placed in the registry of the court and may be withdrawn only under the provisions of chapter 1355 of the Texas Estates Code. This statute provides that the custodian of the person for whose ben-

efit the money is to be used (referred to as the "creditor" in this section of the statute) may be the father, mother, or unestranged spouse or, if they are unavailable, the person who has actual custody. The custodian may expend the funds placed in the registry of the court for the benefit of the creditor. Additionally, if an inmate in an eleemosynary institution lacks a legal guardian of his estate, the institution may make use of the funds for the inmate. If the custodian does not withdraw the money, the creditor, after termination of the creditor's disability, may withdraw the money, or the creditor's heirs or personal representative may withdraw the money as provided by section 1355.105. Tex. Est. Code § 1355.105.

As with sales under section 1351.001, the sale of real and personal property under section 1351.052 is usually in the form of a private sale. The sale must be for cash because the proceeds are to be placed in the court registry. As a general rule, these sales are already subject to an earnest-money contract, which should be made subject to the court's approval. The most important aspect of the sale is the amount of the net proceeds. Most courts will not approve these sales unless the ward is to receive adequate consideration. If real property is involved, most sales will be conducted through a title company, and a proposed closing statement should accompany the application. The clerk cannot adjust the order of sale to accept a deposit of less money than is shown on the order after it has been signed.

§ 3.29:3 Transfer on Death Deed (TODD)

A Transfer on Death Deed (TODD), enacted in 2015, allows a person to transfer title to a named beneficiary or beneficiaries at the grantor's death. *See* Tex. Est. Code ch. 114.

The interest conveyed in the property by the TODD is subject to the claims filed against the probate estate for two years after the death of the grantor. The beneficiary of the TODD must survive the grantor by 120 hours to receive the interest in the property. If the beneficiary predeceases the grantor or dies simultaneously with the grantor, the interest in the property passes through the grantor's estate. A TODD cannot be executed under a power of attorney. If the owner lacks the mental capacity to sign a TODD, an agent or other person may not execute such a document. A TODD can avoid real estate recovery in a Medicaid claim. Tex. Est. Code ch. 114.

§ 3.29:4 Enhanced Life Estate "Lady Bird" Deed

An Enhanced Life Estate Deed ("Lady Bird" Deed) allows the owner of real estate to transfer the property upon death to another person outside of the probate process. *See* Tex. Prop. Code § 5.041. The use of a Lady Bird Deed allows the owner to avoid Medicaid Estate Recovery Program claims. During his lifetime, the grantor retains the right to reside on the property as well as the right to lease, mortgage, or sell the property and retain any proceeds generated from the property. If the grantor wishes to terminate the transfer of the remaining interest in the property to the beneficiary, he can do so at any time.

Unlike a TODD (see section 3.29:3 above), a Lady Bird Deed may be executed by an agent under a power of attorney (with the specific power to do so) so that the issue of capacity of the grantor may be avoided.

§ 3.30 Receivership

When an incapacitated person owns an interest in an ongoing business or commercial property that is in danger of injury, the court may appoint a receiver to take charge of the estate. The receiver is subject to the same compensation and bonding provisions under the Texas Estates Code as a personal representative. The receiver administers the property until the need for the receivership is over. Tex. Est. Code ch. 1354.

In 1999, the provisions for guardianship for missing persons were repealed. Receivers are now to be appointed for missing persons. *See* Tex. Civ. Prac. & Rem. Code §§ 64.001(d), 64.101–.108.

See forms 3-29 and 3-30 in this chapter.

§ 3.31 Removal of Disabilities of Minor

A minor who is (1) either seventeen years old or at least sixteen years old and living apart from parents, a conservator, or guardian and (2) self-supporting (or married) may ask the court to legally remove the disabilities of minority for either limited or general purposes. *See* Tex. Fam. Code ch. 31.

Although an amicus attorney or attorney ad litem must be appointed, the minor may proceed in his own name, and no next friend is required. Tex. Fam. Code §§ 31.001(b), 31.004. If there is a conservator or guardian, he is to verify the pleadings, but if he is unavailable, the amicus attorney or guardian ad litem shall verify the pleadings. Tex. Fam. Code § 31.002(b).

The petition is decided on a "best interest" standard, and the order must specify whether the removal of disabilities is limited or general in scope and the purposes for which disabilities are removed. Tex. Fam. Code § 31.005.

Except for specific constitutional and statutory age requirements, if the disabilities of the minor are removed for general purposes, the minor then has the capacity of an adult, including the capacity to contract. Such orders from other states may be effective when filed in the deed records of any county in this state. Tex. Fam. Code §§ 31.006, 31.007.

If the minor is a ward under a pending guardianship in a statutory probate court, the judge would have the jurisdiction to remove the disabilities, following *In re Graham*, 971 S.W.2d 56 (Tex. 1998). Otherwise, the district court would have exclusive jurisdiction.

See forms 3-31 and 3-32 in this chapter.

§ 3.32 Social Service Agencies

Many social service agencies provide a variety of services specifically tailored to the needs of children, the disabled, and the elderly. Many have a particular emphasis toward a target group, such as veterans or the intellectually disabled.

Beyond the emergency order for protective services (see discussion at section 3.18:2 above), the ability of either Adult Protective Services or Child Protective Services to investigate a potential exploitation or neglect situation is vital to ensuring that the needs of these target groups are met.

§ 3.33 Supports and Services

The entire guardianship process is based on the concept that the court and the officers of the court must seek any less restrictive alternatives to a full guardianship if they exist and are applicable. Tex. Est. Code § 1001.001.

As an adjunct to the concept of a less restrictive alternative, the idea of "supports and services" is now a part of the mechanism by which a protective framework is to be constructed for a proposed ward. A thorough understanding of these concepts is required to comply with the Texas Estates Code in a guardianship proceeding. As referenced in Tex. Est. Code § 1002.031, supports and services are additional types of less restrictive alternatives to a full guardianship, used either to avoid or delay the

necessity for a guardianship or, when employed after the appointment of a guardian, to lessen the impact or extent of a full guardianship.

These formal or informal resources serve to directly supplement the functional deficits of the individual and to enhance areas where there is some residue of capacity, however limited. Choices of particular supports or services will depend on the residual level of capacity of the individual to be benefitted.

The concept of supports and services is derived from a 1999 U.S. Supreme Court decision, *Olmstead v. L.C.*, 527 U.S. 581 (1999), which held that the "integration regulation" of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101) requires states to place persons with disabilities in community settings rather than in institutions when the community placement has been determined to be appropriate, is a less restrictive setting, and can be reasonably accommodated. *Olmstead*, 527 U.S. 581; 28 C.F.R. § 35.130.

Supports and services means available formal and informal resources and assistance that enable an individual to—

(1) meet the individual's needs for food, clothing, or shelter;

(2) care for the individual's physical or mental health;

(3) manage the individual's financial affairs; or

(4) make personal decisions regarding residence, voting, operating a motor vehicle, and marriage.

Tex. Est. Code § 1002.031.

Tex. Est. Code § 1002.0015 provides a nonexclusive list of some of the most commonly used alternatives to guardianship. The appendix to this manual contains a list of several examples of guardianship resources and agency and provider entities.

The twin concepts of supports and services and alternatives are integrated into every step of the guardianship process, ensuring that less restrictive alternatives are continuously considered. They are required to be considered and addressed in the application for guardianship (Tex. Est. Code § 1101.001(b)(3–a), (b)(3–b)) and the findings of the court's order in granting either a full or limited guardianship (Tex. Est. Code § 1101.101).

In a proceeding for restoration or modification (full or partial), supports and services must be considered in—

1. the application and order (Tex. Est. Code §§ 1202.051, 1202.154(a)(4));
2. the physician's certificate of medical examination (Tex. Est. Code § 1202.152(b));
3. the evidence to be presented before the court (Tex. Est. Code § 1202.151(a));
4. the findings of the court (Tex. Est. Code § 1202.153(c)); and
5. the closing of the guardianship, if available supports or services are the basis for the closing (Tex. Est. Code § 1202.001(b)(2)).

Supports and services must additionally be considered on an annual basis throughout the course of the guardianship as the guardian communicates the Ward's Bill of Rights to the ward (Tex. Est. Code § 1151.351; see form 4-15 in this manual); during the process of court visits (Tex. Est. Code § 1054.104); and as a part of the court's review and annual determination (Tex. Est. Code § 1201.052) in the event of a change in the ward's condition, a change in the law, or a change in available programs.

In re Guardianship of A.E., 552 S.W.3d 873 (Tex. App.—Fort Worth 2018, no pet.), highlights the consideration of supports and services in a guardianship proceeding. The proposed ward was a young female with moderate intellectual disabilities and an IQ between 50 and 55. The certificate of medical examination indicated she was able to make decisions regarding only her basic activities of daily living (bathing, grooming, dressing, walking, and toileting and then only with assistance). The examining physician found she lacked the capacity to understand or make any other decisions and was totally incapacitated. The trial court declined to grant a guardianship, citing the presence of both less restrictive alternatives and supports and services. Importantly, the appellate court, in a textbook-like opinion, categorically reviewed the statutory mandate, carefully discussing the burden of proof required. In reversing the trial court on several bases, it essentially held that supports and services do not include decision-making by others and that, where a proposed ward has a total lack of capacity, the concept of supports and services is no longer applicable.

§ 3.34 Visitation Rights: Designation of Essential Caregiver

In 2021 a new chapter was added to the Texas Health and Safety Code to address the denial of visitors to residents of long-term care facilities, including intermediate care facilities for individuals with intellectual disabilities and state-supported living centers, during the COVID-19 pandemic lockdowns. Health and Safety Code section 260B.0002 provides those residents and their guardians or other legally authorized representatives the right to designate an essential caregiver for visitation.

The designation is made in the same manner as designating a power of attorney and ensures visits of at least two hours each day, allowing for procedures to enable physical contact.

A facility has the right to revoke an individual's designation if the caregiver violates the facility's safety protocols or poses a serious community health risk. Tex. Health & Safety Code § 260B.0002.

§ 3.35 Mediation and Family Settlement Agreements

Although the resolution of a guardianship contest might remove the procedural obstruction in granting a guardianship, already existing family conflicts may still remain. Mediation can provide an opportunity to address unresolved issues following the guardianship proceedings and to potentially avoid future conflicts in probate.

If potential conflicts are not resolved in mediation, the underlying, unaddressed issues may resurface after the ward's death in a will contest or other dispute.

In a contested guardianship referred to mediation by the court, the parties can mediate the issue of incapacity, but the applicant must still prove up the issue of incapacity to the court in accordance with Tex. Est. Code ch. 1101. Tex. Est. Code § 1055.151(b)(1).

The parties must consider both any less restrictive alternatives and any available and appropriate supports and services in the mediation. Tex. Est. Code § 1055.151(b)(2).

The parties are to bear the costs of mediation, but a referral to a local alternate dispute resolution center may be made. Tex. Est. Code § 1055.151(c).

The Office of Court Administration is to establish a guardianship mediation training course with at least twenty-four hours of course material. This training will be optional, and no certification will be offered. Tex. Gov't Code § 155.301.

If those with the most at stake can reach an accord (with or without the joinder of the ad litem(s)), and with the approval of the court, as circumstances dictate, everyone is generally better off. “A family settlement agreement . . . is a favorite of the law.” *Shepherd v. Ledford*, 962 S.W.2d 28, 32 (Tex. 1998).

Form 3-1

AUTHORIZATION AGREEMENT FOR VOLUNTARY ADULT CAREGIVER

Revised
October 2017
Page 1 of 6

This authorization agreement is made in conformance with Chapter 34 of the Texas Family Code concerning the following Child:

Child's Full Name:
Date of Birth:

Parent completing this form:

Full Name:
Physical Address:
Telephone Number:
Other contact information:

Child's other parent:

Full Name:
Physical Address:
Telephone Number:
Other contact information:

Parent voluntarily authorizes the following adult caregiver or Parental Child Safety Placement voluntary caregiver to make certain decisions regarding the child, as listed on the next page of this authorization agreement.

Name:
Relationship to Child (check one): Adult Caregiver ☐ Parental Child Safety Placement Voluntary Caregiver in accordance with Child Protective Services if requirements of Texas Family Code, Subchapter L are met ☐
Physical Address:
Telephone Number:
Other contact information:

PARENT AND VOLUNTARY ADULT CAREGIVER UNDERSTAND THAT THEY ARE REQUIRED BY LAW TO IMMEDIATELY PROVIDE EACH OTHER WITH INFORMATION REGARDING ANY CHANGE IN THE OTHER PARTY'S ADDRESS OR CONTACT INFORMATION.

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AUTHORIZATION AGREEMENT FOR VOLUNTARY ADULT CAREGIVER

Parent authorizes the above named voluntary adult caregiver to perform the following acts in regard to the child and the voluntary adult caregiver assumes the responsibility of performing these functions (strike through any that do not apply):

(1) To authorize medical, dental, psychological, surgical treatment, and immunization of the child, including executing any consents or authorizations for the release of information as required by law relating to the treatment or immunization;

(2) To obtain and maintain health insurance coverage for the child and automobile insurance coverage for the child, if appropriate;

(3) To enroll the child in a day-care program or public or private preschool, primary or secondary school;

(4) To authorize the child to participate in age-appropriate extracurricular, civic, social, or recreational activities, including athletic activities;

(5) To authorize the child to obtain a learner's permit, driver's license, or state-issued identification card;

(6) To authorize employment of the child;

(7) To apply for and receive public benefits on behalf of the child; and

(8) To obtain copies or originals of state-issued personal identification documents for the child, including the child's birth certificate; and to the extent authorized under federal law, copies or originals of federally issued personal identification documents for the child, including the child's social security card.

This authorization agreement does not confer on the voluntary adult caregiver of the child the right to authorize the performance of an abortion on the child or the administration of emergency contraception to the child.

To the best of the parent's and voluntary adult caregiver's knowledge (check if applicable):

☐ **This child is not the subject of a current (pre-existing) valid authorization agreement, and no parent, guardian, custodian, licensed child-placing agency or other agency makes any claim to actual physical possession or care, custody or control of the child that is inconsistent with this authorization agreement.**

To the best of the parent's and the voluntary adult caregiver's knowledge (choose one from below):

☐ **THERE IS NO COURT INVOLVEMENT WITH THIS CHILD**

All of the following statements must apply:

- There is no court order or pending suit affecting the parent-child relationship concerning the child.
- There is no pending litigation in any court concerning custody, possession, or placement of the child or access to or visitation with the child.
- The court does not have continuing jurisdiction concerning the child.

☐ **THIS CHILD HAS BEEN THE SUBJECT OF A COURT ACTION**

The court with continuing jurisdiction concerning the child has given written approval for the execution of the authorization agreement accompanied by the following information:

- The county in which the court is located;
- The number of the court; and
- The cause number in which the order was issued or the litigation is pending.

Please staple a copy of the court's order to this agreement.

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AUTHORIZATION AGREEMENT FOR VOLUNTARY ADULT CAREGIVER

WARNINGS AND DISCLOSURES

This authorization agreement is an important legal document. The parent and the voluntary adult caregiver must read all of the warnings and disclosures before signing this authorization agreement.

The parent and voluntary adult caregiver are not required to consult an attorney but are advised to do so.

A parent's rights as a parent may be adversely affected by placing or leaving the parent's child with another person.

This authorization agreement does not confer on the voluntary adult caregiver the rights of a managing or possessory conservator or legal guardian.

A parent who is a party to this authorization agreement may terminate the authorization agreement and resume custody, possession, care, and control of the child on demand and at any time the parent may request the return of the child.

Failure by the voluntary adult caregiver to return the child to the parent immediately on request may have criminal and civil consequences.

Under other applicable law, the voluntary adult caregiver may be liable for certain expenses relating to the child in the voluntary caregiver's care, but the parent still retains the parental obligation to support the child.

In certain circumstances, this authorization agreement may not be entered into without written permission of the court. Examples of when court permission must be granted include when a court has entered a previous order granting custody or establishing a child support obligation.

This authorization agreement may be terminated by certain court orders affecting the child.

<u>This authorization agreement does not supersede, invalidate, or terminate any prior authorization agreement regarding the child.</u>

<u>This authorization agreement is void if a prior authorization agreement regarding the child is in effect and has not expired or been terminated.</u>

This authorization agreement does not confer on the voluntary adult caregiver of the child the right to authorize the performance of an abortion on the child or the administration of emergency contraception to the child.

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AUTHORIZATION AGREEMENT FOR VOLUNTARY ADULT CAREGIVER

MAILING REQUIREMENTS:
When both parents do not sign the parent authorization agreement, a copy of the agreement MUST be mailed to the non-signing parent at the parent's last known address, unless that parent is deceased or has had his or her parental rights terminated. This authorization agreement **is void** unless not later than the 10th day after the date the authorization agreement is signed:

1. The parties mail one copy of this agreement by certified mail, return receipt requested, or international registered mail, return receipt requested, as applicable, to the non-signing parent; and
2. The parties mail one copy of the agreement by first class mail or international first class mail, as applicable to the non-signing parent.

A party to the authorization agreement shall immediately inform each other party of any change in the party's address or contact information. If a party fails to comply with this subsection, the authorization agreement is voidable by the other party.

EXCEPTION TO MAILING REQUIREMENTS:
If a parent who did not sign the authorization agreement **does not have court-ordered possession of or access to the child who is the subject of the agreement**, the parent who is a party to the agreement does not have to mail a copy of the agreement to the non-signing parent if either of the following circumstances applies:

1. A protective order has been issued against the non-signing parent as provided under Chapter 85 of the Texas Family Code or under a similar law of another state for committing an act of family violence (as defined by Section 71.004 of the Texas Family Code) against the parent who signed the agreement or any child of the parent who signed the agreement; or
2. The non-signing parent has been convicted of any of the following criminal offenses against the parent who signed the agreement or any child of the parent who signed the agreement:
   - any offense under Title 5 of the Texas Penal Code (including murder, homicide, kidnapping, assault and sexual assault); or
   - any other criminal offense in Texas or any other state if the offense involves a violent act or prohibited sexual conduct.

TERM OF AUTHORIZATION AGREEMENT

This authorization agreement is for a term of:

- six months from the date the parties enter into the agreement, and will renew automatically for six-month terms unless the agreement is terminated by any of the circumstances provided in Section 34.008 of the Texas Family Code; or
- the time provided in the agreement with a specific expiration date earlier than six months after the date the parties enter into the agreement.

If the parent does not want the agreement to last for six months and renew automatically for six-month terms after that, the parent must identify the circumstances under which the authorization agreement may be terminated (as provided by Section 34.008) before the term of the agreement expires; or continued beyond the term of the agreement by a court (as provided by Section 34.008(b)). Note: See last page of form for full text of Section 34.008 regarding terminating or revoking the agreement

If the parent wishes the agreement to expire at a date earlier than six months from the date the parties enter into the agreement, indicate the date the agreement is to expire: _____

If applicable, state circumstances to terminate the agreement before the expiration date:
_____
_____

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AUTHORIZATION AGREEMENT FOR VOLUNTARY ADULT CAREGIVER

By signing below, parent and the voluntary adult caregiver acknowledge that they have each read this authorization agreement carefully, are entering into the authorization agreement voluntarily, and have read and understand all of the Warnings and Disclosures included in this authorization agreement.

_____
PARENT

Printed name:

SUBSCRIBED AND ACKNOWLEDGED BEFORE ME on this ____ day of _____, 20____.

_____
Notary Public in and for the State of TEXAS

_____
PARENT**

Printed name:

SUBSCRIBED AND ACKNOWLEDGED BEFORE ME on this ____ day of _____, 20____.

_____
Notary Public in and for the State of TEXAS

_____
VOLUNTARY ADULT CAREGIVER

Printed name:

SUBSCRIBED AND ACKNOWLEDGED BEFORE ME on this ____ day of _____, 20____.

_____
Notary Public in and for the State of TEXAS

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AUTHORIZATION AGREEMENT FOR VOLUNTARY ADULT CAREGIVER

Important statutory provisions
Texas Family Code (as of September 1, 2017)

Statute:
Sec. 34.0075 TERM OF AUTHORIZATION AGREEMENT
An authorization agreement executed under this chapter is for a term of six months from the date the parties enter into the agreement and renews automatically for six-month terms unless:

(1) an earlier expiration date is stated in the authorization agreement;
(2) the authorization agreement is terminated as provided by Section 34.008; or
(3) a court authorizes the continuation of the agreement as provided by Section 34.008(b).

Sec. 34.008. TERMINATION OF AUTHORIZATION AGREEMENT
(a) Except as provided by Subsection (b), an authorization agreement under this chapter terminates if, after the execution of the authorization agreement, a court enters an order:

(1) affecting the parent-child relationship;
(2) concerning custody, possession, or placement of the child;
(3) concerning access to or visitation with the child; or
(4) regarding the appointment of a guardian for the child under Section 676, Texas Probate Code.

(b) An authorization agreement may continue after a court order described by Subsection (a) is entered if the court entering the order gives written permission.

(c) An authorization agreement under this chapter terminates on written revocation by a party to the authorization agreement if the party:

(1) gives each party written notice of the revocation;
(2) files the written revocation with the clerk of the county in which:
  (A) the child resides;
  (B) the child resided at the time the authorization agreement was executed; or
  (C) the relative resides; and
(3) files the written revocation with the clerk of each court:
  (A) that has continuing, exclusive jurisdiction over the child;
  (B) in which there is a court order or pending suit affecting the parent-child relationship concerning the child;
  (C) in which there is pending litigation concerning:
    (i) custody, possession, or placement of the child; or
    (ii) access to or visitation with the child; or
  (D) that has entered an order regarding the appointment of a guardian for the child under Section 676, Texas Probate Code.

(d) If an authorization agreement executed under this chapter does not state when the authorization agreement expires, the authorization agreement is valid until revoked.

(e) If both parents have signed the authorization agreement, either parent may revoke the authorization agreement without the other parent's consent.

(f) Execution of a subsequent authorization agreement does not by itself supersede, invalidate, or terminate a prior authorization agreement.

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Form 3-2

This form is based on the form found in Texas Estates Code chapter 752. Additional provisions not included in the form found in chapter 752 have also been added.

Statutory Durable Power of Attorney

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE DURABLE POWER OF ATTORNEY ACT, SUBTITLE P, TITLE 2, OF THE TEXAS ESTATES CODE. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO. IF YOU WANT YOUR AGENT TO HAVE THE AUTHORITY TO SIGN HOME EQUITY LOAN DOCUMENTS ON YOUR BEHALF, THIS POWER OF ATTORNEY MUST BE SIGNED BY YOU AT THE OFFICE OF THE LENDER, AN ATTORNEY AT LAW, OR A TITLE COMPANY.

You should select someone you trust to serve as your agent. Unless you specify otherwise, generally the agent's authority will continue until—

1. you die or revoke the power of attorney;

2. your agent resigns, is removed by court order, or is unable to act for you; or

3. a guardian is appointed for your estate.

I, [**name and address**], appoint [**name and address of person appointed**] as my agent to act for me in any lawful way with respect to all of the following powers that I have initialed below. (YOU MAY APPOINT CO-AGENTS. UNLESS YOU PROVIDE OTHERWISE, CO-AGENTS MAY ACT INDEPENDENTLY.)

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TO GRANT ALL OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF (O) AND IGNORE THE LINES IN FRONT OF THE OTHER POWERS LISTED IN (A) THROUGH (N).

TO GRANT A POWER, YOU MUST INITIAL THE LINE IN FRONT OF THE POWER YOU ARE GRANTING.

TO WITHHOLD A POWER, DO NOT INITIAL THE LINE IN FRONT OF THE POWER. YOU MAY, BUT DO NOT NEED TO, CROSS OUT EACH POWER WITHHELD.

____(A) Real property transactions;

____(B) Tangible personal property transactions;

____(C) Stock and bond transactions;

____(D) Commodity and option transactions;

____(E) Banking and other financial institution transactions;

____(F) Business operating transactions;

____(G) Insurance and annuity transactions;

____(H) Estate, trust, and other beneficiary transactions;

____(I) Claims and litigation;

____(J) Personal and family maintenance;

____(K) Benefits from Social Security, Medicare, Medicaid, or other governmental programs or civil or military service;

____(L) Retirement plan transactions;

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____(M) Tax matters;

____(N) Digital assets and the content of an electronic communication;

____(O) ALL OF THE POWERS LISTED IN (A) THROUGH (N). YOU DO NOT HAVE TO INITIAL THE LINE IN FRONT OF ANY OTHER POWER IF YOU INITIAL LINE (O).

SPECIAL INSTRUCTIONS

Special instructions applicable to agent compensation (initial in front of one of the following sentences to have it apply; if no selection is made, each agent will be entitled to compensation that is reasonable under the circumstances):

____ My agent is entitled to reimbursement of reasonable expenses incurred on my behalf and to compensation that is reasonable under the circumstances.

____ My agent is entitled to reimbursement of reasonable expenses incurred on my behalf but shall receive no compensation for serving as my agent.

The following is applicable only when co-agents have been named.

Special instructions applicable to co-agents (if you have appointed co-agents to act, initial in front of one of the following sentences to have it apply; if no selection is made, each agent will be entitled to act independently):

____ Each of my co-agents may act independently for me.

____ My co-agents may act for me only if the co-agents act jointly.

____ My co-agents may act for me only if a majority of the co-agents act jointly.

Special instructions applicable to gifts (initial in front of the following sentence to have it apply):

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_____ I grant my agent the power to apply my property to make gifts outright to or for the benefit of a person, including by the exercise of a presently exercisable general power of appointment held by me, except that the amount of a gift to an individual may not exceed the amount of annual exclusions allowed from the federal gift tax for the calendar year of the gift.

The following provisions are not part of the statutory form itself, but are a permissible modification to the statutory form under Estates Code section 752.052 to grant specific authority described by section 751.031(b). Include the following options only after discussing them with your client.

GRANT OF SPECIFIC AUTHORITY (OPTIONAL)

My agent MAY NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:

(CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. INITIAL ONLY the specific authority you WANT to give your agent. If you DO NOT want to grant your agent one or more of the following powers, you may also CROSS OUT a power you DO NOT want to grant.)

____ Create, amend, revoke, or terminate an inter vivos trust

____ Make a gift, subject to the limitations of section 751.032 of the Durable Power of Attorney Act (section 751.032 of the Texas Estates Code) and any special instructions in this power of attorney

____ Create or change rights of survivorship

____ Create or change a beneficiary designation

____ Authorize another person to exercise the authority granted under this power of attorney.

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ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.

_____

_____

_____

Any authority granted to my agent herein shall be limited so as to prevent this general power of attorney from causing my agent to be taxed on my income (unless my agent is my spouse) and from causing my assets to be subject to a general power of appointment by my agent, as that term is defined in section 2041 of the Internal Revenue Code of 1986, as amended.

UNLESS YOU DIRECT OTHERWISE BELOW, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT TERMINATES.

CHOOSE ONE OF THE FOLLOWING ALTERNATIVES BY CROSSING OUT THE ALTERNATIVE NOT CHOSEN:

(A) This power of attorney is not affected by my subsequent disability or incapacity.

(B) This power of attorney becomes effective on my disability or incapacity.

YOU SHOULD CHOOSE ALTERNATIVE (A) IF THIS POWER OF ATTORNEY IS TO BECOME EFFECTIVE ON THE DATE IT IS EXECUTED.

IF NEITHER (A) NOR (B) IS CROSSED OUT, IT WILL BE ASSUMED THAT YOU CHOSE ALTERNATIVE (A).

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If alternative (B) is chosen and a definition of my disability or incapacity is not contained in this power of attorney, I shall be considered disabled or incapacitated for purposes of this power of attorney if a physician certifies in writing at a date later than the date this power of attorney is executed that, based on the physician's medical examination of me, I am mentally incapable of managing my financial affairs. I authorize the physician who examines me for this purpose to disclose my physical or mental condition to another person for purposes of this power of attorney. A third party who accepts this power of attorney is fully protected from any action taken under this power of attorney that is based on the determination made by a physician of my disability or incapacity.

I agree that any third party who receives a copy of this document may act under it. Termination of this durable power of attorney is not effective as to a third party until the third party has actual knowledge of the termination. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney. The meaning and effect of this durable power of attorney is determined by Texas law.

If any agent named by me dies, becomes incapacitated, resigns, refuses to act, or is removed by court order, or if my marriage to an agent named by me is dissolved by a court decree of divorce or annulment or is declared void by a court (unless I provided in this document that the dissolution or declaration does not terminate the agent's authority to act under this power of attorney), I name the following (each to act alone and successively, in the order named) as successor(s) to that agent: [**list name[s] and address[es]**].

_____

[**Name of affiant**]

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

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IMPORTANT INFORMATION FOR AGENT

Agent's Duties

When you accept the authority granted under this power of attorney, you establish a "fiduciary" relationship with the principal. This is a special legal relationship that imposes on you legal duties that continue until you resign or the power of attorney is terminated, suspended, or revoked by the principal or by operation of law. A fiduciary duty generally includes the duty to—

(1) act in good faith;

(2) do nothing beyond the authority granted in this power of attorney;

(3) act loyally for the principal's benefit;

(4) avoid conflicts that would impair your ability to act in the principal's best interest; and

(5) disclose your identity as an agent when you act for the principal by writing or printing the name of the principal and signing your own name as "agent" in the following manner:

(Principal's Name) by (Your Signature) as Agent

In addition, the Durable Power of Attorney Act (title 2, subtitle P, Texas Estates Code) requires you to—

(1) maintain records of each action taken or decision made on behalf of the principal;

(2) maintain all records until delivered to the principal, released by the principal, or discharged by a court; and

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(3) if requested by the principal, provide an accounting to the principal that, unless otherwise directed by the principal or otherwise provided in the Special Instructions, must include—

(A) the property belonging to the principal that has come to your knowledge or into your possession;

(B) each action taken or decision made by you as agent;

(C) a complete account of receipts, disbursements, and other actions of you as agent that includes the source and nature of each receipt, disbursement, or action, with receipts of principal and income shown separately;

(D) a listing of all property over which you have exercised control that includes an adequate description of each asset and the asset's current value, if known to you;

(E) the cash balance on hand and the name and location of the depository at which the cash balance is kept;

(F) each known liability;

(G) any other information and facts known to you as necessary for a full and definite understanding of the exact condition of the property belonging to the principal; and

(H) all documentation regarding the principal's property.

Termination of Agent's Authority

You must stop acting on behalf of the principal if you learn of any event that terminates or suspends this power of attorney or your authority under this power of attorney. An event that terminates this power of attorney or your authority to act under this power of attorney includes—

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(1) the principal's death;

(2) the principal's revocation of this power of attorney or your authority;

(3) the occurrence of a termination event stated in this power of attorney;

(4) if you are married to the principal, the dissolution of your marriage by court decree of divorce or annulment or declaration that your marriage is void, unless otherwise provided in this power of attorney;

(5) the appointment and qualification of a permanent guardian of the principal's estate unless a court order provides otherwise; or

(6) if ordered by a court, your removal as agent (attorney-in-fact) under this power of attorney. An event that suspends this power of attorney or your authority to act under this power of attorney is the appointment and qualification of a temporary guardian unless a court order provides otherwise.

Liability of Agent

The authority granted to you under this power of attorney is specified in the Durable Power of Attorney Act (title 2, subtitle P, of the Texas Estates Code). If you violate the Durable Power of Attorney Act or act beyond the authority granted, you may be liable for any damages caused by the violation or subject to prosecution for misapplication of property by a fiduciary under chapter 32 of the Texas Penal Code.

(I) THE AGENT, BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

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Form 3-3

This form is based on the form found in Tex. Est. Code § 1357.056.

Supported Decision-Making Agreement

Important Information for Supporter: Duties

When you agree to provide support to an adult with a disability under this supported decision-making agreement, you have a duty to:

1. act in good faith;
2. act within the authority granted in this agreement;
3. act loyally and without self-interest; and
4. avoid conflicts of interest.

Appointment of Supporter

I, [**name**], make this agreement of my own free will. I agree and designate that:

Name: _____

Address: _____

Phone Number: _____

Email Address: _____

is my supporter.

My supporter may help me with making everyday life decisions relating to the following:

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Yes	No	
☐	☐	obtaining food, clothing, and shelter
☐	☐	taking care of my physical health
☐	☐	managing my financial affairs

My supporter is not allowed to make decisions for me. To help me with my decisions, my supporter may (1) help me access, collect, or obtain information that is relevant to a decision, including medical, psychological, financial, educational, or treatment records; (2) help me understand my options so I can make an informed decision; or (3) help me communicate my decision to appropriate persons.

Yes	No	
☐	☐	A release allowing my supporter to see protected health information under the Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191) is attached.
☐	☐	A release allowing my supporter to see educational records under the Family Educational Rights and Privacy Act of 1974 (20 U.S.C. section 1232g) is attached.

Effective Date of Supported Decision-Making Agreement

This supported decision-making agreement is effective immediately and will continue until [**date**] or until the agreement is terminated by my supporter or me or by operation of law.

SIGNED on _____.

Consent of Supporter

I, [**name of supporter**], consent to act as a supporter under this agreement.

_____ _____
Signature of supporter Signature of adult with disability

_____ _____
Printed Name Printed Name

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_____	_____
Witness 1 Signature	Witness 2 Signature
_____	_____
Printed Name	Printed Name

SIGNED under oath before me on _____.

_____
Notary Public, State of Texas

WARNING: PROTECTION FOR THE ADULT WITH A DISABILITY

IF A PERSON WHO RECEIVES A COPY OF THIS AGREEMENT OR IS AWARE OF THE EXISTENCE OF THIS AGREEMENT HAS CAUSE TO BELIEVE THAT THE ADULT WITH A DISABILITY IS BEING ABUSED, NEGLECTED, OR EXPLOITED BY THE SUPPORTER, THE PERSON SHALL REPORT THE ALLEGED ABUSE, NEGLECT, OR EXPLOITATION TO THE DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES BY CALLING THE ABUSE HOTLINE AT 1-800-252-5400 OR ONLINE AT **WWW.TXABUSEHOTLINE.ORG**.

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Form 3-4

This form is based on the form found in Tex. Health & Safety Code § 166.164.

Medical Power of Attorney Designation of Health-Care Agent

I, [**name of principal**], appoint [**name, address, and telephone number of agent**] as my agent to make any and all health-care decisions for me, except to the extent I state otherwise in this document. This medical power of attorney takes effect if I become unable to make my own health-care decisions, and this fact is certified in writing by my physician.

Limitations on the decision-making authority of my agent are as follows: [**specify**].

Designation of Alternate Agent

(You are not required to designate an alternate agent but you may do so. An alternate agent may make the same health-care decisions as the designated agent if the designated agent is unable or unwilling to act as your agent. If the agent designated is your spouse, the designation is automatically revoked by law if your marriage is dissolved, annulled, or declared void unless this document provides otherwise.)

If the person designated as my agent is unable or unwilling to make health-care decisions for me, I designate the following persons to serve as my agents to make health-care decisions for me as authorized by this document, who serve in the following order:

A. First alternate agent: [**name, address, and telephone number**]

B. Second alternate agent: [**name, address, and telephone number**]

The original of this document is kept at [**specify location**].

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The following individual(s) or institution(s) have signed copies: [**list name[s] and address[es] of each individual or institution**].

Duration

I understand that this power of attorney exists indefinitely from the date I execute this document unless I establish a shorter time or revoke the power of attorney. If I am unable to make health-care decisions for myself when this power of attorney expires, the authority I have granted my agent continues to exist until the time I become able to make health-care decisions for myself.

[**Include the following if applicable:** This power of attorney ends on the following date: [**date**].]

Prior Designations Revoked

I revoke any prior medical power of attorney.

Disclosure Statement

THIS MEDICAL POWER OF ATTORNEY IS AN IMPORTANT LEGAL DOCUMENT. BEFORE SIGNING THE DOCUMENT, YOU SHOULD KNOW THESE IMPORTANT FACTS:

Except to the extent you state otherwise, this document gives the person you name as your agent the authority to make any and all health-care decisions for you in accordance with your wishes, including your religious and moral beliefs, when you are unable to make the decisions for yourself. Because "health care" means any treatment, service, or procedure to maintain, diagnose, or treat your physical or mental condition, your agent has the power to make a broad range of health-care decisions for you. Your agent may consent, refuse to consent, or withdraw consent to medical treatment and may make decisions about withdrawing or withholding life-sustaining treatment. Your agent may not consent to voluntary inpatient men-

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tal health services, convulsive treatment, psychosurgery, or abortion. A physician must comply with your agent's instructions or allow you to be transferred to another physician.

Your agent's authority is effective when your doctor certifies that you lack the competence to make health-care decisions.

Your agent is obligated to follow your instructions when making decisions on your behalf. Unless you state otherwise, your agent has the same authority to make decisions about your health care as you would have if you were able to make health-care decisions for yourself.

It is important that you discuss this document with your physician or other health-care provider before you sign the document to ensure that you understand the nature and range of decisions that may be made on your behalf. If you do not have a physician, you should talk with someone else who is knowledgeable about these issues and can answer your questions. You do not need a lawyer's assistance to complete this document, but if there is anything in this document that you do not understand, you should ask a lawyer to explain it to you.

The person you appoint as agent should be someone you know and trust. The person must be eighteen years of age or older or a person under eighteen years of age who has had the disabilities of minority removed. If you appoint your health- or residential-care provider (e.g., your physician or an employee of a home health agency, hospital, nursing facility, or residential-care facility, other than a relative), that person has to choose between acting as your agent or as your health- or residential-care provider; the law does not allow a person to serve as both at the same time.

You should inform the person you appoint that you want the person to be your health-care agent. You should discuss this document with your agent and your physician and give each a signed copy. You should indicate on the document itself the people and institutions that

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you intend to have signed copies. Your agent is not liable for health-care decisions made in good faith on your behalf.

Once you have signed this document, you have the right to make health-care decisions for yourself as long as you are able to make those decisions, and treatment cannot be given to you or stopped over your objection. You have the right to revoke the authority granted to your agent by informing your agent or your health- or residential-care provider orally or in writing or by your execution of a subsequent medical power of attorney. Unless you state otherwise in this document, your appointment of a spouse is revoked if your marriage is dissolved, annulled, or declared void.

This document may not be changed or modified. If you want to make changes in this document, you must execute a new medical power of attorney.

You may wish to designate an alternate agent in the event that your agent is unwilling, unable, or ineligible to act as your agent. If you designate an alternate agent, the alternate agent has the same authority as the agent to make health-care decisions for you.

THIS POWER OF ATTORNEY IS NOT VALID UNLESS (1) YOU SIGN IT AND HAVE YOUR SIGNATURE ACKNOWLEDGED BEFORE A NOTARY PUBLIC OR (2) YOU SIGN IT IN THE PRESENCE OF TWO COMPETENT ADULT WITNESSES.

THE FOLLOWING PERSONS MAY NOT ACT AS ONE OF THE WITNESSES:

(1) the person you have designated as your agent;

(2) a person related to you by blood or marriage;

(3) a person entitled to any part of your estate after your death under a will or codicil executed by you or by operation of law;

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(4) your attending physician;

(5) an employee of your attending physician;

(6) an employee of a health-care facility in which you are a patient if the employee is providing direct patient care to you or is an officer, director, partner, or business office employee of the health-care facility or of any parent organization of the health-care facility; or

(7) a person who, at the time this medical power of attorney is executed, has a claim against any part of your estate after your death.

By signing below, I acknowledge that I have read and understood the information contained in the above disclosure statement.

(YOU MUST DATE AND SIGN THIS POWER OF ATTORNEY. YOU MAY SIGN IT AND HAVE YOUR SIGNATURE ACKNOWLEDGED BEFORE A NOTARY PUBLIC OR YOU MAY SIGN IT IN THE PRESENCE OF TWO COMPETENT ADULT WITNESSES.)

Select one of the following.

Signature Acknowledged before Notary

I sign my name to this medical power of attorney on [**date**] at [**address**].

_____
[**Name of affiant**]

SIGNED under oath before me on _____.

_____
Notary Public, State of Texas

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Or

Signature in Presence of Two Competent Adult Witnesses

I sign my name to this medical power of attorney on [**date**] at [**address**].

_____
(Signature)

_____
(Print Name)

Statement of First Witness

I am not the person appointed as agent by this document. I am not related to the principal by blood or marriage. I would not be entitled to any portion of the principal's estate on the principal's death. I am not the attending physician of the principal or an employee of the attending physician. I have no claim against any portion of the principal's estate on the principal's death. Furthermore, if I am an employee of a health-care facility in which the principal is a patient, I am not involved in providing direct patient care to the principal and am not an officer, director, partner, or business office employee of the health-care facility or of any parent organization of the health-care facility.

Signature: _____

Print Name: _____ Date: _____

Address: _____

Signature of Second Witness

Signature: _____

Print Name: _____ Date: _____

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Address: _____

Form 3-5 is reserved.

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Form 3-6

This form is based on the form found in Tex. Health & Safety Code § 166.033.

Directive to Physicians and Family or Surrogates

Instructions for completing this document:

This is an important legal document known as an Advance Directive. It is designed to help you communicate your wishes about medical treatment at some time in the future when you are unable to make your wishes known because of illness or injury. These wishes are usually based on personal values. In particular, you may want to consider what burdens or hardships of treatment you would be willing to accept for a particular amount of benefit obtained if you were seriously ill.

You are encouraged to discuss your values and wishes with your family or chosen spokesperson, as well as your physician. Your physician, other health-care provider, or medical institution may provide you with various resources to assist you in completing your advance directive. Brief definitions are listed below and may aid you in your discussions and advance planning. Initial the treatment choices that best reflect your personal preferences. Provide a copy of your directive to your physician, usual hospital, and family or spokesperson. Consider a periodic review of this document. By periodic review, you can best assure that the directive reflects your preferences.

In addition to this advance directive, Texas law provides for two other types of directives that can be important during a serious illness. These are the Medical Power of Attorney and the Out-of-Hospital Do-Not-Resuscitate Order. You may wish to discuss these with your

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physician, family, hospital representative, or other advisers. You may also wish to complete a directive related to the donation of organs and tissues.

DIRECTIVE

I, [**name of principal**], recognize that the best health care is based on a partnership of trust and communication with my physician. My physician and I will make health-care or treatment decisions together as long as I am of sound mind and able to make my wishes known. If there comes a time when I am unable to make medical decisions about myself because of illness or injury, I direct that the following treatment preferences be honored:

If, in the judgment of my physician, I am suffering with a terminal condition from which I am expected to die within six months, even with available life-sustaining treatment provided in accordance with prevailing standards of medical care:

Select one of the following.

__ I request that all treatments other than those needed to keep me comfortable be discontinued or withheld and my physician allow me to die as gently as possible.

Or

__ I request that I be kept alive in this terminal condition using available life-sustaining treatment. (THIS SELECTION DOES NOT APPLY TO HOSPICE CARE.)

Continue with the following.

If, in the judgment of my physician, I am suffering with an irreversible condition so that I cannot care for myself or make decisions for myself and am expected to die without life-sustaining treatment provided in accordance with prevailing standards of care:

Select one of the following.

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__ I request that all treatments other than those needed to keep me comfortable be discontinued or withheld and my physician allow me to die as gently as possible.

Or

__ I request that I be kept alive in this irreversible condition using available life-sustaining treatment. (THIS SELECTION DOES NOT APPLY TO HOSPICE CARE.)

Continue with the following.

Additional Requests: (After discussion with your physician, you may wish to consider listing particular treatments in this space that you do or do not want in specific circumstances, such as artificially administered nutrition and hydration, intravenous antibiotics, etc. Be sure to state whether you do or do not want the particular treatment.) [**Specify.**]

The following is an example.

In regard to whether artificial nutrition and hydration (sometimes called "tube feeding") are included in the term of "treatments to keep me comfortable," I direct that "treatments to keep me comfortable" be construed as [excluding artificially supplied food and water/including artificially supplied food and water.]

Continue with the following.

After signing this directive, if my representative or I elect hospice care, I understand and agree that only those treatments needed to keep me comfortable would be provided, and I would not be given available life-sustaining treatments.

If I do not have a Medical Power of Attorney and I am unable to make my wishes known, I designate the following [person/persons] to make health-care or treatment decisions with my physician compatible with my personal values:

1. [**Name**]

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2. [**Name**]

(If a Medical Power of Attorney has been executed, then an agent already has been named and you should not list additional names in this document.)

If the above persons are not available, or if I have not designated a spokesperson, I understand that a spokesperson will be chosen for me following standards specified in the laws of Texas. If, in the judgment of my physician, my death is imminent within minutes to hours, even with the use of all available medical treatment provided within the prevailing standard of care, I acknowledge that all treatments may be withheld or removed except those needed to maintain my comfort. I understand that under Texas law this directive has no effect if I have been diagnosed as pregnant. This directive will remain in effect until I revoke it. No other person may do so.

SIGNED _____ [**date**], [**city, county, state of residence**]

Two competent adult witnesses must sign below, acknowledging the signature of the declarant. The witness designated as Witness 1 may not be a person designated to make a health-care or treatment decision for the patient and may not be related to the patient by blood or marriage. This witness may not be entitled to any part of the estate and may not have a claim against the estate of the patient. This witness may not be the attending physician or an employee of the attending physician. If this witness is an employee of a health-care facility in which the patient is being cared for, this witness may not be involved in providing direct patient care to the patient. This witness may not be an officer, director, partner, or business office employee of a health-care facility in which the patient is being cared for or of any parent organization of the health-care facility.

Witness 1 _____Witness 2 _____

Definitions:

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"Artificially administered nutrition and hydration" means the provision of nutrients or fluids by a tube inserted in a vein, under the skin in the subcutaneous tissues, or in the gastro-intestinal tract.

"Irreversible condition" means a condition, injury, or illness:

(1) that may be treated, but is never cured or eliminated;

(2) that leaves a person unable to care for or make decisions for the person's own self; and

(3) that, without life-sustaining treatment provided in accordance with the prevailing standard of medical care, is fatal.

Explanation: Many serious illnesses such as cancer, failure of major organs (kidney, heart, liver, or lung), and serious brain disease such as Alzheimer's dementia may be considered irreversible early on. There is no cure, but the patient may be kept alive for prolonged periods of time if the patient receives life-sustaining treatments. Late in the course of the same illness, the disease may be considered terminal when, even with treatment, the patient is expected to die. You may wish to consider which burdens of treatment you would be willing to accept in an effort to achieve a particular outcome. This is a very personal decision that you may wish to discuss with your physician, family, or other important persons in your life.

"Life-sustaining treatment" means treatment that, based on reasonable medical judgment, sustains the life of a patient and without which the patient will die. The term includes both life-sustaining medications and artificial life support such as mechanical breathing machines, kidney dialysis treatment, and artificially administered nutrition and hydration. The term does not include the administration of pain management medication, the performance of a medical procedure necessary to provide comfort care, or any other medical care provided to alleviate a patient's pain.

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"Terminal condition" means an incurable condition caused by injury, disease, or illness that according to reasonable medical judgment will produce death within six months, even with available life-sustaining treatment provided in accordance with the prevailing standard of medical care.

Explanation: Many serious illnesses may be considered irreversible early in the course of the illness, but they may not be considered terminal until the disease is fairly advanced. In thinking about terminal illness and its treatment, you again may wish to consider the relative benefits and burdens of treatment and discuss your wishes with your physician, family, or other important persons in your life.

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Form 3-7

Authorization to Consent to Treatment of Minor

I, [**name**], am the [parent/guardian/managing conservator] of [**name of minor**], a minor child, and have the power to consent to medical treatment for [him/her]. [**Include if applicable:** [**Name[s]**] [is/are] [**name of minor**]'s [other parent/parents].] I authorize and appoint [**name**] as my agent to consent to medical treatment of the minor when I cannot be contacted to so consent, such medical treatment to include, without limitation, X-ray examination; anesthetic treatment; medical, dental, or surgical examination or treatment; and general hospital care. No prior determination of life-threatening emergency or danger of serious or permanent injury resulting from delay of treatment need be made under this authorization.

I will indemnify and hold harmless from any expense or claim of any nature any entity that provides or causes to be provided examination, treatment, or hospital care under this authorization (except to the extent such entity is negligent therein) and conditionally agree to make or cause to be made, by assignment of third-party benefits or otherwise, full and complete payment for such examination, treatment, or hospital care.

SIGNED on [**date**].

_____

[**Name of parent/guardian/managing conservator**]

Child's name: _____

Birth date: _____

Last tetanus immunization: _____

Allergies: _____

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Hospitalization insurance co.: _____

Pediatrician: _____

Type of credit card: _____

Credit card number: _____

Name on credit card: _____

Expiration date: _____

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Form 3-8

Caveat: This form is an example only and is not prescribed by statute. There is no case law upholding the use of such a statement, and it is unclear what the legal effect of such a statement is under Texas law.

A person who completes a statement of intent should discuss his intent with his attorney (when applicable), his family members, the persons designated to act for him in any advance directive or planning document, and others who care about him. Such persons should be given copies of the completed statement of intent.

An original, signed statement of intent should be kept at home and should be readily available so that it is accessible when needed. A copy should also be kept in a secure location with other directives and end-stage planning documents.

The statement of intent should be provided to and discussed with the patient's doctors. The patient should make sure the doctor understands his intent, agrees to follow his intent, and will include the statement in his medical record. The doctor should be asked to tell other doctors who may treat the patient to honor his intent.

A person who completes a statement of intent should take a copy of the statement with him and request that it be put in his medical record, if admitted to a hospital or a nursing home.

Statement of Intent for End-of-Life Planning

I, [**name**], make this statement of intent with regard to the following situations. This statement is in addition to and shall apply to any advanced directives I may have executed or shall hereafter execute. Initials in front of each paragraph of this addendum indicate my desire. If any item is not initialed, that item is not applicable.

__ No cardiopulmonary resuscitation (CPR) is to be performed in the hospital or emergency room unless done within [**specify time frame**] of cardiac arrest.

__ No gastrostomy (creation of a feeding tube to the stomach from the abdomen) is to be done unless I am mentally able to give my consent. If I have given my consent, subsequently become mentally unable to make decisions, and am unable to take nourishment by mouth after [**specify time frame**] of artificial fluid and nutrition support (via IVs, subclavian vein hyperalimentation, nasal gastric tube feeding, or gastrostomy feeding tubes), I direct all of these artificial means of nutrition be stopped.

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__ No respirator is to be used longer than [**specify time frame**] (if the initial indication for its use was the inability to breathe caused by either a head injury or a stroke). A respirator may be used up to [**specify time frame**] if the indication of its use is pneumonia, chest injury, or similar illnesses.

__ In the event that a diagnosis of Alzheimer's disease (or other similar dementia) has been made, and if I have lost my ability to live at home because of the brain disease, I direct that no life-saving procedures be performed. I direct that there be no treatment of me for such illnesses as pneumonia, heart disease, sepsis (overwhelming infection), cancer, stroke, or similar situations. Injuries may be treated in the usual manner.

__ Radiation, chemotherapy, and repeated surgery for metastatic cancer is prohibited unless there is at least a [**percent**] percent chance of improving both my lifespan and quality of life for at least [**number**] months.

__ Renal dialysis for longer than [**specify time frame**] is prohibited, unless I possess the capacity to give consent to a longer period of treatment.

__ If an injury results in quadriplegia (paralysis of all four extremities) plus the loss of ability to communicate for over [**specify time frame**], I direct that no supportive therapy be continued.

__ In the event I suffer a stroke (cerebral vascular accident), I direct that unless there is a strong probability (at least [**percent**] percent) of recovery of both my mental functions and the ability to communicate, plus the ability to care for myself (with minimal help), that all supportive measures and treatments not be extended longer than [**specify time frame**] from the onset of the stroke.

__ I request that adequate dosages of pain medication be used in any of the above situations, as well as in other unforeseen terminal illnesses or injuries, to give total relief of

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pain and discomfort, including the pain of mental anguish, even if this means using doses that exceed the usual amount and even if these higher dosages have a probability of toxicity such as adverse effects on the respiratory or cardiac rate. I recognize that euthanasia and assisted suicide are not legal in Texas but that relief of pain and dignity in death are recognized as legal.

__ In the event that I have elected to stop treatment or life support while possessing the mental capacity to do so, and my illness then progresses to the point that I can no longer make my own decisions, I direct that my decisions to stop treatment or life support be honored.

__ In the event I am hospitalized in an institution or under the care of a physician that will not honor my wishes as stated above, I direct that I be transferred to an institution, a hospice, or my home and to the care of a physician who will honor my directive.

__ A specific condition or situation I would like to address and my intent regarding that condition or situation is described as follows: [**specify**].

As My Death Approaches

General

Select as applicable.

1. I want to die naturally at home, if possible.

2. I wish to know about options for hospice care to provide medical, emotional, and spiritual care for me and my loved ones.

3. I would like to have with me the following special possessions: [**specify**].

Comfort and Personal Care

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Select as applicable.

1. If I show signs of physical or mental distress, I want my caregivers to do whatever they can to help me.

2. I wish to have a cool moist cloth put on my head if I have a fever.

3. I want my lips and mouth kept moist to stop dryness.

4. I wish to have personal care like bathing, shaving, nail clipping, hair brushing, and teeth brushing, as long as they do not cause me pain or discomfort.

5. If I am not able to control my bowel or bladder functions, I wish for my clothes and bed linens to be kept clean and for them to be changed as soon as they can be if they have been soiled.

Surroundings

Select as applicable.

1. I would like to have the following family and friends present when possible: [**specify**].

2. I wish to have my hand held and to be talked to when possible, even if I don't seem to respond to the voice or touch of others.

3. I wish to have others by my side praying for me when possible.

4. I wish to have religious readings and well-loved poems read aloud when I am near death.

5. I wish to have my favorite music played when possible until my time of death.

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6. I wish to have pictures of my loved ones in my room, near my bed.

Advance Directives and Estate Planning Documents

I have completed the following document[s]:

Select as applicable.

1. Preneed Designation of Guardian. [**Name**] has [authority under/a copy of/authority under and a copy of] the document. [His/Her] contact information is: [**specify**].

2. Durable Power of Attorney for Health Care. [**Name**] has [authority under/a copy of/authority under and a copy of] the document. [His/Her] contact information is: [**specify**].

3. Out-of-Hospital Do-Not-Resuscitate Order. [**Name**] has [authority under/a copy of/authority under and a copy of] the document. [His/Her] contact information is: [**specify**].

4. Directive to Physicians or Surrogates. [**Name**] has [authority under/a copy of/ authority under and a copy of] the document. [His/Her] contact information is: [**specify**].

5. Durable Power of Attorney. [**Name**] has [authority under/a copy of/authority under and a copy of] the document. [His/Her] contact information is: [**specify**].

6. Last Will and Testament. [**Name**] has [authority under/a copy of/authority under and a copy of] the document. [His/Her] contact information is: [**specify**].

7. Inter Vivos (Living) Trust. [**Name**] has [authority under/a copy of/authority under and a copy of] the document. [His/Her] contact information is: [**specify**].

8. [**Title of other advance directive or estate planning document.**] [**Name**] has [authority under/a copy of/authority under and a copy of] the document. [His/Her] contact information is: [**specify**].

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Following My Death

Select as applicable.

1. My instructions for a funeral or memorial service are as follows: [**specify intentions for funeral or memorial service**].

2. I would like the disposition of my remains to be [by burial/by cremation/by donation to [**specify to whom donation will be made**]].

3. I am a veteran or may have the right to burial in a veterans or other government cemetery as follows: [**specify burial rights**].

4. I have previously made arrangements, and the contact person is: [**specify**].

5. I have not previously made arrangements, and I would like my service to include: [**specify**].

6. I would like the following people notified: [**specify**].

7. I would like any charitable donations to be made to: [**specify**].

8. I would like my announcement of death (obituary) to include: [**specify**].

Additional Information

Additional restrictions, instructions, and directives may be added at any time. Any item listed above may be revoked or modified by me at any time.

The following people have copies of this statement of intent: [**specify names and contact information for individuals with copies of this statement**].

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_____ _____
Declarant Date

_____ _____
Witness Witness

_____ _____
Witness Address Date Witness Address Date

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Form 3-9

Examination/Investigation Request

Texas Department of Public Safety
Enforcement & Compliance Service
P.O. Box 4087, Austin, TX 78773-0320

DL-76 (9/16)

Examination/Investigation Request

Please complete this form if you have personal knowledge about a driver you believe is no longer capable of safely operating a motor vehicle.

- After reviewing this report, the Department may require the driver to take certain tests such as a vision, knowledge or driving test or provide other medical information.
- The Department may release information contained in this report pursuant to a request under the Public Information Act or in response to a court order.

Email the completed form to: MAB@DPS.Texas.gov, or
Mail to: Texas Department of Public Safety, Enforcement and Compliance Service, P.O. Box 4087, Austin, TX 78773-0320

PERSONAL INFORMATION ON PERSON BEING REPORTED Please complete all available information	NAME (LAST, FIRST, MIDDLE)	DATE OF BIRTH	DRIVER LICENSE NUMBER	
	ADDRESS	CITY	STATE	ZIP CODE
	LICENSE PLATE NUMBER	PHONE NUMBER		

Describe in detail incidents related to or conditions about this driver which indicate the inability to safely operate a motor vehicle. Give specific dates, locations, accident reports, possible medical conditions and all other information which supports the need for testing or evaluation. You should report only information of which you have personal knowledge or physical evidence.

PERSON COMPLETING REQUEST	IT IS A VIOLATION OF THE TEXAS PENAL CODE TO INTENTIONALLY FILE A FALSE REPORT. ANY PERSON WHO INTENTIONALLY FILES A FALSE REPORT MAY BE SUBJECT TO CRIMINAL PROSECUTION.			
	PRINT FULL NAME (LAST, FIRST, MIDDLE)	RELATIONSHIP TO DRIVER	TELEPHONE NUMBER	
	ADDRESS	CITY	STATE	ZIP CODE
	SIGNATURE	DATE		

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Form 3-10

This form is based on the form found in Tex. Est. Code § 1104.204. This form may be modified to omit references to alternate designations, to appoint only a guardian of the person or estate, or to omit the disqualifying language, as appropriate. See Tex. Est. Code §§ 1104.202–.206 for discussion of requirements relating to the declaration and acknowledgment.

Designation of Guardian in Event of Later Incapacity or Need of Guardian

I, [**name of declarant**], make this Designation of Guardian, to operate if the need for a guardian for me later arises.

1. I designate [**name**] to serve as guardian of my person, [**name**] as first alternate guardian of my person, [**name**] as second alternate guardian of my person, and [**name**] as third alternate guardian of my person.

2. I designate [**name**] to serve as guardian of my estate, [**name**] as first alternate guardian of my estate, [**name**] as second alternate guardian of my estate, and [**name**] as third alternate guardian of my estate.

3. If any guardian or alternate guardian dies, does not qualify, or resigns, the next named alternate guardian becomes my guardian.

4. I expressly disqualify the following [person/persons] from serving as guardian of my person: [**name[s]**].

5. I expressly disqualify the following [person/persons] from serving as guardian of my estate: [**name[s]**].

SIGNED on _____.

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_____

[**Name of declarant**]

_____

Witness

_____

Witness

Use the following if the declaration includes a provision disqualifying someone from serving as guardian.

Self-Proving Affidavit

Before me, the undersigned authority, on this date personally appeared the declarant, and [**name**] and [**name**] as witnesses and, all being duly sworn, the declarant said that the above instrument was [his/her] Designation of Guardian and that the declarant had made and executed it for the purposes expressed in the designation. The witnesses declared to me that they are each fourteen years of age or older, that they saw the declarant sign the designation, that they signed the designation as witnesses, and that the declarant appeared to them to be of sound mind.

_____

Declarant

_____

Affiant

_____

Affiant

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

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If the declaration does not include a provision disqualifying someone from serving as guardian, the following acknowledgment should be used.

STATE OF TEXAS)

COUNTY OF)

This instrument was acknowledged before me on [**date**] by [**name**].

_____

Notary Public, State of Texas

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Form 3-11

This form is based on the form found in Tex. Est. Code § 1104.153. This form may be modified to omit references to alternate designations and to also appoint a guardian of the estate of the children, as appropriate.

Declaration of Appointment of Guardian for My Children in Event of Death or Incapacity

I, [**name**], make this declaration to appoint as guardian for my child[ren], listed as follows, in the event of my death or incapacity: [**name[s] of child[ren]**].

I designate [**name**] to serve as guardian of the person of my child[ren], [**name**] as first alternate guardian of the person of my child[ren], [**name**] as second alternate guardian of the person of my child[ren], and [**name**] as third alternate guardian of the person of my child[ren].

I direct that the guardian of the person of my child[ren] serve [with/without] bond.

Include the following if applicable.

I designate [**name**] to serve as guardian of the estate of my child[ren], [**name**] as first alternate guardian of the estate of my child[ren], [**name**] as second alternate guardian of the estate of my child[ren], and [**name**] as third alternate guardian of the estate of my child[ren].

Continue with the following.

If any guardian or alternate guardian dies, does not qualify, or resigns, the next named alternate guardian becomes guardian of my child[ren].

SIGNED on _____.

_____

[**Name of declarant**]

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_____
Witness

_____
Witness

Self-Proving Affidavit

Before me, the undersigned authority, on this date personally appeared the declarant and [**name**] and [**name**] as witnesses and, all being duly sworn, the declarant said that the above instrument was [his/her] Declaration of Appointment of Guardian for the Declarant's Children in the Event of Declarant's Death or Incapacity and that the declarant had made and executed it for the purposes expressed in the declaration. The witnesses declared to me that they are each fourteen years of age or older, that they saw the declarant sign the declaration, that they signed the declaration as witnesses, and that the declarant appeared to them to be of sound mind.

_____
Declarant

_____
Affiant

_____
Affiant

SIGNED under oath before me on _____.

_____
Notary Public, State of Texas

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Form 3-12

This form is based on the form found in Tex. Civ. Prac. & Rem. Code § 137.011.

Declaration for Mental Health Treatment

I, [**name**], being an adult of sound mind, willfully and voluntarily make this declaration for mental health treatment to be followed if it is determined by a court that my ability to understand the nature and consequences of a proposed treatment, including the benefits, risks, and alternatives to the proposed treatment, is impaired to such an extent that I lack the capacity to make mental health treatment decisions. "Mental health treatment" means electroconvulsive or other convulsive treatment, treatment of mental illness with psychoactive medication, and preferences regarding emergency mental health treatment.

Include the following paragraph if applicable.

I understand that I may become incapable of giving or withholding informed consent for mental health treatment due to the symptoms of a diagnosed mental disorder. These symptoms may include: [**specify**].

Continue with the following.

Psychoactive Medications

If I become incapable of giving or withholding informed consent for mental health treatment, my wishes regarding psychoactive medications are as follows:

Select one or more of the following as applicable.

I consent to the administration of the following medications: [**specify**].

And/Or

I do not consent to the administration of the following medications: [**specify**].

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And/Or

I consent to the administration of a federal Food and Drug Administration approved medication that was only approved and in existence after my declaration and that is considered in the same class of psychoactive medications as stated below: [**specify**].

Continue with the following.

Conditions or limitations: [**specify**].

Convulsive Treatment

If I become incapable of giving or withholding informed consent for mental health treatment, my wishes regarding convulsive treatment are as follows:

Select one of the following.

I consent to the administration of convulsive treatment.

Or

I do not consent to the administration of convulsive treatment.

Continue with the following.

Conditions or limitations: [**specify**].

Preferences for Emergency Treatment

In an emergency, I prefer the following treatment FIRST (circle one):

Restraint/Seclusion/Medication

In an emergency, I prefer the following treatment SECOND (circle one):

Restraint/Seclusion/Medication

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In an emergency, I prefer the following treatment THIRD (circle one):

Restraint/Seclusion/Medication

I prefer a [male/female] to administer restraint, seclusion, and/or medications.

Options for treatment before use of restraint, seclusion, and/or medications: [**specify**].

Conditions or limitations: [**specify**].

Additional Preferences or Instructions

[**Specify any additional preferences or instructions.**]

Conditions or limitations: [**specify**].

Signature of principal: _____

Date: _____

Statement of Witnesses

I declare under penalty of perjury that the principal's name has been represented to me by the principal, that the principal signed or acknowledged this declaration in my presence, that I believe the principal to be of sound mind, that the principal has affirmed that the principal is aware of the nature of the document and is signing it voluntarily and free from duress, that the principal requested that I serve as witness to the principal's execution of this document, and that I am not a provider of health- or residential-care to the principal, an employee of a provider of health- or residential-care to the principal, an operator of a community health-care facility providing care to the principal, or an employee of an operator of a community health-care facility providing care to the principal.

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I declare that I am not related to the principal by blood, marriage, or adoption and that to the best of my knowledge I am not entitled to and do not have a claim against any part of the estate of the principal on the death of the principal under a will or by operation of law.

Witness Signature: _____

Print Name: _____ Date: _____

Address: _____

Witness Signature: _____

Print Name: _____ Date: _____

Address: _____

NOTICE TO PERSON MAKING A DECLARATION FOR MENTAL HEALTH TREATMENT

This is an important legal document. It creates a declaration for mental health treatment. Before signing this document, you should know these important facts:

This document allows you to make decisions in advance about mental health treatment and specifically three types of mental health treatment: psychoactive medication, convulsive therapy, and emergency mental health treatment. The instructions that you include in this declaration will be followed only if a court believes that you are incapacitated to make treatment decisions. Otherwise, you will be considered able to give or withhold consent for the treatments.

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This document will continue in effect for a period of three years unless you become incapacitated to participate in mental health treatment decisions. If this occurs, the directive will continue in effect until you are no longer incapacitated.

You have the right to revoke this document in whole or in part at any time you have not been determined to be incapacitated. YOU MAY NOT REVOKE THIS DECLARATION WHEN YOU ARE CONSIDERED BY A COURT TO BE INCAPACITATED. A revocation is effective when it is communicated to your attending physician or other health care provider.

If there is anything in this document that you do not understand, you should ask a lawyer to explain it to you. This declaration is not valid unless it is signed by two qualified witnesses who are personally known to you and who are present when you sign or acknowledge your signature.

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Form 3-13

[Caption. See § 3 of the Introduction in this manual.]

Debtor's Statement—Small Estates

[**Name of debtor**], Debtor, whose address is [**address, city, state**], tenders to the county clerk of [**county**] County, Texas, in accordance with the terms and provisions of chapter 1355 of the Texas Estates Code, the amount of $[**amount**], being not more than $100,000 as specified by statute, for the use and benefit of [**name of creditor**], Creditor, whose Social Security number is [**number**] and whose address is [**address, city, state**].

Debtor states that Creditor is a resident of the state of Texas and [is a minor, whose date of birth is [**date**]/has the following disability: [**specify**]].

Debtor states that the amount of money tendered above is the amount due Creditor on a liquidated and uncontested claim against Debtor arising out of the following transaction: [**specify**].

Debtor requests that the county clerk issue a receipt for the amount of money in accordance with the terms of chapter 1355 of the Texas Estates Code and further that Creditor be advised as required by law.

SIGNED on [**date**].

_____

[**Name of debtor**]

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Form 3-14

[Caption. See § 3 of the Introduction in this manual.]

Application to Withdraw Funds Under Texas Estates Code Chapter 1355

This Application to Withdraw Funds under Texas Estates Code Chapter 1355 is brought by [**name of applicant**], Applicant, who shows in support:

1. [**Name of creditor**], Creditor, is [a minor/an incapacitated person].

2. The domicile of Creditor is [**address**].

3. [**Name of debtor**] on [**date**] deposited with the clerk of the Court of [**county**] County, Texas, the amount of $[**amount**] in accordance with the terms and provisions of section 1355.001 of the Texas Estates Code for the use and benefit of Creditor.

4. Applicant's relationship to Creditor is the [father/mother/unestranged spouse/custodian] of Creditor. [**Include if applicable:** Creditor has no spouse, and [his/her] parents [are deceased/do not reside in the state of Texas].]

5. Applicant has recently incurred extraordinary expenses as a result of [**state facts as applicable, including name of minor or incapacitated person**].

6. The bond of Applicant accompanies this application and is at least double the amount now on deposit as stated above. But in no event is the bond less than two hundred dollars.

7. It would be in the best interest and welfare of Creditor if the above-mentioned amount were withdrawn from the trust account of the county clerk and delivered to Applicant for the use and benefit of Creditor.

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Applicant prays that this application and the accompanying bond be approved and that the county clerk be ordered to deliver the above-described funds to Applicant for the use and benefit of Creditor. Applicant prays for all further relief to which Applicant may be entitled.

Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

_____

Applicant
[**Address**]
[**Telephone**]

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

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Form 3-15

[Caption. See § 3 of the Introduction in this manual.]

Order to Release Funds

On [**date**] the Court considered the Application to Withdraw Funds of [**name of applicant**], Applicant.

The Court finds that Applicant has recently incurred extraordinary expenses as a result of [**state facts, including name of minor child or incapacitated person**] and that Applicant, pursuant to chapter 1355 of the Texas Estates Code, has obtained a bond for double the amount requested herein made payable to the judge or the judge's successors in office and to be conditioned that the custodian will use the money for the creditor's benefit under the directions of the Court. The Court further finds that reasonable and necessary attorney's fees in the amount of $[**amount**] were required for representation in this matter.

IT IS ORDERED that, as authorized by chapter 1355 of the Texas Estates Code, the county clerk of [**county**] County, Texas, be ordered to immediately release the amount of $[**amount**] to [**name of applicant**], to be used for [**specify**] for [**name of minor child or incapacitated person**].

All other relief not expressly granted herein is denied.

SIGNED on _____.

_____
JUDGE PRESIDING

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Form 3-16

[Caption. See § 3 of the Introduction in this manual.]

Motion to Create Texas Property Code Section 142 Trust

This Motion to Create a Texas Property Code Section 142 Trust for the benefit of [**name of minor or incapacitated person**] is brought by [**name of movant**], Movant, as [next friend/guardian ad litem] of [**name of minor or incapacitated person**], who shows in support:

Select the following if judgment is not yet entered.

1. This Court is about to enter its final judgment in the above-entitled and -numbered cause, and [**name of minor or incapacitated person**] will be awarded $[**amount**]. At that time, such funds will be subject to being paid into the registry of this Court because [**name of minor or incapacitated person**] is [a minor/an incapacitated person].

Select the following if judgment is already entered.

1. On [**date**] this Court entered its final judgment in the above-entitled and -numbered cause, and [**name of minor or incapacitated person**] was awarded $[**amount**], free and clear of all costs, expenses, and fees. The funds were then paid into the registry of this Court.

Select the following if the beneficiary is a minor.

2. [**Name of minor**] was born on [**date**] and is a minor, age [**age**] as of the filing of this motion. [**Name of minor**] currently resides at [**address**]. Movant is the [next friend/guardian ad litem] for [**name of minor**]. There is no court-ordered guardianship pending with respect to [**name of minor**] at this time. Movant is of the opinion that it would be in the best interests of [**name of minor**] to have the amount awarded to [him/her] held in trust for [his/her] benefit in accordance with section 142.005 of the Texas Property Code, until [he/she] attains age [**age**]. It is the opinion of Movant that [**name of minor**] will not have sufficient maturity to properly

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manage and invest that sum of money on attaining [his/her] majority at age eighteen. Moreover, it is the opinion of Movant that such a large amount of money should be invested and managed by a corporate trustee, which is in the business of managing large amounts of money, rather than allowing the money to remain in the Court's registry.

Select the following if the beneficiary is an incapacitated person.

2. [**Name of incapacitated person**] was born on [**date**] and is an incapacitated person as defined by section 142.007 of the Texas Property Code, inasmuch as [he/she] lacks sufficient understanding or capacity to make or communicate responsible decisions concerning [his/her] financial affairs. [**Name of incapacitated person**] currently resides at [**address**]. Movant is the [next friend/guardian ad litem] for [**name of incapacitated person**]. Movant is of the opinion that [**name of incapacitated person**] will not have sufficient capacity to properly manage and invest such an amount of money until [he/she] regains capacity. Moreover, it is the opinion of Movant that such a large amount of money should be invested and managed by a corporate trustee, which is in the business of managing large amounts of money, rather than allowing the money to remain in the Court's registry.

Continue with the following.

3. Movant has asked [**name of proposed trustee**] to act as trustee of the trust if this Court agrees that such a trust should be created. Movant understands that [**name of proposed trustee**] is willing to act as trustee.

4. Movant and [**name of proposed trustee**] have agreed on the terms of such a trust, and a proposed trust agreement reflecting those terms accompanies this motion.

[**Name of movant**] prays that this Court create a Texas Property Code section 142.005 trust for the benefit of [**name of minor or incapacitated person**] in accordance with the terms and provisions of the trust agreement filed with this motion. Movant prays for all further relief to which Movant may be entitled.

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Respectfully submitted,

_____

[**Name**]
Attorney for Movant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Certificate of Service

I certify that a true copy of this [**title of document**] was served in accordance with rule 21a of the Texas Rules of Civil Procedure.

SIGNED on _____.

_____

[**Name of attorney**]

Attach proposed trust agreement along with proposed trustee's fee schedule.

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Form 3-17

[Caption. See § 3 of the Introduction in this manual.]

Order Creating Texas Property Code Section 142 Trust

On [**date**] the Court considered the Motion to Create a Texas Property Code Section 142 Trust of [**name of movant**], as [next friend/guardian ad litem] of [**name of minor or incapacitated person**], [a minor/an incapacitated person], requesting the Court to establish a trust for [**name of minor or incapacitated person**] under section 142.005 of the Texas Property Code. The Court, having considered the evidence presented, the argument of counsel, and the terms of the trust instrument filed with the motion and signed by the proposed trustee[s], which is incorporated herein for all purposes by this reference, finds that [**name of minor or incapacitated person**] is [a minor/an incapacitated person as defined by section 142.007 of the Texas Property Code], and that the trust is in the best interests of the [minor/incapacitated person] and should be created under the authority of section 142.005 of the Texas Property Code.

IT IS THEREFORE ORDERED that the funds awarded to [**name of minor or incapacitated person**] under the final judgment in the above-entitled and -numbered cause shall be held in trust for the benefit of the [minor/incapacitated person] in accordance with section 142.005 of the Texas Property Code and according to the terms of the attached trust agreement.

IT IS FURTHER ORDERED that [**name[s] of trustee[s]**] [is/are] hereby appointed trustee[s] of the trust. IT IS FURTHER ORDERED that approval is hereby granted the trustee[s] to charge reasonable fees for [his/her/its/their] trust services at the rates and in the manner provided for in the trust agreement.

SIGNED on _____.

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_____

JUDGE PRESIDING

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Form 3-18

Terms of Trust and Agreement of Trustee

The first page of the trust instrument must include the following statutory language. Tex. Prop. Code § 142.005(b)(7).

NOTICE: THE BENEFICIARY AND CERTAIN PERSONS INTERESTED IN THE WELFARE OF THE BENEFICIARY MAY HAVE REMEDIES UNDER SECTION 114.008 OR 142.005, PROPERTY CODE.

This instrument establishes the terms of a trust created for the benefit of [**name of minor or incapacitated person**], [a minor/an incapacitated person], under the order of the [**designation**] Court of [**county**] County, Texas, under the authority of section 142.005 of the Texas Property Code, as amended.

1. *Trustee.* The trustee of the trust is [**name of trustee**], Trustee. On receipt of the funds constituting the corpus of this trust, Trustee's duties will commence in accordance with the terms of this trust agreement. No bond or other security is required of Trustee or of any successor trustee.

2. *Beneficiary.* The sole and only beneficiary of the trust is [**name of minor or incapacitated person**], Beneficiary.

3. *Trust Estate.* The trust will be funded with the amount of $[**amount**] (plus any accrued interest), which was awarded to Beneficiary as a result of a settlement or final judgment in Cause No. [**number**], styled "[**style of case**]," in the [**designation**] Court of [**county**] County, Texas. This amount of money will constitute the initial principal of the trust that, together with all other properties hereafter acquired by the trust and all income therefrom, will constitute the trust estate of the trust.

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4. *Distributions from Trust.* Trustee will pay to or apply for the benefit of Beneficiary such amounts out of the net income and principal (if income is insufficient) of the trust as are reasonably necessary in the sole discretion of Trustee to provide for the health, education, support, or maintenance of Beneficiary. Any such income not so distributed will be added to the principal of the trust.

In making any discretionary payments to Beneficiary, Trustee will consider (a) the standard of living to which Beneficiary has been accustomed before the creation of the trust; (b) any increase in Beneficiary's standard of living that should occur as a result of the size, anticipated income, and financial return of the trust and the feasibility of sustaining such an increased standard of living; (c) any known resources of Beneficiary; (d) the ability of any person who is legally obligated to support Beneficiary to do so; and (e) the ability of Beneficiary to earn funds for Beneficiary's own support and maintenance except while obtaining an education.

Trustee may make any distribution required or permitted hereunder, without the intervention of any guardian or other legal representative, in any of the following ways in Trustee's sole reasonable discretion: (a) to Beneficiary directly, (b) to the legal or natural guardian of Beneficiary, (c) to any person having custody of Beneficiary, or (d) by using the distribution directly for Beneficiary's benefit.

5. *Revocability.* This trust may not be revoked, altered, or amended by Beneficiary or any guardian or other legal representative of Beneficiary, but it will remain subject to amendment, modification, or revocation by the [**designation**] Court at any time before the termination of the trust.

6. *Spendthrift Provision.* Before the actual receipt of any distribution of any portion of the trust estate by Beneficiary, no property (whether income or principal) of the trust will be subject to anticipation or assignment by Beneficiary or to attachment by or interfer-

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ence or control of any creditor or assignee of Beneficiary or be taken or reached by any legal or equitable process in satisfaction of any debt or liability of Beneficiary. Any attempted transfer or encumbrance of any interest in the trust estate of the trust by Beneficiary before its actual distribution will be void. To the extent allowed by law, no distribution from the trust will be made to satisfy any obligation of Beneficiary if such obligation would otherwise be met from any federal or state assistance program if the trust had not been created.

7. *Trustee's Investment Authority.* Trustee will invest the trust estate in accordance with the standards now or hereafter set forth in title 9 of the Texas Property Code (Texas Trust Code) (or any subsequent applicable law), and Trustee may also invest all or any part of the trust estate in one or more common trust funds now or hereafter established by Trustee pursuant to sections 113.171 and 113.172 of the Texas Property Code.

8. *Trustee's Compensation and Expenses.* Trustee will be entitled to receive for Trustee's services a fair and reasonable compensation determined in accordance with the then-customary and prevailing charges for similar services charged by corporate fiduciaries in [**city, county**] County, Texas, but Trustee's compensation will not exceed the compensation provided by Trustee's then-published fee schedule for such services. Trustee will also be reimbursed for all reasonable expenses incurred by Trustee in connection with the trust. The fees and expenses allowed hereunder have been approved by the [**designation**] Court at the inception of the trust, but the [**designation**] Court may review such fees and expenses at any time on the [**designation**] Court's own motion or at the instance of Trustee or any other party interested in the welfare of Beneficiary, and on a hearing of the matter, the [**designation**] Court will take any action with respect to such fees and expenses as the [**designation**] Court may deem appropriate. Trustee expressly agrees to reimburse to the trust any fees previously paid to Trustee by the trust if the [**designation**] Court orders Trustee to do so.

9. *Administrative Provisions.* In the administration of the trust, Trustee will be authorized and empowered—

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a. to exercise all powers granted by Texas Property Code section 142.005 as now or hereafter amended and to trustees of express trusts by the Texas Property Code or any corresponding statute, except in any instance in which the Texas Property Code or such other statutory provision may conflict with the express provisions of this trust agreement, in which case the provisions of this trust agreement will control.

b. to adjust, arbitrate, compromise, abandon, sue on or defend, and otherwise deal with and settle all claims in favor of or against the trust. To engage and retain attorneys or accountants at any time that it may be reasonably necessary to provide for the prudent management and preservation of the trust.

c. to continue to act as Trustee of the trust regardless of any change of name of Trustee and regardless of any reorganization, merger, or consolidation of Trustee.

10. *Miscellaneous.* The trust will be held and administered under the following terms and conditions:

a. Trustee will keep books of account respecting the trust and all transactions involving the trust and will furnish to Beneficiary, or to the person having the care and custody of Beneficiary if Beneficiary is then under a legal disability, statements at least quarterly showing receipts and disbursements of income and corpus of the trust and a list of assets held in the trust. Trustee will also furnish such statements to the [**designation**] Court on request.

b. No person or entity dealing with Trustee will be obligated to see to the application of any money or property paid or delivered to Trustee, and no person or entity will be obligated to inquire into the expediency or propriety of any

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transaction on the authority of Trustee to enter into and consummate any transactions on terms Trustee deems reasonably appropriate.

c. Trustee may not resign as trustee of the trust without receiving prior authority from the [**designation**] Court.

d. The headings appearing in this instrument are for convenience only and do not purport to define or limit the scope or intent of the provisions to which they refer.

11. *Inception of Trust.* This trust will become effective on (a) the effective date of the court order that authorizes its creation, (b) the transfer of the above-stated amount of money to Trustee, and (c) Trustee's acceptance of the trust, which will be evidenced by the signature below of the appropriate officer of Trustee. This trust is created by operation of law as it is implemented herein by the [**designation**] Court, and to the extent permitted by law neither Beneficiary nor the [**designation**] Court is the grantor of this trust.

SIGNED in multiple originals, any one of which will be deemed an original for all purposes on [**date**].

_____
Trustee
[**Name and title of representative**]
[**Name of entity**]

SIGNED under oath before me on _____.

_____
Notary Public, State of Texas

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Form 3-19

[Caption. See § 3 of the Introduction in this manual.]

Order for Distribution of [Minor's/Incapacitated Person's] Funds

On [**date**] the Court considered the motion of [**name of movant**], as [next friend/guardian ad litem] of [**name of minor or incapacitated person**], [a minor/an incapacitated person], requesting that the Court establish a trust for the [minor/incapacitated person] under Texas Property Code section 142.005. [**Include if applicable:** Also appearing was [**name of guardian**], guardian ad litem for the [minor/incapacitated person].] The Court, having considered the evidence presented, the argument of counsel, and the terms of the trust instrument filed with the motion and signed by the proposed trustee, which is incorporated herein for all purposes by this reference, hereby finds that [**name of minor or incapacitated person**] is [a minor/an incapacitated person as defined by section 142.007 of the Texas Property Code], and this trust is in the best interests of the [minor/incapacitated person] and should be created under the authority of section 142.005 of the Texas Property Code.

IT IS THEREFORE ORDERED that the funds awarded to the [minor/incapacitated person] under the final judgment in the above-entitled and -numbered cause shall be held in trust for the benefit of the [minor/incapacitated person] under section 142.005 of the Texas Property Code and under the terms of the trust agreement attached hereto as Exhibit [**exhibit number/letter**].

IT IS FURTHER ORDERED that [**name of trustee**] is hereby appointed sole trustee of the trust[,/.]

Include the following if funds are already in the registry of the court.

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and the [district/county] clerk is hereby ORDERED to pay to the trustee for the benefit of the [minor/incapacitated person] all amounts awarded herein to the [minor/incapacitated person] (including any interest earned thereon).

Continue with the following.

IT IS FURTHER ORDERED that approval is hereby granted to the trustee to charge a reasonable fee for its trust services at the rates and in the manner provided for in the trust agreement.

SIGNED on _____.

_____
JUDGE PRESIDING

Attach exhibit(s).

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Form 3-20

[Caption. See § 3 of the Introduction in this manual.]

Application for Establishment of Subaccount with [name of trust] Pooled Trust

[**Name of applicant**], Applicant, [guardian of the [person/estate/person and estate] of [**name of ward**], Ward/[**specify other relationship to ward**] of [**name of ward**], Ward], respectfully makes this Application for Establishment of Subaccount with [**name of trust**] Pooled Trust and shows the Court as follows:

1. Applicant is the [guardian of the [person/estate/person and estate]/[**specify relationship to ward**]] in the above-entitled and -numbered cause pursuant to an order of this Court dated [**date**]. Ward is [a minor/an adult/a disabled person], aged [**number**] years, as of the filing of this application [**include if applicable:** and has been adjudicated by this Court as an incapacitated person].

2. Applicant believes that it would be in the best interest of Ward to have Ward's estate, in its entirety, paid and transferred into a subaccount of a pooled trust because of the savings in administrative costs, court costs, and legal fees that would otherwise result under current law.

3. Applicant also believes that the guardianship of Ward's estate should then be closed.

4. Applicant has asked [**name of trustee**], Trustee, to act as trustee of the trust subaccount in the event this Court agrees that such a trust should be created. [**Name of trustee**] is the trustee of a trust that meets the requirements of 42 U.S.C. § 1396p(d)(4)(C) as specified in section 1302.001(3) of the Texas Estates Code. [**Name of trustee**] is qualified and willing to act as the trustee.

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5. Applicant and Trustee have agreed on the terms of a trust that complies with the statutory requirements of section 1302.005 of the Texas Estates Code. The agreed terms are set forth in the Terms of Trust and Agreement of Trustee attached as Exhibit [**exhibit number/ letter**] to this application.

Applicant prays that, on proper notice to all persons entitled to receive notice of this application, the Court grant this application and—

a. order the establishment of a subaccount of a pooled trust for the benefit of Ward in accordance with chapter 1302 of the Texas Estates Code;

b. approve the Terms of Trust and Agreement of Trustee attached as Exhibit [**exhibit number/letter**] to this application;

c. appoint [**name of trustee**] as Trustee of such subaccount;

d. direct [**name of guardian**] to deliver Ward's estate to Trustee, in trust, on approval of [**name of guardian**]'s account for final settlement;

e. expressly hold this guardianship open for the purpose of accepting, reviewing, and approving Trustee's annual accountings and fee applications as required by the Texas Estates Code; and

f. grant any further relief to which Applicant may be justly entitled.

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Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach exhibit(s).

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Form 3-21

[Caption. See § 3 of the Introduction in this manual.]

Order Establishing Subaccount of Pooled Trust

On [**date**], the Court considered the Application for Establishment of Subaccount with Pooled Trust of [**name of applicant**], [guardian of the [person/estate/person and estate] of [**name of ward**], Ward/[**specify other relationship to ward**] of [**name of ward**], Ward]. The Court has read the application and heard all evidence in support of the application. As there are no objections to the application, the Court finds that:

1. This Court has jurisdiction and venue of this cause.

2. Notice of the application has been given to those persons as required by the Texas Estates Code.

3. Citation has been personally served on Ward in accordance with the law.

4. It is in the best interests of Ward, pursuant to section 1302 of the Texas Estates Code, to establish a subaccount of a pooled trust with [**name of trust**] for the benefit of Ward.

5. The [**name of trust**] meets the requirements of 42 U.S.C. § 1396p(d)(4)(C) as specified in section 1302.001(3) of the Texas Estates Code.

6. It is in the best interest of Ward for the following assets to be transferred to a subaccount with [**name of trustee**] to be held in the name of Ward and for the benefit of Ward: [**specify assets to be transferred**].

IT IS THEREFORE ORDERED that:

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1. [**Name of applicant**] shall establish a subaccount with [**name of trustee**] in the name of [**name of ward**], of which [**name of ward**] is the beneficiary, as a less restrictive alternative to the appointment of a guardian of the estate for [**name of ward**].

2. The following assets shall be transferred to a subaccount with [**name of trust**] to be held in the name of [**name of ward**] and for the benefit of [**name of ward**]: [**specify assets as indicated above**].

SIGNED on _____.

_____
JUDGE PRESIDING

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Form 3-22

[Caption. See § 3 of the Introduction in this manual.]

Application for Order of No Administration

[**Name of surviving spouse**], Applicant, as surviving spouse of [**name of decedent**], Decedent, [**include if applicable:** and on behalf of [**name[s] of minor child[ren] and/or adult incapacitated child[ren]**], the [minor child[ren] of Decedent/adult incapacitated child[ren] of Decedent/minor child[ren] and adult incapacitated child[ren] of Decedent]], furnishes the following information to the Court in support of [his/her] Application for Order of No Administration:

1. Applicant is an individual interested in the estate of Decedent, domiciled in and residing at [**address of surviving spouse**], and is the surviving spouse of Decedent.

Include one or both of the following if applicable.

[**Name[s] of minor child[ren]**] [is an individual/are individuals] interested in the estate, domiciled in and residing at [**address of minor child[ren]**], and [is/are] the minor child[ren] of Decedent.

[**Name[s] of adult incapacitated child[ren]**] [is an individual/are individuals] interested in the estate, domiciled in and residing at [**address of adult incapacitated child[ren]**], and [is/are] the adult incapacitated child[ren] of Decedent.

Continue with the following.

2. Decedent died on [**date**], at [**address where decedent died, including county**], at the age of [**number**] years. Fours years have not elapsed since the death of Decedent.

3. This Court has jurisdiction and venue because Decedent had a fixed place of residence and domicile in this county on the date of death.

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4. Decedent owned the following real and personal property: [**specify, including value for each**].

The liens and encumbrances on the above-described property are as follows: [**specify**].

Select one of the following.

5. Decedent died intestate. The names of the heirs of Decedent, and their relationships to Decedent, are: [**specify**].

Or

5. Decedent left a last will and testament dated [**date**], which was never revoked and is filed with this application as Exhibit [**exhibit number/letter**]. The names of the beneficiaries in the will are: [**specify**].

Continue with the following.

6. The creditors of Decedent, and the amounts owed to each, are as follows: [**specify**].

Applicant respectfully requests that this Court make a family allowance and that, if the entire assets of the estate, not including homestead and exempt property, are thereby exhausted, assets be set aside for Applicant [**select if applicable:** and Decedent's minor child[ren]/and Decedent's adult incapacitated child[ren]/and Decedent's minor child[ren] and adult incapacitated child[ren]]. Applicant further requests that the Court issue an Order of No Administration.

Applicant further prays that this Court consider this application without notice or, in the alternative, after such notice as this Court may require, and that the Court grant the relief requested and all further relief to which Applicant may be entitled.

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Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach exhibit(s).

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Form 3-23

[Caption. See § 3 of the Introduction in this manual.]

Order of No Administration

On [**date**], the Court heard the Application for Order of No Administration filed herein by [**name of applicant**], Applicant, in the estate of [**name of decedent**], Decedent.

The Court considered the application [without notice as authorized by Texas Estates Code section 451.002/and finds that notice has been given as required by this Court].

The Court finds that—

1. the facts contained in the application are true;

2. the expenses of [**list expenses related to death, e.g.,** last illness, funeral charges] and of this proceeding have been paid or secured;

3. the value of the estate's assets is greater than the amount required for a family allowance; and

4. the estate's assets will be exhausted after a family allowance is made herein.

IT IS THEREFORE ORDERED that the following estate assets are set aside for [**specify family members**] as a family allowance pursuant to Texas Estates Code section 353.102: [**specify estate assets**].

IT IS FURTHER ORDERED that there shall be no administration of this estate.

IT IS FURTHER ORDERED that all persons owing any money, having custody of any property, or acting as registrar or transfer agent of any evidence of interest, indebtedness, property, or right belonging to the estate, and all persons purchasing from or otherwise deal-

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ing with the estate, shall immediately pay or transfer those assets to the surviving spouse [**select if applicable:** and minor child[ren]/and adult incapacitated child[ren]/and minor child[ren] and adult incapacitated child[ren]] named herein.

SIGNED on _____.

_____
JUDGE PRESIDING

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Form 3-24

This form is based on the form found at Tex. Prop. Code § 141.010(b).

Transfer Under Texas Uniform Transfers to Minors Act

I, [**name of transferor or name and representative capacity if a fiduciary**], hereby transfer to [**name of custodian**], as custodian for [**name of minor**] under the Texas Uniform Transfers to Minors Act, the following: [**describe the custodial property sufficiently to identify it**].

SIGNED on [**date**].

_____

[**Name of transferor**]

[**Name of custodian**] acknowledges receipt of the property described above as custodian for the minor named above under the Texas Uniform Transfers to Minors Act.

_____

[**Name of custodian**]

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Form 3-25

This form is used for the sale of a minor's real or personal property if no guardian has been appointed for the minor's person or estate. The sale is usually in the form of a private sale. If real property is involved, most sales will be conducted through a title company, and a proposed closing statement should accompany the application.

[Caption. See § 3 of the Introduction in this manual.]

Application for Sale of Property Under Texas Estates Code Section 1351.001

This Application for Sale of Property under Texas Estates Code Section 1351.001 is brought by [**name of applicant**], Applicant, a [parent/managing conservator] of [**name of minor**], Minor, a minor, who shows in support:

1. Applicant is the [mother/father/managing conservator] of Minor.

2. The existence of certain property of Minor, which is described in Exhibit [**exhibit number/letter**] attached hereto and incorporated herein for all purposes, has come to the attention of Applicant.

Include the following if applicable.

3. Minor acquired the ownership interest in this property from [**describe source from which title was obtained**].

Continue with the following.

4. Applicant seeks this Court's permission to sell the ownership interest of Minor in this property and to place the proceeds of the sale in the registry of this Court.

5. This Court has venue over this application in that [**state venue facts**].

6. Applicant furnishes this Court with certain additional information as follows—

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a. the ownership interest held in the property is [**specify**];

b. the proposed purchaser's name is [**name**];

c. the appraised value of the property is $[**amount**];

d. the sales price offered for this property is $[**amount**];

e. the net proceeds to be deposited into the registry of this Court after the payment of all costs of sale are $[**amount**]; and

f. this sale is to be conducted at [**describe the location or manner of transfer**].

7. The sale of this property will be for cash.

8. All funds received from the sale will be for the use and benefit of Minor.

9. It is necessary and advisable to sell the interest in this property, as permitted by section 1351.001 of the Texas Estates Code, because there is no need for the creation of a guardianship of the estate at this time.

Applicant requests that citation be issued as required by law and that, after a hearing on this application, the Court enter its order authorizing Applicant to sell the property as may be authorized by law.

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Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

VERIFICATION

STATE OF TEXAS)

COUNTY OF [**county**])

BEFORE ME, the undersigned notary public, on this day personally appeared [**name**], who being by me duly sworn on [his/her] oath deposed and said that [he/she] has read the above and foregoing [**title of document**] [and exhibits] and that the matters contained therein are within [his/her] personal knowledge and are true and correct.

_____

SWORN TO AND SUBSCRIBED BEFORE ME on _____.

_____
Notary Public, State of Texas

Attach exhibit(s). For a sale involving real property, attach a proposed closing statement.

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Form 3-26

[Caption. See § 3 of the Introduction in this manual.]

Order for Sale of Property Under Texas Estates Code Section 1351.001

On [**date**] the Court considered the Application for Sale of Property under Texas Estates Code Section 1351.001 of [**name of applicant**], and after considering the evidence presented in support of the application, the Court finds the following:

1. The application was verified by affidavit and showed that the minor has certain [real/personal/real and personal] property proposed to be sold pursuant to the requirements of chapter 1351 of the Texas Estates Code.

2. A description of the property sought to be sold is contained in Exhibit [**exhibit number/letter**] attached to and made a part of this order.

3. The sale sought in the foregoing application appears reasonable, necessary, and advisable.

4. The application should be granted, the property sold, and the funds deposited into the registry of this Court.

IT IS THEREFORE ORDERED that the property described in this order will be sold for cash in the net amount of $[**amount**], and the net proceeds will be forwarded to the county clerk of this county for deposit into the registry of this Court.

SIGNED on _____.

_____
JUDGE PRESIDING

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Attach exhibit(s).

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Form 3-27

This form may be used if a guardian has been appointed for the person but there is no need for appointment of a guardian of the estate. The sale is usually in the form of a private sale. If real property is involved, most sales will be conducted through a title company, and a proposed closing statement should accompany the application.

[Caption. See § 3 of the Introduction in this manual.]

Application for Sale of Property Under Texas Estates Code Section 1351.052

This Application for Sale of Property under Texas Estates Code Section 1351.052 in the absence of a guardian of the estate is brought by [**name of guardian**], Guardian, guardian of the person of [**name of ward**], Ward, an incapacitated person, who shows in support:

1. Guardian was duly appointed and qualified as guardian of the person of Ward on [**date**].

2. Certain [real/personal/real and personal] property of Ward, more specifically described in Exhibit [**exhibit number/letter**] attached hereto and incorporated herein for all purposes, has come to the attention of Guardian.

3. As guardian of the person, Guardian seeks this Court's permission to sell Ward's interest in the property and place the proceeds of the sale in the registry of this Court.

4. This Court has venue over this application as this Court appointed [**name of guardian**] as guardian of Ward's person.

5. Guardian furnishes this Court with additional information as follows—

   a. the ownership interest held in the herein-described property is [**specify**];

   b. the proposed purchaser's name is [**name**];

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c. the appraised value of the property is $[**amount**];

d. the sales price offered for this property is $[**amount**];

e. the net proceeds to be deposited in the registry of this Court after payment of all costs of sale are $[**amount**]; and

f. this sale is to be conducted at [**describe location or manner of transfer**].

6. The sale of this property will be for cash.

7. All funds received from the sale will be for the use and benefit of Ward.

8. It is necessary and advisable to sell Ward's interest in this property, as permitted by section 1351.052 of the Texas Estates Code, because there is no need for the creation of a guardianship of the estate at this time.

[**Name of guardian**] requests that citation be issued as required by law and that, after a hearing on this application, the Court enter its order authorizing [**name of guardian**] as guardian of the person to sell the described property at a private sale on the terms set forth above or as may be authorized by law.

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Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

VERIFICATION

STATE OF TEXAS)

COUNTY OF [**county**])

BEFORE ME, the undersigned notary public, on this day personally appeared [**name**], who being by me duly sworn on [his/her] oath deposed and said that [he/she] has read the above and foregoing [**title of document**] [and exhibits] and that the matters contained therein are within [his/her] personal knowledge and are true and correct.

_____

SWORN TO AND SUBSCRIBED BEFORE ME on _____.

_____
Notary Public, State of Texas

Attach exhibit(s). For a sale involving real property, attach a proposed closing statement.

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Form 3-28

[Caption. See § 3 of the Introduction in this manual.]

Order for Sale of Property Under Texas Estates Code Section 1351.052

On [**date**] the Court considered the Application for Sale of Property under Texas Estates Code Section 1351.052 filed by [**name of guardian**], Guardian, the guardian of the person of [**name of ward**], Ward, an incapacitated person. After considering the evidence presented in support of the application, the Court finds the following:

1. The application was verified by affidavit, showing that Ward has certain [real/personal/real and personal] property that Guardian proposes to sell under section 1351.052 of the Texas Estates Code.

2. A description of the property sought to be sold is contained in Exhibit [**exhibit number/letter**] attached to and made a part of this order.

3. The sale sought in the foregoing application appears reasonable, necessary, and advisable.

4. The application should be granted, the property sold, and the funds from the sale deposited into the registry of this Court.

IT IS THEREFORE ORDERED that the property described in this order be sold by [**name of guardian**] for cash in the net amount of $[**amount**] and the net proceeds be forwarded to the county clerk of this county for deposit in the registry of this Court.

SIGNED on _____.

© STATE BAR OF TEXAS

_____

JUDGE PRESIDING

Attach exhibit(s).

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Form 3-29

[Caption. See § 3 of the Introduction in this manual.]

Application for Appointment of Receiver

[**Name of applicant**], Applicant, seeks the appointment of a receiver pursuant to Texas Estates Code section 1354.001 to take charge of the estate for the protection, conservation, and preservation of the estate on the following grounds:

1. [**Name of ward or proposed ward**], [Ward/Proposed Ward], is [an incapacitated person/a minor] who resides at [**address of ward or proposed ward**] in this county.

2. [Ward/Proposed Ward] [is subject to a guardianship of the person/is subject to a guardianship in the state of [**name of state**] and there is no guardian of the estate who is qualified in this state/is not subject to a guardianship in this state for the reason that [**state reason**]].

3. The estate of [Ward/Proposed Ward] is in danger of injury, loss, or waste because [**describe circumstances**].

4. The endangered estate of [Ward/Proposed Ward] is located at [**specify address**] and described as follows: [**describe specific property in detail and indicate its nature and value**].

5. This Court has jurisdiction and venue over this proceeding.

6. The appointment of a receiver is a less restrictive alternative to the appointment of a guardian of the estate at this time.

Applicant respectfully requests—

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1. [that the Court fix the time and date for hearing this application/that the Court act without notice];

2. on hearing this application, that the Court appoint [**name of receiver**], or such other person as the Court deems qualified, as receiver of [**specify property**] and that an appropriate surety bond be set;

3. that the receiver be given the following duties and powers: [**specify powers, e.g.,** the power to take possession of and safeguard the property, the power to manage the business of the [incapacitated person/minor], the power to enter into contracts to continue the business of the [incapacitated person/minor], the power to pay the ongoing expenses of the business and make payroll, etc.]; and

4. all other and further relief to which Applicant may be justly entitled.

Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Certificate of Service

I certify that a true copy of this [**title of document**] was served in accordance with rule 21a of the Texas Rules of Civil Procedure.

SIGNED on _____.

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_____

[**Name of attorney**]

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Form 3-30

[Caption. See § 3 of the Introduction in this manual.]

Order Appointing Receiver

On [**date**], the Court considered the Application for Appointment of Receiver, and the Court finds that:

1. [**Name of ward or proposed ward**], [Ward/Proposed Ward], is [an incapacitated person/a minor] who resides at or is located at [**address of ward or proposed ward**].

2. [Ward/Proposed Ward] is [subject to a guardianship of the person/subject to a guardianship in the state of [**name of state**] and there is no guardian of the estate who is qualified in this state/not subject to a guardianship in this state for the reason that [**state reason**]].

3. The estate of [Ward/Proposed Ward] is in danger of injury, loss, or waste because: [**describe circumstances**].

4. The endangered estate of [Ward/Proposed Ward] is located in [**specify address**] and described as follows: [**identify and describe specific property in detail and indicate its nature and value**].

5. This Court has jurisdiction and venue over this proceeding.

6. The appointment of a receiver is a less restrictive alternative to the appointment of a guardian of the estate at this time.

7. A receiver of the property of [Ward/Proposed Ward] should be appointed for the protection, conservation, and preservation of the estate.

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8. [**Name of appointed receiver**] is deemed qualified by the Court to be appointed as receiver.

IT IS THEREFORE ORDERED that the application be granted and that:

1. [**Name of appointed receiver**] is appointed as receiver of the property of [**name of ward or proposed ward**] and granted authority over the property of [**name of ward or proposed ward**] for the protection, conservation, and preservation of the estate.

2. The receiver shall be given the following duties and powers: [**specify powers, e.g.,** the power to take possession of and safeguard the property, the power to manage the business of [Ward/Proposed Ward], the power to enter into contracts to continue the business of [Ward/Proposed Ward], the power to pay the ongoing expenses of the business and make payroll, etc.].

3. The receiver shall give bond in the amount of $[**amount**], conditioned as required by law.

4. On the filing and approval of the receiver's bond as required, the clerk of the Court shall issue a certified copy of this order showing the authority of the receiver herein.

5. When the estate is no longer liable to injury, loss, or waste, the receiver shall report to the Court, file with the clerk a full and final sworn account, and apply to deliver the estate to those persons entitled to receive the same and to seek discharge.

SIGNED on _____.

_____
JUDGE PRESIDING

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Form 3-31

[Caption. See § 3 of the Introduction in this manual.]

Original Petition for Removal of Disabilities of Minority

[**Name of minor**], Petitioner, a minor, petitions the Court to remove the disabilities of minority and would show the Court:

1. Petitioner intends that discovery be conducted under level 2 of rule 190 of the Texas Rules of Civil Procedure.

2. Petitioner is a resident of Texas who resides at [**address, including county**], and is either seventeen years of age or sixteen years of age and living separate and apart from [his/her] parents, managing conservator, or guardian.

3. [Petitioner's parents are deceased./Petitioner's only living parent is [**name of parent**], who resides at [**address**]./Petitioner's parents are [**name of parent A**], who resides at [**address**], and [**name of parent B**], who resides at [**address**].]

[[**Name of managing conservator**], who resides at [**address**], is Petitioner's [sole/joint] managing conservator./No managing conservator is currently appointed for Petitioner.] [**If applicable, repeat for second joint managing conservator.**]

[The guardian of the [person/estate/person and estate] of Petitioner is [**name**], who resides at [**address, city, county, state**]./No guardian is currently appointed for the person or estate of Petitioner.] [**Repeat as applicable if separate guardians for person and estate.**]

4. Petitioner is self-supporting and manages [his/her] own affairs. The removal of the disabilities of Petitioner's minority is in [his/her] best interests because [**specify**].

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5. Petitioner requests that the Court order the disabilities of minority removed [for all general purposes/for the limited purpose of [**specify**]].

Petitioner requests that the Court appoint an amicus attorney or an attorney ad litem as required by law and, after hearing this petition, order the removal of disabilities of minority as requested.

Respectfully submitted,

_____

[**Name**]
Attorney for Petitioner
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

VERIFICATION

STATE OF TEXAS)

COUNTY OF [**county**])

BEFORE ME, the undersigned notary public, on this day personally appeared [**name**], who being by me duly sworn on [his/her] oath deposed and said that [he/she] has read the above and foregoing [**title of document**] [and exhibits] and that the matters contained therein are within [his/her] personal knowledge and are true and correct.

_____

SWORN TO AND SUBSCRIBED BEFORE ME on _____.

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_____

Notary Public, State of Texas

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Form 3-32

[Caption. See § 3 of the Introduction in this manual.]

Order Removing Disabilities of Minority

On [**date**], the Court heard the application of [**name of minor**], Petitioner, a minor, for an order removing the disabilities of minority. Petitioner appeared in person [and [**name of attorney ad litem**], duly appointed as attorney ad litem for Petitioner, personally appeared]. After considering the verified pleading and hearing the evidence, the Court finds removal of the disabilities of minority to be in the best interest of Petitioner.

IT IS THEREFORE ORDERED that the disabilities of minority be removed as to [**name of minor**] for [all general purposes/the limited purpose of [**specify purpose**]].

SIGNED on _____.

_____
JUDGE PRESIDING

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Chapter 4

Creating Guardianships

I. Permanent Guardianships

§ 4.1 Purpose of Permanent Guardianship

The court may appoint a guardian for an incapacitated person if it has clear and convincing proof that the person is incapacitated, that it is in the best interests of the proposed ward to have a guardian appointed, that the rights or property of the proposed ward will be protected by the appointment, and that alternatives to guardianship and supports and services available to the proposed ward that would avoid the need of a guardianship have been considered and are not feasible. Tex. Est. Code § 1101.101(a)(1). A definition of the term *incapacitated person* is found at Tex. Est. Code § 1002.017 (see section 4.5 below). A ward is a person for whom a guardian has been appointed. Tex. Est. Code § 1002.030.

The guardian's ability to act in most circumstances will depend on orders of the court. Tex. Est. Code §§ 1151.102, 1151.103. The court will appoint a guardian with either full or limited authority over an incapacitated person as indicated by that person's actual mental or physical limitations and only as necessary to protect and promote the well-being of the person. Tex. Est. Code § 1001.001. The guardianship may be of the person, the estate, or both. Tex. Est. Code § 1101.151(a).

§ 4.2 Alternatives to Guardianships and Supports and Services

Amendments to the Texas Estates Code enacted by the 2015 Texas Legislature clarify that alternatives to guardianships and available supports and services that would avoid a guardianship should be a primary focus of the applicant, attorneys and guardians ad litem, and the court in a guardianship proceeding. For a greater discussion of alternatives to guardianship, see chapter 3 of this manual. For further information on alternatives to guardianship, see the current edition of State Bar of Texas, *Guardianship Alternatives*.

§ 4.3 Guardian of Person

A guardian of the person with full authority over an incapacitated person has the right to have physical possession of the ward and to establish the ward's legal domicile; the duty to provide care, supervision, and protection for the ward; the duty to provide the ward with clothing, food, medical care, and shelter; the power to consent to medical, psychiatric, and surgical treatment other than inpatient psychiatric commitment of the ward; the power to establish a trust for the ward to be eligible for medical assistance; the power to sign documents necessary or appropriate to facilitate the employment of the ward if the guardian was appointed with full authority over the ward or if the power is specified by court order for a guardian with limited powers over the ward; and the power to transport the ward to an inpatient mental-health facility for a preliminary examination. Tex. Est. Code § 1151.051. However, some of these powers may require specific court authority. The powers of a guardian with limited authority over an incapacitated person are those set forth in the order of appointment or any subsequent orders. Tex. Est. Code § 1101.152. A report on the condition of the ward must be filed at the end of each year of the guardianship. Tex. Est. Code § 1163.101. See sections 8.57 through 8.59 and form 8-35 in this manual.

Where there is no guardian of the estate, on application and order, the guardian of the person may access, manage, and spend the ward's funds in an amount not to exceed $20,000 per year for the ward's benefit. Tex. Est. Code § 1151.0525(a), (b). The guardian of the person has to file a new bond or a rider to an existing bond and must include all expenditures in the annual report required by Texas Estates Code section 1163.101. Tex. Est. Code § 1151.0525(b), (c). When there is no longer any need for the guardian of the person to access, manage, or spend the ward's funds, the guardian of the person is to file an affidavit of fulfillment with the court. This allows the court to require a new bond and to discharge the guardian of the person and the guardian's sureties on the larger bond. Tex. Est. Code § 1151.0525(c).

§ 4.4 Guardian of Estate

A guardian of the estate with full authority over an incapacitated person is entitled to possess and manage all properties belonging to the ward; to collect all debts, claims, and obligations due the ward; to bring and defend all suits by or against the ward; and to access the ward's digital assets. Tex. Est. Code § 1151.101. In addition, the guardian must prudently manage the ward's property, which frequently includes its sale, investment, rental, or other disposition. Tex. Est. Code §§ 1151.101, 1151.102. The powers of a guardian of the estate with limited authority over an incapacitated person are those set forth in the order of appointment or any subsequent orders. Tex. Est. Code § 1101.152. Within thirty days of qualifying, unless an exception is granted by the court, the guardian must file an initial inventory and appraisement of the ward's property subject to the guardian's management. Tex. Est. Code § 1154.051(a). Within sixty days of the end of each year of the guardianship, an account must be filed. Tex. Est. Code §§ 1163.001, 1163.002. See section 7.1 in this manual; see also sections 8.51 through 8.55 and forms 8-31 through 8-34. Except as to the short list of powers set forth in Texas Estates Code section 1151.103, a guardian is required to obtain specific court authority to take any significant action, including but not limited to expending funds, selling or buying property, investing assets, and pursuing and settling claims.

§ 4.5 Persons for Whom Guardian May Be Appointed

The Texas Estates Code allows for the appointment of a guardian of an incapacitated person, including—

1. a minor;
2. an adult who, because of a physical or mental condition, is substantially unable to provide food, clothing, or shelter for himself, to care for his physical health, or to manage his financial affairs; or
3. a person who must have a guardian to receive money from a governmental source.

Tex. Est. Code §§ 1002.017, 1001.001.

"Minor" is included in the definition of "incapacitated person." It is more specifically defined as a person under eighteen years of age who has never been married or has not had the disabilities of minority removed for general purposes. Tex. Est. Code § 1002.019.

§ 4.6 Persons for Whom Guardian Is Appointed to Receive Government Funds

In recent years the appointment of guardians solely to receive government funds has declined because both the Social Security Administration and the Veterans Administration have established simpler, less costly procedures to appoint persons to receive funds for minor or incapacitated beneficiaries. Attorneys are encouraged to consult legal counsel at the local offices of these

agencies about the merits of having a "representative payee" or "VA fiduciary" appointed instead of a guardian. See sections 5.2 through 5.11 in this manual.

Additionally, recent significant changes to the federal regulations relating to veterans benefits also impact the appointment and role of a guardian in related cases. See chapter 5.

However, because some government agencies still require the appointment of a guardian to receive funds to which a minor or an incapacitated person is entitled, the Texas Estates Code provides a special category of guardianship of the person for these situations. *See* Tex. Est. Code § 1151.251. A government certificate to the effect that the appointment of a guardian is a condition precedent to the payment of funds is prima facie evidence of the necessity for the appointment of a guardian. Tex. Est. Code § 1101.106.

Guardians appointed under Tex. Est. Code § 1151.251 have narrow powers and are not considered general guardians of the estate. They may administer only the funds received from the agency, any interest or profits thereon, and any property acquired with the proceeds. Tex. Est. Code § 1151.251. Because their appointment is authorized by the same provision that authorizes guardianship of incapacitated persons—section 1002.017 of the Estates Code—these guardianships are treated together in this manual.

§ 4.7 Guardians of Minors

Both Parents Living and Living Together: No court appointment is necessary for a parent to act only as guardian of the person of a minor, because both parents are natural guardians of the person of the minor. There is no natural guardian of the estate of a minor, but either parent has first priority to be appointed guardian of the minor's estate. If the parents cannot agree who should be appointed, the court appoints the one the court deems better qualified to serve. Tex. Est. Code § 1104.051(a).

Both Parents Living but Not Living Together: The rights of parents who do not live together are equal. The guardianship will be assigned to the one whose appointment would be in the best interests of the minor. Tex. Est. Code § 1104.051(b).

One Parent Dead: If one parent is dead, the surviving parent is the natural guardian of the person of the minor and is entitled to be appointed guardian of the estate. Tex. Est. Code § 1104.051(c).

Both Parents Dead: The order of preference for the guardian of both the person and estate of an orphan is—

1. the person named in the will or written designation of the last surviving parent (Tex. Est. Code § 1104.053(a));
2. the nearest ascendant in the direct line of the minor; if there is more than one ascendant in the same degree in the direct line, the one whose appointment would serve the best interests of the minor, according to the circumstances (Tex. Est. Code § 1104.052(1), (2));
3. the nearest of kin, if there is no qualified ascendant in the direct line willing to serve; if there are two or more kin in the same degree, the one whose appointment would serve the best interests of the minor, according to the circumstances (Tex. Est. Code § 1104.052(3)); and
4. if there is no qualified relative or if no one entitled to be appointed applies therefor, any qualified person appointed by the court (Tex. Est. Code § 1104.052(4)).

Surviving Parent Incapacitated: If the court finds the surviving parent is an incapacitated person, the order of preference for the guardian of both the person and estate of the minor is the same as if both parents are dead, as detailed above.

§ 4.8 Guardians of Persons Other Than Minors

When appointing a guardian for a person other than a minor, the court must give preference to the ward's spouse if he or she is eligible. Tex. Est. Code § 1104.102(1). The eligible person nearest of kin to the ward is entitled to the guardianship if the ward's spouse is not eligible. Tex. Est. Code § 1104.102(2). If two or more persons are equally entitled to serve, the court must appoint the one whose appointment would serve the best interests of the ward. Tex. Est. Code § 1104.102(3)(B). The surviving parent of an individual who is incapacitated may appoint an eligible person by will or written declaration. Tex. Est. Code §§ 1104.103(a), 1104.152. If there is no qualified spouse or relative willing to serve, any qualified person may be appointed by the court. Tex. Est. Code § 1104.102(3)(C).

Note that even if a proposed ward had previously designated a guardian in a valid declaration of guardian, a court creating a guardianship must still give due consideration to the proposed ward's preferences at the time the guardianship is created. Tex. Est. Code § 1104.002.

§ 4.9 More Than One Guardian

Generally, only one person will be appointed guardian of the person or estate. However, the court may appoint joint guardians, if it is in the best interests of the ward, when the applicants are—

1. a husband and wife;
2. joint managing conservators;
3. coguardians duly appointed under the laws of a jurisdiction other than Texas; or
4. both parents of an adult who is incapacitated if the incapacitated person has not been the subject of a suit affecting the parent-child relationship or has been the subject of such a suit and both the incapacitated adult's parents were named as joint managing conservators in that suit but are no longer serving in that capacity.

Tex. Est. Code § 1104.001.

§ 4.10 Corporate Fiduciaries

A corporate fiduciary may serve as guardian of the estate if no other person with a prior right is qualified or willing to serve. *See* Tex. Est. Code § 1002.023. The term *corporate fiduciary* is defined in Tex. Est. Code § 1002.007.

§ 4.11 Waiver of Prior Right

The applicant's attorney will often want to obtain waivers from individuals who may also be entitled to the appointment. If the proposed guardian does not have a statutory preference to the appointment, notice must be given or a waiver must be secured from each person with a prior right. See form 4-1 in this chapter. If a qualified person who has not waived a prior right later applies for letters of guardianship, the court must grant the application and revoke the letters previously granted. Tex. Est. Code § 1203.103.

§ 4.12 Persons Disqualified to Serve as Guardian

Persons who may not be appointed as guardians include—

1. minors or other incapacitated persons;
2. those who by reason of inexperience, lack of education, or any other good reason are shown to be incapable of properly and prudently managing and controlling the proposed ward or his estate;
3. persons, institutions, or corporations found unsuitable;
4. those whose conduct is notoriously bad, and it is presumed not to be in the best interest of an incapacitated person to appoint as guardian a person who has been finally convicted of certain sexual offenses; aggravated assault; injury to a child, elderly individual, or disabled individual; abandoning or endangering a child; terroristic threat; or continuous violence against the family of the ward or incapacitated person;
5. parties (or children of parties) to a lawsuit affecting the welfare of the proposed ward (unless the court determines that there is no conflict or appoints a guardian ad litem);
6. those indebted to the proposed ward or asserting any claim to property adverse to the interests of the proposed ward;
7. persons disqualified by a declaration of guardian made under Texas Estates Code section 1104.202(b) (see section 3.20 and form 3-10 in this manual);
8. persons not certified to serve as guardian as required by subchapter F, chapter 1104, of the Estates Code;
9. nonresidents who fail to designate a resident agent for service; and
10. persons found to have committed family violence that are subject to a protective order issued under chapter 85 of the Texas Family Code if the proposed ward is protected by the order.

Tex. Est. Code §§ 1104.351–.358.

A guardianship program may not be appointed guardian if it is not properly registered as required by the Texas Government Code or if its registration certificate has expired or has been suspended or revoked. Tex. Est. Code § 1104.359. See also Tex. Gov't Code ch. 155, subch. F, and Judicial Branch Certification Commission, Guardianship Registration Rules and Resources, **txcourts.gov/jbcc/register-a-guardianship/guardianship-registration-rules-and-resources/**.

§ 4.13 Standing to Bring Guardianship Action

Any person may commence a guardianship proceeding for the appointment of a guardian. Tex. Est. Code §§ 1101.001(a), 1055.001(a). A person who has an interest adverse to a proposed ward may not apply to create a guardianship, contest the creation of a guardianship, contest the appointment of a guardian, or contest an application for complete restoration or modification. Tex. Est. Code § 1055.001(b). The standing of a person with an alleged adverse interest should be challenged by a motion in limine. Tex. Est. Code § 1055.001(c). See section 10.5 and form 10-4 in this manual.

Some courts have held that a person may lack standing to participate in certain claims but not others. *See In re Dennis*, No. 12-11-00595-CV, 2011 WL 2791126 (Tex. App.—Houston [14th Dist.] July 14, 2011, orig. proceeding) (party lacked standing to participate in guardianship proceeding but able to participate in any restoration hearing—appeal dismissed because relator

filed with the appellate court either a written order or a records of an oral order, and temporary relief of mandamus was denied).

§ 4.14 Testamentary Appointment of Guardian

The last surviving parent of a minor may designate by will or written declaration any qualified person to be guardian of the person of the minor after the parent's death or in the event of the parent's incapacity. A person so named, if not otherwise disqualified, is entitled to the appointment in preference to any other person and is also entitled to be appointed guardian of the minor's estate. Tex. Est. Code § 1104.053(a). See section 3.21 and form 3-10 in this manual.

§ 4.15 Selection of Guardian by Minor

If an application is filed for the guardianship of a minor who is twelve years of age or older, the minor may select his guardian by filing a written request with the clerk. The minor's selection is not absolute. The court must approve the selection as being in the best interest of the minor. Tex. Est. Code § 1104.054(a).

If a guardian has already been appointed, a minor who is twelve years of age or older may select a successor if the previously appointed guardian dies, resigns, or is removed. Tex. Est. Code § 1104.054(b). The minor or his attorney must file a written application to make the selection. See form 4-2 in this chapter. If the court is satisfied that the selected person is suitable and qualified to serve as guardian and the appointment is in the minor's best interest, it will enter an order appointing the new guardian and revoking the letters of guardianship issued to the former guardian. Tex. Est. Code § 1104.054(b).

§ 4.16 Application for Appointment of Guardian

To begin guardianship proceedings, a written application for appointment of a guardian must be filed with the proper court exercising probate jurisdiction. Any person who does not have an interest adverse to the ward may file the application. Tex. Est. Code §§ 1055.001, 1101.001(a). Usually, the applicant is also the person seeking the appointment. Most of the forms and letters in this manual assume that the applicant is also the proposed guardian. The information that must be included and sworn to in the application includes—

1. the proposed ward's name, gender, date of birth, and address;
2. the name, former name if any, relationship, and address of the person seeking to be appointed guardian;
3. facts showing the court has venue;
4. the type of guardianship sought—of the proposed ward's person, estate, or both; and whether alternatives to guardianship and available supports and services to avoid guardianship were considered, and whether such alternatives and supports and services are feasible and would avoid the need of a guardianship;
5. the nature and degree of the alleged incapacity;
6. the specific areas of protection and assistance requested and the limitation or termination of rights requested;
7. facts showing why a guardian should be appointed and the interest of the applicant in the appointment;
8. whether a guardianship of any kind exists for the proposed ward in Texas or any other state and, if so, a description of the guardianship;

9. the name and address of any individual or institution having the care and custody of the proposed ward;

10. a detailed description and estimated value of the proposed ward's liquid assets, including compensation, pension, insurance, or allowance, and nonliquid assets including real property;

11. the name and address of the agent under any power of attorney signed by the proposed ward and a description of the type of power of attorney;

12. if the proposed ward is a minor, the names and addresses of the proposed ward's parents and siblings; the ages of any siblings, and whether either or both of the parents or any of the siblings are deceased; and, if each of the parents and adult siblings are deceased, the names and addresses of other adult living members related to the proposed ward within the third degree by consanguinity;

13. if the proposed ward is a minor, whether the minor was the subject of a legal or conservatorship proceeding within the last two years and, if so, the court involved, the nature of the proceeding, and the final disposition, if any, of the proceeding;

14. if the proposed ward is an adult, the names and addresses of the proposed ward's spouse, parents, siblings, and children or, if none, adult next of kin related within the third degree by consanguinity; the ages of any siblings or children; and whether either parent, the spouse, or any child or sibling is deceased; and

15. if applicable, that the person the applicant desires to be appointed guardian is a private professional guardian who is certified under subchapter C, chapter 155, of the Texas Government Code and has complied with the requirements of subchapter G, chapter 1104, of the Texas Estates Code.

Tex. Est. Code § 1101.001.

The address of a person named in the application may be omitted if the application states that the person either is or was protected by a protective order issued under chapter 85 of the Texas Family Code. A copy of the protective order must be attached as an exhibit, the application must state the county in which the person resides, and additional details regarding notice and citation must be indicated. Tex. Est. Code § 1101.002.

The application must include the last three numbers of the applicant's driver's license number, if any, and the last three numbers of the applicant's Social Security number, if the party has been issued a Social Security number. Tex. Civ. Prac. & Rem. Code § 30.014. Some courts request that the same information be included for the incapacitated person.

If appointment of a guardian for a minor is sought, form 4-3 in this chapter should be used. If the ward is an adult incapacitated person, see form 4-4 for partial incapacity and form 4-5 for total incapacity.

Affidavit of Contact Information: The applicant in a guardianship proceeding is required to file an affidavit with the court containing known contact information for each person entitled to notice of the proceeding. Tex. Est. Code § 1101.003. Note that this is filed with the court, not the clerk, and remains privileged and confidential. The court is to provide a copy to the guardian upon appointment, if different than the applicant. Unless the guardian knows the information is not correct, the guardian is to rely on the contact information in the affidavit, to provide notice about the ward to a relative of the ward under section 1151.056. Tex. Est. Code § 1151.056(h). Attorneys should check with the court to determine how to deliver the affidavit to the court instead of the clerk.

§ 4.17 Jurisdiction

Original jurisdiction for guardianship proceedings will depend on the courts available in a given county. The following counties have statutory probate courts: Bexar, Cameron, Collin, Dallas, Denton, El Paso, Galveston, Harris, Hidalgo, Montgomery, Tarrant, and Travis. Tex. Gov't Code ch. 25. In those counties, exclusive jurisdiction for guardianship proceedings will be in the statutory probate courts. Tex. Est. Code § 1022.005.

Original jurisdiction for guardianship proceedings in other counties will be in either the constitutional county court or, if one exists, a statutory county court at law that has been given explicit guardianship jurisdiction by statute. Tex. Est. Code § 1022.002.

In counties having no statutory probate court or county court at law exercising probate jurisdiction, contested guardianship proceedings originally filed in the constitutional county court may, on the judge's motion, and must, on any party's motion, be transferred to the district court or assigned to a statutory probate judge. However, when all contested matters have been resolved, the guardianship proceeding must be transferred back to the constitutional county court for further proceedings not inconsistent with the district court's orders. Tex. Est. Code § 1022.003(f). A request for the appointment of a statutory probate judge before the transfer to a district court will mandate the assignment of a statutory probate judge. Tex. Est. Code § 1022.003(b). If the county has a county court at law exercising probate jurisdiction, the full guardianship proceeding, including the contested portion, can be transferred to that county court at law from the constitutional county court. Tex. Est. Code § 1022.004.

Appeals from final orders of all courts exercising probate jurisdiction are to the courts of appeals. Tex. Est. Code § 1022.001(c).

A judge of a statutory probate court, on the motion of a party or person interested in the guardianship, may transfer most pending matters incident or pertaining to the guardianship, including a cause of action relating to a guardianship in which a guardian, ward, or proposed ward is a party, from the district court to the statutory probate court. Tex. Est. Code § 1022.007.

§ 4.18 Venue

Guardian of Adult Incapacitated Person: The proceeding to appoint a guardian of the person or estate of an incapacitated person is instituted in either the county in which the proposed ward resides or is located on the day the application is filed or the county in which his principal estate is situated. Tex. Est. Code § 1023.001(a). If the court determines that the proceeding was commenced in a court that did not have venue over the proceeding the court shall, upon the application of any person, transfer the proceeding to the proper county. Tex. Est. Code § 1023.002(c). The clerk must use the electronic filing system to transfer a guardianship case to a court in another county. Tex. Est. Code §§ 1023.006, 1023.007.

Practice Tip: Filing in a county where a proposed ward's principal estate is located, but where the proposed ward is not located, creates problems for the court visitor and the attorney ad litem, who have the duty to visit the proposed ward in person. It is best to file in the county where the proposed ward is located.

Guardian of Minor: The proceeding to appoint a guardian of the person or estate of a minor is instituted in the county in which the minor's parents reside. If the parents live in different counties, venue is in the county in which the parent having sole managing conservatorship resides or, if the parents have joint custody, the county in which the parent with greater access and possession resides. If only one parent is living and that parent has custody, venue is in the county of that parent's resi-

dence. If both parents are dead and the minor was in the custody of a now-deceased parent, venue is in the county in which the last surviving parent having custody resided. If both parents died in a common disaster, venue is in the county in which they resided at the time of death. Tex. Est. Code § 1023.001(b).

Guardian Appointed by Will: The proceeding to appoint a guardian named in the will of the last surviving parent of a minor may be brought in the county in which the will is probated or in the county in which the appointee resides if he resides in Texas. Tex. Est. Code § 1023.001(c).

§ 4.19 Transfer of Guardianship to Another County

A guardian or any other interested person may request to transfer guardianship proceedings to another county. The application must state the reason for the request. Tex. Est. Code § 1023.003(a). The court in which the guardianship is pending may also transfer the guardianship, on its own motion, to another county where the ward resides. Tex. Est. Code § 1023.003(b). The sureties on the bond of the guardian must then be personally served to appear and show cause why the application should not be granted. Tex. Est. Code § 1023.004(a). If the application is filed by a person other than the guardian, the guardian must also be personally served. Tex. Est. Code § 1023.004(b). The guardian must be given notice by certified mail if the court makes a motion to transfer the guardianship. Tex. Est. Code § 1023.004(c).

If after hearing the application or the court's motion the court determines that the transfer would be in the ward's best interests, and either the ward has resided in the county to which the guardianship is to be transferred for at least six months or good cause is not otherwise shown to deny the transfer, the court will enter an order authorizing the transfer after payment of court costs and requiring that any existing bond remain in effect until a new bond has been given or bond rider has been filed after the court's review of the transferred guardianship, and certifying that the guardianship is in compliance with the Texas Estates Code at the time of transfer. Tex. Est. Code § 1023.005(a). In determining whether the transfer is in the ward's best interest the court may consider the interests of justice, the convenience of the parties, and the preference of a ward who is twelve years of age or older. Tex. Est. Code § 1023.005(b). On receipt of an order described complying with Tex. Est. Code § 1023.005(a), the county must accept the transfer of the guardianship. Tex. Est. Code § 1023.005(c). The clerk must record all guardianship papers not yet recorded. On payment of the clerk's fee, the clerk must transmit, using the electronic filing system established under section 72.031 of the Texas Government Code, the case file of the guardianship proceedings to the clerk of the county to which the guardianship has been transferred, and shall use the standardized transfer certificate and index of the transferred documents form developed by the Office of Court Administration of the Texas Judicial System under section 72.037 of the Texas Government Code when transferring the proceeding. Tex. Est. Code § 1023.006.

The order transferring the guardianship will not take effect until the clerk of the court to which the proceeding is transferred accepts and dockets the case record under section 1023.006 of the Texas Estates Code. Tex. Est. Code § 1023.007. See forms 4-6 and 4-7 in this chapter.

When a guardianship is transferred from one county to another, the guardianship continues in the court to which it was transferred as if it had been originally commenced in that court, and that court becomes the court of continuing, exclusive jurisdiction. A proceeding relating to the guardianship that is commenced in the court ordering the transfer continues in the court to which the guardianship is transferred. A judgment or order entered in the guardianship before the transfer has the same effect and shall be enforced as a judgment or order entered by the court to which the guardianship is transferred. The court ordering the transfer does not retain either jurisdiction of the ward or the authority to enforce an order entered for a violation of the Estates Code that occurred before or after the transfer. Tex. Est. Code § 1023.008.

If the court ordering the transfer determines that it is not in the ward's best interest for the guardian of the estate to continue to serve, the court may in its order of transfer revoke the letters of guardianship and appoint a new guardian. The former guardian shall account for and deliver the estate as required by the Estates Code. Tex. Est. Code § 1023.009.

Not later than the ninetieth day after the transfer takes effect, the court to which the guardianship was transferred shall hold a hearing to consider modifying provisions of the transferred guardianship and enter an order requiring the guardian to give a new bond or file a bond rider with the court to which the guardianship was transferred. Tex. Est. Code § 1023.010.

When a transfer of a guardianship occurs as required by the Estates Code, the transferring court may not be held civilly liable for any injury, damage, or loss to the ward or the ward's estate that occurs after the transfer. Similarly, the court receiving the transferred guardianship may not be held civilly liable for any injury, damage, or loss to the ward or the ward's estate that occurs before the transfer. Tex. Est. Code § 1023.011.

§ 4.20 Transfer of Contested Guardianship of Minor

If an interested person contests appointment or seeks removal of the guardian of the person of a minor, the judge may order the transfer of the guardianship to a court with continuing jurisdiction over the parent-child relationship. Tex. Est. Code § 1022.008. See section 10.2:5 in this manual.

§ 4.21 Notice and Citation

When an application for appointment of a guardian is filed, a number of people interested in the welfare of the proposed ward are entitled to notice. The court may not act on an application to create a guardianship until the Monday following ten days after the date that service of notice and citation has been made. Tex. Est. Code § 1051.106.

§ 4.21:1 Notice by Posting

Citation of all applications for guardianship must be by posting. Tex. Est. Code § 1051.102. In most counties, the clerk of the court will prepare the notice and deliver it to the sheriff or constable to be posted at the courthouse door. Because local practice varies, the attorney should check with the clerk's office about preparing the notice.

§ 4.21:2 Personal Service

In addition to citation by posting, personal service of citation is also required on (1) a proposed ward who is twelve years of age or older, (2) the parents of a proposed ward if their location is 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 spouse's location is 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. Tex. Est. Code § 1051.103. The supreme court has held that a technical defect in personal service on the ward does not deprive the court of jurisdiction. *See In re Guardianship of Fairley*, 650 S.W.3d 372 (Tex. 2022) (probate court properly exercised jurisdiction where ward was personally served and participated in proceedings without objection although served by private process service and not sheriff). Citation to a parent or spouse must also contain a statement notifying the parent or spouse that, if a guardianship is created, the relative must elect in writing to receive notice provided for in section 1151.056 of the Texas Estates Code regarding the ward's health and residence. Tex. Est. Code § 1051.103(c). Any competent person may waive the issuance and personal service of citation, in person or by attorney, by fil-

ing a written waiver with the clerk. Tex. Est. Code § 1051.251. See form 4-8 in this chapter. The attorney ad litem for the proposed ward cannot waive the personal service on the proposed ward. Tex. Est. Code § 1051.055(e).

§ 4.21:3 Notice by Qualified Delivery Method

Persons who must receive notice by qualified delivery method (see Texas Estates Code section 1002.0265 for qualified delivery methods) include—

1. all the proposed ward's adult children;
2. all the proposed ward's adult siblings;
3. the administrator of a nursing home 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 known by the applicant to hold a power of attorney signed by the proposed ward;
6. a person designated to serve as the proposed ward's guardian in a written declaration under subchapter E, chapter 1104, of the Texas Estates Code if the applicant knows of the existence of the declaration;
7. a person designated to serve as a minor's guardian in the probated will of the minor's last surviving parent;
8. a person designated to serve as a minor's guardian in a written declaration of the proposed ward's last surviving parent before his death if the applicant knows of the declaration; and
9. each adult named in the application as an "other living relative" of the proposed ward within the third degree of consanguinity in the application for guardianship if the proposed ward's spouse and each of the proposed ward's parents, adult siblings, and adult children are deceased or there is no spouse, parent, adult sibling, or adult child.

Tex. Est. Code § 1051.104(a).

If a party is represented by an attorney of record in a guardianship proceeding, including a proposed ward who has been personally served with notice of the proceeding and is represented by an attorney ad litem, a citation or notice required to be served on the party shall be served instead on that attorney, either by delivery to the attorney in person or by a qualified delivery method. Tex. Est. Code § 1051.055(a), (b).

Notice to a child or sibling must also contain a statement notifying the child or sibling that, if a guardianship is created, the relative must elect in writing to receive notice provided for in section 1151.056 of the Estates Code regarding the ward's health and residence. Tex. Est. Code § 1051.104(d).

Proof of service by qualified delivery method must be filed by the applicant or applicant's attorney with the court under oath that notice was sent, giving the name of each person to whom the notice was sent if not shown on the return receipt or other proof of delivery, and including a copy of the notice and the return receipts or other proofs of delivery. Tex. Est. Code § 1051.104(b).

Estates Code section 1051.106 provides that a court cannot act on an application until the affidavit confirming issuance of notice is filed. However, failure of the applicant to comply with notices to all but the ward's adult children does not affect the validity of a guardianship that is created. Tex. Est. Code § 1051.104(c).

§ 4.22 Appointment of Ad Litem

The court must appoint an attorney ad litem in the guardianship proceeding to represent the proposed ward's interest. Tex. Est. Code § 1054.001. The court may also appoint a guardian ad litem to represent the proposed ward's best interests. Tex. Est. Code §§ 1054.051, 1054.054. The guardian ad litem must not be an interested person, nor may the guardian ad litem be an attorney ad litem, except as provided by sections 1054.052, 1202.101, or 1203.051. Tex. Est. Code § 1054.051(b).

If the proposed ward purports to retain an attorney, on the motion of any party, the court may hold a hearing to determine whether the proposed ward has the capacity to retain an attorney. If not, the court may appoint an attorney ad litem. Tex. Est. Code § 1054.006.

§ 4.23 Hearing to Appoint Guardian

Appearance of Proposed Ward: The proposed ward must be present at a hearing to appoint a guardian unless the court determines on the record or in its order that an appearance is not necessary. Tex. Est. Code § 1101.051(b). If the proposed ward does not attend, the proposed ward's attorney ad litem should explain to the court the reason for the proposed ward's absence.

Jury Trial: The proposed ward or any party in a contested permanent guardianship proceeding is entitled to a jury trial. Tex. Est. Code §§ 1055.052, 1101.052. A jury trial is not authorized in a temporary guardianship. *In re Kuhler*, 60 S.W.3d 381, 383 (Tex. App.—Amarillo 2001, no pet.). See sections 10.4:7 through 10.4:10 in this manual.

Court's Duty to Inquire: At the hearing, the court will inquire into the proposed ward's ability to care for himself and manage his affairs, ascertain the age of a minor proposed ward, and review government reports on a ward for whom a guardian must be appointed to receive government funds. The court will also inquire into the qualifications of the party seeking to be appointed guardian. Tex. Est. Code § 1101.051(a).

The applicant's attorney should elicit testimony on these subjects from the applicant or other witnesses. The court will also have access to the proposed guardian's confidential criminal history record information that has been obtained by the clerk in accordance with subchapter I, subtitle B, of the Texas Estates Code. Tex. Est. Code §§ 1104.401–.412. See discussion in section 4.33 below.

§ 4.24 Standards of Proof of Facts

Clear and Convincing Evidence: Before a guardian may be appointed, the court must find, by clear and convincing evidence, that—

1. the proposed ward is an incapacitated person;
2. it is in the best interests of the proposed ward to have the court appoint a guardian;
3. the rights or property of the proposed ward will be protected by the appointment of a guardian;
4. alternatives to guardianship that would avoid the need for the appointment of a guardian have been considered and are not feasible; and

5. supports and services available to the proposed ward that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible.

Tex. Est. Code § 1101.101(a)(1).

Note that the applicant must prove incapacity based on recurring acts or occurrences within the preceding six months. Isolated instances of negligence or bad judgment cannot be used to prove incapacity. Tex. Est. Code § 1101.102. Nor can a guardian of a minor's estate be appointed based on the payment of claims under Texas Estates Code chapter 1355. Tex. Est. Code § 1101.154. If the proposed ward is not a minor, age cannot be the sole basis for granting a guardianship. Tex. Est. Code § 1101.105.

Preponderance of Evidence: The court must also find, based on a preponderance of the evidence, that—

1. the court has venue of the case;
2. the proposed guardian is eligible and entitled to be appointed or is a proper person to be appointed;
3. for a minor, the guardianship is not created for the primary purpose of enabling enrollment in a school or school district; and
4. the proposed ward is either totally without capacity or lacks only some capacity.

Tex. Est. Code § 1101.101(a)(2).

A finding of partial incapacity must also specifically state whether the proposed ward lacks the capacity, or lacks sufficient capacity without supports and services, to make personal decisions regarding residence, voting, operating a motor vehicle, and marriage. Tex. Est. Code § 1101.101(c).

In an uncomplicated or uncontested guardianship, it is frequently possible to obtain the required testimony from the proposed guardian or other qualified witness.

Proof for Receipt of Government Funds: To prove necessity of a guardianship to receive government funds, the applicant may present a governmental certificate explaining that the appointment of a guardian is a condition precedent for payment. Tex. Est. Code § 1101.106.

§ 4.25 Health Care Provider's Letter or Certificate

Subject to section 1101.104 of the Texas Estates Code, the court may not grant an application to create a guardianship for an incapacitated person, other than a minor or person for whom it is necessary to have a guardian appointed only to receive funds from a governmental source, unless the applicant presents a written letter or certificate, often referred to as a certificate of medical examination (CME), from—

1. a physician licensed in this state, if the ward's alleged incapacity results from a physical condition or a mental condition; or
2. a psychologist licensed in this state or certified by the Health and Human Services Commission to perform the examination in accordance with rules adopted by the executive commissioner of the commission governing examinations of that kind, if the proposed ward's incapacity results from a mental condition.

Tex. Est. Code § 1101.103(a).

The physician or psychologist must have experience examining individuals with the physical or mental condition resulting in the proposed ward's alleged incapacity or must have established a patient-provider relationship with the proposed ward. Tex. Est. Code § 1101.103(a).

The letter or certificate must be dated no more than 120 days before the filing date of the application and must be based on an examination the physician or psychologist performed not earlier than the 120th day before the date the application is filed. Tex. Est. Code § 1101.103(a–2). The letter or certificate from a physician must—

(1) describe the nature, degree, and severity of the proposed ward's incapacity, including any functional deficits 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) in providing a description under Subdivision (1) 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;

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

(3–a) in providing an evaluation under Subdivision (3), state whether improvement in the proposed ward's physical condition and mental functioning is possible and, if so, state the period after which the proposed ward should be reevaluated to determine whether a guardianship continues to be necessary;

(4) state how or in what manner the proposed ward's ability to make or communicate responsible decisions concerning himself or herself is affected by the proposed ward's physical or mental health, including the proposed ward's ability to:

  (A) understand or communicate;

  (B) recognize familiar objects and individuals;

  (C) solve problems;

  (D) reason logically; and

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

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

(6) describe the precise physical or 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–a) state whether a guardianship is necessary for the proposed ward and, if so, whether specific powers or duties of the guardian should be limited if the proposed ward receives supports and services; and

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

Tex. Est. Code § 1101.103(b). See form 4-9 in this chapter.

A letter or certificate from a psychologist must include the above information only in relation to the proposed ward's mental capacity. Tex. Est. Code § 1101.103(b–1).

An advanced practice registered nurse may perform the examination if the letter or certificate is signed by the supervising physician. Tex. Est. Code § 1101.103(a–1).

If the basis of the proposed ward's alleged incapacity is intellectual disability, the court may not grant an application to create a guardianship unless the applicant presents a written certificate that complies with section 1101.103(a) and (b) of the Texas Estates Code or the applicant shows that not earlier than twenty-four months before the hearing date the proposed ward was examined by a physician or psychologist licensed in Texas or certified by the Texas Health and Human Services Commission and the recommendations include a determination of intellectual disability, or a physician or psychologist licensed by the Health and Human Services Commission to perform such an examination has updated or endorsed in writing a prior determination of an intellectual disability for the proposed ward made by a physician or psychologist licensed by the state or certified by the commission. Tex. Est. Code § 1101.104. A physician or psychologist must preferably have experience examining individuals with an intellectual disability. Tex. Est. Code § 1101.104(b). If the physician or psychologist has an established patient-provider relationship with the proposed ward, the physician or psychologist is considered to have the required experience examining individuals with an intellectual disability. Tex. Est. Code § 1101.104(b).

An advanced practice registered nurse may perform the examination if the letter or certificate is signed by the supervising physician. Tex. Est. Code § 1101.104(a)(2)(A), (a–1), (b).

Note: Legislation was passed in the 88th legislative session affecting sections 1101.103 and 1101.104 of the Texas Estates Code. Practitioners should review the text of the entire statute. *See* Acts 2023, 88th Leg., R.S., ch. 1012, § 2 (affecting both sections); Acts 2023, 88th Leg., R.S., ch. 939, § 1 (affecting section 1101.103 of the Texas Estates Code); and Acts 2023, 88th Leg., R.S., ch. 938, § 1 (affecting section 1101.104 of the Texas Estates Code).

If the court determines it is necessary, it may appoint a physician, advanced practice registered nurse, or psychologist to examine the proposed ward after a hearing held for that purpose. The applicant must give the proposed ward and the proposed ward's attorney ad litem written notice concerning the hearing not later than four days before the date of the hearing. The physician, advanced practice registered nurse, or psychologist who examines the proposed ward under this section must make available to the attorney ad litem, for inspection, a written letter or certificate from the physician or psychologist. Tex. Est. Code § 1101.103(c), (d).

§ 4.26 Preference of Proposed Ward

Before appointing a guardian, the court shall give due consideration to the proposed ward's preference of a guardian, regardless of whether the proposed ward has previously designated by declaration a preneed guardian. Tex. Est. Code § 1104.002. When an application is filed for the guardianship of a minor at least twelve years of age, the minor may choose the guardian if the court approves the choice and finds it in the best interests of the minor. Tex. Est. Code § 1104.054(b).

While a proposed ward may express a preference, the court is not obligated to appoint the proposed ward's selection, and the court will weigh whether the proposed ward retains the ability and judgment to make such a preference and whether such selection is in the proposed ward's best interest.

§ 4.27 Order Appointing Guardian

Total Incapacity: After the hearing on the application for letters of guardianship, if the court finds the ward totally incapacitated, it will enter an order appointing a guardian. The order must specify that the guardian has full authority over the incapacitated person; if necessary, the amount of funds from the corpus of the person's estate the court will allow the guardian to expend for the education and maintenance of the ward; whether the person is totally incapacitated because of a mental condition; that the person does not have the capacity to operate a motor vehicle, make personal decisions regarding residence, or vote in public elections; and if it is a guardianship of the person of the ward or of both the person and the estate of the ward, the rights of the guardian with respect to Texas Estates Code section 1151.051(c)(1). Tex. Est. Code § 1101.151. The order must also contain specific findings of fact as listed below.

Partial Incapacity: If the court finds that the ward lacks only some capacity to care for himself or to manage property, it will enter an order appointing a guardian with limited powers. The order must contain the findings of fact listed below. It must also identify (1) the specific powers, limitations, or duties of the guardian with respect to the care and management of the ward's person and property, and (2) the specific rights and powers retained by the ward with and without the necessity for supports and services. If necessary, the order may specify the amount of funds from the corpus of the person's estate the guardian may spend to educate and maintain the ward. It must also state whether the person is incapacitated because of a mental condition and, if so, whether the person retains the right to make personal decisions regarding residence or vote in public elections or maintains eligibility to hold or obtain a driver's license. Tex. Est. Code § 1101.152.

Contents of Order: The order must contain findings of fact and specify—

1. the name of the guardian;
2. the name of the ward;
3. whether the guardianship is of the person, the estate, or both;
4. the amount of the guardian's bond;
5. the names of no more than three appraisers if the guardianship is of the estate and the court deems an appraisal necessary (in most—but not all—counties, appraisers are no longer necessary);
6. that the clerk will issue letters of guardianship when the guardian has qualified; and
7. if the court waives the guardian's training requirements, that the waiver is in accordance with rules adopted by the supreme court under section 155.203 of the Texas Government Code.

Tex. Est. Code § 1101.153(a).

If the health providers' letter or certificate offered as evidence to prove incapacity stated that improvement in the ward's physical or mental condition was possible and specified that reevaluation within a year should occur, the order appointing the guardian must also include the date by which the guardian must submit an updated letter or certificate to the court. Tex. Est. Code § 1101.153(a–1).

Notice to Peace Officers in Order Creating Guardianship of Person: An order creating a guardianship of the person that gives the guardian the right to have physical possession of the ward and to establish the ward's domicile must include the following statement in bold-faced type, in capital letters, or underlined:

> Notice to any peace officer of the state of Texas: You may use reasonable efforts to enforce the right of a guardian of the person of a ward to have physical possession of the ward or to establish the ward's legal domicile as specified in this order. A peace officer who relies on the terms of a court order and the officer's agency are entitled to the applicable immunity against any civil or other claim regarding the officer's good faith acts performed in the scope of the officer's duties in enforcing the terms of this order that relate to the above-mentioned rights of the court-appointed guardian of the person of the ward. Any person who knowingly presents for enforcement an order that is invalid or no longer in effect commits an offense that may be punishable by confinement in jail for as long as two years and a fine of as much as $10,000.

Tex. Est. Code §§ 1101.151(c), 1101.152(c).

See forms 4-10 through 4-12 in this chapter for orders granting guardianships of incapacitated persons.

§ 4.28 Proof of Facts

Some courts will require the witnesses' testimony to be reduced to writing, signed under oath, and filed and recorded in the minutes of the court. See forms 4-13 and 4-14 in this chapter. The court may properly take judicial notice of evidence from previous hearings concerning the same matter. *Trimble v. Texas Department of Protective & Regulatory Service*, 981 S.W.2d 211, 215 (Tex. App.—Houston [14th Dist.] 1998, no writ).

§ 4.29 Special Protections for Ward

A ward has all the rights, benefits, responsibilities, and privileges granted by the constitutions and laws of Texas and the United States except where specifically limited by a court-ordered guardianship or where otherwise lawfully restricted. Tex. Est. Code § 1151.351(a).

§ 4.29:1 Ward's Bill of Rights

Tex. Est. Code § 1151.351 was added in the 2015 Texas legislative session, creating a bill of rights for wards under guardianships. The ward's bill of rights lists twenty-five distinct rights and is similar to the elder bill of rights (see section 4.29:2 below). The ward's bill of rights confirms that an incapacitated person retains as much self-determination as possible, has the right to be informed of all matters affecting the ward, and has the right to petition the court for changes in the guardianship. The bill of rights also gives the ward the right to personal visits from the guardian or the guardian's designee at least once every three months unless the court orders otherwise. The ward has the right to have private communications with the ward's physicians or other medical professionals, unless the court, after a hearing requested by the ward's guardian, orders the private communication to be limited due to the risk of substantial harm to the ward, or the communications being unduly burdensome to the physician or medical professional. See form 4-15 in this chapter.

§ 4.29:2 Elder Bill of Rights

Chapter 102 of the Texas Human Resources Code provides a "bill of rights" for elderly citizens. An elderly individual (age sixty or older) has all the rights, benefits, responsibilities, and privileges granted by the constitutions and laws of Texas and the United States, except where lawfully restricted, and the right to be free of interference, coercion, discrimination, and reprisal in exercising these civil rights. Tex. Hum. Res. Code §§ 102.001(5), 102.003(a). An elderly person's expressly confirmed

rights include the right to make his or her own choices regarding his or her personal affairs, care, benefits, and services; the right to be free from abuse, neglect, and exploitation; and the right to designate a guardian or representative to ensure the appropriate care is provided if a guardian is required. Tex. Hum. Res. Code § 102.003(b).

Although some of an elderly person's rights can be modified or limited through the appointment of a guardian, others apparently may not. For example, an elderly individual has the right to be free from physical and mental abuse, including corporal punishment or physical or chemical restraints that are administered for the purpose of discipline or convenience and not required to treat the individual's medical symptoms; stringent requirements are imposed for the use of such restraints. *See* Tex. Hum. Res. Code § 102.003(c). Additionally, an intellectually disabled elderly individual with a guardian of the person may participate in a behavior modification program that includes the use of restraints or adverse stimuli only with the informed consent of the guardian. Tex. Hum. Res. Code § 102.003(d).

If the ward must reside in a nursing home, the guardian should confirm that the facility respects the tenets of the elder bill of rights to the extent allowable considering the ward's conditions and retained rights. Consult the website for the Attorney General of Texas at **www.texasattorneygeneral.gov/consumer-protection/seniors-and-elderly** for more information.

A services provider may not transfer or discharge an elderly person unless (1) the transfer is for the person's welfare, and the person's needs cannot be met by the services provider; (2) the person's health is improved enough that services are no longer needed; (3) the health and safety of the person or someone else would be endangered if the transfer or discharge were not made; (4) the services provider stops operating or participating in the program that reimburses the services provider for the person's treatment or care; or (5) the person fails, after reasonable and appropriate notices, to pay for services. Tex. Hum. Res. Code § 102.003(r).

Except in an emergency, an elderly person may not be transferred or discharged from a residential facility until the thirtieth day after the date the services provider gives written notice to the guardian (or required person). The written notice must state the intention of the services provider to transfer or discharge the elderly person, the reason for the transfer or discharge and its effective date, the location to which the person will be transferred, and the person's right to appeal the action and the person to whom the appeal should be directed. Tex. Hum. Res. Code § 102.003(s).

Other important rights granted to the elderly are specified in the remaining portions of section 102.003 of the Human Resources Code.

§ 4.29:3 Duty to Report Abuse, Neglect, or Exploitation of Elderly or Disabled Person

A person who becomes aware of any specific acts of abuse, neglect, or exploitation of an elderly (age sixty-five or older) or disabled person must report certain information to the Texas Department of Family and Protective Services or other appropriate agency. *See* Tex. Hum. Res. Code §§ 48.002(a)(1), 48.051(a), (b).

The duty to report applies without exception to a person whose knowledge concerning possible abuse, neglect, or exploitation is obtained during the scope of the person's employment or whose professional communications are generally confidential, including an attorney, clergy member, medical practitioner, social worker, employee or member of a board that licenses or certifies a professional, and mental-health professional. Tex. Hum. Res. Code § 48.051(c). The duty to report clearly extends to a guardian.

The required report may be made orally or in writing and must include the name, age, and address of the elderly or disabled person; the name and address of any person responsible for the elderly or disabled person's care; the nature and extent of the elderly or disabled person's condition; the basis of the reporter's knowledge; and any other relevant information. Tex. Hum. Res. Code § 48.051(d).

Failure to report the abuse, neglect, or exploitation is generally a class A misdemeanor, and knowingly or intentionally reporting information known to be false or unfounded is a class A misdemeanor. Tex. Hum. Res. Code §§ 48.052, 48.053. It is a state jail felony if the abused, neglected, or exploited person is a resident of certain facilities. Tex. Hum. Res. Code § 48.052(a).

Complaints about a nursing home or similar facility may be made to the Texas Health and Human Services Commission at 1-800-458-9858.

§ 4.29:4 Duty to Report Abuse or Neglect of Child

A person who has reasonable cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person must immediately report certain information to the Texas Department of Family and Protective Services or other appropriate agency. *See* Tex. Fam. Code §§ 261.101(a), 261.103.

The duty to report applies without exception to an individual whose personal communications may otherwise be privileged and clearly extends to a guardian. *See* Tex. Fam. Code § 261.101(c). Special provisions relate to professionals. *See* Tex. Fam. Code § 261.101(b).

The report must include, if known, the name and address of the child; the name and address of the person responsible for the child's care, custody, or welfare; and any other pertinent information about the abuse or neglect. Tex. Fam. Code § 261.104. Penalties are prescribed for failure to report and for reporting falsely. *See* Tex. Fam. Code §§ 261.107, 261.109.

Reports may be made at any time to the Department of Family and Protective Services on a twenty-four-hour toll-free number, 1-800-252-5400, or at the Department's secure website, **www.txabusehotline.org**.

§ 4.29:5 Injury to Elderly or Disabled Person or Child

It is a criminal offense for a person to "intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission" cause to a child, elderly person, or disabled person (1) serious bodily injury, (2) serious mental deficiency, impairment, or injury, or (3) bodily injury. Tex. Penal Code § 22.04(a). Similar provisions apply if the person is an owner, operator, or an employee of a group home, nursing facility, assisted living facility, boarding home facility, or intermediate care facility. Tex. Penal Code § 22.04(a–1), (b), (d).

For purposes of this provision, a child is a person fourteen years of age or younger, an elderly person is a person sixty-five years of age or older, and a disabled person is a person with one or more of the following: autism spectrum disorder, developmental disability, intellectual disability, severe emotional disturbance, or traumatic brain injury or who otherwise by reason of age or physical or mental disease, defect, or injury is substantially unable to protect himself from harm or to provide food, shelter, or medical care for himself. Tex. Penal Code § 22.04(c).

A person commits an offense if the person, having custody, care, or control of a child, elderly individual, or disabled individual, intentionally abandons the child or individual in any place under circumstances that expose the child or individual to an unreasonable risk of harm. Tex. Penal Code § 22.041(b). It is a state jail felony if the actor abandoned the child or individual with intent to return for the child or individual, but if the actor abandoned the child or individual without the intent to return for the child or individual, the offense is a third-degree felony. Tex. Penal Code § 22.041(d). It is an exception if the actor voluntarily delivered the child to a designated emergency infant care provider under Texas Family Code section 262.302. Tex. Penal Code § 22.041(h).

An omission that causes one of the described conditions constitutes an offense if the person has a legal or statutory duty to act or has assumed care, custody, or control of the child, elderly person, or disabled person. Tex. Penal Code § 22.04(b). For the purposes of such an omission, the person has assumed care, custody, or control if he has by act, words, or course of conduct acted so as to cause a reasonable person to conclude that he has accepted responsibility for protection, food, shelter, and medical care for the child, elderly person, or disabled person. Tex. Penal Code § 22.04(d). A guardian of the person of either a minor or adult incapacitated person would be subject to section 22.04 by having assumed the care, custody, or control of the ward through his appointment and qualification as guardian.

Depending on the type of injury and the mens rea, penalties may range from those for a first-degree felony to those for a state jail felony. *See* Tex. Penal Code § 22.04(e), (f), (g). Defenses and affirmative defenses are prescribed. *See* Tex. Penal Code § 22.04(i)–(m).

Similar provisions apply to persons connected with nursing homes and similar institutions who injure or exploit a child, elderly person, or disabled person by omission. *See* Tex. Penal Code § 22.04(a–1), (b), (d).

§ 4.29:6 Reporting Financial Exploitation of Vulnerable Adults

A financial institution employee or securities professional must notify the institution, dealer, or investment advisor of suspected financial exploitation of a vulnerable adult (sixty-five years of age or older or disabled) who is an account holder. After receiving the notice, the financial institution must assess the suspected exploitation and submit a report to the Texas Department of Family and Protective Services (DFPS), and an investment advisor must submit a report to the DFPS and the Securities Commissioner. The financial institution or investment advisor must also notify a third party reasonably associated with the vulnerable adult of the exploitation, unless the third party is suspected of the exploitation. Tex. Fin. Code ch. 281. A financial institution may place a hold on any transaction that involves an account of a person over the age of sixty-five years or a person with a disability if the financial institution reports the suspected financial exploitation to the DFPS and has cause to believe the transaction is related to the suspected financial exploitation alleged in the report. The financial institution must place a hold on any transaction involving an account of a vulnerable adult if requested by the DFPS or a law enforcement agency. A hold placed on a transaction expires on the tenth business day after the date the hold is placed unless requested by a state or federal agency or a law enforcement agency investigating the suspected financial exploitation, in which case the financial institution may extend the hold for up to thirty additional days. The financial institution may petition a court to extend a hold. The court may extend or shorten a hold or provide other relief. Tex. Fin. Code § 281.004.

[Section 4.30 is reserved for expansion.]

I. Bond, Letters of Guardianship, and Training

§ 4.31 Guardian's Bond and Safekeeping of Assets

Guardian of Estate: A guardian of the estate must be bonded unless the guardian is a corporate fiduciary or a guardianship program operated by a county. Tex. Est. Code § 1105.101(a), (b). The amount is fixed by the judge based on evidence presented at the hearing on the guardianship application. Unless reduced by safekeeping accounts or cash deposits of the guardian's own funds (see below), the bond amount must be equal to the estimated value of the ward's personal property, together with an additional amount sufficient to cover all revenue expected to be derived during the next twelve months. Social Security payments and rental income may be excluded from this calculation. Tex. Est. Code §§ 1105.153, 1105.154. Under certain circumstances, the court may order that a new bond be executed or that the amount be increased or decreased. Tex. Est. Code §§ 1105.251–.257.

The bond amount may be reduced when assets belonging to the estate are subject to a court-approved safekeeping agreement. Tex. Est. Code § 1105.156. It will be generally more economical for the guardian to enter into a safekeeping agreement before the bond is initially set. The court can approve the safekeeping agreement at or after the time the order creating the guardianship is signed but before letters are issued. By approving the safekeeping agreement before letters are issued, there is no risk that the guardian will have access to assets that are not sufficiently bonded against. The guardian may also deposit his own cash or securities in lieu of a bond or to reduce the amount of the bond, although this procedure is rarely used. Tex. Est. Code § 1105.157(a). See section 7.2 and forms 7-6 through 7-8 in this manual.

The bond should be filed within twenty days after entry of the order granting letters of guardianship or before revocation of the letters for failure to qualify. Tex. Est. Code § 1105.003. The bond must be signed by the guardian and the guardian's surety or sureties and, after court approval, filed with the clerk of the court. Tex. Est. Code §§ 1105.108, 1105.110. See form 4-16 in this chapter.

If personal sureties are used, there must be at least two, and each must own sufficient property within the state to qualify. Only one is required if it is an authorized corporate surety. Tex. Est. Code § 1105.160. However, if the bond exceeds $50,000, the court may require that it be signed by two or more authorized corporate sureties or by one corporate surety and two personal sureties. Tex. Est. Code § 1105.161. See form 4-17.

The attorney should determine local custom concerning personal sureties. Because of potential obstacles to collection and enforcement, guardianship courts generally discourage the use of personal sureties. Even if personal sureties are permitted, the court cannot consider a bond with individual or personal sureties until each prospective surety executes an affidavit that his assets reachable by creditors have a value in excess of his liabilities. The total net worth of the sureties must equal at least double the amount of the bond. The affidavits of the sureties must be presented to the court for consideration and, if approved, are attached to and made a part of the bond. Tex. Est. Code § 1105.201.

Guardian of Person: A guardian of the person only must be bonded unless the guardian is a corporate fiduciary or county guardianship program or is appointed pursuant to a will or written declaration made by a parent that expressly waives the guardian's bond. Tex. Est. Code § 1105.101(a), (b), (c). The only kinds of bonds a court may accept for a guardian of the person are—

1. a corporate surety bond;

2. a personal surety bond;
3. a cash bond; or
4. a personal bond.

Tex. Est. Code § 1105.102(b). In determining the type and amount of the bond, the court will consider—

1. the familial relationship of the guardian to the ward;
2. the guardian's ties to the community;
3. the guardian's financial condition;
4. the guardian's past history of compliance with the court; and
5. the reason the guardian may have previously been denied a corporate surety bond.

Tex. Est. Code § 1105.102(c).

§ 4.32 Letters of Guardianship

Letters of guardianship are issued by the clerk of the court to the person appointed guardian on the guardian's qualification. Tex. Est. Code § 1106.001. The appointed guardian is deemed to have qualified on taking and filing the oath or declaration as required under Texas Estates Code section 1105.051 (see form 4-18 in this chapter), giving the required bond, filing the bond with the clerk, and having the bond approved by the court. If no bond is required, the guardian qualifies on taking the oath. Tex. Est. Code § 1105.002.

The certificate from the clerk of the court, under seal, stating the fact of the appointment, naming the guardian, and giving the date on which the guardian qualified and the expiration date is called the letters of guardianship. It is sufficient evidence of the appointment and qualification of the guardian for all purposes. Tex. Est. Code §§ 1106.001, 1106.005(a). Any number of duplicate letters of guardianship may be issued by the clerk if requested by the guardian. Tex. Est. Code § 1106.004.

§ 4.33 Training and Qualification for Guardians

A court may not appoint a person as guardian if the person has not received training required under Texas Government Code section 155.204 absent a waiver by the court in accordance with rules to be adopted by the supreme court as prescribed by Government Code section 155.203. Tex. Est. Code § 1104.003. A verification of completion of the training is to be provided by the Judicial Branch Certification Commission (JBCC) to the probate court not later than the tenth day before the hearing to appoint a guardian. *See* Tex. Gov't Code § 155.203. See also Judicial Branch Certification Commission, Guardianship Registration Rules and Resources, **txcourts.gov/jbcc/register-a-guardianship/guardianship-registration-rules-and-resources/**. The JBCC shall obtain a copy of the person's criminal history record if the liquid assets of the estate of a ward are $50,000 or less, and the proposed guardian is a resident of the state of Texas. Tex. Gov't Code § 155.205(c). The clerk shall obtain fingerprint-based criminal history record information of a proposed guardian from the Federal Bureau of Investigation Identification division if the liquid assets of the estate exceed $50,000, or the proposed guardian is not a resident of the state of Texas. Tex. Gov't Code § 155.205(a), (b). Each proposed guardian described by subsection (b) shall file with the JBCC proof of having submitted to a fingerprint-based criminal history search. Tex. Gov't Code § 155.205(d); *see also* Tex. Est. Code §§ 1104.402, 1104.404, 1104.405. Because local practice varies, the attorney should check with the court to determine how best to obtain and deliver the FBI fingerprint-based criminal background check. This process does not apply to an attorney, a corporate fidu-

ciary, or a private professional guardian, as the training is designed for family and other lay guardians. Tex. Gov't Code § 155.202.

§ 4.34 Registration of Guardianships and Guardianship Database

All guardianships are required to be registered in accordance with the mandatory registration program established by the supreme court in conjunction with the JBCC. Tex. Gov't Code § 155.151. Additionally, the supreme court, in cooperation with the JBCC and courts with jurisdiction over guardianship proceedings, is required to maintain a central database of all guardianships subject to the jurisdiction of this state. Tex. Gov't Code § 155.152. See also Judicial Branch Certification Commission, Guardianship Registration Rules and Resources, **txcourts.gov/jbcc/register-a-guardianship/guardianship-registration-rules-and-resources/**. The database must be accessible to the Department of Public Safety (DPS) for law enforcement purposes, and the DPS must make information from the database available, with certain restrictions, to law enforcement personnel through the Texas Law Enforcement Telecommunications System or a successor system of telecommunication used by law enforcement agencies and operated by the department. Tex. Gov't Code § 155.153. Information that is contained in the database required under section 155.152, including personal identifying information of a guardian or ward, is confidential and not subject to disclosure under Code chapter 552 or any other law. Tex. Gov't Code § 155.155(a). A law enforcement agency or officer that receives the information must maintain the confidentiality of the information. Tex. Gov't Code § 155.155(b).

Form 4-1

Waiver of Right to Be Appointed Guardian of Person and Estate

I, [**name**], [**relationship**] of [**name of proposed ward**], hereby waive the right to be appointed guardian of the person and estate of Proposed Ward in favor of [**name of applicant**], who is a qualified and proper person and should be appointed guardian.

_____
[**Name**]
[**Address, city, state**]

SIGNED under oath before me on _____.

_____
Notary Public, State of Texas

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Form 4-2

[Caption. See § 3 of the Introduction in this manual.]

Selection of Guardian by Minor

On [**date**], [**name of applicant**] filed an Application for Appointment of Guardian of [Person/Estate/Person and Estate] of [**name of proposed ward**], a minor. No appointment has yet been made. [**Name of proposed ward**] wishes to make a choice of guardian and shows that [he/she] is at least twelve years old and chooses [**name of proposed guardian**] as guardian of [his/her] [person/estate/person and estate] subject to the approval of this Court.

_____
[**Name of proposed ward**]
[**Address, city, state**]

SIGNED under oath before me on _____.

_____
Notary Public, State of Texas

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Form 4-3

[Caption. See § 3 of the Introduction in this manual.]

Application for Appointment of Guardian of Person and Estate of Minor

[**Name of applicant**], Applicant, files this Application for Appointment of Guardian of Person and Estate of Minor pursuant to section 1101.001 of the Texas Estates Code on behalf of [**name of proposed ward**], Proposed Ward, and shows the Court the following:

1. Proposed Ward is a minor [male/female], whose birthday is [**date of birth**]. Proposed Ward resides at [**address, city, county**] County, Texas, [and/but] may be served with citation at [that address/[**address, city, county**] County, Texas].

2. Applicant is the [**relationship**] of Proposed Ward and resides at [**address, city, county**] County, Texas. Applicant desires to be appointed guardian of the person and estate of Proposed Ward. Applicant is eligible to receive letters of guardianship and is entitled to be appointed.

3. Guardianship of the person and estate of Proposed Ward is sought.

> Specify applicable grounds for establishing venue under Tex. Est. Code § 1023.001. The following is an example.

4. This Court has jurisdiction and venue over these proceedings because [one of] Proposed Ward's parent[s] reside[s] in [**county**] County, Texas.

5. Persons to be served by personal citation pursuant to section 1051.103 of the Texas Estates Code are [**specify names and addresses**].

6. Persons to receive notice by certified mail, return receipt requested, pursuant to section 1051.104 of the Texas Estates Code are [**specify names and addresses**].

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7. Proposed Ward is a minor person who is incapable of caring for [himself/herself], unable to manage [his/her] property and financial affairs, and without a legal guardian of [his/her] person and estate. It is necessary and will be advantageous for Proposed Ward to have a guardian of [his/her] person and estate appointed to manage, control, protect, and prevent waste of the assets of [his/her] estate and to provide for the care and attention of Proposed Ward.

8. Alternatives to guardianship and available supports and services to avoid the guardianship were considered. No alternatives or supports and services are available to Proposed Ward or are feasible to avoid the need for a guardianship.

9. Approximate values and descriptions of Proposed Ward's property are listed in Exhibit [**exhibit number/letter**], attached to and incorporated in this application.

10. The requested term of this guardianship is until Proposed Ward reaches majority.

11. The specific facts that require a guardian to be appointed and Applicant's interest in the appointment are [**insert facts supporting necessity for guardianship**].

12. The names and addresses, to the best of Applicant's knowledge, of Proposed Ward's parents, siblings, and of Proposed Ward's next of kin who are adults are [**specify names, relationships, and addresses**]. [**Include if applicable:** The ages of the siblings are [**specify names and ages**]. [**List any parent or sibling who is deceased.**]]

Select one of the following.

13. Proposed Ward has not been the subject of a legal or conservatorship proceeding within the preceding two years.

Or

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13. Proposed Ward has been the subject of a legal or conservatorship proceeding within the preceding two years and [**state disposition, including court involved, nature of proceeding, and final disposition**].

Continue with the following.

14. No guardianship for Proposed Ward exists in this or any other state.

15. Applicant has brought this application in good faith and for just cause in the filing and prosecution of this application and requests [his/her] fees from Proposed Ward's estate under section 1155.054 of the Texas Estates Code.

Applicant prays that notice of this application be given as required by law; that Proposed Ward be personally served with citation to appear and answer this application; that [an attorney/a guardian/an attorney and guardian] ad litem be appointed to represent Proposed Ward; that on hearing Applicant be appointed guardian of the person and estate of Proposed Ward; that letters of guardianship be issued to [**name of applicant**] on [his/her] taking the oath and giving bond as required by law; and for all further relief to which Applicant may be entitled.

Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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VERIFICATION

STATE OF TEXAS)

COUNTY OF [**county**])

BEFORE ME, the undersigned notary public, on this day personally appeared [**name**], who being by me duly sworn on [his/her] oath deposed and said that [he/she] has read the above and foregoing [**title of document**] [and exhibits] and that the matters contained therein are within [his/her] personal knowledge and are true and correct.

_____

SWORN TO AND SUBSCRIBED BEFORE ME on _____.

_____
Notary Public, State of Texas

Attach exhibit(s).

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Form 4-4

[Caption. See § 3 of the Introduction in this manual.]

Application for Appointment of Guardian of [Person/Estate/Person and Estate]

[Adult, Partial Incapacity]

[**Name of applicant**], Applicant, files this Application for Appointment of Guardian of [Person/Estate/Person and Estate] pursuant to section 1101.001 of the Texas Estates Code on behalf of [**name of proposed ward**], Proposed Ward, and shows the Court the following:

1. Proposed Ward is an adult [male/female] whose birthday is [**date of birth**]. Proposed Ward resides at [**address, city, county**] County, Texas, [and/but] may be served with citation at [that address/[**address, city, county**] County, Texas].

Select one of the following.

2. Applicant is the [**relationship**] of Proposed Ward and resides at [**address, city, county**] County, Texas. Applicant desires to be appointed guardian of the [person/estate/person and estate] of Proposed Ward. Applicant is eligible to receive letters of guardianship and is entitled to be appointed.

Or

2. Applicant is not related to Proposed Ward and resides at [**address, city, county**] County, Texas. Applicant is a private professional guardian who is certified under subchapter C of chapter 155 of the Texas Government Code and has complied with the requirements of sections 1104.302 and 1104.303 of the Texas Estates Code. Applicant desires to be appointed guardian of the [person/estate/person and estate] of Proposed Ward. Applicant's taxpayer identification number is [**number**].

Continue with the following.

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3. Guardianship of the [person/estate/person and estate] of Proposed Ward is sought.

4. This Court has jurisdiction and venue over these proceedings because [**select one or both of the following:** Proposed Ward resides in [**county**] County, Texas/[and] Proposed Ward's principal assets are located in [**county**] County, Texas].

5. Persons to be served by personal citation pursuant to section 1051.103 of the Texas Estates Code are [**specify names and addresses**].

6. Persons to receive notice by certified mail, return receipt requested, pursuant to section 1051.104 of the Texas Estates Code are [**specify appropriate names and addresses of parties named in Code section 1051.104**].

7. Proposed Ward is currently [incapacitated to care for [himself/herself]/unable to manage [his/her] property and financial affairs] and without a legal guardian of [his/her] [person/estate/person and estate]. It is necessary and will be advantageous for Proposed Ward to have a guardian of [his/her] [person/estate/person and estate] appointed [to manage, control, protect, and prevent waste of the assets of [his/her] estate/[and] to provide for the care and attention of Proposed Ward].

8. Alternatives to guardianship and available supports and services to avoid the guardianship were considered. No alternatives or supports and services are available to Proposed Ward or are feasible to avoid the need for a guardianship.

9. Approximate values and descriptions of Proposed Ward's property are listed in Exhibit [**exhibit number/letter**], attached to and incorporated in this application.

10. The requested term of this guardianship is for such time as Proposed Ward's medical condition necessitates the guardianship.

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11. The specific facts that require a guardian to be appointed and Applicant's interest in the appointment are [**insert facts supporting necessity for guardianship**].

12. The nature and degree of Proposed Ward's incapacity are set forth in a [letter/certificate] from [his/her] treating physician, [**name of physician**], M.D., attached hereto and incorporated in this application as Exhibit [**exhibit number/letter**].

13. The specific areas of protection and assistance being requested are [**specify**].

Note: Only those powers specifically granted may be exercised. It is important to be detailed, explicit, and precise based on the circumstances of the case.

14. The limitations that Applicant requests the Court to impose on Proposed Ward's rights are [**specify**].

Note: In addition to specifically listing other limitations, the application must include (if desired as relief) a request to limit the proposed ward's right to vote, to make personal decisions regarding his/her residence, and to operate a motor vehicle. Tex. Est. Code § 1101.001(b)(4)(A), (b)(4)(B).

15. No guardianship for Proposed Ward exists in this or any other state.

16. The [person/institution] having care and custody of Proposed Ward and [who/which] is required by law to receive notice by certified mail, return receipt requested, is [**specify name and address**].

Select one of the following.

17. Applicant is not aware of any person or institution that holds a power of attorney signed by Proposed Ward.

Or

17. [**Name**] holds a [general/durable/limited] power of attorney signed by Proposed Ward.

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If applicable, include a paragraph seeking to pay expenses, depending on local practice, for items such as a nursing home and request in proper form permission to pay them before inventory out of the principal and income of the estate. *See* Tex. Est. Code §§ 1101.152(b)(3),1156.001.

Continue with the following.

18. The names and addresses, to the best of Applicant's knowledge, of Proposed Ward's spouse, parents, siblings, and children or, if none living, of Proposed Ward's next of kin who are adults are [**specify names and addresses**]. [**Include if applicable:** The ages of the siblings and children are [**specify names and ages**]. [**List any parent, child, spouse, or sibling who is deceased.**]]

19. Applicant brings this application in good faith and for just cause and requests payment of attorney's fees and expenses from Proposed Ward's estate as allowed by section 1155.054 of the Texas Estates Code.

Applicant prays that notice of this application be given as required by law; that Proposed Ward be personally served with citation to appear and answer this application; that [an attorney/a guardian/an attorney and guardian] ad litem be appointed to represent Proposed Ward; that on hearing Applicant be appointed guardian of the [person/estate/person and estate] of Proposed Ward; that letters of guardianship be issued to [**name of applicant**] on [his/her] taking the oath and giving bond as required by law; [**include if applicable:** that Applicant be allowed to pay the expenses listed above;] and for all further relief to which Applicant may be entitled.

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Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

VERIFICATION

STATE OF TEXAS)

COUNTY OF [**county**])

BEFORE ME, the undersigned notary public, on this day personally appeared [**name**], who being by me duly sworn on [his/her] oath deposed and said that [he/she] has read the above and foregoing [**title of document**] [and exhibits] and that the matters contained therein are within [his/her] personal knowledge and are true and correct.

_____

SWORN TO AND SUBSCRIBED BEFORE ME on _____.

_____
Notary Public, State of Texas

Attach exhibit(s).

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Form 4-5

[Caption. See § 3 of the Introduction in this manual.]

Application for Appointment of Guardian of Person and Estate

[Adult, Total Incapacity]

[**Name of applicant**], Applicant, files this Application for Appointment of Guardian of Person and Estate pursuant to section 1101.001 of the Texas Estates Code on behalf of [**name of proposed ward**], Proposed Ward, and shows the Court the following:

1. Proposed Ward is an adult [male/female] whose birthday is [**date of birth**]. Proposed Ward resides at [**address, city, county**] County, Texas, [and/but] may be served with citation at [that address/[**address, city, county**] County, Texas].

Select one of the following.

2. Applicant is the [**relationship**] of Proposed Ward and resides at [**address, city, county**] County, Texas. Applicant desires to be appointed guardian of the person and estate of Proposed Ward. Applicant is eligible to receive letters of guardianship and is entitled to be appointed.

Or

2. Applicant is not related to Proposed Ward and resides at [**address, city, county**] County, Texas. Applicant is a private professional guardian who is certified under subchapter C of chapter 155 of the Texas Government Code and has complied with the requirements of sections 1104.302 and 1104.303 of the Texas Estates Code. Applicant desires to be appointed guardian of the person and estate of Proposed Ward. Applicant's taxpayer identification number is [**number**].

Continue with the following.

3. Guardianship of the person and estate of Proposed Ward is sought.

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4. This Court has jurisdiction and venue over these proceedings because [**select one or both of the following:** Proposed Ward resides in [**county**] County, Texas/[and] Proposed Ward's principal assets are in [**county**] County, Texas].

5. Persons to be served by personal citation pursuant to section 1051.103 of the Texas Estates Code are [**specify names and addresses**].

6. Persons to receive notice by certified mail, return receipt requested, pursuant to section 1051.104 of the Texas Estates Code are [**specify names and addresses**].

7. Proposed Ward is currently incapacitated to care for [himself/herself], unable to manage [his/her] property and financial affairs, and without a legal guardian of [his/her] person and estate. It is necessary and will be advantageous for Proposed Ward to have a guardian of [his/her] person and estate appointed to manage, control, protect, and prevent waste of the assets of [his/her] estate and to provide for the care and attention of Proposed Ward.

8. Alternatives to guardianship and available supports and services to avoid the guardianship were considered. No alternatives or supports and services are available to Proposed Ward or are feasible to avoid the need for a guardianship.

9. Approximate values and descriptions of Proposed Ward's property are listed on Exhibit [**exhibit number/letter**], attached to and incorporated in this application.

10. The requested term of this guardianship is for such time as Proposed Ward's medical condition necessitates the guardianship.

11. The specific facts that require a guardian to be appointed and Applicant's interest in the appointment are [**insert facts supporting necessity for guardianship**].

12. Proposed Ward is totally incapacitated as set forth in the examination and report under section 1101.103 of the Texas Estates Code from Proposed Ward's treating physician,

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[**name of physician**], M.D., attached hereto and incorporated in this application as Exhibit [**exhibit number/letter**].

13. The Court should find Proposed Ward totally incapacitated for all purposes. Applicant requests that the Court's order of appointment include termination of the right of Proposed Ward to vote in a public election, to make personal decisions regarding [his/her] residence, and to hold or obtain a license to operate a motor vehicle under chapter 521 of the Texas Transportation Code.

14. No guardianship for Proposed Ward exists in this or any other state.

15. The name and address of the [person/institution] having care and custody of Proposed Ward and [who/which] is required by law to receive notice by certified mail, return receipt requested, is [**specify name and address**].

Select one of the following.

16. Applicant is not aware of any person or institution that holds a power of attorney signed by Proposed Ward.

Or

16. [**Name**] holds a [general/durable/limited] power of attorney signed by Proposed Ward.

If applicable, include a paragraph seeking to pay expenses, depending on local practice, for items such as a nursing home and request in proper form permission to pay them before inventory out of the principal and income of the estate. *See* Tex. Est. Code §§ 1101.152(b)(3), 1156.001.

17. The names and addresses, to the best of Applicant's knowledge, of Proposed Ward's spouse, parents, siblings, and children or, if none living, of Proposed Ward's next of kin who are adults are [**specify names and addresses**]. [**Include if applicable:** The ages of the

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siblings and children are [**specify names and ages**]. [**List any parent, child, spouse, or sibling who is deceased.**]]

Continue with the following.

18. Applicant brings this application in good faith and for just cause and requests payment of attorney's fees and expenses from Proposed Ward's estate as allowed by section 1155.054 of the Texas Estates Code.

Applicant prays that notice of this application be given as required by law; that Proposed Ward be personally served with citation to appear and answer this application; that [an attorney/a guardian/an attorney and guardian] ad litem be appointed to represent Proposed Ward; that on hearing Applicant be appointed guardian of the person and estate of Proposed Ward; that letters of guardianship be issued to [**name of applicant**] on [his/her] taking the oath and giving bond as required by law; [**include if applicable:** that Applicant be allowed to pay the expenses listed above;] and for all further relief to which Applicant may be entitled.

Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

VERIFICATION

STATE OF TEXAS)

COUNTY OF [**county**])

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BEFORE ME, the undersigned notary public, on this day personally appeared [**name**], who being by me duly sworn on [his/her] oath deposed and said that [he/she] has read the above and foregoing [**title of document**] [and exhibits] and that the matters contained therein are within [his/her] personal knowledge and are true and correct.

_____

SWORN TO AND SUBSCRIBED BEFORE ME on _____.

_____
Notary Public, State of Texas

Attach exhibit(s).

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Form 4-6

[Caption. See § 3 of the Introduction in this manual.]

Application to Transfer Guardianship from [name of county] County, Texas, Pursuant to Texas Estates Code Section 1023.003

[**Name of applicant**], Applicant, files this Application to transfer the guardianship in the above-entitled and -numbered cause from [**name of transferring county**] County to [**name of receiving county**] County, Texas, pursuant to section 1023.003 of the Texas Estates Code, and in support shows the following:

1. This Court adjudged [**name of ward**], Ward, incapacitated and appointed [**name of guardian**] to serve as the guardian of the person. The Court has been informed that Ward now resides at [**address, city, county**], County, Texas.

2. It is necessary and in the best interest of Ward that the proceedings in this cause be transferred from [**designation of transferring court**] Court in [**name of transferring county**] County, Texas, to the Court having probate jurisdiction in [**name of receiving county**] County, Texas, because Ward does not reside in [**name of transferring county**] County, Texas.

Applicant respectfully requests that on notice and hearing, this Application be granted and this case transferred to the Court having probate jurisdiction in [**name of receiving county**] County, Texas, there to continue as if it had been originally commenced in that Court and for such further relief as the Court may deem appropriate.

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Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Certificate of Service

I certify that a true copy of this [**title of document**] was served in accordance with rule 21a of the Texas Rules of Civil Procedure.

SIGNED on _____.

_____

[**Name of attorney**]

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Form 4-7

[Caption. See § 3 of the Introduction in this manual.]

Order Transferring Guardianship Proceeding from [name of county] County, Texas, Pursuant to Texas Estates Code Section 1023.003

On this day the Court considered the Application to Transfer Guardianship from [**name of transferring county**] County, Texas, to [**name of receiving county**] County, Texas, in the above-entitled and -numbered cause. The Court, having examined the Application and heard the evidence and argument of counsel, finds the following:

1. This Court has jurisdiction and venue of this cause.

2. Guardian, [**name of guardian**], has waived issuance and service of citation by waiver filed herein.

3. The sureties on the bond of the guardian have been cited by personal service or have waived such service.

4. Good cause for denying the Application has not been shown.

5. Transfer of the guardianship is in the best interest of Ward, [**name of ward**].

IT IS THEREFORE ORDERED that:

1. This guardianship is hereby transferred to the Court having probate jurisdiction of [**name of receiving county**] County, Texas.

2. The clerk of this Court shall record any previously unrecorded papers in this guardianship, make a complete, certified transcript of all orders, decrees, judgments and proceedings in this case and submit the transcript with the original

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papers to the [**designation of clerk**] clerk of [**name of receiving county**] County, Texas.

3. The existing bond of [**name of guardian**], Guardian, shall remain in effect until a new bond has been given to this Court or until a rider to the existing bond, noting this transfer, has been filed with this Court.

4. All costs associated with this proceeding are hereby waived.

SIGNED on _____.

_____
JUDGE PRESIDING

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Form 4-8

[Caption. See § 3 of the Introduction in this manual.]

Waiver of Citation

I, the undersigned, [**name**], [**relationship**] of [**name of ward**], an incapacitated person, hereby acknowledge and affirm that I have received a copy of the Application for Appointment of Guardian of [Person/Estate/Person and Estate] filed by [**name of applicant**]. I hereby waive personal service of the application and all notice to which I may be entitled by law to be given in this cause. I waive issuance, service, and return of citation in connection with all matters arising in connection with this cause and enter my appearance in this cause for all purposes. I agree that the application and this cause may be heard without further notice to me. I further represent that I am under no legal disability of any kind.

Include the following as applicable for relatives of the ward.

I understand that if a guardianship is created and I want the guardian to be obligated to notify me regarding developments and changes in the ward's health and residence as described in Texas Estates Code section 1151.056, I must elect in writing to receive such notice.

Continue with the following.

_____

[**Name**]
[**Address, city, state**]

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

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Form 4-9

Health Care Provider's Certificate of Medical Examination

This form was originally developed out of a collaborative project of the ABA Committee on Law and Aging, the American Psychological Association, and the National College of Probate Judges. The current version of the form has been reviewed and approved by the statutory probate judges of Texas.

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Health Care Provider's Certificate of Medical Examination

Revision September 2023

In the Matter of the Guardianship of
_____,
an Alleged Incapacitated Person

For Court Use Only
Court Assigned:_____

To the Physician, Psychologist, or Advanced Practice Registered Nurse

This form is to enable the Court to determine whether the individual identified above is incapacitated according to the legal definition (on page 3), and whether that person should have a guardian appointed.

1. General Information

Examining Health Care Provider's Name _____ Phone: (_____)_____
Office Address _____
_____

Select one: ☐ I am a physician currently licensed to practice in the State of Texas;
☐ I am a psychologist currently licensed in the State of Texas or certified by HHSC; or
☐ I am an advanced practice registered nurse acting under a physician's delegation authority and supervision in accordance with Chapter 157, Occupations Code.

☐ YES ☐ NO I have experience examining individuals with the physical or mental condition resulting in the Proposed Ward's incapacity; or
☐ YES ☐ NO I have an established patient-provider relationship with the Proposed Ward

Proposed Ward's Name _____
Date of Birth _____ Age_____ Gender ☐ M ☐ F
Proposed Ward's Current Residence: _____
_____

I last examined the Proposed Ward on _____, 20_____ at:
☐ a Medical facility ☐ the Proposed Ward's residence ☐ Other: _____

☐ YES ☐ NO The Proposed Ward is under my continuing treatment.
☐ YES ☐ NO Before the examination, I informed the Proposed Ward that communications with me would not be privileged.
☐ YES ☐ NO A mini-mental status exam was given. If "YES," please attach a copy.

2. Evaluation of the Proposed Ward's Physical Condition ***(required to be completed by physician or APRN only, not psychologist)***

Physical Diagnosis: _____
a. Severity: ☐ Mild ☐ Moderate ☐ Severe
b. Prognosis: _____
c. Treatment/Medical History: _____

3. Evaluation of the Proposed Ward's Mental Functioning

Mental Diagnosis: _____
a. Severity: ☐ Mild ☐ Moderate ☐ Severe
b. Prognosis: _____
c. Treatment/Medical History: _____

If the mental diagnosis includes dementia, answer the following:
☐ YES ☐ NO ---- It would be in the Proposed Ward's best interest to be placed in a secured facility for the elderly or a secured nursing facility that specializes in the care and treatment of people with dementia.
☐ YES ☐ NO ---- It would be in the Proposed Ward's best interest to be administered medications appropriate for the care and treatment of dementia.
☐ YES ☐ NO ---- The Proposed Ward currently has sufficient capacity to give informed consent to the administration of dementia medications.

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d. Possibility for Improvement:

☐ YES ☐ NO ---- Is improvement in the Proposed Ward's physical condition and mental functioning possible?

If "YES," after what period should the Proposed Ward be reevaluated to determine whether a guardianship continues to be necessary? _____

4. Cognitive Deficits

a. The Proposed Ward is oriented to the following (check all that apply):

☐ Person ☐ Time ☐ Place ☐ Situation

b. The Proposed Ward has a deficit in the following areas (check all areas in which Proposed Ward has a deficit):

☐--- Short-term memory
☐--- Long-term memory
☐--- Immediate recall
☐--- Understanding and communicating (verbally or otherwise)
☐--- Recognizing familiar objects and persons
☐--- Solve problems
☐--- Reasoning logically
☐--- Grasping abstract aspects of his or her situation
☐--- Interpreting idiomatic expressions or proverbs
☐--- Breaking down complex tasks down into simple steps and carrying them out

c. ☐ YES ☐ NO -- The Proposed Ward's periods of impairment from the deficits indicated above (if any) vary substantially in frequency, severity, or duration.

5. Ability to Make Responsible Decisions

Is the Proposed Ward able to initiate and make responsible decisions concerning himself or herself regarding the following:

☐ YES ☐ NO ---- Make complex business, managerial, and financial decisions
☐ YES ☐ NO ---- Manage a personal bank account
If "YES," should amount deposited in any such bank account be limited? ☐ YES ☐ NO
☐ YES ☐ NO ---- Safely operate a motor vehicle
☐ YES ☐ NO ---- Vote in a public election
☐ YES ☐ NO ---- Make decisions regarding marriage
☐ YES ☐ NO ---- Determine the Proposed Ward's own residence
☐ YES ☐ NO ---- Administer own medications on a daily basis
☐ YES ☐ NO ---- Attend to basic activities of daily living (ADLs) (e.g., bathing, grooming, dressing, walking, toileting) without supports and services
☐ YES ☐ NO ---- Attend to basic activities of daily living (ADLs) (e.g., bathing, grooming, dressing, walking, toileting) with supports and services
☐ YES ☐ NO ---- Attend to instrumental activities of daily living (e.g., shopping, cooking, traveling, cleaning)
☐ YES ☐ NO ---- Consent to medical and dental treatment at this point going forward
☐ YES ☐ NO ---- Consent to psychological and psychiatric treatment at this point going forward

6. Developmental Disability

☐ YES ☐ NO ---- Does the Proposed Ward have developmental disability?
If "NO," skip to number 7 below.
If "YES," answer the following question and look at the next page.

Is the disability a result of the following? (Check all that apply)

☐ YES ☐ NO ---- Intellectual Disability?
☐ YES ☐ NO ---- Autism?
☐ YES ☐ NO ---- Static Encephalopathy?
☐ YES ☐ NO ---- Cerebral Palsy?
☐ YES ☐ NO ---- Down Syndrome?
☐ YES ☐ NO ---- Other? Please explain _____

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Answer the questions in the "Determination of Intellectual Disability" box below only if both of the following are true:

(1) The basis of a proposed ward's alleged incapacity is intellectual disability.
and
(2) **You are making a "Determination of Intellectual Disability" in accordance with rules of the executive commissioner of the Health and Human Services Commission governing examinations of that kind**.

If you are not making such a determination, please skip to number 7 below.

DETERMINATION OF INTELLECTUAL DISABILITY

Among other requirements, a Determination of Intellectual Disability must be based on an interview with the Proposed Ward and on a professional assessment that includes the following:

1) a measure of the Proposed Ward's intellectual functioning;
2) a determination of the Proposed Ward's adaptive behavior level; and
3) evidence of origination during the Proposed Ward's developmental period.

You may use a previous assessment, social history, or relevant record from a school district, another physician, a psychologist, an authorized provider, a public agency, or a private agency if you determine that the previous assessment, social history, or record is valid.

1. Check the appropriate statement below. If neither statement is true, skip to number 7 below.
   - ☐ **I examined the proposed ward in accordance with rules of the executive commissioner of the Health and Human Services Commission governing Intellectual Disability examinations**, and my written findings and recommendations include a determination of an intellectual disability.
   - ☐ **I am updating or endorsing in writing a prior determination of an intellectual disability** for the proposed ward made in accordance with rules of the executive commissioner of the Health and Human Services Commission by a physician or psychologist licensed in this state or an authorized provider certified by the Health and Human Services Commission to perform the examination.
2. What is your assessment of the Proposed Ward's level of intellectual functioning and adaptive behavior?
   ☐ Mild (IQ of 50-55 to approx. 70) ☐ Moderate (IQ of 35-40 to 50-55)
   ☐ Severe (IQ of 20-25 to 35-40) ☐ Profound (IQ below 20-25)
3. ☐ Yes ☐ No ---- Is there evidence that the intellectual disability originated during the Proposed Ward's developmental period?

Note to attorneys: *If the above box is filled out because a determination of intellectual disability has been made in accordance with rules of the executive commissioner of the Health and Human Services Commission governing examinations of that kind, a Court may grant a guardianship application if (1) the examination is made not earlier than 24 months before the date of the hearing or (2) a prior determination of an intellectual disability was updated or endorsed in writing not earlier than 24 months before the hearing date. If a physician's or NPRN's diagnosis of intellectual disability is not made in accordance with rules of the executive commissioner — and the above box is not filled out — the court may grant a guardianship application only if the Physician's Certificate of Medical Examination is based on an examination the physician performed within 120 days of the date the application for guardianship was filed. See Texas Estates Code § 1101.104(a)(1).*

7. Definition of Incapacity

For purposes of this certificate of medical examination, the following definition of incapacity applies:

An "**Incapacitated Person**" is an adult who, because of a physical or mental condition, is substantially unable to: (a) provide food, clothing, or shelter for himself or herself; (b) care for the person's own physical health; or (c) manage the person's own financial affairs. Texas Estates Code § 1002.017.

8. Evaluation of Capacity

☐ YES ☐ NO ---- Based upon my last examination and observations of the Proposed Ward, it is my opinion that the Proposed Ward is incapacitated **according to the legal definition in section 1002.017 of the Texas Estates Code, set out in the box above.**

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If you indicated that the Proposed Ward is incapacitated, indicate the level of incapacity:

☐ **Total** ---------- The Proposed Ward is totally without capacity (1) to care for himself or herself and (2) to manage his or her property.

☐ **Partial** ---------- The Proposed Ward lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself or to manage his or her property.

Evaluation of Capacity (continued)

If you indicated the Proposed Ward's incapacity is partial, what specific powers or duties of the guardian should be limited if the Proposed Ward receives supports and services? _____

_____

_____

If you answered "NO" to all of the questions regarding decision-making in Section 5 (on page 2) and yet still believe the Proposed Ward is **partially** incapacitated, please explain: _____

_____

_____

If you answered "YES" to any of the questions regarding decision-making in Section 5 (on page 2) and yet still believe the Proposed Ward is **totally** incapacitated, please explain: _____

_____

_____

9. Ability to Attend Court Hearing

☐ YES ☐ NO ---- The Proposed Ward would be able to attend, understand, and participate in the hearing.

☐ YES ☐ NO ---- Because of the Proposed Ward's incapacities, I recommend that the Proposed Ward not appear at a Court hearing.

☐ YES ☐ NO ---- Does any current medication taken by the Proposed Ward affect the demeanor of the Proposed Ward or his or her ability to participate fully in a court proceeding?

10. What is the least restrictive placement that you consider is appropriate for the Proposed Ward:

☐ ---------- Nursing home level of care ☐--- Assisted Living Facility

☐ ---------- Group Home ☐--- Memory care unit

☐ ---------- Own Home or with family ☐--- Other _____

11. Additional Information of Benefit to the Court: If you have additional information concerning the Proposed Ward that you believe the Court should be aware of or other concerns about the Proposed Ward that are not included above, please explain on an additional page.

_____ _____

Physician/Psychologist/Advanced Practice Registered Nurse's Signature — Date

_____ _____

Physician/Psychologist/Advanced Practice Registered Nurse's Name Printed — License Number

If the examination was conducted by an Advanced Practicing Registered Nurse, the supervising physician shall sign below:

_____ _____

Supervising Physician's Signature — Date

_____ _____

Supervising Physician's Name Printed — License Number

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Form 4-10

[Caption. See § 3 of the Introduction in this manual.]

Order Appointing Permanent Guardian of Person and Estate with Full Authority

On [**date**] the Court heard the Application for Appointment of Permanent Guardian of Person and Estate of [**name of ward**], Ward, [a minor/an incapacitated person], filed in this proceeding by [**name of applicant**], Applicant, under the authority of sections 1101.001, 1101.151, and 1101.153 of the Texas Estates Code. Applicant appeared in person and through [his/her] attorney of record, [**name of attorney**]. The Court finds that [**name of ward**], Ward, appeared in person and through [his/her] attorney ad litem, [**name of attorney**].

After hearing all evidence and testimony of witnesses in support of the application, no contest or opposition having been asserted, the Court finds by clear and convincing evidence the following:

Ward is a totally incapacitated person, without capacity to care for [himself/herself], to manage [his/her] property, to operate a motor vehicle, to make personal decisions regarding [his/her] residence, or to vote in a public election.

It is in the best interests of Ward to have a permanent guardian of the person and estate with full authority.

Alternatives to guardianships and supports and services available to Ward that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible.

The rights of Ward will be protected by the appointment of a guardian.

The Court further finds by a preponderance of the evidence the following:

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This Court has venue and jurisdiction of this proceeding and of all necessary parties, that citation and notice have been given in the manner and for the length of time required by law, and that no one has contested the application.

Applicant is eligible to act as guardian, is entitled to be appointed as such, and is not disqualified by law.

Ward is a totally incapacitated person, as indicated by [his/her] mental and physical limitations and as evidenced by recurring acts within the preceding six months and continuing to this date.

Include the following if the order is for a minor.

The guardianship is not created for the primary purpose of enabling Ward to establish residency for enrollment in a school or school district in which Ward is not otherwise eligible for enrollment.

Continue with the following.

Applicant has acted in good faith in the filing and prosecution of the application for guardianship.

IT IS ORDERED that [**name of applicant**] is appointed permanent guardian of the person and estate with full authority of [**name of ward**] and shall exercise all the powers, rights, and duties, both general and specific, that are given to a guardian of the person and estate in title 3 of the Texas Estates Code, subject to further orders of this Court.

The powers granted to the guardian by this Order specifically include, but are not limited to—

1. the right to have physical possession of Ward and to establish Ward's legal domicile;

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2. the power to arrange for Ward's food and housing needs;

3. the power to apply for, to arrange, and to consent to any and all medical and dental care, including but not limited to medical tests, examinations, and the administration of medication, as required and needed by Ward;

4. the power to apply for, to arrange, and to consent to any and all psychological tests and evaluations that may be needed by Ward other than the inpatient psychiatric commitment of Ward;

5. the power to apply for and receive funds from state or federal government sources for Ward's benefit;

6. the power to apply for and secure governmental services for Ward;

7. the power to apply for and to secure an identification card for Ward;

8. the power to consent to the disclosure of Ward's confidential records; and

9. the power to execute all documents necessary to facilitate employment.

IT IS FURTHER ORDERED that [**name of ward**] will no longer have the right to—

1. vote in a public election;

2. own, possess, or purchase a firearm;

3. make personal decisions regarding residence; and

4. hold or obtain a license to operate a motor vehicle under chapter 521 of the Texas Transportation Code.

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IT IS FURTHER ORDERED that the clerk of the Court shall prepare and transmit an abstract of judgment for this proceeding to the [**name of county**] County Voter Registrar and to the Texas Department of Public Safety.

IT IS FURTHER ORDERED that the clerk of the Court shall report to the Texas Department of Public Safety pursuant to Texas Government Code sections 411.052 and 411.0521.

IT IS FURTHER ORDERED that [**name of applicant**] post a corporate surety bond in the amount of $[**amount**] in the time required by law.

IT IS FURTHER ORDERED that this order does not constitute authority for [**name of applicant**], the guardian of the person and estate, to act as guardian until [he/she] has qualified according to law by filing an oath with the [**name of county**] County clerk's office, posting the required corporate surety bond, and having the bond approved by the judge. On qualification as guardian, the [**name of county**] County clerk will issue letters of guardianship, with a certified copy of this order attached, that will be evidence to all concerned of [**name of applicant**]'s authority to act as guardian of the person and estate of Ward, and that the letters of guardianship shall expire one year and four months after the guardian's date of qualification unless renewed according to law.

IT IS FURTHER ORDERED that within twelve months from the date of qualification, and annually thereafter, [**name of applicant**] will submit to the Court an annual report of the person.

IT IS FURTHER ORDERED that pursuant to chapter 1156 of the Texas Estates Code, Guardian is allowed to expend a monthly allowance of $[**amount**] from the income or principal of Ward for Ward's care and maintenance and maintenance of Ward's property.

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IT IS FURTHER ORDERED that [**name of applicant**] will submit to the Court no later than thirty days after [his/her] qualification as guardian an inventory and appraisement pursuant to chapter 1154 of the Texas Estates Code.

IT IS FURTHER ORDERED that [**name of attorney**], attorney ad litem representing the interests of Ward, is awarded the amount of $[**amount**] for reasonable and necessary services as attorney ad litem, to be taxed as costs, and to be paid from funds held on deposit with the County clerk for such purpose, with any balance due to be paid by Ward's estate within thirty days of the date of this order. The attorney ad litem is hereby discharged from further responsibility in this case.

IT IS FURTHER ORDERED that the term of this guardianship shall be until Ward is restored to full capacity, dies, or until the Court determines this matter shall be terminated.

IT IS FURTHER ORDERED that the Court finds that [**name of applicant**] has brought this application in good faith and with just cause for the purpose of having a guardian appointed.

NOTICE TO ANY PEACE OFFICER OF THE STATE OF TEXAS: YOU MAY USE REASONABLE EFFORTS TO ENFORCE THE RIGHT OF A GUARDIAN OF THE PERSON OF A WARD TO HAVE PHYSICAL POSSESSION OF THE WARD OR TO ESTABLISH THE WARD'S LEGAL DOMICILE AS SPECIFIED IN THIS ORDER. A PEACE OFFICER WHO RELIES ON THE TERMS OF A COURT ORDER AND THE OFFICER'S AGENCY ARE ENTITLED TO THE APPLICABLE IMMUNITY AGAINST ANY CIVIL OR OTHER CLAIM REGARDING THE OFFICER'S GOOD FAITH ACTS PERFORMED IN THE SCOPE OF THE OFFICER'S DUTIES IN ENFORCING THE TERMS OF THIS ORDER THAT RELATE TO THE ABOVE-MENTIONED RIGHTS OF THE COURT-APPOINTED GUARDIAN OF THE PERSON OF THE WARD. ANY PERSON WHO KNOWINGLY PRESENTS FOR ENFORCEMENT AN ORDER THAT IS INVALID OR NO LONGER IN EFFECT COMMITS AN OFFENSE THAT MAY BE PUNISHABLE BY CONFINEMENT IN JAIL FOR AS LONG AS TWO YEARS AND A FINE OF AS MUCH AS $10,000.

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SIGNED on _____.

_____
JUDGE PRESIDING

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Form 4-11

[Caption. See § 3 of the Introduction in this manual.]

Order Appointing Permanent Guardian of Person with Full Authority

On [**date**] the Court heard the Application for Appointment of Permanent Guardian of Person of [**name of ward**], Ward, [a minor/an incapacitated person], filed in this proceeding by [**name of applicant**], Applicant, under the authority of sections 1101.001, 1101.151, and 1101.153 of the Texas Estates Code. Applicant appeared in person and through [his/her] attorney of record, [**name of attorney**]. The Court finds that [**name of ward**], Ward, appeared in person and through [his/her] attorney ad litem, [**name of attorney**].

After hearing all evidence and testimony of witnesses in support of the application, no contest or opposition having been asserted, the Court finds by clear and convincing evidence the following:

Ward is a totally incapacitated person, without capacity to care for [himself/herself], to manage [his/her] property, to operate a motor vehicle, to make personal decisions regarding [his/her] residence, or to vote in a public election.

It is in the best interests of Ward to have a permanent guardian of the person with full authority.

Alternatives to guardianships and supports and services available to Ward that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible.

The rights of Ward will be protected by the appointment of a guardian.

The Court further finds by a preponderance of the evidence the following:

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This Court has venue and jurisdiction of this proceeding and of all necessary parties, that citation and notice have been given in the manner and for the length of time required by law, and that no one has contested the application.

Applicant is eligible to act as guardian, is entitled to be appointed as such, and is not disqualified by law.

Ward is a totally incapacitated person, as indicated by [his/her] mental and physical limitations and as evidenced by recurring acts within the preceding six months and continuing to this date.

Include the following if the order is for a minor.

The guardianship is not created for the primary purpose of enabling Ward to establish residency for enrollment in a school or school district in which Ward is not otherwise eligible for enrollment.

Continue with the following.

Applicant has acted in good faith in the filing and prosecution of the application for guardianship.

IT IS ORDERED that [**name of applicant**] is appointed permanent guardian of the person with full authority of [**name of ward**] and shall exercise all the powers, rights, and duties, both general and specific, that are given to a guardian of the person in title 3 of the Texas Estates Code, subject to further orders of this Court.

The powers granted to the guardian by this order specifically include, but are not limited to—

1. the right to have physical possession of Ward and to establish Ward's legal domicile;

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2. the power to arrange for Ward's food and housing needs;

3. the power to apply for, to arrange, and to consent to any and all medical and dental care, including but not limited to medical tests, examinations, and the administration of medication, as required and needed by Ward;

4. the power to apply for, to arrange, and to consent to any and all psychological tests and evaluations that may be needed by Ward other than the inpatient psychiatric commitment of Ward;

5. the power to apply for and receive funds from state or federal government sources for Ward's benefit;

6. the power to apply for and secure governmental services for Ward;

7. the power to apply for and to secure an identification card for Ward;

8. the power to consent to the disclosure of Ward's confidential records; and

9. the power to execute all documents necessary to facilitate employment.

IT IS FURTHER ORDERED that [**name of ward**] will no longer have the right to—

1. vote in a public election;

2. own, possess, or purchase a firearm;

3. make personal decisions regarding residence; and

4. hold or obtain a license to operate a motor vehicle under chapter 521 of the Texas Transportation Code.

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IT IS FURTHER ORDERED that the clerk of the Court shall prepare and transmit an abstract of judgment for this proceeding to the [**name of county**] County Voter Registrar and to the Texas Department of Public Safety.

IT IS FURTHER ORDERED that the clerk of the Court shall report to the Texas Department of Public Safety pursuant to Texas Government Code sections 411.052 and 411.0521.

IT IS FURTHER ORDERED that [**name of applicant**] post a [corporate surety/cash] bond in the amount of $[**amount**] in the time required by law.

IT IS FURTHER ORDERED that this order does not constitute authority for [**name of applicant**], the guardian of the person, to act as guardian until [he/she] has qualified according to law by filing an oath with the [**name of county**] County clerk's office, posting the required [corporate surety/cash] bond, and having the bond approved by the judge. On qualification as guardian, the [**name of county**] County clerk will issue letters of guardianship, with a certified copy of this order attached, that will be evidence to all concerned of [**name of applicant**]'s authority to act as guardian of the person of Ward, and that the letters of guardianship shall expire one year and four months after the guardian's date of qualification unless renewed according to law.

IT IS FURTHER ORDERED that within twelve months from the date of qualification, and annually thereafter, [**name of applicant**] will submit to the Court an annual report of the person.

IT IS FURTHER ORDERED that [**name of attorney**], attorney ad litem representing the interests of Ward, is awarded the amount of $[**amount**] for reasonable and necessary services as attorney ad litem, to be taxed as costs, and to be paid from funds held on deposit with the County clerk for such purpose, with any balance due to be paid by Ward's estate within thirty

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days of the date of this order. The attorney ad litem is hereby discharged from further responsibility in this case.

IT IS FURTHER ORDERED that the term of this guardianship shall be until Ward is restored to full capacity, dies, or until the Court determines this matter shall be terminated.

IT IS FURTHER ORDERED that the Court finds that [**name of applicant**] has brought this application in good faith and with just cause for the purpose of having a guardian appointed.

NOTICE TO ANY PEACE OFFICER OF THE STATE OF TEXAS: YOU MAY USE REASONABLE EFFORTS TO ENFORCE THE RIGHT OF A GUARDIAN OF THE PERSON OF A WARD TO HAVE PHYSICAL POSSESSION OF THE WARD OR TO ESTABLISH THE WARD'S LEGAL DOMICILE AS SPECIFIED IN THIS ORDER. A PEACE OFFICER WHO RELIES ON THE TERMS OF A COURT ORDER AND THE OFFICER'S AGENCY ARE ENTITLED TO THE APPLICABLE IMMUNITY AGAINST ANY CIVIL OR OTHER CLAIM REGARDING THE OFFICER'S GOOD FAITH ACTS PERFORMED IN THE SCOPE OF THE OFFICER'S DUTIES IN ENFORCING THE TERMS OF THIS ORDER THAT RELATE TO THE ABOVE-MENTIONED RIGHTS OF THE COURT-APPOINTED GUARDIAN OF THE PERSON OF THE WARD. ANY PERSON WHO KNOWINGLY PRESENTS FOR ENFORCEMENT AN ORDER THAT IS INVALID OR NO LONGER IN EFFECT COMMITS AN OFFENSE THAT MAY BE PUNISHABLE BY CONFINEMENT IN JAIL FOR AS LONG AS TWO YEARS AND A FINE OF AS MUCH AS $10,000.

SIGNED on _____.

_____
JUDGE PRESIDING

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Form 4-12

This order for limited guardianship contemplates that there will be a limited guardianship over both person and estate. If the scope of the limited guardianship is limited to only the person or only the estate, the order should be revised accordingly.

[Caption. See § 3 of the Introduction in this manual.]

Order Appointing Permanent Guardian of Person and Estate with Limited Authority

On [**date**] the Court heard the Application for Appointment of Permanent Guardian of Person and Estate of [**name of ward**], Ward, [a minor/an incapacitated person], filed in this proceeding by [**name of applicant**], Applicant, under the authority of sections 1101.001 and 1101.152–.153 of the Texas Estates Code. Applicant appeared in person and through [his/her] attorney of record, [**name of attorney**]. The Court finds that [**name of ward**], Ward, appeared in person and through [his/her] attorney ad litem, [**name of attorney**].

After hearing all evidence and testimony of witnesses in support of the application, no contest or opposition having been asserted, the Court finds by clear and convincing evidence the following:

Ward is an incapacitated person, without capacity to—

Specify the following as applicable.

1. care for [himself/herself];

2. manage [his/her] property;

3. operate a motor vehicle;

4. make personal decisions regarding [his/her] residence; or

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5. vote in a public election.

Continue with the following.

It is in the best interests of Ward to have a permanent guardian of the person and estate with limited authority.

Alternatives to guardianships and supports and services available to Ward that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible.

The rights of Ward will be protected by the appointment of a guardian.

The Court further finds by a preponderance of the evidence the following:

This Court has venue and jurisdiction of this proceeding and of all necessary parties, that citation and notice have been given in the manner and for the length of time required by law, and that no one has contested the application.

Applicant is eligible to act as guardian, is entitled to be appointed as such, and is not disqualified by law.

Ward is an incapacitated person, as indicated by [his/her] mental and physical limitations and as evidenced by recurring acts within the preceding six months and continuing to this date.

Include the following if the order is for a minor.

The guardianship is not created for the primary purpose of enabling Ward to establish residency for enrollment in a school or school district in which Ward is not otherwise eligible for enrollment.

Continue with the following.

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Applicant has acted in good faith in the filing and prosecution of the application for guardianship.

IT IS ORDERED that [**name of applicant**] is appointed permanent guardian of the person and estate with limited authority of [**name of ward**] and shall exercise all the powers, rights, and duties, both general and specific, that are given to a guardian of the person and estate in title 3 of the Texas Estates Code, subject to further orders of this Court.

The specific powers granted to the guardian by this Order are limited to—

Specify the powers granted. The following are examples.

1. the right to have physical possession of Ward and to establish Ward's legal domicile;

2. the power to arrange for Ward's food and housing needs;

3. the power to apply for, to arrange, and to consent to any and all medical and dental care, including but not limited to medical tests, examinations, and the administration of medication, as required and needed by Ward;

4. the power to apply for, to arrange, and to consent to any and all psychological tests and evaluations that may be needed by Ward other than the inpatient psychiatric commitment of Ward;

5. the power to apply for and receive funds from state or federal government sources for Ward's benefit;

6. the power to apply for and secure governmental services for Ward;

7. the power to apply for and to secure an identification card for Ward;

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8. the power to consent to the disclosure of Ward's confidential records; and

9. the power to execute all documents necessary to facilitate employment.

Continue with the following.

IT IS FURTHER ORDERED that [**name of ward**] will no longer have the right to—

Specify the following loss of rights as applicable.

1. vote in a public election;

2. own, possess, or purchase a firearm;

3. make personal decisions regarding residence; and

4. hold or obtain a license to operate a motor vehicle under chapter 521 of the Texas Transportation Code.

Continue with the following.

IT IS FURTHER ORDERED that [**name of ward**] retains the right to—

Specify the following rights retained as applicable.

1. vote in a public election;

2. own, possess, or purchase a firearm;

3. make personal decisions regarding residence; and

4. hold or obtain a license to operate a motor vehicle under chapter 521 of the Texas Transportation Code.

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Specify any other rights retained as applicable, indicating if necessary, if any of the specific rights are subject to supports and services.

Continue with the following.

IT IS FURTHER ORDERED that the clerk of the Court shall prepare and transmit an abstract of judgment for this proceeding to the [**name of county**] County Voter Registrar and to the Texas Department of Public Safety.

IT IS FURTHER ORDERED that the clerk of the Court shall report to the Texas Department of Public Safety pursuant to Texas Government Code sections 411.052 and 411.0521.

IT IS FURTHER ORDERED that [**name of applicant**] post a corporate surety bond in the amount of $[**amount**] in the time required by law.

IT IS FURTHER ORDERED that this order does not constitute authority for [**name of applicant**], the guardian of the person and estate, to act as guardian until [he/she] has qualified according to law by filing an oath with the [**name of county**] County clerk's office, posting the required corporate surety bond, and having the bond approved by the judge. On qualification as guardian, the [**name of county**] County clerk will issue letters of guardianship, with a certified copy of this order attached, that will be evidence to all concerned of [**name of applicant**]'s authority to act as guardian of the person and estate of Ward, and that the letters of guardianship shall expire one year and four months after the guardian's date of qualification unless renewed according to law.

IT IS FURTHER ORDERED that within twelve months from the date of qualification, and annually thereafter, [**name of applicant**] will submit to the Court an annual report of the person.

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IT IS FURTHER ORDERED that pursuant to chapter 1156 of the Texas Estates Code, Guardian is allowed to expend a monthly allowance of $[**amount**] from the income or principal of [**name of ward**] for Ward's care and maintenance and maintenance of Ward's property.

IT IS FURTHER ORDERED that [**name of applicant**] will submit to the Court no later than thirty days after qualification as guardian an inventory and appraisement pursuant to chapter 1154 of the Texas Estates Code.

IT IS FURTHER ORDERED that [**name of attorney**], attorney ad litem representing the interests of Ward, is awarded the amount of $[**amount**] for reasonable and necessary services as attorney ad litem, to be taxed as costs, and to be paid from funds held on deposit with the County clerk for such purpose, with any balance due to be paid by Ward's estate within thirty days of the date of this order. The attorney ad litem is hereby discharged from further responsibility in this case.

IT IS FURTHER ORDERED that the term of this guardianship shall be until Ward is restored to full capacity, dies, or until the Court determines this matter shall be terminated.

IT IS FURTHER ORDERED that the Court finds that [**name of applicant**] has brought this application in good faith and with just cause for the purpose of having a guardian appointed.

Include the following if order includes the right of the guardian to have possession of ward or establish the ward's domicile.

NOTICE TO ANY PEACE OFFICER OF THE STATE OF TEXAS: YOU MAY USE REASONABLE EFFORTS TO ENFORCE THE RIGHT OF A GUARDIAN OF THE PERSON OF A WARD TO HAVE PHYSICAL POSSESSION OF THE WARD OR TO ESTABLISH THE WARD'S LEGAL DOMICILE AS SPECIFIED IN THIS ORDER. A PEACE OFFICER WHO RELIES ON THE TERMS OF A COURT ORDER AND THE OFFICER'S AGENCY ARE ENTITLED TO THE APPLICABLE IMMUNITY AGAINST ANY CIVIL OR

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OTHER CLAIM REGARDING THE OFFICER'S GOOD FAITH ACTS PERFORMED IN THE SCOPE OF THE OFFICER'S DUTIES IN ENFORCING THE TERMS OF THIS ORDER THAT RELATE TO THE ABOVE-MENTIONED RIGHTS OF THE COURT-APPOINTED GUARDIAN OF THE PERSON OF THE WARD. ANY PERSON WHO KNOWINGLY PRESENTS FOR ENFORCEMENT AN ORDER THAT IS INVALID OR NO LONGER IN EFFECT COMMITS AN OFFENSE THAT MAY BE PUNISHABLE BY CONFINEMENT IN JAIL FOR AS LONG AS TWO YEARS AND A FINE OF AS MUCH AS $10,000.

Continue with the following.

SIGNED on _____.

_____
JUDGE PRESIDING

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Form 4-13

The Texas Estates Code does not require proof of facts, although some courts require the filing of written proof at the hearing appointing the guardian.

Proof of Facts
[Minor]

On this day the undersigned affiant appeared personally in open court and, after being duly sworn, stated under oath:

"My name is [**name of affiant**], and my address is [**address, city, state**].

"[**Name**] is an incapacitated person in that [he/she] is a minor. [He/She] is a [male/female], [**age**] years old, a resident of this county, and without capacity by virtue of minority.

"Proposed Ward was not present because it would not be in the best interests of Proposed Ward to attend the hearing, and Proposed Ward would not be able to materially participate in the hearing at this time.

"The proposed guardian, [**name of proposed guardian**], is a suitable person to be appointed as guardian and is not disqualified by law from accepting letters of guardianship or from serving as such and is entitled to such letters because proposed guardian—

1. has never been declared by the court to be an incapacitated person. Tex. Est. Code § 1104.351(1).

2. is capable of properly and prudently managing and controlling the person of Proposed Ward. Tex. Est. Code § 1104.351(2).

3. is not unsuitable to be appointed guardian. Tex. Est. Code § 1104.352.

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4. has not engaged in conduct in a notoriously bad manner. Tex. Est. Code § 1104.353(a).

5. has never been convicted of any sexual offense, including sexual assault, aggravated sexual assault, and prohibited sexual conduct; aggravated assault; injury to a child, elderly individual, or disabled individual; abandoning or endangering a child; terroristic threat; or continuous violence against the family of the ward or incapacitated person. Tex. Est. Code § 1104.353(b).

6. is not a party or a person whose parent is a party to a lawsuit concerning the welfare of Proposed Ward; is not indebted to Proposed Ward; and does not assert a claim adverse to Proposed Ward or Proposed Ward's property. Tex. Est. Code § 1104.354.

7. is not disqualified in a declaration under Texas Estates Code section 1104.202(b). Tex. Est. Code § 1104.355.

8. is (a) a resident of the state of Texas or (b) a resident of the state of [**name of state**] and has filed an Appointment of Resident Agent. Tex. Est. Code § 1104.357.

9. is not subject to a protective order for family violence. Tex. Est. Code § 1104.358.

"Alternatives to guardianship and supports and services to avoid the guardianship were considered, but none were available or feasible to avoid the need for a guardianship. [**Include additional details and list specific alternatives considered, if appropriate.**]

"No guardianships of any kind exist for Proposed Ward in this or any other state.

"This guardianship is not sought for the purpose of establishing residency for school purposes only."

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_____

[**Name of affiant**]
[**Address, city, state**]

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

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Form 4-14

The Texas Estates Code does not require proof of facts, although some courts require the filing of written proof at the hearing appointing the guardian.

Proof of Facts
[Adult]

On this day the undersigned affiant appeared personally in open court and, after being duly sworn, stated under oath:

"My name is [**name of affiant**], and my address is [**address, city, state**].

"[**Name**] is an incapacitated person as defined in section 1002.017 of the Texas Estates Code. [He/She] is an adult [male/female], [**age**] years old, a resident of this county, and totally without capacity.

"Proposed Ward was not present because it would not be in the best interests of Proposed Ward to attend the hearing, and Proposed Ward would not be able to materially participate in the hearing at this time.

"The proposed guardian, [**name of proposed guardian**], is a suitable person to be appointed as guardian and is not disqualified by law from accepting letters of guardianship or from serving as such and is entitled to such letters because proposed guardian—

1. has never been declared by the court to be an incapacitated person. Tex. Est. Code § 1104.351(1).

2. is capable of properly and prudently managing and controlling the person of Proposed Ward. Tex. Est. Code § 1104.351(2).

3. is not unsuitable to be appointed guardian. Tex. Est. Code § 1104.352.

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4. has not engaged in conduct in a notoriously bad manner. Tex. Est. Code § 1104.353(a).

5. has never been convicted of any sexual offense, including sexual assault, aggravated sexual assault, and prohibited sexual conduct; aggravated assault; injury to a child, elderly individual, or disabled individual; abandoning or endangering a child; terroristic threat; or continuous violence against the family of the ward or incapacitated person. Tex. Est. Code § 1104.353(b).

6. is not a party or a person whose parent is a party to a lawsuit concerning the welfare of Proposed Ward; is not indebted to Proposed Ward; and does not assert a claim adverse to Proposed Ward or Proposed Ward's property. Tex. Est. Code § 1104.354.

7. is not disqualified in a declaration under Texas Estates Code section 1104.202(b). Tex. Est. Code § 1104.355.

8. is (a) a resident of the state of Texas or (b) a resident of the state of [**name of state**] and has filed an Appointment of Resident Agent. Tex. Est. Code § 1104.357.

9. is not subject to a protective order for family violence. Tex. Est. Code § 1104.358.

"Alternatives to guardianship and supports and services to avoid the guardianship were considered, but none were available or feasible to avoid the need for a guardianship. [**Include additional details and list specific alternatives considered, if appropriate.**]

"No guardianships of any kind exist for the proposed ward in this or any other state."

_____

[**Name of affiant**]
[**Address, city, state**]

SIGNED under oath before me on _____.

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_____

Notary Public, State of Texas

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Form 4-15

Ward's Bill of Rights

(Tex. Est. Code § 1151.351)

A ward has all the rights, benefits, responsibilities, and privileges granted by the constitution and laws of this state and the United States, except where specifically limited by a court-ordered guardianship or where otherwise lawfully restricted.

Unless limited by a court or otherwise restricted by law, a ward is authorized to the following:

1. to have a copy of the guardianship order and letters of guardianship and contact information for the probate court that issued the order and letters;
2. to have a guardianship that encourages the development or maintenance of maximum self-reliance and independence in the ward with the eventual goal, if possible, of self-sufficiency;
3. to be treated with respect, consideration, and recognition of the ward's dignity and individuality;
4. to reside and receive support services in the most integrated setting, including home-based or other community-based settings, as required by Title II of the Americans with Disabilities Act (42 U.S.C. Section 12131 et seq.);
5. to consideration of the ward's current and previously stated personal preferences, desires, medical and psychiatric treatment preferences, religious beliefs, living arrangements, and other preferences and opinions;
6. to financial self-determination for all public benefits after essential living expenses and health needs are met and to have access to a monthly personal allowance;
7. to receive timely and appropriate health care and medical treatment that does not violate the ward's rights granted by the constitution and laws of this state and the United States;
8. to exercise full control of all aspects of life not specifically granted by the court to the guardian;
9. to control the ward's personal environment based on the ward's preferences;
10. to complain or raise concerns regarding the guardian or guardianship to the court, including living arrangements, retaliation by the guardian, conflicts of interest between the guardian and service providers, or a violation of any rights under this section;
11. to receive notice in the ward's native language, or preferred mode of communication, and in a manner accessible to the ward, of a court proceeding to continue, modify, or terminate the guardianship and the opportunity to appear before the court to express the ward's preferences and concerns regarding whether the guardianship should be continued, modified, or terminated;
12. to have a court investigator or guardian ad litem appointed by the court to investigate a complaint received by the court from the ward or any person about the guardianship;
13. to participate in social, religious, and recreational activities, training, employment, education, habilitation, and rehabilitation of the ward's choice in the most integrated setting;
14. to self-determination in the substantial maintenance, disposition, and management of real and personal property after essential living expenses and health needs are met, including the right to receive notice and object about the substantial maintenance, disposition, or management of clothing, furniture, vehicles, and other personal effects;
15. to personal privacy and confidentiality in personal matters, subject to state and federal law;
16. to unimpeded, private, and uncensored communication and visitation with persons of the ward's choice, except that if the guardian determines that certain communication or visitation causes substantial harm to the ward:
    A. the guardian may limit, supervise, or restrict communication or visitation, but only to the extent necessary to protect the ward from substantial harm; and
    B. the ward may request a hearing to remove any restrictions on communication or visitation imposed by the guardian under Paragraph (A);
17. to petition the court and retain counsel of the ward's choice who holds a certificate required by Subchapter E, Chapter 1054, to represent the ward's interest for capacity restoration, modification of the guardianship, the appointment of a different guardian, or for other appropriate relief under this subchapter, including a transition to a supported decision-making agreement, except as limited by Section 1054.006;
18. to vote in a public election, marry, and retain a license to operate a motor vehicle, unless restricted by the court;
19. to personal visits from the guardian or the guardian's designee at least once every three months, but more often, if necessary, unless the court orders otherwise;
20. to be informed of the name, address, phone number, and purpose of Disability Rights Texas, an organization whose mission is to protect the rights of, and advocate for, persons with disabilities, and to communicate and meet with representatives of that organization;
21. to be informed of the name, address, phone number, and purpose of an independent living center, an area agency on aging, an aging and disability resource center, and the local mental health and intellectual and developmental disability center, and to communicate and meet with representatives from these agencies and organizations;
22. to be informed of the name, address, phone number, and purpose of the Judicial Branch Certification Commission and the procedure for filing a complaint against a certified guardian;
23. to contact the Department of Family and Protective Services to report abuse, neglect, exploitation, or violation of personal rights without fear of punishment, interference, coercion, or retaliation;
24. to have the guardian, on appointment and on annual renewal of the guardianship, explain the rights delineated in this subsection in the ward's native language, or preferred mode of communication, and in a manner accessible to the ward; and
25. to make decisions related to sexual assault crisis services, including consenting to a forensic medical examination and treatment, authorizing the collection of forensic evidence, consenting to the release of evidence contained in an evidence collection kit and disclosure of related confidential information, and receiving counseling and other support services.

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Form 4-16

[Caption. See § 3 of the Introduction in this manual.]

Order Approving Bond

On [**date**] the Court considered the bond of [**name of applicant**] for the appointment as guardian of the [person/estate/person and estate] of [**name of ward**]. The Court finds the bond to be in compliance with chapter 1105 of the Texas Estates Code.

IT IS THEREFORE ORDERED that the bond presented by [**name of applicant**] in the amount of $[**amount**] is hereby approved.

SIGNED on _____.

_____
JUDGE PRESIDING

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Form 4-17

Guardian's Bond and Affidavit of Sureties

I, [**name of guardian**], as principal, and [**name of surety**] and [**name of surety**], as sureties, are held and firmly bound to the [probate] judge of [Probate Court/County Court/County Court at Law] number [**number**] of [**county**] County, Texas, and successors in office in the sum of $[**amount**], conditioned that the above-bound [**name of guardian**], who has been appointed guardian of [**name of ward**], shall perform all the duties required of [him/her] under the appointment.

SIGNED on [**date**].

_____
[**Name**], Principal

_____
[**Name**], Surety

_____
[**Name**], Surety

We, each of us, individually and severally, [**name**] and [**name**], do swear that we each own real or personal property within this state over and above that exempt from forced sale by law and the constitution of Texas, after payment of all our debts of every description, whether individual or security debts, and after satisfying all our encumbrances that are known to us, and that we reside in the county of [**county**] Texas, and have property in [**county**] County, Texas, liable to execution worth at least double the penalty of the above bond.

_____
[**Name of surety**]
[**Address, city, state**]

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_____
[**Name of surety**]
[**Address, city, state**]

SIGNED under oath before me on _____.

_____
Notary Public, State of Texas

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Form 4-18

Oath

I, [**name of applicant**], do solemnly swear that I will faithfully discharge the duties of guardian of the [person/estate/person and estate] of [**name of proposed ward**] according to law.

_____
[**Name of applicant**]
[**Address, city, state**]

SIGNED under oath before me on _____.

_____
Notary Public, State of Texas

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Chapter 5

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Chapter 5

Guardianships of Veterans and the VA Fiduciary Program

§ 5.1 Introduction

When administering a guardianship estate for an incapacitated veteran or dependent of a veteran who receives funds from the Department of Veterans Affairs (VA), the guardian should be aware of the authority and right of the VA to determine certain outcomes related to VA benefits in guardianship matters. Additionally, recent statutory and rule changes have elevated the importance of community supports and services and alternatives to guardianship. These have resulted in a reduced focus on state guardianship proceedings when addressing the needs of veterans who receive VA benefits.

§ 5.2 Authority

The authority of the VA is generally stated in 38 C.F.R. §§ 13.10–.600 [hereinafter Rule 38], which includes citations to the applicable United States Code sections.

The relationship between the VA and state guardianship courts was altered significantly when part 13 of title 38 of the Code of Federal Regulations was substantially modified effective August 13, 2018. *See generally* **www.federalregister.gov/documents/2018/07/13/2018-14856/fiduciary-activities**. The summary to the rule changes states:

> The amendments will update and reorganize regulations consistent with current law, VA policies and procedures, and VA's reorganization of its fiduciary activities. They will also clarify the rights of beneficiaries in the program, and the roles of VA and fiduciaries in ensuring that VA benefits are managed in the best interest of beneficiaries and their dependents. The amendments to this rulemaking are mostly mandatory to comply with the law. They are also in line with the law's goals to streamline and modernize the fiduciary program and process. These amendments by Congress, reduce unnecessary regulations, streamline and modernize processes, and improve services for Veterans.

83 Fed. Reg. 32,716 (Aug. 13, 2018). The rationale for the VA rule changes—and the federal government's preemption of state law—was articulated as follows:

> State laws often provide helpful guidance; however, under the Supremacy Clause of the Constitution, Federal law is controlling. See U.S. Const. art. VI, cl 2; *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 372–73 (2000). To the extent that a dispute arises between Federal and state law, Federal law establishing and governing VA's fiduciary program as codified in parts 55 and 61 of title 38 of the United States Code, as well as in regulations implementing those statutes, controls. *See* VAOPGC 3-86 (10-28-85) (citing the Supremacy Clause and holding that a state court lacks jurisdiction to override VA's authority in making determinations affecting payment of an incompetent veteran's VA benefits to a VA-appointed fiduciary).

83 Fed. Reg. 32,717–18. The Federal Register advises that questions about the revised VA regulations may be directed to Pension and Fiduciary Service, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, telephone 202-632-8863.

Practice Pointer: These changes to Rule 38 appear to render a number of statutory provisions in the Texas Estates Code impractical, at least as they relate to current VA practices and the application of regulations in situations with veterans who receive VA benefits and that have diminished capacity. The VA is no longer requiring the institution of a state guardianship proceeding as a prerequisite for paying benefits to a veteran suffering from a mental disability; rather, the VA has been utilizing the VA fiduciary program (see section 5.6 below) to designate a federal fiduciary to receive, administer, and account for such benefits. Existing cases may continue to be governed by past practice and existing provisions in the Estates Code; however, some (but not all) probate and county courts have authorized the closing of existing guardianships of the estate of disabled veterans and have allowed the estate to be turned over to a federal fiduciary. Practitioners should carefully analyze the intersection of the Estates Code and Rule 38 in determining how VA benefits will be managed within the context of existing and future guardianship proceedings. Because sections of the Estates Code continue to require guardians of the estate to comply with what are becoming outdated statutory mandates regarding VA benefits, those provisions are referenced in this chapter, although they will likely become increasingly irrelevant to VA practice.

§ 5.3 Guardianship/VA Conflicts

The federal government's assertion of the Supremacy Clause of the U.S. Constitution through the revised federal regulations in VA Rule 38 appears to render most provisions of the Texas Estates Code related to new proceedings involving wards receiving VA benefits ineffective, if not totally irrelevant. As a result, the past conflict between state courts' efforts to protect VA beneficiaries and the increasing assertion of federal authority over veterans benefits seems now to be mostly a historical footnote because of the total eclipsing of this area by the federal government.

Practitioners and courts seeking to protect the interests of recipients of VA benefits with diminished capacity must recognize the superior right of the VA-appointed fiduciary to manage those funds.

At a minimum, it seems likely that there will be fewer guardianships of the estate for veterans whose only asset is VA income; however, there may well be an increase in the number of guardianships of the person of veterans in need of assistance. Guardianships of the estate should not include VA benefits as part of the guardianship estate, although the guardian of the estate may separately serve as fiduciary for VA benefits. Accountings in such guardianships will almost certainly not include VA benefits, as they will be solely managed by VA fiduciaries.

If a veteran is in need of protection by the court, and the VA may be providing little or no oversight over the veteran and the veteran's resources, the court-appointed guardian or advocate will likely need to be prepared, if necessary, to challenge the appointment and actions of the federal fiduciary via the VA administrative appeals process. Local courts and practitioners may also be presented with facts revealing a veteran's substandard living conditions as well as abuse, neglect, or exploitation of the veteran. As these regulations are implemented, Texas courts and legal practitioners will be faced with the dilemma of determining how best to protect vulnerable veterans while working around the VA fiduciary "carve-out" created by Rule 38.

§ 5.4 Benefits

Numerous benefits and programs are available to veterans and their dependents, including disability compensation and benefits, allowance for dependents, pensions, education and training, vocational rehabilitation, home loan guarantees, insurance programs, burial benefits, survivor benefits, and health-care benefits.

Benefits from the VA are exempt from claims of creditors and state and local taxing authorities either before or after receipt. 38 U.S.C. § 5301(a); 38 C.F.R. § 13.270. However, any portion of VA benefits paid in lieu of military retirement pay is subject to garnishment for child support. 42 U.S.C. § 659.

§ 5.5 Duty of VA

The VA is charged with the duty to oversee the use of funds paid for a veteran's benefit or to a veteran's dependent to ensure the funds are properly used. 38 U.S.C. § 5502; 38 C.F.R. §§ 13.10–.100.

§ 5.6 VA Fiduciary Program

On August 13, 2018, new rules affecting the VA fiduciary program became effective under 38 C.F.R. §§ 13.10–.600. A thorough review of the new VA regulations should be undertaken in any legal situation involving a person under guardianship who may be receiving VA benefits or may be a beneficiary of the VA fiduciary program. *See generally* **www.federalregister.gov/documents/2018/07/13/2018-14856/fiduciary-activities**. The purpose of the VA fiduciary program is to protect certain VA beneficiaries who, as a result of injury, disease, or infirmities of advanced age or by reason of being less than the age of majority, cannot manage their VA benefits. Under this program, the VA is responsible for overseeing these vulnerable beneficiaries to ensure their well-being and appoints and oversees fiduciaries who manage the benefits of these beneficiaries. 38 C.F.R. § 13.10(a). This program is analogous to the appointment of a representative payee by the Social Security Administration. Section 13.20 of title 38 of the Code of Federal Regulations provides definitions for key terms such as *beneficiary*, *dependent*, and *fiduciary*.

§ 5.7 Designation of VA Fiduciary

A VA beneficiary generally has the right to manage his own VA benefits. However, the VA may determine that the beneficiary is unable to manage his benefits without VA supervision or the assistance of a fiduciary because of the beneficiary's injury, disease, or infirmities of advanced age or by reason of being less than the age of majority. A court with jurisdiction may also determine that a beneficiary is unable to manage his financial affairs. Under any of these circumstances, the VA is responsible for applying the provisions of this regulation to ensure that VA benefits are being used to maintain the well-being of the beneficiary and the beneficiary's dependents. 38 C.F.R. § 13.30(a).

The VA Hub manager, who has the authority to oversee the activities of a VA Fiduciary Hub, is responsible for appointing a fiduciary in appropriate cases according to a hierarchy of preference. An individual or entity appointed by a court ranks eighth out of ten in the order of preference. 38 C.F.R. § 13.100(a), (e). A court appointment of a legal guardian for a VA beneficiary results in a presumption that the beneficiary lacks capacity to state a preference of a fiduciary, resulting in application of the priority for appointment. 38 C.F.R. § 13.100(e)(1). The Hub manager will appoint a fiduciary for a beneficiary who has been determined by a court with jurisdiction as being unable to manage his or her financial affairs. 38 C.F.R. § 13.100(a)(2). A person or entity who has been removed as legal guardian by a state court for misconduct or who has been adjudicated by a court as being unable to manage his own federal or state benefits is among those who are barred from serving as a VA fiduciary. 38 C.F.R. § 13.130(b).

Even when a state court guardianship already exists, the VA will sometimes appoint a federal fiduciary to receive disability funds on behalf of the veteran. The federal fiduciary may or may not be the same person as the existing guardian. In those cir-

cumstances when the court declines to close a guardianship pursuant to the appointment of a VA fiduciary, the guardian will have to coordinate with the federal fiduciary to ensure that the veteran's bills and expenses are being handled appropriately.

§ 5.8 VA Fiduciary Accountings

If the VA fiduciary is also appointed by a court, the fiduciary must annually provide a certified copy of the accountings provided to the court to the Fiduciary Hub with jurisdiction or facilitate the Hub's receipt of such accountings. 38 C.F.R. § 13.140(d)(1). In addition, the VA fiduciary must submit annual accountings to the VA on a prescribed form (which essentially contains the same information as the annual account filed with the court). Section 13.280 outlines the form for VA accountings to the Fiduciary Hub. 38 C.F.R. § 13.280.

§ 5.9 VA Fiduciary Fees

The Hub manager must approve the VA fiduciary's fee, and the fee cannot exceed 4 percent of the monthly VA benefit. 38 C.F.R. § 13.220(b)(1).

Practice Pointer: VA Rule 38 changes the definition of "fiduciary" under VA standards and no longer recognizes the authority of a guardianship court to approve guardian fees to be paid from VA funds in excess of 4 percent of the VA income (even if the 5 percent "safe harbor" calculation under the Texas Estates Code results in a greater fee). Under the preemption doctrine, the VA has ultimate authority over the payment of fees from VA income. Previously, the VA could allow a professional guardian to be fully compensated with a court order. It remains unclear whether an attorney acting as a guardian may submit an itemized statement for legal services rendered in lieu of the guardian's fee, even if such fees exceed the 4 percent calculation approved for VA fiduciaries.

§ 5.10 When Guardianship of Veteran May Be Necessary

A veteran with a VA fiduciary may still require the appointment of a guardian because (1) the fiduciary lacks legal standing to deal with real property and assets other than VA funds, (2) the fiduciary does not have legal authority to file suit on behalf of the veteran, and (3) a guardianship court may provide enhanced safeguards to protect the veteran or the veteran's funds against neglect, misappropriation, or mismanagement by the fiduciary or other third parties. The personal affairs of the veteran will likely be better managed by a court-appointed guardian of the person, as a fiduciary appointment is not designed with the central focus of providing protection for the personal affairs of the veteran.

§ 5.11 Alternatives to Guardianship

The "appointment of a representative payee to manage public benefits" is listed as one of the "alternatives to guardianship" under Texas Estates Code section 1002.0015(4), and the appointment of a fiduciary by the VA should be considered an alternative to guardianship. The VA fiduciary option would also be considered an available resource to help an individual with certain needs pursuant to Tex. Est. Code § 1002.031.

A guardianship applicant should consider VA benefits when complying with Estates Code section 1101.001(b)(3–a) and (3–b), which requires that an application must state whether alternatives to guardianship and available supports and services to avoid guardianship were considered and whether any alternatives to guardianship and supports and services available to the proposed ward considered are feasible and would avoid the need for guardianship. Tex. Est. Code § 1101.001(b)(3–a), (b)(3–b).

VA benefits should also be considered when complying with the requirements of Estates Code section 1101.101(a)(1) regarding the findings and proof required in the order appointing guardian, which include the mandate of the court to find by clear and convincing evidence that alternatives to guardianship that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible and that supports and services available to the proposed ward that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible. Tex. Est. Code § 1101.101(a)(1)(D), (a)(1)(E).

The VA encourages legal planning that would avoid the need for guardianship and avoid court intervention into the personal and financial affairs of a veteran. The VA promotes execution of the VA Advance Directive: Durable Power of Attorney for Health Care and Living Will, which allows the veteran to state preferences for health care. See form 5-1 in this chapter, a form VA advance directive, available at **www.va.gov/find-forms/about-form-10-0137/**. The instructions to the directive provide that it can serve as a guide for those who will be making decisions for the veteran in the event the veteran is no longer able to do so.

§ 5.12 Inception of Guardianship Proceeding by VA

Texas law continues to provide that the VA may determine that the appointment of a guardian of the estate is needed as a condition precedent for payment of VA benefits. In such cases a certificate executed by the VA's designee stating that a guardianship is necessary is prima facie evidence of that fact in lieu of the medical report or evaluation generally required. *See* Tex. Est. Code § 1101.106. See forms 5-2 and 5-3 in this chapter. Despite the provisions of section 1101.106 of the Texas Estates Code, some courts still require the same medical capacity assessment letter or certificate required for other incapacitated adults. The VA medical center in which the veteran receives treatment has typically provided this letter or certificate in the past. But this provision may likely become increasingly obsolete as the VA appoints VA fiduciaries to manage VA benefits and no longer routinely makes referrals to Texas courts for guardianships on veterans.

§ 5.13 Inception of Guardianship Proceeding on Veteran—Notice to VA

Although not required by the Texas Estates Code, an applicant in a guardianship proceeding on a veteran receiving veterans benefits should contact and provide notice to the VA Fiduciary Hub before, or shortly after, the initiation of the guardianship. The VA will be responsible for appointing a fiduciary to manage the veteran's benefits; however, the practitioner and the court should ensure that the veteran's benefits are being managed by a VA fiduciary.

§ 5.14 Powers, Duties, and Obligations of Guardian of Person Entitled to Government Funds

Section 1151.251(a) of the Texas Estates Code continues to provide that, in the event the court has appointed a guardian of a person for whom it is necessary to have a guardian appointed to receive VA funds, the guardian has power to administer only the funds received from the governmental source, including earnings and interest from those funds and property acquired with those funds. Section 1151.251(b) allows a guardian, without prior court approval, to expend up to $12,000 during any one-year period for the support, maintenance, and education of the veteran and the veteran's dependents. *See* Tex. Est. Code § 1151.251. Although there may be some existing cases where these provisions apply, it would be against current VA regulations for the VA to make referrals for the guardianship of a veteran's funds to Texas courts.

Practice Pointer: The Estates Code has not been amended to reflect the trend in recent years for the VA to appoint its own authorized fiduciaries to manage veterans' benefits, and it certainly does not reflect the significant impact of VA Rule 38 on

Texas guardianship practice. Practitioners and courts should be wary of following Texas statutes on newly filed cases and should give due consideration of VA Rule 38 pending appropriate revisions to the Estates Code.

§ 5.15 Required Notification to VA by Guardian

Pursuant to the Texas Estates Code, once a guardianship has been established and the guardian seeks to expend VA funds, the VA must be notified—

1. when an annual or other accounting of funds and assets is filed;
2. on application for expenditure of funds;
3. on application to invest funds; and
4. when a claim is filed against the estate.

Tex. Est. Code § 1151.301.

The preferred method of providing the required notice is to forward a copy of the document to the VA Hub that serves the county in which the guardianship is pending and to request a waiver from the regional counsel of the department before filing the application. A form waiver may be supplied with the request, although some regional offices may generate their own waivers. Courts exercising jurisdiction over guardianships may refuse to take any action on the account or application until the VA waiver is filed with the court. See section 5.18 below for contact information for the two regional VA offices in Texas and the VA Fiduciary Hub in Nebraska.

Practice Pointer: The VA will likely require the following information in the notice letter:

1. Claim number.
2. Insurance file number or other insurance number.
3. The ward's last name, first name, and middle name.
4. The ward's Social Security number.
5. The ward's service number.
6. The ward's service dates (date entered and separation date).
7. The ward's date of birth.

Notice of the filing and of hearing by submission can be sent to the VA in the event a waiver is not secured, and the request submitted to the court may be approved if the VA does not respond to the notice. See form 5-4 in this chapter.

Practice Pointer: Note that since the creation of hub offices of the VA, the VA regional offices in Texas have not taken any significant role in the review of accountings and other documents or in the providing of waivers of notice. All legal matters involving a fiduciary have been handled by the hub office in Lincoln, Nebraska.

§ 5.16 Guardian's Commission

The basis for computing the commission to be paid to a guardian under the Texas Estates Code does not include veterans benefits received. Tex. Est. Code § 1155.001(1).

§ 5.17 Death of Beneficiary/Ward

On the death of a beneficiary for whom benefits from the VA were payable to a court-appointed guardian, any remaining funds derived from the department that would under state law escheat to the state, less certain expenses, must be returned to the VA with limited exceptions. 38 U.S.C. § 5502(e); 38 C.F.R. § 13.250. The rules for closing these guardianships are similar to those for other guardianships: a final account must be filed (with notice to the VA pursuant to Tex. Est. Code § 1151.301), and the estate is distributed to an estate representative appointed by the court, or, alternatively, distribution is made directly to the heirs pursuant to determination of heirship proceedings. *See* Tex. Est. Code §§ 202.001–.002.

§ 5.18 Communication with VA

Additional information may be obtained by contacting the nearest area VA office or representative. The toll-free telephone number of the VA is 1-800-827-1000. The VA's website is at **www.va.gov/**.

The VA currently has two regional offices in Texas. The Houston regional office is located at 6900 Almeda Road, Houston, TX 77030. The website for the Houston regional office is **www.benefits.va.gov/houston/**. The Houston regional office serves veterans in ninety counties of southern Texas (much of East Texas, the Gulf Coast area, and the southern Rio Grande Valley, including Harris, Bexar, Jefferson, and Victoria counties) in addition to the Republic of Mexico, Central and South America, and the Caribbean. The Waco regional office is located at One Veterans Plaza, 701 Clay Avenue, Waco, TX 76799. The website for the Waco regional office is **www.benefits.va.gov/waco/**. The Waco regional office serves North and West Texas, including Dallas, Tarrant, Potter, and El Paso counties, and much of the Hill Country, including Travis County.

Texas falls within the VA Lincoln Fiduciary Hub in Lincoln, Nebraska, which processes guardianship documents from Texas. The Lincoln Fiduciary Hub controls the region including Kansas, North Dakota, South Dakota, Nebraska, Oklahoma, and Texas. The address for the Lincoln Fiduciary Hub is P.O. Box 85817, Lincoln, NE 68501-5817.

§ 5.19 Veterans Justice Outreach Program

The VA has recently engaged in a system-wide effort to ensure access to services for "justice-involved veteran" populations at risk for homelessness, substance abuse, mental illness, and physical health problems. The Veterans Justice Outreach (VJO) program was created to provide timely access to VA services for eligible, justice-involved veterans to avoid unnecessary criminalization and incarceration of veteran offenders with mental illness.

A justice-involved veteran is—

1. a veteran in contact with local law enforcement who can be appropriately diverted from arrest into mental health or substance abuse treatment;
2. a veteran in a local jail, either pretrial or serving a sentence; or
3. a veteran involved in adjudication or monitoring by a court.

Under this initiative, the VJO specialists provide direct outreach, assessment, referral, and case management services to justice-involved veterans in local courts and jails and coordinate support efforts with local justice system partners. See **www.va.gov/homeless/vjo.asp**.

§ 5.20 Veterans Courts

In 2009, Senate Bill 1940 was passed, authorizing the creation of specialty courts for veterans in Texas. The law took effect on September 1, 2009, as chapter 617 of the Texas Health and Safety Code (now Tex. Gov't Code ch. 124). Veterans courts are designed to provide a team-based approach to ensuring a veteran receives appropriate treatment for the underlying risk factors that can contribute to criminal behavior. Pursuant to chapter 124, the objectives of a veterans treatment court program are—

1. the integration of services in the processing of cases in the judicial system;
2. the use of a nonadversarial approach involving prosecutors and defense attorneys to promote public safety and to protect the due-process rights of program participants;
3. early identification and prompt placement of eligible participants in the program;
4. access to a continuum of alcohol, controlled substance, mental health, and other related treatment and rehabilitative services;
5. careful monitoring of treatment and services provided to program participants;
6. a coordinated strategy to govern program responses to participants' compliance;
7. ongoing judicial interaction with program participants;
8. monitoring and evaluation of program goals and effectiveness;
9. continuing interdisciplinary education to promote effective program planning, implementation, and operations;
10. development of partnerships with public agencies and community organizations, including the U.S. Department of Veterans Affairs; and
11. inclusion of a participant's family members who agree to be involved in the treatment and services provided to the participant under the program.

Tex. Gov't Code § 124.001(a).

The National Center for State Courts has compiled a Veterans Courts Resource Guide, which can be found at **https://cdm16501.contentdm.oclc.org/digital/collection/spcts/id/371**. A list of specialty courts in Texas, which includes veterans courts, is located at **www.texvet.org**.

Form 5-1

VA Advance Directive
Durable Power of Attorney for Health Care and Living Will

OMB Approval Number 2900-0556
Estimated Burden Avg: 30 minutes
Expiration Date: 04/30/2027

Department of Veterans Affairs

VA ADVANCE DIRECTIVE
DURABLE POWER OF ATTORNEY FOR HEALTH CARE AND LIVING WILL

INSTRUCTIONS

This advance directive form is an official document where you can write down your preferences for your health care. If someday you can't make health care decisions for yourself anymore, this advance directive can help guide the people who will make decisions for you.

You can use this form to:

- Name specific people to make health care decisions for you
- Describe your preferences for how you want to be treated
- Describe your preferences for medical care, mental health care, long-term care, or other types of health care

You may complete some, none, or all sections of this form. If you need more space for any part of the form, you may attach extra pages. Be sure to initial and date every page that you attach. You also must initial the sections you complete and sign the form. If you are unable to initial or sign the form because of a physical impairment, you can place an "X", thumbprint, or stamp on the form instead of your initials and signature. If a physical impairment prevents you from doing any of these things, you can ask someone else who is with you to sign, place an "X", thumbprint, or stamp on the form.

When you complete this form, it's important that you also talk to a member of your health care team, family, and other loved ones to explain what you meant when you filled out the form. A member of your health care team can help you with this form and can answer any questions that you have.

PART I: PERSONAL INFORMATION

NAME *(Last, First, Middle)*:	DATE OF BIRTH *(mm/dd/yyyy)*:
STREET ADDRESS:	
CITY, STATE, ZIP:	

HOME PHONE WITH AREA CODE:	WORK PHONE WITH AREA CODE:	MOBILE PHONE WITH AREA CODE:

PUBLIC BURDEN STATEMENT: An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control number for this project is 2900-0556, and it expires 04/30/2027. Public reporting burden for this collection of information is estimated to average 30 minutes per respondent, per year, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate and any other aspect of this collection of information, including suggestions for reducing the burden, to VA Reports Clearance Officer at VACOPaperworkReduAct@va.gov. Please refer to OMB Control No. 2900-0556 in any correspondence. Do not send your completed VA Form 10-0137 to this email address.

PRIVACY ACT STATEMENT: The information requested on this form is solicited under the authority of 38 C.F.R. §17.32. It is being collected to document your preferences for your health care in the event that you cannot speak for yourself anymore. The information you provide may be disclosed outside the VA as permitted by law. Possible disclosures include those that are described in the "routine uses" identified in the VA system of records 24VA10P2, Patient Medical Records-VA, published in the Federal Register in accordance with the Privacy Act of 1974. This is also available in the Compilation of Privacy Act Issuances. You may choose to fill out this form or not, but without this information, VA health care providers may not clearly understand your preferences. If you do not fill out this form, there will be no effect on any benefits you are entitled to receive.

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NAME *(Last, First, Middle)*:	DATE OF BIRTH *(mm/dd/yyyy)*:

PART II: DURABLE POWER OF ATTORNEY FOR HEALTH CARE

This section of the advance directive form is called a Durable Power of Attorney for Health Care. It lets you appoint a specific person to make health care decisions for you in case you can't make decisions for yourself anymore. This person will be called your Health Care Agent.

Your Health Care Agent should be someone:

- You trust
- Who knows you well
- Who is familiar with your values and beliefs

If you get too sick to make decisions for yourself, your Health Care Agent will have the authority to make all health care decisions for you. This includes decisions to admit and discharge you from any hospital or other health care institution. Your Health Care Agent can also decide to start or stop any type of health care treatment. He or she can access your personal health information, and medical records, including information about whether you have been tested for HIV or treated for AIDS, sickle cell anemia, substance abuse or alcoholism.

NOTE: If you wish to give general permission for VA to share your medical records or health information with others, you can complete VA Form 10-5345 (Request for and Authorization to Release Medical Records or Health Information). You can get VA Form 10-5345 from your VA health care provider or you can get it using a computer from this website https://www.va.gov/vaforms/medical/pdf/VA_Form_10-5345_Fillable.pdf.

A - HEALTH CARE AGENT

Place your initials in the box next to your choice. Choose only one.

Initials	
Initials	I don't wish to appoint a Health Care Agent right now. (Skip this section and go to Part III, Living Will.)
Initials	I appoint the person named below to make decisions about my health care if I can't decide for myself anymore.

Name *(Last, First, Middle):*		Relationship to Me:
Street Address:		
City, State, Zip:		
Home Phone with Area Code:	Work Phone with Area Code:	Mobile Phone with Area Code:

B - ALTERNATE HEALTH CARE AGENT

Fill out this section if you want to appoint a second person to make health care decisions for you, in case the first person isn't available.

Initials	
Initials	If the person named above can't or doesn't want to make decisions for me, I appoint the person named below to act as my Health Care Agent.

Name *(Last, First, Middle):*		Relationship to Me:
Street Address:		
City, State, Zip:		
Home Phone with Area Code:	Work Phone with Area Code:	Mobile Phone with Area Code:

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NAME *(Last, First, Middle)*:	DATE OF BIRTH *(mm/dd/yyyy)*:

PART III: LIVING WILL

This section of the advance directive form is called a Living Will. This section of it lets you write down how you want to be treated in case you aren't able to decide for yourself anymore. Its purpose is to help others decide about your care.

A - SPECIFIC PREFERENCES ABOUT LIFE-SUSTAINING TREATMENTS

In this section, you can indicate your preferences for life-sustaining treatments in certain situations. Some examples of life-sustaining treatments are:

- CPR (cardiopulmonary resuscitation)
- a breathing machine (mechanical ventilation)
- kidney dialysis
- a feeding tube (artificial nutrition and hydration)

Think about each situation described on the left and ask yourself, “In that situation, would I want to have life-sustaining treatments?” Place your initials in the box that best describes your treatment preference. You may complete some, all, or none of this section. Choose only one box for each statement.

	Yes. I would want life-sustaining treatments.	I'm not sure. It would depend on the circumstances.	**No.** I would not want life-sustaining treatments.
If I am unconscious, in a coma, or in a vegetative state and there is little or no chance of recovery.	Initials	Initials	Initials
If I have permanent, severe brain damage that makes me unable to recognize my family or friends (for example, severe dementia).	Initials	Initials	Initials
If I have a permanent condition where other people must help me with my daily needs (for example, eating, bathing, toileting).	Initials	Initials	Initials
If I need to use a breathing machine and be in bed for the rest of my life.	Initials	Initials	Initials
If I have pain or other severe symptoms that cause suffering and can't be relieved.	Initials	Initials	Initials
If I have a condition that will make me die very soon, even with life-sustaining treatments.	Initials	Initials	Initials
Other:	Initials	Initials	Initials

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NAME *(Last, First, Middle)*:	DATE OF BIRTH *(mm/dd/yyyy)*:

B - MENTAL HEALTH PREFERENCES

This section is optional. You may skip this section if you do not have a serious mental health problem or if you do not want to write down your preferences for mental health care. If you have a serious mental health condition, you might want to write down medications that have worked for you in the past and that you would want again, or you might want to write down the mental health facilities or hospitals that you like and those that you don't like. If you need more space, you may attach extra pages and use this space to refer to attached pages. Be sure to initial and date every page that you attach.

C - ADDITIONAL PREFERENCES

This section is optional. In this space, you can write other important preferences for your health care that aren't described somewhere else in this document. For example, these might be social, cultural, or faith-based preferences for care, or preferences about treatments such as feeding tubes, blood transfusions, or pain medications. If you need more space, you may attach extra pages and use this space to refer to attached pages. Be sure to initial and date every page that you attach.

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NAME *(Last, First, Middle)*:	DATE OF BIRTH *(mm/dd/yyyy)*:

D - HOW STRICTLY YOU WANT YOUR PREFERENCES FOLLOWED

Place your initials in the box next to the statement that reflects how strictly you want others to follow your preferences. Choose only one.

Initials	I want my preferences, as expressed in this Living Will, to serve as a general guide. I understand that in some situations, the person making decisions for me may decide something different from the preferences I express above, if they think it's in my best interests.
Initials	I want my preferences, as expressed in this Living Will, to be followed strictly, even if the person making decisions for me thinks that this isn't in my best interests.

PART IV: SIGNATURES

A - YOUR SIGNATURE

By my signature below, I certify that this form accurately describes my preferences.

SIGNATURE *(Sign in ink)*:	DATE *(mm/dd/yyyy)*:

B - WITNESSES' SIGNATURES

Two people must witness your signature. Witnesses to the patient's signing of an advance directive are attesting by their signatures only to the fact that they saw the patient or designated third party sign the VA Advance Directive form. Neither witness may, to the witness' knowledge, be named as a beneficiary in the patient's estate, appointed as health care agent in the advance directive, or financially responsible for the patient's care. Nor may a witness be the designated third party who has signed the VA Advance Directive form at the direction of the patient and in the patient's presence.

Witness #1

I personally witnessed the signing of this advance directive. I am not the designated third party who signed this VA Advance Directive form at the direction of the patient and in the patient's presence. I am not appointed as Health Care Agent in this advance directive. I am not financially responsible for the care of the patient making this advance directive. To the best of my knowledge, I am not named as a beneficiary in the patient's estate.

SIGNATURE *(Sign in ink)*:	DATE *(mm/dd/yyyy)*:
Name *(Printed or Typed)*:	
Street Address:	
City, State, Zip:	

Witness #2

I personally witnessed the signing of this advance directive. I am not the designated third party who signed this VA Advance Directive form at the direction of the patient and in the patient's presence. I am not appointed as Health Care Agent in this advance directive. I am not financially responsible for the care of the patient making this advance directive. To the best of my knowledge, I am not named as a beneficiary in the patient's estate.

SIGNATURE *(Sign in ink)*:	DATE *(mm/dd/yyyy)*:
Name *(Printed or Typed)*:	
Street Address:	
City, State, Zip:	

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NAME *(Last, First, Middle)*:	DATE OF BIRTH *(mm/dd/yyyy)*:

PART V: SIGNATURE AND SEAL OF NOTARY PUBLIC *(Optional)*

This VA Advance Directive form is valid in VA facilities without being notarized. However, you may need to have it notarized to be legally binding outside the VA health care setting. Space for a Notary's signature and seal is included below.

On this _____ day of _____ , in the year of _____ , personally appeared before me

_____,

known by me to be the person who completed this document and acknowledged it as their free act and deed.

IN WITNESS WHEREOF, I have set my hand and affixed my official seal in the County of _____,

State of _____ , on the date written above.

Notary Public: _____ Commission Expires: _____

[SEAL]

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Form 5-2

[Caption. See § 3 of the Introduction in this manual.]

Application for Appointment of Guardian of Estate

[**Name of applicant**], Applicant, makes this Application for Appointment of Guardian of Estate of [**name of proposed ward**], Proposed Ward, an incapacitated person for whom the appointment of a guardian is necessary to receive funds due [him/her] from the federal government, and in support shows the following:

1. Proposed Ward is an adult [male/female], born [**date of birth**], who currently resides at [**address, city, county**] County, Texas. Proposed Ward may be served with notice of this proceeding at that address. Service by posting is also requested at this time.

2. Applicant seeks to be appointed guardian of Proposed Ward's estate to receive government funds and is an [individual/attorney] who [resides at/has an office at] [**address, city, state**]. Applicant is not disqualified to serve as guardian and is entitled to be appointed guardian. The appointment will be in the best interests of Proposed Ward and Proposed Ward's estate.

3. The Department of Veterans Affairs is an interested party in this action and is entitled to notice under section 1151.301 of the Texas Estates Code.

4. Proposed Ward is not more than sixty years of age.

The following is an example.

5. Proposed Ward has the following known relatives who are entitled to be appointed guardian: [**name of mother**], Proposed Ward's mother, resides at [**address, city, state**] and may be personally served at that address. Proposed Ward's mother is currently legal custodian of the government funds payable to Proposed Ward. She has repeatedly refused to comply with

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accounting requirements for the funds provided. She is therefore incapable of properly and prudently managing the estate of Proposed Ward. [**Name of father**], Proposed Ward's father, is deceased. Proposed Ward has a brother and two sisters. Proposed Ward's brother, [**name of brother**], whose whereabouts are unknown or are not reasonably ascertainable, has a last known address of [**address, city, state**]. Proposed Ward's sister, [**name of sister**], whose whereabouts are unknown or are not reasonably ascertainable, has a last known address of [**address, city, state**]. Proposed Ward's brother and a sister will be served by certified mail, return receipt requested, at their last known addresses. Proposed Ward has another sister, [**name of sister**], who has signed a Waiver of Preferential Right, which is attached as Exhibit A and incorporated for all purposes. Citation by posting and publication under sections 1051.053–.054 of the Texas Estates Code is requested for unknown relatives entitled to be appointed guardian.

Continue with the following.

6. No other person known to Applicant has a preferential right to serve as guardian under sections 1104.102–.103 of the Texas Estates Code.

7. Proposed Ward is an incapacitated person for whom the appointment of a guardian is necessary to receive funds due [him/her] from the federal government under sections 1002.017 and 1151.251 of the Texas Estates Code. Attached as Exhibit B and incorporated for all purposes is the affidavit of the regional counsel for the Department of Veterans Affairs attesting to the fact that appointment of a guardian is a condition precedent to payment of funds from the federal government. Proposed Ward is eligible and entitled to receive $[**amount**] per month payable by the Department of Veterans Affairs. [**Include if applicable:** Proposed Ward also receives Social Security benefits in the amount of $[**amount**] per month.] It is unknown if Proposed Ward has any accrued estate, as the custodian in fact has not prepared the annual accounts required by the Department of Veterans Affairs. Proposed Ward

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has no other income. A guardianship of the estate is necessary to insure that the personal and property rights of Proposed Ward are protected.

8. No guardianship of any kind for Proposed Ward exists in this or any other state. No known person holds a power of attorney signed by Proposed Ward.

9. This Court has venue of this proceeding as Proposed Ward resides in this county.

10. No person or institution now has the care and custody of Proposed Ward.

11. Applicant requests the Court to authorize payment of attorney's fees from Proposed Ward's estate under section 1155.054 of the Texas Estates Code. Applicant has brought this proceeding in good faith and with just cause in the filing and prosecution of this application.

12. Proposed Ward's estate is composed of, or has been purchased by, federal monetary benefits; therefore, there is no necessity for the appointment of appraisers.

Applicant prays that notice be posted and published as required by law; that citation be issued and served on Proposed Ward; that an attorney ad litem be appointed for Proposed Ward under section 1054.001 of the Texas Estates Code and the fees for his services be allowed as part of the costs of this suit; that on final hearing Proposed Ward be adjudged an incapacitated person for whom the appointment of a guardian of the estate is necessary to receive funds from the federal government; that Applicant be appointed guardian of the estate of [**name of proposed ward**]; that Applicant be entitled to payment of attorney's fees from Proposed Ward's estate; and for all further relief to which Applicant may be entitled.

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Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

VERIFICATION

STATE OF TEXAS)

COUNTY OF [**county**])

BEFORE ME, the undersigned notary public, on this day personally appeared [**name**], who being by me duly sworn on [his/her] oath deposed and said that [he/she] has read the above and foregoing [**title of document**] [and exhibits] and that the matters contained therein are within [his/her] personal knowledge and are true and correct.

_____

SWORN TO AND SUBSCRIBED BEFORE ME on _____.

_____
Notary Public, State of Texas

Attach exhibit(s).

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Exhibit A

Waiver of Preferential Right

[**Name**], [**relationship**] of [**name of proposed ward**], shows the Court that as next of kin [he/she] waives [his/her] preferential right to be appointed guardian herein and requests the appointment of [**name of applicant**] as guardian of the estate of [**name of proposed ward**].

_____
[**Name**]

SWORN TO AND SUBSCRIBED BEFORE ME by [**person waiving preferential right**] on _____ to certify which witness my hand and official seal of office.

_____
Notary Public, State of Texas

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Exhibit B

Regional Counsel's Certificate of Necessity

I hereby certify that [**name of proposed ward**] is a resident of [**county**] County, Texas; that [he/she] is entitled to receive funds payable by the Department of Veterans Affairs; that [he/she] is an incapacitated person for whom the appointment of a guardian is necessary to receive funds due [him/her] from the federal government as provided by sections 1002.017 and 1151.251 of the Texas Estates Code; and that the appointment of a guardian of the estate of [**name of proposed ward**] is a condition precedent to the payment of money due [him/her] from the federal government.

SIGNED on [**date**].

_____
[**Name**]
Regional Counsel
Department of Veterans Affairs

SIGNED under oath before me on _____.

_____
Notary Public, State of Texas

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Form 5-3

[Caption. See § 3 of the Introduction in this manual.]

Order Appointing Guardian

On [**date**] the Court considered the Application for Appointment of Guardian of Estate of [**name of applicant**], Proposed Guardian, proposed guardian of the estate of [**name of proposed ward**], Proposed Ward. It appears to the Court that notice and citation of the filing of the application have been given as required by law; that [**name of proposed ward**] is not able to attend this hearing due to [his/her] physical health, and [his/her] personal appearance is not necessary; and that [**name of proposed ward**] is represented at the hearing on this day by [**name**], attorney ad litem. The Court, having heard the evidence and the argument of counsel, finds by clear and convincing evidence that—

1. Proposed Ward is an incapacitated person for whom the appointment of a guardian is necessary to receive funds due [him/her] from the federal government;

2. the appointment of a guardian would be in the best interests of Proposed Ward and [his/her] estate;

3. Proposed Guardian is an eligible person and not disqualified to act as guardian of Proposed Ward and is a proper person to act and serve as guardian; and

4. the rights of Proposed Ward will be protected by the appointment of a guardian.

The Court further finds by a preponderance of the evidence that—

1. this Court has venue of this proceeding;

2. Proposed Guardian is an eligible person and not disqualified to act as guardian of Proposed Ward and is a proper person to act and serve as guardian;

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3. Proposed Ward lacks the capacity to manage the funds payable to [him/her] by the federal government; and

4. no interested person has applied for the appointment of appraisers, and none is deemed necessary by the Court.

IT IS THEREFORE ORDERED that [**name of proposed ward**] is adjudged an incapacitated person for whom the appointment of a guardian is necessary to receive funds due [him/her] from the federal government.

IT IS FURTHER ORDERED that [**name of applicant**] is appointed guardian of the estate of [**name of proposed ward**], an incapacitated person for whom the appointment of a guardian is necessary to receive funds due [him/her] from the federal government, and bond is hereby fixed in the sum of $[**amount**].

IT IS FURTHER ORDERED that appraisers are waived.

IT IS FURTHER ORDERED that when [**name of applicant**] has made the bond and taken the oath as required by law, the clerk of this Court shall issue letters of guardianship to [**name of applicant**], which shall be effective up to one year and four months after issuance.

SIGNED on _____.

_____
JUDGE PRESIDING

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APPROVED AS TO FORM:

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

_____

[**Name**]
Attorney Ad Litem
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 5-4

[Caption. See § 3 of the Introduction in this manual.]

Notice of Hearing by Submission

TO: All Counsel and Parties of Record:

This notice is provided pursuant to section 1151.301 of the Texas Estates Code. The [**year**]–[**year**] Annual Account, Application for Allowances, and Application for Attorney's Fees of [**name of guardian**], Guardian, filed in connection with the above-styled and numbered cause, will be considered and acted on by the Court by submission. The hearing will occur not earlier than twenty days from the date of filing.

Respectfully submitted,

_____

[**Name**]
Attorney for Guardian
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Certificate of Service

I certify that a true copy of this [**title of document**] was served in accordance with rule 21a of the Texas Rules of Civil Procedure.

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Department of Veterans Affairs
Lincoln Fiduciary Hub
P.O. Box 85817
Lincoln, NE 68501-5817

SIGNED on _____.

_____
[**Name of attorney**]

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Chapter 6

Guardians and Attorneys Ad Litem

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Chapter 6

Guardians and Attorneys Ad Litem

§ 6.1 Introduction

Chapter 1054 of the Texas Estates Code provides for the appointment of attorneys and guardians ad litem. The court must appoint an attorney or guardian ad litem in certain situations and has the discretion and authority to appoint one or both in others.

Practitioners serving as an ad litem or seeking to be appointed by the court are encouraged to con-sult the local rules of the particular county in order to confirm the particular court's requirements for appointment and to ensure awareness of the court's expectations.

Common situations where a court either may or shall appoint an attorney or guardian ad litem, depending on the circumstances, include the following.

Guardian Ad Litem:

- Personal injury actions (Tex. R. Civ. P. 173)
- Trust construction, termination, or modification actions (Tex. Prop. Code § 115.014)
- Sports and entertainment contracts entered into by minors (Tex. Est. Code § 1356.056)
- Inspection by guardian of ward's estate planning documents (Tex. Est. Code § 1162.008)
- Proper investment by guardian (Tex. Est. Code § 1161.007)
- Guardianship proceedings (Tex. Est. Code § 1054.051)

Attorney Ad Litem:

- Guardianship proceedings (Tex. Est. Code § 1054.007)
- Creation of trust for an incapacitated person without a guardian (Tex. Est. Code § 1301.054)
- Receivership of missing person (Tex. Civ. Prac. & Rem. Code § 64.102)
- Mental-health commitments (Tex. Health & Safety Code § 574.003)
- Restoration or modification of guardianship (Tex. Est. Code § 1202.101)
- Removal of community administrator (Tex. Est. Code § 1353.151)
- Heirship determinations (Tex. Est. Code §§ 53.104, 202.009)
- Probate of will after four years (Tex. Est. Code § 258.052)
- Purchase of estate property by guardian (Tex. Est. Code § 1158.653)
- Establishment of pooled trust subaccount (Tex. Est. Code § 1302.003)
- Final settlement of guardianship estate (Tex. Est. Code §§ 1204.001(e), 1204.002)
- Discretionary appointments (Tex. Est. Code §§ 53.104, 1162.008)

Guardian Ad Litem and Attorney Ad Litem:

- Judicial bypass proceedings (Tex. Fam. Code § 33.003(e))
- Family Code appointments (Tex. Fam. Code §§ 107.001–.0161)
- Sale of minor's interest in property (Tex. Est. Code § 1351.001(b))
- Show-cause and compliance actions (Tex. Est. Code § 1203.051)
- Partition actions (Tex. Est. Code § 360.102(1)(B), (1)(C))
- Removal action for potentially incapacitated guardian (Tex. Est. Code § 1203.052(a)(5)(A))

§ 6.2 Limitations on Guardians and Attorneys Ad Litem

It is important to understand the basic differences between the roles, responsibilities, and duties of the attorney ad litem and guardian ad litem. It is equally important to recognize the limitations imposed on them.

§ 6.2:1 Limitations Imposed by Law

The ad litem cannot take any action to waive or prejudice any substantial right of the ward or proposed ward. *See Reasoner v. State*, 463 S.W.2d 55, 59 (Tex. App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.) (minor not bound by ad litem's admission); *see also Berry v. Lowery*, 266 S.W.2d 917, 922 (Tex. App.—Dallas), *aff'd in part and rev'd in part on other grounds*, 269 S.W.2d 795 (Tex. 1954) (ad litem cannot waive right of minor). Thus, an attorney ad litem may not waive service of process or other significant rights of a proposed ward. *See Wright v. Jones*, 52 S.W.2d 247, 250–51 (Tex. Comm'n App. 1932, holding approved).

Further, the authority of an attorney ad litem or guardian ad litem to act is limited to the proceeding in which they are appointed. *Barrow v. Durham*, 574 S.W.2d 857, 860 (Tex. App.—Corpus Christi–Edinburg 1978), *aff'd*, 600 S.W.2d 756 (Tex. 1980). An ad litem cannot institute, intervene in, or represent a ward in any matter inconsistent with the order of appointment. The actions of an ad litem should not exceed the scope of the authority granted in the order of appointment. *See Pleasant Hills Children's Home of the Assemblies of God, Inc. v. Nida*, 596 S.W.2d 947, 951 (Tex. App.—Fort Worth 1980, no writ).

Several cases, discussed at section 6.11 below, define the compensable and noncompensable elements for ad litem fees in personal injury actions, family law cases, and guardianships. While some of these cases do not involve appointments under the Texas Estates Code, the basic responsibilities of the attorney ad litem and guardian ad litem are equally applicable. An ad litem generally will not be compensated for the performance of any work performed beyond the scope of the ad litem's appointment. See section 6.11 below for a complete discussion of ad litem fees.

§ 6.2:2 Limitations Imposed by Court Order

Courts may impose limits on the role of an attorney or guardian ad litem in a guardianship proceeding, such as appointing a guardian ad litem for the limited purpose of reviewing a particular application, motion, or issue before the court. A court, however, should not attempt to limit the statutory duties prescribed by section 1054.004 of the Texas Estates Code on an attorney ad litem appointed to represent a proposed ward. See sections 6.5:1 through 6.5:3 below.

§ 6.3 Ethical Considerations

An attorney ad litem is subject to the same ethical rules and considerations as any other attorney. Therefore, the ad litem cannot engage in ex parte communications with the judge presiding over the guardianship proceeding. The Texas Code of Judicial Conduct provides that a judge "shall not initiate, permit, or consider *ex parte* communications or other communications made to the judge outside the presence of the parties between the judge and . . . a guardian or attorney ad litem." Tex. Code Jud. Conduct, Canon 3B(8), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. B.

An attorney ad litem is also subject to all the other rules of ethics, including but not limited to the duty to maintain the proposed ward's confidence. In fact, when an attorney ad litem retains a psychiatrist to provide an expert opinion about capacity, the assessment and testimony are privileged. *In re Houseman*, 66 S.W.3d 368 (Tex. App.—Beaumont 2002, no pet.).

Compensation for an attorney ad litem is subject to findings by the court awarding compensation that the ad litem's actions for which compensation is sought were equitable and just. Tex. Est. Code § 1155.151(a–1). *Cf. Goodyear Dunlop v. Gamez*, 151 S.W.3d 574 (Tex. App.—San Antonio 2004, no pet.); *Ford Motor Co. v. Aguilar*, No. 13-16-00290-CV, 2017 WL 541117 (Tex. App.—Corpus Christi–Edinburg Feb. 9, 2017, no pet.).

Practice Pointer: It should be noted that Disciplinary Rule 1.16 does not expressly exclude court-appointed attorneys ad litem from its applicability. However, comment 6 to rule 1.16 provides that "nothing in this Rule modifies or reduces a lawyer's obligations under other law." This appears to suggest that rule 1.16 should not be viewed as a restraint on the attorney ad litem. Furthermore, rule 1.16 serves to give an attorney the ability to assess the situation and choose the appropriate action from a range of possibilities. It is the committee's opinion that the rule was not intended to modify or serve as a limitation on the duty of an attorney ad litem to zealously advocate for his client. For a complete discussion of rule 1.16, see section 1.12 in this manual.

§ 6.4 Attorney Ad Litem

§ 6.4:1 Purpose and Function

An attorney ad litem is an attorney appointed by the court to represent and advocate on behalf of a proposed ward, an incapacitated person, an unborn person, or another person described in Texas Estates Code section 1054.007 in a guardianship proceeding. Tex. Est. Code § 1002.002. Unless the ward retains an attorney, the court must appoint an attorney ad litem to represent the interests (including the expressed wishes) of the proposed ward in every guardianship proceeding seeking the appointment of a guardian. *See* Tex. Est. Code §§ 1054.001, 1202.103. An attorney ad litem may also be appointed to represent a ward subsequent to the ward's adjudication of incapacity. As noted at section 6.2:2 above, the duties and responsibilities of an attorney ad litem depend on the basis of the appointment.

Practice Pointer: Pursuant to recent changes to section 1054.006 of the Texas Estates Code, in a guardianship proceeding a ward or proposed ward may—at any time—retain an attorney who is guardianship-certified in Texas instead of having their interest represented by an appointed attorney ad litem. If such an attorney is retained, the court shall remove an appointed attorney and appoint the ward's or proposed ward's retained counsel. *See* Tex. Est. Code § 1054.006(a), (b).

On the motion of a party to a guardianship proceeding or on the court's own motion, the court may hold a hearing on the ward's or proposed ward's capacity to retain an attorney. *See* Tex. Est. Code § 1054.006(c). The burden of proof is on the party motioning the court. *See* Tex. Est. Code § 1054.006(c). If the court finds by a preponderance of evidence that the ward

or proposed ward does not understand the guardianship proceeding or the purpose for which the attorney was retained, the court may appoint an attorney ad litem. *See* Tex. Est. Code § 1054.006(c).

An attorney retained by a ward or proposed ward under this section of the Texas Estates Code must represent the ward's or proposed ward's interests, including the ward's or proposed ward's expressed wishes. *See* Tex. Est. Code § 1054.006(d).

§ 6.4:2 Appointment

The court is required to appoint an attorney ad litem in a guardianship proceeding seeking to adjudicate a person to be either partially or totally incapacitated or in a matter relating to the sale of a ward's guardianship assets to the guardian individually. Tex. Est. Code §§ 1054.001, 1202.101, 1158.653. Failure to appoint an attorney ad litem when required by law may result in a void or voidable judgment. *See Cook v. Winters*, 645 F. Supp. 158 (S.D. Tex. 1986). The court has the discretion to appoint an attorney ad litem in other situations.

Procedure for Appointment: In some courts, the applicant is expected to file a motion and order to appoint an attorney ad litem when the initial application for guardianship is filed. However, other courts prefer to appoint the attorney ad litem on their own motion. Only attorneys who have completed the State Bar of Texas certification training are eligible for appointment. Tex. Est. Code § 1054.201.

Appointments by the court of attorneys ad litem, guardians ad litem, mediators, and attorneys who are private professional guardians shall, with certain exceptions, be made using a "next-up" rotation system from lists to be promulgated and maintained by the local administrative judge. Tex. Gov't Code §§ 37.001–.005.

Exceptions to this requirement include persons not on the maintained lists who are appointed by agreement of the parties and approval of the court; persons with specialized education, training, certification, skill, language proficiency, or knowledge of the subject matter; persons with relevant prior involvement; or persons located in a relevant geographic location. Tex. Gov't Code § 37.004(c), (d).

A 2019 amendment allows the court to appoint a person included on the applicable list whose name does not appear first on the list or a person who meets statutory or other requirements to serve and who is not included on the list if, within thirty days preceding the date of appointment, an initial declaration of a state of disaster is made for the area served by the court. Tex. Gov't Code § 37.004(d–1). A declaration of a state of disaster is made by the governor pursuant to Tex. Gov't Code ch. 418. Tex. Gov't Code § 418.014.

The lists are to be posted annually at the courthouse and be made available on the county's website. Tex. Gov't Code § 37.005.

See forms 6-1 through 6-4 in this chapter.

Certification Requirements: Any attorney representing any person in a guardianship proceeding must have a State Bar of Texas guardianship education certification. Tex. Est. Code § 1054.201. The certification requirement no longer applies only to the applicant's attorney and any court-appointed attorneys.

An attorney may commence representation of a person's interest and file an appearance in a guardianship proceeding before completing the course, but must complete the course not later than the fourteenth day after the date of filing the appearance and before filing any substantive motion in the guardianship proceeding. Tex. Est. Code § 1054.201(c).

The State Bar is mandated to provide the course at a low cost and throughout the state, including online. Tex. Gov't Code § 81.114(e).

Currently, certification requires four hours of credit, including one hour on alternatives to guardianship and supports and services available to proposed wards. Tex. Est. Code § 1054.201(b). The attorney may fulfill this requirement either by attending a seminar or viewing a video recording of the seminar. Many local bar associations offer courses or videos that satisfy the certification requirements. The attorney should forward a copy of the letter of certification to any local court having jurisdiction over guardianship matters. Generally, certification expires after two years, at which time the attorney must obtain a new certificate to be eligible for appointment in a guardianship proceeding. Tex. Est. Code §§ 1054.202(a), 1054.203. However, a new certificate obtained by an attorney who has already been certified expires after four years if the attorney has been certified for each of the four years immediately preceding the date the new certificate was issued. Tex. Est. Code § 1054.202(b).

Certification is also required for an attorney representing the ward on appeal. *In re Guardianship of Marburger*, 329 S.W.3d 923, 930 (Tex. App.—Corpus Christi–Edinburg 2010, no pet.).

Term of Appointment: The term of appointment of an attorney ad litem expires, without a court order, on the date the court either appoints a guardian or successor guardian or denies application for appointment of a guardian, unless the court determines that continued appointment of the attorney ad litem would be in the ward's best interest. Tex. Est. Code § 1054.002(a). The term of an appointment for an ad litem appointed under Texas Estates Code section 1054.001 continues after the appointment of a temporary guardian unless the court order provides for termination or expiration of the appointment. Tex. Est. Code § 1054.002(b).

It is an abuse of discretion for a trial court to appoint an attorney ad litem in any phase of a guardianship proceeding who has not been certified pursuant to the statutory requirements. *In re Guardianship of Marburger*, 329 S.W.3d at 930; *see* Tex. Est. Code § 1054.201.

§ 6.4:3 Required Disclosures

Amendments to Texas Rules of Civil Procedure 194.1–194.6, effective January 1, 2021, require disclosures and production of documents to be made to opposing parties without waiting for a discovery request "*except as exempted by [the Rules] or as otherwise agreed by the parties or ordered by the court.*" Tex. R. Civ. P. 194.1 (emphasis added).

While these rules make specific reference to suits governed by the Texas Family Code and rule 194.2(d) includes specific exemptions from the provisions for certain types of cases, no specific exemptions or references are made for probate and guardianship proceedings.

Probate and guardianship proceedings are exempt from the "Expedited Trial Rules" (Tex. R. Civ. P. 169) under Texas Estates Code sections 53.107 and 1053.105. *See* Tex. Est. Code §§ 53.107, 1053.105. In the absence of a clear indication whether these Estates Code sections similarly shelter probate and guardianship proceedings from the initial disclosure requirements under rule 194, the duty may be avoided either by a Rule 11 Agreement between the parties or by court order. *See* Tex. R. Civ. P. 194.1(a).

See form 6-5 in this chapter for a suggested Rule 11 Agreement.

However, in an applicable case, required disclosures apply to initial, expert, and pretrial disclosures. Initial disclosures are due thirty days after the contestant's answer. Expert disclosures are due ninety days before trial for the movant and sixty days before trial for the contestant. Pretrial disclosures must be made at least thirty days before trial. Tex. R. Civ. P. 194, 195.

§ 6.4:4 Statutory Duties in Proceeding to Appoint Guardian

The statutory duties of an attorney ad litem appointed to represent a proposed ward in a guardianship proceeding are set out in Texas Estates Code section 1054.004.

Review Application and Court File: The attorney ad litem should review the court's file, including the application for guardianship and the order appointing the ad litem, to determine any specific directives given to the ad litem, if the proposed ward was properly served, if the return has been on file for ten days, if notice to third parties has been properly given, and if the matter has already been set for hearing by the court. *See generally* Tex. Est. Code ch. 1051 (notices and process in guardianship proceedings in general).

Request and Review Medical History and Records: Before any hearings, the attorney ad litem must review the proposed ward's medical records detailing his history and current prognosis. Tex. Est. Code § 1054.004(b). Generally, the applicant's attorney should provide the attorney ad litem with copies of all the current pleadings and filings, as well as access to the proposed ward's relevant medical, psychological, and intellectual testing records. If the applicant's attorney does not provide the attorney ad litem with these records, the attorney ad litem should promptly request them. If the records are not provided within a reasonable time, it is prudent for the attorney ad litem to apply to the court for an order directing the release of the records. *See* Tex. Est. Code § 1054.003. Under the federal Health Insurance Portability and Accountability Act (HIPAA), 45 C.F.R. §§ 160.101–.552, 160.101–.105, 160.500–.552, many of these records are considered "protected health information." Also, because 45 C.F.R. § 164.512(e)(1)(i) specifically authorizes disclosure of protected health information in judicial or administrative proceedings in response to a court order, the order appointing the attorney ad litem should include language citing this provision and language authorizing access to confidential information under the Privacy Act of 1974 (5 U.S.C. § 552a) and Veterans Administration Records (38 U.S.C. §§ 5701, 7332). The order should also specify that the ad litem so appointed is an officer of the court. See also forms 6-21 through 6-24 in this chapter. The attorney ad litem should verify that, if needed, the health-care provider's letter or certificate supporting the guardianship is dated not earlier than the 120th day before the date of filing of the application and additionally verify by examining the medical records that the health-care provider actually performed examination of the proposed ward not earlier than that same day. *See* Tex. Est. Code § 1101.103(a). If the proposed ward is alleged to be intellectually disabled, they must be examined by a physician or psychologist licensed in Texas or certified by the Texas Department of Aging and Disability Services to perform such examinations, unless there is written documentation filed with the court that the proposed ward has been examined by a physician, psychologist, or advanced practice registered nurse according to the rules adopted by the Texas Health and Human Services Commission not earlier than twenty-four months before the hearing. Tex. Est. Code § 1101.104. See form 4-9 in this manual for a certificate of medical examination.

Interview and Assess Proposed Ward: An attorney ad litem must interview the proposed ward within a reasonable time before the hearing. The attorney ad litem should discuss with the proposed ward the law and facts of the case, the proposed ward's legal options regarding disposition of the case, the grounds on which the guardianship is sought, and whether alternatives to guardianship, as referenced in Tex. Est. Code § 1002.0015 (a non-exhaustive listing), would meet the needs of the pro-

posed ward and avoid the need for the appointment of a guardian. Tex. Est. Code § 1054.004(a). The attorney ad litem should inform the proposed ward that they are entitled, on request, to a jury trial. *See* Tex. Est. Code § 1101.052. The attorney ad litem should also advise the proposed ward of the ward's bill of rights under Tex. Est. Code § 1151.351. See section 4.29:1 and form 4-15 in this manual.

Before the hearing, the attorney ad litem shall discuss with the proposed ward the attorney ad litem's opinion regarding (1) whether a guardianship is necessary for the proposed ward; and (2) if a guardianship is necessary, the specific powers or duties of the guardian that should be limited if the proposed ward receives supports and services. Tex. Est. Code § 1054.004(a).

The "Assessment of Older Adults with Diminished Capacities: A Handbook for Lawyers," a capacity assessment handbook that is a collaborative effort of the American Bar Association Commission on Law and Aging and the American Psychological Association, is a valuable resource for the attorney ad litem and is available at **www.americanbar.org/groups/law_aging/resources/capacity_assessment/**. It examines the issue of capacity from several standpoints and is designed to assist judges in understanding the concept of incapacity. See also Steve M. King, *Levels of Incapacity*, *in* Advanced Guardianship Law Course, State Bar of Texas (2015).

Be an Advocate: The attorney ad litem is the proposed ward's attorney, whose job is to advocate for the proposed ward. Thus, the attorney ad litem for the proposed ward must decide whether to actively contest the application or to simply ensure that the applicant and his counsel make a prima facie case. The question is easy when the proposed ward is in a persistent vegetative state after a traumatic brain injury or is suffering from advanced Alzheimer's-related senile dementia. When the proposed ward is only occasionally confused or is refusing medical treatment that is discretionary, the role of the attorney ad litem is much more acute. If the proposed ward is opposed to the guardianship, the attorney ad litem must oppose it. That is his job. An attorney ad litem is not appointed as "window-dressing" to an immutable procedure. For a discussion of *Franks v. Roades*, 310 S.W.3d 616 (Tex. App.—Corpus Christi–Edinburg 2010, no pet.), and the duty to advocate for the client, see section 1.12.

Practice Pointer: Given the clear-purpose clause of the guardianship provisions of the Estates Code (Tex. Est. Code § 1001.001), a less restrictive alternative, if appropriate, is to be followed. The attorney ad litem (as well as both the attorney for the applicant and the guardian ad litem) need to bear this in mind as the court will certainly consider the appropriateness and availability of less restrictive alternatives in determining what actions of the attorneys are reasonable and necessary when the issue of attorney's fees is ultimately addressed.

Finally, it is generally not appropriate to file a report of attorney ad litem with the court. The attorney ad litem is an *advocate*. If the attorney ad litem files a report, this may cause them to become a fact witness.

§ 6.4:5 Nonstatutory Duties in Proceeding to Appoint Guardian

In addition to the statutory duties, the attorney ad litem has other duties necessary to represent the interests of the proposed ward.

Prepare and File Answer: The attorney ad litem should prepare and file an answer to the guardianship application. In most cases, it is sufficient to file a general denial. The burden of proof should be properly pleaded. See form 6-6 in this chapter.

Practice Pointer: If the attorney is actively contesting the application, it would be better to file an answer pleading any affirmative defenses and clearly identifying whether the proposed ward objects to the guardianship, the proposed guardian, or both. In addition to serving a copy of the answer on opposing counsel, it is advisable to send a copy to the court investigator.

Consider Requesting Security for Costs: If the guardianship proceeding appears frivolous, the attorney ad litem should consider filing a motion for security for costs under Tex. Est. Code § 1053.052. See forms 6-9 and 6-10. The court may then order the applicant-contestant to post security for costs. If the party fails to comply with the court's order, the attorney ad litem may file a motion to dismiss for failure to post the required security. See forms 6-11 through 6-13. Although previous case law limited the statutory authority to tax costs in guardianship proceedings, recent amendments to the Texas Estates Code specifically authorize judges to tax costs and require reimbursement of attorney's fees of persons found to have acted without good faith or just cause. Tex. Est. Code §§ 1053.052, 1155.054. See sections 10.4:2 through 10.4:6 in this manual.

Consider Requesting Appointment of Guardian Ad Litem: If, in the ethical exercise of the duties of the attorney ad litem, it appears that the court may not be getting a full picture of the factual and legal issues underlying the guardianship application or any contest (absent a breach of the duty of confidentiality), the attorney ad litem should consider asking the court to appoint a guardian ad litem to act in the best interests of the proposed ward.

Consider Requesting Independent Medical Examination: The applicant is required to obtain a letter or certificate from a Texas health-care provider or, in some limited circumstances, a psychologist that meets the requirements of Estates Code section 1101.103. The various Texas statutory probate courts now have a form that is approved in all these courts. See form 4-9 in this manual. If the attorney ad litem believes the medical information is inadequate or incorrect, they may seek either or both a court-ordered independent mental or physical examination. Because the legislature provided a specific procedure to be followed in this regard, a motion for an independent medical examination under Tex. R. Civ. P. 204 is not available in a guardianship proceeding. *Karlen v. Karlen*, 209 S.W.3d 841 (Tex. App.—Houston [14th Dist.] 2006, no pet.). *See* Tex. Est. Code § 1101.103(c). See forms 6-7 and 6-8. Psychological testing can also be a useful tool to determine function, ability, and judgment of a proposed ward and may be authorized in conjunction with a mental examination. It is advisable to have any independent medical examination performed by a physician with a different specialization than the first examination (for example, neurologist vs. gerontologist vs. psychiatrist).

Verify Medical Disclosure: The attorney ad litem should determine whether the medical professional who examined the proposed ward either obtained the proposed ward's permission to release the ward's medical information or warned the proposed ward that the medical professional intended to disclose the results of the examination. Rule 510(d)(4) of the Texas Rules of Evidence requires a "Miranda"-type warning advising the proposed ward that anything they may say to the professional is not confidential. This disclosure is necessary even if the exam is court-ordered. *See Subia v. Texas Department of Human Services*, 750 S.W.2d 827, 830–31 (Tex. App.—El Paso 1988, no writ). If proper disclosure has been given, the court may find that the discussions are not privileged, and the health-care professional may testify about them. *See Dudley v. State for Dudley*, 730 S.W.2d 51, 54 (Tex. App.—Houston [14th Dist.] 1987, no writ). But if the health-care professional fails to make this disclosure, the attorney ad litem may seek to exclude all of the professional's testimony. However, see *In re Guardianship of Parker*, 275 S.W.3d 623 (Tex. App.—Amarillo 2008, no pet.), which held that evidentiary objections to the certificate of medical exam were insufficient to exclude it from consideration if the statute indicated a legislative intent that the certificate be considered by the court before any guardianship could be granted.

Meet and Confirm Age of Minor: If the proposed ward is alleged to be a minor, the attorney ad litem should confirm the minor's age and the need for an appointment of a guardian. The attorney ad litem should also meet the child and, if possible, examine the child's living conditions.

Verify Applicant's Eligibility: The attorney ad litem should determine whether the person seeking to be appointed guardian is appropriate and eligible, the extent and nature of the proposed ward's estate (this will also be useful in setting the bond), and whether the applicant owes money to or has been taking financial advantage of the proposed ward. The attorney ad litem should also request a copy of the applicant's criminal background check that is now required to be submitted before appointment.

Prepare for Hearing: The attorney ad litem should notify the proposed ward in advance of the position to be advocated in court and should prepare the proposed ward to testify, if necessary.

Arrange for Proposed Ward to Attend Hearing: The proposed ward must attend any hearing to establish a guardianship unless the court determines that a personal appearance is not necessary. Tex. Est. Code § 1101.051(b). Courts generally require the attorney ad litem to arrange for the proposed ward to attend this hearing. The attorney ad litem should make an initial determination whether the proposed ward is able to attend. If the proposed ward does not attend the hearing, the attorney ad litem should be prepared, either by personal knowledge or by calling the proposed ward's physician or other appropriate witnesses, to testify why the proposed ward's presence in the courtroom is not necessary. It is also appropriate to ask the treating physician to address the ward's ability to attend a hearing in the health-care provider's letter or certificate provided to the court. The health-care provider's certificate of medical examination (form 4-9) includes a provision to address this matter.

Methods to show that the proposed ward's presence at a hearing would not be in their best interests include the following:

- A health-care provider's letter or certificate stating the medical reasons why the proposed ward's presence is not advisable.

  A written statement by the proposed ward expressing a desire not to appear.

  A tape recording of the proposed ward's statement (with court and counsel's permission).

  A telephonic appearance (with court permission) if the proposed ward is physically unable to attend.

  Statement by the ad litem of the proposed ward's lack of desire or ability to attend.

Closed Hearing: An attorney ad litem has a right to request that the courtroom be closed to the public at the hearing for appointment of a guardian. Tex. Est. Code § 1101.051(c). Such a request is to protect the privacy of the proposed ward.

§ 6.4:6 Role of Attorney Ad Litem After Appointment of Guardian

Duty to Defend Client's Rights: Generally, at the completion of the guardianship hearing, the attorney ad litem is discharged by operation of law. Tex. Est. Code § 1054.002. See forms 6-14 and 6-15 in this chapter. The appointment of the attorney ad litem does not, however, always cease with the appointment of a guardian. The court may, in the order appointing a guardian, specifically provide that the attorney ad litem will continue to represent the ward. Tex. Est. Code § 1054.002. The terms and conditions of this continued appointment should be specifically set forth in the order.

Guardian Purchasing Guardianship Assets: If a guardian seeks to purchase property from the ward's estate, the court must appoint an attorney ad litem to represent the ward in the proposed sale. *See* Tex. Est. Code § 1158.653. The attorney ad litem

should review the application relating to the sale and other information as necessary to determine if the sale is fair and in the ward's best interests.

Final Settlement of Ward's Estate: Several events or circumstances will trigger the closing of a guardianship. *See* Tex. Est. Code §§ 1204.001, 1204.051, 1204.052, 1204.101, 1204.102, 1204.108. If appropriate, the court may appoint an attorney ad litem to represent the ward or the ward's estate in matters relating to a guardian's account for final settlement. *See* Tex. Est. Code §§ 1204.001(e), 1204.002. See form 6-16.

§ 6.5 Guardian Ad Litem

§ 6.5:1 Purpose and Function

A guardian ad litem is a person appointed by the court to represent the best interests of a ward or proposed ward in a guardianship proceeding. Tex. Est. Code § 1002.013. In practice, a guardian ad litem is essentially a fact finder who assists the court in determining what is in the ward's or proposed ward's best interests. A guardian ad litem takes on the role of an officer of the court, rather than the role of the proposed ward's attorney. In this role, they can make recommendations based on what they perceive to be in the proposed ward's best interests, rather than having to advocate any party's particular position. In representing the best interests of the proposed ward, appellate courts have made it clear that the guardian ad litem serves as the personal representative for the proposed ward and not the ward's attorney. *See, e.g., Magna Donnelly Corp. v. Deleon*, 267 S.W.3d 108 (Tex. App.—San Antonio 2008, no pet.); *Patterson v. McMickle*, 191 S.W.3d 819 (Tex. App.—Fort Worth 2006, no pet.); *Goodyear Dunlop v. Gamez*, 151 S.W.3d 574, 582–85 (Tex. App.—San Antonio 2004, no pet.); *Coleson v. Bethan*, 931 S.W.2d 706 (Tex. App.—Fort Worth 1996, no pet.); *Byrd v. Woodruff*, 891 S.W.2d 689 (Tex. App.—Dallas 1994, writ dism'd by agr.).

A person may not be appointed guardian if the person:

(1) Is a party or is a person 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;

(1) is indebted to the proposed ward, unless the person pays the debt before appointment; or

(2) asserts a claim adverse to the proposed ward or the proposed ward's property.

Tex. Est. Code § 1104.354.

The guardian ad litem shall protect the incapacitated person in a manner that will enable the court to determine what action will be in the best interests of the incapacitated person. *See* Tex. Est. Code § 1054.054(b).

§ 6.5:2 Appointment

The court has discretion to appoint a guardian ad litem to represent the best interests of an incapacitated person in a guardianship proceeding. *See* Tex. Est. Code § 1054.051. In the interest of judicial economy, in certain circumstances the court may instead appoint the attorney ad litem under Code section 1054.001 to additionally serve as the guardian ad litem. Tex. Est.

Code § 1054.052. However, if an attorney is appointed as both an attorney ad litem and a guardian ad litem before a guardian has been appointed, they may be faced with an inherent conflict of interest.

If the appointment would be in the best interests of the proposed ward, the court may also appoint a guardian ad litem if the court determines that the person who has applied to be appointed guardian is a party to a lawsuit concerning or affecting the welfare of the proposed ward. *See Roark v. Mother Frances Hospital*, 862 S.W.2d 643, 647 (Tex. App.—Tyler 1993, writ denied) (guardian ad litem required to participate in case to extent necessary to protect ward).

Procedure for Appointment: Any party, including the attorney ad litem, may seek the appointment of a guardian ad litem. The court may also appoint a guardian ad litem on its own motion. The court will appoint a guardian ad litem if it determines that the appointment could be beneficial to the court or the proposed ward. The court will generally enter an order setting forth the scope of the guardian ad litem's duties in the proceeding. See form 6-17 in this chapter.

The same requirements for maintenance of an appointments list discussed in section 6.5 above apply to the appointments of guardians ad litem. Tex. Gov't Code §§ 37.001–.004.

Certification Requirements: A court may appoint any person as guardian ad litem for a proposed ward. Unlike an attorney ad litem, a guardian ad litem is not subject to any certification requirements and may not even be an attorney.

Term of Appointment: The term of appointment of a guardian ad litem expires, without a court order, on the date the court either appoints a guardian or denies application for appointment of a guardian, unless the court determines that continued appointment of the guardian ad litem would be in the ward's best interest. Tex. Est. Code § 1054.053.

§ 6.5:3 Required Disclosures

Amendments to Texas Rules of Civil Procedure 194.1–194.6, effective January 1, 2021, require disclosures and production of documents to be made to opposing parties without waiting for a discovery request "*except as exempted by [the Rules] or as otherwise agreed by the parties or ordered by the court*." Tex. R. Civ. P. 194.1 (emphasis added).

While these rules make specific reference to suits governed by the Texas Family Code and rule 194.2(d) includes specific exemptions from the provisions for certain types of cases, no specific exemptions or references are made for probate and guardianship proceedings.

Probate and guardianship proceedings are exempt from the "Expedited Trial Rules" (Tex. R. Civ. P. 169) under Texas Estates Code sections 53.107 and 1053.105. *See* Tex. Est. Code §§ 53.107, 1053.105. In the absence of a clear indication whether these Estates Code sections similarly shelter probate and guardianship proceedings from the initial disclosure requirements under rule 194, the duty may be avoided either by a Rule 11 Agreement between the parties or by court order. *See* Tex. R. Civ. P. 194.1(a).

See form 6-5 in this chapter for a suggested Rule 11 Agreement.

However, in an applicable case, required disclosures apply to initial, expert, and pretrial disclosures. Initial disclosures are due thirty days after the contestant's answer. Expert disclosures are due ninety days before trial for the movant and sixty days before trial for the contestant. Pretrial disclosures must be made at least thirty days before trial. Tex. R. Civ. P. 194, 195.

§ 6.5:4 Statutory Duties in Proceeding to Appoint Guardian

A guardian ad litem is appointed as an officer of the court to represent the interests of the proposed ward. Tex. Est. Code §§ 1054.051, 1054.054. A guardian ad litem's statutory duties include (1) protecting, rather than advocating for, the proposed ward to "enable the court to determine the action that will be in that person's best interest" (Tex. Est. Code § 1054.054(b)); (2) investigating whether a guardianship is necessary for the proposed ward; and (3) evaluating alternatives to guardianship and supports and services available to the proposed ward that would avoid the need for appointment of a guardian (Tex. Est. Code § 1054.054(c)). See section 3.3 and the appendix in this manual for additional discussion of supports and services.

§ 6.5:5 Nonstatutory Duties in Proceeding to Appoint Guardian

Because limited statutory guidance exists, a guardian ad litem must rely on common sense, experience, and case law while carrying out their duties. In *Goodyear Dunlop v. Gamez*, the San Antonio appeals court held that a guardian ad litem has the duty to act as the personal representative of the minor, rather than as the attorney for the minor. This holding clearly implies that, as a personal representative, the guardian ad litem takes on the fiduciary responsibilities attendant to the appointment of any personal representative but subject to the terms of the specific appointment. See *Goodyear Dunlop v. Gamez*, 151 S.W.3d 574 (Tex. App.—San Antonio 2004, no pet.), and the cases cited therein. Some of the more common actions are discussed below, but this should not be seen as an all-inclusive list.

Review Application and Court File: The guardian ad litem, like the attorney ad litem, should promptly review the court's file.

Prepare and File Notice of Appearance: The guardian ad litem commonly files a notice of appearance in the guardianship proceeding. It is not necessary to file an answer because the guardian ad litem is not an attorney in the proceeding.

Request and Review Medical History and Records: Like an attorney ad litem, the guardian ad litem should promptly request and review the proposed ward's medical records. These records provide information about the proposed ward's medical history and current prognosis that will be necessary for the guardian ad litem to make appropriate recommendations to the court. Because of privacy guidelines, the order appointing the guardian ad litem should include language that authorizes the disclosure of protected health information (Health Insurance Portability and Accountability Act language). Alternatively, an authorization for release of protected health information or a motion to compel these records should be filed. See 45 C.F.R. §§ 160.103, 164.508, 164.512 regarding requirements under HIPAA. See also discussion at section 6.5:2 above and forms 6-21 through 6-24 in this chapter.

Contact Proposed Ward's Physician: If there is a question about capacity, the guardian ad litem may contact the proposed ward's physician or other care provider to determine the extent of a proposed ward's incapacity.

Interview and Assess Proposed Ward: The guardian ad litem should always meet the proposed ward and the applicant. By meeting the proposed ward, the guardian ad litem gains firsthand knowledge of the proposed ward's abilities and potential incapacities and is able to verify the environment in which the proposed ward is residing pending appointment of a guardian. If the visit raises concerns about the proposed ward's living environment or safety, the guardian ad litem may promptly act to protect the proposed ward. For example, if they believe the proposed ward is in imminent danger, a guardian ad litem may seek the appointment of a temporary guardian or may seek their own appointment as guardian. To act in the best interest of the proposed ward, the guardian ad litem should also assess the capacity of the proposed ward. See the discussion at section 6.5:2 above regarding available materials for capacity assessment.

Meet Applicant and Verify Eligibility of Proposed Guardian: The guardian ad litem should interview the applicant before the hearing to determine whether the person seeking to be appointed guardian is qualified and eligible. The guardian ad litem should also determine the extent and nature of the ward's estate. Additionally, the guardian ad litem should verify that the applicant seeking appointment does not have an interest adverse to the proposed ward and is not otherwise disqualified to serve (that is, whether the applicant owes money to or has been taking financial advantage of the proposed ward). *See* Tex. Est. Code §§ 1055.001, 1104.351–.358. This meeting also allows the guardian ad litem to verify that the applicant understands the duties and responsibilities of a guardian and has the requisite education and experience—or competent counsel to assist the applicant—to meet these duties and responsibilities.

Consider Requesting Independent Medical Examination: If the guardian ad litem believes the medical information is inadequate or incorrect, they may seek either or both a court-ordered independent mental or physical examination. *See* Tex. Est. Code § 1101.103(c).

Consider Seeking Security for Costs: A proceeding to seek security for costs can assist the guardian ad litem if the proposed ward is being harassed. See forms 6-9 and 6-10 in this chapter. See also sections 6.5:3 and 10.4:2 through 10.4:6.

Prepare and File Motion in Limine: If the guardian ad litem determines that an applicant may have an interest adverse to the proposed ward or may be disqualified to serve, the guardian ad litem may prepare and file a motion in limine with the court and seek a ruling on the motion. The motion in limine brings the issue of the applicant's standing and disqualification to the attention of the court. Tex. Est. Code § 1055.001(c). See form 10-4 in this manual.

Prepare and File Application for Guardianship: In certain cases, the guardian ad litem may need to prepare and file their own application for guardianship. For example, the guardian ad litem may have been appointed initially in a temporary guardianship proceeding and no party has moved to appoint a permanent guardian. Alternatively, the guardian ad litem may have filed a motion in limine against the applicant. If the guardian ad litem is successful, the applicant's pleadings will be stricken from the record regardless of whether a guardianship is required. In these cases, the guardian ad litem should consider filing their own application to appoint a guardian if they determine the appointment is in the proposed ward's best interests.

Determine Preference of Proposed Ward: The guardian ad litem should determine the proposed ward's preference of a guardian. However, the guardian ad litem is under no duty to recommend the person selected by the proposed ward, if it is not in the proposed ward's best interests or if the proposed guardian is ineligible to serve.

Prepare and File Report of Findings and Recommendations: The information gathered by the guardian ad litem in the investigation of the need for guardianship is subject to examination by the court. Tex. Est. Code § 1054.054(d). Accordingly, most courts request or require that a guardian ad litem file a report setting forth findings and recommendations. The report will generally provide the court the following information:

1. a brief factual overview of the proposed ward's personal and financial situation and relevant family history;
2. information regarding the applicant's eligibility;
3. facts and information advising the court of the need for a guardianship, including any additional medical or personal information regarding the proposed ward's capacity or incapacity;
4. the proposed ward's preference of a guardian, if known;

5. an assessment of whether less restrictive alternatives to guardianship or supports and services are appropriate and available;

6. any other information obtained by the guardian ad litem that may assist the court in reviewing the application for guardianship; and

7. the guardian ad litem's recommendations on whether a guardian is required and, if so, who should be appointed and the scope of the guardian's powers.

Prepare for and Attend Hearing or Trial: The guardian ad litem, like the attorney ad litem, should prepare for and attend the hearing or trial. The guardian ad litem should be mindful not to exceed the scope of the appointment. See section 6.2 above.

§ 6.5:6 Pending Litigation Involving Ward and Guardian

The court may appoint a guardian ad litem for the ward if the guardian is a party to a lawsuit concerning or affecting the welfare of the ward. Generally, the guardian ad litem will represent the interest of the ward throughout the litigation. Such an appointment is similar to the provision for appointment of a guardian ad litem under rule 173 of the Texas Rules of Civil Procedure. *See generally* Tex. R. Civ. P. 173. Accordingly, the guardian ad litem should be familiar with the statutory and case law relevant to the pending lawsuit. If the lawsuit involves personal injury, wrongful death, or survivorship claims, the guardian ad litem should carefully consider their level of competence in these areas and must have sufficient knowledge to structure a possible settlement that is in the ward's best interests. Otherwise, the guardian ad litem should consider seeking a discharge (or associating counsel) so that the court can appoint a more experienced advocate. The needs of a gravely injured incapacitated person can greatly exceed what many insurance companies are willing to place outside of the structured portion of a settlement. The ward may not survive until the annuity fully accumulates prior to its payment phase. In such cases, the failure to have negotiated a commutation rider in the annuity (which commutes the value of the remaining guaranteed payments on the death of an annuitant into a lump sum payment or percentage payment) could be viewed as malpractice.

§ 6.5:7 Estate Plans

On the filing of an application by the guardian to establish an estate plan, the court may appoint a guardian ad litem for the ward or any other interested person. Tex. Est. Code § 1162.008. The guardian ad litem should review the application to determine if the gifts are appropriate, considering the ward's financial situation, the assets sought to be gifted, the effect of the gift on the ward's current and future cash flow if posting on the application has occurred, the ward's prior pattern of giving, and the investment plan required to be filed under section 1162.001 of the Texas Estates Code. If available, the guardian ad litem may also review the ward's will to determine if the gifting would adeem any gifts under the ward's will in a manner inconsistent with its current terms. See part VII. in chapter 8 of this manual for more information on estate plans.

§ 6.6 Removal of Ad Litem

The court has the discretion to appoint or replace a guardian ad litem. *Urbish v. 127th Judicial District Court*, 708 S.W.2d 429, 431–32 (Tex. 1986). A court, on its own motion, may remove and replace an attorney ad litem on proper notice and hearing. Further, any party may move for the removal of the attorney ad litem and, on proper notice and hearing, seek an order of removal. *See Coleson v. Bethan*, 931 S.W.2d. 706, 712 (Tex. App.—Fort Worth 1996, no writ).

An ad litem's appointment will usually terminate on the conclusion of the matter that resulted in the appointment, unless the order specifies otherwise. Tex. Est. Code § 1054.052. If an ad litem is appointed for another specific purpose, such as to review a pending application or cure a conflict between the guardian and ward under Tex. Est. Code § 1104.354(1)(B), the ad litem should be discharged after the specific function for which the ad litem was appointed or retained. The court should then enter an order discharging the ad litem. See forms 6-14 and 6-15 in this chapter. See also form 6-18 for an order vacating the appointment of an attorney ad litem.

§ 6.7 Liability of Ad Litem

§ 6.7:1 Liability of Attorney Ad Litem

An attorney ad litem is a legal advocate for the ward or proposed ward. Thus, the attorney ad litem owes the same duty and professional responsibility to the ward or proposed ward as they would to any other client. *Estate of Tartt v. Harpold*, 531 S.W.2d 696, 698 (Tex. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.). Just as in any other case, a breach of these duties and responsibilities can give rise to an action for legal malpractice.

In *Ex Parte Parker*, No. 07-12-00178-CV, 2014 WL 31253, at *4 (Tex. App.—Amarillo Jan. 3, 2014, no pet.), the appeals court noted that allegations of ineffective assistance of an appointed attorney ad litem would be reviewed under the same standard as in cases regarding termination of parental rights. The standard (applied by both the Texas Supreme Court and the U.S. Supreme Court) requires a complainant to demonstrate (1) that the counsel's assistance fell below an objective standard of reasonableness and (2) that the ad litem's deficient assistance prejudiced the ward's case. Such allegations must be firmly founded in, and affirmatively demonstrated by, the court's record. *Ex Parte Parker*, 2014 WL 31253, at *4.

In *In re Guardianship of Humphrey*, No. 12-07-00118-CV, 2009 WL 388955 (Tex. App.—Tyler Feb. 18, 2009, pet. denied), the appellants were required to raise the issue of the attorney ad litem's ineffective assistance to the trial court.

§ 6.7:2 Liability of Guardian Ad Litem

In contrast to an attorney ad litem, a guardian ad litem does not serve as an attorney (although attorneys are not precluded from being appointed as guardians ad litem). A guardian ad litem's liability, if any, is predicated on the nature of the order of appointment and the duties and responsibilities imposed by the court. If the order of appointment contemplates that the guardian ad litem act as an extension of the court, the appointee is immune from liability for actions taken within the scope of the appointment. *See Delcourt v. Silverman*, 919 S.W.2d 777, 786 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (guardian ad litem entitled to absolute judicial immunity when acting as arm of court); *see also* Tex. Est. Code § 1054.056, which provides for immunity from civil damages for a guardian ad litem (appointed under section 1054.051, 1102.001, or 1202.054) from recommendations made or opinions given as a guardian ad litem, except for statements in such recommendations or opinions that are willfully wrongful, reckless, in bad faith, malicious, or grossly negligent. The immunity is premised on the need for the guardian ad litem to be free to act and make impartial recommendations to the court without fear of a potential lawsuit. *Cf. Kabbani v. Papadopolous*, No. 01-07-00191, 2009 WL 4695466 (Tex. App.—Houston [1st Dist.] Feb. 26, 2009, pet. denied) (court upheld similar statutory immunity for guardian ad litem under Texas Family Code), and *Wilz v. Sanders*, No. 10-04-00007-CV, 2005 WL 428467 (Tex. App.—Waco Feb. 23, 2005, no pet.) (immunity of guardian ad litem upheld where appointed under federal statute).

On the other hand, depending on the duties imposed by the court in the order appointing the guardian ad litem, there may be liability for civil damages for a fiduciary breach of those duties. *See Byrd v. Woodruff*, 891 S.W.2d 689 (Tex. App.—Dallas 1994, writ dism'd by agr.) (guardian ad litem appointed under rule 173 liable for breach of duty as minor's personal representative in settlement proceedings). In *Byrd*, the court addressed these issues, and a careful reading by any attorney considering acting as an ad litem is highly recommended. In short, the court found that (1) a guardian ad litem's role establishes a fiduciary relationship with the ward, (2) a guardian ad litem is not an agent of the court and therefore is not granted judicial immunity, and (3) no attorney-client relationship exists between a guardian ad litem and a ward. *Byrd*, 891 S.W.2d at 708–11; *see also Roark v. Mother Frances Hospital*, 862 S.W.2d 643, 647 (Tex. App.—Tyler 1993, writ denied) (recognizing the different roles between a guardian ad litem and an attorney and affirming trial court's refusal to award any fees to guardian ad litem based on their performance of duties as plaintiff's attorney).

Unlike a guardian ad litem appointed under Tex. R. Civ. P. 173, a guardian ad litem appointed in a guardianship proceeding has qualified judicial immunity if they are appointed to represent the interest of an incapacitated person in a guardianship proceeding involving the creation, modification, or termination of a guardianship as long as the opinion or recommendation is not willfully wrongful, given with conscious indifference or reckless disregard to the safety of another; with malice or in bad faith; or is grossly negligent. Tex. Est. Code § 1054.056.

In the context of litigation, the responsibility of the guardian ad litem is limited, and the guardian ad litem is generally not to participate in the underlying litigation (even to reviewing the discovery or litigation files) except to the limited extent of the division of settlement proceeds. *Jocson v. Crabb*, 133 S.W.3d 268 (Tex. 2004) (per curiam), *on remand*, 196 S.W.3d 302 (Tex. App.—Houston [1st Dist.] 2006, no pet.). A guardian ad litem may choose to actively participate in the litigation and discovery, but compensation is not to be awarded for that activity.

Only in extraordinary circumstances does the rule contemplate that a guardian ad litem will have a broader role. *See generally* Tex. Est. Code §§ 1054.051–.056.

Unlike the immunity conferred for a guardian ad litem in a guardianship proceeding, there is no statutory immunity for a guardian ad litem appointed under the nonguardianship provisions of the Texas Estates Code or for a guardian ad litem appointed under the Texas Property Code (*see* Tex. Prop. Code § 115.014). In those cases, the issue of possible derived judicial immunity must be examined. Derived judicial immunity affords an officer of the court the same immunity as a judge acting in their official capacity: absolute immunity for judicial acts performed in the scope of jurisdiction. *Dallas County v. Halsey*, 87 S.W.3d 552, 554 (Tex. 2002). For an extended analysis of the issue of derived judicial immunity for ad litems, see Dani D. Smith, *Attorney Ad Litems and Guardian Ad Litems: An Overview of the Roles and Liabilities in Non-Guardianship Cases*, *in* Advanced Estate Planning and Probate Course, State Bar of Texas (2018).

§ 6.8 Ad Litem Fees

§ 6.8:1 Basis of Fees for Ad Litem

Section 1155.151 of the Texas Estates Code addresses the payment of professional services and provides that in a guardianship proceeding, the court costs of the proceeding including the cost of the guardians ad litem, attorneys ad litem, court visitor, mental health professionals, and interpreters appointed under this title, shall be set in an amount the court considers equitable and just and, except as provided by subsection (c), shall be paid as follows: (1) out of the guardianship estate; (2) out of the management trust, if a management trust has been created for the benefit of the ward; or (3) if there is no guardianship estate

or no management trust has been created for the ward's benefit or the assets of the guardianship estate or management trust are insufficient to pay the costs, by the party to the proceeding who incurred the costs, unless that party filed, on the party's own behalf, a statement of inability to afford payment of court costs or an appeal bond under rule 145 of the Texas Rules of Civil Procedure (sometimes referred to as a pauper's affidavit). Such a statement is applicable only if it is the applicant who has no ability to pay costs or is receiving governmental assistance based on indigence. It is not the proposed ward whose inability to pay is measured. *See* Tex. Est. Code § 1155.151.

The test for determining entitlement to proceed in forma pauperis is whether the record shows the appellant would be unable to pay "if he really wanted to and made a good-faith effort to do so." *Pinchback v. Hockless*, 164 S.W.2d 19 (Tex. 1942). Typically, only the clerk or an ad litem have standing to contest the affidavit. At a hearing on such a contest, the filer of the affidavit has the burden of proof. *Pinchback*, 164 S.W.2d at 20.

Evidence of the inability to afford costs includes evidence that the declarant receives government benefits or that the declarant is being represented by an attorney who is providing free legal services through certain legal services providers. *See* Tex. R. Civ. P. 145. The statement at form 6-25 in this chapter is based on the Texas Supreme Court's promulgated affidavit, with a check box for "probate" added. The original form was promulgated because of abuses by some Texas counties in the attempted use of the pauper's affidavit. *Report of State Bar of Texas Poverty Law Section Affidavits and Statements of Inability to Pay Committee*, available at **http://povertylawsection.org/wp-content/uploads/2015/01/Report-Affidavits-and-Statements-of-Inability-to-Pay-committee-with-Exhibits-Final.pdf**. The court shall then issue the judgment accordingly. *See* Tex. Est. Code § 1155.151(a).

Also, in a contested proceeding, on a finding that persons have acted without good faith or just cause, the judge is authorized to tax costs and require reimbursement of attorney's fees (including the fees of the ad litems). Tex. Est. Code §§ 1053.052, 1155.054, 1155.151. See section 10.4:2 in this manual.

An attorney ad litem's fee is generally based on the time expended in representing the ward or proposed ward. A guardian ad litem's fee is based on the time expended in carrying out their duties. In either case, the fees and expenses are subject to court approval. Therefore, the ad litem must keep accurate records of the time expended in the case to be able to prove up reasonable and necessary fees and expenses. For ad litems appointed in counties that have issued fee standards, the ad litem should be familiar with the applicable standards adopted by that county. For example, Harris County probate courts adopted the Standards for Court Approval of Attorney Fee Petitions, which may be found at **https://probate.harriscountytx.gov**. In *In re Guardianship of Hanker*, No. 01-12-00507-CV, 2013 WL 3233251 (Tex. App.—Houston [1st Dist.] June 25, 2013, no pet.), the court's published fee schedule (in this case, that of Galveston County) with guidelines and a range of hourly rates based on an attorney's years of experience was upheld as a guide for the finder of fact to determine the reasonableness of the fees under the particular circumstances.

Compensation for a guardian ad litem, regardless of whether a guardianship is created, may be authorized by the court from available funds from either (1) the ward's estate; (2) a management trust created for the benefit of the proposed ward under chapter 1301, if such a trust has in fact been created; or (3) on a determination by the court that the proposed ward or the management trust is unable to pay for services provided by the guardian ad litem, in which case the court may authorize compensation from the county treasury. Tex. Est. Code § 1102.005.

§ 6.8:2 Evidence: Burden of Proof

The ad litem has the burden to apply for the fees and to appear and give sufficient evidence that the ad litem has stayed within the statutorily defined scope of the appointment, to establish the amount of time spent as an ad litem on behalf of the client, that such time expended was reasonable and necessary, and to establish the appropriate hourly rate. *In re White Inter Vivos Trusts*, No. 04-09-00040-CV, 2009 WL 2767155 (Tex. App.—San Antonio Aug. 31, 2009, no pet.); *Magna Donnelly Corp. v. Deleon*, 267 S.W.3d 108 (Tex. App.—San Antonio 2008, no pet.); *Goodyear Dunlop v. Gamez*, 151 S.W.3d 574 (Tex. App.—San Antonio 2004, no pet.).

Billing Records Required: The court cannot adjudicate the reasonableness of attorney's fees on judicial knowledge without the benefit of evidence. *Great American Reserve Insurance Co. v. Britton,* 406 S.W. 2d 901 (Tex. 1966); *Bullock v. Foster Cathead Co.*, 631 S.W.2d 208 (Tex. App.—Corpus Christi–Edinburg 1982, no writ); *Mills v. Mills,* 559 S.W.2d 687 (Tex. App.—Fort Worth 1977). Detailed billing records supply such evidence.

Expert Testimony: If challenged, evidence on the reasonableness of attorney's fees comes under the definition of expert testimony and is measured by the requisites of *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995), which adopted the U.S. Supreme Court's rationale in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

No "Bonus" Factors: Absent exceptional circumstances, a court should not enhance the fee calculated by multiplying the necessary number of hours expended by a reasonable hourly rate. Additional sums are rarely appropriate, particularly since a guardian ad litem serves, in part, as an advisor to the court and will enjoy the protection of qualified judicial immunity. Tex. Est. Code § 1054.056; Tex. R. Civ. P. 173 cmt. 5. *See also Land Rover U.K., Ltd. v. Hinojosa*, 210 S.W.3d 604, 608–09 (Tex. 2006); *Ford Motor Co. v. Garcia*, 363 S.W.3d 618 (Tex. App.—Corpus Christi–Edinburg 2010), *rev'd & remanded*, 363 S.W.3d 573 (Tex. 2012).

No Prior Objections Required: Complaints about the ad litem's services need not be made before the fee hearing. *Jocson v. Crabb*, 133 S.W.3d 268 (Tex. 2004).

An ad litem determined by the court to have exceeded their role will not be paid for unauthorized work. *Land Rover U.K., Ltd.*, 210 S.W.3d at 607; *Magna Donnelly Corp.*, 267 S.W.3d 108; *Goodyear Dunlop*, 151 S.W.3d 574; *Roark v. Mother Frances Hospital*, 862 S.W.2d 643, 647 (Tex. App.—Tyler 1993, writ denied). For example, a guardian ad litem who takes on the role of the ward's attorney is not entitled to compensation for services rendered as an attorney. *Dawson v. Garcia*, 666 S.W.2d 254, 265 (Tex. App.—Dallas 1984, no writ). The trial court has broad discretion in determining a proper fee. On appeal, the standard of review is abuse of discretion. *In re Guardianship of Hanker*, No. 01-12-00507-CV, 2013 WL 3233251 (Tex. App.—Houston [1st Dist.] June 25, 2013, no pet.).

§ 6.8:3 Factors in Determining Reasonableness

For a discussion on determining the reasonableness of fees, see sections 10.10 through 10.10:11 in this manual. See forms 6-19 and 6-20 in this chapter for an application and order to pay appointee's fees and expenses.

§ 6.8:4 Examples of Non-compensable Activities

While ad litems are entitled to be compensated for their time in preparing ad litem reports, there are certain activities for which they are not entitled to charge.

Research: Attorneys who choose to practice in this area should be familiar with probate and guardianship matters, as well as the fee policies of the majority of the statutory probate courts. Because of Texas Disciplinary Rules of Professional Conduct rule 1.01, which states "[a] lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence," the court will not ordinarily reimburse attorneys for basic legal research in these areas. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.01. A formal opinion from the American Bar Association Standing Committee on Ethics and Professional Responsibility indicates, and it is generally a consensus among statutory probate judges, that the costs of computerized legal research (Westlaw and Lexis) are a part of an attorney's overhead, as are the costs of a hard-copy library. Comm. on Ethics & Pro. Resp., Formal Op. 379 (1993). Reimbursement may be allowed for research to address novel legal questions raised by opposing counsel or questions posed by the court.

Preparation of Fee Application, Fee Hearings, and Appeals: Preparing and defending a fee application at a hearing or on appeal promotes the ad litem's interests, not those of the client. Time expended in such activities is not reimbursable. *In re Guardianship of Glasser*, 297 S.W.3d 369, 378–79 (Tex. App.—San Antonio 2009, no pet.); *Holt Texas, Ltd. v. Hale*, 144 S.W.3d 592, 597–98 (Tex. App.—San Antonio 2004, no pet.); *Goodyear Dunlop v. Gamez*, 151 S.W.3d 574, 587–593 (Tex. App.—San Antonio 2004, no pet.). However, appellate attorney's fees were held proper for an ad litem who successfully appealed a trust termination and had the trust reinstated as to the ad litem's clients. *In re White Inter Vivos Trusts*, No. 04-09-00040-CV, 2009 WL 2767155 (Tex. App.—San Antonio Aug. 31, 2009, no pet.).

Consultations with Court Staff Regarding Procedural Questions: These consultations are not reimbursable unless the court staff has specifically requested information not ordinarily contained in properly drafted pleadings or if the fee application reveals special circumstances requiring the attorney to seek guidance from the court.

Telephone Calls to Court Staff or Clerk's Office Inquiring about Status of Paperwork: Attaching a self-addressed, stamped envelope to all applications and proposed orders, coupled with payment of any required filing and posting fees, will help ensure attorneys receive conformed copies of submitted orders. This will reduce or eliminate the necessity for calls to the clerk's office to check on the status of a particular order.

§ 6.8:5 Billing for Additional Legal Professionals and Retaining Specialized Counsel

Only the ad litem is appointed, not the entire law firm of the ad litem; the court's intent is that the appointed attorney act personally as an officer of the court. An ad litem may not be compensated for time expended by other attorneys, unless the court has made a specific finding that the other attorneys' services were reasonable and necessary under a particular extenuating circumstance. *Jocson v. Crabb*, 133 S.W.3d 268, 271 (Tex. 2004); *Goodyear Dunlop v. Gamez*, 151 S.W.3d 574, 588 (Tex. App.—San Antonio 2004, no pet.).

In extenuating circumstances, and with prior permission of the court, additional counsel or support staff may be employed. This will still be subject to a subsequent finding by the court that the additional attorneys' services were reasonable and necessary. *In re Guardianship of Glasser*, 297 S.W.3d 369 (Tex. App.—San Antonio 2009, no pet.) (attorney ad litem in guardianship allowed to retain litigation counsel); *accord Scally v. Scally*, No. 14-09-00344-CV, 2010 WL 3864924 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (ad litem in SAPCR proceeding retained counsel to collect awarded fees); *Goodyear Dunlop*, 151 S.W.3d at 588. The applicant must show particular, unusual circumstances about why it was necessary for persons other than the ad litem to fulfill the ad litem's duties. *Ford Motor Co. v. Garcia*, 363 S.W.3d 573, 580 (Tex. 2012). Additionally, full narrative detail must be provided for any services performed by anyone other than the ad litem. *Ford Motor Co.*, 363 S.W.3d at 580–81.

Legal work performed by legal assistants may be recovered as an element of attorney's fees. *Gill Savings Ass'n v. International Supply Co.*, 759 S.W.2d 697, 702–05 (Tex. App.—Dallas 1988, writ denied). The proof required for billings by legal assistants is set forth in detail in that opinion. For a more recent case, see *Ford Motor Co.*, 363 S.W.3d at 580–81, for specific application to ad litems. In *In re Guardianship of Alford*, 596 S.W.3d 352 (Tex. App.—Texarkana 2020, no pet.), the court of appeals revised an award to include only paralegal work performed that was considered work that has "traditionally been done by any attorney." Answering and placing telephone calls and uploading documents did not qualify. *In re Guardianship of Alford*, 596 S.W.3d at 361 (citing *All Seasons Window & Door Manufacturing, Inc. v. Red Dot Corp.*, 181 S.W.3d 490, 503 (Tex. App.—Texarkana 2005, no pet.) (quoting *Clary Corp. v. Smith*, 949 S.W.2d 452, 469 (Tex. App.—Fort Worth 1997, writ denied))).

§ 6.8:6 Source of Payment

An ad litem's fees are costs of court. The court will typically order the fees to be paid from the estate of the ward or proposed ward. If, however, the court determines that the estate is insufficient to pay, the court may order the county to pay the cost of the ad litem's services in a guardianship proceeding. Tex. Est. Code § 1155.151; *Overman v. Baker*, 26 S.W.3d 506, 512–13 (Tex. App.—Tyler 2000, no pet.). In such cases, the court approves fees under a budget approved and overseen by the commissioners court. Consequently, attorneys can rarely be compensated at their regular hourly rates. "County-pay" cases may be on a "capitated fee" (reduced set fee) basis or on a reduced hourly rate (if the case demands exceed the norm).

Note also that, in contested cases, on a finding that persons have acted without good faith or just cause, the judge is authorized to tax costs and require reimbursement of attorney's fees (including the fees of the ad litems). Tex. Est. Code §§ 1053.052, 1155.054. See section 10.4:2 in this manual. In *In re Strban*, No. 12-21-00049-CV, 2021 WL 2371418 (Tex. App.—Tyler June 9, 2021, no pet.), the ward's father, by filing a guardianship proceeding, became a party to the proceeding and incurred liability for the costs of the proceeding. Because he did not file an affidavit of inability to pay pursuant to Tex. R. Civ. P. 145, the county was not required to pay the costs. And because the father's pleadings supported the request to order the parties to pay the fees of the attorneys and guardian, the father was put on notice of the request for fees and the judge's order requiring the father to make a deposit for costs was appropriate.

When an ad litem can be compensated from a solvent estate, the court's award of reasonable attorney's fees begins with the court's determination of whether the representation reasonably required of (and actually provided by) the ad litem is "typical" or "normal." The court's analysis is based on the ABA factors (see sections 10.10 through 10.10:11 in this manual) as well any unusual circumstances peculiar to probate and guardianship. These factors determine the extent to which the fee allowed should be more than, equal to, or less than the typical or normal fee. In general, ad litem fees are less than the fee of the applicant's attorney unless special factors are present.

§ 6.8:7 Hourly Rates

The hourly rates allowed will vary, depending on the nature of the case and the experience of the attorneys involved. Rates may range from a modest hourly rate for a no-asset, county-pay case to higher rates for complex litigation (such as that involving wrongful death, malpractice, fiduciary breach, or trust). Although the local court will most likely have a published policy regarding what can and cannot be charged for, an attorney's hourly rate is expected to cover office overhead (everything except actual out-of-pocket expenses such as filing fees).

§ 6.8:8 Expenses

Separate expenses and travel costs should be detailed in attached exhibits. Court staff will often check claimed mileage with an online map service like Google Maps.

§ 6.8:9 When to File

The application and order for fees and expenses should be filed at or shortly after the hearing on the guardianship. If the guardian ad litem has brought the application, the application for fees should be made after the guardian has qualified.

§ 6.8:10 Separate Order Awarding Fees

Previous orders of the Texas Supreme Court requiring any order awarding a fee to a person appointed by a statutory probate court to be separate and apart from any other pleading (Misc. Docket Nos. 94-9143 & 07-9188) were repealed following the 2015 enactment of the fee-reporting mechanism of Tex. Gov't Code ch. 36. However, many courts will still want the order awarding fees to be separate and apart from any other pleading to better enable the clerk to meet mandatory reporting requirements.

Despite the dicta in the case of *In re Guardianship of Fortenberry*, 261 S.W.3d 904 (Tex. App.—Dallas 2008, no pet.), fee applications should always be filed as separate pleadings. Requests for fees should never be "embedded" in another pleading. Fee applications should not be filed as claims against the estate unless the estate is insolvent or the guardian has indicated they will refuse to pay when application is made. Being subjected to the claims process may force the ad litem to have to unnecessarily file suit to recover fees. *In re Archer*, No. 04-03-00260-CV, 2004 WL 57049 (Tex. App.—San Antonio Jan. 14, 2004, pet. denied).

§ 6.8:11 Security for Costs

Either the clerk of the court or the attorney ad litem may seek to have the applicant for guardianship post security to cover the probable costs of the guardianship proceeding. *See* Tex. Est. Code § 1053.052. For further discussion of seeking security for costs, see section 6.5:3 above and sections 10.4:2 through 10.4:6 in this manual.

§ 6.9 Fraud, Abuse, or Exploitation of Elderly or Disabled Persons

§ 6.9:1 Duty to Report Abuse, Neglect, or Exploitation of Elderly or Disabled Person

A person who becomes aware of any specific acts of abuse, neglect, or exploitation of an elderly (age sixty-five or older) or disabled person must report certain information to the Texas Department of Family and Protective Services or other appropriate agency. *See* Tex. Hum. Res. Code §§ 48.002(a)(1), 48.051(a), (b). Reports may be made at any time to the Department of Family and Protective Services on a twenty-four-hour toll-free number, 1-800-252-5400, or at the Department's secure website, **www.txabusehotline.org**. Complaints about a nursing home or similar facility may be made to Texas Health and Human Services at 1-800-458-9858.

The duty to report applies without exception to a person whose knowledge concerning possible abuse, neglect, or exploitation is obtained during the scope of the person's employment or whose professional communications are generally confidential,

including an attorney, clergy member, medical practitioner, social worker, employee or member of a board that licenses or certifies a professional, and mental-health professional. Tex. Hum. Res. Code § 48.051(c). Thus the duty to report extends to an attorney ad litem, a guardian ad litem, an employee of the ward's chapter 1301 trust, and so forth.

The required report may be made orally or in writing and must include the name, age, and address of the elderly or disabled person; the name and address of any person responsible for the elderly or disabled person's care; the nature and extent of the elderly or disabled person's condition; the basis of the reporter's knowledge; and any other relevant information. Tex. Hum. Res. Code § 48.051(d).

Failure to report the abuse, neglect, or exploitation is generally a class A misdemeanor, and knowingly or intentionally reporting information known to be false or unfounded is a class B misdemeanor. Tex. Hum. Res. Code §§ 48.052, 48.053.

§ 6.9:2 Financial Abuse of Elderly Individual

Knowingly engaging in the financial abuse of an elderly individual is an offense ranging from a class B misdemeanor (property value less than $100) to a first degree felony (property value of $150,000 or more). Tex. Penal Code § 32.55(c), (d). Financial abuse, which includes financial exploitation, is the wrongful taking, appropriation, obtaining, retention, or use of, or assisting in the wrongful taking, appropriation, obtaining, retention, or use of, money or other property of another person by any means, including by exerting undue influence. Tex. Penal Code § 32.55(a)(2). Financial exploitation is the wrongful taking, appropriation, obtaining, retention, or use of money or other property of another person by a person who has a relationship of confidence or trust with the other person. Financial exploitation may involve coercion, manipulation, threats, intimidation, misrepresentation, or the exerting of undue influence. Tex. Penal Code § 32.55(a)(3). This includes the breach of a fiduciary relationship, including the misuse of a durable power of attorney, or the abuse of guardianship powers, that results in the unauthorized appropriation, sale, or transfer of another person's property. A person has a relationship of trust and confidence with another person if the person is a parent, spouse, adult child, or other relative by blood or marriage of the other person; is a joint tenant or tenant in common with the other person; has a legal or fiduciary relationship with the other person; is a financial planner or investment professional who provides services to the other person; or is a paid or unpaid caregiver of the other person. Tex. Penal Code § 32.55(b).

§ 6.9:3 Securing Execution of Document by Fraud or Deception

Under Texas Penal Code section 32.46, it is an offense if, with the intent to defraud, a person causes another person to sign or execute a document without their effective consent and the document affects the property or service or pecuniary interest of any person. Tex. Penal Code § 32.46(a). If the offense is committed against an elderly individual, it is increased to the next higher category of offense for purposes of punishment. Tex. Penal Code § 32.46(c–1). Consent is not effective if it is (1) induced by deception or coercion; (2) given by a person who because of youth, mental disease or defect, or intoxication is known to be unable to make reasonable property dispositions; or (3) given by a person who by reason of advanced age is known to have a diminished capacity to make informed and rational decisions about the reasonable disposition of property. Tex. Penal Code § 32.46(d)(3). The offense also includes causing a clerk ("public servant") to file or record any purported judgment or other certain documents without the public servant's effective consent. Tex. Penal Code § 32.46(a)(2). The offense is punishable as either a misdemeanor or a felony, depending on the pecuniary interest. Tex. Penal Code § 32.46(b), (c).

§ 6.9:4 Continuous Sexual Abuse of Disabled Person

Amendments to the Texas Penal Code in 2021 extended the applicability of Penal Code section 21.02 relating to the continuous sexual abuse of a young child to also include disabled individuals. The offense is defined as two or more acts of sexual abuse during a period of thirty or more days in duration, regardless of whether the acts are committed against one or more victims. Tex. Penal Code § 21.02. The offense is a first degree felony punishable by imprisonment for life or for a minimum of twenty-five years or a maximum of ninety-nine years. Tex. Penal Code § 21.02(h).

§ 6.9:5 Access to Financial Records by Guardianship Abuse, Fraud, and Exploitation Deterrence Program

The Guardianship Abuse, Fraud, and Exploitation Deterrence Program of the Office of Court Administration may now seek access to the records of a financial institution, accounting records, and other financial records concerning a ward or the ward's estate, including receipts, records of deposits and withdrawals, invoices, bills, and any other records of transactions involving the money or assets of a ward or the ward's estate. Tex. Gov't Code § 72.1221(a). The requested records are to be provided upon request by the program, but the statute allows the program to seek an order of the court in which the guardianship is pending to compel production of the documents. Tex. Gov't Code § 72.1221(a), (c).

§ 6.9:6 Financial Hold on Account of Vulnerable Adult Upon Suspicion of Financial Exploitation

Under new amendments to the Texas Finance Code, Texas Government Code, and Securities Act, a financial institution or a securities dealer or investment adviser may place a hold on any transaction in a vulnerable adult's account for up to ten days if there is reason to believe the transaction involves financial exploitation and the institution has submitted a report of the suspected exploitation to the Texas Department of Family and Protective Services or Securities Commissioner, as applicable. *See* Tex. Fin. Code § 281.004(a), (b); Tex. Rev. Civ. Stat. Ann. art. 581–45; Tex. Gov't Code § 4004.355(a), (b). A "vulnerable adult" is defined as an elderly person or a person with a disability (as further defined in the statute). Tex. Fin. Code § 281.001(5).

§ 6.10 Duty to Report Abuse or Neglect of Child

A person who has reasonable cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person must immediately report certain information to the Texas Department of Family and Protective Services or other appropriate agency. *See* Tex. Fam. Code §§ 261.101(a), 261.103. Reports may be made at any time to the Department of Family and Protective Services on a twenty-four-hour toll-free number, 1-800-252-5400, or at the Department's secure website, **www.txabusehotline.org**.

The duty to report applies without exception to an individual whose personal communications may otherwise be privileged, including an attorney, a member of the clergy, a medical practitioner, a social worker, a mental-health professional, an employee or member of a board that licenses or certifies a professional, and an employee of a clinic or health-care facility that provides reproductive services. *See* Tex. Fam. Code § 261.101(c). Special provisions relate to professionals. *See* Tex. Fam. Code § 261.101(b). Thus the duty to report extends to an attorney ad litem, guardian ad litem, employee of the ward's chapter 1301 trust, and so forth.

The report must include, if known, the name and address of the child; the name and address of the person responsible for the child's care, custody, or welfare; and any other pertinent information about the abuse or neglect. Tex. Fam. Code § 261.104. Penalties are prescribed for failure to report and for reporting falsely. *See* Tex. Fam. Code §§ 261.107, 261.109.

Form 6-1

[Caption. See § 3 of the Introduction in this manual.]

Motion for Appointment of Attorney Ad Litem

(Tex. Est. Code § 1054.001)

This Motion for Appointment of Attorney Ad Litem in accordance with section 1054.001 of the Texas Estates Code is brought by [**name of movant**], Movant, who shows in support:

1. An application for the appointment of a permanent guardian of the [person/estate/person and estate] of [**name of proposed ward**], Proposed Ward, is currently pending before this Court.

2. It is in the interest of Proposed Ward for the Court to appoint an attorney ad litem to represent and advocate the interests of Proposed Ward in these guardianship proceedings.

Movant prays that the Court grant this Motion for Appointment of Attorney Ad Litem in accordance with section 1054.001 of the Texas Estates Code to represent and advocate the interests of Proposed Ward in connection with [**title of application**].

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Respectfully submitted,

_____

[**Name**]
Attorney for Movant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Notice of Hearing

The above motion is set for hearing on _____ at _____ __.M. in [**designation and location of court**].

SIGNED on _____.

_____

Judge or Clerk

Certificate of Service

I certify that a true copy of this [**title of document**] was served in accordance with rule 21a of the Texas Rules of Civil Procedure.

SIGNED on _____.

_____

[**Name of attorney**]

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Form 6-2

[Caption. See § 3 of the Introduction in this manual.]

Order Appointing Attorney Ad Litem

(Tex. Est. Code § 1054.001)

On [**date**] the Court considered [**name of movant**]'s Motion for Appointment of Attorney Ad Litem in accordance with section 1054.001 of the Texas Estates Code. The Court finds that it is in the interest of [**name of proposed ward**], Proposed Ward, that an attorney ad litem be appointed to represent the interests of Proposed Ward in these proceedings.

The Court appoints [**name of attorney**], an attorney licensed to practice before this Court and certified by the State Bar of Texas, as attorney ad litem to advocate the interests of Proposed Ward before the Court in these guardianship proceedings.

IT IS ORDERED that [**name of attorney**], as attorney ad litem, be entitled to reasonable compensation for [his/her] services, to be set by the Court and taxed as a part of the costs of these proceedings, and ordered paid in accordance with the applicable law.

IT IS FURTHER ORDERED that, pursuant to Texas Estates Code sections 1054.003 and 1054.004 and pursuant to HIPAA Regulations (45 C.F.R. section 164.512(e)(1)(i)), the above attorney ad litem is authorized and entitled to review and be supplied with copies of all certificates of current physical, medical, and intellectual examinations and have access to all of [**name of proposed ward**]'s relevant medical, psychological, and intellectual testing records. This means that a health-care organization or physician presented with this order shall give the attorney ad litem complete access to [**name of proposed ward**]'s protected health information. The attorney ad litem is further authorized to discuss with the physician or health-care provider any matters relating to [**name of proposed ward**]'s health-care records and [**name of proposed ward**]'s care, treatment, diagnosis, and needs.

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IT IS FURTHER ORDERED that [**name of attorney**] be given access to all of [**name of proposed ward**]'s relevant financial, medical, psychological, and intellectual testing records.

IT IS FURTHER ORDERED that [**name of attorney**] shall discuss with [**name of proposed ward**] the Bill of Rights for Wards as set forth in section 1151.351 of the Texas Estates Code.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

By:_____
Attorney for Movant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 6-3

[Caption. See § 3 of the Introduction in this manual.]

Motion for Appointment of Attorney Ad Litem

(Tex. Est. Code § 1204.002)

This Motion for Appointment of Attorney Ad Litem in accordance with section 1204.002 of the Texas Estates Code is brought by [**name of movant**], Movant, who shows in support:

1. [**Name of guardian**] has filed a final account with the Court.

Select one of the following.

2. [**Name of ward**], Ward, died on [**date**], and no executor or administrator has been appointed for Ward's estate.

Or

2. [**Name of ward**], Ward, is a nonresident of the state of Texas and therefore requires representation before the Court on this final account.

Or

2. The residence of [**name of ward**], Ward, is unknown and representation before the Court on the final account is required to protect their interests.

Continue with the following.

3. Based on the foregoing facts, in accordance with section 1204.002 of the Texas Estates Code, the appointment of an attorney ad litem is needed to represent Ward's interests in connection with the final settlement of the guardianship.

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Movant prays that the Court grant this Motion for Appointment of Attorney Ad Litem in accordance with section 1204.002 of the Texas Estates Code to represent Ward's interests in the final settlement of the guardianship.

Respectfully submitted,

_____

[**Name**]
Attorney for Movant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 6-4

[Caption. See § 3 of the Introduction in this manual.]

Order Appointing Attorney Ad Litem

(Tex. Est. Code § 1204.002)

On [**date**] the Court considered the Motion for Appointment of Attorney Ad Litem in accordance with section 1204.002 of the Texas Estates Code, and the Court finds as follows:

1. The final account of [**name of guardian**] has been filed in this case.

Select one of the following.

2. [**Name of ward**], Ward, died on [**date**], and no executor or administrator has been appointed for Ward's estate.

Or

2. [**Name of ward**], Ward, is a nonresident of the state of Texas and therefore requires representation before the Court on this final account.

Or

2. The residence of [**name of ward**], Ward, is unknown and representation before the Court on the final account is required to protect [his/her] interests.

Continue with the following.

3. The appointment of an attorney ad litem to represent Ward's interests in connection with the final settlement of the guardianship is required under section 1204.002 of the Texas Estates Code.

IT IS ORDERED that [**name of attorney ad litem**] is hereby appointed attorney ad litem to represent the interests of [**name of ward**] in the final settlement of the guardianship.

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IT IS FURTHER ORDERED that [**name of attorney ad litem**]'s duties include examining the final account and records of [**name of guardian**], determining the person or persons entitled to receive the remaining estate, making objections and filing written pleadings if necessary, and taking such other steps to protect the interests of [**name of ward**] as are deemed necessary, and reporting to the Court whether the final account is true and correct.

IT IS FURTHER ORDERED that [**name of attorney ad litem**] be allowed a reasonable fee, and expenses for [his/her] services are to be paid out of [**name of ward**]'s estate, subject to approval of this Court.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

By:_____
[**Name**]
Attorney for Movant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 6-5

NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA

[Caption. See § 3 of the Introduction in this manual.]

Rule 11 Agreement Regarding Initial Disclosures

Pursuant to Rule 11 of the Texas Rules of Civil Procedure, the parties in this case agree to be bound by the following terms during the pendency of this litigation to the same extent as if these terms were entered by the Court. The parties agree and acknowledge that this Rule 11 Agreement will be filed and made a part of the record in this case. This agreement is effective when it is signed by all parties and filed with the [**county**] County Clerk's Office.

We are the parties in this guardianship application. We understand the parties must usually exchange "Initial Disclosures" of the information and material described in Texas Rules of Civil Procedure, Rule 194.2.

By signing this Rule 11 Agreement:

____ We agree to waive the exchange of Initial Disclosures.

or

____ We agree to waive the exchange of some but not all information and material.

Include the following if applicable.

Disclosure of Information Required

From Whom	Nature of Information to Be Disclosed
_____	_____
_____	_____

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_____ _____

_____ _____

_____ _____

The due date for this information and material is _____.

Continue with the following.

AGREED:

_____ _____
Date Signed Attorney for Applicant

_____ _____
Date Signed Attorney Ad Litem

_____ _____
Date Signed Guardian Ad Litem

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Form 6-6

[Caption. See § 3 of the Introduction in this manual.]

Original Answer of Attorney Ad Litem

This original answer is filed by [**name of attorney ad litem**], Attorney Ad Litem, as attorney ad litem for [**name of proposed ward**], Proposed Ward.

1. Attorney Ad Litem on behalf of Proposed Ward enters a general denial and reserves the right to amend or supplement this answer.

2. Attorney Ad Litem respectfully requests that the Court and jury require [**name of applicant**] to prove their claims, charges, and allegations in accordance with the applicable law as is required by the constitution and laws of the state of Texas.

3. Attorney Ad Litem respectfully requests that [his/her] fees and expenses be taxed as part of the costs in this proceeding and ordered paid in accordance with the applicable law.

Attorney Ad Litem prays that Applicant take nothing by reason of their application filed herein and for such other and further relief to which Attorney Ad Litem may show themselves justly entitled. Attorney Ad Litem requests a judgment for reasonable ad litem fees.

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Respectfully submitted,

_____

[**Name**]
Attorney Ad Litem
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Certificate of Service

I certify that a true copy of this [**title of document**] was served in accordance with rule 21a of the Texas Rules of Civil Procedure.

SIGNED on _____.

_____

[**Name of attorney**]

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Form 6-7

This application may be modified for use under Tex. Health & Safety Code § 574.010 to obtain examination of a proposed patient in a court-ordered mental-health application.

[Caption. See § 3 of the Introduction in this manual.]

Motion for Medical Examination

This Motion for Medical Examination under section [1101.103/1101.104] of the Texas Estates Code is filed by [**name of attorney ad litem**], Attorney Ad Litem, as attorney ad litem for [**name of ward or proposed ward**], [Ward/Proposed Ward], who shows in support:

1. Attorney Ad Litem believes [Ward/Proposed Ward] should be evaluated by [**name of examiner**], an independent health-care provider, for the purpose of determining the [physical capacity/mental capacity] of [Ward/Proposed Ward] and their prognosis.

2. Good cause is shown for an examination of [Ward/Proposed Ward] because their [physical capacity/mental capacity] is in controversy in this proceeding.

3. Attorney Ad Litem moves that the Court designate the time, place, manner, conditions, and scope of the examination to be conducted by [**name of examiner**].

4. Attorney Ad Litem requests that they be provided with a copy of the findings of the examination.

5. Attorney Ad Litem requests that [the costs of the examination be paid out of the assets of [Ward's/Proposed Ward's] estate/[**county**] County, Texas, be responsible for payment of such costs under section 1155.101 of the Texas Estates Code].

[**Name**], Attorney Ad Litem, prays that the Court order [Ward/Proposed Ward] to appear before [**name of examiner**] for the purpose of undergoing an examination in accordance

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with section [1101.103/1101.104] of the Texas Estates Code to determine their [physical capacity/mental capacity] and that a written report be filed with the Court and provided to Attorney Ad Litem and that the costs of such examination be ordered paid as deemed proper by the Court.

Respectfully submitted,

_____

[**Name**]
Attorney Ad Litem
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Notice of Hearing

The above motion is set for hearing on _____ at _____ __.M. in [**designation and location of court**].

SIGNED on _____.

_____

Judge or Clerk

Certificate of Service

I certify that a true copy of this [**title of document**] was served in accordance with rule 21a of the Texas Rules of Civil Procedure.

SIGNED on _____.

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_____

[**Name of attorney**]

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Form 6-8

[Caption. See § 3 of the Introduction in this manual.]

Order for Medical Examination

On [**date**] the Court considered the Motion for Medical Examination under section [1101.103/1101.104] of the Texas Estates Code of [**name of attorney ad litem**], as attorney ad litem for [**name of ward or proposed ward**], [Ward/Proposed Ward], and the Court after hearing the evidence and having considered the motion and the applicable law finds that at least four days' notice of this hearing was given to [Ward/Proposed Ward] and that good cause has been shown for the granting of the motion.

IT IS ORDERED that [**name of independent health-care provider**] is appointed to evaluate the [physical capacity/mental capacity] of [**name of ward or proposed ward**] and render their conclusions and recommendations in a written report within [**specify time frame**].

IT IS FURTHER ORDERED that copies of the report shall be provided to [**name of attorney ad litem and all counsel of record**].

IT IS FURTHER ORDERED that the medical examination take place on or before [**date**] and that the cost of the examination[s] and report[s] be paid [out of the assets of [**name of ward or proposed ward**]'s estate/by [**county**] County, Texas, in accordance with section 1155.101 of the Texas Estates Code].

SIGNED on _____.

_____
JUDGE PRESIDING

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Form 6-9

[Caption. See § 3 of the Introduction in this manual.]

Motion for Security for Costs

This Motion for Security for Costs is brought by [**name of movant**], Attorney Ad Litem, who shows in support:

1. [**Name of movant**] was appointed as attorney ad litem on [**date**].

2. Their fees and expenses in this proceeding are an item of court costs to be taxed as part of this proceeding at the discretion of the Court as a matter of law. The fees and expenses are expected to be $[**amount**].

3. [**Name of party**], [Applicant/Plaintiff], has not given sufficient security for costs.

4. In accordance with section 1053.052 of the Texas Estates Code and rule 143 of the Texas Rules of Civil Procedure, Attorney Ad Litem requests that [Applicant/Plaintiff] be ordered to give security for costs.

Attorney Ad Litem requests that the Court set this Motion for Security for Costs for hearing and on hearing require [Applicant/Plaintiff] to give security for costs in accordance with section 1053.052 of the Texas Estates Code and rule 143 of the Texas Rules of Civil Procedure.

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Respectfully submitted,

_____

[**Name**]
Attorney Ad Litem
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Notice of Hearing

The above motion is set for hearing on _____ at _____ __.M. in [**designation and location of court**].

SIGNED on _____.

_____

Judge or Clerk

Certificate of Service

I certify that a true copy of this [**title of document**] was served in accordance with rule 21a of the Texas Rules of Civil Procedure.

SIGNED on _____.

_____

[**Name of attorney**]

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Form 6-10

[Caption. See § 3 of the Introduction in this manual.]

Order for Security for Costs

On [**date**] the Court considered the Motion for Security for Costs filed by [**name of attorney ad litem**] to require that [**name of party**], [Applicant/Plaintiff], give [additional] security for costs under section 1053.052 of the Texas Estates Code and rule 143 of the Texas Rules of Civil Procedure. The Court finds that [Applicant/Plaintiff] has had due notice of the motion and has not given [additional] security for costs to cover the fees and expenses of the attorney ad litem in these proceedings as required by law. The Court finds that the motion should be granted.

IT IS ORDERED that [**name of party**] is hereby ordered to give [additional] security for costs in accordance with Texas Estates Code section 1053.052 and rule 143 of the Texas Rules of Civil Procedure in the amount of $[**amount**], which is to be deposited with the clerk of this Court within twenty days of notice of entry of this order as required by law.

SIGNED on _____.

_____
JUDGE PRESIDING

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Form 6-11

[Caption. See § 3 of the Introduction in this manual.]

Motion to Dismiss Action for Failure to Give Security for Costs

This Motion to Dismiss Action for Failure to Give Security for Costs is brought by [**name of movant**], Movant, as attorney ad litem, who shows in support:

1. [**Name of party**], [Applicant/Plaintiff], has failed to give security for costs within twenty days after notice of entry of the order directing [Applicant/Plaintiff] to give security for costs had been served on them.

2. Further information in support of this motion is included in the attached affidavit.

3. Movant prays that the action filed by [Applicant/Plaintiff] be dismissed by this Court for failing to comply with the Court's order to give security for costs.

Respectfully submitted,

_____

[**Name**]
Attorney Ad Litem
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Notice of Hearing

The above motion is set for hearing on _____ at _____ __.M. in [**designation and location of court**].

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SIGNED on _____.

_____
Judge or Clerk

Certificate of Service

I certify that a true copy of this [**title of document**] was served in accordance with rule 21a of the Texas Rules of Civil Procedure.

SIGNED on _____.

_____
[**Name of attorney**]

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Form 6-12

[Caption. See § 3 of the Introduction in this manual.]

Affidavit of Failure to Give Security for Costs

[**Name of affiant**] appeared in person before me today and stated under oath:

"I am the attorney ad litem for the [proposed ward/ward] in the above cause.

"On [**date**], the Court entered an order requiring [**name of party**] to give security for costs within twenty days of the date of notice to that party of entry of the order. A copy of the order was duly served on [**name of party**] on [**date**]. The time for compliance has expired.

"[**Name of party**] failed to give security for costs, as ordered, before the expiration of that time, and neglected and omitted to comply with the order of this Court. [**Name of party**] has filed no affidavit of inability to comply with the order of this Court.

"I have personal knowledge of the facts stated in this affidavit, and they are true and correct."

_____
[**Name of affiant**]

SIGNED under oath before me on _____.

_____
Notary Public, State of Texas

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Form 6-13

[Caption. See § 3 of the Introduction in this manual.]

Order of Dismissal

On [**date**] the Court considered the Motion to Dismiss Action for Failure to Give Security for Costs filed by [**name of attorney ad litem**]. The Court, after considering the supporting affidavit, the evidence presented, and the applicable law, finds that [**name of party**] failed and refused and is still refusing to comply with the order of this Court entered on [**date**], requiring [him/her] to deposit security for costs as ordered with the clerk of this Court. The Court therefore finds that the action previously filed by [him/her] in this cause should be dismissed.

IT IS ORDERED that the action filed by [**name of party**] in seeking [**identify relief sought**] is dismissed for failure to comply with the order of this Court of [**date**].

SIGNED on _____.

_____
JUDGE PRESIDING

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Form 6-14

[Caption. See § 3 of the Introduction in this manual.]

Motion for Discharge

This Motion for Discharge is filed by [**name of movant**], [Attorney/Guardian] Ad Litem, as [attorney/guardian] ad litem for [**name**], [a minor/an incapacitated person], who shows in support the following:

1. All matters necessitating the appointment of [Attorney/Guardian] Ad Litem have been concluded.

2. There is no longer a necessity for the services of [Attorney/Guardian] Ad Litem in connection with the representation of the above-named party.

[**Name of movant**], [Attorney/Guardian] Ad Litem, requests that the Court grant this motion and discharge them from the duties as [attorney/guardian] ad litem.

Respectfully submitted,

_____

[**Name**]
Attorney for [Attorney/Guardian] Ad Litem
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Certificate of Service

I certify that a true copy of this [**title of document**] was served in accordance with rule 21a of the Texas Rules of Civil Procedure.

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SIGNED on _____.

_____

[**Name of attorney**]

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Form 6-15

[Caption. See § 3 of the Introduction in this manual.]

Order of Discharge

On [**date**] the Court considered the Motion for Discharge of [**name**], [Attorney/Guardian] Ad Litem, the [attorney/guardian] ad litem for [**name of incapacitated person**], [a minor/an incapacitated person], and the evidence presented. The Court finds that there is no longer a necessity for the services of [Attorney/Guardian] Ad Litem in continued representation on behalf of [**name of incapacitated person**], [a minor/an incapacitated person], and [Attorney/Guardian] Ad Litem should be discharged.

IT IS ORDERED that [**name**], the [attorney/guardian] ad litem for [**name of incapacitated person**], [a minor/an incapacitated person], is hereby discharged from their duties as [attorney/guardian] ad litem.

SIGNED on _____.

_____
JUDGE PRESIDING

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Form 6-16

[Caption. See § 3 of the Introduction in this manual.]

Order Appointing Attorney Ad Litem

On [**date**] the Court considered the necessity for the appointment of an attorney ad litem under section 1204.001(e) of the Texas Estates Code. The Court finds that it is in the best interests of [**name of ward**] and [his/her] estate that such an appointment be made.

IT IS ORDERED that [**name of attorney ad litem**], an attorney licensed to practice before this Court and certified by the State Bar of Texas in accordance with section 1054.201 of the Texas Estates Code, is appointed attorney ad litem for [**name of ward**], relative to matters related to their guardianship, and that the fees and expenses of the attorney ad litem are to be taxed as part of the costs of this proceeding and ordered paid in accordance with the applicable law.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

By:_____
[**Name**]
Attorney for [**name of movant**]
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 6-17

[Caption. See § 3 of the Introduction in this manual.]

Order Appointing Guardian Ad Litem

On [**date**] the Court considered the necessity for the appointment of a guardian ad litem under section 1054.051 of the Texas Estates Code. The Court finds that it is necessary and proper to appoint a guardian ad litem to represent and protect the best interests of the incapacitated person, [**name of ward or proposed ward**].

IT IS ORDERED that [**name of guardian ad litem**] is appointed guardian ad litem to represent and protect the best interests of the incapacitated person, [**name of ward or proposed ward**], and to report to the Court as necessary to enable the Court to determine what action will be in the best interests of [**name of ward or proposed ward**].

IT IS FURTHER ORDERED that the guardian ad litem be entitled to reasonable compensation for their services in an amount to be set by the Court to be taxed as part of the costs of these proceedings and ordered paid in accordance with the applicable law.

IT IS FURTHER ORDERED that, pursuant to Texas Estates Code sections 1054.003 and 1054.004 and HIPAA Regulations (45 C.F.R. section 164.512(e)(1)(i)), the above guardian ad litem is authorized and entitled to review and be supplied with copies of all of [**name of ward or proposed ward**]'s certificates of current physical, medical, and intellectual examinations and have access to all of [**name of ward or proposed ward**]'s relevant medical, psychological, and intellectual testing records. This means that a health-care organization or physician presented with this order shall give the guardian ad litem complete access to [**name of ward or proposed ward**]'s protected health information. The guardian ad litem is further authorized to discuss with the physician or health-care provider any matters relating to [**name**

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of ward or proposed ward]'s health-care records and [**name of ward or proposed ward**]'s care, treatment, diagnosis, and needs.

IT IS FURTHER ORDERED that [**name of guardian ad litem**] shall discuss with [**name of ward or proposed ward**] the Bill of Rights for Wards as set forth in section 1151.351 of the Texas Estates Code.

SIGNED on _____.

_____
JUDGE PRESIDING

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Form 6-18

[Caption. See § 3 of the Introduction in this manual.]

Order Vacating Appointment of Attorney Ad Litem

Select one of the following.

On [**date**] the Court considered the motion of [**name of movant**] for the necessity for the appointment of an attorney ad litem. The Court finds that no necessity exists for the appointment of an attorney ad litem in this case.

Or

On [**date**], on the Court's own motion, the Court considered the necessity for the appointment of an attorney ad litem. The Court finds that no necessity exists for the appointment of an attorney ad litem in this case.

Continue with the following.

IT IS ORDERED that the order dated [**date**], appointing [**name of attorney ad litem**] as attorney ad litem, is vacated.

SIGNED on _____.

_____
JUDGE PRESIDING

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Form 6-19

This application and its corresponding order, form 6-20 in this chapter, are drafted for the payment of fees to the attorney ad litem; however, they can be modified for other appointees including a guardian ad litem or physician depending on the facts of the case. The application and order should be tailored as needed to fit the facts of a particular situation.

[Caption. See § 3 of the Introduction in this manual.]

Application to Pay Appointee's Fees and Expenses

[**Name of attorney ad litem**], Applicant, as attorney ad litem for [**name of ward or proposed ward**], [Ward/Proposed Ward], an incapacitated person, files this Application to Pay Appointee's Fees and Expenses and respectfully represents as follows:

[**Name of attorney ad litem**] was appointed as attorney ad litem for [**name of ward or proposed ward**] by Judge [**name**] on [**date**]. Applicant and their law firm of [**name of law firm**], with offices at [**address, city, state**], have rendered necessary legal services and have advanced necessary expenses on behalf of [Ward/Proposed Ward]. [Ward/Proposed Ward] is now indebted to [**name of law firm**] for legal services rendered and expenses advanced on their behalf for the period [**date**] through [**date**] in the amount of $[**amount**]. These services are described in Exhibit [**exhibit number/letter**], dated [**date**], and in the affidavit of the attorney, incorporated here by reference for all purposes.

Expenses in the amount of $[**amount**] were incurred on behalf of the estate during the period [**date**] through [**date**], as described in Exhibit [**exhibit number/letter**].

All of the fees and expenses were necessary and reasonable and were incurred on behalf of and/or in the preservation, safekeeping, and management of [Ward/Proposed Ward] [and their estate]. [**Name of law firm**] should be reimbursed for these fees and expenses.

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Since their appointment as attorney ad litem, and before the period to which this application pertains, Applicant has requested that this Court approve appointee's attorney's fees and expenses in the total amount of $[**amount**]. The Court approved payment of fees and expenses in the amount of $[**amount**], and those fees and expenses have been paid from the assets of [Ward/Proposed Ward]'s estate.

Therefore, Applicant prays that the total sum of $[**amount**] be taxed against and paid by [**name of guardian**] to [**name of law firm**] for the attorney ad litem's fees and expenses for the period [**date**] through [**date**].

Respectfully submitted,

By:_____
[**Name**]
Attorney Ad Litem
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Certificate of Service

I certify that a true copy of this [**title of document**] was served in accordance with rule 21a of the Texas Rules of Civil Procedure.

SIGNED on _____.

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_____

[**Name of attorney**]

Attorney's Fee Affidavit

BEFORE ME, the undersigned authority, on this day appeared the affiant, [**name**], who, after being by me duly sworn, swears—

1. that Affiant is a duly licensed practicing attorney with offices in [**address, city, county**] County, Texas;

2. that Affiant has performed the legal services described in detail and attached as Exhibit [**exhibit number/letter**] to the Application to Pay Appointee's Fees and Expenses and states that the services were properly and timely performed on behalf of [**name**];

3. that all legal fees and services in the statement attached as Exhibit [**exhibit number/letter**] were rendered only on behalf of [**name**];

4. that only fees and expenses covering the period [**date**] through [**date**], for the total sum of $[**amount**], are submitted;

5. that all just and legal offsets, payments, and credits known to Affiant have been allowed and are reflected in the statement attached as Exhibit [**exhibit number/letter**];

6. that any fees and expenses of legal assistants incurred for work were done under the direction and supervision of an attorney; and

7. that Affiant has made and presented this application and affidavit to the Court with notice to [[**name**]'s guardian/all parties and attorneys of record].

_____

[**Name**]
Affiant

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SIGNED under oath before me on _____.

_____
Notary Public, State of Texas

Attach exhibit(s).

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Form 6-20

[Caption. See § 3 of the Introduction in this manual.]

Order Authorizing Appointee's Fees

On [**date**] the Court considered the Application to Pay Appointee's Fees and Expenses on behalf of [**name of attorney ad litem**], who was appointed by Judge [**name**] on [**date**] to serve as attorney ad litem for [**name of ward or proposed ward**], [Ward/Proposed Ward], and the Court finds that the fees and expenses requested in this proceeding in the amount of $[**amount**] as fees and $[**amount**] as expenses, for the total amount of $[**amount**], are necessary, reasonable, and required for the [creation, maintenance, protection, or operation of this proceeding/[**specify other basis**]].

Select one of the following.

The Court finds that [Ward/Proposed Ward]'s assets are adequate to permit the payment of these fees.

Or

The Court finds that there do not exist funds in the estate of [Ward/Proposed Ward] from which payment of the above-referenced appointee's fees and expenses may be made, and it is therefore directed that [**county**] County, Texas, be responsible for that payment.

Continue with the following.

The Court also finds that the above fees and expenses should be authorized for payment and that this request should be granted.

IT IS ORDERED that the above fees and expenses are taxed as costs against [[**name of ward or proposed ward**]'s estate/[**county**] County, Texas,] and that payment in the amount of $[**amount**] should be made to [**name**] by the [personal representative of [**name of ward or pro-**

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posed ward]'s estate from funds of the estate/treasurer of [**county**] County, Texas, from county funds pursuant to section 1155.151 of the Texas Estates Code/[**specify method**]].

SIGNED on _____.

_____
JUDGE PRESIDING

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Form 6-21

The requirements for a valid authorization for the disclosure of protected health information are governed by 45 C.F.R. § 164.508.

Authorization for Release of Protected Health Information

I, [**name of patient or personal representative**], intend to comply, now and in the future, with all requirements set forth in the Standards for Privacy of Individually Identifiable Health Information, known as the "Privacy Rule," which implements the privacy requirements of the Health Insurance Portability and Accountability Act of 1996, commonly known as "HIPAA," so that the information described below will be freely available to those described below. All provisions hereof shall be construed in accordance with that intent.

I hereby authorize each covered entity identified below to disclose [my/[**name of patient**]'s] individually identifiable health information as described below, which may include information concerning communicable diseases such as Human Immunodeficiency Virus ("HIV") and Acquired Immune Deficiency Syndrome ("AIDS"), mental illness (except psychotherapy notes), chemical or alcohol dependency, laboratory test results, medical history, treatment, or any other such related information.

1. **[My/[name of patient]'s] Additional Identification Information**

   Name: _____

   Date of Birth: _____

   Social Security Number: _____

2. **Identity of Person or Class of Persons Authorized to Make Disclosure.** All covered entities as defined in HIPAA, and all other health-care providers, health plans, and health-care clearinghouses, including but not limited to each and every doctor, psychiatrist, psychologist, dentist, therapist, nurse, hospital, clinic, pharmacy, laboratory,

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ambulance service, assisted living facility, residential care facility, bed and board facility, nursing home, medical insurance company, or any other medical provider or agent thereof having protected health information (as that term is defined in HIPAA), each being referred to herein as a "Covered Entity."

Select one of the following.

3. **Description of Information to Be Disclosed.** All health-care information, reports, and/or records concerning [my/[**name of patient**]'s] medical history, condition, diagnosis, testing, prognosis, treatment, billing information, and identity of health-care providers, whether past, present, or future, and any other information which is in any way related to [my/[**name of patient**]'s] health care. This disclosure shall include the ability to ask questions and discuss this protected medical information with the person or entity who has possession of the protected medical information. It is my intention to give a full authorization to ANY protected medical information to the persons named in this authorization.

Or

3. **Specific Information that May Be Disclosed**

☐ Progress notes ☐ Laboratory reports ☐ Operative reports
☐ Discharge summary ☐ Radiology reports ☐ Consultation reports
☐ X-ray or other images ☐ Photographs/videotapes ☐ Test results
☐ Prescriptions and medicine records ☐ Hospital records
☐ Consultations ☐ Correspondence
☐ Nurses' notes ☐ Billing records
☐ Entire health records in your possession
☐ Other (specify)_____

4. **Person or Class of Persons to Whom the Covered Entity May Disclose the Above-Described Protected Health Information.** The above-described information shall

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be disclosed to the following individuals, each being referred to herein as "Authorized Persons."

(a) _____

_____

_____

(b) _____

_____

_____

(c) _____

_____

_____

5. **Termination.** This authorization shall terminate on the first to occur of: (a) [my/[**name of patient**]'s] death or (b) on written revocation actually received by the Covered Entity. Proof of receipt of my written revocation may be either by certified mail, registered mail, facsimile, or any other receipt evidencing actual receipt by the Covered Entity. Such revocation shall be effective on the actual receipt of the notice by the Covered Entity except to the extent that the Covered Entity has taken action in reliance on this authorization.

6. **Redisclosure.** By signing this authorization, I acknowledge that the information used or disclosed pursuant to this authorization may be subject to redisclosure by the authorized person, and the information once disclosed will no longer be protected by the rules created in HIPAA. No Covered Entity shall require my Authorized Persons to indemnify the Covered Entity or agree to perform any act in order for the Covered Entity to comply with this authorization.

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7. **Acknowledgment of Right to Treatment.** I understand and hereby acknowledge that the Covered Entities may not condition my receipt of health care upon my execution of this authorization, and I may refuse to sign this authorization if I wish to do so.

8. **Instructions to My Authorized Persons.** Authorized Persons shall have the right to bring a legal action in any applicable form against any Covered Entity that refuses to recognize and accept this authorization for the purposes that I have expressed. Additionally, Authorized Persons are authorized to sign any documents that they deem appropriate to obtain the protected medical information.

9. **Revocation.** This authorization may be revoked in writing by me at any time.

10. **Valid Document.** A copy or facsimile of this original authorization shall be accepted as though it was an original document.

11. **My Waiver and Release.** I hereby release any Covered Entity that acts in reliance on this authorization from any liability that may accrue from releasing [my/[**name of patient**]'s] protected medical information to Authorized Persons and for any actions taken by the Authorized Persons. I also specifically prohibit Authorized Persons from filing a complaint of any kind against any Covered Entity that complies with the directions of my Authorized Persons hereunder to the extent that such a complaint purports to charge said Covered Entity with any violation of the Privacy Rules or other federal or state laws related to disclosure of medical records as a result of their compliance with said directions.

Date: _____

_____
Signature of patient or personal representative

Printed name of personal representative: _____

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Description of personal representative's authority: _____

Attach documentation showing personal representative's authority.

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Form 6-22

Protected health information may be disclosed by a provider who receives a valid authorization as specified by 45 C.F.R. § 164.508 or in response to a court order as provided in 45 C.F.R. § 164.512(e)(1).

[Caption. See § 3 of the Introduction in this manual.]

Motion for Order to Obtain Protected Health Information

This Motion for Order to Obtain Protected Health Information of [**name of patient**] is brought by [**name of movant**], who shows in support the Authorization for Release of Protected Health Information for [**name and address of health-care provider**] to produce certain protected health information of [**name of patient**], pursuant to title 45, section 164.508, of the Code of Federal Regulations. A copy of the release is attached as Exhibit [**exhibit number/letter**].

Alternatively, [**name of movant**] requests that the Court enter a qualified protective order, pursuant to title 45, section 164.512(e), of the Code of Federal Regulations, addressing the rights and protections that apply to the protected health information pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA). [**Name of movant**] requests that the qualified protective order provide that the requested health information protected by HIPAA be produced by [**name and address of health-care provider**] and further provide that the information is to be used only in connection with this litigation and that the parties to this matter, their counsel, the employees of their counsel, and their respective agents are prohibited from using or disclosing health information protected by HIPAA for any purpose other than in connection with this litigation. [**Name of movant**] further requests that the qualified protective order require the return of health information protected by HIPAA to [**name of health-care provider**] or the destruction of that information (including all copies) at the end of the litigation.

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The following protected health information of [**name of patient**] is sought:

Dates of health-care services provided: _____

Select as applicable.

- ☐ Progress notes
- ☐ Laboratory reports
- ☐ Operative reports
- ☐ Discharge summary
- ☐ Radiology reports
- ☐ Consultation reports
- ☐ X-ray or other images
- ☐ Photographs/videotapes
- ☐ Prescription and medicine records
- ☐ Test results
- ☐ Consultations
- ☐ Correspondence
- ☐ Hospital records
- ☐ Nurses' notes
- ☐ Billing records
- ☐ Entire health records in the possession of health-care provider
- ☐ Other: [**specify**]

Continue with the following.

The protected health information of [**name of patient**] is relevant and necessary in this suit because [**set forth reasons**].

[**Name of movant**] prays that the Court grant this Motion for Order to Obtain Protected Health Information.

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_____
[**Name**]
Attorney for [**name of movant**]
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Certificate of Conference

I certify that a reasonable effort has been made to resolve the discovery dispute without the necessity of court intervention and has failed.

_____
[**Name**]
Attorney for [**name of movant**]

Notice of Hearing

The above motion is set for hearing on _____ at _____ __.M. in [**designation and location of court**].

SIGNED on _____.

_____
Judge or Clerk

Certificate of Service

I certify that a true copy of this [**title of document**] was served in accordance with rule 21a of the Texas Rules of Civil Procedure.

SIGNED on _____.

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_____

[**Name**]
Attorney for [**name of movant**]

Attach copy of authorization for release of protected health information. See form 6-21.

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Form 6-23

[Caption. See § 3 of the Introduction in this manual.]

Order on Motion for Order to Obtain Protected Health Information

On [**date**] the Court considered [**name of movant**]'s Motion for Order to Obtain Protected Health Information of [**name of patient**].

The Court finds that the health information is relevant to the issues of this case.

Select one of the following.

IT IS ORDERED that [**name**] execute an Authorization for Release of Protected Health Information, in the form of the authorization attached as an exhibit to [**name of movant**]'s Motion for Order to Obtain Protected Health Information, authorizing [**name and address of health-care provider**] to disclose the protected health information of [**name of patient**] described below.

Or

IT IS ORDERED that [**name and address of health-care provider**] shall produce the protected health information of [**name of patient**] described below.

IT IS FURTHER ORDERED that the health information shall be produced on [**date**] at [**time**] at the offices of [**name and address of movant's attorney**].

IT IS FURTHER ORDERED that all parties in this case, their counsel, the employees of their counsel, and their respective agents are prohibited from using or disclosing the health information of [**name of patient**] produced pursuant to this order for any purpose other than the litigation of this case.

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IT IS FURTHER ORDERED that the health information (including all copies) produced pursuant to this order be either returned to [**name of health-care provider**] or destroyed at the end of the litigation pending before this Court.

The costs of production and copying shall be paid in the following manner: [**specify manner of payment**].

Continue with the following.

The following health information of [**name of patient**] is subject to this order:

Dates of health-care services provided: _____

Select as applicable.

- ☐ Progress notes
- ☐ Laboratory reports
- ☐ Operative reports
- ☐ Discharge summary
- ☐ Radiology reports
- ☐ Consultation reports
- ☐ X-ray or other images
- ☐ Photographs/videotapes
- ☐ Prescription and medicine records
- ☐ Test results
- ☐ Consultations
- ☐ Correspondence
- ☐ Hospital records
- ☐ Nurses' notes
- ☐ Billing records

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☐ Entire health records in the possession of health-care provider

☐ Other: [**specify**]

Continue with the following.

SIGNED on _____.

_____
JUDGE PRESIDING

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Form 6-24

Subpoena to Compel Production of Protected Health Information of [name of patient]

Issued in the Name of the State of Texas

You, [**name of witness**], are hereby commanded to appear at [**address, city, county**], Texas, on [**date**] at [**time**] and produce at that time and place the following documents or tangible things in your possession, custody, or control relating to the case entitled "[**style of case**]" and filed under Cause No. [**number**], in the [**designation**] Court of [**county**] County, Texas: [**specify**].

This subpoena is based on a qualified protective court order issued by the [**designation**] Court of [**county**] County, Texas. A certified copy of the qualified protective order is attached to this subpoena. This subpoena is issued at the instance of [**name of party**], [Petitioner/Respondent/Intervenor] in the above-referenced case [**include if applicable:** , by and through [his/her/its] attorney of record, [**name of attorney**]].

FAILURE OF ANY PERSON WITHOUT ADEQUATE EXCUSE TO OBEY A SUBPOENA SERVED ON THAT PERSON MAY BE DEEMED A CONTEMPT OF THE COURT FROM WHICH THE SUBPOENA IS ISSUED OR A DISTRICT COURT IN THE COUNTY IN WHICH THE SUBPOENA IS SERVED, AND MAY BE PUNISHED BY FINE OR CONFINEMENT, OR BOTH.

This subpoena is issued on [**date**] by:

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_____
[**Name of person issuing subpoena**]
[**Capacity**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Proof of Service

I, [**name of witness**], accept service of the attached subpoena and will appear at the time and place directed in the subpoena.

Date: _____.

_____
(Signature of witness)

I, _____, am over the age of eighteen years. I am not a party in the above-entitled and -numbered cause of action. On _____ I served a subpoena, of which this is a true and correct copy, on [**name of witness**] by personally handing the subpoena to the named individual or in accordance with rule 176.5(a) of the Texas Rules of Civil Procedure. I also tendered to the witness the witness fees required by law at the time the subpoena was delivered.

Date: _____.

_____
(Signature of person serving subpoena)

Attach copy of qualified protective order. See form 6-23.

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Form 6-25

Statement of Inability to Afford Payment of Court Costs or an Appeal Bond

The statement of inability, as prescribed by rule 145 of the Texas Rules of Civil Procedure, has been adapted with permission of the Texas Supreme Court rules attorney to include probate courts. The original form is available from the supreme court at **www.txcourts.gov/media/1456942/statement-of-inability-to-afford-payment-of-court-costs-or-an-appeal-bond-bilingual.pdf**.

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NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA

Cause Number: _____
(The Clerk's office will fill in the Cause Number when you file this form)

Plaintiff: _____
(Print first and last name of the person filing the lawsuit.)

And

In the _____ Court Number (check one):
☐ District Court
☐ Probate Court Number _____
☐ County Court / County Court at Law

Defendant: _____
(Print first and last name of the person being sued.)

_____ County Texas

Statement of Inability to Afford Payment of Court Costs or an Appeal Bond

1. Your Information

My full legal name is: _____ My date of birth is: ____/____/____
First Middle Last Month/Day/Year

My address is: (Home) _____

(Mailing) _____

My phone number: _____ My email: _____

About my dependents: "The people who depend on me financially are listed below.

Name	Age	Relationship to Me
1		
2		
3		
4		
5		
6		

2. Are you represented by Legal Aid?

☐ I am being represented in this case for free by an attorney who works for a legal aid provider or who received my case through a legal aid provider. I have attached the certificate the legal aid provider gave me as 'Exhibit: Legal Aid Certificate.

-or-

☐ I asked a legal-aid provider to represent me, and the provider determined that I am financially eligible for representation, but the provider could not take my case. I have attached documentation from legal aid stating this.

or-

☐ I am not represented by legal aid. I did not apply for representation by legal aid.

3. Do you receive public benefits?

☐ I do not receive needs-based public benefits. - or -

☐ I receive these public benefits/government entitlements that are based on indigency:
(Check ALL boxes that apply and attach proof to this form, such as a copy of an eligibility form or check.)

☐ Food stamps/SNAP ☐ TANF ☐ Medicaid ☐ CHIP ☐ SSI ☐ WIC ☐ AABD
☐ Public Housing or Section 8 Housing ☐ Low-Income Energy Assistance ☐ Emergency Assistance
☐ Telephone Lifeline ☐ Community Care via HHSC ☐ LIS in Medicare ("Extra Help")
☐ Needs-based VA Pension ☐ Child Care Assistance under Child Care and Development Block Grant
☐ County Assistance, County Health Care, or General Assistance (GA)
☐ Other: _____

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4. What is your monthly income and income sources?

"I get this monthly income:

$_____in monthly wages. I work as a _____ (Your job title) for _____ (Your employer).

$_____in monthly unemployment. I have been unemployed since (date) _____.

$_____in public benefits per month.

$_____from other people in my household each month: (List only if other members contribute to your household income.)

$_____from ☐ Retirement/Pension ☐ Tips, bonuses ☐ Disability ☐ Worker's Comp ☐ Social Security ☐ Military Housing ☐ Dividends, interest, royalties ☐ Child/spousal support ☐ My spouse's income or income from another member of my household (If available)

$_____from other jobs/sources of income. (Describe) _____

$_____is my total monthly income.

5. What is the value of your property?

"My property includes:	**Value***
Cash	$
Bank accounts, other financial assets	
_____	$
_____	$
_____	$
Vehicles (cars, boats) (make and year)	
_____	$
_____	$
_____	$
Other property (like jewelry, stocks, land, another house, etc.)	
_____	$
_____	$
_____	$
Total value of property	$

*The value is the amount the item would sell for less the amount you still owe on it, if anything.

6. What are your monthly expenses?

"My monthly expenses are:	**Amount**
Rent/house payments/maintenance	$
Food and household supplies	$
Utilities and telephone	$
Clothing and laundry	$
Medical and dental expenses	$
Insurance (life, health, auto, etc.)	$
School and child care	$
Transportation, auto repair, gas	$
Child / spousal support	$
Wages withheld by court order	$
Debt payments paid to: (List)	$
_____	$
_____	$
Total Monthly Expenses	$

7. Are there debts or other facts explaining your financial situation?

"My debts include: (List debt and amount owed)_____

_____

_____"

(If you want the court to consider other facts, such as unusual medical expenses, family emergencies, etc., attach another page to this form labeled "Exhibit: Additional Supporting Facts.") Check here if you attach another page. ☐

8. Declaration

I declare under penalty of perjury that the foregoing is true and correct. I further swear:

☐ I cannot afford to pay court costs.

☐ I cannot furnish an appeal bond or pay a cash deposit to appeal a justice court decision.

My name is _____. My date of birth is: ____/____/____.

My address is _____
(Street) (City) (State) (Zip Code) (Country)

▶ _____ signed on ____/____/____ in _____ County, _____
(Signature) (Month/Day/Year) (county name) (State)

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Chapter 7

Inventory, Safekeeping, and Creditors

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Chapter 7

Inventory, Safekeeping, and Creditors

§ 7.1 Inventory

The inventory is a listing of all known or potential assets of the ward, whether real property in Texas or personal property in any location, on the date the guardian qualifies. Tex. Est. Code § 1154.051(a).

§ 7.1:1 Filing

The guardian is required to file an inventory with the court within thirty days of the date of the guardian's qualification. Tex. Est. Code § 1154.051(a), (c). The date of qualification under the Texas Estates Code is the later of the date that the court approves the bond or the date that the guardian takes the proper oath. Tex. Est. Code § 1105.002. Form 7-1 in this chapter is used for a basic inventory, and form 7-2 is used for a complex inventory; see also section 7.1:4 below.

§ 7.1:2 Valuation

Assets shown in the inventory should be reflected at their full fair market value and not reduced because of outstanding debts or claims against the property. Tex. Est. Code § 1154.051(b). Account values should be as of the date of the guardian's qualification and as accurate as possible, because the inventory will contain the beginning values for the annual account.

§ 7.1:3 Community Interests

The ward's community interest in property should be identified, and the full fair market value of the property should be stated. In addition, if the ward holds property jointly with others, the value of the ward's interest in the property should be shown. Tex. Est. Code § 1154.051(a)(2), (b).

§ 7.1:4 Claims Owed to Estate

The Texas Estates Code requires that a list of claims be filed with the inventory; this should not be confused with a list of creditors. These claims are amounts due or owing to the ward. Tex. Est. Code § 1154.052. Forms 7-1 and 7-2 in this chapter include a list of claims.

§ 7.1:5 Extension of Time

The court may for good cause extend the date within which the inventory is to be filed beyond the thirty-day period. Tex. Est. Code § 1154.051(a). But see section 7.1:6 below. See forms 7-3 and 7-4 in this chapter.

§ 7.1:6 Preliminary Inventory

Most courts ordinarily will not extend the date to file the inventory. If a need exists to justify some delay in the discovery or valuation of assets, the attorney should consider using a preliminary inventory showing assets that have been taken into the

guardian's possession. Until an inventory has been filed and approved, other court orders or approvals for operation of the estate are usually not granted. If additional assets come to the attention of the guardian, an amended or supplemental inventory should be filed. Tex. Est. Code §§ 1154.101, 1154.102.

§ 7.1:7 Order of Approval

An order of approval should be submitted to the court with the inventory. The order should indicate that the court has examined the inventory and approves it. If the court does not approve the inventory, it may order a new one to be filed within twenty days. Tex. Est. Code § 1154.054. Many inventory orders are submitted with unnecessary statements, such as: "The inventory is true, correct, and complete," "The assets shown in the inventory are all the estate assets," or "The inventory contains a full and complete listing of the assets of the ward." The court is examining the inventory only to determine that it conforms with the reporting requirements of the Texas Estates Code, not to approve the identity or value of the assets listed. See form 7-5 in this chapter.

§ 7.1:8 Review of Bond

After the inventory is submitted, the court must determine if the guardian's bond was adequately set at the initial hearing and must increase it if it was not adequate. Tex. Est. Code § 1105.252. The inventory assets and their values are used to redetermine the guardian's bond. Tex. Est. Code § 1105.154. See section 4.31 in this manual.

§ 7.2 Safekeeping of Assets

The bond of a guardian may be reduced in proportion to the cash or other assets of the ward that are placed in safekeeping. Tex. Est. Code § 1105.156(c). The guardian may also deposit his own cash or securities in lieu of a bond or to reduce the amount of the bond. Tex. Est. Code § 1105.157(a). These deposits may be made in domestic or national banks, savings and loan associations, trust companies, or other approved corporate depositories. *See* Tex. Est. Code §§ 1105.155, 1105.157. They must be made in strict accordance with the Texas Estates Code and may be increased, decreased, withdrawn, or released only on court order. Tex. Est. Code §§ 1105.156, 1105.157(e), (f). Courts generally will not allow assets in excess of the FDIC-insured amount, currently $250,000, to be held in the estate's name in any one institution.

Before an order appointing a guardian is entered, or in such an order, a court may require that cash, securities, or other assets of a proposed ward or ward be deposited for safekeeping in a financial institution described by Tex. Est. Code § 1105.155(b). The amount of the bond required to be given by the guardian shall be reduced in proportion to the amount of the cash or the value of the securities or other assets deposited. Tex. Est. Code § 1101.156. This can be beneficial in circumstances in which a client cannot be bonded for the full value of the estate.

§ 7.2:1 Application and Order

An application should be prepared that identifies the institution and the assets requested to be placed in a safekeeping account. See form 7-6 in this chapter. The court order approves both the deposit of assets and the institution in which the deposit is made. It also directs the institution not to release the assets or any income without a specific court order. The court may at this time reduce the guardian's bond commensurate with the amount of assets placed with the institution. Tex. Est. Code §§ 1105.155, 1105.156. See form 7-7.

§ 7.2:2 Agreement

The financial institution must execute a safekeeping or freeze agreement acknowledging its receipt of the court's order and its willingness to honor and abide by the order. The institution should also independently identify the assets received or placed under its control so that their values can be compared to the original application and order. Tex. Est. Code § 1105.157(c). The use of the safekeeping or freeze agreement results in a direct contempt action against the financial institution if the institution allows improper access to the estate's assets without a court order.

Caveat: Freeze agreements can be entered into only with a "financial institution" (as defined by Texas Finance Code section 201.101(1)). The statutory definition restricts this to mean (1) a bank (state or national or foreign), (2) a savings and loan association (state or federal), (3) a credit union (state or federal), (4) a federal savings bank, or (5) a trust company. It further requires the institution to have its main office or a branch office in Texas and be qualified to act as a Texas or federal depository. *See* Tex. Fin. Code § 201.101.

Accordingly, stocks or other securities cannot be placed under a freeze agreement with a brokerage house unless it has been chartered as a "financial institution."

See form 7-8 in this chapter.

§ 7.3 Notice to Creditors

The first step to be taken after the guardian of an estate has qualified and collected the ward's assets is to determine the existence of any creditors of the ward and furnish them with timely and proper notice of the guardianship's creation.

§ 7.3:1 Time Limitations

First Month: Within one month of qualifying, the guardian must furnish the state comptroller of public accounts with certified-mail notice of the appointment if the ward paid or should have paid taxes administered by the comptroller and must also provide notice by publication to all the ward's creditors. Tex. Est. Code § 1153.001. See forms 7-9 and 7-10 in this chapter.

Fourth Month: Within four months after qualifying, the guardian also must furnish certified-mail notice of the guardianship's creation to all secured creditors who have liens against real property of the ward and all creditors with claims for money against the estate of the ward of which the guardian has actual knowledge. Tex. Est. Code § 1153.003(a). See forms 7-11 and 7-12. In addition, the notice should provide a permissive barring of claims by expressly stating that an unsecured creditor must present a claim not later than the 120th day after the date on which the unsecured creditor receives the notice, or it is barred. The notice must include the address for presentment and an instruction that the claim be filed with the clerk of the court issuing the letters of guardianship. Tex. Est. Code § 1153.004. See form 7-13.

§ 7.3:2 Filing Notice

A copy of both the published notice to creditors and the specific notices to holders of recorded claims must be filed with the court in the guardianship proceeding. Tex. Est Code §§ 1153.002, 1153.003(c).

§ 7.3:3 Late Filing

Even though a notice may not be timely made, it should be provided to avoid assessment of any penalty against the guardian. A successor guardian should determine if the previous guardian provided all appropriate notices. If not, the successor should give them. If the previous guardian has given timely and proper notice, the successor is not required to give further notice. Tex. Est. Code § 1153.005(a).

§ 7.4 Claims Procedure

§ 7.4:1 Purpose and Function of Claims Procedure

The claims process places any creditors of the ward on notice that a fiduciary has been appointed and that there are certain statutory standards and procedures to be undertaken before the guardian will make payment. *See* Tex. Est. Code ch. 1157. The guardian must pay approved claims against the estate in the specific order set out in the statute. Tex. Est. Code § 1157.103. Neither the guardian nor the attorney for the guardian should help any creditor prepare or file a claim. The claims process is complex, and caution should be used before filing a guardianship claim.

§ 7.4:2 Presentment of Claim to Guardian

For a claim to be considered, the creditor must present it to the guardian or deposit it with the clerk of the court. Tex. Est. Code §§ 1157.001, 1157.002. In addition, the claim must be presented before the guardianship has been closed and before the general statutes of limitation have run on the specific claim. Tex. Est. Code § 1157.001. Unsecured claims must be presented within the time prescribed by the notice of presentment issued by the guardian. Tex. Est. Code § 1157.060; *see also* Tex. Est. Code § 1153.004. Note that if the claim has been presented and approved by the guardian, the probate court still retains the power to deny the claim. Tex. Est. Code § 1157.056. When presented to the guardian, the claim must contain sufficient information and documentation and an affidavit as to its correctness and completeness. Tex. Est. Code § 1157.004.

The Texas Estates Code also permits the creditor to use alternative procedures to submit the claim for approval if the evidence to support the claim has been lost. Tex. Est. Code §§ 1157.006, 1157.062. Although usually the person holding the claim must authenticate it, the Code permits other persons to submit an authentication affidavit when appropriate. *See* Tex. Est. Code § 1157.005. The guardian should verify that the claim meets the statutory requirements of Estates Code sections 1157.004 and 1157.005. If not, the claim should be rejected or objected to. If the guardian does not object to the form of the claim within thirty days, any defect is waived. Tex. Est. Code § 1157.007. If the 120-day permissive barring letter described at section 7.3:1 above was sent, the creditor must submit a claim that meets the requirements of sections 1157.004 and 1157.005 within the 120-day period, or the claim is barred. Tex. Est. Code § 1153.004.

There are special procedures for the presentation and allowance of secured claims. *See* Tex. Est. Code § 1157.151. Although procedures for presentation of a secured claim do not differ materially from procedures for a general claim, the process by which the Code treats the claim after the creditor files it is considerably different. *See* Tex. Est. Code § 1157.151. A creditor whose claim is based on a written agreement that provides for attorney's fees may include contracted attorney's fees for the preparation, presentation, and collection of the claim as part of the claim. Tex. Est. Code § 1157.003. See form 7-14 in this chapter for a claim.

§ 7.4:3 Allowance and Rejection of Claim

Once a claim has been properly presented and reviewed by the guardian, he may accept, partially accept, or reject the claim by a memorandum endorsed on or attached to the claim. Tex. Est. Code § 1157.051. The guardian has thirty days from the date of presentation to review and approve or reject the claim of the creditor. Tex. Est. Code § 1157.051. Failure to act within thirty days constitutes a rejection of the claim as a matter of law. Tex. Est. Code §§ 1157.002(b), 1157.052. If the guardian improperly rejects a claim, the costs shall be taxed against the guardian individually, or the guardian may be removed if the claim is established through suit. Tex. Est. Code §§ 1157.052, 1157.107, 1157.108. See form 7-14 in this chapter for a memorandum endorsed on a claim.

§ 7.4:4 Presentation and Approval of Claim

When the guardian allows all or part of a claim, it must then be filed with the court and placed on the claims docket. Tex. Est. Code § 1157.053. Once the claim has been entered on the claims docket for ten days, the court will review it. The court will approve or reject the claim, in whole or in part, and then classify it. Tex. Est. Code §§ 1157.055–.056. Any person interested in the ward may appear and object to the claim at any time before the court acts on the claim. Tex. Est. Code § 1157.054. If the court questions the claim, it will conduct a hearing to examine the guardian and the creditor under oath, hear evidence, and take appropriate action. Tex. Est. Code § 1157.056. See form 7-15 in this chapter for an order approving a claim.

§ 7.4:5 Priority of Claims

If the ward's estate is solvent, the guardian of the estate shall pay a claim against the ward's estate that has been allowed and approved or established by suit as soon as practicable, in the following order: (1) expenses for the care, maintenance, and education of the ward or the ward's dependents; (2) funeral expenses of the ward and expenses of the ward's last illness, if the guardianship is kept open after the ward's death, except that any claim against the ward's estate that has been allowed and approved or established by suit before the ward's death shall be paid before the funeral expenses and expenses of the last illness; (3) expenses of administration; and (4) other claims against the ward or the ward's estate. If the ward's estate is insolvent, the guardian shall give first priority to the payment of the administration expenses of the guardianship, including attorney's fees. The guardian shall pay other claims against the ward's estate in the order for solvent estates as provided above. Tex. Est. Code § 1157.103.

§ 7.4:6 Suit on Rejected Claim

If the guardian rejects the creditor's claim, either by memorandum or by failure to timely act, or if the court rejects the claim, the creditor must sue within ninety days of rejection or the claim is barred. Tex. Est. Code § 1157.063.

Form 7-1

The inventory, appraisement, and list of claims must be filed by the guardian within thirty days after qualifying.

[Caption. See § 3 of the Introduction in this manual.]

Inventory, Appraisement, and List of Claims

[Basic]

This inventory is produced by the undersigned [guardian/appraisers/guardian and appraisers] indicating the assets of [**name of ward**]'s estate and their valuation as of the guardian's qualification on [**date**].

List of Assets in Estate

Description	Community or Separate	Value
1. Cash Assets		
2. Socks, Bonds, and Securities		
3. Personal Property		
4. Co-owned Property (Including Ward's Percent Interest)		
5. Real Property		
Total		

List of Claims Owing to Estate

Description of Claim	Community or Separate	Value
Total		

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Respectfully submitted,

_____

[**Name of guardian**]
Guardian

_____

[**Name**]
Attorney for Guardian
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

I, [**name of guardian**], having been duly sworn, state on oath that the foregoing Inventory, Appraisement, and List of Claims is a true and complete statement of all the property and claims of the ward's estate that have come to my knowledge.

_____

[**Name of guardian**]
Guardian

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

The following affidavit may be omitted if no appraisers have been appointed. If one or more appraisers have been appointed, insert one affidavit for each appraiser.

The undersigned appraiser, having been duly sworn, states on oath that the appraisement shown for each item on the foregoing Inventory, Appraisement, and List of Claims is the fair market value thereof.

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_____

[**Name of appraiser**]
Appraiser

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

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Form 7-2

The inventory, appraisement, and list of claims must be filed by the guardian within thirty days after qualifying.

[Caption. See § 3 of the Introduction in this manual.]

Inventory, Appraisement, and List of Claims
[Complex]

Date of Guardian's Qualification: [**date**]

The following is a full, true, and complete inventory and appraisement of [**name of ward**]'s [**include if applicable:** community/separate/community and separate] personal property wherever located and of all real property located in the state of Texas, together with a list of claims due and owing to this estate as of the date of qualification of [**name of guardian**], Guardian, or that have come to the possession or knowledge of Guardian as of the date above.

Summary of Ward's [Community/Separate/Community and Separate] Assets

Real Property

(See Schedule A) $[**amount**]

Stocks, Bonds, and Securities

(See Schedule B) $[**amount**]

Cash

(See Schedule C) $[**amount**]

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Jointly Owned Property

(See Schedule D) $[**amount**]

Tangible Personal Property

(See Schedule E) $[**amount**]

Total Assets: $[**amount**]

List of Claims Owing to Estate

Select one of the following.

Description of Claim	**Community or Separate**	**Value**
Total		

Attach additional sheets if more space is required.

Or

There are no claims due or owing to the estate other than those shown above.

Continue with the following.

The Inventory, Appraisement, and List of Claims should be approved, ordered, and entered into record.

Respectfully submitted,

_____

[**Name of guardian**]
Guardian

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_____

[**Name**]
Attorney for Guardian
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

I, [**name of guardian**], having been duly sworn, state on oath that the foregoing Inventory, Appraisement, and List of Claims is a true and complete statement of all the property and claims of the ward's estate that have come to my knowledge.

_____

[**Name of guardian**]
Guardian

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

The following affidavit may be omitted if no appraisers have been appointed. If one or more appraisers have been appointed, insert one affidavit for each appraiser.

The undersigned appraiser, having been duly sworn, hereby states on oath that the appraisement shown for each item on the foregoing inventory, appraisement, and list of claims is the fair market value thereof.

_____

[**Name of appraiser**]
Appraiser

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SIGNED under oath before me on _____.

_____
Notary Public, State of Texas

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Itemized Assets—Estate of [name of ward]

Schedule A

Real Property

Description	Community or Separate	Value
Total		

Schedule B

Stocks, Bonds, and Securities

Description	Community or Separate	Value
Total		

Schedule C

Cash

Description	Community or Separate	Value
Total		

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Schedule D

Jointly Owned Property

Description, Including Ward's Percent Interest	Community or Separate	Value
Total		

Schedule E

Tangible Personal Property

Description	Community or Separate	Value
Total		

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Form 7-3

This application should be used only if absolutely necessary. Most courts will not approve or permit any expenditures or activity after the inventory has become due. If this form is necessary, the attorney should consider filing a preliminary inventory showing those assets that have been acquired or are known about. A final inventory showing all assets of the estate can be filed at a later date.

[Caption. See § 3 of the Introduction in this manual.]

Application for Extension of Time to File Inventory, Appraisement, and List of Claims

[**Name of applicant**], Applicant, guardian of the [person/estate/person and estate] of [**name of ward**], an incapacitated person, requests an extension of time to file the inventory, appraisement, and list of claims (Inventory) for this estate for the following reasons:

1. Applicant is attempting to obtain adequate information about the nature, extent, and value of the assets of this estate but will not be able to conclude the preparation of the Inventory within the time prescribed by law. An additional [**number**]-day period is requested for the filing of the Inventory.

2. This additional time is not required because of any lack of diligence.

Applicant prays that this Court enter an order extending the date for filing the Inventory to [**number**] days after the date on which it would otherwise be due.

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Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 7-4

[Caption. See § 3 of the Introduction in this manual.]

Order Extending Inventory, Appraisement, and List of Claims

On [**date**] the Court considered the Application for Extension of Time to File Inventory, Appraisement, and List of Claims (Inventory) in the above-entitled and -numbered cause. The Court finds that good reason [exists/does not exist] for the submission of the Inventory at a later date.

IT IS ORDERED that the date for filing the Inventory in this estate [be extended to [**date**]/not be extended].

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED:

_____
[**Name**]
Attorney for Guardian
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 7-5

[Caption. See § 3 of the Introduction in this manual.]

Order Approving Inventory, Appraisement, and List of Claims

On [**date**] the Court considered the Inventory, Appraisement, and List of Claims (Inventory) of the estate of [**name of ward**], Ward, an incapacitated person, presented by the [guardian/guardian and appraisers] of Ward's estate. The Court finds that the Inventory appears to be in compliance with the Texas Estates Code, that there are no objections on file, and that this Inventory should be approved.

IT IS THEREFORE ORDERED that this inventory is approved and ordered filed of record.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
[**Name**]
Attorney for Guardian
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 7-6

[Caption. See § 3 of the Introduction in this manual.]

Application for Safekeeping of Assets and Reduction of [Proposed] Guardian's Bond

[**Name of applicant**], Applicant, [proposed] guardian of the [person/estate/person and estate] of [**name of ward or proposed ward**], [Proposed] Ward, an [alleged] incapacitated person, applies for permission to deposit assets in safekeeping according to section 1105.156 of the Texas Estates Code and for reduction of the bond [to be set by this Court/set in this Court's order signed on [**date**]] and shows in support:

1. [Applicant was appointed guardian of the [person/estate/person and estate] of Ward by order of this Court dated [**date**], and a bond was fixed by this Court in the amount of $[**amount**]./Applicant has applied to be appointed guardian for Proposed Ward and seeks to have the bond set to be reduced.]

Describe in paragraph 2. those estate assets that would require a bond increase, but instead will be placed under safekeeping to permit a bond reduction.

Select one of the following.

2. The estate includes the amount of $[**amount**], and Applicant requests authority to deposit these assets with [**name of financial institution**] for safekeeping.

Or

2. Applicant requests authority to deposit the following assets with the following financial institutions for safekeeping:

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Description of Asset	Name of Institution	Account No.	Amount
Total			

No assets of the estate are currently on deposit with the above-named institutions.

Continue with the following.

Repeat as necessary for each financial institution. If assets to be placed in safekeeping are in more than one institution, insert paragraphs applicable to each institution in the same application and order.

3. [**Name of financial institution**] is a domestic [state/national] bank, duly incorporated and qualified to act as such under the laws of [Texas/the United States], with its principal office located at [**address, city, state**].

4. The deposit of these assets in safekeeping is in the best interest of [Proposed] Ward's estate.

Applicant requests this Court to enter an order authorizing the deposit of the assets identified above in safekeeping with the depositories named above. These assets are to be held by the depositories in a manner that will prevent the withdrawal of these assets without written orders of this Court. Applicant requests that any deposits of money be placed in interest-bearing accounts of the depositories or in direct obligations of the U.S. government and that the depositories be authorized and instructed to distribute on a monthly basis to Applicant the interest as it accrues. Applicant further requests that Applicant's bond ordered in this proceeding be reduced by the amount of assets placed in safekeeping to $[**amount**].

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Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 7-7

[Caption. See § 3 of the Introduction in this manual.]

Order Authorizing Safekeeping of Assets and Reduction of [Proposed] Guardian's Bond

On [**date**] the Court considered the application of [**name of applicant**], [proposed] guardian of the [person/estate/person and estate] of [**name of ward or proposed ward**], [Proposed] Ward, an [alleged] incapacitated person, to deposit assets in safekeeping according to section 1105.156 of the Texas Estates Code. The Court finds that the deposit of assets for safekeeping is in the best interest of [Proposed] Ward's estate; that [**name[s] of financial institution[s]**] [is/are] [a] domestic [state/national] bank[s], duly incorporated and qualified to act as such under the laws of [Texas/the United States]; and that the application should be granted.

IT IS ORDERED that [**name of applicant**], [proposed] guardian of the [person/estate/person and estate] of [**name of ward or proposed ward**], an [alleged] incapacitated person, shall deposit assets in the amount of $[**amount**] belonging to [**name of ward or proposed ward**]'s estate in an interest-bearing account or obligations of the United States of America with [**name[s] of financial institution[s]**] for safekeeping; that [**name[s] of financial institution[s]**] [is/are] hereby approved as [a] [depository/depositories]; [and] that the money shall be deposited in a manner that will prevent the withdrawal of the money without written orders of this Court[;/.]

Include the following if the income of the estate assets must be used by the guardian for the ward's care and maintenance.

and that the interest earned on the money shall be distributed each interest-paying period by [**name[s] of financial institution[s]**] to [**name of applicant**] to be held by [him/her] and used for the benefit of [**name of ward**] as directed by the orders of this Court.

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Repeat as necessary for each financial institution. Continue with the following.

IT IS FURTHER ORDERED that [**name of applicant**] shall provide each of the above-named financial institutions with a certified copy of this order and obtain from them a receipt acknowledging their agreement to comply with the terms hereof.

IT IS FURTHER ORDERED that on the filing and approval of all receipts of safekeeping a new bond in the amount of $[**amount**] shall be filed by [**name of applicant**] as [proposed] guardian of the [person/estate/person and estate] of [**name of ward or proposed ward**].

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 7-8

[Caption. See § 3 of the Introduction in this manual.]

Safekeeping Agreement

[**Name of financial institution**], a domestic [state/national] bank duly incorporated and qualified to act as a depository under the laws of [Texas/the United States], by and through the undersigned officer, hereby certifies that [**name of guardian**], Guardian, as guardian of the [person/estate/person and estate] of [**name of ward**], Ward, an incapacitated person, deposited with this institution the below-described assets belonging to Ward's estate in the amount of $[**amount**] for safekeeping with this institution as follows:

> Identify each asset that has been placed in the institution's possession. If a number of assets are in the institution's possession, attach an exhibit to the agreement.

Description of Asset	Account No.	Amount
Total		

This institution, as evidenced by the signature of an officer below, agrees to maintain the above-described estate assets in accounts or in United States government obligations with this institution, which are titled or identified as assets of this estate and styled "[**name of guardian**], Guardian of the Estate of [**name of ward**], an Incapacitated Person," to be held in safekeeping, and further that no portion of these assets will be distributed or delivered to any other person including Guardian without receipt of a certified copy of an order of the Court that permits the release of funds in accordance with Texas Estates Code section 1105.156.

> Include the following paragraph if the income of the estate assets must be used by the guardian for the ward's care and maintenance.

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This institution further certifies that it will distribute only the interest earned on the above-described assets held in safekeeping at each interest-paying period only to [**name of guardian**], guardian of the [person/estate/person and estate] of [**name of ward**], an incapacitated person.

Continue with the following.

This institution further certifies that it has received a certified, signed copy of the Court's Order Authorizing Safekeeping of Assets and Reduction of Guardian's Bond signed on [**date**] in the above-styled and -numbered cause and does by the signature of its officer below agree to abide by the terms and limitations of the order or all subsequent orders issued by the Court to the institution concerning the assets of this estate that are to be maintained under safekeeping.

SIGNED on _____.

_____
[**Name of officer**]
[**Title of officer**]
[**Name of institution**]

APPROVED on _____.

_____
JUDGE PRESIDING

Attach exhibit(s).

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Form 7-9

An attorney may prefer to have the claim addressed to him as representative of the guardian, as authorized by statute. *See* Tex. Est. Code § 1153.001.

Published Notice to Creditors

Notice is hereby given that letters of guardianship for the [person/estate/person and estate] of [**name of ward**], an incapacitated person, were issued on [**date**], in Docket No. [**number**], pending in the [**designation**] Court of [**county**] County, Texas, to [**name of guardian**], Guardian, as guardian of the [person/estate/person and estate].

The residence of Guardian is in [**county**] County, Texas, and the mailing address is: Guardian of the [person/estate/person and estate] of [**name of ward**], c/o [**name of guardian**], [**address, city, state**].

All persons having claims against this estate, which is currently being administered, are required to present them within the time and in the manner prescribed by law.

SIGNED on [**date**].

_____

[**Name of guardian**]
Guardian

_____

[**Name**]
Attorney for Guardian
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 7-10

Publisher's Affidavit

I solemnly swear that the above notice was published in the [**name of newspaper**], a newspaper printed in [**city, county**] County, Texas, and of general circulation in this county, as provided in section 1153.001 of the Texas Estates Code for the service of citation or notice by publication, and that the issue of the newspaper in which this notice was published was dated [**date**]. A copy of the notice as published is attached.

_____
[**Name of publisher**]
Publisher
[**Name of newspaper**]

SIGNED under oath before me on _____.

_____
Notary Public, State of Texas

Attach a copy of the notice as published.

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Form 7-11

Notice to Secured and General Creditors

To: All creditors of the estate of [**name of ward**], an incapacitated person

You are hereby given notice that on [**date**], [**name of guardian**] was appointed guardian of the [person/estate/person and estate] of [**name of ward**], an incapacitated person, in Docket No. [**number**] in the [**designation**] Court of [**county**] County, Texas, and that letters of guardianship were issued on [**date**].

It appears that you may have a claim for money against the above estate because—

1. you may hold a secured claim supported by a deed of trust; mortgage; or vendor's, mechanic's, or contractor's lien on real estate of this estate; or

2. you may hold an outstanding claim, of which the guardian has actual knowledge, against this estate for money.

Notice is given that you are to present your claim within the time and in the manner prescribed by law. [**Include if applicable:** If you are an unsecured creditor, you must present your claim not later than the 120th day after the date on which you receive this notice or the claim is barred, if the claim is not barred by the general statutes of limitation. Any such claim may be presented at [**address, city, state**]. The claim must be filed with the clerk of the court issuing the letters of guardianship, identified above.]

SIGNED on [**date**].

_____

[**Name of guardian**]
Guardian

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Form 7-12

Proof of Service of Notice to Secured and General Creditors

Before me, the undersigned authority, on this day personally appeared [**name of guardian**], guardian of the [person/estate/person and estate] of [**name of ward**], an incapacitated person. The estate has been assigned Docket No. [**number**] in the [**designation**] Court of [**county**] County, Texas. The guardian, known to me both personally and as that representative and first being by me duly sworn, on [his/her] oath stated that [he/she] is that person and representative; that attached hereto is a copy of a notice under section 1153.003 of the Texas Estates Code; that the notice was mailed by registered letter, return receipt requested, addressed to the following record holders of indebtedness or claims referred to in the notice, at their last known post office addresses: [**list names and addresses of creditors**]; that the mailing was as required by law; that the return receipt[s] returned to the affiant after the mailing [is/are] also attached hereto; and that this affidavit and the attached [copy/copies] of notice[s] and of return receipt[s] will be filed in the court from which letters of guardianship were issued to the affiant.

_____
[**Name of guardian**]
Guardian

SIGNED under oath before me on _____.

_____
Notary Public, State of Texas

Include attachment(s).

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Form 7-13

This notice should be sent by certified or registered mail, return receipt requested.

Permissive Notice to Creditors

[**Name and address of creditor**]

[**Include certified mail number**]

Re: Permissive notice to unsecured creditor regarding period for presentment of claim

[**Salutation**]

You are hereby given notice that [**name of ward**] was declared an incapacitated person on [**date**] in Cause No. [**number**] in the [**designation**] court of [**county**] County, Texas. [**Name of guardian**] was appointed as guardian of estate of [**name of ward**] on [**date**] and qualified as such on [**date**]. Letters of Guardianship were issued to [**name of guardian**] on [**date**]. Our records indicate that you may have a claim against the estate. In order to comply with section 1153.004 of the Texas Estates Code, you must present a claim for the amounts owed not later than the 120th day after the date of receipt of this notice or the claim is barred (if the claim is not already barred by the general statutes of limitation). The claim should be presented to [**name of guardian**], c/o [**name and address of attorney**]. In addition, the claim must be filed with the clerk of the [**designation**] court of [**county**] County, Texas. The claim must be presented in the form and in the manner required by the Texas Estates Code.

I represent the guardian, [**name of guardian**], and therefore cannot provide you with legal assistance on your requirements in filing this claim with the Court. If you have additional questions regarding your duties in filing a claim, you should consult with an attorney in Texas.

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In accordance with 15 U.S.C. § 1692c and chapter 392 of the Texas Finance Code, I am instructing you to cease calling [**name of ward**] and [**name of guardian**] regarding this account. Further, your offices and the offices of [**name of collection agency**] should discontinue sending all correspondence to [**name of ward**] or to [**name of guardian**] regarding the referenced account. After your receipt of this letter, if you or anyone acting on your behalf contacts either [**name of ward**] or [**name of guardian**], a civil lawsuit may be asserted against you under chapter 392 of the Texas Finance Code or under the Federal Fair Debt Collection Practices Act (15 U.S.C. § 1692p).

Sincerely yours,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 7-14

If the claim is not founded on a written instrument or account, it must state the facts on which it is founded. If the evidence of the claim has been lost or destroyed, the claim must attest to the loss or destruction and must be proved by testimony in open court or by oral or written deposition. Tex. Est. Code §§ 1157.004, 1157.006.

[Caption. See § 3 of the Introduction in this manual.]

Claim of [name of claimant]

[**Name of affiant**] appeared in person before me today and stated under oath:

"My name is [**name of affiant**]. I am competent to make this affidavit. The facts stated within this affidavit are within my personal knowledge and are true and correct.

If the claimant is a corporation, include the following sentence.

"I am the [**specify title**] of the corporation doing business as [**name of corporation**].

Continue with the following.

"The claim of [**name of claimant**] for [**describe services**] rendered to the estate of [**name of ward**], an incapacitated person, and expenses incurred in connection with providing the services in accordance with the statement of [**name of claimant**], dated [**date**], are in the total amount of $[**amount**]. A true and correct copy of the claim is attached as Exhibit [**exhibit number/letter**] and incorporated by reference.

"I have made a diligent inquiry and examination of the claim.

"The claim is just, and all legal offsets, payments, and credits known to me have been allowed.

"I have authority to make this claim on behalf of [**name of claimant**]."

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SIGNED under oath before me on _____.

_____
Notary Public, State of Texas

Memorandum of Allowance of Claim

The foregoing claim of [**name of claimant**] [was presented to me as guardian of the estate of [**name of ward**], an incapacitated person/was filed with the county clerk of [**county**] County, Texas] on [**date**], and, after having been examined by me, the claim was found to be in compliance with the provisions of section 1157.004 of the Texas Estates Code, and to the best of my knowledge and belief this claim is proper and constitutes a valid obligation against [**name of ward**]'s estate. This claim is allowed by me as guardian of the estate on [**date**].

_____
Guardian

Attach exhibit(s).

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Form 7-15

[Caption. See § 3 of the Introduction in this manual.]

Order Approving Claim

On [**date**], the Court considered the claim of [**name of claimant**] for [**describe services**] and related expenses, filed on [**date**], and approved by [**name of guardian**], the guardian of the estate, on [**date**]. The Court after examination finds that the claim of [**name of claimant**] for the period from [**date**] to [**date**] for [**specify**] in the amount of $[**amount**] and for expenses and advances in the amount of $[**amount**], for a total claim of $[**amount**], has been on file for the required time. The Court finds that this amount is just and fair; that all legal offsets, payments, and credits have been allowed against the claim; and that [**name of claimant**] is entitled to payment in the order prescribed under section 1157.103 of the Texas Estates Code.

IT IS ORDERED that this claim is approved in full according to section 1157.005 of the Texas Estates Code in the amount of $[**amount**] and assigned an order of payment as [an expense for the care, maintenance, and education of [**name of ward**] [and [**name of ward**]'s [spouse/dependent[s]/spouse and dependent[s]]/a funeral or last illness expense of [**name of ward**]/an expense of administration/a claim against [**name of ward**] and [his/her] estate under section 1157.103 of the Estates Code].

SIGNED on _____.

_____
JUDGE PRESIDING

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APPROVED AS TO FORM:

_____

[**Name**]
Attorney for Claimant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Administration

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Chapter 8

Administration

I. Administrative Procedures

§ 8.1 Scope of Chapter

Guardianship proceedings are the subject of intense court supervision and control. Almost every action first requires the guardian's attorney to seek the court's permission. This includes expenditures, sales, purchases, and engaging counsel. Properly maintaining the court's supervision over the guardianship requires the guardian to prepare and submit a large number of applications to keep the court informed about the guardianship and seek court approval of all actions. This chapter contains guidelines and practice comments for various administrative procedures that might arise during the guardianship's existence. These guidelines are based on the authors' experience practicing in the probate courts. Not all areas are covered directly by the Texas Estates Code, and many judges have their own local rules and procedures for guardianship cases in their courts. The guardian should consult other resources if this chapter does not address a specific need. Guardians should also always check with a court for its local rules and procedures in guardianship cases.

§ 8.2 Overview of Expenditures

The guardian of the person must provide food, clothing, medical care, and shelter for the ward. Tex. Est. Code § 1151.051(c)(3). The guardian of the estate must take care of and manage the estate of the ward. Tex. Est. Code § 1151.151. A guardian will necessarily incur expenses in carrying out his duties. A guardian is not required to spend personal funds to provide for the ward, but he may not expend funds of the ward's estate unless specifically authorized to do so by the Texas Estates Code or by prior court approval. *See* Tex. Est. Code §§ 1155.101–.103. With proper court approval the guardian of the estate may acquire goods or services and pay for these expenditures with estate funds. *See* Tex. Est. Code §§ 1101.151(b)(3), 1101.152(b)(3), 1156.001, 1156.051. If the guardian of the estate must expend estate funds without prior court approval, the Code provides procedures for the subsequent approval of these expenditures. *See* Tex. Est. Code § 1156.004.

§ 8.3 Monthly Allowance

Guardians incur routine expenses throughout the guardianship. A court can order a monthly allowance in the order appointing guardian, but courts more often consider a separate application filed after the guardian qualifies. The guardian of the estate should file an application showing projected monthly expenditures to be paid by the estate's income and corpus for the education and maintenance of the ward and the ward's property. The application must be filed within thirty days of qualification, if the court did not order a monthly allowance in the order appointing guardian, or by the date specified by the court, whichever is later. Tex. Est. Code § 1156.001. See forms 8-1 and 8-2 in this chapter for an application and order that can be adapted to meet most situations.

The application must list separately the amounts requested for education and maintenance of the ward and the amount requested for maintenance of the property. Tex. Est. Code § 1156.001(c). The application may provide that a certain amount of money be paid to the guardian of the person for the ward's education and maintenance. Tex. Est. Code § 1156.003(b)(2).

The court shall consider the condition of the estate and the income and corpus of the estate necessary to pay the reasonably anticipated regular education and maintenance expenses of the ward. Tex. Est. Code § 1156.002. An accounting for those expenditures is still required annually even if the court authorized the budget. Tex. Est. Code § 1156.003(d).

§ 8.3:1 Expenditures for Ward's Dependents

The guardian of the estate for a ward may also seek court authority for expenditure of funds for maintenance or education of the ward's spouse and dependents. Tex. Est. Code § 1156.052. See forms 8-3 and 8-4 in this chapter for an application and order to expend funds. The applicant must mail notice of the application to all interested persons. *See* Tex. Est. Code § 1156.052(c); *see also* Tex. Est. Code § 1002.018 (defining interested persons). The application should include information regarding—

1. the circumstances of the ward, the ward's spouse, and the ward's dependents and their need for support;
2. the ability and duty of the ward's spouse, as applicable, to support himself or herself and the ward's dependents;
3. the size of the ward's estate;
4. the beneficial interest the ward or the ward's spouse or dependents, as applicable, has in any trusts; and
5. an existing estate plan, if the ward has one, including a trust or will, that provides a benefit to the ward's spouse or dependents, as applicable.

See Tex. Est. Code § 1156.052.

See form 8-2 for an order establishing expenditures.

§ 8.3:2 Expenditures for Minors

Parents have an obligation to support their minor children. Tex. Fam. Code § 151.001(a)(3); *see* Tex. Est. Code § 1156.051(a). If the parent cannot provide for the minor's support, the guardian of the person is permitted to obtain court approval, based on clear and convincing evidence, to pay from the ward's estate expenses related to the ward's support only. *See* Tex. Est. Code § 1156.051.

Application for Expenditures on Behalf of Minor: A written application should include—

1. detailed information on both the annual income of the ward and the principal assets available to provide for his future support; and
2. detailed information about the financial condition of the ward's parents, family income and expenses, and other children supported by the parents and any other information that will allow the court to understand the hardship on the family or the family's inability to provide adequately for the ward.

See Tex. Est. Code § 1156.051(b).

Though not required by the Texas Estates Code, the guardian's verification of the application or the inclusion of an affidavit of the parent stating the specifics of the ward's need and the hardship that will exist may avoid a hearing and expedite approval of the application. *See* Tex. Est. Code § 1156.051(b). See form 8-5 in this chapter for an application.

Note that the guardian of the estate for the minor can make no expenditure for the ward's parents or other siblings because the minor has no duty to support his parents or siblings.

Order: The court may enter an order authorizing the expense if it finds the expenditure is in the ward's best interests. *See* Tex. Est. Code § 1156.004. The court may also appoint a guardian ad litem. *See* Tex. Est. Code § 1054.051. See form 8-6 for an order.

§ 8.4 Payment of Additional Expenses

If someone has provided goods or services to the ward without prior court approval, the guardian of the estate should submit these expenses to the probate court for approval before making payment from the ward's estate. Tex. Est. Code §§ 1155.101, 1155.103.

§ 8.4:1 Application for Payment of Expenses

A written application for payment of expenses should be verified and include—

1. details of all expenses sought to be paid;
2. copies of any invoices, statements, or other documents containing information about and amounts of expenses; and
3. details concerning the ward's needs or other justification for the specific expense item.

See Tex. Est. Code § 1155.103. See form 8-7 in this chapter for an application for authority to expend funds.

§ 8.4:2 Hearing and Order

There is no requirement for a hearing on an application for payment of additional expenses. Once filed with the clerk, it can be presented to and acted on by the court. The court will enter an order authorizing the expense if it finds it is in the ward's best interests. See form 8-8 in this chapter for an order.

§ 8.5 Reimbursement of Expenditures Provided by Guardian of Estate

The Texas Estates Code permits reimbursement for necessary and reasonable expenses that the guardian of the estate has paid out of personal funds. *See* Tex. Est. Code § 1155.101.

§ 8.5:1 Application for Reimbursement of Expenses Paid

A written application for reimbursement of expenditures should be verified and include—

1. details of all expenses for which reimbursement is sought;
2. copies of any invoices, statements, or other documents containing information about and amounts of expenses; and
3. details concerning the ward's needs or justification for the specific expense item.

Practice Pointer: Because most expenses should be paid only by court order, if the guardian is seeking reimbursement, it may be helpful to explain why the guardian could not wait for court authorization before making the payment. See form 8-9 in this chapter for an application for reimbursement.

§ 8.5:2 Hearing

Unless the requested reimbursement is unusual or excessive, most courts do not require hearings on applications for reimbursement and will consider the applications as they are filed. And while a request for reimbursement of minor expenses may be incorporated into the annual account that the guardian of the estate has filed, it is better practice to file a separate application.

§ 8.5:3 Order

Section 1155.101 of the Texas Estates Code indicates to some extent what the guardian must include in a court's order for reimbursement. The court will enter an order authorizing the expense if it finds the expenditure was reasonable and necessary. Tex. Est. Code § 1155.101. See form 8-10 in this chapter for an order.

§ 8.6 Recovery of Attorney's Fees

The fees of the attorney hired to represent the guardian of the estate are considered part of the costs of administration and thus are expenses for the operation of the guardianship. Tex. Est. Code §§ 1155.053, 1155.054, 1155.101, 1155.102, 1155.151. A guardian is entitled to be reimbursed from the ward's estate for all necessary and reasonable expenses incurred in performing any duty as guardian, including payment of reasonable attorney's fees. Tex. Est. Code § 1155.101. Thus, attorney's fees incurred by the guardian in the day-to-day operations of the estate may be recovered.

The guardian must make a request to the court to pay or, if the guardian has paid personally, for any reimbursement of fees and expenses. The process most often used is to submit an application directly to the court for approval before the guardian makes payment. Some courts require the application to be supported by an affidavit of one or more attorneys; check local practice. For example, the Harris County courts post attorney's fee guidelines on the county's website. As with any expenditure that the court must approve, the application should contain specific, detailed information about the nature of the request. See forms 8-11 and 8-12 in this chapter for an application and attorney's fee order.

For a discussion of fees paid by the guardian to a court appointee under Texas Estates Code sections 1054.001, 1155.151, and 1102.001, see section 6.8 in this manual.

§ 8.7 Ratification of Expenditures for Maintenance and Education

The court may ratify expenditures made by the guardian of the estate from the corpus and income of the ward's estate under certain circumstances without prior approval. The application should be filed as promptly as possible but no later than the filing of the annual account. If the expenditure is large, the guardian should apply as soon as possible without waiting until the end of the annual accounting period.

A written application for these expenditures should indicate that—

1. the expenditures were made when it was not convenient or possible to first secure court approval;
2. the proof is clear and convincing that the expenditures were reasonable and proper;
3. the court would have granted authority in advance to make the expenditure; and
4. the ward received the benefit of the expenditures.

Tex. Est. Code § 1156.004.

If the expenditure is small or consists of many small expenditures, the guardian of the estate can submit the application as a part of the annual account rather than submit a separate application. See form 8-13 in this chapter for an application to ratify expenses and form 8-14 for a corresponding order; these should be used only if funds of the guardianship estate have been spent without prior court approval.

§ 8.8 Investment Management Plans

The guardian of the estate, within 180 days of qualification or on a date specified by the court, has the duty to invest estate assets according to Texas Estates Code section 1161.003 or file a written application for an order that authorizes the guardian to develop and implement an investment management plan for estate assets and to invest in or sell securities under that plan. Tex. Est. Code § 1161.051(a). The plan should be very detailed and will allow the court to declare that one or more estate assets must be retained despite being underproductive with respect to income or overall return. Additionally, the court will determine if estate funds may be loaned or invested in real estate. The court may allow investments or the purchase of insurance or annuity contracts. The duty to invest the estate may also be modified or eliminated by application pursuant to this section. Tex. Est. Code § 1161.051(a)(2)(B). Although the Texas Estates Code requires the application to be made within 180 days of qualification, courts routinely consider such requests at any time during the guardianship. *See* Tex. Est. Code § 1161.051(a).

The court may approve the investment management plan without a hearing. Tex. Est. Code § 1161.051(b). However, because investment management plans will be specifically tailored to the particular estate, the court will usually benefit from a hearing to better understand the basis for the request.

A court may order the relief requested in the investment plan if the actions requested by the guardian of the estate are in the best interests of the ward. The order must state in reasonably specific terms (1) the nature of the investment, investment plan, or other action requested in the application and authorized by the court, including (if applicable) the authority to invest in or sell securities in accordance with the plan; (2) when an investment must be reviewed and reconsidered by a guardian; and (3) whether the guardian must report the guardian's review and recommendations to the court. Tex. Est. Code § 1161.052(a), (b). Citation or notice is not necessary to invest in or sell securities under such a court-authorized investment plan. Tex. Est. Code § 1161.052(c).

If an account or other asset is the subject of a specific or general gift under a ward's will or if a ward has funds, securities, or other property held with a right of survivorship, the guardian is not prevented from administering or changing the asset in any manner. Tex. Est. Code § 1161.053.

A proposed application for a management plan and the corresponding order are included as forms 8-43 and 8-44 in this chapter. As an investment plan is tailored to a specific estate, the forms should be revised as necessary to provide the information that will allow the court to properly consider the requested management plan. The forms are provided for illustrative purposes only and contain information that may not need to be included in every application.

[Sections 8.9 and 8.10 are reserved for expansion.]

II. Compensation

§ 8.11 Guardian Compensation

§ 8.11:1 Purpose and Function

The Texas Estates Code permits certain guardians of the person and all guardians of the estate to be compensated for acting as a guardian. *See* Tex. Est. Code ch. 1155.

§ 8.11:2 Calculating Compensation for Guardian of Person

The court may authorize to the permanent or temporary guardian of a person compensation of no more than 5 percent of the *gross income* of the ward's estate. Tex. Est. Code § 1155.002(a). When determining gross income, the court must consider the monthly income from all sources and whether the ward received assistance under the state Medicaid program. Tex. Est. Code § 1155.004. However, Social Security or veterans benefits may not be considered. Tex. Est. Code § 1155.001(1). Note that the court may deny compensation if it finds that the guardian has not adequately performed his duties or has been removed for cause. Tex. Est. Code § 1155.008.

§ 8.11:3 Calculating Compensation for Guardian of Estate

Guardians and temporary guardians of a ward's estate are entitled to reasonable compensation, and a fee of 5 percent of the gross income and 5 percent of all money paid out of the estate is considered reasonable. Tex. Est. Code § 1155.003. The court must find that the guardian of an estate has taken care of and managed the estate according to Texas Estates Code provisions. Tex. Est. Code § 1155.003. The guardian must give consideration to the method of characterizing income. Money loaned, invested, or paid over on settlement of the estate; Social Security and veterans benefits; and money paid for tax-motivated gifts do not constitute "gross income" or "money paid out" for purposes of calculating the guardian's compensation. Tex. Est. Code §§ 1155.001, 1155.003(b). In addition, while the Estates Code permits the guardian to operate a farm, ranch, factory, or other business of the ward, no specific provision permits the guardian to receive compensation for providing these services. *See* Tex. Est. Code § 1151.155. Any interested person may petition the court to modify the guardian's compensation if the amount calculated under section 1155.003 is unreasonably low. The court may also modify the compensation on its own motion. Tex. Est. Code § 1155.006(a). However, most courts are reluctant to grant a request for compensation above the statutory amount without notice, a hearing, and significant testimony. A court on its own motion or on that of an interested person can deny a guardian compensation in whole or in part. Tex. Est. Code § 1155.008. A denial of compensation should contain a finding that the guardian did not adequately perform the duties required or was removed for cause. Tex. Est. Code § 1155.008.

§ 8.11:4 Calculating Compensation for Guardian of Person and Estate

Unless a guardian of an estate is permitted to receive additional compensation as described at section 8.11:3 above, the guardians of the person and estate may not jointly receive a fee that exceeds 5 percent of the gross income plus 5 percent of all money paid out of the estate. Tex. Est. Code § 1155.005. The method of characterizing income remains the same.

§ 8.11:5 Application for Compensation

The court will consider an application for compensation for the guardian of the estate at the time the court approves an annual or final account. Tex. Est. Code § 1155.003(a). The Texas Estates Code makes no specific provision about when an application for compensation of the guardian of the person should be filed. *See* Tex. Est. Code § 1155.002(a). Some courts allow the application to be included with the annual account, and others require it to be a separate pleading. Either way, the court will consider a compensation application for the guardian of the estate after approval of the annual account or with a final account. Tex. Est. Code § 1155.003(a).

Contents of Application for Compensation: Because the accounting figures that the court approves will form the basis for the final calculation of compensation, the guardian must support the application with adequate details about both income and expenses and should always sign the application. The application need not be supported by an affidavit unless the guardian is requesting additional compensation exceeding the statutorily calculated amount. *See* Tex. Est. Code § 1155.006. See form 8-15 in this chapter for an application for compensation.

Compensation Hearing: The general calculation for the compensation is set as a matter of law. Therefore, there should be no reason for a hearing on the application. Most courts will require a hearing on applications if the guardian requests additional compensation.

Quarterly Payments: The court may also authorize compensation for the guardian in an estimated amount the court finds reasonable to be paid on a quarterly basis before the filing of the annual account. Tex. Est. Code § 1155.006(a)(2). Requests for interim fees are not generally granted except in rare circumstances.

If quarterly compensation is authorized, the court may later reduce or eliminate the guardian's compensation if, after review of the annual or final accounting, the court finds the guardian (1) received compensation in excess of the amount permitted, (2) has not adequately performed the duties required of a guardian, or (3) has been removed for cause. Tex. Est. Code § 1155.007(a). If the court reduces or eliminates a guardian's compensation, the guardian and the surety on the guardian's bond are liable to the guardianship estate for any excess compensation received. Tex. Est. Code § 1155.007(b).

Compensation Order: The Code makes no provision about the contents of the order approving the guardian's compensation payment. Note that a guardian is a court appointee, and the order must comply with the supreme court's reporting requirements for appointees' fees. The county clerk must report to the supreme court the court-ordered guardian's compensation. This order also allows the court to keep track of estate expenditures for review in the next annual account. See form 8-16 for an order.

§ 8.12 Payment of Attorney's Fees to Attorney Serving as Guardian

If an attorney is serving as a guardian and is also providing legal services in connection with the guardianship, the attorney is not entitled to compensation for the guardianship services or payment of the attorney's fees for the legal services unless the attorney files with the court a detailed description of the services performed that identifies which of the services provided were guardianship services and which were legal services. Tex. Est. Code § 1155.052(a). An attorney serving as guardian is not entitled to payment of attorney's fees for guardianship services that are not legal services. Tex. Est. Code § 1155.052(b). Each court shall set the compensation to be paid to attorneys for guardian services. Tex. Est. Code § 1155.052(c). Many courts set a much lower hourly rate for attorneys serving as guardian than the hourly rate for legal services performed by that attor-

ney in the same guardianship. The guardian's time serving as an attorney should be segregated from his fiduciary time. Attorneys should check with the court for its local procedures in paying attorneys who are also serving as guardians.

[Sections 8.13 through 8.20 are reserved for expansion.]

III. Contracts

§ 8.21 Contract for Goods or Services

It is advisable to obtain prior court approval before entering into any contracts relating to goods or services furnished to the ward or his estate. Prior court approval is required when managing the ward's property. *See* Tex. Est. Code §§ 1151.102, 1151.103.

§ 8.21:1 Application Form

A written application for approval to contract for goods and services should contain—

1. details about the nature of the services;
2. an indication of what funds will need to be used during the accounting year;
3. an explanation of the necessity for the expenditure; and
4. a copy of the proposed contract or details about the terms of any proposed contract.

The guardian should submit the application to the court for approval as soon as possible. Note that some courts prefer the application to be verified, but it is not required by statute. See form 8-17 in this chapter for an application.

§ 8.21:2 Hearing

Unless the proposed contract covers something of an unusual nature or provides for a significant expense, the court does not usually require a hearing on the application.

§ 8.21:3 Order

The court order should approve the contract and the amount of funds to be spent during the accounting period. This order also allows the court to keep track of the estate's expenditures for review in the next annual account. The contract usually should cover only a one-year period. See form 8-18 in this chapter for an order.

§ 8.22 Contract to Employ Attorney

It is the obligation of the guardian of an estate to collect and recover property for the ward's estate. Tex. Est. Code § 1151.105. The guardian is permitted to sue to recover personal property, debts, or damages. Tex. Est. Code § 1151.104. If it is necessary to employ an attorney to represent the guardian in such an action, the guardian must seek court approval of a contingency fee contract or arrangement in accordance with Tex. Est. Code § 1155.053. The court may authorize a contingency fee in excess

of one-third of the recovery, but most will do so only under exceptional circumstances. Tex. Est. Code § 1155.053(b). The Texas Estates Code governs this process and the method of payment. *See* Tex. Est. Code § 1155.053(b).

§ 8.22:1 Application to Employ Attorney

A written application for approval to employ an attorney should contain—

1. information about the need to hire counsel and the expertise of the proposed counsel, including—
    a. the time and labor that will be required, the novelty and difficulty of the questions to be involved, and the skill that will be required to perform the legal services properly;
    b. the fee customarily charged in the locality for similar legal services;
    c. the value of property recovered or sought to be recovered by the guardian under this section;
    d. the benefits to the estate that the attorney will be responsible for securing; and
    e. the experience and ability of the attorney who will be performing the services;
2. a copy of the contingent fee contract; and
3. a statement about whether a lawsuit is anticipated and, if necessary, a request for court authorization to commence a suit.

Tex. Est. Code § 1155.053(c). If a contract is entered into or a conveyance made pursuant to a contract before the court approves the contract or conveyance, that contract or conveyance is void unless the court ratifies or reforms the contract or documents to the extent necessary to cause the contract or conveyance to meet the requirements of Texas Estates Code section 1155.053. Tex. Est. Code § 1155.053.

See form 8-19 in this chapter for an application to employ an attorney.

§ 8.22:2 Order

Attached to the application should be an order authorizing the guardian to execute the fee agreement, institute suit, and recover his fees. See form 8-20 in this chapter for an order.

[Sections 8.23 through 8.30 are reserved for expansion.]

IV. Sale of Real Property

§ 8.31 Sale of Guardianship Real Property

All sales of guardianship property must be authorized by the court before title will pass out of the guardianship estate. The court may order the property sold for cash, for credit, at public auction, or by private sale, as it considers most advantageous to the estate, except when otherwise directed by the Texas Estates Code. Tex. Est. Code § 1158.001.

An application to sell real property may be made only—

1. if funds are needed to pay expenses of administration, allowances, and claims against the ward or the estate;

2. to pay the funeral and last illness expenses of a deceased ward;

3. to make up a deficiency if the estate's income, sales of personal property, and the proceeds of previous sales are insufficient to pay for the education and maintenance of the ward or the debts of the estate;

4. to dispose of undivided interests in property owned by the estate if it is in the best interests of the estate to sell the interest;

5. to dispose of property that is nonproductive or underproductive; or

6. to conserve the estate by selling mineral interests or royalties on minerals in place.

Tex. Est. Code § 1158.251.

§ 8.31:1 Terms of Sale

The court may approve a sale of real property on terms that will be most beneficial to the estate. Tex. Est. Code § 1158.001. The concern of the court is to preserve and protect the ward and his estate. The guardian of the estate may reconvey a property acquired by the estate through foreclosure of a preexisting lien without compliance with the otherwise applicable credit-sales provisions. *See* Tex. Est. Code § 1158.352.

§ 8.31:2 Public Auction

A public auction of real property must be conducted in the same basic manner as any public auction ordered by statute. The auction must be advertised by published notice in the county in which the estate is pending, made to the highest bidder, held at the courthouse door or other place authorized, and held on the first Tuesday of the month between 10:00 A.M. and 4:00 P.M. Tex. Est. Code §§ 1158.401–.403.

The court may permit an auction in a county in which the land is located if notice is provided in both the county in which the land is located and the county in which the estate is pending. Tex. Est. Code § 1158.403(c). Auctions not completed on the auction day advertised may be continued. Tex. Est. Code § 1158.404. If the highest bidder defaults, the property may be readvertised and auctioned again without a further court order; a defaulting bidder is liable for 10 percent of the amount of the bid and the amount of any deficiency in the price on the second auction. Tex. Est. Code § 1158.405.

§ 8.31:3 Private Sale

A private sale must comply with the terms specified in the order authorizing the sale. No additional advertising, notice, or citation is required unless the court directs otherwise. Tex. Est. Code § 1158.451.

§ 8.31:4 Sale of Easement

A sale of an easement or right-of-way may be made by a guardian of the estate with prior court approval. Tex. Est. Code §§ 1158.501, 1158.502; *see also* Tex. Est. Code § 1158.001. The procedure is the same as for a private sale of real property under the Texas Estates Code. Tex. Est. Code § 1158.502; *see also* Tex. Est. Code § 1158.451.

§ 8.32 Application

The guardian of the estate need not wait until a specific purchaser for property has been found. Because of the time required to complete the process, the guardian should begin obtaining court approval as soon as a need to sell property has been determined.

The application must include—

1. an adequate description of the real property to be sold (which should conform to the inventory description of the property);
2. an affidavit of the condition of the estate stating the assets of the estate, the claims and their amounts that have been or will be approved, and the property that will remain after the sale to satisfy any claims; and
3. specific facts that show the necessity or advisability of the sale.

Tex. Est. Code § 1158.252.

See form 8-21 in this chapter for an application for sale of real property.

§ 8.32:1 Hearing

All applications for the sale of real property are to be heard by the court that receives the application for approval of the sale. Some courts require a formal hearing at which the attorney will present the application. Tex. Est. Code § 1158.255(b), (c). Others will merely review the application and, if it contains sufficient information, approve it by submission after the proper posting time has run. Tex. Est. Code § 1158.255(b). The attorney should check with the staff of the court in which the application has been filed to determine the practice of that court.

§ 8.32:2 Citation

Following the filing of the application for sale, citation by posting must be issued and returned before the court may act. Tex. Est. Code § 1158.253. This requirement is mandatory and may not be waived or avoided. Failure to comply will cause any decree of sale that may be issued to be void.

§ 8.32:3 Opposition

A person interested in the guardianship may, during the period provided in the citation issued under Texas Estates Code section 1158.253, file a written opposition or seek sale of other estate property. Tex. Est. Code § 1158.254. “Interested person” is defined in Tex. Est. Code § 1002.018. If an opposition is filed during the period provided in the citation issued under section 1158.253, the court shall hold a hearing on the application. Tex. Est. Code § 1158.255(a). If the court orders a hearing on the application, the court must designate in writing a date and time for the hearing on the application and the opposition together with evidence pertaining to the application or opposition. Notice must be issued to the applicant and to each person who files an opposition to the sale of the date and time of the hearing. Tex. Est. Code § 1158.255(c).

§ 8.32:4 Order of Sale

After citation has been returned and on hearing the application, the court may either approve the sale as submitted, deny it, or order the sale of other property. Tex. Est. Code § 1158.256(a).

The order must specify—

1. the real property to be sold (the description of which should be the same as that contained in the inventory and application);
2. whether the property is to be sold by private sale or at public auction and, if at public auction, the time and place of the auction;
3. the purpose for the sale and its advisability;
4. the court's finding on the adequacy of the general bond;
5. that the sale be made and the report returned in accordance with law; and
6. the terms of the sale.

Tex. Est. Code § 1158.256(b).

The court must also review the adequacy of the bond for the estate and determine whether the bond must remain unchanged or be increased. Tex. Est. Code §§ 1158.256(b)(5), 1158.552(3). In most cases the court will wait until after receiving the report of sale before ordering a bond increase, unless the affidavit on the estate's condition shows that a present need to increase the bond exists. Tex. Est. Code § 1158.256(b)(4). See form 8-22 in this chapter for an order for sale of real property.

§ 8.32:5 Report of Sale

The Texas Estates Code provides that after a successful bid at auction or a private contract for sale is finalized and the sale has been made, the guardian of the estate is required to file a report of sale not later than the thirtieth day after the event. Tex. Est. Code § 1158.551. The report must contain—

1. the date the court approved the order for the sale;
2. a description of the real property sold (which should conform to the inventory description and order of sale);
3. the time and place of the auction or the date the property was placed under contract;
4. the name of the purchaser;
5. the amount of the successful bid or the contracted purchase price of the property;
6. the terms of the sale and whether the sale was at public auction or by contract; and
7. a statement that the purchaser is ready to comply with the terms of the sale.

Tex. Est. Code § 1158.551. See form 8-23 in this chapter.

§ 8.32:6 Approval of Sale

Once the report of sale is filed, the court must wait five days before the approval of the sale may be signed. *See* Tex. Est. Code §§ 1158.552–.553. Before signing, the court must review the report and determine that the sale was properly made, that it was for a fair price, and that an increased bond has been filed, if required. The action of the court in approving the sale constitutes a final judgment. Tex. Est. Code § 1158.556. See form 8-24 in this chapter for an approval of sale.

§ 8.32:7 Delivery of Deed or Lien Documents

Only after the approval of sale is signed may the guardian of the estate execute a deed to the property that has been sold. Tex. Est. Code § 1158.558(a). The deed that the guardian signs should be a special, not a general, warranty deed. *See* Tex. Est. Code § 1158.557. If the sale is on credit, the guardian cannot deliver the deed until all proper financing documents such as the note and deed of trust have been delivered. The guardian is responsible for properly recording the deed of trust or mortgage. Tex. Est. Code § 1158.558(c).

§ 8.32:8 Bond on Sale

A court may not approve a sale of real estate before the court determines if the guardian of the estate must file a new, increased bond to cover the proceeds from the sale. Tex. Est. Code § 1158.554. If a new bond is required, the court may not approve the sale until the increased bond is filed. Tex. Est. Code §§ 1158.552(3), 1158.554. An increase is often necessary because the general bond of the guardian of the estate does not cover the value of the real property held in the estate.

§ 8.32:9 Penalty for Neglect

Any guardian of the estate who fails to comply with the delivery requirements of Texas Estates Code section 1158.558 may be subject to removal, and both the guardian and the surety are liable for any loss to the ward's estate that may be occasioned by the guardian's negligence. Tex. Est. Code § 1158.559.

§ 8.33 Guardian's Purchase of Property

A guardian ordinarily may not purchase directly or indirectly any of the ward's property that is to be sold. The only two exceptions that exist are for preexisting executory contracts and court-approved sales. Tex. Est. Code §§ 1158.651–.653. If the guardian seeks court approval to purchase property from the estate, the court will appoint an attorney ad litem, and the court may require notice for the sale. Tex. Est. Code § 1158.653. If a purchase is made in violation of the Texas Estates Code, the court will set aside the sale and order that the property be reconveyed to the estate. Tex. Est. Code § 1158.654.

§ 8.34 Abandonment of Property

If the ward's estate has real or personal property that is worthless or burdensome and it would be more economical to abandon the property than to conduct a sale, the guardian may file an application, and the court may issue an order authorizing abandonment of the property without notice or hearing. Tex. Est. Code § 1151.102(c)(6). If the application clearly shows that the property is worthless or burdensome, most courts will consider the application on submission and issue an order accordingly. See forms 8-29 and 8-30 in this chapter for an application and corresponding order.

[Sections 8.35 through 8.40 are reserved for expansion.]

V. Sale of Personal Property

§ 8.41 General Terms for Sale of Guardianship Personal Property

The court must authorize sales of personal property before the guardian of the estate can convey ownership from the estate. The court may order the property sold for cash or on credit at public auction or by private sale. Tex. Est. Code § 1158.001. The Texas Estates Code requires the prompt sale of perishable personal property (see section 8.42 below), allows the expedited sale of nonperishable property (see section 8.43) and livestock (see section 8.44), and also permits abandonment of worthless property (see section 8.45). Application must be made for all sales of personal property, either by the guardian of the estate or by an interested person. Tex. Est. Code § 1158.101. To the extent possible, the application must conform to the requirements for sales of real property. Tex. Est. Code § 1158.102.

§ 8.42 Application for Sale of Perishable Personal Property

After the inventory and appraisement have been approved, the guardian must apply to the court to sell property that is liable to perish, waste, or deteriorate in value or will be an expense or disadvantage to the estate to keep. Tex. Est. Code § 1158.051. Personal property that is exempt from forced sale, a specific legacy, or property needed to maintain a farm, ranch, or other business may not be included in a sale under section 1158.051. In determining whether to order a sale under section 1158.051, the court will consider—

1. the guardian's duty to care for and manage the estate as would a person of ordinary prudence, discretion, and intelligence; and
2. whether the asset is one in which a trustee may be permitted to invest under chapter 117 or subchapter F, chapter 113, of the Texas Property Code.

Tex. Est. Code § 1158.051; *see also* Tex. Prop. Code ch. 117. See form 8-25 in this chapter for an application.

§ 8.42:1 Terms of Sale

The court may approve a sale of perishable personal property on terms that will be most beneficial and advantageous to the ward's estate. Tex. Est. Code §§ 1158.001, 1158.101. See form 8-26 in this chapter for an order approving a sale.

§ 8.42:2 Public Auction

A public auction of perishable personal property is to be conducted after notice is issued by the guardian of the estate and posted in the same manner as in original proceedings in probate. Tex. Est. Code § 1158.103. The Texas Estates Code provides no details of how notice is to be given; at the very least, notice should be published in the county in which the estate is located, giving information about the time, place, and terms of the sale. *See* Tex. Est. Code § 1158.103. Since no specific Code provision requires a hearing on the sale of personal property, the attorney should check with the court staff to ascertain the practice of a particular court.

§ 8.42:3 Private Sale

Although the Texas Estates Code permits the private sale of perishable personal property, there are no provisions to guide the guardian through the process. *See* Tex. Est. Code § 1158.001. Thus, when a court approves a private sale of perishable personal property, the sale should comply with the terms specified in the application and the order. No additional advertising, notice, or citation should be required unless the court directs otherwise.

§ 8.42:4 Order of Sale

Perishable personal property in the ward's estate may not be sold until the court has entered an order authorizing the sale. Tex. Est. Code §§ 1158.001, 1158.101. The order of sale should describe the property to be sold or incorporate by reference the description of the property that was in the application. See form 8-26 in this chapter for an order approving the sale.

§ 8.43 Other Sale of Personal Property

The guardian of the estate or any interested person may apply to sell personal property of the ward not required to be sold under section 1158.051 of the Texas Estates Code if the sale is in the best interests of the ward—

1. to pay expenses of care, maintenance, and education of the ward or the ward's dependents;
2. to pay expenses of the guardianship administration, allowances, or claims against the ward or the ward's estate; or
3. to pay funeral expenses and last illness expenses if the guardianship is kept open after the ward's death.

Tex. Est. Code § 1158.101. *But see In re Estate of Glass*, 961 S.W.2d 461, 462 (Tex. App.—Houston [1st Dist.] 1997, writ denied) (when ward dies, only role of guardian is to submit final account and conclude guardianship).

§ 8.43:1 Application for Sale of Personal Property

The Texas Estates Code gives little guidance about the contents of the application for the sale of personal property and requires merely that the sale comply with Code provisions for a sale of real property under sections 1158.252 through 1158.256. Tex. Est. Code § 1158.102. It is not necessary to wait until a purchaser for a specific property has been found in order to apply for the sale. Because of the time required to complete the process, the guardian should begin it as soon as a need to sell property has been determined. The application should provide—

1. an adequate description, which conforms to the inventory description, of the personal property to be sold (note that the inventory often does not contain a detailed description of the personal property assets, so an amendment to the inventory may be needed);
2. an affidavit of the condition of the estate stating the assets of the estate, the claims and their amounts that have been or will be approved, and the property that will remain after the sale; and
3. the specific facts that justify the sale.

See Tex. Est. Code §§ 1158.102, 1158.252. See form 8-27 in this chapter for an application.

§ 8.43:2 Hearing

No specific Texas Estates Code provision requires that an application for the sale of personal property be heard by the court. *See* Tex. Est. Code § 1158.001; *but see* Tex. Est. Code § 1158.102 (insofar as possible, sales of personal property must conform to requirements for sales of real estate). Some courts require a formal hearing at which the attorney will present the application. Other courts will merely review the application and, if it contains sufficient information, approve it after the proper posting time has run. The attorney should check with staff of the court in which the guardianship is pending to determine its practice.

§ 8.43:3 Citation

Because an application for the sale of personal property must insofar as possible conform to that for a sale of real property, the citation requirements for real property sales should also apply. *See* Tex. Est. Code § 1158.102. Thus, the application for sale should have citation by posting issued before the court acts on the application. *See* Tex. Est. Code § 1158.253.

§ 8.43:4 Order of Sale

Because sales of personal property should conform with the rules applied to real property, the probate court should not act until after citation has been returned. *See* Tex. Est. Code § 1158.102. The court should then conduct the hearing or consider the application. If the sale is approved, the court will enter an order authorizing it. Tex. Est. Code § 1158.001. The order should—

1. contain a complete and adequate description of the property to be sold, which is the same as the description in the inventory and sale application;
2. state whether the property is to be sold at public auction (indicating the time and place of sale) or by a private sale;
3. state the purpose for the sale and its advisability; and
4. state the court's finding on the adequacy of the general bond.

See Tex. Est. Code § 1158.256(b) (requirements for an order of sale of real property). See form 8-28 in this chapter for an order.

§ 8.43:5 Report of Sale

Once a sale of the personal property has been completed, the guardian should file a report of the sale with the court. Tex. Est. Code § 1158.105(a). Note that although section 1158.105 does not include a deadline for filing the report of sale, it should be filed within thirty days to conform to the procedure for the sale of real property. *See* Tex. Est. Code §§ 1158.105, 1158.551. The attorney should check with each court to determine what it requires, but the report should contain at least—

1. the date that the court approved the order for the sale;
2. a description of the personal property that conforms to the inventory and order of sale;
3. the time and place of the sale;
4. the name of the purchaser (but if the value of the property is small or there are multiple purchasers of small items, many courts will allow the report to omit this information); and

5. the amount received for each piece of the personal property sold.

See Tex. Est. Code §§ 1158.105, 1158.551. See form 8-23 in this chapter for a report.

§ 8.43:6 Approval of Sale

The sections of the Texas Estates Code regulating the confirmation of sales of real property apply to the sale of personal property. Tex. Est. Code § 1158.105(a).

Once the report of sale is filed, the court must wait five days before the approval of sale may be signed. *See* Tex. Est. Code § 1158.552–.553. Before signing, the court must review the report and determine that the sale was made for a fair price. The court also must determine if an increased bond should be filed. *See* Tex. Est. Code §§ 1158.552, 1158.556. If a bill of sale is required, the guardian should issue it without warranty. Tex. Est. Code § 1158.105(c). The cost for the bill of sale must be assessed against the purchaser. Tex. Est. Code § 1158.105(c). The action of the court in approving the sale constitutes a final judgment. *See* Tex. Est. Code § 1158.556. There is usually no need to execute separate documents conveying ownership as in real property sales; it is the approval of sale that vests the title in the purchaser. Tex. Est. Code § 1158.105(b). If the personal property is subject to the certificate-of-title laws, additional documents will need to be completed. See form 8-24 in this chapter for an approval of sale.

§ 8.43:7 Review of Guardian's Bond

A court should not approve any sale of property without a review to determine if an increased bond would be required to cover the proceeds from the sale. *See* Tex. Est. Code §§ 1158.552(3), 1158.553 (applicable to sale of personal property pursuant to Texas Estates Code sections 1158.101 and 1158.105). Because personal property is bonded at the creation of the guardianship, the attorney should check with the court to see if there is a need to increase the guardian's bond if the proceeds received are equal to or less than inventory values.

§ 8.44 Special Provisions for Livestock

The Texas Estates Code provides special provisions for quick disposition of livestock, allowing the court to dispense with the requirements for citation and notice based on the circumstances. The required application should—

1. be written and sworn;
2. describe the livestock;
3. state the reasons for the sale; and
4. provide that the sale will be conducted through a bonded livestock commission merchant or bonded livestock auction commission merchant.

Tex. Est. Code §§ 1158.151, 1158.152.

The court will issue an order authorizing the sale after the application has been reviewed and found to be acceptable. The order should authorize the guardian to deliver the livestock to the designated livestock commission merchant or bonded livestock auction commission merchant, who will conduct the sale and receive a commission not to exceed 5 percent of the sale price. Tex. Est. Code §§ 1158.153, 1158.155. A report of sale containing a verified copy of the merchant's account of sale

must be made promptly to the court. No confirmation order is required from the court for title to pass. Tex. Est. Code § 1158.154.

§ 8.45 Abandonment of Property

If the ward's estate has real or personal property that is worthless or burdensome and it would be more economical to abandon the property than to conduct a sale, the guardian may file an application under Texas Estates Code section 1151.102(b) to abandon worthless or burdensome property, and the court may issue an order authorizing abandonment of the property without notice or hearing. Tex. Est. Code § 1151.102(c)(6). If the application clearly shows that the property is worthless or burdensome, most courts will consider the application on submission and issue an order accordingly. See forms 8-29 and 8-30 in this chapter for an application and corresponding order.

[Sections 8.46 through 8.50 are reserved for expansion.]

VI. Annual Account and Report

§ 8.51 Annual Account Required—Guardian of the Estate

The guardian of the estate must file a sworn account not later than the sixtieth day after the expiration of twelve months from the date the guardian qualified, unless the court extends the time or waives the accounting requirement. Tex. Est. Code § 1163.001(a) (requirements of accountings), § 1163.006 (waiver of accountings). The guardian must also file an annual account each year thereafter until the guardianship is closed. Tex. Est. Code § 1163.002. Unless the annual account has been timely filed and approved or otherwise waived, the guardian's letters of guardianship cannot be renewed. Tex. Est. Code § 1106.003(a). A waiver of this requirement may be considered only if the estate contains negligible or fixed income. Tex. Est. Code § 1163.006. The court has a duty to review each guardianship at least annually, and if this is not done the judge can be held liable for any damages. Tex. Est. Code §§ 1201.001–.003. If the guardian fails to file any required reports, after a hearing and failure to show good cause, the guardian may be removed and the letters of guardianship revoked. Tex. Est. Code § 1163.151. The court may change the accounting period to coincide with the end of a calendar month or year, but it should not permit an annual account to cover more than twelve months. Tex. Est. Code § 1163.102(b).

§ 8.52 Annual Account Form

An annual account must contain—

1. detailed information covering all claims filed against the ward's estate during the accounting period;
2. a description of any property that has come to the guardian's knowledge and that has not been previously inventoried;
3. a description of any changes to the estate's property that have not been previously reported;
4. an account of all receipts and disbursements during the accounting period, with receipts of principal and income shown separately;
5. a complete, accurate, and detailed description of the property being administered, with the condition of the property, the use being made of the property, and the term and price of any rental property;

6. a list of the estate's cash balances and their locations; and
7. a detailed list of all personal property, including all bonds, notes, and other securities.

Tex. Est. Code § 1163.001.

The annual account will usually also contain a request for the guardian's compensation.

Some courts require a specific form or information not technically required by statute. For example, some courts allow statements to be attached and others require a listing of each receipt in the pleading. It is important to confirm the supervising court's preference about both form and substance before finalizing the account to avoid a delay in approval. See forms 8-31 and 8-33 in this chapter for forms for complex and simple annual accounts.

§ 8.53 Documentation Annexed to Annual Account

The guardian must attach to the annual account—

1. vouchers for all expenses claimed or, if vouchers are not available, other evidence satisfactory to the court;
2. an official letter from the bank for all money deposits showing the amounts in general or special deposits; and
3. proof of the existence and possession of all securities owned by the estate or shown by the account and other assets held by a depository subject to court order.

Tex. Est. Code § 1163.003.

The practitioner should check with the court to determine the procedure it requires for submission of documents relevant to the annual accounting.

§ 8.54 Guardian's Account Affidavit

The guardian must submit an affidavit with the annual account that states—

1. that the account contains a correct and complete statement of the matters to which the account relates;
2. that the bond premium has been paid;
3. that all tax returns have been filed;
4. that all taxes have been paid, showing the amount, date paid, and to whom they were paid;
5. if the taxes have not been paid or the returns have not been filed, the reasons for any failure to file tax returns or pay taxes; and
6. if the guardian is a private professional guardian, a guardianship program, or the Texas Health and Human Services Commission, whether the guardian or an individual certified under subchapter C, chapter 111, of the Texas Government Code, that is providing guardianship services to the ward and is swearing to the account on the guardian's behalf is or has been the subject of an investigation conducted by the guardianship certification board during the accounting period.

Tex. Est. Code § 1163.005.

§ 8.55 Court Action on Annual Account

The annual account must be filed with the county clerk and remain on file for ten days before it is presented to the court for review. Tex. Est. Code § 1163.051(a), (b). The court must review the account and may require additional information to be presented until it is satisfied that the account is correct. Tex. Est. Code § 1163.052. The account may not be approved unless the guardian proves possession of all cash and assets of the estate. Tex. Est. Code § 1163.051(c). If the estate is solvent, the court will then order the guardian to pay all outstanding claims. If the estate is insolvent, the court must order any outstanding claims to be paid in the order of their priority. Tex. Est. Code §§ 1163.053, 1163.054; *see also* Tex. Est. Code § 1157.103.

See forms 8-32 and 8-34 in this chapter for orders.

§ 8.56 Retention of Assets

A guardian can retain without court approval until the first anniversary of the date of receipt any assets received by the estate at its inception or added by gift, devise, inheritance, mutation, or increase without regard to diversification of investments and without liability for any depreciation or loss resulting from the retention. Tex. Est. Code § 1161.006(a).

On application the court may order the continued retention of the assets after one year if the retention is an element of the estate investment plan. Tex. Est. Code § 1161.006(c). See section 8.8 above.

§ 8.57 Annual Report Required—Guardian of the Person

Once each year for the duration of the guardianship, the guardian of the person must file a report advising the court of the physical, medical, and mental status of the ward. Tex. Est. Code § 1163.101. The report is to cover the twelve-month period after the guardian was qualified and each twelve-month period thereafter. Tex. Est. Code § 1163.102(a). The court can change the reporting period if it does not extend the period longer than twelve months. The report is due not later than the sixtieth day following the date the reporting period ends. Tex. Est. Code § 1163.102(b), (c). Many courts have a standard report of the person that they prefer a guardian to submit; the practitioner should determine the court's preferences before preparing the report.

§ 8.58 Annual Report Form

The annual report must be made under oath or with an unsworn declaration and must contain—

1. the guardian's current name, address, and phone number;
2. the ward's current name and date of birth, address, phone number, and age;
3. a complete description of the ward's residence and its type (for example, nursing, foster);
4. the length of time the ward has resided at the present residence and the reason for any change during the year;
5. the date the guardian last saw the ward and the number of times the guardian saw the ward during the year;
6. a statement of whether the guardian has possession of the ward's estate;
7. a statement regarding the ward's mental and physical health;
8. a description of the ward's medical care during the year, including the identity of the ward's physician, psychiatrist, psychologist, dentist, social or case worker, or other person providing treatment;

9. a description of any recreational, educational, social, or occupational activities of the ward;

10. the guardian's evaluations of the ward's living arrangements, the ward's feelings about the living arrangements, and the ward's unmet needs, if any;

11. a statement of whether the court should modify or change the guardian's powers;

12. a statement that the bond premium has been paid;

13. if the guardian is a private professional guardian, a guardianship program, or the Texas Health and Human Services Commission, whether the guardian or an individual certified under subchapter C, chapter 111, of the Texas Government Code, that is providing guardianship services to the ward and is swearing to the account on the guardian's behalf is or has been the subject of an investigation conducted by the guardianship certification board during the preceding year; and

14. any additional information the guardian desires to share with the court, including whether the guardian has filed for emergency detention of the ward under subchapter A, chapter 573, of the Texas Health and Safety Code and, if applicable, the number of times the guardian has filed and the date of the application.

Tex. Est. Code §§ 1163.101(c), 1163.1011.

If the ward has died, the date and place of death should be provided in lieu of the information about the ward otherwise required. Tex. Est. Code § 1163.103.

See form 8-35 in this chapter for an annual report to use if the court does not provide its own preferred form.

§ 8.59 Court Action on Annual Report

The court, if satisfied that the facts in the annual report are true, will approve the report after its review. Tex. Est. Code § 1163.104(a). The court may waive the costs and fees associated with the filing of the annual report. Tex. Est. Code § 1163.104(c). See form 8-36 in this chapter for an order to use if the court does not have its own preferred form.

§ 8.60 Penalty for Failure to File Account, Exhibit, or Report

If a guardian fails to file any account, exhibit, or report, the court or any person interested in the ward's estate may cause the guardian to appear and show cause why the account, exhibit, or report should not be filed. Tex. Est. Code § 1163.151(a). At the hearing the court may order the guardian to file the account, exhibit, or report and fine the guardian up to $1,000, revoke the guardian's letters, or both, unless the guardian can show good cause for the failure to file the account, exhibit, or report. Tex. Est. Code § 1163.151(b).

[Sections 8.61 through 8.70 are reserved for expansion.]

VII. Power to Make Certain Gifts and Charitable Contributions

§ 8.71 Authority

The guardian may seek the court's permission to make tax-motivated gifts, charitable contributions, and certain transfers from assets of the ward's estate to qualify the ward for government benefits. Tex. Est. Code §§ 1162.001, 1162.005, 1162.051–.053.

§ 8.72 Tax-Motivated Gifts— Application and Notification

The guardian of the estate or an interested party may apply to the court for authority to make a tax-motivated gift or transfer on behalf of the ward to qualify the ward for government benefits. Tex. Est. Code § 1162.001. Notification of the application must be given by posting and by certified mail. Tex. Est. Code § 1162.003. The persons to receive mailed notice include all devisees under the will, trust, or other beneficial instrument relating to the ward's estate; the ward's spouse; the ward's dependents; and any other person whom the court directs. Tex. Est. Code § 1162.003. See form 8-39 in this chapter for an application.

§ 8.73 Estate or Transfer Plan

The applicant must outline a proposed estate or other transfer plan, describe the benefits that will be derived from it, and show that it is consistent with the ward's intentions. Tex. Est. Code § 1162.002. However, if the ward's intentions cannot be ascertained, it will be presumed that the ward favors a reduction in tax liability and qualification for government benefits. Tex. Est. Code § 1162.002(b).

§ 8.74 Hearing and Order

The court may order the guardian of the estate to establish an estate plan that minimizes income, estate, inheritance, or other taxes if the guardian shows that the funds to be used are not required during the ward's lifetime for the support of the ward or the ward's family and that the ward will probably remain incapacitated throughout his lifetime. Tex. Est. Code § 1162.001. See form 8-40 in this chapter for an order.

The court may also order the guardian of the estate to establish a transfer plan that qualifies the ward for government benefits. Tex. Est. Code § 1162.001.

If the court deems it advisable, it may appoint a guardian ad litem for the ward or any other interested party. Tex. Est. Code § 1162.008.

The court may modify an approved transfer plan if the guardian applies to the court for such modification. Tex. Est. Code § 1162.002(c).

The court may authorize the guardian to make the tax-motivated gifts or transfers to qualify for government benefits on a periodic basis without further application or court order if the court finds it would be in the best interest of the ward and the ward's estate. Tex. Est. Code §§ 1162.001, 1162.004(a). The court may modify or set aside such an order later because of a change in the ward's financial condition. Tex. Est. Code § 1162.004(b).

§ 8.75 Donees

Gifts of principal or income of the ward's personal or real property may be made outright or in trust for the benefit of—

1. a charitable organization qualifying as such under the Internal Revenue Code in which the ward would reasonably have an interest;
2. the ward's spouse or descendant or another person related by blood or marriage;
3. a devisee under the ward's last will, trust, or other beneficial instrument; and
4. a person serving as a guardian of the ward if that person is the ward's spouse or descendant or another person related by blood or marriage or a devisee under the ward's last will, trust, or other beneficial instrument.

Tex. Est. Code § 1162.001.

§ 8.76 Charitable Contributions

A guardian who wants to make a charitable contribution must file a sworn application requesting an order from the court in which the guardianship is pending. Tex. Est. Code § 1162.051. An application to make a charitable contribution must be for a specific amount from the income from the ward's estate. Tex. Est. Code § 1162.051. These contributions may be made only to—

1. corporations, trusts, or community chests, funds, or foundations, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes; or
2. nonprofit federal, state, county, or municipal projects operated exclusively for the public health or welfare.

Tex. Est. Code § 1162.051.

The application must remain on file for at least ten days before the hearing. Tex. Est. Code § 1162.052(b). After a hearing, the court may authorize a charitable contribution if—

1. the proposed contribution will probably not exceed 20 percent of the ward's net income for the current calendar year;
2. the net income of the ward's estate for the current calendar year exceeds or probably will exceed $25,000;
3. the full amount of the contribution will probably be deductible from gross income in determining the net income for the ward under the applicable federal income tax laws;
4. the condition of the ward's estate justi-fies the contribution; and
5. the charitable contribution is of a reasonable amount and for a worthy cause.

Tex. Est. Code § 1162.053. See forms 8-41 and 8-42 in this chapter for an application and corresponding order.

§ 8.77 Strict Construction

Tax-motivated gifts, contributions, and transfers to qualify for government benefits must comply with all requirements of the Texas Estates Code. Any gift or transfer that is not authorized by the Code, with or without court approval, is invalid. *See In re Guardianship of Estate of Neal*, 406 S.W.2d 496, 503 (Tex. App.—Houston), *writ ref'd n.r.e.*, 407 S.W.2d 770 (Tex. 1966)

(per curiam) (decided before enactment of Texas Probate Code sections 865–866, now Estates Code chapter 1162). Posting is required on an application to make tax-motivated gifts or transfers for government benefits. Tex. Est. Code § 1162.001.

[Sections 8.78 through 8.80 are reserved for expansion.]

VIII. Investments

§ 8.81 Investments Generally

The guardian of the estate is not required to invest funds that are immediately needed for the education, support, and maintenance of the ward or others the ward supports. Tex. Est. Code § 1161.001(b). Excess funds must be invested unless the court orders otherwise. Tex. Est. Code § 1161.001.

The court may, on its own motion or on written request of an interested person, cite the guardian to appear and show cause why the estate's funds are not invested. Tex. Est. Code § 1161.007(a). After thirty-one days' notice, the court may conduct a final hearing to protect the estate. The court may appoint a guardian ad litem for the sole purpose of representing the ward's best interest. Tex. Est. Code § 1161.007(d).

§ 8.82 Standard for Management and Investments

The standard applicable to a guardian is that which a person of ordinary prudence, discretion, and intelligence would exercise in his own affairs, considering the probable income from, the probable increase in value of, and the safety of the capital. Tex. Est. Code § 1161.002(a). Other relevant factors include—

1. the anticipated costs of supporting the ward;
2. the ward's age, education, current income, ability to earn additional income, net worth, and liabilities;
3. the nature of the ward's estate; and
4. any other resources available to the ward.

Tex. Est. Code § 1161.002(a).

In determining whether the guardian has exercised the standard of investment required, the court must, absent fraud or gross negligence, take into consideration the investment of all assets rather than the prudence of only a single investment. Tex. Est. Code § 1161.002(b). Investments that are considered safe are—

1. bonds or other obligations of the United States;
2. tax-supported bonds of Texas;
3. except as limited by section 1161.004(b) and (c), tax-supported bonds of a county, district, political subdivision, or municipality in Texas;
4. shares or share accounts of a state savings and loan association or savings bank with its main office or a branch office in Texas if the payment of the shares or share accounts is insured by the Federal Deposit Insurance Corporation (FDIC);

5. shares or share accounts of a federal savings and loan association or savings bank with its main office or a branch office in Texas if the payment of the shares or share accounts is insured by the FDIC;

6. collateral bonds of companies incorporated under the laws of Texas, having a paid-in capital of $1 million or more, when the bonds are a direct obligation of the company that issues them and are specifically secured by first mortgage real estate notes or other securities pledged with a trustee;

7. interest-bearing time deposits that may be withdrawn on or before one year after demand in a bank that does business in Texas in which the payment of the time deposits is insured by the FDIC; and

8. an ABLE account established in accordance with the Texas Achieving a Better Life Experience (ABLE) Program under subchapter J, chapter 54, of the Texas Education Code.

Tex. Est. Code § 1161.003.

The court may modify or eliminate the guardian's investment duties on a showing by clear and convincing evidence that the modification is in the best interest of the ward. Tex. Est. Code § 1161.005.

§ 8.83 Investment in Real Estate

The guardian may invest in real estate if the guardian believes it is in the ward's best interests and if there is sufficient cash on hand to provide for the education, support, and maintenance of the ward and others the ward supports, if applicable, and for the maintenance, insurance, and taxes on the real estate in which the guardian wishes to invest. Tex. Est. Code § 1161.151(a). The court should render an order authorizing the investment. Tex. Est. Code § 1161.152.

§ 8.84 Liability of Guardian and Guardian's Surety for Failure to Invest

In addition to other remedies of law, if the guardian of the estate fails to invest or lend estate assets in the manner provided for by statute, the guardian and the guardian's surety are liable for the principal and the greater of the highest legal rate of interest on the principal during the period the guardian failed to invest or lend assets or the overall return that would have been made on the principal if invested as provided for by statute. Tex. Est. Code § 1161.008(a).

In addition, the guardian and guardian's surety are liable for attorney's fees, litigation expenses, and costs related to a proceeding brought to enforce chapter 1161. Tex. Est. Code § 1161.008(b).

§ 8.85 Loans

If the guardian has on hand funds belonging to the ward in an amount that provides a return that is more than is necessary for the education, support, and maintenance of the ward and, if applicable, others the ward supports, the guardian may lend funds for a reasonable rate of interest. Tex. Est. Code § 1161.202.

The rate will be considered reasonable if it is equal to at least 120 percent of the applicable short-term, midterm, or long-term interest rate under section 7520 of the Internal Revenue Code for the month during which the loan is made. Tex. Est. Code § 1161.202(b).

A guardian of the estate who complies with this section with court approval will not be personally liable if the borrower is unable to pay and the security fails. If the guardian committed fraud or negligence in making or managing the loan, including

collecting on the loan, the guardian and the guardian's surety are liable for the loss sustained by the guardianship estate as a result of the fraud or negligence. Tex. Est. Code § 1161.205(a).

The guardian cannot make a loan until the guardian submits to an attorney all bonds, notes, mortgages, abstracts, and other documents relating to the loan and receives a written opinion that title on the relevant notes, bonds, or real estate is clear. Tex. Est. Code § 1161.203(c).

The guardian of the estate may obtain a mortgagee's title insurance policy on any real estate loan in lieu of an abstract and an attorney's opinion. Tex. Est. Code § 1161.203(d).

Within thirty days after a loan is made without a court order, the guardian of the estate must file a report accompanied by an affidavit stating the full facts related to the loan. Tex. Est. Code § 1161.204.

Subchapter E, chapter 1161, of the Texas Estates Code does not apply to investments made in debentures, bonds, or other publicly traded debt security. *See* Tex. Est. Code ch. 1161, subch. E.

[Sections 8.86 through 8.90 are reserved for expansion.]

IX. Duty to Inform

§ 8.91 Guardian of Person's Duty to Inform Ward's Relatives about Ward's Health and Residence

When filing an application for guardianship, the applicant must mail a copy of the application and notice containing, among other things, a statement to a relative of the ward described in Tex. Est. Code § 1051.104(a)(1)–(2) notifying the relative that, if a guardianship is created for the proposed ward, the relative must elect in writing to receive notice about the ward under section 1151.056. Tex. Est. Code § 1051.104. If the relative of the ward described in section 1051.104(a)(1)–(2) opts in, the guardian of the adult ward shall as soon as practicable inform the relative if (1) the ward dies, (2) the ward is admitted to a medical facility of acute care for a period of three days or more, (3) the ward's residence has changed, or (4) the ward is staying at a location other than the ward's residence for longer than one calendar week. Tex. Est. Code § 1151.056(b). If the ward dies, the guardian shall inform the relative of any funeral arrangements and the location of the ward's final resting place. Tex. Est. Code § 1151.056(c).

"Relatives" include the spouse, parents, siblings, and children against whom a protective order has not been issued to protect the ward; who have not been found by a court or other state agency to have abused, neglected, or exploited the ward; and who have elected in writing to receive notice about the ward. Tex. Est. Code § 1151.056(a); *see also* Tex. Est. Code § 1101.001(b)(13)(A)–(D). A relative entitled to notice pursuant to this section may choose not to receive the notice by providing to the guardian a written request to that effect. Tex. Est. Code § 1151.056(d). The guardian must file any written request received with the court. Tex. Est. Code § 1151.056(d).

The guardian may file a motion with the court showing good cause to relieve the guardian of the duty to provide notice about a ward to a relative. Tex. Est. Code § 1151.056(e). The relative in question must be provided a copy of the motion, unless the guardian is unable to locate the relative after making reasonable efforts to discover and locate the relative. Tex. Est. Code § 1151.056(f). The relative in question may file evidence in response to the motion. The Texas Estates Code is silent on whether a hearing is required, but the court must consider any evidence filed by the relative before relieving the guardian of

the duty to provide notice to that person. The court shall relieve the guardian of the duty to notify the relative in question if the court finds that—

1. the motion includes a written request from a relative electing not to receive the notice;
2. the guardian was unable to locate the relative after making reasonable efforts to discover and locate the relative, or the guardian was able to locate the relative but unable to establish communication with the relative after making reasonable efforts to estalbish communication; or
3. notice is not in the best interest of the ward.

Tex. Est. Code § 1151.056(g).

§ 8.92 Guardian of Person's Duty to Inform Court

The guardian of the person must immediately provide written notice to the court that granted the guardianship of the filing of an application for emergency detention of the ward. Tex. Est. Code § 1151.051(d); see also Texas Health and Safety Code chapter 573, subchapters A and C, and chapter 16 in this manual.

The guardian of the person may place the ward in a more restrictive facility only if the guardian provides notice of the proposed placement to the court, the ward, and any other person who has requested notice and after (1) the court orders the placement at a hearing scheduled by the court on its own motion, if the ward or another person objects to the proposed placement before the eighth business day after receipt of notice, or (2) the seventh business day after the court's receipt of notice if it does not schedule a hearing on the proposed placement. Tex. Est. Code § 1151.051(e).

Form 8-1

The expense sheet included as Exhibit A should be customized as appropriate. Some courts prefer a detailed approach, and others will accept more general categories of expenses.

[Caption. See § 3 of the Introduction in this manual.]

Application to Establish Monthly Allowance

[**Name of applicant**], Applicant, guardian of the estate of [**name of ward**], Ward, an incapacitated person, files this Application to Establish Monthly Allowance under section 1156.001 of the Texas Estates Code and in support shows:

1. Ward is [**age**] years old and resides with [**name of caregiver**], [his/her] [**relationship**].

2. Applicant's present estimate of Ward's monthly and annual expenses, for which Applicant requests permission to make disbursements, is set forth in Exhibit A, attached. The expenses listed on Exhibit A are based on the total estimated costs to support Ward.

3. Applicant believes that a monthly allowance, is both reasonable and necessary for Ward's protection and benefit. An amount of $[**amount**] per month would be adequate for the education and maintenance of Ward and an additional amount of $[**amount**] per month would be adequate for the maintenance of Ward's estate.

4. There will be adequate funds available monthly to pay these expenses because Ward currently receives income of approximately $[**amount**] from [**source of income**]. There are currently on deposit the following approximate amounts belonging to Ward's estate: [**describe deposits, including amount**].

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Applicant requests this Court to enter an order authorizing a monthly allowance of $[**amount**] for education and maintenance expenses of Ward and $[**amount**] for maintenance of Ward's estate.

Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Exhibit A

Estimated Expenses

The following lists are provided as examples of categories. It is recommended that the requests be grouped in categories of "Ward's Education and Maintenance" and "Ward's Estate" as required by Tex. Est. Code § 1156.001 and totaled to assist the court in its review.

Description	Monthly Amount	Yearly Amount
1. Water and sewer		
2. Electricity		
3. Gas (e.g., Entex)		
4. Food and groceries		
5. Gasoline		
6. Cable (e.g., Comcast)		
7. Insurance: car		
8. Insurance: house		
9. Insurance: health		
10. Caregivers		
11. Charitable donations		
12. Auto maintenance, accrual		

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Description	Monthly Amount	Yearly Amount
13. Home maintenance		
14. Lawn service		
15. Periodicals		
16. Prescription deductibles		
17. Toiletries and personal hygiene		
18. Clothing allowance		
19. Telephone		
20. Medical deductibles		
21. Debt service, estimate		
22. Miscellaneous expenses		
23. Personal allowance and spending		
24. Income tax accrual		
25. Tax advice and filings		
Total Expenses	$_____	$_____

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Form 8-2

[Caption. See § 3 of the Introduction in this manual.]

Order Establishing Monthly Allowance

On [**date**] the Court considered the Application to Establish Monthly Allowance. The Court finds that such expenses are reasonable and necessary and in the best interests of Ward, [**name of ward**], and [his/her] estate, that evidence has been presented in support of the application, and that the application should be granted.

IT IS THEREFORE ORDERED that the proposed monthly allowance described in Exhibit A of the Application is approved.

IT IS FURTHER ORDERED that Applicant, [**name of applicant**], is authorized to expend $[**amount**] per month from Ward's estate for the education and maintenance of Ward and an additional $[**amount**] for the maintenance of Ward's estate.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 8-3

[Caption. See § 3 of the Introduction in this manual.]

Application to Expend Funds for Adult Ward's [Spouse/ Dependent[s]/Spouse and Dependent[s]]

[**Name of applicant**], Applicant, guardian of the estate of [**name of ward**], Ward, an incapacitated person, files this Application to Expend Funds for Ward's [Spouse/Dependent[s]/ Spouse and Dependent[s]] under Texas Estates Code section 1156.052 and in support shows:

1. Ward is [**age**] years old and resides with [**name of caregiver or spouse**], [his/her] [**relationship**].

2. Ward has [a spouse/dependent[s]/a spouse and dependent[s]] consisting of: [**specify name[s] and relationship[s]**]. Ward's [spouse/dependent[s]/spouse and dependent[s]] [is/are] in need of funds to provide for [his/her/their] education and maintenance. Applicant believes that $[**amount**] annually would be adequate to meet their needs and requests authority to pay that amount directly to [**name of recipient**] to be used for the education and maintenance of Ward's [spouse/dependent[s]/spouse and dependent[s]] according to Texas Estates Code section 1156.052.

3. There are adequate funds available to make this disbursement because Applicant currently receives $[**amount**] per month from [**source of income**] for the benefit of Ward and currently has on deposit the following amounts belonging to Ward's estate: [**describe deposits, including amount**].

4. The foregoing expenditure of funds for the education and maintenance of Ward's [spouse/dependent[s]] is reasonable and necessary, and Ward is obligated by law to provide such support.

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Applicant requests the Court to enter an order authorizing disbursement of the sum of $[**amount**] annually for payment of the support expenses of Ward's [spouse/dependent[s]/ spouse and dependent[s]], including [**include as applicable:** day care, clothing, medical care, food, shelter, education, and transportation]. The amount will be paid in [**time frame for payment**] installments.

Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 8-4

[Caption. See § 3 of the Introduction in this manual.]

Order Authorizing Expenditure of Funds for Adult Ward's [Spouse/Dependent[s]/Spouse and Dependent[s]]

On [**date**], the Court considered the Application to Expend Funds for Adult Ward's [Spouse/Dependent[s]/Spouse and Dependent[s]]. The Court finds that such disbursement of funds is reasonable and necessary and in the best interests of [**name of ward**], Ward, and Ward's estate and that the application should be granted.

IT IS THEREFORE ORDERED that [**name of applicant**], guardian of the estate of [**name of ward**], an incapacitated person, is authorized to disburse the annual amount of $[**amount**] to be paid in [**time frame for payment of installments**] installments to [**name of recipient**] for the education and maintenance expenses of [**name of ward**]'s [spouse/dependent[s]/spouse and dependent[s]], for [**include as applicable:** day care, clothing, medical care, food, shelter, education, and transportation], until further order of this Court.

SIGNED on _____.

_____
JUDGE PRESIDING

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APPROVED AS TO FORM:

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 8-5

Provide as much information as possible to show the court that the ward has a genuine need for additional economic support and that the ward's parents are unable to provide that support without undue hardship because the court must make a finding based on clear and convincing evidence. See section 8.3:2 in this chapter. Attach to Exhibit B information documenting the parents' hardship conditions and any other supporting evidence to establish need. Adequate documentation may permit the court to authorize reasonable requests without formal court hearings. Note that, to the extent possible, the guardian should pay any routine expenses and limit payments to caregivers or custodial parents to those amounts that are difficult for the guardian for the guardian to pay directly.

[Caption. See § 3 of the Introduction in this manual.]

Application to Expend Funds for Care and Support of Minor Ward

[**Name of applicant**], Applicant, guardian of the person of [**name of ward**], Ward, an incapacitated person, files this Application to Expend Funds for Care and Support of Minor Ward under Texas Estates Code section 1156.051(b) and shows:

1. Ward is a minor. Ward is [**age**] years old and resides with [**name of caregiver**], [his/her] [**relationship**].

> Describe circumstances that prevent the ward's parents from providing for his support, education, or maintenance without unreasonable hardship. The following paragraphs are examples.

2. Ward is in immediate need of [**specify need**]. Ward's physical condition is [**specify condition**]. Ward has special needs for [**specify other needs**], and expenses [must be/were] incurred by Ward's [**relationship**], [**name of caregiver**], for Ward's care and maintenance that far exceed the amount that [**name[s] of parent[s]**] could adequately provide. [**Specify other facts, e.g.:** Ward's father is unable to work or unable to obtain employment that will provide for Ward's needs.]

Applicant believes that $[**amount**] annually would be adequate for the immediate care and maintenance of Ward and requests authority to pay that amount in monthly installments

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directly to [**name of caregiver**] to be used for the care and maintenance of Ward according to Texas Estates Code section 1156.051(b). See the attached Exhibits A and B.

3. There are adequate funds available for this disbursement because Applicant currently receives $[**amount**] per month from [**source of income**] for the benefit of Ward and currently has on deposit the following amounts belonging to Ward's estate: [**describe deposits, including amount**].

4. The foregoing expenditure of funds for the care and maintenance of Ward is reasonable and necessary and in the best interests of Ward and Ward's estate and should be authorized by this Court.

Applicant requests that the Court enter an order authorizing Applicant to disburse the sum of $[**amount**] monthly for payment of expenses of Ward, including [**include as applicable:** day care, clothing, medical care, food, shelter, education, and transportation] and requests all further relief to which Applicant may be entitled.

Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Include the following as applicable. While not mandatory, the guardian's verification of the application may avoid a hearing and expedite approval of the application.

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VERIFICATION

STATE OF TEXAS)

COUNTY OF [**county**])

BEFORE ME, the undersigned notary public, on this day personally appeared [**name**], who being by me duly sworn on [his/her] oath deposed and said that [he/she] has read the above and foregoing [**title of document**] [and exhibits] and that the matters contained therein are within [his/her] personal knowledge and are true and correct.

_____

SWORN TO AND SUBSCRIBED BEFORE ME on _____.

_____
Notary Public, State of Texas

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Exhibit A

[**Name of parent**] appeared in person before me today and stated under oath:

"My name is [**name of parent**]. I am competent to make this affidavit. The facts stated within this affidavit are within my personal knowledge and are true and correct.

"I am the [**relationship**] of [**name of ward**], an incapacitated person.

"Because of Ward's [physical/medical/[**specify other conditions**]] condition[s], I am unable to provide adequately for [his/her] needs from my own finances.

Include if applicable.

"Ward has certain unmet needs that can and should be addressed at an early stage to prevent long-term harm to Ward.

Continue with the following.

"I am aware of my obligation to provide for the support of Ward and would do so were it not for the unreasonable hardship that these expenditures [have placed/will place] on me and Ward's family.

"I have provided [**name of applicant**], guardian of the person of Ward, copies of my W-2 forms and my income tax return for the last [**specify**] years, which clearly indicate the financial condition of our family.

"I have also provided Applicant with a list of services Ward needs, and when necessary I have obtained estimates of the costs to provide these services.

"The application to expend funds and accompanying exhibits are true, correct, and complete statements of the matters to which they relate to the fullest extent of my knowledge at this time."

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_____
Affiant

SIGNED under oath before me on _____.

_____
Notary Public, State of Texas

© STATE BAR OF TEXAS

Exhibit B

Attached hereto and made a part of Applicant's Application to Expend Funds for Care and Support of Minor Ward under section 1156.051(b) of the Texas Estates Code [is/are]: [**specify supporting documentation**].

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Form 8-6

[Caption. See § 3 of the Introduction in this manual.]

Order Authorizing Expenditure of Funds for Care and Support of Minor Ward

On [**date**], the Court considered the application of [**name of applicant**], guardian of the person of [**name of ward**], Ward, an incapacitated person, for authority to expend funds from the estate of Ward for [his/her] care and support. The Court finds by clear and convincing evidence that the requested disbursement of funds is reasonable and necessary and in the best interests of Ward and Ward's estate, and that the application should be granted.

IT IS THEREFORE ORDERED that [**name of guardian**], guardian of the estate of [**name of ward**], an incapacitated person, is authorized to disburse the amount of $[**amount**], which can be paid in installments as determined by [**name of guardian**], to [**name of recipient**] for the immediate care and maintenance of [**name of ward**], including day care, clothing, medical care, food, shelter, education, and transportation.

IT IS FURTHER ORDERED that [**name of recipient**] should provide the guardian of the estate with receipts and proof of all expenditures indicating that they were made as required.

SIGNED on _____.

_____
JUDGE PRESIDING

© STATE BAR OF TEXAS

APPROVED AS TO FORM:

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 8-7

[Caption. See § 3 of the Introduction in this manual.]

Application for Authority to Expend Funds

[**Name of applicant**], Applicant, guardian of the [person/estate/person and estate] of [**name of ward**], Ward, an incapacitated person, files this Application for Authority to Expend Funds and shows the Court the following:

1. Applicant was appointed guardian of the [person/estate/person and estate] by order of this Court dated [**date**] and qualified as the guardian of the [person/estate/person and estate] of Ward on [**date**], by the filing of [his/her] bond and oath.

2. It is necessary to incur and pay expenses from Ward's estate for [**explain the purpose of expenditure**].

3. Applicant believes that the expenditures identified above are in the best interests of Ward and [his/her] estate, and it is necessary and proper that the estate funds be expended.

4. Applicant requests authority to expend funds from Ward's estate to pay these necessary expenses.

[**Name of applicant**], guardian of the [person/estate/person and estate] of [**name of ward**], an incapacitated person, requests that the Court enter an order authorizing Applicant to expend funds for the identified expenditures as listed and that the Court grant all further relief to which Applicant may be entitled.

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Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

STATE OF TEXAS)

COUNTY OF)

The undersigned states under oath: "I am the applicant in the foregoing application. I have personal knowledge of the facts stated in it and the accompanying exhibits, and they are true and correct."

_____

Affiant

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

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Form 8-8

[Caption. See § 3 of the Introduction in this manual.]

Order Authorizing Expenditure of Funds

On this day, the Court considered the Application for Authority to Expend Funds of [**name of applicant**], guardian of the [person/estate/person and estate] of [**name of ward**], an incapacitated person. The Court, after considering the application, finds that the expenditures are in the best interest of [**name of ward**]'s estate and [**name of applicant**] should be authorized to expend the funds described in the application.

IT IS THEREFORE ORDERED that [**name of applicant**], guardian of the [person/estate/person and estate] of [**name of ward**], an incapacitated person, is authorized to expend the amount of $[**amount**] from [**name of ward**]'s estate for the purposes described in the application.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 8-9

[Caption. See § 3 of the Introduction in this manual.]

Application for Reimbursement of Expenditures

[**Name of applicant**], Applicant, guardian of the [person/estate/person and estate] of [**name of ward**], Ward, an incapacitated person, files this Application for Reimbursement of Expenditures for the education and maintenance of Ward and expenditures made on behalf of Ward for the care and protection of Ward's estate, and in support shows the following:

1. [**Name of applicant**] was appointed as guardian of Ward's [person/estate/person and estate] and properly qualified on [**date**]. Applicant's present bond is $[**amount**], and the last approved annual account covered the period from [**date**] to [**date**].

2. During the operation of Ward's estate for the period from [**date**] to [**date**], [Applicant/[**name[s]**]/Applicant and [**name[s]**]] [was/were] required to pay for certain expenses necessary to maintain, protect, and provide for Ward and Ward's estate. [**Include details and information concerning the ward's needs and justification for the expenditures.**] [**Include if applicable:** At the time these expenditures were made, Ward's estate was inadequate to cover them.] Applicant identifies these expenses as follows: [**describe expenses, including amount, date incurred, and who paid, and attach references to invoices, statements, etc. as exhibits**].

3. Because of the emergency nature of these expenditures [,/and] the immediate needs of Ward, [**include if applicable:** and the inadequacy of Ward's estate,] Applicant was not able to pay for these expenditures from Ward's estate when payment was needed. Applicant's failure to seek prior approval was not due to Applicant's negligence or failure to foresee Ward's needs but rather the expenses occurred at a time that it was not convenient or possible to obtain prior court approval. These expenses were advanced in good faith by [Applicant/[and] [**name[s]**]].

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4. These were reasonable and necessary expenses incurred for the benefit of Ward and Ward's estate. Applicant requests that this Court approve the reimbursement of the expenses as there are now adequate funds in Ward's estate with which to make reimbursement.

Applicant requests that this Court review the application and information furnished, approve the expenditures and authorize their reimbursement to [Applicant/[**name[s]**]/ Applicant and [**name[s]**]] from funds of Ward's estate, and provide all further relief to which Applicant may be entitled.

Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach exhibit(s).

STATE OF TEXAS)

COUNTY OF)

The undersigned states under oath: "I am the applicant in the foregoing application. I have personal knowledge of the facts stated in it and the accompanying exhibits, and they are true and correct."

_____

Affiant

© STATE BAR OF TEXAS

SIGNED under oath before me on _____.

_____
Notary Public, State of Texas

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Form 8-10

[Caption. See § 3 of the Introduction in this manual.]

Order Authorizing Reimbursement

On [**date**], the Court considered the Application for Reimbursement of Expenditures of [**name of applicant**], guardian of the estate of [**name of ward**], Ward, an incapacitated person, for expenditures made on behalf of Ward and Ward's estate. After reviewing the application, together with the supporting information and records, the Court finds that the expenditures were reasonable and proper, and that the application should be granted.

Select as applicable.

IT IS ORDERED by the Court that the expenditures made by [**name of applicant**], guardian of the estate, and specifically identified in the application in the amount of $[**amount**] should be approved.

And/Or

IT IS ORDERED that the expenditures made by [**name**] on behalf of [**name of ward**] and [**name of ward**]'s estate as specifically identified in the application in the amount of $[**amount**] should be approved.

Repeat as necessary for each person who made expenditures.

Continue with the following.

IT IS FURTHER ORDERED that all of the above expenditures in the total amount of $[**amount**] should be paid to [[**name of applicant**]/the person[s] who [is/are] entitled to receive such reimbursement/[**name of applicant**] and the person[s] who [is/are] entitled to receive such reimbursement] by the guardian of the estate from funds of [**name of ward**]'s estate.

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SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 8-11

[Caption. See § 3 of the Introduction in this manual.]

Application for Payment of Attorney's Fees

[**Date of fees requested, e.g.,** May to December 2021]

[**Name of applicant**], Applicant, guardian of the estate of [**name of ward**], Ward, an incapacitated person, files this Application for Payment of Attorney's Fees and Expenses and in support shows:

1. [**Name of attorney**] is a duly licensed and practicing attorney with offices in [**city, county**] County, Texas, who has rendered necessary legal services and advanced necessary expenses on behalf of [**name of applicant**], as guardian of the estate of [**name of ward**], an incapacitated person, for the period of time of [**date**] to [**date**], as described in the statement attached as Exhibit A and the attorney's fee affidavit attached as Exhibit B.

2. By reason of the performance of these legal services and the advancement of expenses, Ward and Ward's estate have become indebted to [**name of attorney**] in the amount of $[**amount**], which is reasonable under the circumstances.

Some courts require a summary of fees requested and paid to date. Include the following if applicable.

3. Since the appointment of [**name of applicant**], as guardian of the estate of [**name of ward**], an incapacitated person, [**name of applicant**] has requested the approval of attorney's fees and expenses in the amount of $[**amount**]. The Court has approved fees and expenses in the total amount of $[**amount**].

Continue with the following.

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4. Applicant has reviewed the fees and expenses indicated above and requests that this Court approve their payment.

Applicant requests that this Court review the application and the information furnished, approve the payment of the fees and expenses, enter an order authorizing Applicant to pay those fees and expenses, and grant all further relief to which Applicant may be entitled.

Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Approved:

By: _____

[**Name of applicant**], as guardian of the estate of [**name of ward**], an incapacitated person.

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Exhibit A

Attach comprehensive invoice or otherwise provide the following information.

Date of Service	Description of Service	Name	Time	Rate	Amount
	Total				

Statement of Expenses

Description of Expense	Amount
Total	

Recap of Fees and Expenses

Name	Time	Rate	Amount
Attorney			
Paralegal			
Total Services			
Total Expenses			
Total Services and Expenses			

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Exhibit B

Attorney's Fee Affidavit

STATE OF TEXAS)

COUNTY OF)

[**Name of attorney**] appeared in person before me today and stated under oath:

"My name is [**name of attorney**]. I am competent to make this affidavit. The facts stated within this affidavit are within my personal knowledge and are true and correct.

"I am a duly licensed and practicing attorney with the firm of [**name of law firm**] with offices in [**city, county**] County, Texas. I was admitted to the State Bar of Texas in [**date**] and have [**number**] years of experience.

"I performed the legal services that are described in detail in the attachment to the Application for Payment of Attorney's Fees. Those services were properly and timely performed on behalf of [**name of applicant**], as guardian of the estate of [**name of ward**], an incapacitated person.

"All of the legal fees and services described in the attached statement were rendered on behalf of [**name of applicant**], as guardian of the estate of [**name of ward**], an incapacitated person, and were solely for the purpose of preserving and protecting the assets of Ward's estate and for the welfare and protection of Ward's person.

"Only fees and expenses covering the period of [**date**] through [**date**] for the total of $[**amount**] are submitted.

"All just and legal offsets, payments, and credits known to me to have been allowed are reflected in the attached statement of fees.

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"I have made and presented this application and affidavit to the court with the approval of the guardian of the estate as evidenced by the guardian's signature affixed to the Application for the Payment of Attorney's Fees."

_____
Affiant

SIGNED under oath before me on _____.

_____
Notary Public, State of Texas

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Form 8-12

[Caption. See § 3 of the Introduction in this manual.]

Attorney's Fee Order

On [**date**] the Court considered the Application for Payment of Attorney's Fees. The Court finds that attorney's fees and expenses in the amount of $[**amount**] are reasonable, necessary, and required for the protection and welfare of [**name of ward**] and [his/her] estate and should be paid and that the application should be granted.

IT IS THEREFORE ORDERED that the guardian of the estate, [**name of applicant**], pay to [**name of attorney**] those fees and expenses in the amount of $[**amount**] out of funds belonging to this estate.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 8-13

[Caption. See § 3 of the Introduction in this manual.]

Application to Ratify Expenditures

[**Name of applicant**], Applicant, guardian of the estate of [**name of ward**], Ward, an incapacitated person, files this Application to Ratify Expenditures made out of the corpus of Ward's estate without prior court approval and, in support, shows the following:

1. [**Name of applicant**] was appointed as the guardian of Ward's estate and properly qualified on [**date**]. Applicant's present bond is $[**amount**], and the last approved annual account covered the period from [**date**] to [**date**].

2. During the operation of Ward's estate for the period from [**date**] to [**date**], Applicant was required to incur expenses necessary to maintain, protect, and provide for Ward and Ward's estate. These expenses are identified as follows: [**describe expenses, including amount and date incurred**].

3. Because of the emergency nature of the above expenditures and the immediate needs of Ward, Applicant was not able to seek prior court authorization. Applicant's failure to seek prior approval was not due to Applicant's negligence or failure to foresee Ward's needs. Such expenses were made a time that it was not convenient or possible to obtain prior court approval and were made in good faith by Applicant.

4. These expenditures were made for the care and maintenance of Ward, who received the benefits of them.

Applicant requests that this Court review the application and information furnished, approve the expenditures and ratify their expenditure by Applicant, and grant all further relief to which Applicant may be entitled.

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Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach exhibit(s) if expenditures were made to a nursing home.

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Form 8-14

[Caption. See § 3 of the Introduction in this manual.]

Order Ratifying Corpus Disbursements

On [**date**], the Court considered the application of [**name of applicant**], Applicant, guardian of the estate of [**name of ward**], Ward, an incapacitated person, for ratification of expenditures made out of the corpus of Ward's estate without prior court approval. After review of the application, together with the supporting information and records, the Court finds by clear and convincing evidence that the expenditures were reasonable and proper, that these expenditures were made for the benefit of Ward and in furtherance of Ward's education and maintenance; that the expenditures were made by Applicant in good faith; that Ward received the benefit of the expenditures; and that the Application to Ratify Expenditures should in all respects be granted.

IT IS ORDERED that the expenditures made by [**name of applicant**], guardian of the estate, and specifically identified in the Application to Ratify Expenditures for $[**amount**] are ratified and approved.

SIGNED on _____.

_____
JUDGE PRESIDING

© STATE BAR OF TEXAS

APPROVED AS TO FORM:

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 8-15

If compensation calculated as shown seems unreasonably low, the guardian may request a higher fee. Section 1155.006 of the Estates Code provides specific procedures for obtaining additional compensation. When requesting additional compensation, include additional paragraphs indicating why the statutory fee is too low. An application requesting a larger fee generally will require a hearing before the court. Note that receipts not included in gross income should generally not be included in the total income of the estate.

[Caption. See § 3 of the Introduction in this manual.]

Application for Compensation of Guardian

[**Name of applicant**], Applicant, guardian of the [person/estate/person and estate] of [**name of ward**], Ward, an incapacitated person, files this Application for Compensation of Guardian under section[s] [1155.002/1155.003/1155.002 and 1155.003] of the Texas Estates Code and shows in support:

1. Applicant qualified as guardian on [**date**].

2. Applicant has filed [his/her] annual account, which covers the period from [**date**] to [**date**], with this Court, and this Court approved the annual account on [**date**].

3. Applicant has adequately performed the duties as guardian of the [person/estate/person and estate] of Ward by [taking proper care of Ward's person/[and] managing Ward's estate] and is entitled to receive compensation in the form of a commission from the assets being administered according to section[s] [1155.002/1155.003/1155.002 and 1155.003] of the Texas Estates Code.

4. Applicant requests that the Court award a fee of $[**amount**], which has been calculated under section[s] [1155.002/1155.003/1155.002 and 1155.003] of the Texas Estates Code in the following manner:

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A. Total income of the estate $[**amount**]

Include as applicable.

Less: Department of Veterans Affairs income <$[**amount**]>

Sales of estate assets $[**amount**]

Less: Social Security income <$[**amount**]>

Return on principal of investments $[**amount**]

Income subject to commission $[**amount**]

Commission on Income (5 percent of $[**amount**]): $[**amount**]

Use B. only if this is guardian of person and estate or guardian of the estate.

B. Total expenses of the estate $[**amount**]

Less: Tax-motivated gifts <$[**amount**]>

Investments $[**amount**]

Money loaned $[**amount**]

Expenses subject to commission $[**amount**]

Commission on Expenses (5 percent of $[**amount**]): $[**amount**]

$[**amount of commission on income**] +

$[**amount of commission on expenses**]

Total Commission: $[**amount**]

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Continue with the following.

5. Ward's estate has adequate funds from which Applicant may be paid the statutory commission requested as evidenced by the approved annual account on file in this matter.

Applicant requests this Court authorize the expenditure of funds from Ward's estate in the amount of $[**amount**] as compensation for the services rendered under section[s] [1155.002/1155.003/1155.002 and 1155.003] of the Texas Estates Code and for all other relief to which Applicant may be entitled.

Respectfully submitted,

_____

[**Name**]
Applicant

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 8-16

[Caption. See § 3 of the Introduction in this manual.]

Order Authorizing Guardian's Compensation

On [**date**] the Court considered the application for compensation of [**name of applicant**], Applicant, who qualified on [**date**] to serve as guardian of the [person/estate/person and estate] of [**name of ward**], Ward, an incapacitated person. The Court finds that Applicant's compensation requested for services rendered in the amount of $[**amount**] is reasonable, that Applicant has taken care of and assisted Ward, that Applicant has managed Ward's estate in compliance with the Texas Estates Code requirements, that this estate has assets from which the payment of these fees and expenses may be made, that the above compensation should be authorized for payment, and that this request should be granted.

IT IS THEREFORE ORDERED that [**name of applicant**], the guardian of [**name of ward**]'s estate, pay the above compensation in the amount of $[**amount**] to [**name of applicant**], from funds of [**name of ward**]'s estate.

SIGNED on _____.

_____
JUDGE PRESIDING

© STATE BAR OF TEXAS

APPROVED AS TO FORM:

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 8-17

The specific content of this application is dependent on the types of goods or services being requested. The following application is an example and should be modified as needed to conform to the particular facts of a case.

[Caption. See § 3 of the Introduction in this manual.]

Application to Contract for [Goods/Services]

[**Name of applicant**], Applicant, guardian of the estate of [**name of ward**], Ward, an incapacitated person, files this Application to Contract for [Goods/Services], which are needed and will benefit Ward, and in support shows:

1. Ward's [physical/mental/medical] condition is such that Ward would benefit from the [services of [**name of provider**] for [**specify**]/purchase of [**specify goods contracted for**] for [**specify**]]. The person[s] identified in the attached [agreement/invoice] [is/are] willing to provide these [goods/services] and to enter into the contract attached as Exhibit [**exhibit number/letter**].

2. The [inventory/annual account] on file shows that available funds are adequate to provide for these [goods/services]. Applicant believes that the costs for these [goods/services] in the amount of $[**amount**] [per month] are reasonable.

Applicant asks for authority to execute the attached agreement on behalf of Ward's estate and to expend the funds for these [goods/services] in the amount identified therein for the period from [**date**] to [**date**] and for all other relief to which Applicant is entitled.

Respectfully submitted,

_____

[**Name**]
Applicant

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_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach exhibit(s).

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Form 8-18

[Caption. See § 3 of the Introduction in this manual.]

Order Approving Contract for [Goods/Services]

On [**date**], the Court considered the application of [**name of applicant**], guardian of the estate of [**name of ward**], Ward, an incapacitated person, to contract for [goods/services] to be provided by [**name**] for the benefit of Ward. The Court finds that the guardian's request is reasonable, necessary, and beneficial for Ward, that available funds in the estate are adequate to provide for such payments, and that it is in the best interests of Ward and Ward's estate to receive these services.

IT IS ORDERED that [**name of applicant**], guardian of the estate of [**name of ward**], an incapacitated person, is authorized to enter into the contract attached to the application on file herein, and that [**name of applicant**] is authorized to pay the amount of $[**amount**] [per month] for the period identified in the [agreement/invoice] from funds of [**name of ward**]'s estate.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 8-19

[Caption. See § 3 of the Introduction in this manual.]

Application to Employ Attorney

[**Name of applicant**], Applicant, guardian of the estate of [**name of ward**], Ward, an incapacitated person, seeks authority under sections 1151.104 and 1151.105 of the Texas Estates Code to retain [**name of law firm**] as attorneys for the purpose of [instituting suit to recover [**specify**] on behalf of Ward's estate/defending Ward and [his/her] estate from a lawsuit initiated against Ward]. In addition, authority is requested to enter into a contingent fee agreement and to institute a lawsuit if necessary to protect Ward's interests, and in support Applicant shows:

1. [**Name of applicant**] was appointed guardian of the estate of [**name of ward**], an incapacitated person, and qualified as guardian on [**date**].

Select one of the following.

2. Applicant shows that Ward possesses a claim arising out of [**specify**] and requests authority to execute a contract of employment with the law firm of [**name of law firm**] of [**city, county**] County, Texas, to represent Applicant in recovering Ward's claim. The terms and provisions of the proposed representation will comply with the recovery limitations under section 1155.053 of the Texas Estates Code. A copy of the proposed fee contract is attached as Exhibit [**exhibit number/letter**].

Or

2. Applicant shows that Ward's estate has been made a party to a lawsuit and requests authority to execute a contract of employment with the law firm of [**name of law firm**] of [**city, county**] County, Texas, to represent Applicant on behalf of Ward's estate in such law-

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suit. The terms and provisions of the proposed representation are contained in the proposed fee contract attached hereto as Exhibit [**exhibit number/letter**].

Continue with the following.

3. Applicant requests this Court to authorize employment of the above-named law firm on behalf of Applicant for Ward's estate under section 1151.104 of the Texas Estates Code, without further orders of this Court for the purpose of [seeking recovery for Ward and [his/her] estate for all damages and expenses to which Ward may be entitled/defending the lawsuit].

If the fees are not on a contingency basis, generally the court will approve the hourly rates but will require the guardian to seek permission for each invoice prior to payment.

Applicant seeks authority on behalf of Ward and [his/her] estate to enter into a contract to employ the law firm of [**name of law firm**] of [**city, county**] County, Texas, to represent Applicant on behalf of Ward's estate with respect to [all claims and recoveries that Ward and [his/her] estate may be entitled to seek for the losses sustained/the lawsuit filed against Ward], that Applicant be authorized [to institute suit on behalf of Ward and [his/her] estate for recovery of those claims/to defend against said lawsuit], and all further relief to which Applicant may be entitled.

Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Attach exhibit(s).

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Form 8-20

[Caption. See § 3 of the Introduction in this manual.]

Order Authorizing Employment of Attorney

On [**date**], the Court considered the application of [**name of applicant**], Applicant, guardian of the estate of [**name of ward**], Ward, an incapacitated person, to employ attorneys with the law firm of [**name of law firm**] of [**city, county**] County, Texas, enter into a fee agreement [and institute a lawsuit under section 1151.104 of the Texas Estates Code for recoveries that Ward and [his/her] estate may be justly entitled to seek/for the purpose of defending Ward and [his/her] estate against a lawsuit filed against [him/her]]. The Court finds that Applicant should be authorized to enter into such a fee agreement and [to institute suit/to defend against the lawsuit] on behalf of Ward and Ward's estate.

IT IS ORDERED that [**name of applicant**] is given permission to enter on behalf of [**name of ward**]'s estate the attached employment agreement with the law firm of [**name of firm**] of [**city, county**] County, Texas, for [the recovery of [**name of ward**]'s claims of whatever nature/the purpose of defending [**name of ward**] and [his/her] estate].

If the fee agreement provides for a contingent fee, include the next two paragraphs.

IT IS FURTHER ORDERED that [**name of applicant**] is authorized under section 1155.053 of the Texas Estates Code on behalf of [**name of ward**]'s estate to convey to the law firm of [**name of firm**] of [**city, county**] County, Texas, as [**name of ward**]'s attorneys, fees for legal services, limited to [a one-third contingent interest in the claims plus incidental costs and expenses [**describe approved fee arrangement**]].

IT IS FURTHER ORDERED that the attorneys are not restricted from seeking additional fees that may be authorized under section 1155.053 of the Texas Estates Code, provided

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the fees are sought in strict compliance with the statutory authority and approved by this Court by written order.

Continue with the following.

IT IS FURTHER ORDERED that [**name of applicant**] is authorized to execute on behalf of [**name of ward**]'s estate the attached fee agreement and if necessary [to institute suit/ to defend against the lawsuit] on behalf of [**name of ward**] and [his/her] estate in the appropriate court without additional orders from this Court.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Include attachment(s).

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Form 8-21

[Caption. See § 3 of the Introduction in this manual.]

Application for Sale of Real Property

[**Name of applicant**], Applicant, guardian of the estate of [**name of ward**], Ward, an incapacitated person, files this Application for Sale of Real Property belonging to Ward's estate and shows in support:

1. The inventory, appraisement, and list of claims of this estate was approved by this Court on [**date**].

2. The present bond of Applicant is $[**amount**] and was approved by this Court on [**date**].

3. Exhibit A, attached to this application, contains the legal description of the property sought to be sold. This sale consists of Ward's [**specify**] interest in the above-described real property.

4. This application is accompanied with attached Exhibit B, verified by affidavit, showing fully and in detail the condition of this estate and containing all other information required by section 1158.252 of the Texas Estates Code.

5. It is necessary and advisable to sell the estate's interest in the property in order to [**specify one or more of the reasons authorized in Estates Code section 1158.251**].

6. It would be in the best interest of this estate for the property to be sold at

Select one of the following.

a private sale for cash or such other terms as may be authorized by law.

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Or

a public auction in compliance with the terms and provisions of sections 1158.401–.405 of the Texas Estates Code.

Continue with the following.

Applicant requests that citation be issued as required by law and that, after a hearing on this application, the Court enter an order authorizing Applicant to sell the real property at a [private sale/public auction] on the terms requested or as may be authorized by law.

Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Exhibit A

Legal Description of Real Property

The following is the legal description of the real property covered by the foregoing Application for Sale of Real Property: [**describe property to match description in inventory**].

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Exhibit B

This affidavit of the estate's condition can also be used with only minor modifications as an attachment to the application for the sale of personal property under Tex. Est. Code § 1158.051.

Verified Exhibit Showing Condition of Estate

STATE OF TEXAS)

COUNTY OF)

[**Name of applicant**] personally appeared before me today and stated under oath:

"My name is [**name**]. I am competent to make this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

"I am the duly appointed and qualified guardian of the estate of [**name of ward**], an incapacitated person, and in support of the Application for Sale of Real Property, submit this exhibit to the Court to show fully and in detail the condition of the estate since the [inventory/last annual account] was approved on [**date**].

Charges and Claims

"The following are all of the charges and claims against the estate that have been approved or established by suit or have been rejected but may yet be established.

Description of Claim	Approved or Rejected	Unpaid Amount	Paid Amount
Total			

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Expenses Incurred Since [Inventory/Last Annual Account]

"The following are all of the expenses that have been incurred by the estate since the [inventory/last annual account].

Description of Expense	Court Approval Date	Payment Date	Unpaid Amount	Paid Amount
Total				

Property Remaining on Hand

"The following is a full and complete list of all property owned by the estate still remaining on hand and liable for the payment of the above charges, expenses, and claims:

Description of Assets	Asset Value
Total	

"This sale is sought in the foregoing application in order to [**specify the reason under Texas Estates Code section 1158.251 that requires this property be sold**], and this sale of real property is in Ward's best interests."

_____
Affiant

SIGNED under oath before me on _____.

_____
Notary Public, State of Texas

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Form 8-22

[Caption. See § 3 of the Introduction in this manual.]

Order for Sale of Real Property

On [**date**] the Court considered the Application for Sale of Real Property. The Court finds as follows:

1. Citation has been issued and served as required by law, and no one contested the application.

2. The application was accompanied by an exhibit, verified by affidavit, showing the condition of the estate, and the application and exhibit meet the requirements of section 1158.252 of the Texas Estates Code.

3. A legal description of the real property to be sold is contained in Exhibit A attached to the application and is made a part of this order.

4. The general bond of [**name of applicant**] [is sufficient/is insufficient as required by law and should be increased to $[**amount**]/should be decreased to $[**amount**]].

5. The sale sought in the foregoing application is necessary and advisable in order to: [**specify the reason that authorizes sale of real property under section 1158.251 of the Estates Code**].

6. The application should be granted and the property should be sold at a [private sale/public auction].

IT IS THEREFORE ORDERED that the real property described in Exhibit A attached to the application be sold at a [private sale/public auction] for cash or such other terms as are permitted by law.

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IT IS FURTHER ORDERED that [no additional bond is required of [**name of applicant**] at this time/[**name of applicant**]'s bond should be increased to $[**amount**]/[**name of applicant**]'s bond should be decreased to $[**amount**]] and that after the sale has been made, a report of sale be returned as required by law.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 8-23

The report of sale for real or personal property will vary only slightly depending on the method of sale. In most cases real property will be sold through a title company, which will provide detailed closing papers and reports. Personal property will usually be sold at garage sales or through auctions. Auctions will usually have some sales records, which should be identified and attached. If the sale is by a less structured method, such as a garage sale, then a simple record should be made, identifying the item, purchaser, and price, and should be attached to the report.

[Caption. See § 3 of the Introduction in this manual.]

Report of Sale of [Real/Personal] Property

[**Name of guardian**], Guardian, guardian of the estate of [**name of ward**], an incapacitated person makes [his/her] Report of Sale of [Real/Personal] Property as follows:

1. The Order of Sale of [Real/Personal] Property for this estate is dated [**date**].

2. A description of the [real/personal] property sold is attached hereto as Exhibit [**exhibit number/letter**].

3. The property was sold at a [private sale/public auction] on [**date**] in [**county**] County, Texas.

4. The name of the purchaser is [**name of purchaser**].

5. The amount of the [successful bid for/final private sale contract for] the property was $[**amount**], less costs and expenses of $[**amount**], leaving a net price of $[**amount**].

6. The present bond of Guardian is $[**amount**] and was approved by this Court on [**date**].

Include the following if applicable.

7. This sale [was/is] for cash and [was/will be] made as specified in the closing documents, copies of which are attached as Exhibit [**exhibit number/letter**].

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And/Or

8. There is an appraisal on file in this guardianship showing that the property has been valued at $[**amount**].

Continue with the following.

9. The purchaser is ready to comply.

Respectfully submitted,

_____

[**Name**]
Attorney for Guardian
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach exhibit(s).

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Form 8-24

[Caption. See § 3 of the Introduction in this manual.]

Approval of Sale of [Real/Personal] Property

On [**date**], the Court considered the Report of Sale of [Real/Personal] Property filed on [**date**]. The Court finds that at least five days have expired since the filing of the report, that [the general bond is sufficient to protect the estate/the general bond is insufficient and should be increased to $[**amount**]], that this sale was in compliance with this Court's previous Order of Sale of [Real/Personal] Property and with the provisions of the Texas Estates Code, and that the [real/personal] property has been sold for a fair price. The property sold is described in Exhibit [**exhibit number/letter**], which is attached to and made a part of this order.

IT IS ORDERED that the sale described in the report is approved and conveyance of the property is authorized on compliance by the purchaser with the terms of sale, which are as follows: [**state the specific terms of the sale and the amount of the net proceeds**].

Select one of the following.

IT IS FURTHER ORDERED that [**name of guardian**] be authorized to make this conveyance upon the purchaser's compliance with the terms of the sale.

Or

Include the following if funds are being sent directly to the safekeeping account.

IT IS FURTHER ORDERED that [**name of guardian**] be authorized to make this conveyance upon the purchaser's compliance with the terms of the sale [**include if applicable:** and that [**name of title company/name of guardian**] is ordered to wire transfer the net proceeds of this sale in the amount of $[**amount**] to the guardianship safekeeping account number [**number**] with [**name of financial institution**]].

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Include one of the following.

IT IS FURTHER ORDERED that the bond of [**name of guardian**] currently on file is sufficient.

Or

IT IS FURTHER ORDERED that the bond of [**name of guardian**] be increased to $[**amount**] and that [**name of guardian**] is authorized to make this conveyance only after approval by this Court of an increased bond in the amount of $[**amount**].

Continue with the following.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
[**Name**]
Attorney for Guardian
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach exhibit(s).

© STATE BAR OF TEXAS

Form 8-25

[Caption. See § 3 of the Introduction in this manual.]

Application for Sale of Perishable Personal Property

[**Name of applicant**], Applicant, guardian of the estate of [**name of ward**], Ward, an incapacitated person, files this Application for Sale of Perishable Personal Property according to section 1158.051 of the Texas Estates Code and shows in support:

1. The present condition of the estate is as shown on the Inventory, Appraisement, and List of Claims filed with this Court on [**date**] and approved by this Court on [**date**].

2. Applicant deems it to be in the best interests of Ward's estate to sell [**property description**] and requests authority to do so.

3. The total value of the property at the time of Applicant's qualification was $[**amount**]. The value of the property as of [**date**] is approximately $[**amount**].

Select one of the following.

4. Applicant believes that a high risk exists for the property to depreciate in value or perish. Applicant believes it is advisable to sell the property and to invest the proceeds from the sale.

Or

4. Since Applicant's appointment, the market value of the property has increased and the estate would benefit by realizing these gains before any market correction.

Continue with the following.

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5. Applicant is of the opinion that it is in the best interest of the estate for the property to be sold at a [private sale/public auction] for cash and the cash proceeds be invested as authorized by the Texas Estates Code.

Applicant prays that [he/she] be authorized to sell the above-described property at [private sale/public auction] for cash and for all further relief to which Applicant may be entitled.

Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 8-26

[Caption. See § 3 of the Introduction in this manual.]

Order Approving Sale of Perishable Personal Property

On [**date**] the Court considered the Application for Sale of Perishable Personal Property according to section 1158.051 of the Texas Estates Code filed by [**name of applicant**], Applicant, guardian of the estate of [**name of ward**], an incapacitated person. After considering the application, this Court finds that the application complies with Texas Estates Code section 1158.051, the sale described in the application is necessary and advisable [to avoid depreciation of the value of the personal property/to take advantage of an increase in the market value of the personal property], and Applicant should be authorized to make the sale described in the application.

IT IS THEREFORE ORDERED that [**name of applicant**], guardian of the estate of [**name of ward**], an incapacitated person, sell the personal property described in the application at [private sale/public auction] for cash and that [**name of applicant**] make a report of the sale to this Court and return the report in accordance with the law.

SIGNED on _____.

_____
JUDGE PRESIDING

© STATE BAR OF TEXAS

APPROVED AS TO FORM:

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 8-27

Include a detailed description of all assets to be sold as identified in the inventory. If the inventory identified only general categories of assets and values, provide a more specific description of each item to be sold with its estimated value and file a supplemental inventory identifying these assets.

[Caption. See § 3 of the Introduction in this manual.]

Application for Sale of Personal Property

[**Name of applicant**], Applicant, guardian of the estate of [**name of ward**], Ward, an incapacitated person, files this Application for Sale of Personal Property belonging to Ward's estate and shows in support:

1. The Inventory, Appraisement, and List of Claims of this estate was approved by this Court on [**date**].

2. The present bond of Applicant is $[**amount**] and was approved by this Court on [**date**].

3. Applicant requests to sell the personal property belonging to Ward's estate, which is described as follows: [**describe property, including inventory value**].

4. A statement verified by affidavit showing in detail the condition of this estate and containing all information required by sections 1158.102 and 1158.252 of the Texas Estates Code is attached as Exhibit [**exhibit number/letter**].

5. The property to be sold is not required to be sold under section 1158.051 of the Texas Estates Code and is not exempt property of Ward. It is necessary to sell Ward's interest in this personal property to [**specify one or more of the reasons under Estates Code section 1158.101 that the sale is authorized**].

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6. It would be in Ward's best interests for [his/her] personal property as herein described to be sold at a [private sale/public auction].

Applicant requests that citation be issued as required by law, that the Court enter an order authorizing Applicant to sell the personal property at a [private sale/public auction] on the terms requested or as may be authorized by law, and all other relief to which Applicant may be entitled.

Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach exhibit(s).

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Form 8-28

[Caption. See § 3 of the Introduction in this manual.]

Order for Sale of Personal Property

On [**date**] the Court considered the Application for Sale of Personal Property according to section 1158.101 of the Texas Estates Code filed by [**name of applicant**], Applicant, guardian of the estate of [**name of ward**], Ward, an incapacitated person. After considering the application this Court finds as follows:

1. Citation has been issued and served as required by law, and no one contested the application.

2. The application was accompanied by a verified Exhibit [**exhibit number/letter**] showing the condition of the estate, and the application and exhibit meet the requirements of sections 1158.102 and 1158.252 of the Texas Estates Code.

3. A description of the personal property to be sold is contained in Exhibit [**exhibit number/letter**] attached to the application and is made a part of this order.

4. The general bond of Applicant [is sufficient/is insufficient as required by law and should be increased to the amount of $[**amount**]/should be decreased to $[**amount**]].

5. The property to be sold is not required to be sold under section 1158.051 Texas Estates Code, is not exempt property of Ward, and the sale is necessary and advisable in order to [**specify the reason under section 1158.101 that the sale is authorized**].

6. The application should be granted, and the property should be sold at a [private sale/public auction].

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IT IS THEREFORE ORDERED that the personal property described in Exhibit [**exhibit number/letter**] attached to the application be sold at a [private/public] sale for cash or other terms as are permitted by law.

IT IS FURTHER ORDERED that [no additional bond be required of [**name of applicant**] at this time/[**name of applicant**]'s bond be increased to $[**amount**]/[**name of applicant**]'s bond be decreased to $[**amount**]], and that after the sale has been made, a report of sale be returned in the manner required by law.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 8-29

[Caption. See § 3 of the Introduction in this manual.]

Application for Abandonment of [Real/Personal] Property

[**Name of applicant**], Applicant, guardian of the estate of [**name of ward**], Ward, an incapacitated person, files this Application for Abandonment of [Real/Personal] Property and shows in support:

1. This Court approved the Inventory, Appraisement, and List of Claims of this estate on [**date**].

2. The property to be abandoned is described in the attached Exhibit [**exhibit number/letter**]. The description conforms to that identified in the inventory. This abandonment includes the ownership interest of Ward in the described [real/personal] property.

3. It is in the best interest of the estate to abandon Ward's interest in the property, as permitted by section 1151.102(c)(6) of the Texas Estates Code.

Applicant requests the Court enter an order authorizing Applicant to abandon the above-described property and all further relief to which Applicant may be entitled.

Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Attach exhibit(s).

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Form 8-30

[Caption. See § 3 of the Introduction in this manual.]

Abandonment Order

On [**date**] the Court considered [**name of applicant**]'s Application for Abandonment of [Real/Personal] Property, and, after considering the evidence presented in support of this application, the Court finds as follows:

1. Citation on this application was found not to be required.

2. A legal description of the [real/personal] property to be abandoned is attached as Exhibit [**exhibit number/letter**] and made a part of this order.

3. The application meets the requirements of section 1151.102(c)(6) of the Texas Estates Code.

4. The abandonment of the described property is in the best interest of [**name of ward**]'s estate.

5. [**Name of applicant**]'s application should be granted and the property should be abandoned.

IT IS THEREFORE ORDERED that [**name of applicant**] is authorized to abandon the property described in Exhibit [**exhibit number/letter**] attached to this order.

SIGNED on _____.

_____
JUDGE PRESIDING

© STATE BAR OF TEXAS

APPROVED AS TO FORM:

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach exhibit(s).

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Form 8-31

This form is provided as a template that includes the minimum amount of information required by the Texas Estates Code. Practitioners are advised to check with the applicable guardianship court to see if the court has another preferred format. Note that some courts post their preferred templates on their websites.

[Caption. See § 3 of the Introduction in this manual.]

Annual Account
[Complex]

[**Name of guardian**], Guardian, guardian of the [person and estate/estate] of [**name of ward**], Ward, an incapacitated person, presents this verified account according to section 1163.002 of the Texas Estates Code and shows in support:

1. This account covers the twelve-month period from [**date**] to [**date**].

2. The Court approved Guardian's inventory on [**date**], and Guardian's bond in the amount of $[**amount**] was approved by the Court on [**date**].

3. [The following claims against the estate have been presented, and the following action has been taken with respect to each: [**describe all claims, state whether allowed or rejected, and if they have been paid**]/No claims against the estate have been presented].

Select as applicable.

4. The following personal property has come to Guardian's attention or into Guardian's possession and was not previously listed or inventoried: [**describe property in detail, when it was discovered, and state its value**].

And/Or

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5. The following changes have occurred in the personal property of the estate but have not been reported: [**describe in detail any changes**].

And/Or

6. The following real property has come to Guardian's attention or into Guardian's possession and was not previously listed or inventoried: [**describe property in detail, when it was discovered, and state its value**].

And/Or

7. The following changes have occurred in the real property of the estate but have not been reported: [**describe in detail any changes**].

And/Or

8. No [real/personal/real or personal] property has come to Guardian's attention or into Guardian's possession that was not previously listed or inventoried.

And/Or

9. No changes have occurred in the [real/personal/real or personal] property of the estate that have not been reported.

Continue with the following.

10. The receipts of the estate are as follows: [**describe each receipt, the date, and amount received; receipts of principal and income must be shown separately**].

11. The disbursements of the estate are as follows: [**describe each item of expense, the date paid, and the amount paid. If the court issued approvals for the expenditures, show the dates of those orders**].

12. The description of the real property remaining and being administered except as otherwise specified is as follows: [**describe the property, its condition, its use, and, if it is**

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being rented, the terms and price for rent; this should include any new or changed property listed in prior paragraphs].

13. The following cash belonging to the estate is on hand: [**give amounts, location of depositories, type of account, and if account is subject to court order**].

14. The description of the personal property of the estate is as follows: [**describe property as required by section 1163.001(b)(7) of the Texas Estates Code; this should include any new or changed property listed in prior paragraphs**].

15. Attached to this account are proper vouchers for each item of credit claimed in this account.

16. Attached to this account are verifications from all depositories in which money or other personal property belonging to this estate is being held in safekeeping.

Select as applicable.

17. The following disbursements were reported in paragraph 11. above, but were made by Guardian from the corpus of Ward's estate and without prior court authorization under section 1156.004 of the Texas Estates Code. Guardian respectfully requests that the Court approve and ratify these payments: [**identify the disbursement, the date expended, and its amount**].

And/Or

18. Guardian requests that this Court authorize reimbursement of certain disbursements made for Ward's benefit during this reporting period, but paid for by [Guardian/[**name of other person**]]. This account indicates that there are ample funds in Ward's estate from which these payments may be reimbursed. The disbursements are as follows: [**describe each disbursement, including the date, its amount, and the person making it**].

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And/Or

19. Guardian has previously received court authorization to make disbursements from Ward's estate to cover expenses authorized under section 1156.001 of the Texas Estates Code. Ward's income continues to be less than Ward's needs for support and maintenance. Guardian requests that the Court authorize the expenditures detailed in Exhibit [**exhibit number/letter**] to this account from Ward's estate in the amount of $[**amount**] per month during the next accounting period from [**date**] to [**date**] to cover these expenditures. [**Identify each expense and the approximate amount monthly**].

And/Or

20. Guardian requests, based on this account, that this Court reduce [his/her] bond from the amount of $[**amount**] to an amount that would adequately protect Ward's estate as reflected in this annual account.

And/Or

21. Guardian requests that this Court authorize the payment of any approved and unpaid claims set forth in this annual account. Ample funds exist for their payment. These claims are as follows: [**describe the claim, the person to receive payment, and the amount**].

Most courts prefer to have guardian compensation requests included in an annual account. If a guardian compensation request is included, include the following.

22. Applicant has filed [his/her] annual account, which covers the period from [**date**] to [**date**], with this Court, and this Court approved the annual account on [**date**].

23. Applicant has adequately performed the duties as guardian of the [person and estate/estate] of Ward by [managing Ward's estate/managing Ward's estate and taking proper care of Ward's person] and is entitled to receive compensation in the form of a commission

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from the assets being administered according to section[s] [1155.003/1155.002 and 1155.003] of the Texas Estates Code.

24. Applicant requests that the Court award a fee of $[**amount**], which has been calculated under section[s] [1155.003/1155.002 and 1155.003] of the Texas Estates Code in the following manner:

A.	Total income of the estate	$[**amount**]
	Include as applicable.	
	Less: Department of Veterans Affairs income	<$[**amount**]>
	Sales of estate assets	$[**amount**]
	Less: Social Security income	<$[**amount**]>
	Return on principal of investments	$[**amount**]
	Income subject to commission	$[**amount**]
	Commission on Income (5 percent of $[**amount**]):	$[**amount**]
B.	Total expenses of the estate	$[**amount**]
	Less: Tax-motivated gifts	<$[**amount**]>
	Investments	$[**amount**]
	Money loaned	$[**amount**]
	Expenses subject to commission	$[**amount**]
	Commission on Expenses (5 percent of $[**amount**]):	$[**amount**]

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$[**amount of commission on income**] +

$[**amount of commission on expenses**]

Total Commission: $[**amount**]

Continue with the following.

25. Ward's estate has adequate funds from which Applicant may be paid the statutory commission requested as evidenced by the approved annual account on file in this matter.

If the annual account does not include compensation for the guardian, include the following.

22. Guardian is not seeking compensation for [his/her] services during this accounting period.

Continue with the following.

Reconciliation of Cash Items

The following is a summary and reconciliation of the foregoing sections of this Account of Guardian:

Paragraph 2: Beginning value of the estate $[**amount**]

Paragraph 4 and 6: Property not previously reported $[**amount**]

Paragraph 5 and 7: Changes in property of the estate $[**amount**]

Paragraph 10: Total receipts $[**amount**]

Paragraph 11: Total disbursements $[**amount**]

Paragraph 12: Total real property $[**amount**]

Paragraph 13: Total cash $[**amount**]

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Paragraph 14: Total personal property other than cash $[**amount**]

> The value of the total assets at close of the accounting period is equal to the sum of paragraphs 12. through 14.

TOTAL ASSETS AT CLOSE OF THIS ACCOUNTING PERIOD $[**amount**]

[**Name of guardian**], guardian of the estate, requests the Court approve this annual account and enter such other orders as may be proper.

Respectfully submitted,

_____

[**Name**]
Guardian

_____

[**Name**]
Attorney for Guardian
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Guardian's Affidavit

[**Name of guardian**], guardian of the [person and estate/estate] of [**name of ward**], an incapacitated person, appeared in person before me today and stated the following under oath:

"My name is [**name of guardian**]. I am the guardian of the [person and estate/estate] in the above-entitled and -numbered cause. This annual account contains a true, correct, and complete statement of the matters to which this account relates. The bond premium for the next accounting period has been paid. All tax returns for the ward during this accounting period have been filed.

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"I have paid all taxes owed by the ward during the accounting period of this account as follows: [**list name of agency, date, and amount paid**].["]

If the guardian is unable to pay all or part of the taxes owed, substitute for the above a detailed statement identifying the tax, its due date, its amount, and why such taxes have not or cannot be paid.

If the guardian is a private professional guardian, a guardianship program, or the Health and Human Services Commission, include the following.

"I am not and have not been the subject of an investigation conducted by the Judicial Branch Certification Commission during the accounting period."

Continue with the following.

_____
Affiant

SIGNED under oath before me on _____.

_____
Notary Public, State of Texas

Attach exhibit(s).

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Form 8-32

[Caption. See § 3 of the Introduction in this manual.]

Order Approving Annual Account
[Complex]

On [**date**] the Court considered the Annual Account of [**name of guardian**], Guardian, for the period from [**date**] to [**date**], filed according to section 1163.002 of the Texas Estates Code. The Court finds that the annual account has remained on file for ten days before being considered. The Court finds that the account provides information regarding—

1. the assets in Guardian's possession including cash and other assets;

2. [the payment of taxes due/a sufficient explanation of why any taxes have not been paid or tax returns filed];

3. [the bond premium for the next accounting period/a sufficient explanation of the reason why the premium has not been paid]; and

4. all expenditures on behalf of this estate during the accounting period.

The Court is satisfied that the matters stated in the annual account are in compliance with the Texas Estates Code, that a continuing need exists for this guardianship to continue, and that this annual account should be approved.

The Court finds that [**name of guardian**] has taken care of and managed the estate in compliance with the Texas Estates Code and is authorized to receive $[**amount**] as compensation for those services during the accounting period.

If disbursements were made from funds of the estate without prior court approval and they have been reviewed by the court and are to be approved, include the following.

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The Court finds that certain expenditures were made for the benefit of [**name of ward**], Ward, without prior authorization, but based on the information and records furnished, these expenditures should be ratified and approved pursuant to section 1156.004 of the Texas Estates Code.

If disbursements were made from funds of the guardian or another without prior court approval and if a request for reimbursement is contained in the account, include the following.

The Court finds, based on the information and records furnished to it, certain expenditures were made for Ward's benefit without prior authorization from funds of [Guardian/[**name**]] and should be reimbursed to [Guardian/[**name**]] from Ward's estate according to section 1156.004 of the Texas Estates Code.

Continue with the following.

IT IS THEREFORE ORDERED that:

1. The annual account is approved and ordered filed of record.

2. [**Name of guardian**]'s next annual account for this estate will cover the twelve-month period ending [**date**] and be due not later than [**date**] unless the deadline is extended by order of this Court.

3. [**Name of guardian**]'s letters terminate, pursuant to section 1106.002 of the Texas Estates Code, on [**date**] unless renewed by the Court's order approving the next [annual account/annual account and annual report] as provided under section 1106.003 of the Texas Estates Code.

Select as applicable.

4. [**Name of guardian**] is authorized to receive $[**amount**] as compensation for [his/her] services during the accounting period from [**name of ward**]'s estate.

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5. The expenditures from [**name of ward**]'s estate in the amount of $[**amount**] are hereby approved and ratified.

6. The expenditures made by [[**name of guardian**]/[**name**]] for [**name of ward**]'s benefit in the amount of $[**amount**] are approved and directed to be repaid to [[**name of guardian**]/[**name**]] by [**name of guardian**] from assets of [**name of ward**]'s estate.

7. [**Name of guardian**]'s bond be reduced to $[**amount**].

8. [**Name of guardian**] is authorized to pay the claims of $[**amount**] to [**name**].

9. [**Name of guardian**] is authorized to spend $[**amount**] per month during the next twelve-month accounting period from [**name of ward**]'s estate to provide education and maintenance for [**name of ward**], as described in Exhibit [**exhibit number/letter**] attached to the annual account as authorized under section 1156.001 of the Texas Estates Code.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
[**Name**]
Attorney for Guardian
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 8-33

This form is provided as a template that includes the minimum amount of information required by the Texas Estates Code. Practitioners are advised to check with the applicable guardianship court to see if the court has another preferred format. Note that some courts post their preferred templates on their websites.

[Caption. See § 3 of the Introduction in this manual.]

Annual Account

[Simple]

[**Name of guardian**], guardian of the [person and estate/estate] of [**name of ward**], an incapacitated person, presents the annual account of this estate, covering the period from [**date**] to [**date**].

Reconciliation of Cash Items

Cash on hand as of the last annual account	$[**amount**]
Cash receipts during the year	$[**amount**]
TOTAL	$[**amount**]
Disbursements during the accounting period	<$[**amount**]>
TOTAL cash now on hand	$[**amount**]

Name and location of depository for cash: _____

Value of All Property Now in Possession of Estate

(Summary only)

Real estate	$[**amount**]

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Notes payable to estate $[**amount**]

Stocks, bonds, & securities $[**amount**]

Cash: (balance shown above) $[**amount**]

Other personal property $[**amount**]

Receipts

List amounts received as income from sources such as rent, pensions, interest, insurance, lawsuits, sales of real estate, personal property, stocks, bonds, and notes, or income of any nature from any other sources. Identify separately all receipts of principal and income.

Description	Date Received	Community or Separate	Principal	Income
Total				

Disbursements

List every expenditure by the amount paid and its purpose.

Description	Court Order Date	Date Paid	Community or Separate	Amount
1. Court Costs				
2. Medical				
3. Doctors				
4. Nursing Home				
5. Other				
Total				

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Property Administered

A complete, accurate, and detailed description of all property that the guardian is administering should be provided, including the condition of the property and the use being made of it, and if rented, the rental terms and price.

Description	Community or Separate	Value
1. Real Property		
2. Personal Property		
3. Co-owned Property		
Total		

Claims

List all claims presented against the estate during the period covered by this account specifying those that have been allowed, paid, or rejected and the date rejected, or have been sued on and the status of the suit.

Description	Approved or Denied	Paid Amount	Unpaid Amount
Total			

Bonds, Notes, Stocks, Etc.

Describe property as required by Tex. Est. Code § 1163.001(c), including stocks, bonds, notes, and any other securities.

Description	Safekeeping	Community or Separate	Amount
Total			

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Most courts prefer to have guardian compensation requests included in an annual account. If a guardian compensation request is included, include the following.

1. Applicant has filed [his/her] annual account, which covers the period from [**date**] to [**date**], with this Court, and this Court approved the annual account on [**date**].

2. Applicant has adequately performed the duties as guardian of the [person and estate/estate] of Ward by [managing Ward's estate/managing Ward's estate and taking proper care of Ward's person] and is entitled to receive compensation in the form of a commission from the assets being administered according to section[s] [1155.003/1155.002 and 1155.003] of the Texas Estates Code.

3. Applicant requests that the Court award a fee of $[**amount**], which has been calculated under section[s] [1155.003/1155.002 and 1155.003] of the Texas Estates Code in the following manner:

A. Total income of the estate $[**amount**]

Include as applicable.

Less: Department of Veterans Affairs income <$[**amount**]>

Sales of estate assets $[**amount**]

Less: Social Security income <$[**amount**]>

Return on principal of investments $[**amount**]

Income subject to commission $[**amount**]

Commission on Income (5 percent of $[**amount**]): $[**amount**]

B. Total expenses of the estate $[**amount**]

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Less: Tax-motivated gifts	<$[**amount**]>
Investments	$[**amount**]
Money loaned	$[**amount**]
Expenses subject to commission	$[**amount**]
Commission on Expenses (5 percent of $[**amount**]):	$[**amount**]
$[**amount of commission on income**] +	
$[**amount of commission on expenses**]	
Total Commission:	$[**amount**]

Continue with the following.

4. Ward's estate has adequate funds from which Applicant may be paid the statutory commission requested as evidenced by the approved annual account on file in this matter.

If the annual account does not include compensation for the guardian, include the following.

Guardian is not seeking compensation for [his/her] services during this accounting period.

Continue with the following.

Respectfully submitted,

_____

[**Name**]
Guardian

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_____

[**Name**]
Attorney for Guardian
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Guardian's Affidavit

[**Name of guardian**], guardian of the estate of [**name of ward**], an incapacitated person, appeared in person before me today and stated under oath:

"I am the guardian of the [person and estate/estate] in the above-entitled and -numbered cause. This account contains a true, correct, and complete statement of the matters to which this account relates. The bond premium for the next accounting period has been paid. All tax returns for the ward during this accounting period have been filed.

"I have paid all taxes owed by the ward during the accounting period of this accounting as follows: [**list name of agency, date, and amount paid**].["]

If the guardian is unable to pay all or part of the taxes owed, substitute for the above a detailed statement identifying the tax, its due date, its amount, and why such taxes have not or cannot be paid.

If the guardian is a private professional guardian, a guardianship program, or the Health and Human Services Commission, include the following.

"I am not and have not been the subject of an investigation conducted by the Judicial Branch Certification Commission during the accounting period."

Continue with the following.

_____

Affiant

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SIGNED under oath before me on _____.

_____
Notary Public, State of Texas

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Form 8-34

[Caption. See § 3 of the Introduction in this manual.]

Order Approving Annual Account

[Simple]

On [**date**] the Court considered the annual account of this estate and finds—

1. the Court has jurisdiction of this proceeding and of the subject matter as required by law;

2. the annual account has remained on file for a full ten days before being considered;

3. the Court has now been advised on all items of the account, and possession of cash and other assets kept in safekeeping as well as those on deposit has been duly proved as required by law;

4. the Court is satisfied that the facts stated in the account are complete; and

5. the annual account has been audited and settled by the Court, complies with the Texas Estates Code, and should be approved.

The Court finds that [**name of guardian**] has taken care of and managed the estate in compliance with the Texas Estates Code and is authorized to receive $[**amount**] as compensation for those services during the accounting period.

IT IS THEREFORE ORDERED that:

1. The annual account is approved and ordered filed of record.

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2. [**Name of guardian**]'s next annual account for this estate cover the twelve-month period ending [**date**] and be due not later than [**date**] unless the deadline is extended by prior order of this Court.

3. [**Name of guardian**]'s letters terminate, pursuant to section 1106.002(b) of the Texas Estates Code on [**date**], unless renewed by the Court's order approving the next [annual account/annual account and annual report] as provided under section 1106.003 of the Texas Estates Code.

4. [**Name of guardian**] is authorized to receive $[**amount**] as compensation for [his/her] services during the accounting period from [**name of ward**]'s estate.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
[**Name**]
Attorney for Guardian
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 8-35

Note that many courts have a preferred template for the annual report, which may often be available online. Practitioners should check with the local court and consider whether there is a preferred form that should be used in a given case.

[Caption. See § 3 of the Introduction in this manual.]

Annual Report on Location, Condition, and Well-Being of Ward

I, [**name of guardian**], Guardian, represent that I am the guardian of the person of [**name of ward**], Ward, an incapacitated person, and that my annual report to the Court for the period from [**date**] through [**date**] is as follows:

1. Name of ward:

   Telephone no.:

   Date of birth:

   Age:

If the ward has died, state the date and place of death and do not complete the rest of the form.

2. Ward's residence is [**address, city, state**]. This residence is [Guardian's home/ Ward's home/a foster or boarding home/the home of Ward's [**describe relationship, e.g.,** mother]/a hospital or medical facility/a nursing home/[**specify other**]].

3. Ward has been in [his/her] present residence since [**date**]. [**If the ward has moved within the past year, state the reasons for the change.**]

4. As guardian, I rate Ward's living arrangements as [excellent/average/below average]. [**If below average, explain.**]

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5. As guardian, I believe Ward is [content/unhappy] with [his/her] living situation.

6. During the last twelve months I have seen Ward [**number**] times. The last date I saw Ward was [**date**].

7. As guardian, I [do/do not] have possession or control of Ward's estate.

8. During the past year Ward's mental health [improved/remained unchanged/ became worse]. [**If the ward's mental health has changed, describe the change.**]

9. During the past year Ward's physical health [improved/remained unchanged/ became worse]. [**If the ward's physical health has changed, describe the change.**]

10. Ward [is/is not] under the regular care of a physician. [His/Her] doctor's name is [**name of doctor**], and the doctor's address is [**address, city, state**].

11. During the past year Ward has been treated or evaluated by [**state the names and addresses of any service providers, such as physicians, dentists, social worker, etc., the date service was rendered, and the type of service received**].

Select one of the following.

12. During the past year Ward has participated in the following activities: [**describe any recreational, educational, or occupational activities**].

Or

12. [There were no activities available to Ward/Ward refuses to participate in any activities/Ward is unable to participate in any activities].

Include the following if applicable.

13. I believe Ward has the following unmet needs: [**describe needs.**]

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Continue with the following.

14. I have received $[**amount**] for Ward's benefit from [**name**]. The amount of $[**amount**] was spent directly for Ward's benefit in the following manner: [**describe expenditure. Attach a statement if necessary.**]

15. My powers as guardian should [be increased/be decreased/remain the same]. [**Explain.**]

16. I [have/have not] paid the bond premium for the next reporting period.

Include any other information concerning the ward's condition that the court should be advised about.

17. The guardianship [should/should not] be continued. [**Explain.**]

SIGNED on _____.

_____
[**Name**]
Guardian
[**Address**]
[**Telephone**]

_____
[**Name**]
Attorney for Guardian
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

[**Name of guardian**] appeared in person before me today and stated under oath:

The following should be used if the guardian is making a sworn declaration.

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"My name is [**name of guardian**]. I am competent to make this affidavit. The facts stated within the foregoing annual report are a true, correct, and complete statement of the present location, condition, and well-being of [**name of ward**], an incapacitated person, as of the date stated herein."

_____
Affiant

SIGNED under oath before me on _____.

_____
Notary Public, State of Texas

The following should be used if the guardian is making an unsworn declaration.

"My name is [**name of guardian**], and my date of birth is [**date of birth**]. I am competent to make this affidavit. I declare under penalty of perjury that the facts stated within the foregoing annual report are a true, correct, and complete statement of the present location, condition, and well-being of [**name of ward**], an incapacitated person, as of the date stated herein."

SIGNED on _____.

_____
[**Name of guardian**]

Include attachment(s).

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Form 8-36

[Caption. See § 3 of the Introduction in this manual.]

Order Approving Annual Report

On [**date**] the Court considered the Annual Report on Location, Condition, and Well-Being of Ward for [**name of ward**], Ward, an incapacitated person, and the Court, having examined this report, finds that [**name of guardian**], the guardian of the person, appears to have cared for and provided for Ward during the period from [**date**] to [**date**] in compliance with the Texas Estates Code requirements, that Ward's condition [remained unchanged/ improved/became worse], and that this guardianship should be continued.

IT IS THEREFORE ORDERED that:

1. The annual report of [**name of ward**]'s condition is approved and ordered filed of record.

2. [**Name of guardian**]'s next annual report will cover the twelve-month period ending [**date**] and be due not later than [**date**] unless the deadline is extended by prior order of this Court.

3. The letters of guardianship for [**name of guardian**] will terminate, pursuant to section 1106.002 of the Texas Estates Code on [**date**], unless renewed by the Court's order approving the next annual report as provided under section 1106.003 of the Texas Estates Code.

Include the following if applicable.

4. The cost and fees associated with the filing of the annual report are waived.

Continue with the following.

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SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
[**Name**]
Attorney for Guardian
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 8-37

[Caption. See § 3 of the Introduction in this manual.]

Application to Pay Claim

[**Name of applicant**], Applicant, guardian of the estate of [**name of ward**], Ward, an incapacitated person, files this application for permission to pay the claim of [**name of claimant**], which has been submitted, allowed, and approved as follows:

1. The claim of [**name of claimant**] in the amount of $[**amount**] was [presented to Applicant/filed with the county clerk of [**county**] County] on [**date**] and was timely allowed by Applicant. This Court approved this claim as [an expense for the care, maintenance, and education of Ward [and Ward's [spouse/dependent[s]/spouse and dependent[s]]]/a funeral or last illness expense of Ward/an expense of administration/a claim against Ward and [his/her] estate under section 1157.103 of the Estates Code] in the amount of $[**amount**] on [**date**].

2. Applicant has examined the assets of Ward and finds that there are adequate funds available at this time to make payment of this claim. There are no claims against Ward's estate that have a higher priority.

Applicant requests this Court to approve the payment of the claim of [**name of claimant**] in the amount of $[**amount**], to satisfy this claim in full out of Ward's funds, and for all further relief to which Applicant may be entitled.

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Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 8-38

[Caption. See § 3 of the Introduction in this manual.]

Order Approving Payment of Claim

On [**date**], the Court considered the application of [**name of applicant**], guardian of the estate of [**name of ward**], Ward, an incapacitated person, to pay the claim of [**name of claimant**]. The claim was filed on [**date**] and is for [**specify services**] and should be paid from the estate of Ward. The Court finds that the claim of [**name of claimant**] for [**specify**] in the amount of $[**amount**] has been approved and identified for payment. The Court finds that this claim is just and fair; that all legal offsets, payments, and credits have been allowed against the claim; that there are no claims against Ward's estate that have a higher priority; and that Ward's estate contains adequate assets to pay the claim at this time.

IT IS ORDERED by the Court that [**name of guardian**] be authorized to pay from the assets of [**name of ward**]'s estate the claim of [**name of claimant**] in the amount of $[**amount**].

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 8-39

[Caption. See § 3 of the Introduction in this manual.]

Application for Authority to Make [Annual] Tax-Motivated Gifts

[**Name of applicant**], Applicant, guardian of the estate of [**name of ward**], Ward, an incapacitated person, files this Application for Authority to Make [Annual] Tax-Motivated Gifts under section 1162.001 of the Texas Estates Code and shows in support:

1. Applicant's annual account is presently on file and pending approval by this Court. Ward's estate presently consists of property with a total value of approximately $[**amount**]. Ward's income for [**year**] was approximately $[**amount**], and [his/her] expenses totaled approximately $[**amount**]. [**Include the following if the value of the personal property is significant:** Ward's personal property consists of [**describe property**] valued at $[**amount**].]

2. Applicant anticipates increased income and decreased expenses from Ward's estate during the upcoming accounting period. As a result, the value of Ward's gross estate at [his/her] death will cause the accrual of a substantial estate-tax liability. Applicant believes that it is in the best interests of Ward and Ward's estate to establish a plan to make certain tax-motivated gifts of [**specify**] from Ward's estate. In addition, [due to Ward's deteriorating physical and mental condition,] Ward is unlikely to ever need, use, or enjoy all of Ward's property, and if property is given during Ward's life the federal estate tax liability can be reduced.

3. Specifically, the gifts that Applicant believes would be advantageous to give include the items listed on Exhibit [**exhibit number/letter**] attached to this application.

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4. Applicant believes that the tax benefit to be derived from the establishment of a gift-giving plan, when coupled with the savings on the cost of maintaining and caring for the property, is good cause for the making of such gifts.

5. The [devisees/beneficiaries] under Ward's [will/trust/[**specify other instrument**]] are as follows: [**list name, address, and relationship for each**].

6. Applicant proposes to make these tax-motivated gifts as follows: [**specify recipient amount of gift and whether it is a one-time gift or annual gift**].

7. During [his/her] lifetime Ward has expressed an interest and willingness to make such gifts.

Applicant requests the authority of this Court to make the tax-motivated gifts described above and all further relief to which Applicant may be entitled.

Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach exhibit(s).

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Form 8-40

[Caption. See § 3 of the Introduction in this manual.]

Order Authorizing [Annual] Tax-Motivated Gifts

On [**date**] the Court heard [**name of applicant**]'s Application for Authority to Make [Annual] Tax-Motivated Gifts. The Court finds that all notices have been given as required by section 1162.003 of the Texas Estates Code, that the proposed tax-motivated gifts are in the best interests of [**name of ward**] and [his/her] estate, and that this request should be granted.

IT IS THEREFORE ORDERED that [**name of applicant**], guardian of the estate of [**name of ward**], an incapacitated person, is authorized to make the specific tax-motivated gifts of [**name of ward**]'s property as described in the application.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 8-41

[Caption. See § 3 of the Introduction in this manual.]

Application to Make Charitable Gifts

[**Name of applicant**], Applicant, guardian of the estate of [**name of ward**], Ward, an incapacitated person, files this Application to Make Charitable Gifts under section 1162.051 of the Texas Estates Code and shows in support:

1. Applicant's annual account is presently on file with this Court. Ward's estate presently consists of property with a total value of approximately $[**amount**]. Ward's income for [**year**] was approximately $[**amount**], and [his/her] expenses totaled approximately $[**amount**]. [**Include if value of personal property is significant:** Ward's personal property consists of [**describe property**] valued at $[**amount**].]

2. Applicant anticipates increased income and decreased expenses from Ward's estate during the upcoming accounting period. As a result, Ward's net income for the current year exceeds $25,000 and may cause the accrual of a substantial income tax liability. Applicant believes that it is in the best interests of Ward and Ward's estate to make certain charitable gifts of [**specify**] from Ward's estate. The full amount of the contribution should be deductible and should not exceed 20 percent of the net income of Ward's estate for the current calendar year. The condition of Ward's estate justifies the contribution.

3. Specifically, the assets that Applicant believes would be advantageous to give to charity include the items listed on Exhibit [**exhibit number/letter**] attached to this application.

If property is to be given, include the following statement.

Applicant estimates that the total fair market value of this property is between $[**amount**] and $[**amount**]. In connection with the making of the proposed gifts, Applicant

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would obtain a statement for use in tax reporting of the fair market value of the property from the [charity/charities] to which the gift was made.

Continue with the following.

4. Applicant believes that a tax benefit will be derived from the proposed charitable gifts, the proposed contribution is reasonable in amount, and the [charity is/charities are] worthy.

5. Applicant proposes to make the charitable gifts to [**list proposed designee[s] and specify location of each**], which [is a charity/are charities] previously benefitted by Ward.

Applicant requests the authority of this Court to make the charitable gifts described above and all further relief to which Applicant may be entitled.

Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

VERIFICATION

STATE OF TEXAS)

COUNTY OF [**county**])

BEFORE ME, the undersigned notary public, on this day personally appeared [**name**], who being by me duly sworn on [his/her] oath deposed and said that [he/she] has read the

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above and foregoing [**title of document**] [and exhibits] and that the matters contained therein are within [his/her] personal knowledge and are true and correct.

_____

SWORN TO AND SUBSCRIBED BEFORE ME on _____.

_____
Notary Public, State of Texas

Attach exhibit(s).

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Form 8-42

[Caption. See § 3 of the Introduction in this manual.]

Order Authorizing Charitable Gifts

On [**date**] the Court considered [**name of applicant**]'s Application to Make Charitable Gifts under section 1162.051 of the Texas Estates Code. The Court finds that the guardian's application has remained on file for ten days before being considered, that the proposed charitable gift[s] [is/are] in the best interests of [**name of ward**] and [his/her] estate, and that this request should be granted.

IT IS THEREFORE ORDERED that [**name of applicant**], guardian of the estate of [**name of ward**], an incapacitated person, is authorized to make the specific charitable gift[s] of [**name of ward**]'s property as described in the Application to Make Charitable Gifts.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 8-43

This form is furnished only as a basic example and should not be used as a standard form. The attorney must be careful to tailor the details of the form to the facts of the particular case.

[Caption. See § 3 of the Introduction in this manual.]

Application for Approval of Guardian's Management Plan

Date of qualification: [**date**]

[**Name of guardian**], Guardian, guardian of the estate of [**name of ward**], Ward, an incapacitated person, files this plan for the handling and investment of Ward's assets, pursuant to the provisions of section 1161.001 of the Texas Estates Code, and seeks approval of the following plan from the Court:

Ward's Current Situation

Ward is [**describe marital status, e.g.,** an unmarried widow], age [**age**]. [He/She] resides at [**address, city, state**]. [**Describe living conditions, e.g.,** Ward's living situation is excellent. [He/She] lives at home with a caregiver as recommended by [his/her] treating physician. Ward has some outside social activity, including attending church.]

Bond and Safekeeping Arrangements

Guardian is currently bonded for $[**amount**] with [**name of bonding company**]. [There are no safekeeping agreements in place at this time/[**describe safekeeping agreement and give the date the court authorized it**]].

Monthly Allowance

A monthly allowance in the amount of $[**amount**], pursuant to section 1156.001 of the Texas Estates Code, was approved by the Court on [**date**].

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Current Assets

Select one of the following.

The property of the estate was reported to the Court in the inventory of the estate, which was approved on [**date**]. There have been no significant changes to the assets other than those necessary to pay monthly expenses.

Or

The current property of the estate, including property not reported on the guardian's inventory, appraisement, and list of claims and including any interim changes in the property to the date of this plan, is outlined below.

The following is a complete list of all changes in property belonging to the estate: [**list any changes since the filing of the inventory**].

Real Estate

Description	Value
Total Value of Real Estate	

Personal Property

Description	Value
Total Value of Personal Property	

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List of Claims

Description	Value
Total Value of Claims Due and Owing to the Estate	

Cash and Brokerage Accounts

Description	Name of Institution	Type of Account or Asset	Account Number[s]	Amount
Total Value				

Continue with the following.

Property Not under Control of Guardian

Describe any property not under the control of the guardian, such as trusts or Social Security payments, the value of the property, and how the property affects the estate.

Plans for Maintenance and Management

Guardian's plan for the maintenance and management of the property of Ward's estate is as follows:

1. Real Property

Select one of the following.

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Homestead. Ward currently resides at [**address, city, state**], property that [he/she] owns. Guardian plans to maintain this property as Ward's homestead as long as it is in Ward's best interests to do so. If maintaining the property ceases to be in Ward's best interests, Guardian will file the appropriate application with the Court.

Or

Homestead. Ward's home is vacant and application will be made to sell or lease the property.

Or

Homestead. Ward is in a nursing home; however Ward's spouse resides at [**address, city, state**], the homestead of Ward and [his/her] spouse. The homestead property will be retained and amounts budgeted to provide for utilities, taxes, insurance, and other items related to upkeep and maintenance. Guardian has verified insurance coverage on the homestead.

Include the following if applicable.

Other Real Property. At the present time, Guardian plans to [retain the real property of the estate as listed in this management plan/to retain the real property at [**address, city, state**]/rent the property at [**address, city, state**] [**include if applicable:** and has entered into a lease]/sell the property at [**address, city, state**]]. Guardian has verified insurance and liability coverage on the property.

Continue with the following.

2. Personal Property

Household Furnishings and Personal Effects. The household furnishings and personal effects of Ward are located in the homestead property described above and will be main-

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tained for [his/her] use and benefit. Ward is wearing [his/her] jewelry. Guardian has verified insurance on the personal property.

Automobile. [An application to sell Ward's vehicle [has been/will be] filed with the Court, and the proceeds from the sale will be deposited into the estate checking account/ Ward's vehicle will be maintained so that [he/she] may be transported to appointments. Guardian will seek insurance coverage on the vehicle and authorized drivers].

3. Cash on Hand

Estate Checking Account. The estate checking account is used as an operating account from which Guardian pays for Ward's needs pursuant to the monthly allowance. The estate checking account, account number [**number**] at [**name of institution**], has a balance of $[**amount**] as of [**date**] [**include if applicable:** and is interest bearing].

Claims

A general notice to creditors was given pursuant to section 1153.001 of the Texas Estates Code. [[**Describe claims**]/There are no known claims against the estate].

Unpaid Debt

[[**Describe debts**]/There are no debts or expenses of the estate presently due and owed by the estate that have not been paid].

Income

Ward receives $[**amount**] in Social Security income each month or $[**amount**] on a yearly basis. [His/Her] accounts at banks and brokerages generate approximately $[**amount**] per year. In addition, [he/she] receives a pension from [**name of institution or agency**], which

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generates $[**amount**] per year. Guardian anticipates that the required minimum distribution from Ward's IRA will be $[**amount**] for [**year**].

Analysis of Assets

Select as applicable.

1. Guardian pays recurring bills from Account No. [**number**] at [**name of institution**], including cable bills, telephone bills, and utility bills. Guardian plans to retain assets in this account for the purpose of paying these recurring bills.

2. Assets at [**name of institution**] held in Account No. [**number**], Ward's IRA account, consist of cash, U.S. obligations, and corporate bonds and generate an annual income of approximately $[**amount**], a return of approximately [**percent**] percent. The minimum required distribution from this account was $[**amount**] in [**year**]. On [**date**], the IRA contained $[**amount**] in assets. Based on Ward's age, and using a single life expectancy table, it is anticipated that the minimum required distribution for [**year**] will be approximately $[**amount**]. The asset mix in this account is as follows: [**percent**] percent cash, [**percent**] percent U.S. obligations, and [**percent**] percent corporate bonds.

3. Assets at [**name of institution**] in Account No. [**number**] total $[**amount**]. Assets in this account consist of notes, which generate income of approximately $[**amount**] per year, a return of approximately [**percent**] percent.

4. Assets at [**name of institution**] in Account No. [**number**], a management trust account established by Ward for [his/her] benefit, consist of cash, government bonds, corporate bonds, and equities, which generate income of approximately $[**amount**] per year, a return of [**percent**] percent. The asset mix in this account is as follows: [**percent**] percent cash ($[**amount**]), [**percent**] percent government bonds ($[**amount**]), [**percent**] percent corporate

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bonds ($[**amount**]), and [**percent**] percent equities ($[**amount**]). Guardian does not control the assets in this account. The terms of the management trust provide [**describe terms**].

If all of the income of the trust accounts, all of the income of the accounts under management of Guardian, and all of Ward's retirement income are considered, Ward potentially has at [his/her] disposal income in the amount of approximately $[**amount**] per year.

Ward must have conservative investments as the cost of [his/her] care is exceeding [his/her] monthly income. [He/She] currently needs approximately $[**amount**] per month in income to meet the costs of [his/her] caretakers, although future needs may vary due to changes in Ward's condition. The investment goals are to provide Ward with the highest quality domicile, caretaking, and lifestyle consistent with the life [he/she] enjoyed before inception of the guardianship.

Tax-Motivated Gifts

[Guardian does not plan to make any tax-motivated gifts at the present time/[**Describe any tax-motivated gifts**]].

Terms of Investment Plan

Guardian requests authority to retain the assets as they currently exist. Guardian will work with the trustee of the various trusts established for the benefit of Ward to coordinate investment goals and provide for Ward. If investment goals change or the brokerage holding Ward's accounts makes recommendations with regard to purchases and sales of assets, Guardian will make the appropriate application with the Court.

Select from the following as applicable.

Guardian requests authority to retain the following assets, which were on hand at the inception of the guardianship: [**describe assets**].

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And/Or

Guardian requests authority to retain the following assets, which are [under-productive/ volatile]: [**describe assets**].

And/Or

Guardian requests authority to sell the following assets in order to diversify Ward's portfolio: [**describe assets**].

And/Or

Guardian requests authority to hire an investment advisor to evaluate Ward's portfolio.

And/Or

Guardian requests authority to loan the following assets under section 1161.202 of the Texas Estates Code: [**describe assets**].

And/Or

Guardian will request under separate application authority to create a management trust under Texas Estates Code chapter 1301.

And/Or

Guardian requests authority to make investments, limited to those types of investments specified in Texas Estates Code section 1161.003.

And/Or

Guardian requests authority to purchase a prepaid funeral policy for Ward.

Include any other information that may need to be brought to the attention of the court.

Continue with the following.

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The applicant prays that the Court approve Guardian's investment plan described above and prays for all further relief to which Guardian may be entitled.

Respectfully submitted,

_____

[**Name**]
Guardian

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 8-44

This form is furnished only as a basic example and should not be used as a standard form. The attorney must be careful to tailor the details of the form to the facts of the particular case.

[Caption. See § 3 of the Introduction in this manual.]

Order Approving Guardian's Management Plan

On this day the Court considered the Application for Approval of Guardian's Management Plan of [**name of guardian**] for the estate of [**name of ward**]. After considering the application, reviewing the proposed management plan, and considering the facts and circumstances, the Court finds from the preponderance of the evidence that the application should be granted.

IT IS THEREFORE ORDERED that the following assets may be retained, and [**name of guardian**] will not be liable for any depreciation or loss resulting from their retention: [**name of ward**]'s residence, jewelry, furnishings, artwork, antiques, clothing, personal effects, and automobile.

IT IS FURTHER ORDERED that [**name of guardian**] is authorized to open a new interest-bearing checking account as described in the application. No further order of this Court is necessary for this action.

IT IS FURTHER ORDERED that [**name of guardian**] will review the investment performance of those [**name of institution**] common-trust funds that hold [**name of ward**]'s funds on an annual basis and will report [his/her] findings in the annual account.

IT IS FURTHER ORDERED that [**name of guardian**] will sell [**number**] shares of [**name**] in Account No. [**number**] at [**name of institution**] over a two-year period and invest the proceeds of sale in a diversified portfolio of dividend paying stocks. [**Name of guardian**] will

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sell [**number**] shares of [**name**] in Account No. [**number**] at [**name of institution**] and retain or invest the proceeds in accordance with the goals of the management plan.

IT IS FURTHER ORDERED that [**name of guardian**] will enter into a safekeeping custody account agreement with the trust department of [**name of institution**], as described in the application, but subject to further orders of this Court. [**Name of guardian**] will direct [**name of institution**], in its capacity as safekeeping custodian, to invest all of [**name of ward**]'s cash that is placed into the safekeeping account and is not otherwise invested in the [**name of institution**] institutional money market fund as described in the application. No further order of this Court is necessary for this action.

IT IS FURTHER ORDERED that [**name of guardian**] is authorized to transfer the securities in the [**account number**] brokerage account to the [**name of institution**] safekeeping account for sale pursuant to further orders of this Court. [**Name of guardian**] will purchase and sell such other securities as may be determined by [**name of institution**] to meet the goals of this management plan.

IT IS FURTHER ORDERED that [**name of guardian**]'s management plan is approved and will continue until the later of [**anniversary date**] or further orders of this Court approving a subsequent investment plan for [**name of ward**] and that [**name of guardian**] may take such further action as may be necessary, including the purchase and sale of securities to meet the goals of the management plan more particularly described in the management plan filed with this Court.

SIGNED on _____.

_____
JUDGE PRESIDING

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APPROVED AS TO FORM:

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Chapter 9
Modification, Restoration, and Successor Guardians

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Chapter 9

Modification, Restoration, and Successor Guardians

§ 9.1 Scope of Chapter

Guardianships are not stagnant, and the continued appointment of a guardian is not a certainty. Once created, most guardianships and guardians are subject to continued review and oversight. Tex. Est. Code ch. 1201; *but see* Tex. Est. Code § 1201.051 (does not apply to guardianship created only to receive funds from governmental sources). At least annually, a guardianship should be reviewed to determine if it should be continued, modified, or terminated. Tex. Est. Code § 1201.002. The obligation of review is on both the overseeing court and the guardian. In addition, a ward or any person interested in the ward's welfare may ask the court to modify a guardianship and expand or limit a guardian's powers or to terminate the guardianship entirely, based on a change to the ward's incapacity. Tex. Est. Code §§ 1202.051, 1202.054. Finally, when a guardian resigns, is removed, or dies, a successor guardian may be appointed. Tex. Est. Code § 1203.102. This chapter is intended to provide an overview of the current law and practical tips relating to the changes in the scope of a guardianship or the appointed guardian after the initial hearing.

§ 9.2 Annual Review Regarding Continuation

All guardianships created after September 1, 1993, must be reviewed annually to determine if they should be continued, modified, or terminated, unless such guardianships were created only for the purpose of having the guardian receive government funds. Tex. Est. Code § 1201.052. The court is required to make its determination in writing and to file it with the clerk. Tex. Est. Code § 1201.054.

Practice Pointer: This provision appears fairly innocuous but is very powerful. Because the standards for the court are somewhat of a blank slate (discretionary), this provision could be employed in a number of creative ways. Even though the procedure and standards for modification under Texas Estates Code chapter 1202 are fairly restrictive (see sections 9.3 through 9.5:4 below), the annual determination under section 1201.054 contains no such procedural restrictions.

Review by Statutory Probate Courts: If the guardianship is pending in a statutory probate court, the judge may review (1) the reports of the court investigator, guardian ad litem, or court visitors; (2) the annual accounting of the guardian of the estate, or the annual report of the guardian of the person; or (3) conduct a hearing. Tex. Est. Code § 1201.053(a).

Review by Nonstatutory Probate Courts: If the guardianship is not in a statutory probate court, the judge may use any appropriate method to make the review. Tex. Est. Code § 1201.053(b).

Important Note: A person (including a ward or any person interested in the ward's welfare) may not reapply for complete restoration of a ward's capacity or a modification of a ward's guardianship before the first anniversary of the date of the hearing on the last preceding application, except as otherwise provided by the court on good cause shown by the applicant. Tex. Est. Code § 1202.055. This provision is consistent with the annual review for guardianships and is designed to eliminate unnecessary or burdensome repetition before the court.

§ 9.3 Modification

The ward or any person interested in the ward's welfare may petition the court for an order of modification. Tex. Est. Code § 1202.051(a). This includes both expanding or limiting a guardian's powers and duties because of a change in the ward's incapacity (i.e., further deterioration or partial restoration). Texas Estates Code chapter 1202 addresses the standards and procedures for modification of a guardianship. Tex. Est. Code § 1202.051(a)(2)–(a)(3). See forms 9-1 through 9-4 in this chapter.

§ 9.3:1 Application

Generally, a ward or any person interested in the ward's welfare must file a written application with the court. Tex. Est. Code § 1202.051(a)(2), (a)(3). The application must be sworn to and include—

1. the ward's name, sex, date of birth, and address;
2. the name and address of any person serving as guardian of the person of the ward on the date the application is filed;
3. the name and address of any person serving as guardian of the estate of the ward on the date the application is filed;
4. the nature and description of the ward's guardianship;
5. the specific areas of protection and assistance and any limitation of rights that exist;
6. a general description of the increased or decreased powers sought by the guardian or the ward and general facts and evidence supporting a modification, including—
    a. the nature and degree of the ward's incapacity;
    b. the specific areas of protection and assistance to be provided to the ward and requested to be included in the court's order; and
    c. any limitation of the ward's rights requested to be included in the court's order;
7. the approximate value and description of the ward's property, including any compensation, pension, insurance, or allowance to which the ward is or may be entitled; and
8. if the ward is sixty years of age or older, the names and addresses, to the best of the applicant's knowledge, of the ward's spouse, siblings, and children or, if there is no known spouse, sibling, or child, the names and addresses of the ward's next of kin.

Tex. Est. Code § 1202.052.

It is also advisable to attach a physician's certificate or letter supporting the requested modification. *See* Tex. Est. Code § 1202.152; see also section 9.5:3 below.

§ 9.3:2 Citation

An application to modify must be served on the guardian and the ward, if the ward is not the applicant. Tex. Est. Code § 1202.053.

§ 9.3:3 Informal Request

A ward may also request modification by informal letter to the court. Tex. Est. Code § 1202.054(a). On receipt of a ward's informal request, the court must appoint a court investigator or guardian ad litem to determine if modification is necessary. Tex. Est. Code § 1202.054(b). The court investigator or guardian ad litem is required to file a report with the court containing findings and conclusions. If the court investigator or guardian ad litem determines that it is in the best interest of the ward for the guardianship to be modified, then he is required to file an application under Texas Estates Code sections 1202.051 and 1202.052. Tex. Est. Code § 1202.054(c). See section 9.3:1 above.

Importantly, it should be noted that any person found to have knowingly interfered with the transmission of a request for modification by informal letter to the court may be adjudged guilty of contempt of court. Tex. Est. Code § 1202.054(a).

§ 9.3:4 Initiation by Court

In addition to modifying a guardianship under chapter 1202, courts may modify a guardianship under the provisions of three laws passed in 1997. *See* Acts 1997, 75th Leg., R.S., ch. 77, § 10 (S.B. 997); Acts 1997, 75th Leg., R.S., ch. 434, § 2 (H.B. 1316); Acts 1997, 75th Leg., R.S., ch. 1403, § 6 (H.B. 2189). These laws allow a court to modify an older guardianship to conform to statutory amendments affecting guardianships filed after September 1, 1997. The 1997 amendments do not apply retroactively to a guardianship created before September 1, 1997, unless a court modifies the older, pre-1997 guardianship. Thus, these sections can be made applicable by such a modification.

Practice Pointer: Many of the provisions in these acts would have little or no effect on guardianships created before 1997; however, several provisions could benefit these older guardianships. These acts permit the probate court on its own motion to modify all such guardianships under its supervision. The attorney should check with the court in which the guardianship is pending to see if such an order has been entered.

§ 9.3:5 Representation of Ward

The court must appoint an attorney ad litem in every modification proceeding. Tex. Est. Code § 1202.101. The attorney ad litem is entitled to reasonable compensation for services, regardless of whether the proceeding results in modification. Tex. Est. Code § 1202.102.

In addition, the ward has the right to retain private counsel to represent them in seeking the restoration of certain of their rights or modification of their guardianship. Tex. Est. Code § 1202.103(a). But a private attorney's compensation is not guaranteed as the court "may order that compensation for services provided by an attorney retained under this section be paid from funds in the ward's estate *only* if the court finds that the attorney had a good faith belief that the ward had the capacity necessary to retain the attorney's services." Tex. Est. Code § 1202.103(b) (emphasis added). Further, the guardian or any other person interested in the ward's welfare may challenge the authority of counsel to represent the ward in such a proceeding by filing a motion under rule 12 of the Texas Rules of Civil Procedure. *See Angelina County v. McFarland*, 374 S.W.2d 417, 423 (Tex. 1964) (rule 12 exclusive means to challenge authority); *Gulf Regional Education Television Affiliates v. University of Houston*, 746 S.W.2d 803, 809 (Tex. App.—Houston [14th Dist.] 1988, writ denied); *Valley International Properties, Inc. v. Brownsville Savings & Loan Ass'n*, 581 S.W.2d 222, 226 (Tex. App.—Corpus Christi–Edinburg 1979, no writ).

Practice Pointer: The right to represent a ward is not absolute. Therefore, an attorney who is considering representing a ward should use reasonable means to confirm the incapacitated person has the requisite capacity to retain counsel. This is par-

ticularly an issue in a modification proceeding as the ward's ability to contract is often one of the last powers to be restored. The attorney should personally meet with the ward to determine whether the ward appears to be acting independently; understands that they are seeking to retain the attorney to represent them; is generally oriented to time, place, and person; and understands the basic financial arrangement and resulting obligations. If the court has appointed an attorney ad litem for the ward, the attorney should seek permission to visit with the ward from their court-appointed counsel. Furthermore, it is strongly advisable to seek the opinion of the ward's physician or a doctor qualified to render a medical opinion regarding the ward's capacity to enter into a contract before agreeing to represent the ward. If possible, the doctor should reduce their opinion to writing.

§ 9.3:6 Hearing and Proof Required

The party filing the application to modify has the burden of proof at the hearing. Tex. Est. Code § 1202.151(b). At the hearing, the court is required to consider only evidence regarding the ward's mental or physical capacity at the time of the hearing that is relevant to the modification of the ward's guardianship. Tex. Est. Code § 1202.151(a).

As with the original granting of the guardianship (in proceedings since 1994), a physician's letter or certificate, in similar form to that required under Texas Estates Code section 1101.103, is required for a modification of the guardianship. Tex. Est. Code § 1202.152(a). Importantly, the court may appoint a physician to examine the ward to determine if modification is in the best interests of the ward in the same manner and to the same extent as the original guardianship. Tex. Est. Code § 1202.152(c); *see also* Tex. Est. Code § 1101.103(c)–(d).

To grant the application to modify, the court must find by a preponderance of the evidence that the current nature and degree of the ward's incapacity warrant modification. Tex. Est. Code § 1202.153(b)–(c).

The court is permitted to make a broad range of findings when presented with an application to modify a guardianship. It can expand or restrict the rights and powers of both the guardian and the ward to the extent necessary to accomplish the continuing objectives of the guardianship. Tex. Est. Code §§ 1202.153–.156. See forms 9-1 through 9-4 in this chapter.

§ 9.3:7 Order

If the court modifies the guardian's powers or duties, the order must include—

1. the guardian's name;
2. the ward's name;
3. the type of guardianship being modified (person, estate, or both);
4. the specific powers, limitations, or duties of the guardian and the new specific areas of protection and assistance to be provided to the ward;
5. if the ward's incapacity resulted from a mental condition, a statement whether the ward retains the right to vote and make personal decisions regarding residence;
6. if applicable, any necessary supports and services for the modification of the guardianship; and
7. a direction that the clerk must issue modified letters of guardianship to conform to the order.

Tex. Est. Code §§ 1202.154, 1202.156.

If the court determines not to modify the guardianship, the application is to be dismissed and an order entered to that effect. Tex. Est. Code § 1202.157.

§ 9.4 Restoration

The ward or any person interested in the ward's welfare may petition the court for an order of "complete" restoration of capacity and the settlement and closing of the guardianship. Tex. Est. Code § 1202.051(a)(1). This procedure is not to be confused with a modification of a guardianship because of a "partial" restoration of capacity, which is addressed at sections 9.3 through 9.5:4 above, although the standards and procedures are generally the same. Texas Estates Code chapter 1202 addresses the standards and procedures for a complete restoration of a ward's capacity. See forms 9-5 and 9-6 in this chapter.

§ 9.4:1 Application

As with a modification proceeding, a ward or any person interested in the ward's welfare must generally file a written application with the court. Tex. Est. Code § 1202.051(a)(1). The application must be sworn to and include—

1. the ward's name, sex, date of birth, and address;
2. the name and address of any person serving as guardian of the person or estate of the ward on the date the application is filed;
3. the nature and description of the ward's guardianship;
4. the specific areas of protection and assistance and any limitation of rights that exist;
5. a statement seeking a restoration of the ward's capacity because the ward is no longer an incapacitated person;
6. the approximate value and description of the ward's property, including any compensation, pension, insurance, or allowance to which the ward is or may be entitled; and
7. if the ward is sixty years of age or older, the names and addresses, to the best of the applicant's knowledge, of the ward's spouse, siblings, and children or, if there is no known spouse, sibling, or child, the names and addresses of the ward's next of kin.

Tex. Est. Code § 1202.052.

It is also advisable to attach a physician's certificate or letter finding that the ward has capacity and that all rights should be restored. *See* Tex. Est. Code § 1202.152; see also section 9.8:1 below.

§ 9.4:2 Citation

An application to restore the capacity of a ward must be served on the guardian and the ward, if the ward is not the applicant. Tex. Est. Code § 1202.053.

§ 9.4:3 Informal Request

A ward may also request complete restoration of capacity by informal letter to the court. Tex. Est. Code § 1202.054(a). On receipt of a ward's informal request, the court must appoint a court investigator or guardian ad litem to determine whether the ward is no longer incapacitated. Tex. Est. Code § 1202.054(b). The court investigator or guardian ad litem is required to file a

report with the court containing findings and conclusions. If the court investigator or guardian ad litem determines that it is in the best interest of the ward for the guardianship to be terminated, then they are required to file an application under Texas Estates Code sections 1202.051 and 1202.052. Tex. Est. Code § 1202.054(c). See section 9.6:1 above.

Importantly, it should be noted that any person found to have knowingly interfered with the transmission of a request for restoration of capacity by informal letter to the court may be adjudged guilty of contempt of court. Tex. Est. Code § 1202.054(a).

§ 9.4:4 Representation of Ward

The court must appoint an attorney ad litem in every proceeding to restore a ward's capacity. Tex. Est. Code § 1202.101. The attorney ad litem is entitled to reasonable compensation for his services, regardless of whether the proceeding results in the restoration of the ward's capacity. Tex. Est. Code § 1202.102.

In addition, the ward has the right to retain private counsel in seeking the restoration of their capacity. Tex. Est. Code § 1202.103(a). But a private attorney's compensation is not guaranteed as the court "may order that compensation for services provided by an attorney retained under this section be paid from funds in the ward's estate *only* if the court finds that the attorney had a good faith belief that the ward had the capacity necessary to retain the attorney's services." Tex. Est. Code § 1202.103(b) (emphasis added). Further, the guardian or any other person interested in the ward's welfare may challenge the authority of counsel to represent the ward in such a proceeding by filing a motion under rule 12 of the Texas Rules of Civil Procedure. *See Angelina County v. McFarland*, 374 S.W.2d 417, 423 (Tex. 1964) (rule 12 exclusive means to challenge authority); *Gulf Regional Education Television Affiliates v. University of Houston*, 746 S.W.2d 803, 809 (Tex. App.—Houston [14th Dist.] 1988, writ denied); *Valley International Properties, Inc. v. Brownsville Savings & Loan Ass'n*, 581 S.W.2d 222, 226 (Tex. App.—Corpus Christi–Edinburg 1979, no writ).

Practice Pointer: The right to represent a ward is not absolute. Therefore, an attorney who is considering representing a ward should use reasonable means to confirm the incapacitated person has the requisite capacity to retain counsel. This is particularly an issue in a proceeding to restore a ward's capacity. The attorney should personally meet with the ward to determine whether the ward appears to be acting independently; understands that they are seeking to retain the attorney to represent them; is generally oriented to time, place, and person; and understands the basic financial arrangement and resulting obligations. If the court has appointed an attorney ad litem for the ward, the attorney should seek permission to visit with the ward from his court-appointed counsel. Furthermore, it is strongly advisable to seek the opinion of the ward's physician or a doctor qualified to render a medical opinion regarding the ward's capacity to enter into a contract before agreeing to represent the ward. If possible, the doctor should reduce their opinion to writing.

§ 9.4:5 Hearing and Proof Required

The party filing the application to restore the ward's capacity has the burden of proof at the hearing. Tex. Est. Code § 1202.151(b). At the hearing, the court is required to consider only evidence regarding the ward's mental or physical capacity at the time of the hearing that is relevant to the complete restoration of the ward's capacity. Tex. Est. Code § 1202.151(a).

As with the original granting of the guardianship (in proceedings since 1994), a physician's letter or certificate, in similar form to that required under Texas Estates Code section 1101.103, is required for complete restoration of a ward's capacity. Tex. Est. Code § 1202.152(a). Importantly, the court may appoint a physician to examine the ward to determine if complete

restoration of the ward's capacity is in the best interests of the ward in the same manner and to the same extent as the original guardianship. Tex. Est. Code § 1202.152(c); *see also* Tex. Est. Code § 1101.103(c)–(d).

To grant the application for restoration, the court must find by a preponderance of the evidence that the ward is no longer incapacitated. Tex. Est. Code § 1202.153(a).

§ 9.4:6 Order

If the court decides to terminate the guardianship, the order restoring the ward must state—

1. the guardian's name;
2. the ward's name;
3. the type of guardianship being terminated (person, estate, or both);
4. that the ward is no longer an incapacitated person;
5. that there is no further need for a guardianship of the person or estate;
6. that the ward's mental capacity is completely restored;
7. that the guardian is required to immediately settle and close the guardianship and deliver all of the remaining guardianship estate to the ward; and
8. that when the guardianship is finally settled and closed, the clerk is to revoke all letters of guardianship.

If applicable, the order must also state any necessary supports and services for the restoration of the ward's capacity. Tex. Est. Code §§ 1202.154–.155.

If the court finds the ward's capacity has not been restored, the application is to be dismissed and an order entered to that effect. Tex. Est. Code § 1202.157.

§ 9.4:7 Removal of Firearm Disability upon Restoration

A person whose guardianship was terminated because of a restoration of capacity may file an application with the guardianship court for an order requesting the removal of the person's disability to purchase a firearm imposed under 18 U.S.C. § 922(g)(4). Tex. Est. Code § 1202.201(a). In addition, in a proceeding involving an application to restore a ward's capacity, the applicant can request an order seeking the same relief. Tex. Est. Code § 1202.201(b). In determining whether to grant relief, the court must hear and consider evidence about—

1. the circumstances that led to imposition of the firearm disability,
2. the person's mental history,
3. the person's criminal history, and
4. the person's reputation.

The court may not grant relief under this section unless the court makes and enters in the record the following affirmative findings:

1. the person or ward is no longer likely to act in a manner dangerous to public safety, and

2. removing the person's or ward's disability to purchase a firearm is in the public interest.

Tex. Est. Code § 1202.201(c)–(d).

§ 9.5 Appointment of Successor Guardian

When there is a vacancy in the position of guardian because of the guardian's resignation, removal, or death, there typically is a need for further administration necessitating the appointment of a successor guardian. Additionally, there may be other circumstances that necessitate the removal of the guardian and appointment of a successor, not for any cause or error of the former but because of a higher right for appointment of the successor. The procedures for appointing successor guardians are generally included in Tex. Est. Code §§ 1203.101–.153. See forms 9-7 and 9-8 in this chapter.

§ 9.5:1 Resignation, Removal, or Death; Immediate Appointment

In the case of the resignation, removal, or death of a guardian, the court may, on application and on service of notice "as directed by the court," appoint a successor guardian. Tex. Est. Code § 1203.102(a). However, citation and notice are not required if the court finds that the immediate appointment of a successor guardian is necessary. Tex. Est. Code § 1203.102(a)–(b). The court can appoint a successor guardian as part of its final order in a resignation or removal proceeding, or after being informed of the death of the guardian, with or without an application having been filed requesting the appointment of a successor guardian. Subject to an order of the court, the successor guardian appointed immediately has the same rights and powers of the former guardian. Tex. Est. Code § 1203.102(b). The immediate appointment, however, does not preclude an interested person from filing an application to be appointed successor guardian, and, upon hearing, the court may set aside the immediate appointment and appoint a qualified applicant as successor guardian in accordance with Texas Estates Code chapter 1104. Tex. Est. Code § 1203.102(c). If the immediate appointment is set aside, the court may require the successor guardian to prepare and file a verified accounting. Tex. Est. Code § 1203.102(d).

The Estates Code does not specifically address the need for additional citation when an interested person files an application to be appointed successor guardian after a resignation, removal, or death has occurred. In practice, most courts require citation by posting or some other form of service based on the holding of *Torres v. Ramon*, 5 S.W.3d 780 (Tex. App.—San Antonio 1999, no pet.). In *Torres*, the court held that proper citation of each party's respective application for guardianship was necessary for the trial court to have jurisdiction to consider that party's application even though the Estates Code appears to require only service of the original (first) application for the appointment of a guardian. Because the cross-applicant did not perfect personal and other service of his application, the appellate court in *Torres* held that the trial court lacked jurisdiction to hear the cross-application for guardianship. In other words, the citation of the original application by another party did not grant the court jurisdiction over the cross-application. *Torres*, 5 S.W.3d at 782 n.1.

Practice Pointer: Notwithstanding the jurisdiction requirement, courts are also required to make a reasonable effort to consider the ward's preference for the person to be appointed guardian. *See* Tex. Est. Code § 1104.002. Therefore, some notice of the appointment of a successor, the appointment of a guardian ad litem, or a visit from a court investigator may be necessary to comply with the preference requirements set forth in the Estates Code. It is advisable to check with court staff to determine each court's procedures for appointing a successor guardian. Some courts allow the appointment by submission, others require a hearing, and all vary as to their notice requirements.

§ 9.5:2 Resignation

A guardian who desires to resign is required to file a written application with the court. Tex. Est. Code § 1203.001. The guardian of the ward's estate is required to accompany the guardian's application with a verified exhibit and final account showing the true condition of the guardianship entrusted to the guardian's care. Tex. Est. Code § 1203.001(1). The guardian of the ward's person is required to accompany their application with a verified report containing the required information under Texas Estates Code section 1163.101 showing the condition of the ward entrusted to the guardian's care. Tex. Est. Code § 1203.001(2). See form 9-9 in this chapter.

If the necessity exists, the court may immediately accept the resignation and appoint a successor guardian as provided by Estates Code section 1203.102(b). Tex. Est. Code § 1203.002(a); see also section 9.11 above. However, the court may not discharge a guardian of the estate or release the guardian or the sureties on the guardian's bond until the court approves the guardian's final accounting. Tex. Est. Code § 1203.002(b); *see also* Tex. Est. Code § 1203.006(a).

The court is required to set a hearing date and time on the application to resign at which interested persons may appear and contest the exhibit and final account or report of the guardian supporting the application. Tex. Est. Code § 1203.004(a)–(b). Citation for the hearing is required to be served on all interested persons by posting unless the court directs that citation be published. Tex. Est. Code § 1203.004(c).

At the hearing, if the court is satisfied that all matters entrusted to the guardian applying to resign have been handled and accounted for in accordance with law, the court shall enter an order approving the exhibit and final account or report and requiring that the guardian turn over all estate property. Tex. Est. Code § 1203.005(b). The guardian of the person is required to comply with all court orders concerning the ward. Tex. Est. Code § 1203.005(c). The court will not enter an order accepting the resignation and discharging the guardian and the sureties on the guardian's bond, if any, until the guardian has fully complied with the court's orders. Tex. Est. Code § 1203.006(b). Thus, the order approving the final account should include language that discharges the guardian upon the filing of a certificate of compliance, or the guardian should file a certificate of compliance and seek entry of a separate order accepting the guardian's resignation and discharging them. See form 9-10.

§ 9.5:3 Removal

Texas Estates Codes sections 1203.051 and 1203.052 provide for the removal of a guardian by the court or at the request of an interested person, with or without notice to and service of citation on the guardian, depending on the circumstances requiring the removal.

A guardian may be removed without notice if the guardian—

1. fails to qualify;
2. fails to timely file an inventory;
3. fails to timely give a new bond;
4. is absent from the state for three months at one time without court permission or removes from the state;
5. cannot be served, evades service, cannot be found, or is a nonresident of the state without a resident agent to accept service;

6. neglects to educate or maintain the ward as liberally as the ward's means and the condition of the ward's estate permit;
7. misapplies, embezzles, or removes from the state estate assets or is about to do any of these acts; or
8. engages in conduct with respect to the ward that would be considered to be abuse, neglect, or exploitation, as those terms are defined by Texas Human Resources Code section 48.002.

Tex. Est. Code § 1203.051(a). Removal without notice for the last two reasons must be found on the basis of clear and convincing evidence given under oath. Tex. Est. Code § 1203.056(a).

A guardian may be removed with notice if—

1. sufficient grounds appear to support the belief that the guardian has misapplied, embezzled, or removed property committed to the guardian's care from the state or is about to do so;
2. the guardian fails to file any account or report required by law;
3. the guardian fails to obey court orders with respect to the guardian's duties;
4. the guardian is proved to be guilty of gross misconduct or gross mismanagement in the performance of the guardian's duties;
5. the guardian becomes incapacitated, is sentenced to the penitentiary, or is otherwise incapable of performing the guardian's duties;
6. the guardian engages in conduct with respect to the ward that would be considered to be abuse, neglect, or exploitation, as those terms are defined by Human Resources Code section 48.002;
7. the guardian neglects to educate or maintain the ward to the extent that the ward's estate and the ward's ability or condition permit;
8. the guardian interferes with the ward's progress or participation in community programs;
9. the guardian, if a private professional guardian, fails to be certified as required by subchapter G, chapter 1104, of the Estates Code;
10. the court determines that, because of the dissolution of the joint guardians' marriage, the termination of the guardians' joint appointment and the continuation of only one of the joint guardians as the sole guardian is in the best interest of the ward; or
11. the guardian would be ineligible for appointment under subchapter H, chapter 1104, of the Estates Code.

Tex. Est. Code § 1203.052(a).

If there is probable cause to believe that a guardian is an incapacitated person, an attorney ad litem may be appointed to represent the ward's interests, either on the court's own motion or on the complaint of an interested person, and a court investigator or guardian ad litem may be appointed to investigate whether the guardian should be removed. If the court determines it is necessary, the court may appoint the necessary physicians to examine the guardian to determine whether the guardian is incapacitated for purposes of Estates Code section 1203.052(a)(5)(A). Tex. Est. Code § 1203.052(c).

If the necessity exists, the court may immediately appoint a successor guardian following removal of the guardian as provided by Estates Code section 1203.102(b). Tex. Est. Code § 1203.054; see also section 9.11 above. The court may not discharge the

removed guardian of the estate or release the guardian or the sureties on the guardian's bond until the court approves the guardian's final accounting. Tex. Est. Code § 1203.054. But the court can order the removed guardian to immediately turn over the ward's estate to the successor guardian. Tex. Est. Code § 1203.055.

§ 9.5:4 Death

Texas Estates Code section 1203.102 provides for the appointment of a successor guardian when the former guardian dies, if the guardianship needs to be continued. *See* Tex. Est. Code § 1203.102(a). See form 9-7 in this chapter.

The personal representative of the deceased guardian, at the time and in the manner ordered by the court, is required to account for, pay, and deliver all guardianship property entrusted to the representative's care to a successor guardian or other person entitled to receive it. Tex. Est. Code § 1203.102(a). Accordingly, citation on the deceased guardian's personal representative is required.

§ 9.5:5 Other Circumstances Requiring Appointment

The Texas Estates Code addresses five additional circumstances when a successor guardian may be appointed without the resignation, removal, or death of the currently serving guardian. Tex. Est. Code §§ 1203.103–.107. In such circumstances, the prior guardian's letters are revoked, and the successor is appointed. These include the following:

1. When the person seeking such appointment has a prior right to serve in such capacity and has not waived that right. Tex. Est. Code § 1203.103.
2. When the person seeking appointment was named in the will to serve but was a minor at the time the will was probated and has now become an adult. Tex. Est. Code § 1203.104.
3. When the person seeking appointment was named in the will to serve but was sick or absent from the state when the will was probated. Tex. Est. Code § 1203.105.
4. When the person seeking appointment was named in the will to serve and the will was not discovered until after the currently serving guardian was appointed. Tex. Est. Code § 1203.106.
5. When the person seeking appointment was a spouse, parent, or child of the proposed ward who was previously disqualified from serving because of a litigation conflict under Estates Code section 1104.354(1) and the conflict has been removed and the person is now qualified to serve. Tex. Est. Code § 1203.107.

The court may revoke letters of guardianship and grant other letters as described in the above five circumstances only (1) upon application and (2) after personal service of citation on the person whose letters are sought to be revoked requiring the person to appear and show cause why the application should not be granted. Tex. Est. Code § 1203.101. See form 9-8 in this chapter. Under these provisions, the guardian is not immediately removed, and his powers to act over the ward and his estate are considered valid pending the court's determination that the applicant's right is in fact superior. If a prior right to act as guardian is shown to exist, the previously appointed guardian must relinquish control of the ward and his estate, the letters of the previously appointed guardian will be revoked, and letters will be granted to the applicant who exhibits the prior right. Because the powers of the prior guardian terminate when the court signs an order appointing a successor and revoking the prior letters of guardianship, the court should also order an immediate turnover of assets to the successor on the successor's qualification.

§ 9.5:6 Order Appointing Successor Guardian

The Texas Estates Code does not mandate any particular form, findings, or statements that must be in an order appointing a successor guardian. The appointment of a successor guardian may be, and often is, included as part of the court's order relating to the former guardian (i.e., resignation or removal). But the appointment can also be made by separate order. It is suggested, however, that the order appointing the successor guardian include findings and statements similar to the order appointing the original guardian. See form 9-11 in this chapter. Thus, the order should include the following:

1. that the court continues to have jurisdiction and venue;
2. the name of the ward;
3. whether the ward was represented by an ad litem (if not, the order should confirm that an ad litem was not necessary);
4. that the ward remains incapacitated (for example, total, partial, minor);
5. that the appointment of a successor guardian is in the ward's best interest;
6. that the person seeking to be appointed guardian is eligible and qualified to serve; and
7. the amount of bond required.

The order should then—

1. grant or order the appointment of the person or entity appointed as successor guardian;
2. state whether the successor will serve as guardian of the person, estate, or both;
3. state the successor guardian's powers and any related limitations; and
4. set the amount of bond and require the guardian to execute an oath.

§ 9.5:7 Rights, Powers, and Duties of Successor Guardian

The rights, powers and duties of successor guardians are described in Texas Estates Code sections 1203.202–.203. A successor guardian has all rights and powers of and is subject to all duties of the predecessor. Tex. Est. Code § 1203.202(a). A successor guardian shall administer the ward's estate as a continuation of the former administration. Tex. Est. Code § 1203.202(b). However, a successor guardian must look to the order appointing the successor guardian to determine if their powers and duties were expanded or contracted from the predecessor's administration. Ultimately, the order of appointment will control, and the successor guardian will be required to seek court approval before taking many actions.

Because of the importance of the final account, a successor guardian must pursue the predecessor to return a proper final account and is entitled to any order in the court's power necessary to enforce the delivery of the ward's estate. *See* Tex. Est. Code § 1151.105; *Portanova v. Hutchison*, 766 S.W.2d 856, 857 (Tex. App.—Houston [1st Dist.] 1989, no writ). To the extent a predecessor's accounting is deficient for any reason, a successor guardian should file any and all objections and appear and challenge the accounting at any hearing to approve the accounting. The ability to challenge the predecessor's final account and prevent him from receiving a judicial discharge provides a significant power to the successor guardian in his efforts to identify and determine the extent of the ward's property, confirm receipt of all the property in the predecessor's possession, and discover any claims against the predecessor in relation to the predecessor's administration.

A successor guardian may take the following actions: (1) make and be made a party to a suit prosecuted by or against the predecessor, (2) settle with the predecessor and receive and give receipt for any property in the predecessor's possession, and (3) file suit against the predecessor and the predecessor's bond(s) for all the estate property that the predecessor received but did not account for and turn over. Tex. Est. Code § 1203.202(c).

Finally, not later than the thirtieth day after qualification, a successor guardian is required to prepare and file an inventory, appraisement, and list of claims of the estate in the same manner required of the originally appointed guardian. Tex. Est. Code § 1203.203.

Form 9-1

The ward or any person interested in the ward's welfare may petition the court for an order of modification. Tex. Est. Code § 1202.051. See section 1202.052 for the application's required contents.

[Caption. See § 3 of the Introduction in this manual.]

Application to Modify Guardianship

[[**Name of ward**], Ward, an incapacitated person/[**name of applicant**], Applicant, the [**relationship**] of [**name of ward**]], files this Application to Modify Guardianship and shows the following in support:

1. [**Name of ward**], Ward, is an adult [male/female], born [**date of birth**], who resides at [**address, city, state**] [**include if ward is not the applicant:** and may be served with citation at [**address, city, state**]]. Ward's estate is described in the inventory of the estate on file and approved by this Court on [**date**]. [**Include if applicable:** In addition, Ward's estate is entitled to [compensation/a pension/insurance proceeds/an allowance].]

> If the guardian of the estate is not also the guardian of the person, repeat the following for each.

2. On [**date**] the Court appointed [**name of guardian**], Guardian, as guardian of the [person/estate/person and estate] of [**name of ward**], an incapacitated person. Guardian resides at [**address, city, state**].

3. The guardianship has proceeded as a [**nature and description of ward's guardianship, e.g.,** partial guardianship with Guardian exercising only limited rights and powers **or** full guardianship with all rights and powers] over [Ward/Ward's estate/Ward and Ward's estate] for [**time period, e.g.,** two years].

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4. Ward's condition has now changed to the extent that Guardian's rights, powers, and duties need to be [limited/expanded] because Ward [has/does not have] sufficient capacity to care for [his/her] physical health and manage [his/her] own financial affairs. [**Describe circumstances giving rise to the application**].

5. A [letter/certificate] from Ward's attending physician dated [**date**] supporting the requested modification is attached as Exhibit [**exhibit number/letter**]. Based on the present findings of Ward's physician, Guardian's rights, powers, and duties should be [limited/expanded] as Ward [can/cannot] exercise independent judgment and control over [his/her] [person/estate/person and estate]. As a result of this change in condition, the Court is requested to modify the existing letters of guardianship issued to [**name of guardian**] as guardian of the [person/estate/person and estate] to [**describe additional powers or duties to be granted to guardian or limitation of powers or duties previously granted to guardian, e.g.,** [allow Ward/permit Guardian] to exercise full rights, powers, and duties over [Ward/Ward's estate/Ward and Ward's estate]].

6. Applicant requests that the order appointing guardian of the [person/estate/person and estate] of [**name of ward**], an incapacitated person, be modified under section 1202.051(2) of the Texas Estates Code and that the rights, powers, and duties of Guardian, as specified in the order of appointment signed on [**date**] and in the letters of guardianship issued, be revised to find that Ward is [now/no longer] able to exercise the above described powers and duties over [his/her] [person/estate/person and estate].

Include the following if the ward is sixty years old or older.

7. Notice will be given to: [**List names, addresses, and relationships of the ward's spouse, siblings, and children, if any, if known to applicant. If there is no known spouse, sibling, or child, list next of kin.**]

Continue with the following.

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Applicant prays that notice of this application be given as required by law, that new letters of guardianship issue [granting additional powers and duties to Guardian/limiting Guardian's powers and duties] as described herein and for all further relief to which Applicant may be entitled.

Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

VERIFICATION

STATE OF TEXAS)

COUNTY OF [**county**])

BEFORE ME, the undersigned notary public, on this day personally appeared [**name**], who being by me duly sworn on [his/her] oath deposed and said that [he/she] has read the above and foregoing [**title of document**] [and exhibits] and that the matters contained therein are within [his/her] personal knowledge and are true and correct.

_____

SWORN TO AND SUBSCRIBED BEFORE ME on _____.

_____

Notary Public, State of Texas

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Attach exhibit(s).

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Form 9-2

[Caption. See § 3 of the Introduction in this manual.]

Order Modifying Guardianship

On [**date**] the Court considered the Application to Modify Guardianship filed by [**name of applicant**] and the order appointing [**name of guardian**], Guardian, as guardian of the [person/estate/person and estate] of [**name of ward**], Ward, an incapacitated person. [Guardian appeared in person and through [his/her] attorney/Ward appeared [in person and] through [his/her] [attorney/guardian/attorney and guardian] ad litem]. [After hearing evidence and arguments from counsel/After considering the evidence], the Court finds by a preponderance of the evidence as required by section 1202.153 of the Texas Estates Code that [**describe circumstances giving rise to the application, e.g.,** Ward's condition [improved/deteriorated]] and Guardian's rights, powers, and duties should be [limited/expanded] as set forth in the Application as Ward is now [partially capacitated/totally incapacitated] and [capable/totally incapable] of maintaining [his/her] [person/estate/person and estate]; that the change in Ward's capacity warrants modification; and that the application should be granted.

IT IS ORDERED that the order appointing guardian of the [person/estate/person and estate] dated [**date**] be modified to reflect that [**name of ward**] is now [partially capacitated/totally incapacitated] and [capable/totally incapable] of maintaining [his/her] [person/estate/person and estate] and that [**describe additional powers or duties granted to guardian or limitation of powers or duties previously granted to guardian, e.g.,** [[**name of guardian**] as guardian of the [person/estate/person and estate] shall/Ward is allowed to] exercise and have full rights, powers, and duties over [Ward/Ward's estate/Ward and Ward's estate]].

IT IS FURTHER ORDERED that all previously issued letters in the possession of [**name of guardian**] be returned to the clerk of this Court for cancellation; that all other out-

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standing letters are hereby canceled; and that the clerk of this Court issue new letters of guardianship that specifically state that [**name of ward**] is now [partially capacitated/totally incapacitated] and [capable/totally incapable] of maintaining [his/her] [person/estate/person and estate] and that [**describe additional powers or duties granted to guardian or limitation of powers or duties previously granted to guardian, e.g.,** [[**name of guardian**] as guardian of the [person/estate/person and estate] shall/Ward is allowed to] exercise and have full rights, powers, and duties over [Ward/Ward's estate/Ward and Ward's estate]].

IT IS FURTHER ORDERED that the term of this guardianship be modified to reflect that this guardianship continue until [**name of ward**] is restored or has died or this Court determines that this guardianship should be terminated.

Include the following if applicable.

IT IS FURTHER ORDERED that the fees of [**name of attorney ad litem**], as attorney ad litem, in the amount of $[**amount**] in this proceeding are approved and ordered paid and that [**name of attorney ad litem**] is discharged as attorney ad litem.

And/Or

IT IS FURTHER ORDERED that the fees of [**name of guardian ad litem**], as guardian ad litem, in the amount of $[**amount**] in this proceeding are approved and ordered paid and that [**name of guardian ad litem**] is discharged as guardian ad litem.

And/Or

IT IS FURTHER ORDERED that the fees of [**name of appointee**], as [**type of appointee**], in the amount of $[**amount**] in this proceeding are approved and ordered paid.

And/Or

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IT IS FURTHER ORDERED that all fees and expenses of this proceeding are taxed as costs and that [**name of guardian**], as guardian of the estate of [**name of ward**], is ordered to pay those fees and expenses out of the guardianship estate.

Continue with the following.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 9-3

[Caption. See § 3 of the Introduction in this manual.]

Application for Partial Restoration of Ward

[[**Name of ward**], Ward, an incapacitated person/[**name of applicant**], Applicant, the [**relationship**] of [**name of ward**]], files this Application for Partial Restoration of Ward and shows the following in support:

1. [**Name of ward**], Ward, is an adult [male/female], born [**date of birth**], who resides at [**address, city, state**] [**include if the ward is not the applicant:** and may be served with citation at [**address, city, state**]]. Ward's estate is described in the inventory of the estate on file and approved by this Court on [**date**]. [**Include if applicable:** In addition, Ward's estate is entitled to [compensation/a pension/insurance proceeds/an allowance].]

> If the guardian of the estate is not also the guardian of the person, repeat the following paragraph for each.

2. On [**date**] the Court appointed [**name of guardian**], Guardian, as guardian of the [person/estate/person and estate] of [**name of ward**], an incapacitated person. Guardian resides at [**address, city, state**].

3. [**State facts that led to the filing of the application for appointment of guardian.**] The guardianship has proceeded as a [**nature and description of ward's guardianship, e.g.,** partial guardianship with Guardian exercising only limited rights and powers **or** full guardianship with all rights and powers] over [Ward/Ward's estate/Ward and Ward's estate] for [**time period, e.g.,** two years].

> Paragraphs 4.–6. below are examples of the type of information the court will consider but are not required to be in the application and may not be available.

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4. On [**date**], Guardian filed [his/her] annual report on location, condition, and well-being of Ward. A copy of that report is attached as Exhibit [**exhibit number/letter**] and is incorporated by this reference for all purposes. [**State facts from the report that support this application.**]

5. On [**date**], [**name of court visitor**] filed a court visitor program summary report with the Court detailing [his/her] visit with Ward. A copy of that report is attached as Exhibit [**exhibit number/letter**] and is incorporated by this reference for all purposes. [**State facts from the report that support this application.**]

6. On [**date**], Guardian filed [his/her] most recent annual report on the location, condition, and well-being of Ward, a copy of which is attached as Exhibit [**exhibit number/letter**] and is incorporated by this reference for all purposes. [**State facts from the report that support this application.**]

7. Since Guardian's appointment, Ward has regained sufficient mental capacity to do some, but not all, of the tasks necessary to care for [himself/herself] and to manage [his/her] property. Specifically, Ward has regained sufficient mental capacity in regard to the following activities:

Select from the following as applicable.

a. the power to vote;

b. the power to handle money up to $[**amount**] per week;

c. the power to consent to routine medical and dental treatment, including non-invasive procedures, and psychiatric visits;

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d. the power to make arrangements to travel within the state of Texas without court approval (i) with a family member without Guardian's consent and (ii) with a companion with Guardian's consent;

e. the power to enroll in public or private residential care facilities;

f. the power to make decisions related to military service;

g. the power to participate in the selection of residential placement; and

h. the power to enroll in educational classes.

Continue with the following.

8. Ward currently has the capacity to perform the tasks commensurate with the powers listed above. Ward's progress is documented in a [letter/certificate] dated [**date**] from [**name of physician**]. A copy of the physician's [letter/certificate] is attached as Exhibit [**exhibit number/letter**] and is incorporated by this reference for all purposes. [**State facts from the letter that support this application.**]

9. Accordingly, Applicant requests the Court to partially restore Ward to the extent [he/she] has regained sufficient mental capacity in regard to the activities listed above.

Applicant prays that notice of this application be given as required by law, that the Court partially restore [**name of ward**] to the extent [he/she] has regained sufficient mental capacity in regard to the activities listed above, and for all further relief to which Applicant may be entitled.

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Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

VERIFICATION

STATE OF TEXAS)

COUNTY OF [**county**])

BEFORE ME, the undersigned notary public, on this day personally appeared [**name**], who being by me duly sworn on [his/her] oath deposed and said that [he/she] has read the above and foregoing [**title of document**] [and exhibits] and that the matters contained therein are within [his/her] personal knowledge and are true and correct.

_____

SWORN TO AND SUBSCRIBED BEFORE ME on _____.

_____
Notary Public, State of Texas

Attach exhibit(s).

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Form 9-4

[Caption. See § 3 of the Introduction in this manual.]

Order for Partial Restoration of Ward

On [**date**] the Court considered the Application for Partial Restoration of Ward filed by [**name of applicant**] and the order appointing [**name of guardian**], Guardian, as guardian of the [person/estate/person and estate] of [**name of ward**], Ward, an incapacitated person. [Guardian appeared in person and through [his/her] attorney/Ward appeared [in person and] through [his/her] [attorney/guardian/attorney and guardian] ad litem]. [After hearing evidence and arguments from counsel/After considering the evidence], the Court finds by a preponderance of the evidence as required by section 1202.153 of the Texas Estates Code that Ward has sufficient mental capacity with regards to the activities described in the application; the current degree of Ward's incapacity warrants a modification of the guardianship; some of Ward's rights need to be restored; and the application is in all respects in order.

IT IS THEREFORE ORDERED that [**name of ward**] has regained sufficient mental capacity to do some, but not all, of the tasks necessary to care for [himself/herself] and to manage [his/her] property and, therefore, is partially restored with regard to—

Select from the following as applicable.

1. the power to vote;

2. the power to handle money up to $[**amount**] per week;

3. the power to consent to routine medical and dental treatment, including non-invasive procedures, and psychiatric visits;

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4. the power to make arrangements to travel within the state of Texas without court approval (a) with a family member without [**name of guardian**]'s consent and (b) with a companion with [**name of guardian**]'s consent;

5. the power to enroll in public or private residential care facilities;

6. the power to make decisions related to military service;

7. the power to participate in the selection of residential placement; and

8. the power to enroll in educational classes.

Continue with the following.

IT IS FURTHER ORDERED that [**name of guardian**], guardian of the [person/estate/person and estate] of [**name of ward**], an incapacitated person, retain full authority over [**name of ward**]'s [person/estate/person and estate] with all of the duties, powers, and limitations that can be granted to a guardian of the [person/estate/person and estate] by the laws of Texas except the powers that have been restored to [**name of ward**], which are—

Select from the following as applicable.

1. the power to vote;

2. the power to handle money up to $[**amount**] per week;

3. the power to consent to routine medical and dental treatment, including non-invasive procedures, and psychiatric visits;

4. the power to make arrangements to travel within the state of Texas without court approval (a) with a family member without [**name of guardian**]'s consent and (b) with a companion with [**name of guardian**]'s consent;

5. the power to enroll in public or private residential care facilities;

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6. the power to make decisions related to military service;

7. the power to participate in the selection of residential placement; and

8. the power to enroll in educational classes.

Continue with the following.

IT IS FURTHER ORDERED that the clerk of this Court is directed to reissue letters of permanent guardianship to [**name of guardian**], guardian of the [person/estate/person and estate] of [**name of ward**], an incapacitated person, specifying the specific powers, limitations, and duties of [**name of guardian**] with respect to [**name of ward**]'s care and management of [**name of ward**]'s property as stipulated by this Order.

IT IS FURTHER ORDERED that [**name of guardian**]'s prior bond in the sum of $[**amount**] and oath of office remain in effect.

IT IS FURTHER ORDERED that [**name of guardian**] is authorized to release to [**name of ward**] the sum of $[**amount**] per week out of the income and principal until further orders of this Court.

Include the following if applicable.

IT IS FURTHER ORDERED that the fees of [**name of attorney ad litem**], as attorney ad litem, in the amount of $[**amount**] in this proceeding are approved and ordered paid and that [**name of attorney ad litem**] is discharged as attorney ad litem.

And/Or

IT IS FURTHER ORDERED that the fees of [**name of guardian ad litem**], as guardian ad litem, in the amount of $[**amount**] in this proceeding are approved and ordered paid and that [**name of guardian ad litem**] is discharged as guardian ad litem.

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And/Or

IT IS FURTHER ORDERED that the fees of [**name of appointee**], as [**type of appointee**], in the amount of $[**amount**] in this proceeding are approved and ordered paid.

And/Or

IT IS FURTHER ORDERED that all fees and expenses of this proceeding are taxed as costs and that [**name of guardian**], as guardian of the estate of [**name of ward**], is ordered to pay those fees and expenses out of the guardianship estate.

Continue with the following.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 9-5

[Caption. See § 3 of the Introduction in this manual.]

Application for Restoration of Ward and Termination of Guardianship

[[**Name of ward**], Ward, an incapacitated person/[**name of applicant**], Applicant, the [**relationship**] of [**name of ward**]], files this Application for Restoration of Ward and Termination of Guardianship and shows the following in support:

1. Ward's estate is described in the inventory of the estate on file and approved by this Court on [**date**]. [**Include if applicable:** In addition, Ward's estate is entitled to [compensation/a pension/insurance proceeds/an allowance].]

> If the guardian of the estate is not also the guardian of the person, repeat the following paragraph for each.

2. On [**date**] the Court appointed [**name of guardian**], Guardian, as guardian of the [person/estate/person and estate] of [**name of ward**], an incapacitated person. Guardian resides at [**address, city, state**].

3. [**State facts that led to the filing of the application for appointment of guardian.**] The guardianship has proceeded as a [**nature and description of the ward's guardianship, e.g.,** partial guardianship with Guardian exercising only limited rights and powers **or** full guardianship with all rights and powers] over [Ward/Ward's estate/Ward and Ward's estate] for [**time period, e.g.,** two years].

> Paragraphs 4.–6. below are examples of the type of information the court will consider but are not required to be in the application and may not be available.

4. On [**date**], Guardian filed [his/her] annual report on location, condition, and well-being of Ward. A copy of that report is attached as Exhibit [**exhibit number/letter**] and is incor-

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porated by this reference for all purposes. [**State facts from this report that support the application.**]

5. On [**date**], [**name of court visitor**] filed a court visitor program summary report with this Court detailing [his/her] visit with Ward in Guardian's home. A copy of that report is attached as Exhibit [**exhibit number/letter**] and is incorporated by this reference for all purposes. [**State facts from this report that support the application.**]

6. Since Guardian's appointment, Ward has regained sufficient mental capacity to do all tasks necessary to care for [himself/herself] and to manage [his/her] financial affairs. Ward's capacity is documented in a [letter/certificate] dated [**date**] from [**name of physician**]. A copy of the physician's [letter/certificate] is attached as Exhibit [**exhibit number/letter**] and is incorporated by this reference for all purposes. [**State facts from the letter that support this application.**]

7. [**Name of applicant**] believes that the guardianship should be terminated because Ward's condition no longer warrants its existence. The termination and restoration are in the best interests of Ward and are in keeping with the policy of striving for maximum self-reliance and independence adopted in section 1001.001 of the Texas Estates Code. In this case, the policy would be fulfilled by the complete restoration of Ward and the termination of the guardianship.

Applicant prays that notice of this application be given as required by law, that the Court find that [**name of ward**] has regained [his/her] capacity to do all of the tasks necessary to care for [himself/herself] and to manage [his/her] property and, therefore, order the termination of the guardianship, and for all further relief to which Applicant may be entitled.

Respectfully submitted,

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_____

[**Name**]
Applicant

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

VERIFICATION

STATE OF TEXAS)

COUNTY OF [**county**])

BEFORE ME, the undersigned notary public, on this day personally appeared [**name**], who being by me duly sworn on [his/her] oath deposed and said that [he/she] has read the above and foregoing [**title of document**] [and exhibits] and that the matters contained therein are within [his/her] personal knowledge and are true and correct.

_____

SWORN TO AND SUBSCRIBED BEFORE ME on _____.

_____
Notary Public, State of Texas

Attach exhibit(s).

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Form 9-6

[Caption. See § 3 of the Introduction in this manual.]

Order Restoring Capacity and Terminating Guardianship

On [**date**] the Court considered the Application for Restoration of Ward and Termination of Guardianship of the [person/estate/person and estate] of [**name of ward**], Ward, filed by [[**name of guardian**]/[**name of ward**]/[**name of person interested in the ward**]]. [Guardian appeared in person and through [his/her] attorney/Ward appeared [in person and] through [his/her] [attorney/guardian/attorney and guardian] ad litem]. [After hearing evidence and arguments from counsel/After considering the evidence], the Court finds by a preponderance of the evidence as required by section 1202.153 of the Texas Estates Code that Ward has regained the capacity to do all of the tasks necessary to care for [himself/herself] and to manage [his/her] property, that Ward is no longer incapacitated and should be restored, that there no longer exists a need to continue the guardianship of the [person/estate/person and estate], that it will be in the best interests of Ward and [his/her] estate for the guardianship to be terminated, and that the application should be granted.

IT IS THEREFORE ORDERED that [**name of ward**] is found to have regained the capacity to do all tasks necessary to care for [himself/herself] and to manage [his/her] property.

IT IS FURTHER ORDERED that, in the absence of need for the guardianship of the [person/estate/person and estate] of [**name of ward**], that guardianship is terminated.

IT IS FURTHER ORDERED that [**name of guardian**] present to the Court a verified account for final settlement and the final report of the condition of [**name of ward**] in accordance with the Texas Estates Code within [**number**] days.

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IT IS FURTHER ORDERED that on final settlement of this guardianship and subject to the approval of the Court, [**name of guardian**] deliver all the property of the guardianship estate and any income due according to section 1204.107 of the Texas Estates Code to [**name of ward**], who is fully restored.

Include the following if applicable.

IT IS FURTHER ORDERED that the fees of [**name of attorney ad litem**], as attorney ad litem, in the amount of $[**amount**] in this proceeding are approved and ordered paid and that [**name of attorney ad litem**] is discharged as attorney ad litem.

And/Or

IT IS FURTHER ORDERED that the fees of [**name of guardian ad litem**], as guardian ad litem, in the amount of $[**amount**] in this proceeding are approved and ordered paid and that [**name of guardian ad litem**] is discharged as guardian ad litem.

And/Or

IT IS FURTHER ORDERED that the fees of [**name of appointee**], as [**type of appointee**], in the amount of $[**amount**] in this proceeding are approved and ordered paid.

And/Or

IT IS FURTHER ORDERED that all fees and expenses of this proceeding are taxed as costs and that [**name of guardian**], as guardian of the estate of [**name of ward**], is ordered to pay those fees and expenses out of the guardianship estate.

Continue with the following.

SIGNED on _____.

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_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 9-7

Because the court has previously determined the ward's capacity in the original order of appointment, the application should seek an appointment of the same degree and should include this same determination as a part of the finding of fact in the order approving the appointment of a successor guardian. The application should contain information concerning the specific limitations contained in the original order of appointment so that the court will be apprised of the ward's needs and the limitations to be placed on the successor guardian. If applicable, the application should also detail the specific emergency conditions that make immediate appointment of a successor guardian necessary. The guardian's powers should not be expanded without compliance with the modification provisions of the Texas Estates Code.

[Caption. See § 3 of the Introduction in this manual.]

Application for Appointment of Successor Guardian

[Due to Death or Prior Resignation]

[**Name of applicant**], Applicant, the [**relationship**] of [**name of ward**], Ward, an incapacitated person, files this Application for Appointment of Successor Guardian and shows the following in support:

1. Ward is [a minor/an adult] [male/female] who is [**age**] years old, born [**date of birth**]. Ward currently resides at [**address, city, county**] County, Texas. Ward has previously been served with citation. Additional service of notice will be made as directed by the Court pursuant to section 1203.153 of the Texas Estates Code.

2. [**Name of guardian**], Guardian, was appointed guardian of the [person/estate/person and estate] of Ward by the Court on [**date**]. Guardian [is now deceased, having died on [**date**]/resigned on [**date**]].

Include the following if applicable.

3. A copy of Guardian's [death certificate/resignation] is attached as Exhibit [**exhibit number/letter**].

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Continue with the following.

4. [**Name of proposed successor guardian**], Proposed Successor Guardian, resides at [**address, city, county**] County, Texas. Proposed Successor Guardian is [related to Ward in the capacity of [**relationship**]/not related to Ward]. Proposed Successor Guardian desires to be appointed as the guardian of the [person/estate/person and estate] of Ward. Proposed Successor Guardian is eligible to receive letters of guardianship and is entitled to be appointed.

5. This Court has venue over these proceedings because the original guardianship was filed and created in this Court.

Include the following if the appointment of an immediate successor guardian is necessary.

6. Ward is a person who is incapacitated to care for [himself/herself] and to manage [his/her] property and financial affairs and is currently without a legal guardian of [his/her] person and of [his/her] estate. There exists an immediate need for the appointment of a successor guardian to provide for the ongoing needs for the care and attention of [Ward/Ward's estate/Ward and Ward's estate] for the following reasons: [**specify**].

7. The requested term of this guardianship is [**specify, e.g.,** for such time as Ward's physical or medical condition necessitates the continuation of this guardianship].

8. The nature and degree of Ward's continuing incapacity is as follows: [**specify**].

Include the following if the original order of appointment restricted the rights and duties of the guardian or the ward.

9. The specific areas of protection and assistance being requested are as follows: [**specify**]. The limitations that are requested to be imposed on Ward are as follows: [**specify**].

Continue with the following.

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Applicant prays that [**name of proposed successor guardian**] be appointed successor guardian of the [person/estate/person and estate] of [**name of ward**], an incapacitated person, that the Court order the clerk of this Court to issue letters of guardianship to Proposed Successor Guardian on [his/her] qualification as required by law, and for all further relief to which Applicant may be entitled.

Respectfully submitted,

_____

[**Name**]
Applicant

_____

[**Name**]
Proposed Successor Guardian

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Certificate of Service

I certify that a true copy of this [**title of document**] was served in accordance with rule 21a of the Texas Rules of Civil Procedure.

SIGNED on _____.

_____

[**Name of attorney**]

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Form 9-8

[Caption. See § 3 of the Introduction in this manual.]

Application for Appointment of Successor Guardian

[Due to Other Circumstances Requiring Appointment]

[**Name of applicant**], Applicant, files this Application for Appointment of Successor Guardian and shows the following in support:

1. Applicant is [**name of ward**]'s [**relationship**] and resides at [**address, city, county**] County, Texas. Applicant is a person interested in [**name of ward**]'s welfare and is qualified to serve as guardian of the [person/estate/person and estate]. [**Name of ward**], Ward, an incapacitated person, resides at and may be served with citation of this application at [**address, city, county**] County, Texas.

2. [**Name of guardian**] is currently serving as guardian of the [person/estate/person and estate], and [he/she] may be served with this application at [**address, city, county**] County, Texas.

3. This application is brought pursuant to section [**specify applicable section between 1203.103 and 1203.107**] of the Texas Estates Code. Applicant has a right to serve as guardian of the [person/estate/person and estate]. [**Describe circumstances giving rise to the application, e.g.,** When this guardianship was initially opened, Applicant was a minor. Unfortunately, Ward's condition has deteriorated to such a degree that [he/she] has little recognition of [his/her] surroundings. Applicant believes it would be in the best interest of Ward, now that Applicant has reached majority, to have a family member caring for and overseeing Ward's personal decisions. Applicant is able to monitor Ward's care and would prefer to have family members making the decisions concerning Ward's care rather than to have a nonrelative mak-

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ing these decisions. Applicant believes [his/her] appointment as guardian of the person is in the best interest of Ward.]

4. Applicant brings this application in good faith and with just cause and requests that [his/her] attorney's fees and expenses be paid from Ward's estate.

Applicant prays that notice of this application be given as required by law; that, pursuant to section [**specify a section between 1203.103 and 1203.107**] of the Texas Estates Code, [**name of guardian**] be removed as guardian of the person and Applicant be appointed successor guardian of the [person/estate/person and estate]; and for all further relief to which Applicant may be entitled.

Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Certificate of Service

I certify that a true copy of this [**title of document**] was served in accordance with rule 21a of the Texas Rules of Civil Procedure.

SIGNED on _____.

_____

[**Name of attorney**]

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Form 9-9

Because the court has previously determined the ward's capacity in the original order of appointment, the application should seek an appointment of the same degree and should include this same determination as a part of the finding of fact in the order approving the appointment of a successor guardian. The application should contain information concerning the specific limitations contained in the original order of appointment so that the court will be apprised of the ward's needs and the limitations to be placed on the successor guardian. If applicable, the application should also detail the specific emergency conditions that make immediate appointment of a successor guardian necessary. The guardian's powers should not be expanded without compliance with the modification provisions of the Texas Estates Code.

[Caption. See § 3 of the Introduction in this manual.]

Application for Leave to Resign as Guardian and for Appointment of Successor Guardian

[**Name of applicant**], Applicant, guardian of the [person/estate/person and estate] of [**name of ward**], Ward, an incapacitated person, files this Application for Leave to Resign as Guardian and for Appointment of Successor Guardian and shows the following in support:

1. Ward is [a minor/an adult] [male/female] who is [**age**] years old, born [**date of birth**]. Ward currently resides at [**address, city, county**] County, Texas. Ward has previously been served with citation. Additional service of notice will be made as directed by the Court pursuant to section 1203.153 of the Texas Estates Code.

2. Applicant is the duly appointed, qualified, and acting guardian of the [person/estate/person and estate] of Ward. Applicant hereby resigns as guardian of the [person/estate/person and estate] because [**specify reasons for resignation**]. Applicant requests that the Court appoint a successor guardian of the [person/estate/person and estate] of Ward.

3. [A full and verified report on the location, condition, and well-being of Ward is attached as Exhibit [**exhibit number/letter**]./A full, complete, and verified final account, showing the true condition of Ward's estate, is attached as Exhibit [**exhibit number/letter**]./A full

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and verified report on the location, condition, and well-being of Ward is attached as Exhibit [**exhibit number/letter**]. Additionally, a full, complete, and verified final account, showing the true condition of Ward's estate, is attached as Exhibit [**exhibit number/letter**].]

Include the following if applicable.

4. Applicant requests that the Court appoint [**name of proposed successor guardian**], Proposed Successor Guardian, as the successor guardian.

5. Applicant believes that it is in the best interests of Ward to have Proposed Successor Guardian appointed as the successor guardian. It is no longer necessary for Applicant to serve as guardian because Ward's needs can be more adequately and economically served by Proposed Successor Guardian.

6. Proposed Successor Guardian resides at [**address, city, county**] County, Texas. Proposed Successor Guardian is [related to Ward in the capacity of [**relationship**]/not related to Ward]. Proposed Successor Guardian desires to be appointed as the guardian of the [person/estate/person and estate] of Ward. Proposed Successor Guardian is eligible to receive letters of guardianship and is entitled to be appointed.

Continue with the following.

7. This Court has venue over these proceedings because the original guardianship was filed and created in this Court.

Include the following if the appointment of an immediate successor guardian is necessary.

8. Ward is a person who is incapacitated to care for [himself/herself] and to manage [his/her] property and financial affairs. There exists an immediate need for the appointment of a successor guardian to provide for the ongoing needs for the care and attention of Ward and Ward's estate for the following reasons: [**specify**].

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Continue with the following.

9. The requested term of this guardianship is for [**specify, e.g.,** such time as Ward's physical or medical condition necessitates the continuation of this guardianship].

10. The nature and degree of Ward's continuing incapacity is as follows: [**specify**].

Include the following only if the original order restricted the guardian or the ward to specific areas of authority or limitation.

11. The specific areas of protection and assistance being requested are as follows: [**specify**]. The limitations that are requested to be imposed on Ward are as follows: [**specify**].

Continue with the following.

Applicant prays that their resignation be accepted and that the Court appoint a successor guardian of the [person/estate/person and estate] of [**name of ward**], an incapacitated person; that the Court order the clerk of this Court to issue letters of guardianship to Successor Guardian on their qualification as required by law; and for all further relief to which Applicant may be entitled.

Respectfully submitted,

_____

[**Name**]
Applicant

Include a signature line for a proposed successor guardian if applicable.

_____

[**Name**]
Proposed Successor Guardian

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_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Certificate of Service

I certify that a true copy of this [**title of document**] was served in accordance with rule 21a of the Texas Rules of Civil Procedure.

SIGNED on _____.

_____

[**Name of attorney**]

Attach exhibit(s) if applicable.

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Form 9-10

This form is to be used for the approval of a final account or report (or both) in the case of a resigning guardian.

[Caption. See § 3 of the Introduction in this manual.]

Order Approving [Final Account/Final Report/Final Account and Report] and Ordering Delivery of Estate

On [**date**] the Court considered the [Final Account/Final Report/Final Account and Report] filed by [**name of guardian**], Guardian, as [guardian of the person/guardian of the estate/guardian of the person and estate] of [**name of ward**], Ward, an incapacitated person. The Court, having examined the account and documents filed and having heard all objections, exceptions, and evidence in support of and against the [Final Account/Final Report/Final Account and Report] and having audited and settled the same, makes the following findings:

1. The Court has jurisdiction and venue over this proceeding.

2. Citation has been served in the manner required by law.

3. The [Final Account/Final Report/Final Account and Report] of Guardian are true and correct and should be approved.

4. [**Name of guardian**] has fully performed [his/her] duties as [guardian of the person/guardian of estate/guardian of the person and estate] of Ward, and should be discharged and released from any further duty, responsibility, and liability in this capacity.

5. [**Name of surety**], the surety on the bond of [**name of guardian**], should be discharged from further liability under the bond.

IT IS THEREFORE ORDERED that the [Final Account/Final Report/Final Account and Report] filed by [**name of guardian**], as [guardian of the person/guardian of the estate/

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guardian of the person and estate] of Ward, contemporaneously with the Application for Leave to Resign as Guardian and for Appointment of Successor Guardian, are APPROVED.

IT IS FURTHER ORDERED that, after paying the fees of [Guardian/Guardian's attorney, if requested], [**name of guardian**], as former Guardian, shall deliver all property and assets of Ward to [**name of successor guardian**] as Successor Guardian of the [person/estate/person and estate] of Ward.

IT IS FURTHER ORDERED that, upon filing a report of compliance, [**name of guardian**], in [his/her] capacity as [guardian of the person/guardian of the estate/guardian of the person and estate] of Ward is discharged and released from further duty, responsibility, and liability in connection with [his/her] service as guardian of the [person/estate/person and estate].

IT IS FURTHER ORDERED that, upon filing a report of compliance, [**name of guardian**]'s surety, [**name of surety**], is discharged from further liability under the bond.

SIGNED on _____.

_____
JUDGE PRESIDING

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Form 9-11

[Caption. See § 3 of the Introduction in this manual.]

Order Appointing Successor Guardian

On [**date**] the Court considered the application of [**name of applicant**] to appoint a successor guardian of the [person/estate/person and estate] of [**name of ward**], Ward, an incapacitated person. The Court has reviewed the application and the documents filed with it and finds that [an immediate need/the need] exists for the appointment of a successor guardian of the [person/estate/person and estate] of Ward. The Court finds that the allegations contained in the motion appear to be true and that notice and citation [is not required/has been given in the manner and for the length of time required by law]. The Court makes the following specific findings of fact and conclusions of law based on a preponderance of the evidence:

Ward has previously been found by this Court to be an incapacitated person.

A continued need exists for a guardian of the [person/estate/person and estate] of Ward, and it is in Ward's best interests that [**name of proposed successor guardian**] be appointed as successor guardian of Ward's [person/estate/person and estate].

[Ward's rights/Ward's property/Ward's rights and property] will be protected by the appointment of a successor guardian.

The Court makes the following specific findings of fact and conclusions of law based on a preponderance of the evidence:

1. The Court has venue under section 1023.001 of the Texas Estates Code, as well as subject matter jurisdiction.

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2. [**Name of proposed successor guardian**] is not ineligible by law to serve as successor guardian of the [person/estate/person and estate] of Ward.

Select one of the following.

3. Ward is totally without capacity as provided by section 1101.151 of the Texas Estates Code to [care for [himself/herself]/manage [his/her] property/care for [himself/herself] and manage [his/her] property].

Or

3. Ward lacks the capacity to do some, but not all, of the tasks necessary to [care for himself/herself]/manage [his/her] property/care for [himself/herself] and manage [his/her] property].

Include the following if the appointment of an appraiser is not required at the initial hearing.

4. There does not currently exist a need for the appointment of an appraiser for Ward's estate and an appraiser is waived at this time subject to further orders of this Court.

Continue with the following.

IT IS THEREFORE ORDERED that [**name of proposed successor guardian**] is appointed as the successor guardian of the [person/estate/person and estate] of [**name of ward**], an incapacitated person.

Select one of the following.

[**Name of ward**] is found to be incapacitated and lacks the necessary capacity to [care for [himself/herself]/manage [his/her] property/care for [himself/herself] and manage [his/her] property] as a reasonably prudent person would do, and a full guardianship of the [person/estate/person and estate] is hereby granted with all the rights, duties, and powers granted to a successor guardian by law. [**Name of ward**] is declared fully incapacitated without the author-

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ity to exercise any rights or powers over [[himself/herself]/[his/her] estate/[himself/herself] and [his/her] estate].

Or

[**Name of ward**] is found to be partially incapacitated and lacks some capacity; therefore [**name of proposed successor guardian**] is permitted to exercise only certain rights, duties, and powers over the [person/estate/person and estate] of Ward, and [**name of proposed successor guardian**] is restricted in performing only those acts specifically provided for in this order.

[**Name of proposed successor guardian**] is granted only those powers and authority that are specifically provided as follows: [**specify**].

[**Name of proposed successor guardian**] is not permitted to perform those acts that are specifically provided as follows: [**specify**].

Continue with the following.

IT IS FURTHER ORDERED that the bond of [**name of proposed successor guardian**] as successor guardian of the [person/estate/person and estate] of [**name of ward**], an incapacitated person, is set at $[**amount**] and that letters of successor guardianship are to be issued by the clerk of this Court on the qualification of [**name of proposed successor guardian**] in the form and manner required by law.

Include the following if applicable.

[**Name of appraiser**] is appointed to appraise the assets of the estate of [**name of ward**], an incapacitated person.

Include the following only if it is determined that the ward's income will not be adequate to provide for the maintenance and expenses of the ward before the hearing.

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[**Name of proposed successor guardian**] as successor guardian is authorized to expend from the corpus of the estate of [**name of ward**], an incapacitated person, the sum of $[**amount**] per month for a period not to exceed twelve months from the date of this Order until [**date**] and subject to further orders of this Court.

Continue with the following.

IT IS FURTHER ORDERED that [**name of prior guardian**]'s resignation is accepted.

Select one of the following.

[**Name of prior guardian**], the former guardian, is ordered to turn over to the successor guardian immediately on [his/her] qualification all assets of Ward's estate or to be received by Ward's estate.

Or

[**Name of representative**], the representative of the deceased guardian's estate, is ordered to turn over to the successor guardian immediately on [his/her] qualification all assets of Ward's estate in [his/her] possession.

Continue with the following.

SIGNED on _____.

_____
JUDGE PRESIDING

© STATE BAR OF TEXAS

APPROVED AS TO FORM:

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Include the following if applicable.

_____

[**Name**]
Attorney Ad Litem
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Chapter 10
Litigation

§ 10.1 Scope of Chapter 691

§ 10.2 Jurisdictional Issues: Citation 691

§ 10.2:1 Permanent Guardianship 692

§ 10.2:2 Temporary Guardianship 694

§ 10.2:3 Application to Convert Temporary to Permanent Guardianship 696

§ 10.2:4 Failure to Meet Service and Notice Requirements 696

§ 10.2:5 Jurisdictional Conflicts Between Family Court and Probate Court 698

§ 10.2:6 Jurisdictional Issues Generally 699

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Chapter 10

Litigation

§ 10.1 Scope of Chapter

Every guardianship begins as a contested guardianship. At a minimum, the court must appoint an attorney ad litem to advocate for the proposed ward. In some cases the attorney ad litem needs only to ensure the applicant meets the burden of proof. Other guardianships, however, may involve issues of adverse interest, disqualification, and incapacity.

This chapter is intended to provide practical tips for dealing with many of the more common issues in a contested guardianship.

Practice Pointer—Attorney Certification: As a practitioner, it is important to note that effective September 1, 2021, an attorney representing *any* person in a guardianship proceeding, not just the applicant's attorney and any court-appointed attorney, must obtain a guardianship education certification. Tex. Est. Code § 1054.201(a); Tex. Gov't Code § 81.114. An attorney who does not have the certification may enter an appearance but must complete the course requirements within fourteen days and prior to filing any substantive pleading. Tex. Est. Code § 1054.201(c). The State Bar of Texas provides a course of instruction available via the Internet for attorneys who wish to practice in any guardianship case. Tex. Gov't Code § 81.114(a), (e).

§ 10.2 Jurisdictional Issues: Citation

Before beginning substantive work on a guardianship proceeding, the parties and the proposed ward's attorney ad litem should verify that the applicant has met the strict notice and citation requirements found in chapter 1051 and section 1251.005 of the Texas Estates Code. *See* Tex. Est. Code ch. 1051, § 1251.005.

Although Tex. R. Civ. P. 103 provides for service of citation and other notices in all civil cases, it is limited in probate and guardianship proceedings by Tex. R. Civ. P. 2, because the substantive provisions of the Estates Code address the same area and differ from the general rules. As a result, the notice and citation provisions of the Estates Code control over those in the Rules of Civil Procedure.

The decision in *Torres v. Ramon* reiterates the importance of proper citation of all applications and cross-applications for guardianship. *See Torres v. Ramon*, 5 S.W.3d 780 (Tex. App.—San Antonio 1999, no pet.). In *Torres*, the court noted that proper citation of each party's respective applications for guardianship was necessary for the trial court to have jurisdiction to consider the party's application. Because the cross-applicant did not perfect personal and other service of his application, the trial court lacked jurisdiction to hear the cross-application for guardianship; the citation of the original application did not grant the court jurisdiction over any cross-applications filed by other persons. *Torres*, 5 S.W.3d at 782 n.1.

Although older cases have held that all provisions for citation must be strictly observed (*see Torres*, 5 S.W.3d at 780), some more recent appellate opinions seem to relax the otherwise strict requirements of citation. For further discussion of these cases and a discussion of failure to meet service requirements, see section 10.2:4 below.

§ 10.2:1 Permanent Guardianship

Before the hearing on a permanent guardianship, several types of notice and citation must issue.

Posted Citation: Citation must be posted (accomplished by the clerk of the court in which the guardianship proceedings are pending) showing (1) that the application was filed, (2) the name of the proposed ward, (3) the name of the applicant, and (4) the name of the person to be appointed guardian. Tex. Est. Code § 1051.102(a).

Additionally, the citation must cite all persons interested in the welfare of the proposed ward to appear at the time and place stated in the notice if the persons wish to contest the application. Tex. Est. Code § 1051.102(b). Finally, the citation must contain a clear and conspicuous statement informing those interested persons of the right provided in section 1051.252 to be notified of all motions, applications, or pleadings relating to the application for guardianship or any subsequent guardianship proceeding involving the ward after the guardianship is created. Tex. Est. Code § 1051.102(d).

Personal Citation: The sheriff or other officer shall personally serve citation to appear and answer an application for guardianship on—

1. a proposed ward twelve years of age and older;
2. the parents of a proposed ward, if their whereabouts are known or can be reasonably ascertained (note that this is not limited to a proposed ward less than a certain age);
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.

Tex. Est. Code § 1051.103. The supreme court has held that a technical defect in personal service on the ward does not deprive the court of jurisdiction. *See In re Guardianship of Fairley*, 650 S.W.3d 372 (Tex. 2022) (probate court properly exercised jurisdiction where ward was personally served and participated in proceedings without objection although served by private process service and not sheriff).

Practice Pointer: The reference to service by the sheriff or "other officer" means a uniformed peace officer. Some appellate courts have determined that personal service of citation by a process server or other non-peace officer is insufficient. To be safe, personal service of the proposed ward should always be by a uniformed peace officer.

Citation by Confirmed Mail Delivery: Service must be by certified or registered mail, return receipt requested, or "any other form of mail that provides proof of delivery." The persons the applicant shall serve include—

1. adult children of the proposed ward;
2. adult siblings of the proposed ward;
3. the administrator of a nursing home where the proposed ward is located;
4. the operator of a residential facility in which the proposed ward resides;
5. any known holder of a power of attorney from the proposed ward;
6. any person known to be designated to serve under a designation of guardian under Texas Estates Code chapter 1104;

7. a person designated to serve as guardian in the probated will of the proposed ward's last surviving parent;
8. any person known to be designated by a deceased parent to serve under a designation of guardian; and
9. each adult named as an other living relative within the third degree of consanguinity in the application as required by Estates Code section 1101.001(b)(11) or (13) if the proposed ward's spouse and each of the proposed ward's parents, adult siblings, and adult children are deceased or there is no spouse, parent, adult sibling, or adult child.

Tex. Est. Code § 1051.104(a).

The validity of a guardianship is not affected by the failure of the applicant to serve any of the persons listed in section 1051.104(a), *except the adult children of the proposed ward. See In re Guardianship of V.A.*, 390 S.W.3d 414, 421 (Tex. App.—San Antonio 2012, pet. denied); *see also* Tex. Est. Code § 1051.104(c).

Waiver of Notice or Citation: A person other than the proposed ward who is entitled to receive notice or personal service of citation under sections 1051.103 and 1051.104(a) of the Estates Code may, by writing filed with the clerk, waive the receipt of notice or the issuance of personal service of citation either in person or through an attorney at litem. Tex. Est. Code § 1051.105. The attorney ad litem cannot accept service for the proposed ward, and the proposed ward cannot waive personal service. Even an agent under a valid power of attorney previously given by the proposed ward cannot accept or waive service on behalf of the proposed ward. *In re Martinez*, No. 04-07-00558-CV, 2008 WL 227987 (Tex. App.—San Antonio Jan. 30, 2008, no pet.) (mem. op.). All other persons entitled to personal service may file waivers. Tex. Est. Code § 1051.105.

To obtain a waiver, the person wishing to waive service should send a cover letter including a postage-paid return envelope, a waiver form, and a copy of the front side of the posted citation.

Proof of Delivery: The applicant shall file with the court—

1. copies of the notices given to the persons included in Estates Code section 1054.104(a), along with proofs of delivery of the notices (typically, the return receipts or "green cards") from the certified mail, and
2. an affidavit, sworn to by the applicant or the applicant's attorney, reciting—
    a. that notices were mailed as required by Estates Code section 1051.104(a), and
    b. the name of each person to whom the notice was mailed (if the return receipt does not show the person's name).

Tex. Est. Code § 1051.104(b).

Lead Time Requirement: In the process of obtaining waivers and serving the persons included in Estates Code section 1054.104(a), be aware that Estates Code section 1051.106 provides "[t]he court may not act on an application for the creation of a guardianship until the applicant has complied with Section 1051.104(b) and not earlier than the Monday following the expiration of the 10-day period beginning on the date service of notice and citation has been made as provided by Sections 1051.102, 1051.103, and 1051.104(a)(1)." The affidavit of service under Estates Code section 1051.104(b) must also comply with the ten-day "lead-time" requirement. Tex. Est. Code § 1051.106.

Substituted Service: In some instances, it is desirable or necessary to obtain service by a person other than a uniformed peace officer. This may be due to considerations such as scheduling difficulties on the part of the sheriff's department or the family's sensitivities to having a uniformed officer appear to serve the proposed ward, for example, at an assisted living center where the proposed ward resides.

Alternative service is authorized (as directed by court order and as authorized by the Estates Code or Texas Rules of Civil Procedure) if—

1. any interested person requests it;
2. no specific form of notice, service, or return is prescribed; or
3. the code provisions are insufficient or inadequate.

Tex. Est. Code § 1051.201(a).

In any event, service by private process or an alternative method must always be on application (supported by an affidavit) and order. Tex. Est. Code § 1051.201(b).

Practice Pointer: Some courts may have forms for an application for alternative service they prefer, and, in some counties, local rules prescribe the form of the application of the order. When considering alternative service, determine if there is a local rule prescribing a form of the application and order or if the court has a form it prefers.

Case Law: At least one appellate court has held that the lack of personal service on the proposed ward did not deprive the court of subject matter jurisdiction when the contestant prevented personal service on the proposed ward, accepted service on her behalf, and filed an answer on her behalf, when there was no clear legislative intent to make loss of jurisdiction mandatory. *See In re Guardianship of Jordan*, 348 S.W.3d 401 (Tex. App.—Beaumont 2011, no pet.). Likewise, substituted service was upheld on a proposed ward on a proper motion, affidavit, and order. *See In re Guardianship of Bays*, 355 S.W.3d 715, 718–19 (Tex. App.—Fort Worth 2011, no pet.).

Return of Citation and Notice: A citation or noticed issued by a county clerk must be returned to the court from which the citation or notice was issued on the first Monday after the service is perfected. Tex. Est. Code § 1051.154.

§ 10.2:2 Temporary Guardianship

Temporary guardianships require compliance with certain expedited notice and citation requirements, all of which are set out in Texas Estates Code chapter 1251. On the filing of an application for temporary guardianship, the court clerk must issue personal citation to the proposed ward and the proposed temporary guardian (if that person is not the applicant) and notice to be served on the proposed ward's appointed attorney. Tex. Est. Code § 1251.005(a). This citation or notice must describe with particularity the rights of the parties and the date, time, place, purpose, and possible consequences of a hearing on the application for appointment of a temporary guardian. Tex. Est. Code § 1251.005(b). The citation issued must contain a statement regarding the authority of a person under section 1051.252 who is interested in the estate or welfare of a proposed ward or, if a guardianship is created, the ward, to file with the county clerk a written request to be notified of all or any specified motions, applications, or pleadings filed with respect to the temporary guardianship proceeding by any person or by a person specifically designated in the request. Tex. Est. Code § 1251.005(b–1). A copy of the application for temporary guardianship must also be attached to the citation or notice. Tex. Est. Code § 1251.005(c). Unlike an application for permanent guardianship, an application for temporary guardianship does not have to be served on the proposed ward's spouse, children, or siblings. *See In re Guardianship of Guerrero*, 496 S.W.3d 288, 291 (Tex. App.—San Antonio 2016, no pet.); *Woollett v. Matyastik*, 23 S.W.3d 48, 54 (Tex. App.—Austin 2000, pet. denied).

On the filing of an application for temporary guardianship, the court shall appoint an attorney to represent the proposed ward in all guardianship proceedings in which independent counsel has not been retained by or on behalf of the proposed ward. Tex. Est. Code § 1251.004.

Practice Pointer: Once an application for temporary guardianship is assigned a cause number, immediately file a motion and order to appoint an attorney ad litem for the proposed ward as a courtesy to the court. While some courts prepare their own orders of appointment, unless you are familiar with the procedures of the court assigned to the case it may expedite the appointment of an attorney ad litem if your motion and order is already filed for the court's consideration.

Scheduling Hearing: Immediately after an application for a temporary guardianship is filed, the court shall issue an order setting a certain date for the hearing on the application. Tex. Est. Code § 1251.006(a). Unless postponed, a hearing shall be held not later than the tenth day after the date the application for temporary guardianship is filed. Tex. Est. Code § 1251.006(b). Only the proposed ward or the proposed ward's attorney may consent to postponement of the hearing on an application for temporary guardianship for a period not to exceed thirty days after the date the application is filed. Tex. Est. Code § 1251.006(c). Because of the urgency inherent in an application for temporary guardianship, it takes precedence over all matters except older matters of the same character. Tex. Est. Code § 1251.006(d).

Rights of Proposed Ward: At the hearing on an application for temporary guardianship, the proposed ward has the right to (1) receive prior notice, (2) be represented by counsel, (3) be present, (4) present evidence, (5) confront and cross-examine witnesses, and (6) a closed hearing if requested by the proposed ward or his attorney. Tex. Est. Code § 1251.008. Section 1251.008(1) of the Estates Code (requiring *prior* notice to the proposed ward) reinforces the importance of securing service and notice on the proposed ward before the hearing on an application for temporary guardianship may commence. Failure to comply with the notice requirement before the hearing denies the proposed ward his constitutional right of due process embodied in chapter 1251 of the Estates Code. Defective service on the proposed ward effectively voids any order affirming the appointment of a temporary guardian on jurisdictional grounds. *See Torres v. Ramon*, 5 S.W.3d 780 (Tex. App.—San Antonio 1999, no pet.). However, under the right circumstances and with a court order, alternative service on the proposed ward can be effective. *See In re Guardianship of Bays*, 355 S.W.3d 715 (Tex. App.—Fort Worth 2011, no pet.).

Motion for Dismissal of Application for Temporary Guardianship: On one day's notice to the party who filed the application, the proposed ward or his attorney may appear and move for the dismissal of an application for temporary guardianship. Tex. Est. Code § 1251.007(a), (b). However, this provision may not provide the court a vehicle for summary dismissal. *In re Guardianship of Vavra*, 365 S.W.3d 476 (Tex. App.—Eastland 2012, no pet.). If a motion is made for dismissal of an application for temporary guardianship, the court shall hear and determine the motion as expeditiously as justice requires. Tex. Est. Code § 1251.007(c).

When Applicant Is Required to Appear: If the applicant for a temporary guardianship is not the proposed temporary guardian, a temporary guardianship may not be granted before a hearing on the application unless the proposed temporary guardian appears in court. Tex. Est. Code § 1251.009.

Practice Pointer: Because there are no powers of a temporary guardian set forth in the statute, any order appointing a temporary guardian must describe (1) the reasons for the temporary guardianship and (2) the powers and duties of the temporary guardian. Tex. Est. Code § 1251.010(c). Consequently, an order granting the temporary guardian "all the powers and duties" as stated in the Estates Code confers no authority on the guardian. *See Bennett v. Miller*, 137 S.W.3d 894, 897 (Tex. App.—Texarkana 2004, no pet.).

Expiration and Closing of Temporary Guardianship: Unless the temporary guardianship remains open under Tex. Est. Code § 1251.052, the guardianship remains in effect for no more than sixty days. Tex. Est. Code § 1251.151. A final report must be filed at the termination of the temporary guardianship. Tex. Est. Code § 1251.153(a–1). Provided the ward is still living, the final report must include the reasons the temporary guardianship expired including a statement of facts that addresses whether the temporary guardianship expired because of (1) a finding by the court that the ward has full capacity or sufficient capacity to care for the ward's own needs with supports and services, (2) there are alternatives to guardianship established that meet the ward's needs, or (3) a permanent guardian appointed by the court has qualified to serve as guardian. Tex. Est. Code § 1251.153(a–1)(1). If the ward is deceased, the final report, in the form and manner required of a guardian of the person under section 1163.103, must include the date and place of death. Tex. Est. Code § 1251.153(a–1)(2). On proof of delivery and court approval of the final report, the temporary guardian shall be discharged and bond sureties released. Tex. Est. Code § 1251.153(b).

§ 10.2:3 Application to Convert Temporary to Permanent Guardianship

For an application requesting that the temporary guardianship be converted to a permanent guardianship, requesting a full guardianship after requesting a finding of partial incapacity, or asking for someone other than the original applicant to be appointed, new citation may be required. In light of the *Torres* decision, the ward should also be personally served with the application to convert the temporary to a permanent guardianship to preserve the court's jurisdiction. See the discussion of *Torres v. Ramon*, 5 S.W.3d 780 (Tex. App.—San Antonio 1999, no pet.), at sections 10.2 and 10.2:2 above.

Practice Pointer: If possible, at the time of filing an application for temporary guardianship, the applicant should also make application for permanent guardianship to allow the citation to show all the relief requested. The relief requested should pray for "a guardianship of the person, and if necessary, a guardianship of the estate" and include a request for "any suitable person" to be appointed. The protective pleading can often help avoid the need for additional citation to be issued, with the attendant ten-day delays.

§ 10.2:4 Failure to Meet Service and Notice Requirements

The applicant has the burden of establishing compliance with any required service and notice under the Texas Estates Code.

Historically, appellate courts strictly enforced the personal service requirements. *See, e.g., In re Guardianship of Erickson*, 208 S.W.3d 737 (Tex. App.—Texarkana 2006, no pet.) (order appointing permanent guardian was void because statute requiring specific waiting period before trial court action on application was not complied with, thereby depriving court of power to act); *Ortiz v. Gutierrez*, 792 S.W.2d 118, 119 (Tex. App.—San Antonio 1989, writ dism'd) (holding personal service requirement under former guardianship statute was jurisdictional and, therefore, trial court properly dismissed guardianship proceeding when proposed ward had not been personally served).

But appellate courts recently have indicated that a lack of personal service will not automatically void an appointment. For example, in *In re Guardianship of Bays*, 355 S.W.3d 715, 719 (Tex. App.—Fort Worth 2011, orig. proceeding), the appellate court found that substituted service under rule 106 of the Texas Rules of Civil Procedure may be an accepted method of personal service in a temporary guardianship setting. In *Bays*, the record confirmed that "after multiple attempts to serve Bays by the certified process server under the methods that provide proof of actual service, the process server resorted to court order; and in compliance with Rule 106 and that order, he served Bays by attaching the notice to her door." *Bays*, 355 S.W.3d at 719 (citing Tex. R. Civ. P. 106(b)). The record also established that the process server's affidavit, a motion for substituted service

and related order, and a return by the process server were all on file prior to the temporary guardianship hearing. *Bays*, 355 S.W.3d at 719. Therefore, alternative service had been properly made.

Likewise, the Beaumont court of appeals addressed whether strict compliance with the statute was always required when serving the proposed ward with notice that an application for guardianship had been filed. *See In re Guardianship of Jordan*, 348 S.W.3d 401 (Tex. App.—Beaumont 2011, no pet.). In *Jordan*, the party complaining about the lack of strict compliance with the statute was actually the person preventing service of citation on the proposed ward. After reviewing and comparing the opinions of other appellate courts requiring strict compliance, the court considered the Texas Supreme Court decision in *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71 (Tex. 2000), which softened the strict compliance rule in some instances. In *Dubai Petroleum Co.*, the supreme court addressed the issue of a trial court's subject matter jurisdiction when a party failed to strictly comply with a statute. Softening the punitive effect of technical noncompliance, the court noted that "it seems perverse to treat a judgment as perpetually void merely because the court or the parties made a good-faith mistake in interpreting the law." *Dubai Petroleum Co.*, 12 S.W.3d at 76. The court further noted that "the modern direction of policy is to reduce the vulnerability of final judgments to attack on the ground that the tribunal lacked subject matter jurisdiction." *Dubai Petroleum Co.*, 12 S.W.3d at 76 (quoting *Restatement (Second) of Judgments* § 11 cmt. e, at 113 (1982)). As the *Jordan* court observed, the supreme court "overruled its precedent that a failure to establish a statutory prerequisite deprived a court of subject matter jurisdiction." *Jordan*, 348 S.W.3d at 409 (citing *Dubai Petroleum Co.*, 12 S.W.3d at 76). Applying this same reasoning in a guardianship context, the *Jordan* court found "no clear legislative intent that compliance with a specific method of obtaining a person's presence in court is necessary to confer subject matter jurisdiction to bind parties who have made appearances in court" and found the court had authority to appoint a guardian even though the ward was not personally served. *See Jordan*, 348 S.W.3d at 410.

Strict adherence to the statutory notice requirements was also eroded in the case of *In re Guardianship of V.A.*, 390 S.W.3d 414 (Tex. App.—San Antonio 2012, pet. denied). In that case, the appellate court held that the failure to serve the father of the proposed ward was not error where the father's parental rights had been terminated. Furthermore, the failure to personally serve the ward's managing conservator (although given notice) was excused (under former Texas Probate Code section 633(c)(3), now recodified as Tex. Est. Code § 1051.103) because the party complaining could not assert the rights of another (here a *jus tertii* argument). The appellate court also relied on former Probate Code section 633(f) (now recodified as Tex. Est. Code § 1051.104(c)) for the proposition that failure to comply with certain notice provisions does not affect the validity of a guardianship. *V.A.*, 390 S.W.3d at 417. Also excused was the failure to serve adult siblings under section 633(d)(2) (now section 1051.104(a)(2)) and the hospital administrator under section 633(d)(2) (now section 1051.104(a)(3)). In other words, while strict adherence to the statutory service and notice requirements is the goal, there are instances in which failure to comply does not render the guardianship void.

§ 10.2:5 Jurisdictional Conflicts Between Family Court and Probate Court

Contested Guardianship of Minor's Person: If an interested person contests an application for the appointment of a guardian of the *person* of a minor or seeks the removal of a guardian of the *person* of a minor, the judge, on the judge's own motion, may transfer all matters related to the guardianship proceeding to a court of competent jurisdiction in which a suit affecting the parent-child relationship (SAPCR) under the Texas Family Code is pending (that is, a district court or, in some instances, a county court at law). *See* Tex. Est. Code § 1022.008. Section 1022.008 addresses the conflicting issues involving the custody or right to custody of a minor. (Note: There is no similar provision relating to a contested guardianship of a minor's *estate*.) *See* Tex. Est. Code § 1022.008.

The transferring court (that is, the probate court) may retain jurisdiction over the minor ward's estate and even over another minor who may also be the subject of the suit. Tex. Est. Code § 1022.008. The receiving court is required to apply the provisions of the Family Code, including sections 155.005 and 155.205 of the Family Code. Tex. Est. Code § 1022.008.

Contested Guardianship of Adult Disabled Child: Jurisdictional issues often arise between the family and probate courts when a disabled child who was previously the subject of a SAPCR reaches adulthood. The primary issue is whether the family court retains jurisdiction over issues relating to the adult disabled child's person or estate or whether the probate court gains exclusive jurisdiction.

Section 154.309(c) of the Family Code arguably grants the family court that originally presided over the SAPCR continuing, exclusive jurisdiction over the adult disabled child. Tex. Fam. Code § 154.309(c). However, section 154.309 of the Family Code, addressing the possession of or access to an adult disabled child, is located in the chapter entitled "Child Support" rather than in the chapter of the Family Code that relates to possession or access. *See* Tex. Fam. Code § 154.309. In contrast, the Texas Estates Code provides that all applications for guardianship must be filed with the court that presides over guardianship proceedings, such as a statutory probate court, county court at law, other statutory court exercising the jurisdiction of a probate court, constitutional county court, or county court. *See* Tex. Est. Code § 1022.002.

One case addressing this issue is *Garland v. Garland*, 868 S.W.2d 847 (Tex. App.—Dallas 1993, no writ). In *Garland*, a family district court ordered continuing support payments past the age of majority for a mentally incapacitated child. The child's father subsequently filed an application for guardianship in a statutory probate court when the child reached the age of twenty-two. The child's mother, previously appointed the child's managing conservator by the family court, filed a motion to dismiss alleging the family court had continuing, exclusive jurisdiction over the child, even after the child reached majority. The statutory probate court granted the motion and dismissed the guardianship application. On appeal, the appellate court held that the statutory probate court erred in dismissing the application because the statutory probate court, rather than the family court, has original, exclusive, and mandatory jurisdiction over the guardianship proceeding. *Garland*, 868 S.W.2d at 850.

Matters Related to Guardianship Proceeding: Section 1022.005 of the Estates Code provides that "[a] cause of action related to a guardianship proceeding of which the statutory probate court has exclusive jurisdiction as provided by Subsection (a) must be brought in the statutory probate court unless the jurisdiction of the statutory probate court is concurrent with the jurisdiction of a district court as provided by Section 1022.006 or with the jurisdiction of any other court." Tex. Est. Code § 1022.005.

Concurrent Jurisdiction with District Court: A statutory probate court has concurrent jurisdiction with the district court in (1) a personal injury, survival, or wrongful death action by or against a person in the person's capacity as a guardian and (2) an action involving a guardian in which each other party aligned with the guardian is not an interested person in the guardianship. Tex. Est. Code § 1022.006. Sections 1022.001 and 1022.005 of the Estates Code also confer jurisdiction on the statutory probate court, rather than the district court, to hear all applications, petitions, and motions regarding guardianships in counties in which there is a statutory probate court. *See* Tex. Est. Code §§ 1022.001, 1022.005; *see also In re Graham*, 971 S.W.2d 56 (Tex. 1998) (probate court may transfer to itself divorce proceeding pending in family district court); *In re J7S Inc.*, 979 S.W.2d 374, 377 (Tex. App.—Houston [14th Dist.] 1998, pet. dism'd); *Garland*, 868 S.W.2d at 850. In counties in which there is no statutory probate court, all applications, petitions, and motions regarding guardianships are heard by the county court at law, a statutory court exercising the jurisdiction of a probate court, the constitutional county court, or the county court. *See* Tex. Est. Code §§ 1022.001–.004.

§ 10.2:6 Jurisdictional Issues Generally

The jurisdiction of a guardianship court depends on whether it is a statutory probate court. *See* Tex. Est. Code § 22.007(c) (formerly Texas Probate Code sections 606 and 606A). Furthermore, the application of this jurisdictional section depends on when the proceeding was commenced. *See* Acts 2011, 82d Leg., R.S., ch. 1085, § 43 (S.B. 1196), eff. Sept. 1, 2011 (providing that "Sections 605, 608, and 609, Texas Probate Code, as amended by this Act, and Sections 606A, 607A, 607B, 607C, 607D, and 607E, Texas Probate Code, as added by this Act, apply only to an action filed or a proceeding commenced on or after the effective date of this Act. An action filed or proceeding commenced before the effective date of this Act is governed by the law in effect on the date the action was filed or the proceeding was commenced, and the former law is continued in effect for that purpose."). See also Acts 2009, 81st Leg., ch. 680, § 1, eff. Jan. 1, 2014, regarding the effective date of any substantive change made by the enactment of the Texas Estates Code.

Generally, except when the jurisdiction of a statutory probate court is concurrent with that of a district court or any other court, a statutory probate court has "exclusive jurisdiction of all guardianship proceedings." Tex. Est. Code § 1022.005. Section 1021.001 defines matters related to a guardianship proceeding depending on whether the court is a statutory probate court. *See* Tex. Est. Code § 1021.001.

The amount in controversy does not affect the jurisdiction of a constitutional or statutory county court exercising probate jurisdiction. *See Womble v. Atkins*, 331 S.W.2d 294, 298–99 (Tex. 1960).

§ 10.2:7 Role of Mandatory Venue Provisions

Over the last decade, there has been significant debate about whether the probate courts' jurisdiction trumps other mandatory venue provisions. Tex. Est. Code § 1022.006 provides that a statutory probate court has concurrent jurisdiction with the district court in—

(1) a personal injury, survival, or wrongful death action by or against a person in the person's capacity as a guardian; and

(2) an action involving a guardian in which each other party aligned with the guardian is not an interested person in the guardianship.

Tex. Est. Code § 1022.006.

Texas Estates Code section 1022.007(b) provides that "[n]otwithstanding any other provision of this title, the proper venue for an action by or against a guardian, ward, or proposed ward for personal injury, death, or property damages is determined under Section 15.007, Civil Practice and Remedies Code." Tex. Est. Code § 1022.007(b). In 2005, the Texas Supreme Court held that a statutory probate court may not override otherwise mandatory venue provisions. *See Gonzalez v. Reliant Energy, Inc.*, 159 S.W.3d 615 (Tex. 2005). In *Gonzalez*, the court held that a statutory probate court's attempt to transfer a case from another court to itself is prohibited when venue of the proceeding is not otherwise proper. For example, if a guardian sued for personal injuries to a ward, the suit by the guardian of the estate could be transferred only to a statutory probate court where the guardianship is pending if the original venue of the case would properly be brought in the same county as the statutory probate court. The holding appears to expressly reverse the opinion of *In re Houston Northwest Partners, Ltd.*, 98 S.W.3d 777 (Tex. App.—Austin 2003, orig. proceeding), and other prior opinions suggesting to the contrary that a statutory probate court could override mandatory venue provisions.

Regardless of whether the suit is heard in district court or a statutory probate court, the guardian of the person or the estate of a ward may not be excluded from attending a legal proceeding in which the ward is a party or participating as a witness. Tex. Est. Code § 1151.005.

§ 10.2:8 Transfer to Statutory Probate Court

If an action is pending in a district court, constitutional county court, or statutory county court that relates to a pending guardianship proceeding, any party or person interested in the guardianship may seek to transfer the action to the probate court. The Texas Estates Code permits a judge of a statutory probate court, on the motion of a party to the action or of a person interested in the guardianship, to—

1. transfer to the judge's court from a district, county, or statutory court a cause of action that is a matter related to a guardianship proceeding pending in the statutory probate court, including a cause of action that is a matter related to a guardianship proceeding pending in the statutory probate court and in which the guardian, ward, or proposed ward in the pending guardianship proceeding is a party; and
2. consolidate the transferred cause of action with the guardianship proceeding to which it relates and any other proceedings in the statutory probate court that are related to the guardianship proceeding.

Tex. Est. Code § 1022.007(a), (b); *see also* Tex. Gov't Code ch. 25 (for probate court provisions relating to particular counties).

The transfer provisions should not be seen as a means to circumvent otherwise mandatory venue provisions. In *Gonzalez v. Reliant Energy, Inc.*, 159 S.W.3d 615 (Tex. 2005), the Texas Supreme Court addressed the transfer issue directly. The court held that if venue was not originally proper in the statutory probate court, no transfer can be made unilaterally to bring the litigation into the guardianship estate or a statutory probate court. *Gonzalez*, 159 S.W.3d at 622. See the related discussion regarding venue and Tex. Est. Code § 1022.007(b) at section 10.2:7 above.

§ 10.2:9 Transfer for Want of Venue

Once a guardianship proceeding has commenced, if the court determines that venue does not lie in that county, on application of any interested person the court must transfer the proceeding to a proper county. Tex. Est. Code § 1023.002(c). The appropriate venue for appointment of a guardian depends on the type of guardianship action and the venue rules in Texas Estates Code chapter 1023.

§ 10.3 Proposed Ward's Right to Private Attorney

The Texas Estates Code clearly recognizes the right to counsel by requiring the appointment of an attorney ad litem for every proposed ward on the filing of an application for guardianship. *See* Tex. Est. Code § 1054.001. The right to counsel of one's own choice is fundamental. *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). In any guardianship proceeding, a proposed ward (who is found to possess the capacity to contract) is authorized to retain counsel rather than have an attorney ad litem appointed for him. *See* Tex. Est. Code § 1054.006.

The proper procedural vehicle to make a threshold determination of the proposed ward's capacity to contract is a "Motion to Show Authority" pursuant to Tex. R. Civ. P. 12. In this sworn motion, the privately retained attorney is cited to appear and

bears the burden to show his authority to act on behalf of the proposed ward. A "Rule 12" motion is the exclusive method of questioning an attorney's authority to represent a party and, therefore, must be heard and determined before the parties announce ready for trial. *Price v. Golden*, No. 03-99-00769-CV, 2000 WL 1228681 (Tex. App.—Austin Aug. 31, 2000, no pet.). Such a motion might be a conflict for an attorney ad litem, who may be put in a position to defend their client's capacity.

The key issue will be whether the proposed ward has sufficient capacity to understand the concept of the contractual relationship between attorney and client. The motion gives the court an early opportunity to observe the proposed ward and sometimes results in the pursuit of a less restrictive alternative. However, if the attorney cannot sustain their burden to show such authority (and demonstrate the threshold capacity of the proposed ward to be able to retain counsel), the attorney is barred from representing the proposed ward in the proceeding. Tex. R. Civ. P. 12. While this is a fairly low burden, it is dispositive on the issue. *Logan v. McDaniel*, 21 S.W.3d 683 (Tex. App.—Austin 2000, pet. denied).

If the proposed ward lacks the capacity to hire an attorney, retained counsel is not entitled to recover fees for legal services performed in a guardianship contest. *Breaux v. Allied Bank of Texas*, 699 S.W.2d 599 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.), *cert. denied*, 479 U.S. 1002 (1986).

§ 10.3:1 Modification and Restoration

A ward has the right to retain a private attorney to represent them in seeking a modification of the guardianship or the restoration of the ward's rights. Tex. Est. Code § 1202.103(a). The court may order that the ward's attorney 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. Est. Code § 1202.103(b). In appropriate circumstances many judges will appoint the ward's choice of an attorney as the attorney ad litem and discharge the court's appointee.

§ 10.3:2 Considerations Before Representation

The ward or proposed ward does not have an absolute right to private representation. Therefore, an attorney who is considering representing a ward or proposed ward should use reasonable means to confirm that the alleged incapacitated person has the requisite capacity to retain an attorney. For example, the attorney may meet the potential client to determine whether he appears to be acting independently; understands that he is seeking to retain the attorney to represent him; is generally oriented to time, place, and person; and understands the basic financial arrangement and resulting obligations. If the court has appointed an attorney ad litem, the attorney should speak with the proposed ward's court-appointed attorney.

Further, it is advisable to seek the opinion of the potential client's physician or a doctor qualified to render a medical opinion regarding the potential client's capacity to enter into a contract. If possible, the attorney should obtain a written opinion.

§ 10.3:3 Payment of Private Attorney's Fees

An attorney who successfully defeats an application for guardianship or restores the ward's capacity can look to the capacitated client for payment. However, an attorney who is unsuccessful in defending against a guardianship or restoring a ward may still be entitled to fees if the court finds that the attorney has acted with a good-faith belief that the ward or proposed ward had the capacity to retain the attorney's services. Tex. Est. Code § 1202.103(b); *see also Breaux v. Allied Bank of Texas*, 699 S.W.2d 599 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

§ 10.4 Initial Considerations in Litigation

§ 10.4:1 Assignment of Statutory Probate Judge

Litigants in counties in which there is no statutory probate court, county court at law, or other statutory court exercising the jurisdiction of a probate court may request the assignment of a statutory probate judge to hear the contested portion of the guardianship proceeding. Tex. Est. Code § 1022.003(a)(1); *see also* Tex. Gov't Code § 25.0022. If the county judge has not transferred the contested portion to the district court at the time the motion requesting the assignment is filed, the judge must grant the motion and may not transfer the matter to district court unless the party withdraws the motion. Tex. Est. Code § 1022.003(b). Failure to comply with the request is an abuse of the presiding county judge's discretion. *See In re Vorwerk*, 6 S.W.3d 781 (Tex. App.—Austin 1999, no pet.) (assignment to district court after request for assignment of statutory judge was abuse of trial court's discretion). On the conclusion of the contested matter, including an appeal, the statutory probate judge shall transfer the resolved portion of the case back to the county court. Tex. Est. Code § 1022.003(g). If only the contested matter in a guardianship proceeding is assigned to a statutory probate court judge, or if the contested matter in a guardianship proceeding is transferred to a district court, the county court shall continue to exercise jurisdiction over the management of the guardianship, other than the contested matter, until final disposition of the contested matter is made. Tex. Est. Code § 1022.003(h).

§ 10.4:2 Costs of Proceedings

In a guardianship proceeding, the court costs of the proceeding, including the costs of any guardians ad litem, attorneys ad litem, court visitors, mental-health professionals, and interpreters appointed by the court in an amount the court considers equitable and just, are paid as follows, and the court shall issue judgment accordingly:

1. out of the guardianship estate;
2. out of the management trust, if a management trust has been created for the benefit of the ward under Texas Estates Code chapter 1301 and the court determines it is in the best interest of the ward;
3. by the party to the proceeding who incurred the costs, unless that party filed, on the party's own behalf, an affidavit of inability to pay the costs under rule 145 of the Texas Rules of Civil Procedure, that shows the party is unable to afford the costs, if—
    a. there is no guardianship estate or no management trust has been created for the ward's benefit; or
    b. the assets of the guardianship estate or management trust, as appropriate, are insufficient to pay the costs; or
4. out of the county treasury if—
    a. there is no guardianship estate or management trust or the assets of the guardianship estate or management trust, as appropriate, are insufficient to pay the costs; and
    b. the party to the proceeding who incurred the costs filed, on the party's own behalf, an affidavit of inability to pay the costs under rule 145 of the Texas Rules of Civil Procedure, that shows the party is unable to afford the costs.

Tex. Est. Code § 1155.151(a).

Bad-Faith Exception: If the court finds that a party in a guardianship proceeding acted in bad faith or without just cause in prosecuting or objecting to an application in the proceeding, the court may order the party to pay all or a part of the costs of

the proceeding. If the party found to be acting in bad faith or without just cause was required to provide security for the probable costs of the proceeding under section 1053.052 of the Estates Code, the court shall first apply the amount provided as security as payment for costs ordered by the court. If the amount provided as security is insufficient to pay the entire amount ordered by the court, the court shall render judgment in favor of the estate against the party for the remaining amount. Tex. Est. Code § 1155.151(c).

As originally enacted, the provisions for taxing costs in a guardianship specified that only the estate of the ward could bear the costs of the proceeding. *See* Tex. Est. Code § 1155.151 (formerly Texas Probate Code section 669(a)). This led to many situations in which the ward's estate had to bear the expense of otherwise unfounded contests. *See generally In re Guardianship of Vavra*, 365 S.W.3d 476 (Tex. App.—Eastland 2013, no pet.); *In re Mitchell*, 342 S.W.3d 186 (Tex. App.—El Paso 2011, no pet.); *Trevino v. Reese*, No. 01-10-00717-CV, 2011 WL 2436523 (Tex. App.—Houston [1st Dist.] June 16, 2011, no. pet.); *In re Guardianship of Marburger*, 329 S.W.3d 923 (Tex. App.—Corpus Christi–Edinburg 2010, no pet.); *In re Guardianship of Person & Estate of A.M.K*, No. 04-0800268-CV, 2009 WL 1028074 (Tex. App.—San Antonio Apr. 15, 2009, no pet.); *In re Guardianship of Thomas*, No. 02-08-299-CV, 2009 WL 670187 (Tex. App.—Fort Worth Mar. 12, 2009, no pet.); *In re Guardianship of Humphrey*, No. 12-07-00118-CV, 2009 WL 388955 (Tex. App.—Tyler Feb. 18, 2009, pet. denied); *In re Guardianship of Humphrey*, No. 12-07-00225-CV, 2009 WL 388958 (Tex. App.—Tyler Feb. 18, 2009, pet. denied); *In re Guardianship of Humphrey*, No. 12-06-00222-CV, 2008 WL 2445503 (Tex. App.—Tyler June 18, 2008, pet. denied); *Ajudani v. Walker*, 232 S.W.3d 219 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *In re Van Brookshire*, No. 01-06-00789-CV, 2006 WL 2690254 (Tex. App.—Houston [1st Dist.] Sept. 21, 2006, orig. proceeding).

Recent amendments to the provisions for the taxing of costs and the awarding of fees of ad litems allow the taxing of costs and order reimbursement of attorney's fees of persons found to have acted without good faith or just cause. *See* Tex. Est. Code §§ 1053.052, 1155.054.

An applicant or contestant in a guardianship proceeding may be required—on motion, notice, and hearing—to give security for the probable costs of the guardianship proceeding within twenty days of the date of the order. Failure to provide security will result in dismissal of the contest or opposition. Tex. Est. Code § 1053.052. *See also* Tex. R. Civ. P. 143.

This is a significant issue because, in guardianship matters, the proposed ward has little or no control over their own estate. Minors and persons *non compos mentis* are *non sui juris* and remain altogether under the court's protection, even when represented by a next friend or guardian. *Byrd v. Woodruff*, 891 S.W.2d 689, 704 (Tex. App.—Dallas 1994, writ dism'd by agr.); *M.K.T. Railroad Co. v. Pluto*, 156 S.W.2d 265, 268 (Tex. 1941); *Greathouse v. Fort Worth & Denver City Railway Co.*, 65 S.W.2d 762, 765 (Tex. Comm'n. App. 1933). It is the responsibility of the court in such an instance to protect the estate of an alleged incapacitated person. Tex. Est. Code § 1201.003 (judge's liability).

Additionally, unlike most civil cases, guardianship proceedings require the appointment of one or more ad litems, proportionally increasing the probable costs of a contest. Contested guardianship proceedings are highly structured, and the costs incurred can quickly go far beyond the normal filing fees and discovery items associated with ordinary civil cases.

§ 10.4:3 Parties from Whom Security May Be Required

The laws regulating costs in ordinary civil cases apply to a guardianship proceeding *unless otherwise expressly provided for*. Tex. Est. Code § 1053.051. In ordinary civil cases only a party "who seeks affirmative relief" (Tex. R. Civ. P. 143) or "seeks judgment against any other party" (Tex. R. Civ. P. 147) may be ruled to give security for costs. However, in guardianship pro-

ceedings, because any "interested party" is allowed to contest any portion of a guardianship administration, the vulnerability of the proposed ward's estate to substantial costs from repeated contests is greatly increased. As a result, in guardianship proceedings, security may be required from persons who are simply complaining about or opposing a guardianship matter, regardless of whether they are seeking affirmative relief. Tex. Est. Code § 1053.052. An exception to this provision is that no security for costs may be required of a guardian, attorney ad litem, or guardian ad litem appointed under Texas Estates Code chapter 1053 in any suit brought by the guardian, attorney ad litem, or guardian ad litem in their respective fiduciary capacities. Tex. Est. Code § 1053.052(c).

§ 10.4:4 Timing and Determination of Security Amount

A motion for security for costs may be filed and heard at any time before the trial of an application, complaint, or opposition relating to a guardianship proceeding. Such a motion may be filed by an officer of the court or a person interested in the guardianship or in the welfare of the ward. Tex. Est. Code § 1053.052(b).

Unlike in civil cases in which the party seeking affirmative relief may be ordered to deposit a sum "sufficient to pay the accrued costs," in a guardianship proceeding the court is to order security for the "probable costs of the proceeding." Tex. Est. Code § 1053.052; *see also* Tex. R. Civ. P. 146. The court must receive proof of the probable costs expected to be incurred during the proceeding.

§ 10.4:5 How Costs Are Secured

A party ordered to provide security for costs has three options.

Writ of Attachment: A writ of attachment may be filed on property, real or personal, of the person giving security. Tex. R. Civ. P. 146 (regarding attachments, see Tex. R. Civ. P. 592). Writs of attachment are somewhat arcane and maintenance-intensive procedures requiring the person allowing the attachment to have sufficient attachable property in the county and to allow additional attachments if property is sold or values drop. For this reason, writs of attachment are rarely used. *See* Tex. R. Civ. P. 592–609.

Surety Bond: In return for a premium payment, a party may provide security for costs by posting a surety bond under Tex. R. Civ. P. 148. The bond should be one with sureties (preferably corporate) to secure costs, but the court may not fix a specific amount for anticipated costs. *Johnson v. Smith*, 857 S.W.2d 612, 615 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding); *Smith v. White*, 695 S.W.2d 295, 297 (Tex. App.—Houston [1st Dist.] 1985, orig. proceeding). The bond is, in effect, an open bond to secure payment of whatever costs might accrue. *Mosher v. Tunnel*, 400 S.W.2d 402, 404 (Tex. App.—Houston [1st Dist.] 1966, writ ref'd n.r.e.). A party seeking affirmative relief may be required to give security for costs at any time before final judgment. Failure to comply within twenty days of receiving notice will result in dismissal of the claim. Tex. R. Civ. P. 143. A bond for a specified amount, rather than an open-ended bond, will not satisfy rule 143. *Clanton v. Clark*, 639 S.W.2d 929, 930–31 (Tex. 1982); *Hager v. Apollo Paper Corp.*, 856 S.W.2d 512, 514–15 (Tex. App.—Houston [1st Dist.] 1993, no writ). All bonds given as security for costs shall authorize judgment against all the obligors in the bond for the costs, to be entered in the final judgment of the cause. Tex. R. Civ. P. 144.

Cash: A party may deposit cash with the clerk of the court in lieu of the bond. Tex. R. Civ. P. 146. Like attachments, the cash deposit is a maintenance-intensive option. If the "probable costs" exceed the cash deposit, additional cash deposits will be necessary. However, if either an attachment or bond is furnished, no further security is required. Tex. R. Civ. P. 148.

The option lies with the party ruled for costs, and not the court, about whether a cost bond shall be furnished or a deposit made in lieu of bond. *Buck v. Johnson*, 495 S.W.2d 291, 298 (Tex. App.—Waco 1973, no writ).

§ 10.4:6 Enforcement of Costs

Failure to give security as ordered within twenty days of the order will result in dismissal of the contest or opposition. Tex. R. Civ. P. 143; *In re Guardianship of Thomas*, No. 02-08-299-CV, 2009 WL 670187 (Tex. App.—Fort Worth Mar. 12, 2009, no pet.). A writ of mandamus can be used to correct the requirement of payment of a fixed amount of security prior to final judgment. *TransAmerican Natural Gas Corp. v. Mancios*, 877 S.W.2d 840, 844 (Tex. App.—Corpus Christi–Edinburg 1994, orig. proceeding [mand. overr.]).

§ 10.4:7 Right to Request Jury Trial

Authority under Texas Estates Code: Any party to a contested guardianship proceeding, including the proposed ward, may request a jury trial. Tex. Est. Code §§ 1055.052, 1101.052. Several provisions of the Texas Estates Code speak to this right. Section 55.002 expressly states that, "[i]n a contested probate or mental illness proceeding in a probate court, a party is entitled to a jury trial as in other civil actions." Tex. Est. Code § 55.002. Further, the Estates Code states that the laws and rules governing estates of decedents apply to guardianships as well. Tex. Est. Code § 1001.002.

Authority under Texas Constitution: The Texas Constitution guarantees the right to a jury trial. Article V, section 10, provides:

> In the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury; but no jury shall be empaneled in any civil case unless demanded by a party to the case, and a jury fee be paid by the party demanding a jury, for such sum, and with such exceptions as may be prescribed by the Legislature.

Tex. Const. art. V, § 10.

Article V, section 10, confers a right to trial by jury when a proceeding is styled as a "cause." The test for what constitutes a "cause" is not based on the nature of the contest but merely whether there is a matter of fact for a jury to decide. *Tolle v. Tolle*, 104 S.W. 1049, 1050 (Tex. 1907) (contest over letters of administration is cause that warrants right to jury trial); *Cockrill v. Cox*, 65 Tex. 669 (1886); *Linney v. Peloquin*, 35 Tex. 29 (1872) (will contest cause that warrants right to jury trial). The Texas Supreme Court has broadly construed article V, section 10, to apply to all causes, both in law and at equity. *See also Southwestern Bell Telephone v. Public Utility Commission*, 571 S.W.2d 503, 517 (Tex. 1978).

The drawing of jury panels, selection of jurors, and practice in the statutory probate courts must conform to that prescribed by law for county courts. However, practice, procedure, rules of evidence, issuance of process and writs, juries, and all other matters pertaining to the conduct of trials and hearings in the statutory probate courts involving those matters of concurrent jurisdiction with district courts are governed by the laws and rules pertaining to district courts. The number of jurors is also governed by the laws and rules pertaining to district courts, provided, however, that parties in a trial proceeding heard in a statutory probate court may agree to try a case with fewer than twelve jurors. Tex. Gov't Code § 25.0027.

§ 10.4:8 Guardianship Proceedings That May Be Tried to Jury

Permanent Guardianship: Although a party (including a proposed ward) in a proceeding seeking the appointment of a permanent guardian may request a jury trial, the right to a jury trial may be waived if not timely requested. Therefore, the attorney must be punctual in requesting the jury trial and in paying the jury fee. Tex. Est. Code §§ 1055.052, 1101.052. The constitutional right to a trial by jury can be waived by the express actions of a party or the failure to timely object to the rulings of the court. *See Goode v. McGuire*, No. 01-20-00028-CV, 2021 WL 4432534 (Tex. App.—Houston [1st Dist.] Sept. 28, 2021, no pet.).

Temporary Guardianship: A jury trial is not authorized in a temporary guardianship. *In re Kuhler*, 60 S.W.3d 381, 382–83 (Tex. App.—Amarillo 2001, no pet.). This is true, according to the appellate court in *Kuhler*, because the statutes governing temporary guardianships provide that "[t]he court shall appoint a temporary guardian" after a hearing. *See* Tex. Est. Code § 1251.010. In other words, whether to appoint a temporary guardian is apparently considered a question of law, not of fact.

§ 10.4:9 Issues That May Be Tried to Jury

For sample pattern jury charges relating to guardianship proceedings, see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Family & Probate*.

While not an exhaustive list, the following issues may be tried to a jury.

Capacity: It is well established in Texas that the issue of capacity is one of fact for a jury. *See Krause v. White*, 612 S.W.2d 639, 643 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (temporary guardianship); *In re Guardianship of Dahl*, 590 S.W.2d 191, 198 (Tex. App.—Amarillo 1979, writ ref'd n.r.e.) (permanent guardianship). A determination of incapacity of an adult ward must be evidenced by recurring acts or occurrences in the preceding six months and not by isolated instances of negligence or bad judgment. Tex. Est. Code § 1101.102.

Supports and Services: A jury may determine whether, by clear and convincing evidence, there are supports and services available to the proposed ward that would make the appointment of a permanent guardian of the person or estate unnecessary. *See* Tex. Est. Code § 1101.101(a)(1)(E).

Best Interest of Proposed Ward: There must be a finding by clear and convincing evidence that it is in the best interest of the proposed ward to appoint a guardian and whether it should be a guardian of the person or guardian of the estate or both. Tex. Est. Code § 1101.101(a)(1)(B), (a)(1)(C).

Suitability to Serve: Whether a party is suitable to serve as guardian is also an issue of fact for a jury. *See In re Guardianship of Norman*, 61 S.W.3d 20, 22–23 (Tex. App.—Amarillo 2001, pet. denied); *Ulrickson v. Hawkins*, 696 S.W.2d 704, 708 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.).

Selection between Suitable Persons: If two applicants are qualified to serve as guardian, the issue of who will best serve the needs of the ward may be submitted to a jury. *See Chapa v. Hernandez*, 587 S.W.2d 778, 781 (Tex. App.—Corpus Christi–Edinburg 1979, no writ).

Restoration: When considering restoration, the jury must take "supports and services" into account and decide if the ward should be restored completely or partially with supports and services and whether that restoration should be for the person or estate or both. Tex. Est. Code § 1202.051(a).

§ 10.4:10 Considerations in Requesting Jury Trial

The attorney in a guardianship proceeding must decide whether to request a jury. Obviously, the decision is a difficult one, and each attorney's decision will largely depend on whom he represents and the issues before the court.

General Considerations: Statutory probate judges are familiar with the test of incapacity and have seen the condition in many forms. They recognize that a proposed ward's mental status may have improved because of recent compliance with the proposed ward's medication schedule but that this improvement may be temporary. Members of the jury often identify with the proposed ward. The prospect of a jury trial forces the party seeking the guardianship to consider whether the matter can be resolved without the time and expense of a trial.

Spouse Seeking to Serve as Guardian: Spouses have priority to be appointed guardians unless found to be disqualified. Tex. Est. Code § 1104.102(1). If otherwise eligible and not disqualified, a spouse need not request a jury because of the priority status granted to them by statute. If, however, an allegation is asserted that the spouse be disqualified or is unsuitable to serve, perhaps because of alleged neglect, cruelty, or abuse to the proposed ward, the attorney seeking to have the spouse appointed may consider requesting a jury.

Nonspouse Seeking to Serve as Guardian: If two or more persons are seeking appointment as guardian, due consideration should be given to the character, education, transgressions, and appearance of one candidate versus the other. A key factor can be the applicant's relationship to the proposed ward. *See* Tex. Est. Code § 1104.102 (appointment preferences). If an individual is not disqualified and is entitled to serve as guardian in preference over the other applicant, a jury trial is generally an unnecessary expense. See section 10.5:3 below regarding disqualification.

§ 10.4:11 Right to Closed Hearing

If privacy concerns or media attention are important considerations, the proposed ward, an ad litem, or a privately retained attorney may request a closed hearing. Tex. Est. Code §§ 1101.051(c), 1251.008(6). Such requests should be timely and in writing to preserve the record.

§ 10.4:12 Continuance—Temporary Guardianship

The hearing to confirm the appointment of a temporary guardian may be extended by agreement but by no more than thirty days. The proposed ward's attorney must consent to the extension. Tex. Est. Code § 1251.006(c). If personal citation has not been delivered to the proposed ward, a continuance is mandated. The continuance can be for the entire period of the temporary guardianship (*see* Tex. Est. Code §§ 1251.008, 1251.151); however, this is not the best practice. A full extension without an affirmation hearing raises constitutional due-process issues that have not been tested.

§ 10.4:13 Temporary Guardianship Pending Contest

If a temporary or permanent guardianship is contested, the court may appoint a temporary guardian pending contest on its own motion or on the motion of another, grant a temporary restraining order under Tex. R. Civ. P. 680, or both without additional citation if the court finds the appointment or issuance of the order is necessary. Tex. Est. Code § 1251.051. Temporary guardianships pending contest are governed by Texas Estates Code section 1251.051, which provides that—

> the court, on the court's own motion or on the motion of any interested party, may appoint a temporary guardian or grant a temporary restraining order under Rule 680, Texas Rules of Civil Procedure, or both, *without issuing additional citation* if the court finds that the appointment or the issuance of the order is necessary to protect the proposed ward or the proposed ward's estate.

Tex. Est. Code § 1251.051 (emphasis added).

A temporary guardian qualifies by posting bond and filing the oath of office. The temporary guardian's term expires either at the conclusion of the hearing on the contest, when a court-appointed permanent guardian qualifies, or on the nine-month anniversary of the date the temporary guardian qualifies, unless the term is extended by court order issued after a motion to extend the term is filed and a hearing on the motion is held. Tex. Est. Code § 1251.052(b).

The court must find probable cause to believe that the appointment is necessary to protect the proposed ward or the proposed ward's estate, or both, and that there is substantial evidence of incapacity. Tex. Est. Code § 1251.001. The presence of imminent danger is not an essential element in this determination. To the extent the court will allow the selection, it is best if the parties agree to a third party to serve pending contest. Such agreement will not be construed by the court as a tacit admission for the necessity of a guardian. The court may, however, take judicial notice of arguments made in temporary guardianship proceedings and in any subsequent proceedings. *Trimble v. Texas Department of Protective & Regulatory Service*, 981 S.W.2d 211, 215 (Tex. App.—Houston [14th Dist.] 1998, no pet.). See forms 10-1 through 10-3 in this chapter.

§ 10.5 Challenges to Standing in Guardianship Proceedings

Subject to a few exceptions, anyone may commence a guardianship proceeding, contest a guardianship proceeding, or contest the appointment of a particular person as guardian. Tex. Est. Code § 1055.001(a); *see also Torres v. Ramon*, 5 S.W.3d 780, 782 (Tex. App.—San Antonio 1999, no pet.).

Some individuals may, however, lack standing to proceed with or be a party to a guardianship proceeding. *See Allison v. Walvoord*, 819 S.W.2d 624 (Tex. App.—El Paso 1991, mand. motion overr.). A person lacks standing if he has an interest adverse to the proposed ward. Early identification of an adverse interest will allow expeditious disposal of the issue of qualification to serve.

Additionally, some persons are disqualified from serving as guardian. *See* Tex. Est. Code §§ 1104.351–.358. Individuals disqualified under sections 1104.351–.358 may still have standing under section 1055.001 to contest the appointment of another person.

§ 10.5:1 Adverse Interest

A person lacks standing to contest a guardianship proceeding if he has an interest adverse to the proposed ward. Tex. Est. Code § 1055.001. If an individual lacks standing, he may not—

1. file an application to create a guardianship;
2. contest the creation of a guardianship;
3. contest the appointment of a certain person or persons as guardian of the proposed ward's person or estate or both; or
4. contest an application to restore a ward's capacity or modify the guardianship.

Tex. Est. Code § 1055.001(b). Note that the statute does not prohibit an individual from bringing the need for a guardian to the court's attention informally through its investigator. In fact, this can be an important tool if a person has concerns about whether a proposed ward's behavior rises to the level justifying a guardianship.

The Texas Estates Code does not define what constitutes an "adverse interest" or provide much, if any, guidance on what the court may deem to be one. *See* Tex. Est. Code § 1055.001(b). Some guidance on this issue is provided in *Betts v. Brown*, No. 14-99-00619-CV, 2001 WL 40337 (Tex. App.—Houston [14th Dist.] Jan. 18, 2001, no pet.) (not designated for publication). Further, no Texas court has clearly defined "adverse interest" under section 1055.001(b). However, the term *adverse interest* has been defined in cases decided under former Texas Probate Code section 681 (now Estates Code sections 1104.351–.358) and its predecessors. Estates Code section 1104.354 disqualifies a person from serving as guardian if they are asserting a claim to property that is adverse to the ward. *See* Tex. Est. Code § 1104.354(3). See also the discussion of the grounds for disqualification at section 10.5:3 below.

The court in *Betts* did point out that an adverse interest must be something other than the conditions of disqualification under former Probate Code section 681 (now Tex. Est. Code §§ 1104.351–.358).

Examples of individuals who may have an adverse interest include the following.

Potential Creditor: A potential creditor of a proposed ward clearly lacks standing to seek or contest a guardianship proceeding. *Allison v. Walvoord*, 819 S.W.2d 624 (Tex. App.—El Paso 1991, orig. proceeding [leave denied]).

In *Allison*, the wife filed an application seeking to be appointed limited guardian of her husband. At the time, her husband was the defendant in two lawsuits. The plaintiffs contested the application because they were concerned that the commencement of a guardianship proceeding and the appointment of a guardian would adversely affect future discovery. The wife challenged the plaintiffs' standing to appear and contest her application for guardianship. The trial court (citing the former temporary guardianship statute) denied the wife's motion and found the potential creditors had standing in the guardianship application. *Allison*, 819 S.W.2d at 625. The El Paso court of appeals reversed the trial court, directing it to strike the plaintiffs' contest to the guardianship application, stating "[t]he act is to 'protect the well-being of the individual' and those with an adverse interest can hardly qualify as being persons interested in protecting his well-being." *Allison*, 819 S.W.2d at 627.

Spouse with Financial Interest Adverse to Incapacitated Spouse: Although a spouse generally has priority to serve as guardian of an incapacitated mate, the spouse may be disqualified for having a financial interest adverse to the incapacitated spouse. For example, a spouse seeking a divorce at the time of the guardianship has an adverse interest. Further, a spouse may

be disqualified if issues exist concerning the characterization of the couple's marital estate. *Dobrowolski v. Wyman*, 397 S.W.2d 930 (Tex. App.—San Antonio 1965, no writ).

In *Dobrowolski*, the husband was appointed guardian of his wife of seventeen years. Both spouses had children from prior marriages and owned separate property. After the husband's appointment, the wife's daughter sought to remove him, arguing he was disqualified because he had claims potentially adverse to the ward regarding whether the couple's property was community or separate. The trial court agreed. On appeal, the husband stated that he was not asserting claims to or seeking an account of their assets. Nonetheless, the court of appeals affirmed the husband's removal, holding that guardians have a duty to determine the nature and extent of a ward's estate. *Dobrowolski*, 397 S.W.2d at 932 (citing *Dakan v. Dakan*, 83 S.W.2d 620 (Tex. 1935)). Because the couple's property had been commingled, a complete account would be needed to determine each spouse's separate property. In determining the wife's assets, the guardian would have the duty to protect her interests. Because of the possibility of conflicting claims during the accounting process, the husband was found to have an adverse interest and was disqualified. *Dobrowolski*, 397 S.W.2d at 932.

Parent with Financial Interest Adverse to Minor: Parents have priority to serve as guardians of their minor child's estate. However, a parent may be disqualified if they have a financial interest adverse to the child. For example, in *Phillips v. Phillips*, the court held that a surviving parent who sought to be appointed guardian of her minor children's estate had an interest adverse to her children relating to the settlement of her deceased spouse's estate. *Phillips v. Phillips*, 511 S.W.2d 748, 750–51 (Tex. App.—San Antonio 1974, no writ).

Another common example of an adverse financial interest is that of a parent with a child support obligation.

Person with Duty to Account to Proposed Ward: Persons who owe a duty to account to the proposed ward may have an adverse interest. For example, an agent under a power of attorney that was executed by a ward before appointment of a guardian has a duty to account to the guardian of the ward's estate. Tex. Est. Code § 751.133. Thus, the agent may have an adverse interest because, if the agent were appointed guardian, the agent would be accounting to themself for their prior actions.

Similarly, a partner in a partnership inherited by minor wards was disqualified to serve as guardian of the minors' estates. *In re Guardianship of Henson*, 551 S.W.2d 136, 139 (Tex. App.—Corpus Christi–Edinburg 1977, writ ref'd n.r.e.).

Guarantor of Ward's Promissory Note: A guarantor of a note or debt obligation of a proposed ward may have an adverse interest. Because of the strict claims requirements, a guardian can sometimes delay the payment of a ward's debt obligations. If the person appointed guardian has previously executed a guarantee on the ward's behalf, the guardian's interest may conflict with that of the ward. Note, however, that some courts have opined that merely being indebted to the proposed ward does not *automatically* create an adverse interest. *See In re Guardianship of Miller*, 299 S.W.3d 179 (Tex. App.—Dallas 2009, no pet.).

Actual vs. Potential Adverse Interest: In *Adcock v. Sherling*, the court attempted to clarify the definition of "adverse interest" by distinguishing a potential adverse interest from an existing adverse interest. *Adcock v. Sherling*, 923 S.W.2d 74 (Tex. App.—San Antonio 1996, no writ). Potential adverse interests will not disqualify a person from seeking or contesting a guardianship proceeding.

The *Adcock* court held that the ward's son did not have an "adverse interest" merely because he was holding a certificate of deposit for her benefit as trustee. The court noted that the evidence proved the son was not indebted to the ward, he had no claim adverse to the ward or her property, and that none of the funds represented by the certificate and accumulated interest

had been spent. The court further noted that the record did not establish how the son's duty as trustee of the trust would conflict with his role as guardian. Therefore, the court found that—

> while there potentially could have been an adverse claim or a conflict of interest, there is, in fact, no such adverse claim or conflict because Adcock's position concerning the money, that it is to be held by him and his brother to be used for their mother's benefit, is the same interest that the estate has in the property.

Adcock, 923 S.W.2d at 77.

§ 10.5:2 Procedure to Challenge Standing

The procedure for challenging standing in a guardianship is by motion in limine. *See* Tex. Est. Code § 1055.001(c); *see also Womble v. Atkins*, 331 S.W.2d 294, 298 (Tex. 1960). A motion in limine is essentially a trial on the issue of standing. Its purpose is to dispose of select issues before the trial on the merits.

If a contest is filed, the applicant (or contestant) should attempt to determine as soon as possible whether the opposing party may have an adverse interest. Discovery is useful in determining whether an adverse interest exists. If it ultimately appears that a party may have an adverse interest, a motion in limine should be filed as soon as possible and set for hearing. *See Womble*, 331 S.W.2d at 298. The challenged party is entitled to forty-five days' notice of the initial hearing on the motion in limine. Tex. R. Civ. P. 245. See forms 10-4 and 10-5 in this chapter.

Matter of Law: In some cases, no genuine issue of fact exists about whether the party lacks standing under Texas Estates Code section 1055.001(b). For example, a party in a guardianship proceeding who is indebted to the proposed ward, as evidenced by a written promissory note or judgment, may be disqualified and lack standing unless the person pays off the debt. In such cases, the attorney should consider filing a motion for partial summary judgment seeking a ruling that the contestant has an adverse interest as a matter of law. This tactic may eliminate the necessity for a full evidentiary hearing on the motion in limine and minimize attorney's fees and expenses.

Issue of Fact: If issues of fact exist about whether a party has an adverse interest, the court will hold a full evidentiary hearing on the motion in limine. Because standing is an issue for the court, a party is not entitled to a jury trial. *See, e.g., Texas Ass'n of Business v. Texas Air Control Board*, 852 S.W.2d 440, 445–46 (Tex. 1993) (standing is jurisdictional and can be raised on appeal); *Allison v. Walvoord*, 819 S.W.2d 624, 627 (Tex. App.—El Paso 1991, orig. proceeding [leave denied]); *Von Behren v. Von Behren*, 800 S.W.2d 919, 923 (Tex. App.—San Antonio 1990, writ denied) (party to suit for managing conservator not entitled to jury trial on threshold issue of standing). However, each party may call and cross-examine witnesses. At the conclusion of the hearing, the judge will determine whether the party has an adverse interest and lacks standing in the guardianship proceeding. If the court finds that a party lacks standing, that party's pleadings should be stricken. *See Allison*, 819 S.W.2d at 627.

Appeal: A finding that a party lacks standing constitutes a final judgment and may be appealed. *See Fischer v. Williams*, 331 S.W.2d 210, 213–14 (Tex. 1960); *A&W Industries v. Day*, 977 S.W.2d 738, 740 (Tex. App.—Fort Worth 1998, no pet.) (citing *Crowson v. Wakeham*, 897 S.W.2d 779, 783 (Tex. 1995)); *see also Womble*, 331 S.W.2d at 297 (holding that dismissal of probate action because party is not interested party is "in no sense . . . interlocutory" but is final judgment). Thus, the party found to lack standing should file a motion for new trial or notice of appeal within thirty days from the date of the trial court's ruling. Tex. R. Civ. P. 329b(a); Tex. R. App. P. 26.1.

On appeal, the appellate court will review the correctness of the trial court's conclusions of law as drawn from the facts. *See A&W Industries*, 977 S.W.2d at 741 (citing *Mercer v. Bludworth*, 715 S.W.2d 693, 697 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.), *overruled on other grounds by Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 894 (Tex. 1991)). "The trial court's conclusions of law are reviewable *de novo* as a question of law, and will be upheld on appeal if the judgment can be sustained on any legal theory supported by the evidence." *A&W Industries*, 977 S.W.2d at 741 (citing *Nelkin v. Panzer*, 833 S.W.2d 267, 268 (Tex. App.—Houston [1st Dist.] 1992, writ dism'd w.o.j.)).

A person found to lack standing to file an application for guardianship or a contest to an application for guardianship is not entitled to recover attorney's fees, even if the court finds that the application or contest was filed in good faith and with just cause. *See In re Guardianship of Bernsen*, No. 13-17-00076-CV, 2018 WL 2355198 (Tex. App.—Corpus Christi–Edinburg May 10, 2018, no pet.).

§ 10.5:3 Disqualification

Certain individuals are "disqualified" to serve as a guardian. Tex. Est. Code §§ 1104.351–.358. Although an adverse interest affects a party's standing in a guardianship proceeding, disqualification generally only prohibits the disqualified party's ability to be appointed. It does not automatically exclude the disqualified party from participating in the guardianship proceeding.

Texas Estates Code sections 1104.351 through 1104.358 prohibit the following types of persons from being appointed guardian.

Minors: A minor is disqualified from serving as a guardian. Tex. Est. Code § 1104.351(1).

Notoriously Bad Persons: A person whose conduct is "notoriously bad" is disqualified from serving as a guardian. Tex. Est. Code § 1104.353. A notoriously bad person may be one convicted of child or spousal abuse, a spouse who had abandoned their mate, or a person who has shown indifference, neglect, or cruelty toward the proposed ward. *See Legler v. Legler*, 37 S.W.2d 284 (Tex. App.—Austin 1931, no writ) (husband disqualified because he abandoned wife for ten years); *see also* Tex. Est. Code § 1104.358. A determination of what constitutes notoriously bad conduct will generally be an issue of fact.

It is presumed not to be in the best interest of a ward or incapacitated person to appoint a person as guardian who has been finally convicted of—

1. any sexual offense, including sexual assault, aggravated sexual assault, and prohibited sexual conduct;
2. aggravated assault;
3. injury to a child, elderly individual, or disabled individual;
4. abandoning or endangering a child;
5. terroristic threat; or
6. continuous violence against the family of the ward or incapacitated person.

Tex. Est. Code § 1104.353(b).

Incapacitated Persons: An incapacitated person is disqualified from serving as a guardian. Tex. Est. Code § 1104.351(1).

Parties to Lawsuit Involving Proposed Ward: An individual who is a party to a lawsuit or whose parents are parties to a lawsuit affecting the proposed ward's welfare is disqualified to be appointed a guardian unless the court determines that the applicant's and the proposed ward's interests do not conflict or the court appoints a guardian ad litem to represent the proposed ward throughout the litigation. Tex. Est. Code § 1104.354(1); *see also Mireles v. Alvarez*, 789 S.W.2d 947 (Tex. App.—San Antonio 1990, writ denied) (husband disqualified from serving as wife's guardian because they were coplaintiffs in lawsuit).

Persons Indebted to Proposed Ward: A person who is indebted to the proposed ward is disqualified from serving as guardian. Tex. Est. Code § 1104.354(2). This is a common ground for disqualification. The debt may be evidenced by written instrument or other evidence. The debtor may remove this disqualification by repaying the debt before their appointment. Tex. Est. Code § 1104.354(2).

Persons Asserting Claim Adverse to Proposed Ward: A person asserting a claim adverse to the proposed ward or the guardianship estate is disqualified from serving as guardian. Tex. Est. Code § 1104.354(3). This is another common ground for disqualification. See section 10.5:1 above for a more detailed discussion.

Incapable Persons: A person who, due to lack of education, experience, or otherwise, is incapable of managing and controlling the proposed ward's person or estate is disqualified from serving as guardian. Tex. Est. Code § 1104.351(2); *see also Trimble v. Texas Department of Protective & Regulatory Service*, 981 S.W.2d 211, 216 (Tex. App.—Houston [14th Dist.] 1998, no pet.). "Incapable" has been defined as "lacking capacity, ability, or qualifications for the purpose or end in view." *In re Guardianship of Allen*, No. 12-14-00249-CV, 2015 WL 7280894, at *2 (Tex. App.—Tyler Nov. 18, 2015, no pet.). An individual will not be automatically disqualified simply because he lacks knowledge of guardianship law or does not have a business degree. *Blackburn v. Gantt*, 561 S.W.2d 269, 273 (Tex. App.—Houston [1st Dist.] 1978, no writ). Rather, the court will consider the experience of the applicant in light of the issues that may be involved in administering the proposed ward's estate. Thus, an individual may be incapable of serving as guardian because of the particularities of the proposed ward's estate. *See Blackburn*, 561 S.W.2d at 273 (bank, instead of son, appointed guardian to administer ward's considerable estate).

Nonresidents Who Fail to Designate Resident Agents: A nonresident of Texas may not be appointed as a guardian in Texas unless he has filed a designation of resident agent in the guardianship proceeding. Tex. Est. Code § 1104.357. If an applicant is a nonresident of Texas, the application for guardianship and a designation of resident agent should be filed contemporaneously, if possible, but certainly by or before the hearing to appoint a guardian.

Unsuitable Persons: The court may find that a person, corporation, or institution is "unsuitable" and thus disqualified to be appointed guardian. Tex. Est. Code § 1104.352.

Persons Subject to Protective Order for Family Violence: A person found to have committed family violence who is subject to a protective order under chapter 85 of the Texas Family Code may not be appointed guardian of a ward or proposed ward protected by the order. Tex. Est. Code § 1104.358.

Such a determination is subject to review for abuse of discretion. Although the trial court's discretion is generally upheld, a rare exception was found in a decedent's estate case in *In re Estate of Gay*, 309 S.W.3d 676 (Tex. App.—Houston [14th Dist.] 2010, no pet.), in which the reviewing court held the probate court abused its discretion and acted without reference to guiding rules and principles by refusing to appoint brothers as administrators of their father's estate because the trial judge found they had misrepresented themselves before a federal tribunal as their deceased father's "personal representatives by testamentary designation" when, in fact, they had not been appointed by a court as their father's personal representatives.

Persons Disqualified by Declaration: A person may be disqualified to be appointed guardian if the proposed ward executed a written declaration under Code section 1104.202(b) that specifically disqualifies the individual. Tex. Est. Code § 1104.355.

Persons Not Certified to Serve: A person may not be appointed guardian who does not have the certification required by Estates Code chapter 1104, subchapter F. Tex. Est. Code § 1104.356.

§ 10.5:4 Raising Issue of Disqualification

If a potentially ineligible person seeks to be appointed guardian, it is preferable to file a contest to the application specifying the basis for disqualification. If the court characterizes the grounds for disqualification as "adverse interest" under section 1055.001 of the Texas Estates Code, it may then find that the party lacks standing and strike that party's pleadings. See section 10.5:1 above.

§ 10.6 Medical Evidence

§ 10.6:1 Health Care Provider's Certificate of Medical Examination (CME)

Generally, the statement of the doctor who examined the proposed ward will be the only medical evidence of incapacity during the process of initiating a guardianship. As a result, a certificate of medical examination (CME) is an extremely important document in the course of the application process. No guardianship of an adult incapacitated person may be granted without a CME that complies with Texas Estates Code section 1101.103. It is advisable to obtain the CME before filing the guardianship application. This allows the attorney to sign the pleading with a good-faith belief that the application is not groundless or frivolous. *See* Tex. R. Civ. P. 13. This is also usually the single most important factor affecting how quickly the guardianship hearing may be set.

Because Estates Code section 1101.103 requires that a CME be presented to the court and that it be considered by the court before ruling on the application for guardianship, the Amarillo court of appeals held in *In re Guardianship of Parker*, 275 S.W.3d 623 (Tex. App.—Amarillo 2008, no pet.), that the CME is not subject to evidentiary objections.

§ 10.6:2 Incapacitated Proposed Ward

No guardianship of an adult incapacitated person may be granted without a certificate of medical examination (CME). The CME must comply with Tex. Est. Code § 1101.103, which specifically sets out the requirements of the report that are necessary for the court to have before it before it can legally grant a guardianship. Only physicians may complete a CME. Tex. Est. Code § 1101.103(a). The certificate must be based on an examination conducted within 120 days before the application is filed and dated within that same 120-day time period. *See In re Guardianship of Hoffpauir*, No. 09-16-00152-CV, 2018 WL 1321509, at *10 (Tex. App.—Beaumont Mar. 15, 2018, pet. filed) (confirming that CME must be dated not earlier than 120th day before application is filed, not within six months of hearing or trial). See section 10.6:3 below for a discussion of determination of intellectual disability. Specific requirements for the contents of the CME are discussed in Texas Estates Code section 1101.103.

The CME must—

(1) describe the nature, degree, and severity of the proposed ward's incapacity, including any functional deficits 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) in providing a description under Subdivision (1) 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;

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

in providing an evaluation under Subdivision (3), state whether improvement in the proposed ward's physical condition and mental functioning is possible and, if so, state the period after which the proposed ward should be reevaluated to determine whether a guardianship continues to be necessary;

(4) state how or in what manner the proposed ward's ability to make or communicate responsible decisions concerning himself or herself is affected by the proposed ward's physical or mental health, including the proposed ward's ability to:

(A) understand or communicate;

(B) recognize familiar objects and individuals;

(C) solve problems;

(D) reason logically; and

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

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

(6) 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;

state whether a guardianship is necessary for the proposed ward and, if so, whether specific powers or duties of the guardian should be limited if the proposed ward receives supports and services; and

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

Tex. Est. Code § 1101.103(b).

§ 10.6:3 Intellectually Disabled Potential Ward

If the proposed ward is intellectually disabled (formerly referred to as "mentally retarded"), the certificate of medical examination (CME) alone will not be sufficient to appoint a guardian. Instead, the application must also include documentation regarding intellectual disability. Tex. Est. Code § 1101.104. Either a physician or a psychologist may complete a "determination of intellectual disability" (DID) under Tex. Est. Code § 1101.104.

Rather than having a 120-day time frame, the DID must be based on an examination performed within the twenty-four months preceding the hearing. Tex. Est. Code § 1101.104(a)(2)(A). It is not unusual to encounter an intellectually disabled patient who has not been examined in some years, particularly if their physical health is stable.

Frequently, when no DID has been performed within the last two years, courts will allow the doctor or psychologist to review the most recent (but now out-of-date) DID and certify that it is still accurate and complete.

If the proposed ward is "dually diagnosed," that is, has an intellectual disability diagnosis but also a medical diagnosis (e.g., autism, static encephalopathy), a DID is not required, and the regular CME may be used.

Physicians are authorized to perform DIDs and combine the CME with a DID. A traditional DID may also still be submitted. *See* Tex. Est. Code § 1101.104.

A standard form of CME (which includes a DID) is included as form 4-9 in this manual.

§ 10.6:4 Independent Medical Examination

If the proposed ward is uncooperative, the applicant cannot obtain proper consent to waive the patient-physician privilege, the applicant cannot gain access to the proposed ward, or the ad litems or a contestant want a "second opinion," the court may order an independent medical exam and appoint the necessary physicians. If an independent medical examination is sought, an application should be filed with the court setting out the requested scope of the examination and any requested limitations. The proposed ward and attorney ad litem must receive notice at least four days before the hearing. Tex. Est. Code § 1101.103(c). Service of the notice of hearing should be accomplished in the same manner as service of an application for guardianship. Although Texas Estates Code section 1101.103(c) requires four days' notice, this requirement may be waived. See forms 10-6 and 10-7 in this chapter. A court abuses its discretion if it appoints a physician to perform an examination of a proposed ward without the necessity therefor being determined "at a hearing held for that purpose" after notice to the proposed ward and the attorney ad litem. *See In re Kelm*, 569 S.W.3d 232, 236 (Tex. App.—Houston [1st Dist.] 2018, no pet.).

Note that even though section 1101.103 specifically refers to physicians, courts have discretion to appoint a physician and, when appropriate, order additional testing. For example, a psychiatrist may require neuropsychological testing to render a complete report. Thus, consideration should be given to any tests that may need to be ordered to obtain a complete independent evaluation.

§ 10.7 Privileges and Exceptions

§ 10.7:1 Physician-Patient Privilege

General Rule: Communications between an individual and their physician are privileged and may not be disclosed by the physician. Tex. R. Evid. 509(c)(1). Further, a patient's medical records are confidential and may not be disclosed. Tex. R. Evid. 509(c)(2).

Waiver of Privilege: The patient or any repre-sentative of the patient may consent to the release of privileged information. Tex. R. Evid. 509(e)(2). An authorized representative may include the patient's guardian or attorney ad litem in the guardianship hearing. Tex. R. Evid. 509(f)(1).

§ 10.7:2 Mental-Health Privilege

General Rule: All communications, including all records, between an individual and their physician or another professional related to the patient's mental health are privileged. Tex. R. Evid. 510(b). Further, section 576.005 of the Texas Health and Safety Code provides that "[r]ecords of a mental health facility that directly or indirectly identify a present, former, or proposed patient are confidential unless disclosure is permitted by other state law." *See* Tex. Health & Safety Code § 576.005.

Disclosure of Name and Birth and Death Dates: A mental-health facility must release the name, date of birth, or date of death of a person who was a patient at the facility on request by a representative of a cemetery or funeral establishment only for the purpose of inscribing the name or date on a grave marker, unless otherwise instructed by the patient or the patient's guardian. Tex. Health & Safety Code § 576.0055.

Waiver of Privilege: The patient or any repre-sentative of the patient may consent to the release of privileged information by signing a written consent. Tex. R. Evid. 510(d)(2). An authorized representative includes any person bearing the written consent of the patient and the patient's guardian. Tex. R. Evid. 510(a)(3).

§ 10.7:3 Exceptions to Privilege

Guardianship "Miranda" Warning: Texas Rule of Evidence 510(d)(4) allows physicians and other mental-health professionals to disclose information concerning the proposed ward's mental or emotional health obtained in the course of a court-ordered examination provided the professional previously informed the proposed ward that their communications would not be privileged. *See* Tex. R. Evid. 510(d)(4). For the exception to apply, the judge must find that the patient was told that the information would not be privileged before communicating with the physician. Tex. R. Evid. 510(d)(4).

This exception is specifically addressed in the certificate of medical examination (CME). When using a physician or other health-care professional to evaluate a proposed ward who may not be well versed in the CME form, it is worth informing the physician or other health-care professional of the importance of informing the proposed ward of this exception to privilege.

Failure to Give Guardianship "Miranda" Warning: If a medical doctor or expert fails to give the required disclosure, the expert's entire testimony generally will be excluded as privileged. Accordingly, experts should be warned about these requirements before evaluating the proposed ward. Furthermore, the health care provider's letter, certificate, or medical report should include a statement confirming that the expert gave the proposed ward the required disclosure and, if possible, that the proposed ward consented to the release of information in writing.

If the physician failed to give the proper warning, the temporary guardian of the person or an acting agent-in-fact could also consent to the disclosure of mental-health information under rule 510(b) of the Texas Rules of Evidence. See section 10.7:2 above.

When contesting medical testimony, the attorney should take the opposing witness on voir dire before the direct examination to determine if the disclosure was made and the privilege was waived. If not, the attorney should move to strike further testimony of the witness.

§ 10.8 Discovery

§ 10.8:1 Testifying Medical Expert

Selecting Qualified Experts: Hiring a psychiatrist or neurologist who has experience determining and testifying about capacity in guardianship proceedings is of great importance, as he will be familiar with the legal criteria for establishing capacity. The expert should be board certified, if possible. Most judges will hesitate to grant an application for guardianship with no medical testimony. Possible alternatives to physicians as experts include social workers, nurses, and medical or home-care attendants.

Qualifying Experts: Rule 702 of the Texas Rules of Evidence, which governs testifying experts, provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." Tex. R. Evid. 702.

***Daubert* Standard:** The United States Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), adopted a new standard relating to the admissibility of expert testimony. The Texas Supreme Court subsequently adopted the holding of *Daubert* in *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995). This rule now applies to all experts. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

In *Daubert*, the Supreme Court held that rule 702 of the Federal Rules of Evidence requires scientific expert testimony to be both reliable and relevant. *Daubert*, 509 U.S. at 589. The trial court granted a motion for summary judgment because the plaintiffs failed to establish that the opinions of their experts were generally accepted by the relevant scientific community. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 727 F. Supp. 570, 572 (S.D. Cal. 1989) (quoting *United States v. Kilgus*, 571 F.2d 508, 510 (9th Cir. 1978)). The court of appeals followed the "general acceptance test" established in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), and affirmed the lower court's ruling. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 951 F.2d 1128 (9th Cir. 1991).

On appeal, the Supreme Court held that rule 702 did not incorporate the *Frye* test, noting that *Frye*'s restrictive "general acceptance" test was at odds with the liberal approach of the Federal Rules of Evidence. *Daubert*, 509 U.S. at 588 (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)). Rather, rule 702 requires the proffered testimony to be (1) scientific knowledge (2) that will "assist the trier of fact to understand the evidence or to determine a fact in issue." *Daubert*, 509 U.S. at 589 (quoting Fed. R. Evid. 702). To constitute "scientific knowledge," the proffered testimony must be reliable. *Daubert*, 509 U.S. at 590. In addition, to be helpful to the trier of fact, the evidence must be relevant. *Daubert*, 509 U.S. at 591. Scientific evidence is relevant if there is a "valid scientific connection to the pertinent inquiry as a precondition to admissibility." *Daubert*, 509 U.S. at 592. The Court further enumerated four nonexclusive factors to assist trial judges in determining whether scientific evidence is relevant and reliable and therefore admissible under rule 702. They are—

1. whether a theory or technique can be and has been tested (falsifiability);
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 the standards controlling the technique's operation; and
4. the general acceptance of the theory or technique by the relevant scientific community.

Daubert, 509 U.S. at 591–94.

Texas Adopts *Daubert* Rule in *Robinson*: In 1995, the Texas Supreme Court adopted the *Daubert* holding in *E.I. du Pont de Nemours & Co. v. Robinson* by finding that rule 702 of the Texas Rules of Evidence also requires a proponent of scientific expert testimony to demonstrate that such evidence is relevant and reliable before it can be admitted. *Robinson*, 923 S.W.2d at 556. Once an expert's qualifications are established, the proponent of the testimony must then demonstrate that the evidence is *relevant* and *reliable* before the testimony can be admitted. *See Daubert*, 509 U.S. at 579; *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 720 (Tex. 1998).

By applying these tests to opinions proffered by a party, the trial court is mandated to assume the role of a "gatekeeper." However, the trial court need not determine "whether an expert's conclusions are correct, but only whether the analysis used to reach them is reliable." *Gammill*, 972 S.W.2d at 728. The trial court retains discretion in determining the admissibility of expert testimony, and the standard on appeal is an abuse of that discretion. *Gammill*, 972 S.W.2d at 719.

Extension of *Daubert* and *Robinson* to All Experts: For several years following the *Daubert* and *Robinson* decisions, it was unclear whether their holdings applied only to "hard sciences" such as testing, research, and analysis or were intended to extend to clinical sciences. The United States Supreme Court clarified this issue in *Kumho Tire Co. v. Carmichael*, which held that the trial court's *Daubert* gatekeeper obligation applied to all expert testimony. *Kumho Tire Co.*, 526 U.S. at 147–149; *see also Gammill*, 972 S.W.2d at 713.

Effect on Guardianship Proceedings: Because medical testimony is a fundamental requirement in a guardianship proceeding, special consideration should be given to the selection of medical experts to examine a proposed ward for purposes of providing medical expert testimony. It is preferable to select doctors with experience and training in psychology or neurology, if possible. Geriatric psychiatrists and neurologists make good witnesses as they are able to testify to commonly used psychiatric tests in their area of specialization.

The failure to select a medical expert with specialized training and knowledge could result in the exclusion of the expert's testimony. For example, the Texas Supreme Court affirmed the exclusion of an emergency room doctor's testimony offered to establish the relationship between a patient's head injury and death. *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996). In reaching its decision, the court noted that a neurologist was better suited to opine on such matters. *Broders*, 924 S.W.2d at 153. The court also noted that medical experts are not automatically qualified simply because they possess a medical degree. Rather, 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 on that particular subject." *Broders*, 924 S.W.2d at 153 (citing *Ponder v. Texarkana Memorial Hospital*, 840 S.W.2d 476, 477–78 (Tex. App.—Houston [14th Dist.] 1991, writ denied)).

The attorney should be prepared to question the opposing party's expert. See form 10-16 in this chapter for a list of sample questions for the physician witness in a contested guardianship proceeding. These questions do not form an exhaustive list.

Nevertheless, under *In re Guardianship of Parker*, 275 S.W.3d 623, 628–29 (Tex. App.—Amarillo 2008, no pet.), because Tex. Est. Code § 1101.103 (formerly Texas Probate Code section 687) requires that the certificate of medical examination (CME) be presented to the court and that it be considered by the court before ruling on the application for guardianship, the court held that the CME is not subject to evidentiary objections.

§ 10.8:2 Testifying Nonexpert Witness

In jury trials, lay witnesses who are personally acquainted with the proposed ward are among the most influential. Lay witnesses may testify about the proposed ward's actions, conduct, and demeanor. Juries often give more credence to their testimony than to that of expert witnesses whom the jury may believe have something to gain or lose.

If a nonexpert gives an opinion about mental capacity, the witness must state facts on which their opinion is based. *Ellington v. Ellington*, 443 S.W.2d 50, 53 (Tex. App.—Tyler 1969, writ ref'd n.r.e.). If the witness states that they believe the proposed ward is of unsound mind, the witness must divulge detailed facts on which they base their conclusion. Conversely, if the witness concludes the proposed ward is of sound mind, very little detail may be necessary. *See Williford v. Masten*, 521 S.W.2d 878, 885 (Tex. App.—Amarillo 1975, writ ref'd n.r.e.); *Moeling v. Russell*, 483 S.W.2d 21, 23 (Tex. App.—Tyler 1972, no writ).

Potential witnesses may include a religious adviser; friends, acquaintances, or members of the proposed ward's social groups; or any person who has had business dealings with the proposed ward such as a housekeeper, a banker, an accountant, a hairdresser, or a veterinarian.

§ 10.8:3 Court Investigator's Report

On the filing of an application for guardianship under Texas Estates Code section 1101.001, a court investigator investigates the circumstances alleged in order to determine whether a less restrictive alternative is appropriate. Tex. Est. Code § 1054.151. The court investigator's role does not supersede any statutory duty or obligation of another to report or investigate abuse or neglect. Tex. Est. Code § 1054.154.

The investigator must file a report on their findings. Tex. Est. Code § 1054.153(a). In contested cases, the investigator must furnish the attorneys with a copy of their report by the earlier of seven days after the day it is completed or ten days before the day the trial is scheduled to begin. Tex. Est. Code § 1054.153(b). Most court investigators appreciate receiving relevant telephone numbers and contact addresses from the applicant to assist in their investigation. While the report should include facts and findings, the investigator should take care not to advocate for a particular outcome or in favor of a particular party. Doing so could at a minimum disqualify the investigator and at worse invite a motion to recuse the judge, since the investigator is an arm of the court.

§ 10.8:4 Confidentiality of State and County Agency Reports

General Rule: Agencies such as the Texas Department of Family and Protective Services may have information relevant to an applicant's eligibility to serve or contest a guardianship proceeding. There are, however, confidentiality requirements with respect to the records of state and county agencies. The Texas Human Resources Code deems confidential and not subject to disclosure—

1. a report of abuse, neglect, or exploitation;
2. the identity of the person making a report; and
3. all files, reports, records, communications, and working papers used or developed in an investigation relating to services provided under Code chapter 48.

Tex. Hum. Res. Code § 48.101(a).

Exception: A court, including a court in which a guardianship is pending, may direct the release of confidential information if it determines that the disclosure is essential to the administration of justice and will not endanger the life or safety of any individual who is the subject of, makes, or participates in a report of abuse, neglect, or exploitation. Tex. Hum. Res. Code § 48.101(c)(3); *see also In re Chesses*, 388 S.W.3d 330 (Tex. App.—El Paso 2012, no pet.).

The party seeking disclosure of a report must prepare and file a motion with the court requesting its release and a hearing on the motion. Tex. Hum. Res. Code § 48.101(c)(1). The movant must give the department or investigating state agency and each interested party notice of the motion and hearing. Tex. Hum. Res. Code § 48.101(c)(2). The court must hold a hearing and conduct an in camera review of the information before determining whether to direct the release of the report. Tex. Hum. Res. Code § 48.101(c)(3).

The notice and filing requirements delay procurement of the agency reports by several weeks. Accordingly, the application for their disclosure should be filed before the guardianship hearing to ensure sufficient time exists to receive and review them. See forms 10-8 and 10-9 in this chapter.

§ 10.8:5 Discovery Generally

Discovery is an effective tool for determining another party's motivations in seeking or contesting a guardianship. It also allows the attorney to ascertain whether that party has an adverse interest that would disqualify the applicant from seeking or contesting the guardianship.

A party should promptly send a request for disclosure and follow up with other discovery appropriate for the allegations in the proceedings. Discovery should be used to investigate a party's standing, any adverse interests, any disqualifications, and opposition to another party's entitlement or qualifications. If defending against a guardianship, the attorney should attempt to determine whether the proponent has recently engaged in personal or business transactions that tacitly admit that the proposed ward has capacity. Such transactions may include accepting a check signed by the proposed ward or acting under a power of attorney recently executed by the proposed ward.

Finally, if any party is actively asserting that the proposed ward has capacity, the proposed ward should be deposed so that the attorney will be aware of the proposed ward's probable testimony. See forms 10-11 through 10-15 in this chapter.

Required Disclosures: Amendments to Texas Rules of Civil Procedure 194.1–194.6, effective January 1, 2021, require disclosures and production of documents to be made to opposing parties without waiting for a discovery request "*except as exempted by [the Rules] or as otherwise agreed by the parties or ordered by the court.*" Tex. R. Civ. P. 194.1 (emphasis added).

While these rules make specific reference to suits governed by the Texas Family Code and rule 194.2(d) includes specific exemptions from the provisions for certain types of cases, no specific exemptions or references are made for probate and guardianship proceedings.

Probate and guardianship proceedings are exempt from the "Expedited Trial Rules" (Tex. R. Civ. P. 47(c), 169) under Texas Estates Code sections 53.107 and 1053.105. *See* Tex. Est. Code §§ 53.107, 1053.105. In the absence of a clear indication whether these Estates Code sections similarly shelter probate and guardianship proceedings from the initial disclosure require-

ments under rule 194, the duty may be avoided either by a Rule 11 Agreement between the parties or by court order. *See* Tex. R. Civ. P. 194.1(a).

See form 6-5 in this manual for a suggested Rule 11 Agreement.

However, in an applicable case, required disclosures apply to initial, expert, and pretrial disclosures. Initial disclosures are due thirty days after the contestant's answer. Expert disclosures are due ninety days before trial for the movant and sixty days before trial for the contestant. Pretrial disclosures must be made at least thirty days before trial. Tex. R. Civ. P. 194, 195.

§ 10.9 Considerations During Hearing and Trial

§ 10.9:1 Burden of Proof

The burden of proof in a contested guardianship is on the person alleging the incapacity. In other words, the applicant will be required to prove all the statutory elements necessary for the court to appoint a guardian. Tex. Est. Code § 1101.101(b).

§ 10.9:2 Findings Required by Trier of Fact

Note that in all guardianship proceedings, two standards of proof are employed: both clear and convincing and preponderance of evidence. Section 1101.101 of the Texas Estates Code lists the requisite findings and the applicable standards.

Clear and Convincing Evidence: Before appointing a guardian, the finder of fact must find by clear and convincing evidence that—

1. the proposed ward is incapacitated (the incapacity of an adult proposed ward must be evidenced by recurring acts within the preceding six months and not by isolated instances of negligence or bad judgment);
2. it is in the best interest of the proposed ward to have the court appoint a person as the proposed ward's guardian;
3. the proposed ward's rights or property will be protected by the appointment of a guardian;
4. alternatives to guardianship that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible; and
5. supports and services available to the proposed ward that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible.

Tex. Est. Code § 1101.101(a)(1).

Clear and convincing evidence means "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." *Trimble v. Texas Department of Protective & Regulatory Service*, 981 S.W.2d 211, 217 (Tex. App.—Houston [14th Dist.] 1998, no pet.). This standard falls between the preponderance-of-evidence standard in civil proceedings and the reasonable-doubt standard in criminal proceedings. *Trimble*, 981 S.W.2d at 217. For example, to avoid a guardianship, there must be clear and convincing evidence that available supports and services would enable the proposed ward to make personal decisions on their own, not that supports and services would enable another person to make those same decisions for the proposed ward. *In re Guardianship of A.E.*, 552 S.W.3d 873 (Tex. App.—Fort Worth 2018, no pet.).

Preponderance of Evidence: Before appointing a guardian, the finder of fact must find by a preponderance of the evidence that—

1. the court has venue of the case;
2. the person to be appointed guardian is eligible to act as guardian and is entitled to appointment or, if no eligible person entitled to appointment applies, the person appointed is a proper person to act as guardian;
3. if a guardian is appointed for a minor, 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 he is not otherwise eligible for enrollment; and
4. the proposed ward is totally without capacity to care for themself and to manage their property or lacks the capacity to do some, but not all, of the tasks necessary to care for themself or to manage their property.

Tex. Est. Code § 1101.101(a)(2).

§ 10.9:3 Ward's Presence in Courtroom

Section 1101.051 of the Texas Estates Code requires the proposed ward's presence in the courtroom at the hearing; if the proposed ward does not attend, the court must make a finding on the record of why the proposed ward's presence was not necessary or may enter its determination in the order. Tex. Est. Code § 1101.051(b). Generally, the duty to bring the proposed ward to the courtroom or to explain the proposed ward's nonappearance rests with the attorney ad litem. Several methods may be used to prove why the proposed ward's presence at the hearing would not be in the proposed ward's best interests. Examples include the following:

- Incorporate into the health care provider's letter or certificate the medical reason the proposed ward's presence would be inappropriate.
- Prepare a written statement by the ad litem for the proposed ward to sign, expressing their desire not to appear.
- Tape record (with the court's permission) the proposed ward's statement to the court.
- Arrange for a telephonic appearance if the proposed ward is physically unable to attend and the court will allow it.
- Arrange for the ad litem to testify about the proposed ward's inability or lack of desire to attend.

§ 10.9:4 Hearsay Objection to Health Care Provider's Letter or Certificate

It is generally appropriate to allow hearsay of a medical professional without subjecting the professional to cross-examination if the physician's testimony is not truly controverted. This commonly occurs if no one objects to the admission of the physician's letter or certificate. Also, rule 803(4) of the Texas Rules of Evidence provides a hearsay exception for "statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Tex. R. Evid. 803(4); *see also In re Guardianship of Parker*, 275 S.W.3d 623 (Tex. App.—Amarillo 2008, no pet.). Because Tex. Est. Code § 1101.103 requires that a certificate of medical examination (CME) be presented to the court and that it be considered by the court before ruling on the application for guardianship, the court in *Parker* held that the CME was not subject to evidentiary objections. *See* Tex. R. Evid. 803(4).

§ 10.9:5 "Dead Man's Statute"

The "dead man's statute," which limits the admissibility of a decedent's statements under certain circumstances, applies to incapacitated individuals as well. Under this rule of evidence, neither party is allowed to testify against the other about oral statements by the testator, intestate, or ward unless that testimony is corroborated or unless the witness is called at trial to testify by the opposite party. Tex. R. Evid. 601(b).

Most transactions with the proposed ward or ward can be admitted. Tex. R. Evid. 601(b). Additionally, Texas courts follow the modern line of cases from other jurisdictions holding that "corroborating evidence need not be sufficient standing alone to support the verdict, but must tend to confirm and strengthen the testimony of the witness and show the probability of its truth." *Quitta v. Fossati*, 808 S.W.2d 636, 641 (Tex. App.—Corpus Christi–Edinburg 1991, writ denied) (citing *Powers v. McDaniel*, 785 S.W.2d 915, 920–21 (Tex. App.—San Antonio 1990, writ denied)); *Parham v. Wilbon*, 746 S.W.2d 347, 350 (Tex. App.—Fort Worth 1988, no writ); *Bobbitt v. Bass*, 713 S.W.2d 217, 220 (Tex. App.—El Paso 1986, writ dism'd)).

§ 10.9:6 Jury Charge

When trial is inevitable, a jury charge should be prepared and submitted to the court. *See* Tex. R. Civ. P. 271–279.

For sample pattern jury charges relating to guardianship proceedings, see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Family & Probate*.

§ 10.10 Attorney's Fees

Reasonable and necessary attorney's fees may be charged against the ward's estate or, if the estate is insufficient, from the county treasury if the county budgets funds for that purpose under section 1155.054 of the Texas Estates Code. *See Nelkin v. Panzer*, 833 S.W.2d 267, 269 (Tex. App.—Houston [1st Dist.] 1992, writ dism'd w.o.j.) (citing former Texas Probate Code section 247); *see also* Tex. Est. Code § 1155.054.

A private attorney who defends the proposed ward in the guardianship proceeding may also seek payment of attorney's fees and expenses from the ward's estate. However, if the court ultimately finds that the proposed ward is incapacitated and, therefore, incapable of entering into a contract, the private attorney may be denied recovery of attorney's fees on the grounds that the proposed ward did not have capacity to retain counsel.

If the court finds that a party in a guardianship proceeding acted in bad faith or without just cause in prosecuting or objecting to an application in the proceeding, the court may order the party to reimburse the ward's estate for all or part of the attorney's fees awarded under Texas Estates Code section 1155.054 and shall issue judgment against the party and in favor of the ward's estate for the amount of attorney's fees ordered to be reimbursed to the ward's estate. *See* Tex. Est. Code § 1155.054(d).

Because attorney's fees are not classically considered "costs," such amounts are not to be included in calculating the "probable costs" for ruling for security for costs under Tex. Est. Code § 1053.052. See sections 10.4:2 through 10.4:6 above.

Amendments in 2021 to the Texas Civil Practice and Remedies Code broaden the category of parties from whom attorney's fees can be recovered. Fees may now be recovered in civil actions from any individual or "organization" (defined by Texas Business Organizations Code section 1.002(62)) other than a quasi-governmental entity authorized to perform its function by state law, a religious organization, a charitable organization, or a charitable trust. Tex. Civ. Prac. & Rem. Code § 38.001.

§ 10.10:1 Requesting Attorney's Fees

It is advisable to include a plea of good faith and just cause in the application to appoint a guardian. This plea lays the foundation for, and the finding is a condition precedent to, an award of attorney's fees from the ward's estate. See form 10-1 in this chapter for suggested language.

"Good faith" and "just cause" are not defined by the Texas Estates Code, and no Texas case has defined these terms in the context of a discretionary award of attorney's fees to a party who filed an application for appointment of a guardian. However, the Estates Code includes a similar attorney's fees provision regarding the probate of a will. *See* Tex. Est. Code § 352.052(a) (awarding attorney's fees from the estate to a person designated as executor or administrator who defends or prosecutes a proceeding to have the will admitted to probate and acts in "good faith and with just cause"). In this context, "good faith" means an "action prompted by honesty of intention or a reasonable belief that the action was probably correct." *In re Estate of Kam*, 484 S.W.3d 642, 654 (Tex. App.—El Paso 2016, pet. denied) (quoting *Ray v. McFarland*, 97 S.W.3d 728, 730 (Tex. App.—Fort Worth 2003, no pet.)). A party acts "for just cause" when their actions are "based on reasonable grounds and there [is] a fair and honest" reason for their actions. *In re Estate of Kam*, 484 S.W.3d at 654–55 (quoting *Ray*, 97 S.W.3d at 730).

If the request for attorney's fees is not contested, it may be submitted as an application for payment of attorney's fees or by filing a claim. The application should be in writing, showing each item of expense and the date of the expense, including a description of the legal services provided; verified by an affidavit of the guardian or applicant; and filed with the clerk of the court to comply with section 1155.103 of the Estates Code regarding expenses against the guardianship estate. The payment also must be authorized by court order before payment can be made from the ward's estate. *See* Tex. Est. Code § 1155.103; *see also Woollett v. Matyastik*, 23 S.W.3d 48, 52 (Tex. App.—Austin 2000, pet. denied).

The timing of the request for attorney's fees is important. At least one court of appeals has held that the court that creates the guardianship is in the best position to evaluate the request for fees. In *In re Estate of Larson*, which involved a contested guardianship, the attorneys who represented the ward's spouse failed to file an application for fees before the closing of the guardianship. Instead, they waited and filed a claim in the ward's estate after her death. On appeal from the awarding of those fees in the probate estate, the court of appeals held that only the guardianship court can award fees under the guardianship provisions of the Estates Code. *See In re Estate of Larson*, 541 S.W.3d 368 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

§ 10.10:2 Evidentiary Requirements

Generally, the determination of the reasonableness of attorney's fees is a question of fact, and the fee award must be supported by competent evidence. *In re Guardianship of Hanker*, No 01-12-00507-CV, 2013 WL 3233251 (Tex. App.—Houston [1st Dist.] June 25, 2013, no pet.); *Brown & Root U.S.A., Inc. v. Trevino*, 802 S.W.2d 13, 14–15 (Tex. App.—El Paso 1990, no writ) (citing *Great American Reserve Insurance Co. v. Britton*, 406 S.W.2d 901 (Tex. 1966)). When determining the amount of fees to award, the court should consider the attorney's hourly rate and the hours expended. *See Central Texas Micrographics v. Leal*, 908 S.W.2d 292, 299 (Tex. App.—San Antonio 1995, no writ); *Hanker*, 2013 WL 3233251, at *3–5. Expert testimony concerning the reasonableness and necessity of the legal services performed can be used to support the award. *Barrett v. Parchman*, 675 S.W.2d 289, 291 (Tex. App.—Dallas 1984, no writ); *Hanker*, 2013 WL 3233251, at *3; *see also* Tex. Disciplinary Rules Prof'l Conduct R. 1.04, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9).

Texas appellate courts have held that the trial court does not have authority to adjudicate the reasonableness of attorney's fees on judicial knowledge without the benefit of evidence. *Brown & Root U.S.A., Inc.*, 802 S.W.2d at 15. If no evidence or insuf-

ficient evidence supports an award, the court abuses its discretion in making the award and the case must be reversed. *Brown & Root U.S.A., Inc.*, 802 S.W.2d at 16; *Hanker*, 2013 WL 3233251, at *2, 3. For additional guidance on the determination of reasonable and necessary evidence and the lodestar method for calculating fees, see sections 10.10:3 through 10.10:11 below.

§ 10.10:3 Reasonable and Necessary

As a general rule, the party seeking to recover attorney's fees carries the burden of proof, and reasonableness of the fee is a fact question. *See, e.g., Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 892 (Tex. App.—Austin 2010, pet. denied).

§ 10.10:4 Authorization to Recover Attorney's Fees; Fee-Shifting

Texas law does not generally permit recovery of attorney's fees unless authorized by statute or contract; this rule is known as "the American Rule." *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310–11 (Tex. 2006); *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. National Development & Research Corp.*, 299 S.W.3d 106, 120 (Tex. 2009); *In re Marriage of Pyrtle*, 433 S.W.3d 152, 160 (Tex. App.—Dallas 2014, pet. denied).

Attorney's fees are specifically authorized by statute in many circumstances encountered by those practicing in the guardianship area. For a list of statutes allowing or related to the recovery of attorney's fees in guardianship proceedings, see section 10.10:11 below.

When a claimant for fees seeks payment of fees from other than their retained client, typically pursuant to contract or statute, this is often referred to as "fee-shifting." *Transcontinental Insurance Co. v. Crump*, 330 S.W.3d 211, 230 (Tex. 2010); *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 484 (Tex. 2019).

When a claimant wishes to obtain attorney's fees from the opposing party, the claimant must prove that the requested fees are both reasonable and necessary. *Rohrmoos Venture*, 578 S.W.3d at 484.

The idea behind awarding attorney's fees in fee-shifting situations is to compensate the prevailing party generally for its reasonable losses resulting from the litigation process. To secure an award of attorney's fees from an opponent, the prevailing party must prove that (1) recovery of attorney's fees is legally authorized and (2) the requested attorney's fees are reasonable and necessary for the legal representation, so that such an award will compensate the prevailing party generally for its losses resulting from the litigation process. *Rohrmoos Venture*, 578 S.W.3d at 487.

Because such fee awards are compensatory in nature, fee-shifting is not a mechanism to improve a lawyer's economic situation, and only fees that are reasonable and necessary for the legal representation will be shifted to the nonprevailing party. The fee award may not necessarily be the amount contracted for between the prevailing party and its lawyer, because a client's agreement to a certain fee arrangement or obligation to pay a particular amount does not necessarily establish that fee as reasonable and necessary. *Rohrmoos Venture*, 578 S.W.3d at 487–88.

A party must be represented by a lawyer to secure an award of attorney's fees. This includes a corporation being represented by its own in-house counsel, a law firm being represented by a member of the firm, an attorney representing himself pro se, or a state being represented by its attorney general. *Rohrmoos Venture*, 578 S.W.3d at 488.

§ 10.10:5 Expert Testimony

Reasonableness of attorney's fees must be supported by expert testimony. *Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821, 830 (Tex. App.—Dallas 2014, no pet.); *Twin City Fire Insurance Co. v. Vega–Garcia*, 223 S.W.3d 762, 770–71 (Tex. App.—Dallas 2007, pet. denied). This requirement may be satisfied by sworn testimony from an attorney designated as an expert before testifying. *See Woodhaven Partners*, 422 S.W.3d at 830. Testimony from a party's lawyer about that party's attorney's fees that "is not contradicted by any other witness and is clear, positive, direct, and free from contradiction" is taken as true as a matter of law. *In re A.B.P.*, 291 S.W.3d 91, 98 (Tex. App.—Dallas 2009, pet. denied).

An affidavit complying with section 18.001 of the Texas Civil Practice and Remedies Code can support an award of attorney's fees. *See* Tex. Civ. Prac. & Rem. Code § 18.001. Such an affidavit, stating that the amount charged for a service was reasonable at the time and place that the service was provided and that the service was necessary, must be taken before an officer with authority to administer oaths and must be made by the person who provided the service or the person in charge of records showing the service provided and charge made. Tex. Civ. Prac. & Rem. Code § 18.001(b), (c). Although section 18.001(c)(3) provides that an itemized statement of the service and charge must be included, there is authority that attorney's fees do not have to be itemized. *See Jamshed v. McLane Express, Inc.*, 449 S.W.3d 871, 884 (Tex. App.—El Paso 2014, no pet.).

The affidavit must be served on each other party by the earlier of (1) ninety days after the date the defendant files an answer; (2) the date the offering party must designate any expert witness under a court order; or (3) the date the offering party must designate any expert witness as required by the Texas Rules of Civil Procedure. Tex. Civ. Prac. & Rem. Code § 18.001(d). If services are provided for the first time by a provider after the answer is filed, the affidavit must be served by the earlier of (1) the date the offering party must designate any expert witness under a court order or (2) the date the offering party must designate any expert witness as required by the Texas Rules of Civil Procedure. Tex. Civ. Prac. & Rem. Code § 18.001(d–1). When the affidavit is served, notice must be filed with the clerk that the affidavit was served in accordance with section 18.001. Except as provided by the Texas Rules of Evidence, the affidavit is not required to be filed with the clerk before the trial begins. Tex. Civ. Prac. & Rem. Code § 18.001(d–2).

The party opposing a claim in the affidavit must serve a counteraffidavit made by a person "qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit." It must give reasonable notice of the basis on which the serving party intends to controvert the claim at trial, and it may not be used to controvert the causation element of the cause of action. Tex. Civ. Prac. & Rem. Code § 18.001(f).

The counteraffidavit must be served on the party or the party's attorney by the earlier of (1) 120 days after the date the defendant files its answer; (2) the date the party offering the counteraffidavit must designate expert witnesses under a court order; or (3) the date the party offering the counteraffidavit must designate any expert witness as required by the Rules of Civil Procedure. Tex. Civ. Prac. & Rem. Code § 18.001(e). If service of the affidavit was made under section 18.001(d–1), the counteraffidavit must be served by the later of (1) thirty days after the affidavit was served; (2) the date the party offering the counteraffidavit must designate any expert witness under a court order; or (3) the date the party offering the counteraffidavit must designate any expert witness as required by the Rules of Civil Procedure. Tex. Civ. Prac. & Rem. Code § 18.001(e–1). When the counteraffidavit is served, written notice must be filed with the clerk that the counteraffidavit was served in accordance with section 18.001. Tex. Civ. Prac. & Rem. Code § 18.001(g).

If continuing services are provided after a relevant deadline, affidavits may be supplemented on or before the sixtieth day before the trial begins, and counteraffidavits may be supplemented on or before the thirtieth day before the trial begins. Tex.

Civ. Prac. & Rem. Code § 18.001(h). Deadlines may be altered by agreement of all parties or with leave of court. Tex. Civ. Prac. & Rem. Code § 18.001(i).

An unsworn declaration comporting with section 132.001 of the Civil Practice and Remedies Code may be submitted instead of an affidavit. *See* Tex. Civ. Prac. & Rem. Code § 132.001.

§ 10.10:6 Lodestar Method

The lodestar method for proving reasonableness and necessity of attorney's fees applies to fee-shifting claims under the Texas Estates Code. *See Land Rover U.K., Ltd. v. Hinojosa*, 210 S.W.3d 604, 607–08 (Tex. 2006); *Garcia v. Martinez*, 988 S.W.2d 219, 222 (Tex. 1999). There is a presumption that the base lodestar calculation, when supported by sufficient evidence, reflects the reasonable and necessary attorney's fees that can be shifted to a nonprevailing party. *Land Rover U.K., Ltd.*, 210 S.W.3d at 607–08; *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 499 (Tex. 2019).

The determination of what constitutes a reasonable attorney's fee involves two steps. *Rohrmoos Venture*, 578 S.W.3d at 494. The fact finder's starting point for calculating an attorney's fee award is determining the reasonable hours worked multiplied by a reasonable hourly rate, and the fee claimant bears the burden of providing sufficient evidence on both counts. *Rohrmoos Venture*, 578 S.W.3d at 498. Under the lodestar method, sufficient evidence includes, at a minimum, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services. The fact finder then multiplies the number of such hours by the applicable rate, the product of which is the base fee or lodestar. *Rohrmoos Venture*, 578 S.W.3d at 498.

The fact finder may then adjust the base lodestar up or down (apply a multiplier), if relevant factors indicate an adjustment is necessary to reach a reasonable fee in the case. Thus, the fact finder must first determine a base lodestar figure based on reasonable hours worked multiplied by a reasonable hourly rate. In a jury trial, the jury should be instructed that the base lodestar figure is presumed to represent reasonable and necessary attorney's fees, but other considerations may justify an enhancement or reduction to the base lodestar; accordingly, the fact finder must then determine whether evidence of those considerations overcomes the presumption and necessitates an adjustment to reach a reasonable fee. *Rohrmoos Venture*, 578 S.W.3d at 499.

§ 10.10:7 Contemporaneous Billing Records

Contemporaneous billing records are not required to prove that the requested fees are reasonable and necessary, but such billing records are *strongly* encouraged to prove the reasonableness and necessity of requested fees when those elements are contested. In all but the simplest cases, counsel should introduce detailed billing records into evidence, in addition to counsel's oral testimony, to support fee requests. Thus, counsel should document its time by using contemporaneous billing records or other documentation recorded reasonably close to the time when the work is performed to ensure that a potential award of attorney's fees can withstand appellate scrutiny. *See Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 502 (Tex. 2019).

§ 10.10:8 Relevance of Amount Incurred Under Fee Contract

Because fee-shifting awards are to be reasonable and necessary for successfully prosecuting or defending against a claim, reasonableness and necessity do not depend solely on the contractual fee arrangement between the prevailing party and its law-

yer. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 498 (Tex. 2019). An amount incurred or contracted for is not conclusive evidence of reasonableness or necessity; the fee claimant still has the burden of establishing reasonableness and necessity. *Rohrmoos Venture*, 578 S.W.3d at 488.

§ 10.10:9 *Arthur Andersen* Factors

The lodestar method developed as a "short hand version" of the *Arthur Andersen* factors and was never intended to be a separate test or method for determining reasonableness and necessity of attorney's fees. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 496 (Tex. 2019); *see Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 818 (Tex. 1997).

The base lodestar figure accounts for most of the relevant *Arthur Andersen* considerations, and an enhancement or reduction of the base lodestar figure cannot be based on a consideration that is subsumed in the first step of the lodestar method. *See Rohrmoos Venture*, 578 S.W.3d at 493. The base lodestar calculation usually includes at least the following considerations from *Arthur Andersen*: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill required to perform the legal service properly; (4) the fee customarily charged in the locality for similar legal services; (5) the amount involved; (6) the experience, reputation, and ability of the lawyer or lawyers performing the services; (7) whether the fee is fixed or contingent on results obtained; (8) the uncertainty of collection before the legal services have been rendered; and (9) results obtained. *Rohrmoos Venture*, 578 S.W.3d at 500. These *Arthur Andersen* considerations therefore may not be used to enhance or reduce the base lodestar calculation to the extent that they are already reflected in the reasonable hours worked and reasonable hourly rate. If a fee claimant seeks an enhancement, it must produce specific evidence showing that a higher amount is necessary to achieve a reasonable fee award. Similarly, if a fee opponent seeks a reduction in the fee, that party bears the burden of providing specific evidence to overcome the presumptive reasonableness of a base lodestar figure. *Rohrmoos Venture*, 578 S.W.3d at 501.

§ 10.10:10 Paralegal Fees

Paralegal fees are not automatically recoverable as a subset of attorney's fees. For recovery of paralegal fees in connection with the recovery of attorney's fees, the paralegal must have performed work that has traditionally been done by an attorney. *Gill Savings Ass'n v. International Supply Co.*, 759 S.W.2d 697, 702 (Tex. App.— Dallas 1988, writ denied). In addition, the evidence must establish—

1. that the paralegal is qualified through education, training, or work experience to perform substantive legal work;
2. that the substantive legal work was performed under the direction and supervision of an attorney;
3. the nature of the legal work performed;
4. that the hourly rate charged for the paralegal was reasonable and necessary; and
5. that the number of hours expended by the paralegal were reasonable and necessary.

See El Apple 1, Ltd. v. Olivas, 370 S.W.3d 757 (Tex. 2012).

"Substantive legal work" includes conducting client interviews and maintaining general contact with the client; locating and interviewing witnesses; conducting investigations and statistical and documentary research; drafting documents, correspondence, and pleadings; summarizing depositions, interrogatories, and testimony; and attending executions of wills, real estate

closings, depositions, court or administrative hearings, and trials with an attorney. "Substantive legal work" does not include clerical or administrative work. *See In re Guardianship of Alford*, 596 S.W.3d 352 (Tex. App.—Texarkana 2020, no pet.); State Bar of Texas Paralegal Division, *Texas Paralegal Standards*, **https://txpd.org** (follow "Paralegal Definition & Standards" hyperlink under "About" hyperlink).

In *Gill Savings*, although holding that paralegal fees are includable in an attorney's fee award under certain conditions, the court found that the testimony and exhibits did not provide any help in determining the qualifications, if any, of the legal assistants, the nature of the work performed, or the hourly rate being charged and held that the evidence was legally insufficient to support the award. *Gill Savings*, 759 S.W.2d at 705; *see also Clary Corp. v. Smith*, 949 S.W.2d 452, 469–70 (Tex. App.—Fort Worth 1997, pet. denied) (outlining requirements necessary for recovery and finding evidence legally insufficient for recovery); *Moody v. EMC Services*, 828 S.W.2d 237, 248 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (outlining requirements necessary for recovery and finding evidence legally insufficient for recovery); *Multi-Moto Corp. v. ITT Commercial Finance Corp.*, 806 S.W.2d 560, 570 (Tex. App.—Dallas 1991, writ denied) (outlining requirements necessary for recovery).

When proving a reasonable attorney's fee, the lawyer should testify that that the hourly rate charged for the paralegal work was reasonable; testifying simply about the total amount of paralegal fees is not sufficient. *See Clary Corp.*, 949 S.W.2d at 470; *see also Moody*, 828 S.W.2d at 248 (invoices listing total cost for various services performed by paralegal not sufficient to support award of fees).

§ 10.10:11 Statutes and Rules—Attorney's Fees

The following statutes and rules allow or relate to the recovery of attorney's fees in guardianship proceedings:

Texas Estates Code

§ 1052.003 Guardianship Fee Book

§ 1053.053 Exemption for Military Personnel

§ 1053.054 Exemption for Public Safety Personnel

§ 1054.055 Guardian Ad Litem

§ 1151.055 Access to Ward

§ 1155.002 Compensation for Certain Guardians of the Person

§ 1155.003 Compensation for Guardian of the Estate

§ 1155.004 Considerations in Authorizing Compensation

§ 1155.005 Maximum Aggregate Compensation

§ 1155.006Modification of Unreasonably Low Compensation; Authorization for Payment of Estimated Quarterly Compensation

§ 1155.007 Reduction or Elimination of Estimated Quarterly Compensation

§ 1155.008 Denial of Compensation

§ 1155.052 Dual Compensation

§ 1155.053 Recovery of Property; Contingent Fees

§ 1155.054 Attorney's Fees for Applicant

§ 1155.101 Reimbursement of Expenses in General

§ 1155.102 Reimbursement of Expenses to Recovery of Property

§ 1155.103 Expense Charges: Requirements

§ 1155.151 Costs in Guardianship Proceedings Generally

§ 1155.152 Removal of Guardian

§ 1155.202 Medicaid Recipients

§ 1157.003 Inclusion of Attorney's Fees in Claim

§ 1161.203(e) Loan Requirements

§ 1163.104 Guardian of the Person Annual Report, Waiver of Fees

§ 1251.013 Temporary Guardians

§ 1253.152 Unjustifiable Conduct

§ 1302.003 Guardianship Management Trust—Attorney Ad Litem

§ 1353.102 Removal of Community Administrator

§ 1356.001 Sports and Entertainment Contracts for Minors

Texas Civil Practice and Remedies Code

§ 18.001 Affidavit Concerning Cost and Necessity of Services

§ 37.009 Costs (Declaratory Judgment)

§ 38.001 Recovery of Attorney's Fees

§ 38.002 Procedure for Recovery of Attorney's Fees

§ 38.003 Presumption

§ 38.004 Judicial Notice

§ 10.11 Alternative Dispute Resolution

It is the policy of this state to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children, and the early settlement of pending litigation through voluntary settlement procedures. Tex. Civ. Prac. & Rem. Code § 154.002. Nevertheless, unless the parties are willing participants, a court cannot force the disputants to peaceably resolve or negotiate their differences. *Hansen v. Sullivan*, 886 S.W.2d 467, 469 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding). Mediation is the most common type of alternative dispute resolution used in contested guardianships.

§ 10.11:1 Mediation

Mediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them. Tex. Civ. Prac. & Rem. Code § 154.023(a). While the parties may seek out a mediator with experience in handling contested guardianships, the mediator may not impose their own judgment on the issues for that of the parties. Tex. Civ. Prac. & Rem. Code § 154.023(b).

Contested guardianships can involve a number of issues, including whether the proposed ward is incapacitated, who should serve as guardian, whether an applicant or contestant has an adverse interest, and questions of suitability to serve as a fiduciary. These issues are often fact driven and highly emotional. As a result, parties can be hesitant or even reluctant to mediate. Nevertheless, courts routinely require the parties to attempt mediation before being granted a trial date. For that reason, mediation should be a viable alternative to an expensive guardianship contest.

§ 10.11:2 Requesting Mediation

A court may, on its own motion or the motion of a party, refer a pending dispute for resolution by an alternative dispute resolution procedure like mediation. Tex. Civ. Prac. & Rem. Code § 154.021(a). In so doing, the court shall confer with the parties in the determination of the most appropriate alternative resolution procedure. Tex. Civ. Prac. & Rem. Code § 154.021(b).

Either on written agreement of the parties or on the court's own motion, the court may refer a contested guardianship proceeding to mediation. Tex. Est. Code § 1055.151(a). When a contested proceeding is referred to mediation under section 1055.151(a), the applicant must still prove that the proposed ward is an incapacitated person even when incapacity is to be mediated. Tex. Est. Code § 1055.151(b)(1). Additionally, during the mediation, all parties to the proceeding shall evaluate alternatives to guardianship and available supports and services that may avoid the need for appointment of a guardian. Tex. Est. Code § 1055.151(b)(2).

(a) A mediated settlement agreement is binding on the parties if the agreement:

(1) provides, in a prominently displayed statement that is in boldfaced type, in capital letters, or underlined, that the agreement is not subject to revocation by the parties;

(2) is signed by each party to the agreement; and

(3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.

(b) If a mediated settlement agreement meets the requirements of this section, a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule or law.

(c) Notwithstanding Subsections (a) and (b), a court may decline to enter a judgment on a mediated settlement agreement if the court finds that the agreement is not in the ward's or proposed ward's best interests.

Tex. Est. Code § 1055.152.

Practice Pointer: Practitioners should remember to consider the costs of mediation. Under section 1055.151(c), the costs of the mediation shall be paid by the parties to the proceeding unless otherwise ordered by the court. If the parties are unable to pay the costs of the mediation, the court may refer the parties to a local alternative dispute resolution center if one exists in that county.

Because contested guardianships can be emotionally charged, parties can sometimes resist or avoid appearing at mediation and, even if they do appear, negotiating in good faith. Be mindful that a trial judge has inherent authority to hold parties in contempt for refusal to physically appear at mediation. However, the court cannot compel the parties to negotiate in "good faith." *Gleason v. Lawson*, 850 S.W.2d 714, 717 (Tex. App.—Corpus Christi–Edinburg 1993, no writ).

§ 10.11:3 Choosing Mediator

A court may, on the request of any party, appoint a qualified mediator. Alternatively, the parties can agree among themselves who will serve to mediate a contested guardianship. When selecting a mediator, factors to consider are (1) the person's qualifications and experience, (2) the cost of mediation, (3) the availability of the mediator, and (4) the success rate of the mediator. Another factor to consider, though not required, is whether the mediator has completed the Office of Court Administration (OCA) guardianship mediation training. The OCA by rule shall establish a training course with at least twenty-four hours of training for persons facilitating mediation under title 3 of the Texas Estates Code that may be provided by a mediation training provider approved by the office. Tex. Gov't Code § 155.301. Many former probate judges and guardianship practitioners avail themselves of mediation services. However, depending on the practitioner's location, finding a mediator with experience in guardianships can be a challenge.

§ 10.11:4 Effect of Written Settlement

If the parties reach a settlement and execute a written settlement agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract. Tex. Civ. Prac. & Rem. Code § 154.071(a). Keep in mind that while courts are eager for parties to reach agreements, having a mediated settlement agreement does not guarantee that the court will be able to carry out its terms. In other words, the court will not allow the parties to agree to something not otherwise allowed in the Texas Estates Code. For example, the parties to a contested guardianship cannot agree that the proposed ward is incapacitated without evidence to support that finding. Likewise, the parties cannot agree to a person's serving as guardian if the person is otherwise disqualified. So when reaching an agreement, the parties must make sure it includes terms that the court can and will accept in accordance with the applicable statutes.

Form 10-1

[Caption. See § 3 of the Introduction in this manual.]

Application for Appointment of Temporary Guardian Pending Contest

[**Name of applicant**], Applicant, files this Application for Appointment of Temporary Guardian Pending Contest on behalf of [**name of proposed ward**], Proposed Ward, and shows the Court the following:

1. Proposed Ward, the person for whom the appointment of a guardian is sought, is [an adult [male/female]/a minor] whose date of birth is [**date of birth**] and who currently resides at [**address, city, county**] County, Texas, [and/but] who may be served with citation at [**address, city, county**] County, Texas.

2. Applicant is the [**relationship**] of Proposed Ward and resides at [**address, city, county**] County, Texas. Applicant desires to be appointed temporary guardian of the person and estate of Proposed Ward pending contest. [He/She] is eligible to receive letters of guardianship and is entitled to be appointed.

3. This Court has jurisdiction and venue over these proceedings because Proposed Ward resides in [**county**] County, and the principal part of Proposed Ward's property is situated in [**county**] County.

4. [It is alleged that] Proposed Ward is totally incapacitated.

Include the following if applicable.

5. Proposed Ward has stated that [he/she] prefers that Applicant serve as guardian as authorized by the Texas Estates Code. [**Include the following if applicable:** The court investigator has stated in [his/her] report that Proposed Ward wants Applicant to serve as [his/her] guardian.]

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Continue with the following.

6. Applicant requests the Court give due consideration to Proposed Ward's preference pursuant to section 1104.002 of the Texas Estates Code. Applicant requests appointment and is qualified to be appointed as temporary guardian of Proposed Ward pending contest.

7. Alternatively, Applicant requests that a qualified neutral third party be appointed temporary guardian of the estate pending contest and that Applicant be appointed temporary guardian of the person pending contest of Proposed Ward.

8. A necessity exists for the appointment of a temporary guardian of Proposed Ward pending contest. [**Describe the reason for appointment of a temporary guardian, e.g.,** Although Proposed Ward's incapacity has been admitted by all parties except the attorney ad litem, a contest has been filed to Applicant's right to serve, delaying the appointment of a permanent guardian.]

9. Substantial evidence exists that Proposed Ward's physical well-being may be impaired and that Proposed Ward's estate may be wasted, as enumerated more specifically in the paragraphs below.

10. Proposed Ward is unable to make reasonable and informed decisions concerning [his/her] health or estate. [**Describe supporting documentation, e.g.,** In support of the immediate need for the appointment of a guardian, Applicant attaches the physician's [letter/certificate] of [**name of doctor**], Applicant's expert, as Exhibit [**exhibit number/letter**], and the physician's [letter/certificate] of [**name of doctor**], the attorney ad litem's expert, as Exhibit [**exhibit number/letter**].]

11. This Court should appoint a temporary guardian of the estate pending contest to insure that Proposed Ward's interests are adequately represented.

12. The limited powers and authority that Applicant requests the Court grant are—

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Select as applicable.

a. to take control of Proposed Ward's financial affairs to determine the status and extent of [his/her] assets;

b. to take possession of Proposed Ward's assets and financial documents wherever located, including the contents of Proposed Ward's safe-deposit boxes;

c. to collect the proceeds of any insurance policies, any annuity contracts, and Social Security proceeds that are owed to Proposed Ward;

d. to file any necessary income tax return for Proposed Ward during the temporary guardianship, to pay any income taxes owed, and to prepare and file any inventories (and any other reports) in any Court having jurisdiction of Proposed Ward's estate or in connection with those tax returns;

e. to pay all ad valorem taxes owed by Proposed Ward; and

f. to make expenditures to protect Proposed Ward's property and to apply to this Court for authority to pay from funds of the Proposed Ward's estate expenses of the temporary guardianship.

13. The powers and authority that Applicant requests the Court to grant are—

a. to make medical decisions and engage the services of any medical care providers for the care and benefit of Proposed Ward, as allowed by the Texas Estates Code[./; and]

Include the following if applicable.

b. to provide food, clothing, and shelter for Proposed Ward, including arranging for care at [**name of nursing facility**].

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Continue with the following.

14. No one has legal authority to consent to medical treatment, as Proposed Ward is incapable of giving informed consent, and no one is authorized to collect life insurance proceeds or Social Security benefits on Proposed Ward's behalf.

15. Applicant brings this Application for Appointment of Temporary Guardian Pending Contest in good faith and for just cause. Applicant requests that the Court find Applicant and [his/her] attorneys have acted in good faith and for just cause in matters relating to this application and that [his/her] attorney's fees and expenses related to the establishment of the requested guardianship be approved and paid out of Proposed Ward's guardianship estate.

Applicant prays that this Court appoint [**name of applicant**] temporary guardian pending contest of the person and estate of [**name of proposed ward**], pending the outcome of the contest or, in the alternative, that this Court appoint [**name of applicant**] temporary guardian pending contest of the person of [**name of proposed ward**] and a qualified neutral third party temporary guardian pending contest of the estate of [**name of proposed ward**]; that the appointment of the attorney ad litem be continued; that a time for a hearing on this application be set; that attorney's fees be awarded against Proposed Ward's estate; that a trial on the permanent guardianship be set; that notice and citation be issued as required by law; and for all other relief to which Applicant may be entitled.

Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Include the following if applicable. While not mandatory, some courts require that these applications be verified.

VERIFICATION

STATE OF TEXAS)

COUNTY OF [**county**])

BEFORE ME, the undersigned notary public, on this day personally appeared [**name**], who being by me duly sworn on [his/her] oath deposed and said that [he/she] has read the above and foregoing [**title of document**] [and exhibits] and that the matters contained therein are within [his/her] personal knowledge and are true and correct.

_____

SWORN TO AND SUBSCRIBED BEFORE ME on _____.

_____
Notary Public, State of Texas

Certificate of Service

I certify that a true copy of this [**title of document**] was served in accordance with rule 21a of the Texas Rules of Civil Procedure.

SIGNED on _____.

_____
[**Name of attorney**]

Attach exhibit(s).

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Form 10-2

[Caption. See § 3 of the Introduction in this manual.]

Motion to Extend Temporary Guardianship Pending Contest

[**Name of movant**], the temporary guardian of the person and estate of [**name of ward**], Ward, an incapacitated person, files this Motion to Extend Temporary Guardianship Pending Contest pursuant to section 1251.051 of the Texas Estates Code and shows the Court the following:

1. On [**date**], this Court appointed [**name of movant**] as temporary guardian of the person and estate of Ward. [**Name of movant**] incorporates by reference [**name of applicant**]'s Application for the Appointment of Temporary Guardian of the Person and Estate. The temporary guardianship remains in effect until [**date**].

2. On [**date**], [**name of movant**] filed [his/her] Application for Appointment of Permanent Guardian of the person and estate of Ward, because it is in the best interests of Ward that the temporary guardianship be made permanent.

3. On or about [**date**], [**name of contestant**] filed [his/her] contest to [**name of movant**]'s Application for Appointment of Guardian [**include the following if applicable:** , and in addition, filed [his/her] own Application for Appointment of Guardian]. The contest remains unresolved.

4. Pursuant to section 1251.051 of the Texas Estates Code, if an application to convert a temporary guardianship to a permanent guardianship is challenged or contested, this Court may appoint a temporary guardian whose term expires after sixty days from the original date of appointment of the temporary guardian, at the hearing to appoint a permanent guard-

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ian, or on the date a permanent guardian appointed by the court qualifies to serve, whichever is later.

5. [**Name of movant**] brings this Motion to Extend Temporary Guardianship Pending Contest in good faith and for just cause. Movant requests that the Court find Movant and [his/her] attorney[s] have acted in good faith and for just cause in matters relating to this motion and that [his/her] attorney's fees and expenses related to the extension of the requested guardianship be approved and paid out of Ward's guardianship estate.

[**Name of movant**], the temporary guardian of the person and estate of [**name of ward**], an incapacitated person, prays that this temporary guardianship be extended pursuant to section 1251.051 of the Texas Estates Code; that [**name of movant**] remain as temporary guardian of the person and estate of Ward pending contest; and for all other relief to which [**name of movant**] may be entitled.

Respectfully submitted,

_____

[**Name**]
Attorney for Movant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Include the following if applicable. While not mandatory, some courts require that these applications be verified.

VERIFICATION

STATE OF TEXAS)

COUNTY OF [**county**])

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BEFORE ME, the undersigned notary public, on this day personally appeared [**name**], who being by me duly sworn on [his/her] oath deposed and said that [he/she] has read the above and foregoing [**title of document**] [and exhibits] and that the matters contained therein are within [his/her] personal knowledge and are true and correct.

_____

SWORN TO AND SUBSCRIBED BEFORE ME on _____.

_____
Notary Public, State of Texas

Certificate of Service

I certify that a true copy of this [**title of document**] was served in accordance with rule 21a of the Texas Rules of Civil Procedure.

SIGNED on _____.

_____
[**Name of attorney**]

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Form 10-3

[Caption. See § 3 of the Introduction in this manual.]

Order Extending Temporary Guardianship Pending Contest

On [**date**] the Court considered the motion of [**name of movant**], temporary guardian of the person and estate of [**name of proposed ward**], an incapacitated person, to extend the temporary guardianship pending contest pursuant to section 1251.051 of the Texas Estates Code. The Court finds that it is necessary to extend the temporary guardianship and that [**name of movant**] should remain as temporary guardian of the person and estate of [**name of proposed ward**], an incapacitated person.

IT IS THEREFORE ORDERED that [**name of movant**] is appointed as temporary guardian of the person and estate of [**name of proposed ward**] pending contest, pursuant to section 1251.051 of the Texas Estates Code.

IT IS FURTHER ORDERED that the temporary guardian shall have the limited powers—

1. to take control of [**name of proposed ward**]'s financial affairs to determine the status and extent of [his/her] assets;

2. to take possession of [**name of proposed ward**]'s assets and financial documents wherever located, including the contents of [his/her] safe-deposit boxes;

3. to collect the proceeds of any insurance policies, any annuity, contracts, and Social Security proceeds that are owed to [**name of proposed ward**];

4. to file any necessary income tax return for [**name of proposed ward**] during the temporary guardianship and to pay any income taxes owed and to prepare and file any inven-

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tories (and any other reports) in any Court having jurisdiction of [**name of proposed ward**]'s estate or in connection with those tax returns;

5. to pay all ad valorem taxes owed by [**name of proposed ward**]; and

6. to make expenditures to protect [**name of proposed ward**]'s property and to apply to this Court for authority to pay from funds of [**name of proposed ward**]'s estate expenses of the temporary guardianship.

IT IS FURTHER ORDERED that the temporary guardian shall have the powers and authority—

1. to make medical decisions and engage the services of any medical care providers for the care and benefit of [**name of proposed ward**], as allowed by the Texas Estates Code[./; and]

Include the following if applicable.

2. to provide food, clothing, and shelter for [**name of proposed ward**], including arranging for care at [**name of nursing facility**].

Continue with the following.

IT IS FURTHER ORDERED that [**name of movant**]'s bond as temporary guardian of the person and estate of [**name of proposed ward**] shall remain in effect during the pending contest.

SIGNED on _____.

_____
JUDGE PRESIDING

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APPROVED:

_____

[**Name**]
Attorney for Movant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 10-4

This form may be used to challenge the standing or qualification of an individual seeking appointment as a guardian or to contest the standing of an individual contesting a guardianship on the basis that the individual has an interest adverse to the proposed ward.

[Caption. See § 3 of the Introduction in this manual.]

Motion in Limine

[**Name of movant**], Movant, files this Motion in Limine under section 1055.001(c) of the Texas Estates Code and shows the Court the following:

1. Movant seeks appointment as the guardian of the person and estate of [**name of proposed ward**], Proposed Ward, in this guardianship cause.

2. [**Name of person with adverse interest**], Applicant, lacks standing in this guardianship cause pursuant to section 1055.001(b) of the Texas Estates Code. [**State the basis for adverse interest, e.g.,** Applicant is indebted to Proposed Ward, has made adverse claims against [him/her] and [his/her] estate, and has claimed the ownership of certain assets belonging to Proposed Ward and threatened to sue Proposed Ward.]

Include the following if challenging the qualification of an individual seeking appointment as guardian.

3. Furthermore, Applicant is disqualified to serve as Proposed Ward's guardian pursuant to subchapter H, chapter 1104 of the Texas Estates Code. [**State any additional basis for disqualification, e.g.,** Applicant is unsuitable, and Proposed Ward has expressly disqualified Applicant from serving as guardian of either his person or estate. A copy of Proposed Ward's declaration of guardian in the event of later incompetence or need of guardian is attached as Exhibit [**exhibit number/letter**] and incorporated by this reference.]

Continue with the following.

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4. Proposed Ward requests the Court find as a matter of law that Applicant lacks standing to appear in this guardianship cause to contest any application for appointment of guardian of the person and estate of [**name of proposed ward**] or seek appointment as [his/her] permanent guardian, as Applicant has an interest adverse to Proposed Ward. Movant requests these determinations be made before any additional costs are incurred in determining the necessity of a guardian or who is to be appointed.

Movant, [**name of movant**], requests this Court grant Movant's Motion in Limine and determine that Applicant, [**name of person with adverse interest**], has an interest adverse to [**name of proposed ward**] and strike Applicant's pleadings in this cause. Movant prays for all other relief to which Movant may be entitled.

Respectfully submitted,

_____

[**Name**]
Attorney for Movant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Certificate of Service

I certify that a true copy of this [**title of document**] was served in accordance with rule 21a of the Texas Rules of Civil Procedure.

SIGNED on _____.

_____

[**Name of attorney**]

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Attach exhibit(s).

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Form 10-5

[Caption. See § 3 of the Introduction in this manual.]

Order Granting Motion in Limine

On [**date**] the Court heard the Motion in Limine pursuant to section 1055.001(c) of the Texas Estates Code of [**name of movant**] to strike the pleadings filed by [**name of person with adverse interest**]. The Court, after considering the evidence and hearing the arguments of the attorneys, finds that [**name of person with adverse interest**] lacks standing in this matter as [he/she] has interests that are adverse to the ward.

IT IS THEREFORE ORDERED that all pleadings filed by [**name of person with adverse interest**] are stricken, and [he/she] is dismissed from this guardianship with prejudice.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED:

By:_____
[**Name**]
Attorney for Movant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 10-6

This form may be used to request an independent mental examination of a proposed ward under Texas Estates Code section 1101.103 or 1101.104. For an examination of a proposed ward whose alleged incapacity is intellectual disability, section 1101.104 requires that the physician or psychologist appointed be certified by the Texas Department of Aging and Disability Services. Tex. Est. Code § 1101.104.

[Caption. See § 3 of the Introduction in this manual.]

Motion for Independent Mental Examination

[**Name of movant**], Movant, makes this Motion for Independent Mental Examination and in support shows the Court the following:

1. Movant believes it is in the best interests of [**name of proposed ward**], Proposed Ward, to be evaluated by an independent [psychiatrist/psychologist/physician] in this proceeding.

2. Movant believes it would be in Proposed Ward's best interests, pursuant to section section [1101.103/1101.104] of the Texas Estates Code, for the Court to order a complete independent mental examination of Proposed Ward to be conducted by a court-designated, board-certified [**include if applicable:** geriatric/pediatric] [psychiatrist/psychologist/physician] for the purpose of [**describe purpose of examination, e.g.,** determining Proposed Ward's present mental state and assessing [his/her] care and rehabilitation needs].

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

4. Movant therefore requests that the Court designate the time, place, manner, conditions, and scope of the examination to be conducted by the [psychiatrist/psychologist/physician] named by the Court to make the examination of Proposed Ward. Movant also asks this

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Court to order all parties to supply the [psychiatrist/psychologist/physician] with all of Proposed Ward's medical records from [**date**] to the present in their possession or that of their attorneys. [**Include if applicable:** [**Name of caretaker**] should also be ordered to turn over [his/her] daily log of medications.] It is further requested that the report of the examining [psychiatrist/psychologist/physician] be provided to the Court and all attorneys of record.

5. Movant requests that the cost of the examination be paid by Proposed Ward's estate as it is beneficial to Proposed Ward to have the facts of [his/her] mental status determined.

6. Movant requests that Proposed Ward be examined with no one else present other than the court-appointed [psychiatrist/psychologist/physician] and his or her staff and medical advisors and that no one communicate with the [psychiatrist/psychologist/physician] before the issuance of his or her report, other than to provide the medical records by letter with copies to all attorneys of record.

Movant prays that the Court order that Proposed Ward be examined by a board-certified [**include if applicable:** geriatric/pediatric] [psychiatrist/psychologist/physician] designated by this Court for the purpose of undergoing an independent mental examination pursuant to section [1101.103/1101.104] of the Texas Estates Code to determine [his/her] mental status; that the Court order the medical records be turned over; that a hearing be held on the motion; that no one be present at the examination except Proposed Ward, the [psychiatrist/psychologist/physician], and [his/her] staff and medical advisors; that the Court order the examination to be paid by [**name**]; and for all other relief to which Movant may be entitled.

Respectfully submitted,

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_____

[**Name**]
Attorney for Movant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Certificate of Service

I certify that a true copy of this [**title of document**] was served in accordance with rule 21a of the Texas Rules of Civil Procedure.

SIGNED on _____.

_____

[**Name of attorney**]

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Form 10-7

[Caption. See § 3 of the Introduction in this manual.]

Order for Independent Mental Examination

On [**date**] the Court considered the Motion for Independent Mental Examination filed by [**name of movant**], and the Court, after finding that proper notice has been given and hearing the evidence and having considered the motion and the applicable law, finds that good cause has been shown for the granting of the motion pursuant to section [1101.103/1101.104] of the Texas Estates Code.

IT IS THEREFORE ORDERED that [**name of doctor**], a board-certified [**include if applicable:** geriatric/pediatric] [psychiatrist/psychologist/physician] is hereby appointed by the Court to [**describe scope of examination, e.g.,** examine [**name of proposed ward**]'s mental status and assess [his/her] rehabilitation needs], and should render [his/her] findings in a written report to this Court.

IT IS FURTHER ORDERED that all parties and their attorneys deliver all medical records from [**date**] to the present [**include if applicable:** , including the caretaker's daily log of medications,] to the [psychiatrist/psychologist/physician] within three days of the date of this Order.

IT IS FURTHER ORDERED that no one will be present during the examination other than [**name of proposed ward**] and [**name of doctor**] and [his/her] medical staff and medical advisors and that no one communicate with [**name of doctor**] other than by letter with the medical records with copies to all attorneys of record.

IT IS FURTHER ORDERED that the cost of the examination and report be paid to [**name of doctor**] by [**name of proposed ward**]'s estate.

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SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED:

By:_____
[**Name**]
Attorney for Movant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 10-8

Notice of the hearing on a motion to disclose confidential information must be served on the Department of Family and Protective Services or the investigating state agency as well as on each interested party. Tex. Hum. Res. Code § 48.101(c)(2).

[Caption. See § 3 of the Introduction in this manual.]

Motion for Disclosure of Confidential Records

[**Name of movant**], Movant, [**identify movant's standing, e.g.,** guardian of the person and estate of [**name of ward**], an incapacitated person], respectfully requests that this Court order the disclosure of the confidential records of [**name of investigating agency**] pertaining to [**name of ward**] and in support shows the Court the following:

Describe the reason the confidential records are required. The following is an example.

1. Movant is the court-appointed guardian of the person and estate of [**name of ward**], an incapacitated person. [**Name of contesting individual**], [**relationship to the ward**], who has asserted a prior right to serve as guardian, is contesting Movant's appointment. Movant believes that [**name of contesting individual**] is disqualified to serve as guardian.

2. As part of an evidentiary hearing this Court held on [**date**], testimony was elicited from [**name of specialist**], a specialist with [**name of investigating agency**]. The written records formed the underlying basis of [**name of specialist**]'s testimony and are confidential pursuant to section 48.101 of the Human Resources Code. An exception exists, however, to the confidentiality requirements in a guardianship proceeding on a showing of cause. [**Describe grounds for releasing records, e.g.,** Because the care and treatment of [**name of ward**] is in issue, and because [**name**]'s prior conduct in providing care for [**name of ward**] is also in issue in this cause, Movant believes that good cause exists to permit the confidential

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records of [**name of investigating agency**] to be disclosed to Movant and the other parties to this cause regarding [**name of ward**].]

Movant prays that after an in camera review by the Court, [he/she] be entitled to review the records of [**name of investigating agency**] regarding [**name of ward**] and for all other relief to which Movant may be entitled.

Respectfully submitted,

_____

[**Name**]
Attorney for Movant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Certificate of Service

I certify that a true copy of this [**title of document**] was served in accordance with rule 21a of the Texas Rules of Civil Procedure.

SIGNED on _____.

_____

[**Name of attorney**]

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Form 10-9

[Caption. See § 3 of the Introduction in this manual.]

Order Granting Disclosure of Confidential Records

On [**date**], the Court considered the motion of [**name of movant**], Movant, to review confidential records of [**name of investigating agency**] pertaining to [**name of ward**], Ward, an incapacitated person. The Court after reviewing the pleadings in camera finds that disclosure is essential to the administration of justice and will not endanger the life or safety of Ward, the party making the report, or the parties participating in the investigation and that Movant has shown good cause why [he/she] should be granted authority to review the confidential records.

IT IS THEREFORE ORDERED that [**name of custodian**], custodian of records of [**name of investigating agency**], produce for inspection records pertaining to [**name of ward**] that are identifiable and unredacted in the [**designation**] Court of [**county**] County, Texas, on [**date**] at [**time**].

IT IS FURTHER ORDERED that no copies of such records be made.

SIGNED on _____.

_____
JUDGE PRESIDING

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APPROVED:

By:_____

[**Name**]
Attorney for Movant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Form 10-10 is reserved.

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Form 10-11

[Caption. See § 3 of the Introduction in this manual.]

[Title of requestor]'s [Interrogatories/Requests for Production/Requests for Admission]

To: [**Name of party**], by and through [his/her] attorney of record, [**name and address of attorney**].

[**Name of requestor**] serves on [**name of party**] [his/her] [First Set of Interrogatories/ First Set of Requests for Production/[and] First Set of Requests for Admission] and seeks the following:

In this document the following definitions and usages shall apply:

"You" or "your" means [**name of party**], in all capacities, and all of [his/her] attorneys, accountants, associates, successors, employees, agents, partners, or independent contractors performing any service for [him/her].

["Mr. [**last name of requestor**]"/"Ms. [**last name of requestor**]"] means [**full name of requestor**], the [**title of requestor**] in the above-referenced proceeding.

["Mr. [**last name of proposed ward**]"/"Ms. [**last name of proposed ward**]"] shall refer to [Mr./Ms.] [**full name of proposed ward**], the proposed ward in the above-referenced proceeding.

"Guardianship proceeding," "proceeding," or "litigation" refers to the above-referenced proceeding, including all pending applications, contests, claims for affirmative relief, or defenses.

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"Documents" is defined to be synonymous in meaning and equal in scope to the usage of that term in rule 192.3(b) of the Texas Rules of Civil Procedure. The terms "document," "documents," and "records" are used in their broadest sense and shall include all written, printed, typed, recorded, or graphic matter of every kind and description, both originals and copies, and all attachments and appendices thereto. Without limiting the foregoing, the terms "document," "documents," and "records" shall include all agreements, contracts, communications, correspondence, letters, electronic mail, telecopies, telegrams, telexes, messages, memoranda, records, reports, books, summaries or other records of telephone conversations or interviews, summaries or other records of personal conversations, minutes or summaries or other records of meetings and conferences, summaries or other records of negotiations, other summaries, diaries, diary entries, calendars, appointment books, time records, instructions, work assignments, visitor records, forecasts, statistical data, statistical statements, financial statements, worksheets, work papers, drafts, graphs, maps, charts, tables, accounts, analytical records, consultants' reports, appraisals, bulletins, brochures, pamphlets, circulars, trade letters, press releases, notes, notices, marginal notations, notebooks, telephone bills or records, bills, statements, records of obligations and expenditures, invoices, lists, journals, advertising, recommendations, files, printouts, compilations, tabulations, purchase orders, receipts, sale orders, confirmations, checks, canceled checks, letters of credit, envelopes or folders or similar containers, vouchers, analyses, studies, surveys, transcripts of hearings, transcripts of testimony, expense reports, microfilm, microfiche, articles, speeches, tape or disc recordings, sound recordings, video recordings, film, tapes, photographs, punch cards, programs and data compilations from which information can be obtained (including matter used in data processing), and other printed, written, handwritten, typewritten, recorded, stenographic, computer-generated, computer-stored, or electronically stored matter, however and by whomever produced, prepared, reproduced, disseminated, or made. The terms "document," "documents," and "records" shall include all copies of documents by whatever means made, except that where a document is identified or produced, identical copies thereof which do not contain any

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markings, additions, or deletions different from the original need not be separately produced. "Document," "documents," and "records" mean and include all matter within the foregoing description that is in your possession or control, or the control of any attorney, accountant, or financial advisor for you.

"Identify" or "identification" means (1) when used in reference to a natural person, that respondent shall state such natural person's full name, present or last known address, and telephone number; (2) when used in reference to a document, that respondent shall state the date, subject and substance, author, all recipients, type of document (e.g., letter, telegram, memorandum, computer printout, sound reproduction, chart, etc.), its present location, and the identity of its present custodian if other than the person answering these [Interrogatories/Requests for Production/[and] Requests for Admission]; and (3) when used in reference to an event, meeting, occasion, statement, or conversation, that respondent shall state the date, place, duration, and persons attending, present, or participating.

"Possession, custody, or control" of an item, or references to that phrase, means that you either have physical possession of the item or have a right to possession of the item that is equal or superior to the person who has physical possession of the item.

Singular and masculine forms of nouns and pronouns shall embrace and be read and applied as plural, or as feminine or neuter, as appropriate to the context.

Each query is to be construed and responded to independently and not to be referenced to any other query herein for purposes of limitation.

"Relate," "related," or "relating" means having reference to, connection with, or being associated with.

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"Through present" shall mean the date you answer this discovery and shall include further the last date you are required to supplement your responses to this discovery pursuant to the Texas Rules of Civil Procedure.

"Including" shall be interpreted to mean "including, without limitation," and shall not be interpreted to exclude any information otherwise within the scope of any request.

"Communication" means the transmittal of information (in the form of facts, ideas, inquiries, or otherwise) and includes, without limitation, every manner or means of statement, declaration, utterance, notation, disclaimer, or transfer or exchange of information of any nature whatsoever, by or to whomever, whether oral or written, and whether face-to-face or by telephone, mail, facsimile, electronic mail, personal delivery, or otherwise, including but not limited to correspondence, conversations, dialogue, discussions, interviews, consultations, agreements, and other understandings.

"Persons" refers to natural persons or entities, including but not limited to all partnerships, firms, associations, joint ventures, corporations, and any other form of business organization or arrangement, as well as governmental or quasi-governmental agencies. If other than a natural person, the term includes all natural persons associated with such entity.

"And" and "or" shall each be individually interpreted in every instance as meaning "and/or" and shall not be interpreted disjunctively to exclude any information otherwise within the scope of any request.

Include the following as applicable.

Interrogatories

Pursuant to the provisions of rules 192 and 197 of the Texas Rules of Civil Procedure, you are required to complete written answers to the attached interrogatories immediately on the expiration of [thirty/fifty] days following the date you are served with these interrogato-

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ries. Your written answers must be served on the undersigned, [**name of attorney**], at [his/her] offices at [**address, city, state**]. With regard to the interrogatories, you are instructed that failure to answer fully and in writing any of the following interrogatories may result in the Court entering an order compelling you to file written answers, directing you to pay the undersigned's reasonable expenses incurred in securing such an order, including attorney's fees, striking all your pleadings in this litigation, or entering a default judgment against you. Further, you have an affirmative duty to supplement your answers to the interrogatories with information that you may acquire after filing your written answers if such information makes it known that your previous answer was incorrect when made or if the answer, though correctly made, is no longer true and the circumstances are such that your failure to amend your written answers would be in substance a knowing concealment. You are hereby requested to so supplement any of your written answers to these interrogatories at such time and, in the absence of any written objection to this request, it will be presumed that you have agreed to do so. Answers to these interrogatories must be made under oath separately and fully in writing.

If you object to any of these interrogatories because you believe the number of answers called for exceeds the permissible limit provided by the Texas Rules of Civil Procedure, then please provide the maximum number of answers you believe are required by the Texas Rules of Civil Procedure by answering the interrogatories in consecutive order until you have reached the maximum number of answers you believe are required. This subparagraph is by no means an admission by the proponent of these interrogatories that the number of answers called for by these interrogatories is excessive or violative of any rule of law.

Requests for Production

Pursuant to rules 192 and 196 of the Texas Rules of Civil Procedure, you are requested to produce and permit the inspection and copying of items requested in the attached requests for production to [**name of attorney**] at [his/her] offices at [**address, city, state**], immediately

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on the expiration of [thirty/fifty] days following the date you are served with this set of requests for production.

The requests for production include requests for documents and things that are in your actual possession, custody, or control and also documents and things in your constructive possession. You need not have actual physical possession of the documents and things requested. You have possession, custody, or control if you have a right to possession superior to that of a third party (including an agency, authority, or representative who has physical possession). *See* Tex. R. Civ. P. 192.7(b).

If a document requested hereunder has already been produced in response to a previous request for production, subpoena, or order in this litigation, it need not be produced again. However, any documents previously produced should be identified by date, description, and by reference to the paragraph herein to which the documents are relevant.

Requests for Admission

Pursuant to rule 198 of the Texas Rules of Civil Procedure, you are requested to admit or deny the relevant facts requested in the attached requests for admission. Each of the matters of which an admission is requested is deemed admitted without further action unless within [thirty/fifty] days from the date you are served with this set of requests for admissions a sworn statement is delivered to [**name of attorney**] at [his/her] offices at [**address, city, state**] either admitting or denying the same or setting forth in detail the reasons why you cannot truthfully admit or deny the same.

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_____

[**Name**]
Attorney for [**title of requestor**]
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Certificate of Service

I certify that a true copy of this [**title of document**] was served in accordance with rule 21a of the Texas Rules of Civil Procedure.

SIGNED on _____.

_____

[**Name of attorney**]

Attach interrogatories, requests for production, and requests for admission. See forms 10-12 through 10-15 in this chapter for examples.

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Form 10-12

Interrogatories to parties are the subject of Tex. R. Civ. P. 197. Interrogatories may not request items subject to disclosure under Tex. R. Civ. P. 194.

Sample Interrogatories

Select as applicable.

1. State your name, address, telephone number, Social Security number, birth date, and driver's license number, and the name, address, and telephone number of anyone helping you prepare answers to these interrogatories. Include in the address requested in this and all other interrogatories the street address, apartment number, city or township, county, and state. If the address is rural, include in the description of the address called for by this and all other interrogatories directions, to the nearest tenth of a mile, over public roads and streets from the nearest incorporated town or city.

2. Identify all witnesses that you intend to call at trial in the guardianship proceeding, including their names, addresses, telephone numbers, and a brief description of the subjects on which you expect each witness to testify.

3. Please state the name, address, and office telephone number of every physician, doctor, osteopath, psychiatrist, psychologist, or other medical care provider who has provided medical care or advice to [**name of proposed ward**] or has provided advice to you about [**name of proposed ward**] from [**date**] through the present.

4. Please state the date, time, and nature of each personal or telephonic contact you have had with [**name of proposed ward**] from [**date**] through the present.

5. List all facts, incidents, or matters of which you have personal knowledge that support your claim that [**name of proposed ward**] lacks judgment to handle [his/her] personal or financial affairs.

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6. Have you or has anyone on your behalf interviewed or obtained any statements from anyone concerning any matters relevant to this lawsuit? If so, please state the name, address, and telephone number of each such person.

7. Please state the fact and reason that supports your allegation in your application for the appointment of a guardian for [**name of proposed ward**] that [**name of proposed ward**] is unable to care for [himself/herself] or to manage [his/her] financial affairs.

8. Are you or have you been a party to any lawsuit (other than this lawsuit) from [**date**] through the present? If so, please state the cause number, style, and name of the court in which any such suit was heard or is pending.

9. Are you indebted to [**name of proposed ward**]? If so, please state the amount of any such debt and describe the reason for any such debt.

10. Are you indebted to [**list any trusts or entities in which the proposed ward has an interest**]? If so, please state the amount of any such debt and describe the reason for any such debt.

11. Do you have any claim that is adverse to [**name of proposed ward**] or to any property, real or personal, of [**name of proposed ward**]? If so, please describe each such claim in full.

12. Do you have any claim that is adverse to [**list any trusts or entities in which the proposed ward has an interest**] or to any property, real or personal, of [that entity/those entities]?

13. State your educational background (include in your answer the names of all educational institutions you have attended since high school, the dates of attendance, and any degrees you have earned). Please also identify all professional licenses you hold, whether any

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such license is current, and whether you have been disciplined by the governing body of any profession in which you hold a license.

14. State the person or persons who asked you to join, as an applicant, in the guardianship proceeding pending under Cause No. [**number**] in the [**designation**] Court of [**county**] County, Texas.

15. State every reason that supports your claim that [**name of proposed ward**]'s physical well-being or estate may be in jeopardy.

16. Have you ever been charged with or arrested for any crime other than a minor traffic violation? If so, please state the date, location, and nature of the alleged offense for which you were charged or arrested and the name of the governmental agency that charged or arrested you.

17. Have you ever been convicted of or been made subject to deferred adjudication, suspended sentence, or probation for any crime other than a minor traffic violation? If so, please state the date, location, and nature of the offense and the name of the court that rendered any such measure against you, and describe the nature of the conviction, adjudication, or probation rendered against you.

18. State your marital history, giving the name and present address of your current spouse, if any, and of any prior spouse.

19. State whether you have ever been divorced. If so, please state the cause number, style, identity of the court, and date of any judgment or decree for any divorce.

20. State your employment history since your twenty-first birthday. Include in your answer the name, address, and telephone number of each employer, the name of your supervisor at each employer, and the dates of employment.

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21. Has [**name of proposed ward**] made any gifts or loans to you since your twenty-first birthday? If so, please describe each such gift or loan by providing the date, nature, and amount (if made in the form of money) of any gift or loan from [**name of proposed ward**] to you in an amount or value in excess of $500.

22. Have you ever been treated by a psychiatrist for a mental or emotional disorder or disease, chronic intoxication, or drug abuse or addiction? If so, please describe the reason for any such treatment and state the name and address of each such treating psychiatrist.

23. Have you ever been admitted as a patient to any hospital or treatment facility for treatment of a mental disorder or disease, chronic intoxication, or drug abuse or addiction? If so, please state the name and address of each such hospital or treatment facility, the name and address of the treating physician, and the date of each such admission to a hospital or treatment facility.

24. Are you currently taking any prescription drugs for any mental disorder or disease, chronic intoxication, or drug abuse or addiction? If so, please identify each such prescription drug you are currently taking and the name and address of the prescribing physician.

25. Do you suffer from any physical condition, infirmity, or disease that impairs (a) your ability to communicate with others, (b) your ability to read or write, (c) your short-term or long-term memory, (d) your ability to make decisions, or (e) your ability to drive an automobile? If so, please describe each such condition, infirmity, or disease.

26. State the name, address, and telephone number of each expert used for consultation who is not expected to be called as a witness at trial if (a) the consulting expert's work product forms a basis either in whole or in part of the opinions of an expert who is to be called as a witness or (b) the consulting expert's report or work product is reviewed by or received by the expert who is to testify in this case. For each such witness, give the subject matter on which he or she has provided an opinion, the mental impressions and opinions held by the

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expert, and the facts known to the expert (regardless of when the facts or information was acquired) that relate to or form the basis of the mental impressions and opinions held by the expert.

27. Please state the name and address of every hospital, clinic, or outpatient facility that has provided medical care or advice to [**name of proposed ward**] or has provided advice to you about [**name of proposed ward**] from [**date**] through the present.

28. Please state every reason why, in your opinion, it would be in the best interests of [**name of proposed ward**] for [you/[**name**]] to become [his/her] guardian, if that is your opinion.

29. Please state every reason why, in your opinion, [**name**] would not be qualified to act as guardian of [**name of proposed ward**], if that is your opinion.

30. Please state every reason why, in your opinion, [**name**] would not be suitable to act as guardian of [**name of proposed ward**], if that is your opinion.

31. Are you aware of any attempts or plans made to change any trust or will created or signed by [**name of proposed ward**] [**include if applicable:** or [his/her] spouse]? If so, please explain and describe all such attempts or plans and explain and describe why any such attempts or plans were not carried out.

32. Has [**name of proposed ward**] signed a will, trust agreement, power of attorney, or directive to physicians since [**date**]? If so, please describe the documents that have been signed and provide the name, address, and telephone number of each attorney or estate planner who prepared or assisted with the preparation and execution of each such document.

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Form 10-13

Requests for production are the subject of Tex. R. Civ. P. 196. Requests for production may not request items available through disclosure under Tex. R. Civ. P. 194. Note: Documents provided to, reviewed by, or prepared by a testifying expert are subject to disclosure under rule 194. Likewise, medical records must also be requested under rule 194 in certain situations.

Sample Requests for Production

Select as applicable.

1. Produce for inspection and copying all documents related to this lawsuit given to or obtained, reviewed, or prepared by each person used for consultation and who is not expected to be called as a witness at trial if the consulting expert's work product forms a basis in whole or in part of the opinions of an expert who is to be called as a witness or the consulting expert's report or work product is reviewed by or received by the expert who is to testify in this case.

2. Produce for inspection and copying all documents that relate directly or indirectly to the mental condition of [**name of proposed ward**] from [**date**] through the present.

3. Produce for inspection and copying all documents that relate directly or indirectly to the physical condition of [**name of proposed ward**] from [**date**] through the present.

4. If you are or have been a party to any lawsuit (other than this lawsuit) from [**date**] through the present, please produce for inspection and copying the pleadings in any such suit.

5. If you are indebted to [**name of proposed ward**] or to any trust or business entity in which [**name of proposed ward**] has an interest, please produce for inspection and copying all documents relating to any such debt.

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6. If you have any claim that is adverse to [**name of proposed ward**] or to any property, real or personal, of [**name of proposed ward**], please produce for inspection and copying all documents relating to that claim or property.

7. Please produce for inspection and copying all documents relating to any claim you have against [**list any trusts or entities in which the proposed ward has an interest**] or to any property, real or personal, of any such entity.

8. Please produce for inspection and copying all diplomas from degrees you have earned, professional licenses you hold, and all documents relating to any disciplinary proceeding held against you.

9. If you have been divorced, please produce for inspection and copying any divorce decree or judgment entered in any such divorce case.

10. Please produce for inspection and copying all documents relating to any gift or loan in an amount or value in excess of $500 made to you by [**name of proposed ward**].

11. Please produce for inspection and copying all documents that relate to any crime, other than minor traffic violations, for which you have been charged or arrested.

12. Please produce for inspection and copying all documents that relate to your claim that [**name of proposed ward**] is unable to manage [his/her] person and estate.

13. Please produce for inspection and copying all documents that relate to your claim that a necessity exists for the appointment of a permanent guardian of [**name of proposed ward**]'s person and estate.

14. Please produce for inspection and copying all documents that [**name of physician**] provided you.

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15. Please produce for inspection and copying all documents that relate to any personal or business matter involving you and [**name of proposed ward**] from [**date**] through the present.

16. Please produce for inspection and copying all documents relating to your claim for attorney's fees and expenses from [**name of proposed ward**] including, but not limited to, all attorney's fee contracts, letter agreements, billing statements, and invoices.

17. Please produce for inspection and copying all documents relating to written complaints or concerns you have prepared (except to or for your lawyers) relating to [**name of proposed ward**]'s personal and financial matters.

18. Please produce for inspection and copying [**include as applicable:** (a) [**name of proposed ward**]'s last will, (b) the last will of [**name of proposed ward**]'s spouse, (c) all trust agreements signed by [**name of proposed ward**], (d) all trust agreements signed by [**name of proposed ward**]'s spouse, including all exhibits thereto, (e) all powers of attorney signed by [**name of proposed ward**], (f) all powers of attorney signed by [**name of proposed ward**]'s spouse, (g) all directives to physicians signed by [**name of proposed ward**], and (h) all directives to physicians signed by [**name of proposed ward**]'s spouse].

19. Please produce for inspection and copying all witness statements from anyone concerning any matters relevant to this lawsuit.

20. Please produce for inspection and copying the documents related to any actions taken by you as agent for [**name of proposed ward**], including but not limited to financial records, invoices you have paid, checks, account agreements, beneficiary designations, guarantees, consents, engagement agreements, and other contracts.

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21. Please produce for inspection and copying all documents reviewed or relied upon in the preparation of your Answers to [**title of requestor**]'s Request for Disclosure in this litigation.

22. Please produce for inspection and copying all documents related to the investigation of your allegations in the litigation.

23. Please produce for inspection and copying all documents and materials you intend to use in any deposition in the litigation.

24. Please produce for inspection and copying all documents or evidence you intend to use for impeachment purposes in the litigation.

25. Please produce for inspection and copying all exhibits you intend to use at trial.

26. Please produce for inspection and copying all documents that have not been produced under the above requests for production numbers 1. through 25. that relate to or reflect facts relevant to this lawsuit.

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Form 10-14

Requests for Admission
[Directed to Applicant]

Select as applicable.

1. Admit or Deny

that [**name of proposed ward**] is an adult individual who is not substantially unable to provide food, clothing, or shelter for [himself/herself].

Answer:

2. Admit or Deny

that [**name of proposed ward**] is an adult individual who is not substantially unable to care for [his/her] own physical health.

Answer:

3. Admit or Deny

that [**name of proposed ward**] is an adult individual who is not substantially unable to manage [his/her] own financial affairs.

Answer:

4. Admit or Deny

that you are not suitable to act as guardian of [**name of proposed ward**].

Answer:

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5. Admit or Deny

that you have no personal knowledge of [**name of proposed ward**]'s physical health.

Answer:

6. Admit or Deny

that you have no personal knowledge of [**name of proposed ward**]'s mental health.

Answer:

7. Admit or Deny

that you have no personal knowledge of [**name of proposed ward**]'s ability to handle [his/her] financial matters.

Answer:

8. Admit or Deny

that you are currently indebted to [**name of proposed ward**].

Answer:

9. Admit or Deny

that you claim to have acquired from [**name of proposed ward**] an interest in the [**describe any property received from the proposed ward**].

Answer:

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Form 10-15

Requests for Admission
[Directed to Contestant]

Select as applicable.

1. Admit or Deny

that [**name of proposed ward**] is an adult individual who, because of a physical or mental condition, is substantially unable to provide food, clothing, or shelter for [himself/herself], to care for [his/her] own physical health, or to manage [his/her] own financial affairs.

Answer:

2. Admit or Deny

that [**name**] is not the only person who would be qualified to act as guardian of [**name of proposed ward**].

Answer:

3. Admit or Deny

that [**name**] is not disqualified to become guardian of [**name of proposed ward**].

Answer:

4. Admit or Deny

that [**name**] is a person suitable to become guardian of [**name of proposed ward**].

Answer:

Repeat above paragraph as needed.

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5. Admit or Deny

that since [**date**] there were attempts or plans made to change a will signed by [**name of proposed ward**].

Answer:

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Form 10-16

Questions for Physician Witness

1. State your full name for the court.

2. How are you employed?

3. Are you licensed to practice medicine in the state of Texas?

4. Is your license on file with the appropriate authority in this county?

5. What is your professional address?

6. What medical school did you attend?

7. Where did you do your internship and residency?

8. Did you complete a fellowship?

9. Are you a member of any professional associations?

10. Are you associated with any hospitals?

11. Have you brought your curriculum vitae with you?

12. Is your curriculum vitae true, correct, and accurate in every respect?

13. Are you board certified?

14. If so, when did you obtain your board certification?

15. If so, in what areas are you board certified?

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16. In the field of [**state field, e.g.,** psychiatry], do you treat patients who because of a physical or mental condition are substantially unable to provide food, clothing, or shelter for themselves or to care for their own health or financial affairs?

17. Do you know [**name of proposed ward**]?

18. When did you have occasion to treat the proposed ward? (Question the expert about each meeting.)

19. Did you examine the proposed ward?

20. Was the examination less than 120 days before the guardianship application?

21. Did you disclose to the proposed ward that you would be testifying about [his/her] capacity?

22. Did the proposed ward waive the disclosure of the examination?

23. Did you apply your training and expertise in your examination of the proposed ward?

24. What did the exam consist of?

25. What type of tests were administered?

26. What were the results of the examination?

27. What was the diagnosis?

28. Did you consult with any other physician in this matter?

29. Did you review any tests, reports, or opinions of any other doctors?

30. Did those assist you in reaching your opinions?

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31. Do you have an opinion on whether the proposed ward is able to be present in the court-room for a hearing?

32. Is the proposed ward on medication? If so, please describe the type of medication and dosage.

33. Based on reasonable medical probability, do you have an opinion about whether the proposed ward is incapacitated?

34. If so, what is your opinion?

35. Do you recommend the appointment of a legal guardian for the proposed ward?

36. Have you ever treated the proposed guardian for any psychiatric problems?

37. Based on reasonable medical probability, do you have an opinion about whether the proposed ward is totally incapacitated or partially incapacitated?

38. Based on reasonable medical probability, do you believe that in the future the proposed ward's diagnosis is likely to improve or change?

39. If partially incapacitated, what activities is the proposed ward incapable of performing?

If applicable, prove up medical report and offer as an exhibit.

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Form 10-17

[Caption. See § 3 of the Introduction in this manual.]

Objection to Application to Pay Appointee's Fees and Expenses [and Request for Jury Trial]

[**Name of movant**] files this objection to Application for Payment of Appointee's Fees and Expenses filed by [**name of appointee**] and shows the Court as follows:

1. [**Name of movant**] objects to the fees and expenses as they were not reasonable and necessary in and around [**county**] County, Texas.

Include the following if applicable.

2. [**Name of movant**] requests a jury trial of all disputed issues of fact with respect to the Application for Payment of Appointee's Fees and Expenses filed by [**name of appointee**].

Continue with the following.

[**Name of movant**] requests that this Court deny the Application to Pay Appointee's Fees and Expenses filed by [**name of appointee**] [, to grant Movant's request for a jury trial,] and prays for all other relief to which [**name of movant**] may be entitled.

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Respectfully submitted,

_____

[**Name**]
Attorney for Movant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Certificate of Service

I certify that a true copy of this [**title of document**] was served in accordance with rule 21a of the Texas Rules of Civil Procedure.

SIGNED on _____.

_____

[**Name of attorney**]

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Form 10-18

[Caption. See § 3 of the Introduction in this manual.]

Agreed Motion for Mediation in Temporary Guardianship Pending Contest

[**Name of movant**], the temporary guardian of the person and estate of [**name of ward**], Ward, an incapacitated person, files this Agreed Motion for Mediation in Temporary Guardianship Pending Contest in the estate of [**name of estate**], incapacitated, pursuant to section 1055.151 of the Texas Estates Code and shows the Court the following:

1. On [**date**], this Court appointed [**name of movant**] as temporary guardian of the person and estate of Ward. [**Name of movant**] incorporates by reference [**name of applicant**]'s Application for Appointment of Temporary Guardian of Person and Estate in the estate of [**name of estate**]. The temporary guardianship remains in effect until [**date**].

2. On [**date**], [**name of movant**] filed [his/her] Application for Appointment of Permanent Guardian of Person and Estate of Ward, because it is in the best interests of Ward that the temporary guardianship be made permanent.

3. On or about [**date**], [**name of contestant**] filed [his/her] contest to [**name of movant**]'s Application for Appointment of Guardian [**include the following if applicable:** and [his/her] own Application for Appointment of Guardian]. The contest remains unresolved.

4. Pursuant to section 1055.151 of the Texas Estates Code, on the written agreement of the parties, the Court may refer a contested guardianship proceeding to mediation. Determination of incapacity may be a mediated issue although the applicant must still prove to the Court that the proposed ward is an incapacitated person in accordance with Texas Estates Code section 1101.

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5. Pursuant to Texas Estates Code section 1055.151, all parties shall evaluate the availability of alternatives to guardianship and supports and services that may be feasible to avoid the need for guardianship.

6. [**Name of movant**] brings this Agreed Motion for Mediation in Temporary Guardianship Pending Contest in the estate of [**name of estate**], in good faith and for just cause. Applicant requests that the Court find Applicant and [his/her] attorney[s] have acted in good faith and for just cause in matters relating to this motion. The parties agree, pursuant to Texas Estates Code section 1055.151, that the cost of mediation will be paid by the parties unless otherwise ordered by the Court.

[**Name of movant**], the temporary guardian of the person and estate of [**name of estate**], an incapacitated person, prays that mediation be ordered pursuant to section 1055.151 of the Texas Estates Code and for all other relief to which [**name of movant**] may be entitled.

Respectfully submitted,

_____

[**Name**]
Attorney for Movant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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AGREED TO BY:

_____

[**Name**]
Attorney for Contestant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 10-19

[Caption. See § 3 of the Introduction in this manual.]

Agreed Order for Mediation in Temporary Guardianship Pending Contest

This Court, having considered movant's Agreed Motion for Mediation in Temporary Guardianship Pending Contest in the estate of [**name of estate**], and arguments of counsel, if any, is of the opinion that mediation is appropriate in this case and the motion should be granted.

IT IS THEREFORE ORDERED that the Agreed Motion for Mediation in Temporary Guardianship Pending Contest in the estate of [**name of estate**] is granted, and [**name**] and [**name**] are appointed and shall serve as mediators.

IT IS FURTHER ORDERED that the parties are to share the fees and expenses of the mediation equally, and the parties are to participate in the mediation in good faith.

IT IS FURTHER ORDERED that each party or a representative of each party having settlement authority attend the mediation proceedings scheduled to occur thirty days after execution of this order and that each party submit to the mediators a brief statement of the principal issues involved in the case and their respective positions at least seven days before mediation.

IT IS FURTHER ORDERED that the clerk shall serve notice of this order on counsel for all parties.

SIGNED on _____.

_____
JUDGE PRESIDING

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APPROVED:

_____

[**Name**]
Attorney for Movant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

APPROVED AS TO FORM:

_____

[**Name**]
Attorney for Contestant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Chapter 11
Guardianship Management Trusts

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Forms

Form 11-1 Application to Create Management Trust for Benefit of [**name of ward**] 803
Form 11-2 Management Trust 805

[Form 11-3 is reserved for expansion.]

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Form 11-4 Order Creating Management Trust for Benefit of [**name of ward**] 812

Form 11-5 First Annual Account of Trustee of Management Trust 815

Form 11-6 Order Approving Annual Account of Management Trust 820

Form 11-7 Application for Leave to Resign as Trustee and for Appointment of Successor Trustee 822

Form 11-8 Application for Appointment of Successor Trustee of Management Trust 825

Form 11-9 Order Appointing Successor Trustee of Management Trust 828

Form 11-10 Joint Application for Termination of Original Management Trust, Discharge of Trustee of Original Management Trust, Creation of Restated Management Trust, and Appointment of Trustee of Restated Management Trust 830

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Form 11-12 Order Creating Restated Management Trust and Directing Trustee to File Final Account 840

Form 11-13 Final Account of Trustee of Management Trust 843

Form 11-14 Order Approving Final Account and Directing Funding of Restated Management Trust 848

Form 11-15 Application to Discharge Trustee 852

Form 11-16 Order Discharging Trustee 854

Form 11-17 Application for Payment of Trustee's Compensation 856

Form 11-18 Order Authorizing Trustee's Compensation 858

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Chapter 11

Guardianship Management Trusts

§ 11.1 Overview of 1301 Management Trust

The 1301 Management Trust, named for chapter 1301 of the Texas Estates Code, offers an attractive mechanism for the management of assets belonging to minor children, incapacitated adults, and persons with only a physical disability. Statutory probate courts overwhelmingly prefer the use of the management trust as an alternative to opening a guardianship estate. Such a trust generally eliminates the need for a guardian of the minor's or incapacitated person's estate and permits such persons' property to be managed without application to the court for approval of discretionary distributions, payment of expenses, and other day-to-day administrative actions. Attorneys, courts, and trustees understandably are more comfortable using familiar forms for the 1301 Management Trust, as such forms have withstood the test of time, are easy to replicate, and are less complicated to administer by the trustee. However, the provisions of the 1301 Management Trust may also be tailored to fit the beneficiary's unique needs. See form 11-2 in this chapter for a sample 1301 Management Trust.

§ 11.2 Statutory Basis of 1301 Management Trust

The 1301 Management Trust began as a section 867 Management Trust, named after section 867 of the Texas Probate Code. Enacted in 1993, section 867 gave courts the power to create a trust for the benefit of a minor child or incapacitated adult as an alternative to guardianship of the person's estate. *See* Acts 1993, 73d Leg., R.S., ch. 957, § 1 (H.B. 2685), eff. Sept.1, 1993. Since 1993, the 1301 Management Trust, as it is now called after the recodification of the Texas Probate Code as the Texas Estates Code in 2014, has undergone many revisions to help serve people more efficiently and expand its functionality. The first major change to this court-created trust came in 1997. Before then, a guardianship was needed in order to create a management trust, but the 1997 revisions to Probate Code section 867 made it possible to create a management trust independent of a guardianship for a minor child or an incapacitated adult. *See* Acts 1997, 75th Leg., R.S., ch. 1375, § 1 (H.B. 1314), eff. Sept. 1, 1997. Then, in 2011, persons with only physical disabilities scored a win when section 867 was amended to enable them to become beneficiaries of management trusts. *See* Acts 2011, 82d Leg., R.S., ch. 1085, § 30 (S.B. 1196), eff. Sept. 1, 2011. In 2013, section 867 was amended again to allow persons with only a physical disability to apply for the creation of a management trust without the need of a guardian or attorney ad litem. Before the 2013 changes, persons having only a physical disability faced important limitations with respect to the management trust. The 2013 legislative changes to section 867 (recodified in 2014 as Tex. Est. Code §§ 1301.051–.058) enabled persons suffering only a physical disability to (1) file for the creation of a management trust; (2) enjoy more discretion regarding the terms and trusteeship of the trust; (3) avoid the expense of an attorney ad litem; and (4) sidestep court protections normally afforded to incapacitated persons and minor children, like court audits of annual accountings and the bonding of fiduciaries. *See* Acts 2013, 83d Leg., R.S., ch. 161, §§ 6.060, 6.066, 6.067, 6.069, 6.073 (S.B. 1093), eff. Jan. 1, 2014; Acts 2013, 83d Leg., R.S., ch. 982, §§ 26, 28, 29 (H.B. 2080), eff. Jan. 1, 2014.

§ 11.3 Persons Authorized to Seek Formation of 1301 Management Trust

The following persons may apply for the creation of a 1301 Management Trust: (1) the guardian of a ward; (2) an attorney ad litem or guardian ad litem appointed to represent a ward or a ward's interests; (3) a person interested in the welfare of an

alleged incapacitated person who does not have a guardian; (4) an attorney ad litem or guardian ad litem appointed to represent an alleged incapacitated person who does not have a guardian; or (5) a person who has only a physical disability. *See* Tex. Est. Code § 1301.051. Importantly, in 2011, the legislature extended the list of applicants to include persons having only a physical disability. In 2013, the legislature made forming a 1301 Management Trust for such persons much more efficient by removing the requirements that (1) the court appoint an attorney ad litem; (2) a bank or trust company serve as trustee; and (3) the fiduciary be bonded and file annual accountings. *See* Tex. Est. Code §§ 1301.057, 1301.058, 1301.154. Such amendments to chapter 1301 of the Texas Estates Code paved the way for the formation of court-created, self-settled supplemental needs trusts.

§ 11.4 Required Terms of 1301 Management Trust

A 1301 Management Trust generally contains required terms as set out below and may also include optional terms. However, these terms may be omitted or modified if doing so is in the best interest of the person for whom the trust is being created. *See* Tex. Est. Code § 1301.101(c) and discussion below. A 1301 Management Trust created for a minor child or incapacitated person must provide that (1) the minor child or incapacitated person is the sole beneficiary; (2) the trustee may distribute income or principal as necessary for the health, education, maintenance, or support of the beneficiary; (3) any trust income that is not distributed to the beneficiary is added to the trust principal; (4) if the trustee is a corporate fiduciary, it serves without having to give bond; and (5) subject to the court's approval, the trustee is entitled to receive reasonable compensation payable from the income or principal of the trust for the services the trustee provides to the beneficiary in the same manner that compensation of a guardian is determined and paid. *See* Tex. Est. Code § 1301.101. If the 1301 Management Trust is created for the benefit of a person having only a physical disability, the trustee need not be bonded, and the trustee is entitled to reasonable compensation without needing the court's approval. Tex. Est. Code § 1301.101(a–1).

§ 11.4:1 Sole Beneficiary

The ward must be the sole beneficiary of a 1301 Management Trust. Tex. Est. Code § 1301.101(a)(1). However, the trust may provide that the trustee make distributions to a person whom the beneficiary is obligated to support as necessary for the person's health, education, maintenance, and support. Such distributions may be made without the intervention of the ward's guardian or other representative or, in the case of an incapacitated person, the incapacitated person's representative. *See* Tex. Est. Code § 1301.102.

§ 11.4:2 Distribution Standard

A 1301 Management Trust must provide that the trustee may disburse as much principal or income as the trustee determines is necessary for the ward's health, education, support, and maintenance, and that any income not distributed will be added to principal. Tex. Est. Code § 1301.101(a)(2), (a)(3). Curiously, chapter 1301 of the Texas Estates Code fails to specifically address distributions to a minor child beneficiary of a 1301 Management Trust when there exists a person having a legal obligation to support such a minor child. Elsewhere in the Code, guidance is provided in the context of a guardianship of a minor child's estate. The Code makes it clear that a guardian of a minor child's estate may not use income or corpus from the ward's estate for the ward's support, education, or maintenance unless the guardian presents clear and convincing evidence that the parents are unable to support the ward without unreasonable hardship. *See* Tex. Est. Code § 1156.051. Though this provision does not specifically relate to distributions to a minor child beneficiary of a 1301 Management Trust, the trustee should find it instructive.

Practice Pointer: Exceptions exist to the mandatory health, education, support, and maintenance standard for 1301 Management Trusts. For example, if the attorney wants the trust to qualify as a supplemental needs trust so that the ward's eligibility for government benefits will be preserved, the trust should not permit distributions for the ward's basic maintenance and support but only for the ward's supplemental needs not otherwise covered by a government benefits program.

§ 11.4:3 Bond

A corporate fiduciary serving as the trustee of a 1301 Management Trust serves without bond. Tex. Est. Code § 1301.058(a)(1). Further, any other trustee of a 1301 Management Trust created for a person who has only a physical disability serves without bond. Tex. Est. Code § 1301.058(a)(2). A person other than a corporate fiduciary serving as trustee must file a bond with the county clerk in an amount equal to the value of the trust's principal plus the projected annual income and with the conditions the court determines are necessary. Tex. Est. Code § 1301.058(b).

§ 11.4:4 Trustee's Compensation

Subject to the court's approval, the trustee of a 1301 Management Trust may receive reasonable compensation from the trust estate determined, paid, reduced, and eliminated in the same manner as compensation of a guardian under chapter 1155 of the Texas Estates Code. Tex. Est. Code § 1301.101(a)(5), (b). See forms 11-17 and 11-18 in this chapter. Chapter 1155 permits the guardian of an estate a fee of 5 percent of the estate's gross income and 5 percent of all money paid out on a finding that the guardian has prudently managed the estate. Tex. Est. Code § 1155.003. There are exceptions to the 5 percent rule, allowing for the trustee's compensation to be either increased or reduced. *See* Tex. Est. Code §§ 1155.002(b), 1155.003, 1155.005–.008.

Many courts, however, permit compensation in accordance with the trustee's regular fee schedule. If the court permits compensation in accordance with the trustee's fee schedule, the schedule should be attached to the application creating the trust, and the applicant should seek the court's approval for trustee compensation based on that schedule.

§ 11.4:5 Successor Trustee

The court may appoint a successor trustee of a 1301 Management Trust if the trustee resigns, becomes ineligible, or is removed. Tex. Est. Code § 1301.155. See forms 11-7 through 11-9 in this chapter.

§ 11.4:6 Liability

The guardian of the person or estate is not liable for the acts or omissions of the trustee of a 1301 Management Trust. Tex. Est. Code § 1301.156. In response to a case involving a court-created trust wherein the supreme court upheld an exculpatory clause, the legislature enacted the language in section 1301.103 of the Texas Estates Code. *See* Acts 2011, 82d Leg., R.S., ch. 823, § 1.02 (H.B. 2759), eff. Jan. 1, 2014; *Texas Commerce Bank v. Grizzle*, 96 S.W.3d 240 (Tex. 2002). A provision of the trust that relieves a trustee from a duty, responsibility, or liability is enforceable only if the provision is limited to specific facts and circumstances unique to the property of the trust and is not applicable generally to the trust, and the court creating or modifying the trust makes a specific finding by clear and convincing evidence that the provision is in the best interest of the trust beneficiaries. Tex. Est. Code § 1301.103.

§ 11.4:7 Amending Trust

The court may amend, modify, or revoke a 1301 Management Trust at any time before the trust terminates, but the ward or the guardian of the ward's estate may not revoke the trust. Tex. Est. Code § 1301.201. When creating or modifying a 1301 Management Trust, the court may omit or modify terms required by section 1301.101(a), (b), which mandates distributions for the ward's health, education, maintenance, and support, only if the court determines that modification or omission is necessary and appropriate for the ward to receive public benefits or assistance under a state or federal program not otherwise available to the ward, or that it is in the best interests of the person for whom the trust is created. Tex. Est. Code § 1301.101(c). See forms 11-10 and 11-12 in this chapter.

§ 11.4:8 Termination

If the ward is a minor child, a 1301 Management Trust terminates on the death of the ward or on the ward's eighteenth birthday, whichever is earlier, or on a date selected by the court that is not later than the ward's twenty-fifth birthday. Tex. Est. Code § 1301.203(a). Some courts will not permit a 1301 Management Trust to extend beyond the ward's eighteenth birthday, assuming the ward is not otherwise incapacitated. If the applicant wants the trust to extend beyond the ward's eighteenth birthday, the applicant should check with the court in which the guardianship is pending. If the ward is not a minor child, the trust terminates according to the terms of the trust, on the date the court determines that continuing the trust is no longer in the ward's best interests, or on the death of the ward. Tex. Est. Code § 1301.203(b).

Practice Pointer: If a minor child beneficiary of a 1301 Management Trust also suffers from a disability that would enable the child to access a government benefits program, the 1301 Management Trust may be established as a supplemental needs trust. However, some courts still require that the 1301 Management trust terminate when the ward attains the age of twenty-five, even if the ward is likely never to regain capacity. In this situation, the trust must be modified before the ward reaches age twenty-five to ensure that the ward's government benefits will not be reduced or terminated. *See* Tex. Est. Code § 1301.203.

§ 11.4:9 Annual Account

The trustee of a 1301 Management Trust must prepare an annual account and file it with the court. The requirements are the same as those for a guardian of the estate under the Texas Estates Code, and the annual account is subject to court review in the same manner as an annual account prepared by a guardian. Tex. Est. Code § 1301.154. The annual account is therefore due not later than the sixtieth day after the anniversary date of the court order establishing the 1301 Management Trust. The annual account must (1) list all claims against the 1301 Management Trust presented to the trustee and specify which claims have been allowed, paid, or rejected by the trustee and which claims have been the subject of a lawsuit and the status of such lawsuit; (2) show all property that has come to the trustee's knowledge or possession; (3) show any change in the 1301 Management Trust's property that was not previously reported; (4) provide a complete account of receipts and disbursements for the period covered by the account, including the source and nature of the receipts and disbursements, with separate listings for principal and income receipts; (5) provide a complete, accurate, and detailed description of the property within the trust, the condition of the property and use of the property, and, if rented, the terms on which and the price for which the property was rented; and (6) show the cash balance on hand and the name and location of the depository where the balance is kept. *See* Tex. Est. Code § 1163.001.

Practice Pointer: Practitioners should consider whether other requirements imposed on the guardian of an estate, as set out in Texas Estates Code section 1163.003 (Supporting Vouchers and Other Documents Attached to Account) and section 1163.005 (Verification of Account and Statement Regarding Taxes and Status as Guardian), apply to the trustee of a 1301 Management Trust. The trustee must provide a copy of the annual account to the guardian of the ward's estate or person. Tex. Est. Code § 1301.154. See forms 11-5 and 11-6 in this chapter. The trustee of a 1301 Management Trust created for a person who has only a physical disability need not file an annual account with the court. *See* Tex. Est. Code § 1301.154(d). See section 11.3 above.

Practice Pointer: Most often, the 1301 Management Trust contains marketable securities managed by a professional investment advisor. Account statements for the trust account are available each month, but most standard account statements are insufficient to provide a snapshot of the assets in the 1301 Management Trust as of the anniversary date of the trust's creation. Moreover, such account statements rarely provide the detail necessary to report the unrealized gains and losses with respect to each asset under management. Reporting unrealized gains and losses with respect to the assets under management is necessary to enable the proper balancing of the trustee's annual account. To address this issue, consider asking the investment advisor to provide a detailed annual report of the assets under management as of the anniversary date of the creation of the trust and ask that the report include, with respect to each asset under management, value as of the anniversary date of the creation of the 1301 Management Trust; date of purchase; purchase price; date of sale; sales price; and, for assets currently in the portfolio, any unrealized gains and losses associated with such assets.

§ 11.4:10 Final Account

On termination of a 1301 Management Trust, the trustee must prepare a final account in the same manner as a guardian under sections 1204.101 and 1204.102 and, after court approval, must distribute the remaining trust assets to the ward when the trust terminates on its own terms, to the successor trustee, or to the personal representative of the deceased ward's estate. Tex. Est. Code § 1301.204. See forms 11-12 and 11-13 in this chapter.

§ 11.4:11 Application and Order to Discharge

After the order approving the final account is signed and entered, the trustee of a 1301 Management Trust must deliver any property remaining in the trust to the former ward, a successor trustee, or the representative of the deceased ward's estate. Tex. Est. Code § 1301.204. The trustee should obtain a receipt from the person or entity to whom the property was delivered and file it with the court along with the application and order to discharge the trustee. See forms 11-14 through 11-16 in this chapter.

§ 11.5 Optional Terms of 1301 Management Trust

The terms of a 1301 Management Trust created for a ward or an incapacitated person may allow the trustee to make distributions to a person whom the beneficiary is obligated to support as necessary for that person's health, education, maintenance, and support. Such distributions may be made without the intervention of the ward's guardian or representative of an incapacitated person. *See* Tex. Est. Code § 1301.102. Further, the court may include additional provisions in a management trust on the trust's creation or modification if the court determines the addition does not conflict with a required term. *See* Tex. Est. Code § 1301.102(d).

§ 11.5:1 Authority for Modifying Required Terms of 1301 Management Trust

The court creating or modifying a 1301 Management Trust may omit or modify otherwise applicable required terms if the court is creating a trust for a person who has only a physical disability or if the court determines that the omission or modification is (1) necessary and appropriate for the person for whom the trust is created to be eligible to receive public benefits or assistance under a state or federal program that is not otherwise available to the person or (2) in the best interests of the person for whom the trust is being created. *See* Tex. Est. Code § 1301.101(c). These provisions appear to open the door to a broad range of planning options for which a 1301 Management Trust may be adapted. Consequently, the practitioner might consider customizing or adding terms to the standard 1301 Management Trust form to address the individual needs of the beneficiary. The following practice notes focus on setting out specific examples wherein making modifications to the standard language of the 1301 Management Trust results in significant benefits to the beneficiary.

§ 11.5:2 Adding Supplemental Needs Language

For beneficiaries receiving Supplemental Security Income or Medicaid, or those who may at some point need to avail themselves of such benefits, the practitioner should consider creating the 1301 Management Trust as a supplemental needs trust. This will ensure that the trust property is not considered an asset of the beneficiary for purposes of determining eligibility for these means-tested benefits. "Supplemental Needs Trust" (SNT) is a broad term encompassing self-settled and third-party created trusts, and most 1301 Management Trusts are self-settled trusts, even though the funds such trusts receive often come from another person (such as when a minor child is the named beneficiary of a life insurance policy). The SNT provides a mechanism for preservation of assets and distributions for the beneficiary while giving the beneficiary the option of maintaining eligibility for certain governmental need-based benefits. The operative words describing these trusts are "supplemental needs," thereby distinguishing such trusts from "support" or other types of trusts. SNTs may have very strict distribution restrictions, prohibiting certain distributions, or they may be drafted more broadly. A trust with broad distribution standards may give the trustee full discretion to make distributions, even to the extent of causing the beneficiary to forfeit governmental benefits, if it is determined that such a strategy is in the best interest of the beneficiary. If the 1301 Management Trust qualifies as a supplemental needs trust, the ward may be able to access government benefits programs. If the trust is to qualify as a supplemental needs trust, special care must be given to ensure that the trust conforms to the provisions of 42 U.S.C. § 1396p(d)(4)(A), including a pay-back provision in the trust document. A pay-back provision requires that on the termination of the trust, either on the death of the beneficiary or on the beneficiary's regaining capacity, the trust is required to reimburse the state Medicaid agency for all medical expenses paid on behalf of the ward. Failure to include this pay-back provision will result in the loss of the government benefit. 42 U.S.C § 1396p(d)(4)(A).

Practice Pointer: Under current Social Security regulations, the trust is permitted to pay some administrative expenses before reimbursement to the state. On the death of the trust beneficiary, the trust is allowed to pay taxes owed from the trust due to the death of the beneficiary and reasonable administration fees associated with terminating and wrapping up the trust. Social Security Administration Program Operations Manual SI System 01120.203.B.10.

§ 11.5:3 Extending Term of Trust

If the person for whom a 1301 Management Trust is created is a minor child, section 1301.203(a) of the Texas Estates Code requires the trust to terminate on the earlier of the following: (1) the person's death; (2) the person's eighteenth birthday; or (3) the date provided in the court order, which may not be later than the person's twenty-fifth birthday. If the person for whom a management trust is created is not a minor, the trust terminates (1) according to the terms of the trust; (2) on the date the court

determines that continuing the trust is no longer in the person's best interest; or (3) at the person's death. Tex. Est. Code § 1301.203(b). Considering the provisions set out in section 1301.203 regarding termination, it may be possible for the adult beneficiary of a 1301 Management Trust formed when the beneficiary was a minor child to seek court modification of the trust to extend the term of the trust beyond the date provided in the original provisions of the trust. Such an extension may be an option as long as continuing the trust is in the best interest of the beneficiary. When the beneficiary of a 1301 Management Trust becomes an adult, section 1301.203(b) of the Code governs the termination of the trust. Consequently, the requirement that the trust terminate no later than the beneficiary's twenty-fifth birthday may be lifted and the termination date extended by the court through modification of the trust when doing so is in the beneficiary's best interest. The court may modify a 1301 Management Trust at any time before the date of the trust's termination. *See* Tex. Est. Code § 1301.201.

Example: Consider a beneficiary for whom a 1301 Management Trust was created when he was young who now struggles with physical and mental health challenges, though he is far from incapacitated. He appreciates the fact that the 1301 Management Trust bestows the following benefits: (1) professional management by a corporate trustee; (2) court oversight of distributions, investments, and fees; (3) professionally prepared annual accountings; (4) possible protection from creditors and future failed marriages; and (5) the ability to qualify for valuable needs-based governmental programs. Though the trust is scheduled to terminate when the beneficiary reaches the age of twenty-five, given the benefits of the trust he has enjoyed for almost his entire life, he may desire that the trust continue for many more years.

Section 1301.203 of the Estates Code provides that "[i]f the person for whom a management trust is created is a minor, the trust terminates on . . . the date provided by court order, which may not be later than the person's 25th birthday. . . . If the person for whom a management trust is created is not a minor, the trust terminates . . . on the date the court determines that continuing the trust is no longer in the person's best interests." Tex. Est. Code § 1301.203. In the example above, the beneficiary was a minor child when the 1301 Management Trust was created. But now as an adult beneficiary of the trust, he should be able to make a case that extending the term of the trust is in his best interest and ask the court to modify the trust to extend its term beyond his twenty-fifth birthday. Even if the court declines to extend the term of the trust beyond his twenty-fifth birthday based on section 1301.203, he could make application to extend the trust term based on section 1301.051, which provides that a person who has only a physical disability may apply for the creation (and presumably a modification to extend the term of) a 1301 Management Trust. If the beneficiary seeks an extension of the trust's term as a person with only a physical disability, he might consider asking the court to do more than extend the trust term. For example, he might ask the court to alleviate the trustee of the duty to file annual accountings under section 1301.154, which provides that "[t]he court may not require a trustee of a trust created for a person who has only a physical disability to prepare and file with the court the annual accounting." Doing so would enable the trust to save the expenses associated with the preparation and filing of the annual accountings and enable the beneficiary to retain more privacy with respect to the assets and distributions associated with the trust.

§ 11.5:4 Coordinating Investments and Distributions with Estate Plan

Most 1301 Management Trusts address the investment authority of the trustee and contain language similar to the following:

> Trustee shall invest the trust estate in accordance with the standards now or hereafter set forth in chapter 113 of the Texas Property Code, as amended. Trustee may also invest all or any part of the trust estate in one or more common trust funds or mutual funds now or hereafter established by Trustee or an institution affiliated with Trustee when it is found by Trustee to be prudent. To the extent allowed by law, Trustee's investment authority shall not be limited by any provisions of the Texas Estates Code.

Often, however, little consideration is given to preserving the estate plan of the incapacitated beneficiary when the plan involves beneficiary designations, pay-on-death provisions, or accounts held with others as joint tenants with rights of survivorship.

Example: Consider an older adult who recently became incapacitated and has accumulated a sizable estate that, with good management, could support the older adult through his sunset years. Though the will leaves the estate to the person's children in equal shares, some assets will pass outside of probate; for example, to a longtime housekeeper as the pay-on-death beneficiary of a credit union account, and to a church as the beneficiary of a 401(k). When the person became incapacitated, a 1301 Management Trust was established, and one of the children was appointed guardian of the person. In drafting the 1301 Management Trust and selecting a trustee, care was taken to respect the incapacitated adult's estate planning wishes and sidestep, to the extent possible, potential claims from persons receiving assets outside of probate against the trustee after the incapacitated adult's death. To protect the incapacitated adult's existing estate plan, the drafting attorney could consider asking the court to order the trustee of the 1301 Management Trust to maintain the incapacitated adult's church as the beneficiary of the 401(k) plan and to designate the church as the beneficiary of any subsequent IRA rollover account resulting if the trustee is unable to maintain the 401(k) account with the plan administrator. The drafting attorney could also include language to guide the trustee with respect to retention of assets, investments, distribution, and apportionment of income, expenses, gains, and losses.

Frequently, when a 1301 Management Trust is formed for an incapacitated person, the trustee gathers and manages the assets under the trustee's institutional canopy, paying little mind to existing beneficiary designations, pay-on-death designations, and rights of survivorship. Properly, the trustee's primary focus is on the best interests of the incapacitated beneficiary. However, respecting the estate plan of the incapacitated beneficiary should factor into the discussion about the best interests of the beneficiary. Section 1301.204 of the Estates Code provides that, "[u]nless otherwise provided by the court . . . the trustee of a management trust shall . . . distribute the principal or any undistributed income of the trust to . . . the representative of the deceased ward's or incapacitated person's estate on the ward's or incapacitated person's death." Tex. Est. Code § 1301.204.When an incapacitated beneficiary of a 1301 Management Trust properly establishes an estate plan, as in the example above, the practitioner should consider including a more tailored distribution-on-death provision in the trust document. Naturally, drafting a 1301 Management Trust agreement with an eye toward protecting potential successors in interest to an incapacitated person's assets requires many considerations: (1) whether the beneficiary designations/pay-on-death provisions/joint tenant with right of survivorship agreements are valid; (2) whether those having an expectancy interest in the assets or estate of the incapacitated person should receive notice of the application for the creation of a 1301 management trust (*see* Tex. Est. Code § 1301.0511); (3) whether those having an expectancy interest in the assets or estate of the incapacitated person should join in a settlement agreement (*see, e.g., Shepherd v. Ledford*, 962 S.W.2d 28 (Tex. 1998)) wherein they approve of the distribution provisions of the 1301 Management Trust upon the death of the incapacitated beneficiary; (4) what tax implications are associated with proportionate distributions from nonqualified and qualified assets; and (5) whether a trustee is willing to serve when the trust contains more complicated management and distribution provisions. Trustees generally appreciate more instructive trust terms that help the trustee manage and distribute the assets earmarked for potential successors in interest, which can minimize the risk of later claims against the trustee.

§ 11.5:5 Avoiding Final Distribution to Estate of Ward or Incapacitated Person

A contested guardianship often results when a person having compromised mental capacity begins signing estate planning documents, especially when the terms of such documents deviate significantly from the person's previous estate plan or if they

stray from what may be considered to be a natural distribution. Resolving the contested guardianship sometimes requires presettling the distribution plan to take effect upon the death of the proposed ward. Naturally, presettling the distribution plan would require a finding that the possibility of improvement in the proposed ward's mental capacity is extremely remote.

Example: Consider a recently incapacitated person who has been married several times. The person has four children from the first marriage and enjoys a very close relationship with his children and grandchildren. Late in life, the incapacitated person remarries, and as his mental capacity begins to decline, he becomes susceptible to the influence of others. Despite the incapacitated person's longtime relationship with his estate planning attorney, the new spouse has estate planning documents prepared on behalf of the incapacitated person by a different attorney, leaving the entire estate to the new spouse. Such a changed plan represents a significant departure from that which the incapacitated person had maintained for many years, as he had consistently provided that his children were to receive one-half of his estate. The children become aware of these changes and arrange for the parent to meet with the parent's longtime attorney. The attorney refuses to take instruction from the longtime client or the children of the client, as the attorney questions his client's capacity. The children then file for guardianship of their parent, and the new spouse contests the guardianship. After a long, bitter dispute, the parties meet for mediation. One of the sticking points preventing settlement of the guardianship dispute is that the incapacitated person's latest estate-planning changes name the new spouse as the sole beneficiary. The parties all agree that a 1301 Management Trust is preferred to the creation of a guardianship estate, and no party wants to litigate the estate plan after the incapacitated person's death. The parties are willing to agree that the incapacitated person's estate should be distributed according to the terms of a minimally funded revocable trust the incapacitated person formed years before his mental capacity began to decline.

Tex. Est. Code § 1301.204 provides that, "[u]nless otherwise provided by the court . . . the trustee of a management trust shall . . . distribute the principal or any undistributed income of the trust to . . . the representative of the deceased ward's or incapacitated person's estate on the ward's or incapacitated person's death." Given the family's willingness to agree in a mediated settlement agreement that the revocable trust should govern the final distribution of the incapacitated person's estate, the court approves a modification to the standard language of the 1301 Management Trust that enables the trustee to distribute the principal and undistributed income remaining in the management trust to the trustee of the revocable trust upon the incapacitated person's death. The court's willingness to allow such a trustee-to-trustee transfer upon the incapacitated person's death enables the family to resolve the contested guardianship, preserve assets for the care of the incapacitated person, and avoid the possibility of a will contest upon the person's death.

§ 11.5:6 Hurdles to Modifying 1301 Management Trust

Finding innovative solutions to challenges that are as unique as the life stories giving rise to them inserts an element of risk that some practitioners may find unacceptable. The risk may be minimized when the 1301 Management Trust is used to address challenges in a way that enhances or protects the best interests of the beneficiary and ensures the due-process rights of interested persons. But institutional resistance on the part of trustees and judges may stymie efforts to tailor the 1301 Management Trust to the needs of a beneficiary. Many of the modifications suggested herein require the acceptance by interested persons or at least notice to persons whose interests are at stake. For example, if the terms of the 1301 Management Trust direct the distribution of the trust upon the death of the ward or incapacitated person to someone other than the personal representative of the estate of the ward or incapacitated person, in contravention of section 1301.204 of the Texas Estates Code, due-process concerns arise about those having an expectancy interest in the beneficiary's estate. Naturally, such concerns may be put to rest if the deviations from the traditional 1301 Management Trust provisions are supported by a settlement agreement signed by all interested persons. In addition, many courts in Texas face budgetary constraints and lack the resources required

to properly oversee guardianship cases. In January 2019, the Office of Court Administration released findings on its initiative to enhance protections of incapacitated persons by implementing the Guardianship Abuse, Fraud and Exploitation Deterrence Program. The findings support the program for reasons including that (1) over 21,000 of the state's approximately 51,250 active guardianships reside in counties that lack resources to closely monitor these important cases; (2) a review of 29,606 guardianship files found that 41 percent were out of compliance; and (3) in the 244 counties in Texas without a statutory probate judge, the county judge or county court at law judge presides over guardianship cases without sufficient resources to monitor their cases. Office of Court Administration, *Texas Guardianship Reform: Protecting the Elderly and Incapacitated* 2 (Jan. 2019), **www.txcourts.gov/media/1445683/gafedp-annual-report-fy19.pdf**.

Facing scarcity of resources and attempting to standardize the review and audit of 1301 Management Trust accountings, some courts resist approving 1301 Management Trust terms that look unfamiliar. This resistance is not misplaced, as approving such terms requires the court to make a finding that the terms are in the best interests of the beneficiary. Tex. Est. Code § 1301.053. Further, the court must take a more circumspect approach than usual and determine whether all parties in interest are before the court. Moreover, the court must confirm that due-process concerns are addressed. Finally, once the 1301 Management Trust is operational, the court must revisit its terms each year as the annual accountings are being audited, if the distinctive language of the 1301 Management Trust impacts the management or distribution of assets.

§ 11.6 Trustee

The court may appoint an individual, including someone who is a private professional guardian, a nonprofit corporation qualified to serve as a guardian, or a guardianship program as the trustee of a 1301 Management Trust, provided the court finds that (1) the appointment is in the best interests of the ward or incapacitated person for whom the trust is created and (2) the value of the trust's principal is either less than $150,000 or more than $150,000, but the applicant has been unable to find a financial institution in the geographic area willing to serve as trustee. In all other cases where the beneficiary is a minor child or an incapacitated person, the trustee must be a financial institution. Tex. Est. Code § 1301.057. If the management trust is formed for the benefit of a person having only a physical disability, the court is not required to appoint a financial institution to serve as trustee. In all other cases, the court must appoint a financial institution to serve as trustee of the 1301 Management Trust. Tex. Est. Code § 1301.057.

§ 11.7 Court; Hearing; Order

The application for creation of a 1301 Management Trust for a ward must be filed in the court in which the guardianship is pending. Tex. Est. Code § 1301.052(a). If the guardian of the person and the guardian of the estate are in agreement, both may join in the application. *See* Tex. Est. Code § 1301.051. If one person is serving as guardian of both the person and estate, that person should file the application in both capacities. See forms 11-1 through 11-4 in this chapter. The statute does not require a hearing on the application; however, the judge may decide a hearing is appropriate and most often does, especially if there is any indication of disagreement among the interested parties or any question about whether the trust is in the ward's best interests. The judge also may appoint a guardian ad litem to assist the court in determining whether the trust would be in the ward's best interests. Tex. Est. Code § 1301.054(c). If the court agrees to waive the hearing, the order should state that the court is creating a 1301 Management Trust for the ward and direct the guardian of the ward's estate, if one has been appointed, to file the final account. See forms 11-5 and 11-6. Importantly, a 1301 Management Trust may also be created for an alleged incapacitated person who does not have a guardian if the court, after a hearing on the matter, finds that (1) the person who would be the beneficiary of the 1301 Management Trust is incapacitated and (2) the creation of a 1301 Management Trust is in the per-

son's best interest. Tex. Est. Code § 1301.054. Naturally, the alleged incapacitated person will have a court-appointed attorney ad litem (and a court-appointed guardian ad litem if necessary) to represent the alleged incapacitated person in the hearing to determine the person's capacity. Tex. Est. Code § 1301.054(c). The establishment of a 1301 Management Trust must be in the ward's best interests, and the court must make a finding to that effect. *See* Tex. Est. Code § 1301.053. Texas Estates Code chapter 1301 does not define "best interests," nor does it address the factors the court may consider in determining best interests, so the attorney will have to describe these items based on the facts and circumstances. For example, if the applicant seeks to establish a 1301 Management Trust with supplemental needs provisions, the ward's best interests will be served by preserving the ward's eligibility for government benefits. If the 1301 Management Trust contains standard terms, the ward's best interests will be served by saving the court costs and legal fees associated with a regular guardianship and obtaining the advantages of the professional management and broader investment options available to a corporate trustee.

§ 11.8 Taxes

Texas Estates Code chapter 1301 management trusts are considered grantor trusts under Internal Revenue Code sections 671–678. *See* 26 U.S.C. §§ 671, 677(a). Taxes due and the costs of preparation of tax returns may come out of trust funds. Income is generally taxable to the beneficiary. 26 U.S.C. § 671; 26 C.F.R. § 1.671–2. The trustee should be certain the appropriate tax returns are filed. *See* 26 U.S.C §§ 671–678.

Form 11-1

Estates Code section 1301.051 lists the persons who may apply for the creation of a chapter 1301 trust. This form is drafted with the guardian as applicant and should be modified as needed if the applicant is anyone other than the guardian.

[Caption. See § 3 of the Introduction in this manual.]

Application to Create Management Trust for Benefit of [name of ward]

[**Name of guardian**], Applicant, guardian of the estate of [**name of ward**], files this Application to Create Management Trust for Benefit of Ward under chapter 1301 of the Texas Estates Code and shows the following in support:

Describe the source of the trust estate. The following is an example.

1. The [**designation**] Court of [**county**] County, Texas, is about to enter a judgment in Cause No. [**number**], styled "[**style of case**]," in which [**name of ward**], Ward, will be awarded the sum of $[**amount**].

Continue with the following.

2. Applicant is the guardian of the estate of Ward. Applicant believes that it would be in the best interests of Ward if the money awarded were held in a management trust for the benefit of Ward according to chapter 1301 of the Texas Estates Code.

3. Applicant has requested that [**name of proposed trustee**], Proposed Trustee, of [**city**], Texas, be permitted to act as trustee of this trust if the Court agrees that such a trust should be created. Applicant understands that Proposed Trustee has agreed to act as trustee. Proposed Trustee is a trust company having trust powers in the state of Texas and is therefore

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qualified to serve as trustee of a trust created according to chapter 1301 of the Texas Estates Code.

4. Applicant and Proposed Trustee have agreed on the terms of a proposed trust agreement that complies with the provisions of chapter 1301 of the Texas Estates Code and that accompanies this application as Exhibit [**exhibit number/letter**].

5. Applicant prays that the Court create a management trust for the benefit of Ward under the terms of chapter 1301 of the Texas Estates Code, that Proposed Trustee be appointed the trustee of the trust, and that approval be given for the payment from the trust of reasonable fees to Proposed Trustee for its services as trustee under the terms of the trust agreement, which accompanies this application. Applicant prays for all further relief to which Applicant may be entitled.

Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach exhibit(s).

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Form 11-2

[Caption. See § 3 of the Introduction in this manual.]

Management Trust

This agreement establishes the terms of a management trust created for the benefit of [**name of beneficiary**], Beneficiary, in accordance with the order of the [**designation**] Court of [**county**] County, Texas, under the authority of chapter 1301 of the Texas Estates Code.

1. *Trustee.* The trustee of the trust will be [**name of trustee**], Trustee. Trustee's address is [**address, city, county**] County, Texas. On receipt of the funds constituting the corpus of the Trust, Trustee's duties will begin in accordance with the terms of the trust. No bond or other security is required of Trustee or any successor trustee. However, Trustee currently maintains a financial institution bond in the amount of $[**amount**]. Trustee hereby agrees to maintain that bond or a similar bond subject to the reasonable commercial availability of such bonds. Trustee agrees to notify the Court within five days of learning that a bond is no longer available.

2. *Beneficiary.* The sole beneficiary of the trust is Beneficiary, who was born on [**date of birth**]. Beneficiary currently resides at [**address, city, county**] County, Texas.

3. *Trust Estate.* The trust will be funded with cash in the sum of $[**amount**] [**describe funding, e.g.,** , which will be awarded to the trust on behalf of Beneficiary as a result of a judgment in Cause No. [**number**], styled "[**style of case**]," in the [**designation**] Court of [**county**] County, Texas]. This money will constitute the initial principal of the trust, which, together with all other properties acquired by the trust and all income therefrom, will constitute the trust estate of the trust.

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4. *Distributions from the Trust.* Trustee will pay to or apply for the benefit of Beneficiary such amounts out of the net income and principal (if income is insufficient) of the trust as are in the sole discretion of Trustee reasonably necessary to provide for the health, education, support, or maintenance of Beneficiary, subject to any applicable Texas Estates Code provisions. Any income not distributed will be added to the principal of the trust.

In making any discretionary payments to Beneficiary, Trustee will consider (a) the standard of living to which Beneficiary was accustomed before the creation of the trust, (b) any known resources of Beneficiary, (c) the ability of any person who is legally obligated to support Beneficiary to do so, and (d) any present or future Texas Estates Code provisions governing the use and expenditure of funds held in management trusts.

Trustee may make any distribution required or permitted under the trust, without the intervention of any guardian or other legal representative, in any of the following ways: (a) to the legal or natural guardian of Beneficiary or to any person who has physical custody of Beneficiary; (b) to any person furnishing care, education, support, or maintenance to Beneficiary; or (c) by using the distribution directly for the benefit of Beneficiary.

No distribution from the trust may be made to or for the benefit of Beneficiary to satisfy any obligation if that obligation would otherwise be met from any federal or state assistance program if the trust had not been created. Trustee will not be responsible for making such a determination nor will Trustee be held liable for any distribution made in good faith that results in the loss of any federal or state assistance or for any distribution made pursuant to an order of any state agency requiring distribution for the benefit of Beneficiary.

Trustee is specifically authorized to pay accounting fees for preparation of Beneficiary's personal income tax return and to pay any income tax owed by Beneficiary or the trust that is attributable to income generated by the trust.

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Note: If the beneficiary is a minor, the trust must terminate when the beneficiary is twenty-five years old. Tex. Est. Code § 1301.203(a). However, some courts will not permit a chapter 1301 trust to extend beyond the ward's eighteenth birthday.

5. *Termination.* The trust will terminate when [Beneficiary turns [**age**]/the Court determines Beneficiary to be no longer incapacitated or on the death of Beneficiary]. On termination, Trustee will pay all of the remaining trust estate of the Trust to Beneficiary, free of any further trust or, if Beneficiary is then deceased, to the personal representative of Beneficiary's estate.

6. *Revocability.* This trust may not be amended, altered, or revoked by Beneficiary or any guardian or other legal representative of Beneficiary but remains subject to amendment, modification, or revocation by the Court at any time before the termination of the Trust.

7. *Spendthrift Provision.* Before the actual receipt of any distribution of any portion of the trust estate by Beneficiary, no property (whether income or principal) of the trust will be subject to anticipation or assignment by Beneficiary or to attachment by or the interference or control of any creditor or assignee of Beneficiary or be taken or reached by any legal or equitable process in satisfaction of any debt or liability of Beneficiary. Any attempted transfer or encumbrance of any interest in the trust estate by Beneficiary before its actual distribution will be void. In addition to being applicable to Beneficiary, this paragraph also applies to anyone other than Beneficiary who may be entitled to any portion of the trust estate on termination of the trust.

8. *Trustee's Investment Authority.* Trustee will invest the trust estate in accordance with the standards in chapter 113 of title nine of the Texas Property Code as amended or with any subsequent applicable law. Trustee may also invest all or any part of the trust estate in a common trust fund now or hereafter established by Trustee pursuant to the Texas Trust Code. The investments must be in federally insured, interest-bearing time or deposit accounts or obligations backed by the United States government or its agencies or instrumentalities or in

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mutual funds composed primarily of securities issued by the United States government or its agencies or instrumentalities and managed by investment management organizations having in excess of $10 billion in assets under management.

9. *Trustee's Compensation and Expenses.* Trustee will be entitled to be paid a fair and reasonable compensation for its services out of the trust assets, either annually, quarterly, or monthly, at its option. Compensation will be in accordance with customary and prevailing charges for similar services charged by corporate fiduciaries in [**city, county**] County, Texas and in compliance with the existing guardianship compensation statutes. Trustee's compensation will not exceed Trustee's then-published fee schedule. Trustee will be entitled to recover from the trust all reasonable expenses incurred by Trustee in administration of the trust. Trustee's initial fee and expense schedule has been attached to this trust agreement and approved by the Court at the inception of the trust, but the Court will review all trustee fees and expenses incurred and paid annually and will consider such paid fees in light of the then-prevailing charges for similar services by corporate fiduciaries in [**city, county**] County, Texas. The Court may, on its own motion or at the request of Trustee or any other party interested in the welfare of Beneficiary, take any action it deems proper with respect to such fees and expenses.

Trustee's fee schedule attached to this trust agreement constitutes the basis for Trustee's compensation, subject only to review by the Court on an annual basis.

10. *Administrative Provisions.* In the administration of the trust, Trustee will be authorized and empowered—

a. to exercise all the powers now or hereafter granted to trustees of express trusts by the Texas Trust Code or any corresponding statutes, except that in any instance in which the Texas Trust Code, the provisions applicable to management trusts created under the Texas Estates Code, or other statutory

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provision may conflict with the express provisions of this trust agreement, the provisions of this trust agreement will control; and

b. to adjust, arbitrate, compromise, abandon, sue on, defend, or otherwise deal with and settle all claims in favor of or against the trust and to engage and retain attorneys or accountants at any time reasonably necessary to provide for the prudent management and preservation of the trust.

11. *Miscellaneous.* The trust also will be held and administered under the following terms and conditions:

a. The Trust will be governed in all respects by the laws of the state of Texas; jurisdiction and venue will lie in Texas in all matters involving the trust and those persons acting in connection with the trust.

b. Trustee will keep account books for the trust and all transactions involving the Trust and will furnish Beneficiary, or the person having the care and custody of Beneficiary if Beneficiary is then under a legal disability, statements at least quarterly showing receipts and disbursements of income and corpus of the trust and a list of assets held by the trust. Trustee will prepare and file with the Court regular annual accounts and, on the termination of the trust, a final account. All accounts will be prepared and filed in the same manner and form required of a guardian under title 3 of the Texas Estates Code. Trustee will provide copies of all accounts to any then-serving guardian of Beneficiary's person and any then-serving guardian of Beneficiary's estate. All accounts are subject to court review and approval in the same manner as provided in the Texas Estates Code. Trustee will not be responsible or liable to Beneficiary or any other person on account of any actions that Trustee may

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take or fail to take in Trustee's good-faith reliance on any order or proceeding of the Court.

c. No person or entity dealing with Trustee under the trust will be obligated to see to the application of any money or property paid or delivered to Trustee, and no such person or entity will be obligated to inquire into the expediency or propriety of any transaction or the authority of Trustee to enter into and consummate any such transaction on terms Trustee may deem reasonably appropriate.

d. Trustee may not resign as trustee of the trust, nor may another trustee be substituted in place of Trustee, without receiving prior authority from the Court to do so. If the trusteeship should become vacant, or on Trustee's submission of an application to resign, the power to appoint a successor will be exercisable by the Court alone.

e. The headings in this trust agreement are for convenience only and do not define or limit the scope or intent of the provisions to which they refer.

f. If any portion of this trust agreement is contrary to any applicable law or to the applicable rules and regulations of any authority regulating the activities of Trustee, the conflicting provision will be deemed deleted, and a provision as nearly alike in tenor, effect, and reading as will comply with such laws, rules, and regulations will be substituted in its place.

12. *Inception of the Trust.* This trust becomes effective on the entry of the order to which this trust agreement is attached and the transfer of the above-described money to Trustee.

SIGNED on [**date**].

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_____
[**Name of trustee**]
Trustee
By:
[**Name**]
[**Title**]

The form and content of this trust instrument are hereby approved.

_____
[**Name of guardian**]
Guardian

This instrument was acknowledged before me on [**date**] by [**name of representative**], as [**capacity**] of [**name of trustee**] as trustee, a state trust corporation, on behalf of the corporation.

_____
Notary Public, State of Texas

Form 11-3 is reserved.

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Form 11-4

[Caption. See § 3 of the Introduction in this manual.]

Order Creating Management Trust for Benefit of [name of ward]

On [**date**] the Court considered the application of [**name of guardian**], the guardian of the estate of [**name of ward**], Ward, requesting that the Court establish a management trust for Ward under chapter 1301 of the Texas Estates Code. The Court considered the evidence presented and the argument of counsel and reviewed the terms of the trust agreement attached to this Order as Exhibit [**exhibit number/letter**] and hereby finds that Ward is an incapacitated person; the trust is in the best interests of Ward and should be created under the authority of chapter 1301 of the Texas Estates Code; [**name of trustee**], Trustee, the proposed trustee of the Trust, is a trust company having trust powers in Texas and therefore is qualified to serve as trustee of a trust created under chapter 1301 of the Texas Estates Code; Trustee on receipt of the [**include if applicable:** settlement proceeds and other] assets of Ward's estate will assume the full responsibility, liability, and expense of making distributions, trust investments, and accounts for all trust assets and all receipts and disbursements of the trust; and Trustee should be allowed reasonable compensation for its services as trustee.

Include the following if applicable.

IT IS THEREFORE ORDERED that any funds awarded to [**name of ward**] by any judgment or order in Cause No. [**number**], styled "[**style of case**]," in the [**designation**] Court of [**county**] County, Texas, will be held in trust for the benefit of [**name of ward**], according to chapter 1301 of the Texas Estates Code and the terms of the trust agreement.

Continue with the following.

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IT IS [FURTHER/THEREFORE] ORDERED that [**name of trustee**] of [**city**], Texas, is hereby appointed the trustee of the trust created by the trust agreement and, on acceptance by the trustee of the trust, all sums awarded to [**name of ward**] will be paid to [**name of trustee**] for the benefit of [**name of ward**].

IT IS FURTHER ORDERED that [**name of guardian**] will prepare and file with this Court, for its review and approval, a final account as guardian of [**name of ward**]'s estate, and when the final account is approved, the guardianship of [**name of ward**]'s estate will be closed, but this cause will be retained on the Court's docket for compliance with the provisions of chapter 1301 of the Texas Estates Code, including annual accounts and trustee compensation, until closed by order of this Court.

IT IS FURTHER ORDERED that approval is hereby granted to [**name of trustee**] to charge a fee for its trust services at the rates and in the manner provided in the fee schedule attached to the trust agreement, these being reasonable fees as provided under subchapter A of chapter 1155 of the Texas Estates Code; however, these fees are subject to the annual review and approval of the Court.

IT IS FURTHER ORDERED that [**name of trustee**] will prepare and file with this Court for its review and approval, an annual account of assets and transactions in the trust, with a copy of the annual account to be provided to the guardian of the person of [**name of ward**].

SIGNED on _____.

_____
JUDGE PRESIDING

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APPROVED AS TO FORM:

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Include if applicable.

_____

[**Name**]
Attorney Ad Litem
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach exhibit(s).

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Form 11-5

Estates Code section 1301.154 requires the trustee to file an annual account in the same manner and form that is required of the guardian. Estates Code section 1163.001 provides detailed requirements for what must be included in the initial annual accounting (e.g., depository information on cash balances, information related to rental properties, or required information relating to certain bonds, notes, and other securities). *See* Tex. Est. Code § 1163.001. Section 1163.001 should be reviewed carefully, and this form should be modified as appropriate to comply with the statutory requirements.

[Caption. See § 3 of the Introduction in this manual.]

First Annual Account of Trustee of Management Trust

[**Name of trustee**], Trustee, court-appointed trustee of the management trust created for the sole benefit of [**name of beneficiary**], Beneficiary, presents this verified First Annual Account of Trustee of Management Trust, from [**date**] through [**date**], pursuant to section 1301.154 of the Texas Estates Code.

1. *Guardianship Estate.* [**Name of guardian**], Guardian, guardian of the estate of [**name of ward**], was appointed guardian of the estate on [**date**]. Guardian's final account was approved by this Court on [**date**].

2. *Trust Beneficiary.* The trust beneficiary is [**name of beneficiary**]. [He/She] was born on [**date of birth**].

3. *The Trust.* The trust was established by order of this Court dated [**date**]. It was funded with $[**amount**] from [**describe source of funds, e.g.,** funds awarded to Beneficiary and held in various guardianship accounts belonging to the guardianship estate].

4. *Changes in Property of the Trust.* No changes to the property of the trust occurred other than those listed in paragraph 11. of this account and more fully described in the statement of account activity, detailing all receipts and disbursements for the accounting period. The statement of account activity will be provided to the Court under separate cover.

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5. *Claims against the Trust.* [There were no claims presented to Trustee during the accounting period./The following claim[s] [was/were] presented to Trustee during the accounting period and the following action[s] [was/were] taken: [**list claims and actions taken, along with which claims have been the subject of a lawsuit, if any**].]

6. *Property of the Trust.* A complete description of all property belonging to the trust that came into the possession or knowledge of Trustee as of the first day of the accounting period appears on the schedule of assets, attached as Exhibit [**exhibit number/letter**] and incorporated by reference.

7. *Receipts.* A list of all revenue and income received by Trustee for the benefit of Beneficiary during the period covered by the annual account is set out on the statement of account activity and summarized in paragraph 11. of this account.

8. *Disbursements.* Disbursements made and expenses incurred on behalf of and for the benefit of Beneficiary are listed in paragraph 11. of this account and more fully described in the statement of account activity.

9. *Description of Property Being Administered.* No property, other than cash assets and mutual funds that remain in the trust, is subject to the control and management of Trustee. A complete description of all assets subject to the control and management of Trustee appears on the schedule of assets, which is attached as Exhibit [**exhibit number/letter**] and incorporated by reference. Exhibit [**exhibit number/letter**], a verification of funds on deposit, states the total principal under management as of [**date**] in the amount of $[**amount**].

10. *Trustee Fees.* The fee schedule for this accounting period was previously approved by the Court. The fee schedule was attached to the trust agreement at the time of approval. The fees taken for this accounting period are $[**amount**] and are set out in detail in Exhibit [**exhibit number/letter**]. Fees were calculated using the fee schedule attached to the original trust agreement and attached as Exhibit [**exhibit number/letter**].

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11. *Summary of Receipts and Disbursements*

Beginning cash as received on [**date**] from [**payor**]:	$[**amount**]	
Receipts		
[**Name of payor**]:	$[**amount**]	
Total receipts of interest/income:	$[**amount**]	
Total receipts of principal:	$[**amount**]	
Total beginning cash and receipts:		$[**amount**]
Disbursements		
[**Name of payee**]:	$[**amount**]	
Total disbursements:		$[**amount**]

Recapitulation

Beginning cash and receipts:	$[**amount**]	
Unrealized capital [gain/loss]:	$[**amount**]	
Less disbursements:	<$[**amount**]>	
Ending balance:		$[**amount**]

12. *Total Value of Estate at End of Accounting Period.* The total value of the Trust as of [**date**] is $[**amount**], as evidenced by the verification of funds attached hereto as Exhibit [**exhibit number/letter**].

13. *Taxes.* A grantor letter has been furnished to Beneficiary regarding taxable income from this trust. The taxable income from this trust should be reported on Beneficiary's individual income tax return (IRS Form 1040).

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[**Name of trustee**] prays that citation and notice be issued as required by law unless waived; that the Court audit, settle, and approve this annual account; and that the Court enter such other orders as may be proper.

Respectfully submitted,

_____
Trustee
[**Name and title of representative**]
[**Name of entity**]

_____
[**Name**]
Attorney for Trustee
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Trustee's Affidavit

[**Name of trustee**], Trustee, appeared in person before me today and stated the following under oath: that the annual account contains a true, correct, and complete statement of the matters to which this account relates, that no bond premium is due or owing, that all tax returns for the trust have been filed during the accounting period, and that all taxes owed during the accounting period on behalf of the trust have been paid.

_____
[**Name of affiant**]

Signed under oath before me by [**name**], a trust officer of [**name of trustee**], on [**date**].

_____
Notary Public, State of Texas

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Attach exhibit(s).

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Form 11-6

[Caption. See § 3 of the Introduction in this manual.]

Order Approving Annual Account of Management Trust

On [**date**] the Court considered the annual account of [**name of trustee**], the trustee for the management trust in the above-entitled and -numbered guardianship proceeding, and after examining the annual account the Court finds that the annual account for the period [**date**] to [**date**] has been filed and exhibited for the time required by law, that this annual account appears to comply with the provisions of the Texas Estates Code, that no objections have been filed, and that this annual account should be approved as filed.

IT IS ORDERED that the annual account of the management trust of [**name of beneficiary**], an incapacitated person, is hereby approved.

IT IS FURTHER ORDERED that [**name of trustee**], as trustee, file its next annual account of this management trust covering the twelve-month period from [**date**] to [**date**] no later than [**date**].

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

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_____

[**Name**]
Attorney for Trustee
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach exhibit(s).

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Form 11-7

[Caption. See § 3 of the Introduction in this manual.]

Application for Leave to Resign as Trustee and for Appointment of Successor Trustee

[**Name of applicant**], Applicant, trustee of the estate of [**name of beneficiary**], Beneficiary, an incapacitated person, files this Application for Leave to Resign as Trustee and for Appointment of Successor Trustee, and shows the following in support:

1. *Request to Resign.* Applicant is the duly appointed, qualified, and acting trustee of Beneficiary. Applicant desires to resign as trustee and requests that the Court appoint [**name of proposed successor trustee**], Proposed Successor Trustee, as successor trustee pursuant to section 1301.155 of the Texas Estates Code.

2. *Appointment of Successor Trustee.* Applicant believes that it is in the best interests of Beneficiary to have a successor trustee appointed. It is no longer necessary for Applicant to serve as trustee because Beneficiary's needs can be more adequately and economically served by Proposed Successor Trustee.

3. *Beneficiary.* Beneficiary is [a minor/an adult] [male/female] who is [**age**] years old, born [**date of birth**]. Beneficiary currently resides at [**address, city, county**] County, Texas. Beneficiary has previously been served with citation.

4. *Present Trustee.* On [**date**] this Court appointed Applicant as the trustee under chapter 1301 of the Texas Estates Code for the purpose of managing Beneficiary's trust. Applicant wishes to resign as trustee.

5. *Proposed Successor Trustee.* Proposed Successor Trustee has its office at [**address, city, county**] County, Texas, and is a corporate fiduciary.

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6. *Venue.* This Court has venue over these proceedings because the original guardianship was filed and created in this Court and the management trust was created by and is reviewed by this Court.

7. *Need for Immediate Appointment of Successor Trustee and Continuation of Trust.* Beneficiary is a person who is incapacitated to care for and manage [his/her] property and financial affairs and is without a legal guardian of [his/her] estate. There exists an immediate necessity for the appointment of a successor trustee to provide for the ongoing financial needs of Benefiary and Beneficiary's estate because [**specify, e.g.,** there exist a considerable number of assets that need to be supervised and taxes that need to be paid].

8. *Term of Trust.* The terms of trust are set out in the attached Exhibit [**exhibit number/letter**], the original trust agreement approved by this Court on [**date**].

Applicant prays that this resignation be accepted and that [**name of proposed successor trustee**] be appointed successor trustee of [**name of beneficiary**], an incapacitated person, and for all further relief to which Applicant may be entitled.

Respectfully submitted,

_____

[**Name**]
Trustee
[**Name and title of representative**]
[**Name of entity**]

_____

[**Name**]
Successor Trustee
[**Name and title of representative**]
[**Name of entity**]

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_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach exhibit(s).

Certificate of Service

I certify that a true copy of this [**title of document**] was served in accordance with rule 21a of the Texas Rules of Civil Procedure.

SIGNED on _____.

_____

[**Name of attorney**]

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Form 11-8

[Caption. See § 3 of the Introduction in this manual.]

Application for Appointment of Successor Trustee of Management Trust

[**Name of applicant**], Applicant, files this Application for Appointment of Successor Trustee of Management Trust of [**name of beneficiary**], Beneficiary, an incapacitated person, and shows the following in support:

1. *Applicant.* Applicant is an individual interested in the management trust because [**specify information relating to applicant's interest in the management trust**]. Applicant may be served with citation at [**address, city, county**] County, Texas.

2. *Beneficiary.* [**Name of beneficiary**] is [a minor/an adult] [male/female] who is [**age**] years old, born [**date of birth**]. Beneficiary currently resides at [**address, city, county**] County, Texas. Beneficiary has previously been served with citation.

3. *Guardian.* [**Name of guardian**] currently resides at [**address, city, county**] County, Texas and will be served with citation or is expected to waive service of citation with respect to this Application. On [**date**], [**name of guardian**] was appointed as the permanent guardian of the person of Beneficiary.

4. *Prior Trustee.* On [**date**], [**name of trustee**] was appointed trustee of a management trust. Trustee has indicated that it wishes to resign as evidenced by a statement set out in Exhibit [**exhibit number/letter**].

5. *Proposed Successor Trustee.* [**Name of proposed successor trustee**], Proposed Successor Trustee, has its offices at [**address, city, county**] County, Texas, and is a corporate fiduciary having trust powers in Texas. Proposed Successor Trustee desires to be appointed as

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the trustee of the existing management trust of Beneficiary as evidenced by a statement set out in Exhibit [**exhibit number/letter**], and Proposed Successor Trustee is eligible to act as a trustee for the trust.

6. *Venue.* This Court has venue over these proceedings because the original management trust was filed and created in this Court.

7. *Need for Immediate Appointment of Trustee and Continuation of Trust.* Beneficiary is a [minor/person who is incapacitated to care for and to manage [his/her] property and financial affairs] and is without a legal guardian of [his/her] estate. There exists an immediate necessity for the appointment of a successor trustee to provide for the ongoing needs of Beneficiary's estate because [**specify, e.g.,** there exist a considerable number of assets that need to be supervised and taxes that need to be paid].

> If the beneficiary is a minor, the applicant should request that the trust continue until the beneficiary reaches a specified age, between 18 and 25, in accordance with the terms of the original trust agreement approved by the court.

8. *Term of Trust.* The requested term of this trust is [for such time as Beneficiary's physical or medical condition necessitates the continued need for the management of Beneficiary's estate/until Beneficiary turns [**age**]].

Applicant prays that [**name of proposed successor trustee**] be appointed successor trustee of the management trust of [**name of beneficiary**], an incapacitated person, and for all further relief to which Applicant may be entitled.

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Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Certificate of Service

I certify that a true copy of this [**title of document**] was served in accordance with rule 21a of the Texas Rules of Civil Procedure.

SIGNED on _____.

_____

[**Name of attorney**]

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Form 11-9

[Caption. See § 3 of the Introduction in this manual.]

Order Appointing Successor Trustee of Management Trust

On [**date**] the Court considered the application of [**name of applicant**] [for Leave to Resign as Trustee and for Appointment of Successor Trustee/to Appoint Successor Trustee] of the Management Trust of [**name of beneficiary**], Beneficiary, an incapacitated person (the "Application"). The Court has reviewed the Application and the documents filed with it and finds that an immediate need exists for the appointment of a successor trustee of the management trust established for Beneficiary. The Court finds that the allegations contained in the Application appear to be true, and that notice and citation [is not required/has been given in the manner and for the length of time required by law]. The Court makes the following findings of fact:

1. A continued necessity exists for a management trust over the estate of [**name of beneficiary**], an incapacitated person, that [**name of proposed successor trustee**] is not ineligible to serve, and that it is in Beneficiary's best interests that [**name of proposed successor trustee**] be appointed as successor trustee over Beneficiary's estate.

2. Beneficiary's [rights/property/rights and property] will be protected by the appointment of a successor trustee.

3. The Court has venue under section 1023.001 of the Texas Estates Code, as well as subject matter jurisdiction.

IT IS THEREFORE ORDERED that [**name of proposed successor trustee**] is appointed as the successor trustee of the management trust for the benefit of [**name of beneficiary**], an incapacitated person.

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IT IS FURTHER ORDERED that [**name of prior trustee**]'s resignation is accepted and it is ordered to file a final account of its actions as trustee not later than [**date**].

IT IS FURTHER ORDERED that [**name of prior trustee**], the former trustee, is ordered to immediately turn over to the successor trustee all assets contained in Beneficiary's trust.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
[**Name**]
Attorney for Prior Trustee
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

_____
[**Name**]
Attorney for Successor Trustee
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 11-10

[Caption. See § 3 of the Introduction in this manual.]

Joint Application for Termination of Original Management Trust, Discharge of Trustee of Original Management Trust, Creation of Restated Management Trust, and Appointment of Trustee of Restated Management Trust

Applicants, [**name of guardian applicant**] and [**name of trustee applicant**], make this Joint Application for Termination of Original Management Trust, Discharge of Trustee of Original Management Trust, Creation of Restated Management Trust, and Appointment of Trustee of Restated Management Trust, and show the following:

1. [**Name of ward**], Ward, an incapacitated person, is [a minor/an adult], age [**age**] as of the filing of this application. Ward has been adjudicated an incapacitated person by this Court and is the ward of this Court in the above-captioned cause.

2. Applicant [**name of guardian applicant**] is the guardian of the person of Ward. Ward currently resides at [**address, city, county**] County, Texas.

By order dated [**date**], this Court created a management trust for Ward under chapter 1301 of the Texas Estates Code and appointed Applicant [**name of trustee applicant**] as trustee of the Original Management Trust.

3. The Original Management Trust was initially funded with [**specify**].

4. Applicant [**name of trustee applicant**] desires to be discharged as trustee of the Original Management Trust. Both applicants believe that it would be in the best interests of Ward for this Court to terminate the Original Management Trust, discharge [**name of trustee applicant**] as trustee, create a restated management trust in the stead of the Original Management Trust, and appoint a new trustee of the Restated Management Trust.

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5. Applicant [**name of trustee applicant**] has asked [**name of proposed successor trustee**], Proposed Successor Trustee, to act as trustee of the Restated Management Trust if this Court agrees that such a trust should be created. Applicant [**name of trustee applicant**] understands that Proposed Successor Trustee is willing to act as trustee of the Restated Management Trust.

6. Proposed Successor Trustee has agreed to the terms of the proposed Restated Management Trust. The proposed terms comply with the provisions of chapter 1301 of the Texas Estates Code. The proposed terms are set forth in the terms of the Restated Management Trust attached to and made a part of this application as Exhibit [**exhibit number/letter**].

7. Applicant [**name of trustee applicant**] has agreed to waive all its right to compensation and expense reimbursement as trustee. Applicant [**name of guardian applicant**] and Proposed Successor Trustee desire to release [**name of trustee applicant**] from all liabilities it may have with regard to its service as trustee of the Original Management Trust.

Applicants pray—

1. that this Court enter its order (a) creating the Restated Management Trust for Ward in accordance with chapter 1301 of the Texas Estates Code and the terms of the Restated Management Trust attached as Exhibit [**exhibit number/letter**], (b) designating [**name of proposed successor trustee**] as the trustee of that trust, and (c) directing Applicant [**name of trustee applicant**], as trustee of the Original Management Trust, to submit its final account to this Court;

2. that on this Court's approval of [**name of trustee applicant**]'s final account the Court enter its order (a) confirming that [**name of trustee applicant**], as trustee of the Original Management Trust, has waived all its right to compensation and expense reimbursement as trustee and that [**name of trustee applicant**] will not receive any compensation or reimbursement and (b) directing [**name of trustee applicant**], as trustee of the Original Management

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Trust, to deliver all the remaining property of the Original Management Trust to Proposed Successor Trustee, to be held and disposed of in accordance with chapter 1301 of the Texas Estates Code and the attached terms of the Restated Management Trust; and

3. that on [**name of trustee applicant**]'s delivery of all the remaining property of the Original Management Trust to Successor Trustee and the Proposed Successor Trustee's filing of its receipt of same, the Court enter its order terminating the Original Management Trust and discharging [**name of trustee applicant**] as trustee of the Original Management Trust, and granting all further relief to which applicants may be entitled.

Respectfully submitted,

_____

[**Name of guardian applicant**]
Applicant

_____

[**Name of trustee applicant**]
Applicant

_____

[**Name**]
Attorney for Guardian
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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_____

[**Name**]
Attorney for Trustee
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach exhibit(s).

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Form 11-11

[Caption. See § 3 of the Introduction in this manual.]

Restated Management Trust

This instrument establishes and restates the terms of a management trust as authorized by chapter 1301 of the Texas Estates Code.

1. *Guardianship.* Cause No. [**number**], styled "[**style of case**]," has been pending before the [**designation**] Court of [**county**] County, Texas.

2. *Original Management Trust.* By order dated [**date**], the Court created a management trust for [**name of beneficiary**] pursuant to chapter 1301 of the Texas Estates Code and appointed [**name of original trustee**] of [**city**], Texas, as trustee of the Original Management Trust.

3. *Restated Management Trust.* By order dated [**date**], the Court created a restated management trust for [**name of ward**], Ward, pursuant to chapter 1301 of the Texas Estates Code to replace the Original Management Trust and directed [**name of original trustee**], Trustee, to deliver the assets of the Original Management Trust to the trustee of this Restated Management Trust (the Trust), who is named below.

4. *Beneficiary.* [**Name of beneficiary**], Beneficiary, an incapacitated person born on [**date of birth**], is the sole beneficiary of the Trust. Beneficiary is the ward in the above-described guardianship.

5. *Trustee Named.* [**Name of trustee**], Trustee, is the sole trustee of the Trust.

6. *Bond, Liability.* No bond or other security is required of Trustee. No guardian of Beneficiary's estate or person or any surety on the bond of any guardian will be liable for an act or omission of Trustee.

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7. *Resignation.* Trustee may not resign as trustee nor may another trustee be substituted in place of Trustee without receiving prior authority from the Court.

8. *Trust Estate.* The Trust will be funded with all the property remaining in the Original Management Trust. This property will constitute the initial principal of the Trust, which, together with all other property transferred to the Trust and all income therefrom, will constitute the trust estate of the Trust.

9. *General Distributions.* Trustee will pay to or apply for the benefit of Beneficiary as much of the income and principal of the Trust as may be reasonably necessary, in the sole discretion of Trustee, to provide for the health, education, support, or maintenance of Beneficiary and to comply with any mandatory provision of current or future law that may apply to management trusts created under chapter 1301 of the Texas Estates Code. Any income not distributed under this paragraph will be added to the principal of the Trust.

10. *Additional Distributions.* In addition, Trustee may pay to Beneficiary's guardian or to any person having physical custody of Beneficiary such amounts of the principal of the Trust as may be reasonably appropriate, in the sole discretion of Trustee, to provide for the support of Beneficiary.

11. *Distribution Considerations.* In making any discretionary distributions Trustee will consider (a) the standard of living to which Beneficiary has been accustomed before the creation of the Trust, (b) any known resources of Beneficiary, (c) the ability of any person who is legally obligated to support Beneficiary to do so, (d) the ability of Beneficiary to earn funds for Beneficiary's own support and maintenance except while obtaining an education, and (e) any law that may apply to management trusts created under chapter 1301 of the Texas Estates Code. This Trust is intended to safeguard the Trust estate [**include if applicable:** , which was created to replace the Medicaid programs that would normally provide for the Beneficiary's lifetime care]. The creation and provision of the Trust, along with the continued supervision of the Court, is intended to guarantee Beneficiary the highest quality of life in the

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least restrictive environment. Accordingly, the provisions of the Trust relating to health, education, support, and maintenance will be broadly construed to the extent allowed under chapter 1301 of the Texas Estates Code.

12. *Facility of Payment.* Except as otherwise provided, Trustee may make any distribution required or permitted under this Trust, without the intervention of any guardian or other legal representative, in any of the following ways: (a) to Beneficiary directly, if appropriate, (b) to the natural or legal guardian of Beneficiary's person, (c) to any person furnishing care, education, support, or maintenance to Beneficiary, or (d) by using any distribution directly for Beneficiary's benefit.

13. *Termination.* The Trust will terminate on the death of Beneficiary or on the Court's determination that a guardianship is not necessary and the Trust is no longer needed. If Beneficiary is living on termination of the trust, Trustee will pay all the then-remaining trust estate of the Trust to Beneficiary free of any other trust. If Beneficiary is deceased on termination of the Trust, Trustee will pay all the then-remaining trust estate of the Trust to the personal representative of Beneficiary's estate, but only if Beneficiary's will is admitted to probate or a personal representative of Beneficiary's estate qualifies within six months of Beneficiary's death. If not, Trustee will pay all the then-remaining trust estate to Beneficiary's heirs at law under sections 201.001 and 201.002 of the Texas Estates Code.

14. *Trust Amendment, Modification, or Revocation.* The Court may amend, modify, or revoke the Trust at any time before the date of the Trust's termination. No other person, including Beneficiary, the guardian of Beneficiary's person or estate, or other legal representative of Beneficiary, may amend, modify, or revoke the Trust.

15. *Spendthrift Provision.* To the fullest extent allowed by law (a) the Trust will be a spendthrift trust, (b) no property of the Trust will be subject to anticipation or assignment by Beneficiary, (c) no property of the Trust will be subject to attachment by or the interference or control of any creditor or assignee of Beneficiary or be taken or reached by any legal or equi-

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table process in satisfaction of any debt or liability of Beneficiary except in accordance with the applicable provisions of the Texas Estates Code, (d) any attempted transfer or encumbrance of any interest in the trust estate of the Trust by Beneficiary before its actual distribution will be wholly void, and (e) no distribution from the Trust will be made to satisfy any obligation to Beneficiary if such obligation would otherwise be met from any federal or state assistance program if the Trust had not been created.

16. *Trustee's Investment Authority.* Trustee will invest the trust estate in accordance with the standards set forth in chapter 113 of title nine of the Texas Property Code (or any subsequent applicable law). Trustee may also invest all or any part of the trust estate in one or more common trust funds or common mutual funds now or hereafter established by Trustee. To the maximum extent allowed by law, the Trustee's investment authority will not be limited by chapter 1161 of the Texas Estates Code or any other provision of title three of the Texas Estates Code.

17. *Trustee's Compensation and Expense Reimbursement.* Trustee is entitled to reimbursement for all necessary and reasonable expenses incurred by Trustee in performing any duty as trustee. Trustee is also entitled to fair and reasonable compensation determined in accordance with the then-customary and prevailing charges for similar services charged by corporate fiduciaries in [**city, county**] County, Texas, in compliance with the existing guardianship compensation statutes. Trustee's compensation initially will be based on its current fee schedule, a copy of which is attached to this instrument. Trustee may receive its compensation (and reimburse itself for its expenses) on an annual, quarterly, or monthly basis, at Trustee's election. Trustee's fees are subject to annual review by the Court and review at any time on the Court's own motion or at the instance of Trustee or any other party interested in the welfare of Beneficiary. On a hearing of the matter, the Court may take any action it deems proper with respect to such fees and expenses.

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18. *Trustee Powers.* In the administration of the Trust, Trustee will have the following powers:

a. To exercise all the powers now or hereafter granted to trustees of express trusts by the Texas Trust Code or any corresponding statute, except in any instance in which the Texas Trust Code or other statutory provisions may conflict with the express provisions of this instrument, or the provisions contained in Texas Estates Code chapter 1301, in which case the provisions of this instrument and the Texas Estates Code will control.

b. To adjust, compromise, abandon, sue on, or defend and otherwise deal with and settle all claims in favor of or against the Trust and to engage and retain attorneys or accountants at any time reasonably necessary to provide for the prudent management and preservation of the Trust.

c. To continue to act as trustee of the Trust regardless of any change of name of Trustee and regardless of any reorganization, merger, or consolidation of Trustee.

19. *Records, Annual and Final Account.* Trustee will keep account books for the Trust and all transactions involving the Trust. Trustee will prepare and file with the Court a regular annual account and, on the termination of the Trust, a final account. All accounts will be prepared and filed in the same manner and form required of a guardian under title three of the Texas Estates Code. Trustee will provide copies of all accounts to any then-serving guardian of Beneficiary's person and any then-serving guardian of Beneficiary's estate. All accounts are subject to court review and approval in the same manner required of accounts prepared by a guardian under title three of the Texas Estates Code.

20. *Third Parties Dealing with Trustee.* No person or entity dealing with Trustee will be obligated to see to the application of any property paid or delivered to Trustee, and no such person or entity will be obligated to inquire into the expediency or propriety of any trans-

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action or the authority of Trustee to enter into and consummate the same on such terms as Trustee may deem reasonably appropriate.

21. *Headings.* The headings in this instrument are for convenience only and do not define or limit the scope or intent of the provisions to which they refer.

22. *Multiple Originals.* This instrument may be signed in multiple originals, any one of which will be deemed an original for all purposes.

23. *Inception of Trust.* The Trust will become effective on the last to occur of (a) the Court's entry of its order creating this Trust, (b) the initial transfer of any property to Trustee, (c) Trustee's acceptance of the Trust, evidenced by the signature below of the appropriate officer of Trustee, or (d) the filing of the original of this document with the county clerk in the guardianship proceeding.

SIGNED on _____.

_____
[**Name of trustee**]
Trustee
By:
[**Name**]
[**Title**]

This instrument was acknowledged before me on [**date**] by [**name of representative**], as [**capacity**] of [**name of trustee**] as Trustee, a state trust corporation, on behalf of the corporation.

_____
Notary Public, State of Texas

Include attachment(s).

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Form 11-12

[Caption. See § 3 of the Introduction in this manual.]

Order Creating Restated Management Trust and Directing Trustee to File Final Account

On [**date**] the Court heard the Application for Termination of Original Management Trust, Discharge of Trustee of Original Management Trust, Creation of Restated Management Trust, and Appointment of Trustee of Restated Management Trust filed jointly by [**name of guardian applicant**] and [**name of trustee applicant**].

[**Name of guardian applicant**] is the guardian of the person of [**name of ward**], Ward, an incapacitated person. [**Name of trustee applicant**] is the serving trustee of a management trust created for Ward according to chapter 1301 of the Texas Estates Code by order of the Court dated [**date**].

The application requests the Court to (1) terminate the Original Management Trust, (2) discharge [**name of trustee applicant**] as trustee, (3) create a restated Management Trust in the stead of the Original Management Trust, and (4) appoint a new trustee of the Restated Management Trust.

The Court has considered the application and examined the terms of the Restated Management Trust filed with the application. The Court has considered the evidence presented and the arguments of counsel. There being no exceptions or objections to the application, the Court finds that it would be in the best interests of Ward to (1) terminate the Original Management Trust, (2) discharge [**name of trustee applicant**] as trustee, (3) create the Restated Management Trust in the stead of the Original Management Trust, and (4) appoint a new trustee of the Restated Management Trust.

IT IS THEREFORE ORDERED that the Restated Management Trust for [**name of ward**] is created pursuant to chapter 1301 of the Texas Estates Code and in accordance with

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the terms of the Restated Management Trust attached to and made a part of this order as Exhibit [**exhibit number/letter**].

IT IS FURTHER ORDERED that [**name of successor trustee**] is appointed sole trustee of the Restated Management Trust.

IT IS FURTHER ORDERED that the fee schedule of [**name of successor trustee**], Successor Trustee, attached to the trust agreement and presented to the Court is hereby approved for the first twelve-month period of the Restated Management Trust.

IT IS FURTHER ORDERED that [**name of trustee applicant**] file its final account as trustee of the Original Management Trust.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
[**Name**]
Attorney for Guardian
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

_____
[**Name**]
Attorney for Trustee
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Attach exhibit(s).

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Form 11-13

Estates Code section 1301.204 requires the trustee to file a final account in the same manner and form that is required of the guardian. Estates Code sections 1204.101 and 1204.102 provide the requirements for what must be included in the final account. Sections 1204.101 and 1204.102 should be reviewed carefully, and this form should be modified as appropriate to comply with the statutory requirements.

[Caption. See § 3 of the Introduction in this manual.]

Final Account of Trustee of Management Trust

[**Name of trustee**], Trustee, court-appointed trustee of the management trust created for the sole benefit of [**name of beneficiary**], Beneficiary, presents this verified Final Account of Trustee of Management Trust.

1. *Replacement of Original Management Trust.* On [**date**] this Court created the Restated Management Trust for Ward to replace the Original Management Trust, and there is therefore no further need for the Original Management Trust. Trustee has properly administered the Original Management Trust. Trustee respectfully presents this verified final account of its trusteeship covering the period from inception of [**date**] through [**date**].

2. *Trust Beneficiary.* The trust beneficiary is [**name of beneficiary**]. [He/She] was born on [**date of birth**].

3. *The Trust.* The Original Management Trust was established by order of this Court dated [**date**]. It was funded with $[**amount**] from [**describe source of funds, e.g.,** funds awarded to Beneficiary and held in various guardianship accounts belonging to the guardianship estate].

4. *Changes in Property of the Trust.* No changes to the property of the Original Management Trust occurred other than those listed in paragraph 11. of this account and more

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fully described in the statement of account activity, detailing all receipts and disbursements for the accounting period. The statement of account activity will be provided to the Court under separate cover.

5. *Claims against the Trust.* [There were no claims presented to Trustee during the accounting period./The following claim[s] [was/were] presented to Trustee during the accounting period and the following action[s] [was/were] taken: [**list claims and actions taken, along with which claims have been the subject of a lawsuit, if any**].]

6. *Property of the Trust.* A complete description of all property belonging to the trust that came into the possession or knowledge of Trustee as of the first day of the accounting period appears on the schedule of assets, attached as Exhibit [**exhibit number/letter**] and incorporated by reference.

7. *Receipts.* A list of all revenue and income received by Trustee for the benefit of Beneficiary during the period covered by the final account is set out on the statement of account activity and summarized in paragraph 11. of this account.

8. *Disbursements.* Disbursements made and expenses incurred on behalf of and for the benefit of Beneficiary are listed in paragraph 11. of this account and more fully described in the statement of account activity.

9. *Description of Property Being Administered.* No property, other than cash assets and mutual funds that remain in the Original Management Trust, is subject to the control and management of Trustee. A complete description of all assets subject to the control and management of Trustee appears on the schedule of assets, which is attached as Exhibit [**exhibit number/letter**] and incorporated by reference. Exhibit [**exhibit number/letter**], a verification of funds on deposit, states the total principal under management as of [**date**] in the amount of $[**amount**].

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10. *Trustee Fees.* The fee schedule for this accounting period was previously approved by the Court. The fee schedule was attached to the trust agreement at the time of approval. The fees taken for this accounting period are $[**amount**] and are set out in detail in Exhibit [**exhibit number/letter**]. Fees were calculated using the fee schedule attached to the original trust agreement and attached as Exhibit [**exhibit number/letter**].

11. *Summary of Receipts and Disbursements*

Beginning cash as received on [**date**] from [**payor**]:_____ $[**amount**]

Receipts

[**Name of payor**]:	$[**amount**]
Total receipts of interest/income:	$[**amount**]
Total receipts of principal:	$[**amount**]
Total beginning cash and receipts:	$[**amount**]

Disbursements

[**Name of payee**]:	$[**amount**]
Total disbursements:	$[**amount**]

Recapitulation

Beginning cash and receipts:	$[**amount**]
Unrealized capital [gain/loss]:	$[**amount**]
Less disbursements:	<$[**amount**]>
Ending balance:	$[**amount**]

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12. *Total Value of Estate at End of Accounting Period.* The total value of the Original Management Trust as of [**date**] is $[**amount**], as evidenced by the verification of funds attached hereto as Exhibit [**exhibit number/letter**].

13. *Taxes.* A grantor letter has been furnished to Beneficiary regarding taxable income from the Original Management Trust. The taxable income from the Original Management Trust should be reported on Beneficiary's individual income tax return (IRS Form 1040).

14. *Delivery of Remaining Assets.* The remaining assets of the Original Management Trust should be delivered to [**name of successor trustee**] as trustee of the Restated Management Trust.

15. *Waiver of Commissions and Compensation.* Trustee hereby waives all commissions and other compensation that it might otherwise be entitled to receive from the property of the Original Management Trust, save and except the trustee fees referenced in paragraph 10.

[**Name of trustee**] prays that citation and notice be issued as required by law unless waived; that the Court audit, settle, and approve this final account; and that the Court enter such other orders as may be proper.

Respectfully submitted,

_____

Trustee
[**Name and title of representative**]
[**Name of entity**]

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_____
[**Name**]
Attorney for Trustee
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Trustee's Affidavit

[**Name of trustee**], Trustee, appeared in person before me today and stated the following under oath: that the final account contains a true, correct, and complete statement of the matters to which this account relates, that no bond premium is due or owing, that all tax returns for the trust have been filed during the accounting period, and that all taxes owed during the accounting period on behalf of the trust have been paid.

_____
[**Name of affiant**]

Signed under oath before me by [**name**], a trust officer of [**name of trustee**], on [**date**].

_____
Notary Public, State of Texas

Attach exhibit(s).

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Form 11-14

[Caption. See § 3 of the Introduction in this manual.]

Order Approving Final Account and Directing Funding of Restated Management Trust

On [**date**] the Court heard the Application for Termination of Original Management Trust, Discharge of Trustee of Original Management Trust, Creation of Restated Management Trust, and Appointment of Trustee of Restated Management Trust filed jointly by [**name of guardian applicant**] and [**name of trustee applicant**] regarding a management trust created by order of the Court dated [**date**] for [**name of ward**], Ward, an incapacitated person, pursuant to chapter 1301 of the Texas Estates Code.

By order dated [**date**] the Court created a management trust for Ward pursuant to chapter 1301 of the Texas Estates Code, appointed [**name of successor trustee**] as sole trustee of the Restated Management Trust, and directed [**name of trustee applicant**] to file its Final Account as trustee of the Original Management Trust.

On [**date**] the Court further considered the application and considered the Final Account filed by [**name of trustee applicant**]. The Court has examined the Final Account and the vouchers accompanying it, has heard all evidence in support of and against the Final Account, and has duly audited and settled the Final Account. The Court has reviewed the waiver of notice of hearing on the Final Account filed by [**name of guardian applicant**], guardian of the person of Ward. The Court has considered the evidence presented and the argument of counsel. There being no exceptions or objections to the Final Account or the application, the Court makes the following findings:

1. Citation has been served in the manner required by law.

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2. It is in the best interests of Ward to transfer to the Restated Management Trust all the property now being administered by [**name of trustee applicant**] as trustee of the Original Management Trust.

3. [**Name of trustee applicant**] has administered the Original Management Trust in accordance with the Texas Estates Code and the orders of this Court.

4. All expenditures for Ward listed in the Final Account were reasonable and their payment should be ratified.

5. [**Name of trustee applicant**] has waived all commissions and other compensation it would otherwise be entitled to receive from the Original Management Trust.

IT IS THEREFORE ORDERED that the Final Account for the period ending [**date**], filed with this Court by [**name of trustee applicant**], is hereby approved.

IT IS FURTHER ORDERED that all expenditures made by [**name of trustee applicant**] during the accounting period listed in the Final Account are hereby ratified and approved.

IT IS FURTHER ORDERED that [**name of trustee applicant**] receive no commission or other compensation or any reimbursement for its attorney's fees incurred with regard to this matter.

IT IS FURTHER ORDERED that [**name of trustee applicant**] deliver all the remaining funds and other property in the trust estate (including any income or interest), as set forth in the Final Account, to [**name of successor trustee**] to be held and disposed of for [**name of ward**] pursuant to chapter 1301 of the Texas Estates Code and in accordance with the terms of Restated Management Trust previously approved by the Court.

IT IS FURTHER ORDERED that [**name of successor trustee**] pay from the assets of the Restated Management Trust the court costs, legal fees, and other expenses incurred by it

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and by [**name of trustee applicant**] incident to the termination of the Original Management Trust and the establishment of the Restated Management Trust.

IT IS FURTHER ORDERED that [**name of successor trustee**] annually submit an account of its actions in the same form as would be required of a guardian of a ward's estate to this Court for its review and approval and to any then-serving guardian of [**name of ward**]'s person or estate.

IT IS FURTHER ORDERED that [**name of successor trustee**] submit to this Court annually an application for approval of [**name of successor trustee**]'s compensation for the services that [**name of successor trustee**] provided to [**name of ward**] as the ward's trustee. The appropriateness of [**name of successor trustee**]'s compensation will be determined in accordance with the orders of this Court and in the same manner as compensation of a guardian of an estate under section 1155.002 of the Texas Estates Code and any applicable successor statute.

IT IS FURTHER ORDERED that, after all the remaining funds and other property in the Original Management Trust (including any income or interest) as set forth in the Final Account have been delivered to [**name of successor trustee**], [**name of trustee applicant**] file its Application to Discharge Trustee.

SIGNED on _____.

_____
JUDGE PRESIDING

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APPROVED AS TO FORM:

_____

[**Name**]
Attorney for Guardian
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

_____

[**Name**]
Attorney for Trustee
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 11-15

[Caption. See § 3 of the Introduction in this manual.]

Application to Discharge Trustee

[**Name of trustee**], Trustee, trustee of the management trust created by order of this Court dated [**date**] for [**name of ward**], an incapacitated person, according to chapter 1301 of the Texas Estates Code, files this Application to Discharge Trustee and shows the following in support:

The Original Management Trust has been administered in accordance with the laws of the state of Texas and orders of this Court.

Trustee's Final Account of the Original Management Trust has been approved by order of this Court.

Trustee has delivered all the trust estate remaining in its hands to the person entitled to receive it, as determined by order of this Court.

A receipt executed by [**name of recipient**] acknowledging receipt of all the assets of the Original Management Trust estate from Trustee has been filed with the Court.

Trustee prays that it be released and forever discharged as trustee from all future liability and responsibility in connection with the administration of the Original Management Trust estate.

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Respectfully submitted,

_____

[**Name**]
Attorney for Trustee
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 11-16

[Caption. See § 3 of the Introduction in this manual.]

Order Discharging Trustee

On [**date**] the Court considered the application of [**name of trustee**], Trustee, of [**city**], Texas, trustee of the management trust created by order of this Court dated [**date**] for [**name of ward**], an incapacitated person, according to chapter 1301 of the Texas Estates Code, for the final discharge of Trustee as trustee of the Original Management Trust. The Court finds that Trustee entered on and has since faithfully performed its duties as trustee of the Original Management Trust; that the trust estate has been administered in accordance with the laws of the state of Texas; that all orders of this Court relating to its trust have been in all respects fully complied with by Trustee; that Trustee's Final Account has been approved by order of this Court; that Trustee has delivered all the trust estate remaining in its hands less any trust expenses set forth in Trustee's Final Account to [**name of successor trustee**], Successor Trustee, and that a receipt executed by Successor Trustee acknowledging receipt of all the assets of the estate from Trustee has been filed with this Court. The Court finds that Trustee should be discharged.

IT IS THEREFORE ORDERED that [**name of trustee**] is discharged as trustee from the administration of the Original Management Trust.

SIGNED on _____.

_____
JUDGE PRESIDING

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APPROVED AS TO FORM:

_____

[**Name**]
Attorney for Trustee
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

_____

[**Name**]
Attorney for Guardian
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach exhibit(s).

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Form 11-17

[Caption. See § 3 of the Introduction in this manual.]

Application for Payment of Trustee's Compensation

1. [**Name of trustee**], Trustee, court-appointed trustee of the Management Trust created for the sole benefit of [**name of ward**], Ward, an incapacitated person, has filed its first annual account with this Court for the trust pursuant to section 1301.154 of the Texas Estates Code for the period of [**date**] through [**date**]. The fee schedule for that time period was attached to the trust agreement and approved at the time of inception of the Trust.

2. Trustee was appointed by this Court on [**date**], continues to act in its court-appointed capacity, and continues to render services and advance necessary expenses on behalf of the trust and Ward. By reason of the performance of its duties and under the terms of the trust agreement, Trustee requests that this Court, after review and consideration, enter an order authorizing Trustee to collect its fees and expenses under the fee schedule attached as Exhibit [**exhibit number/letter**] from [**date**] through [**date**] in the amount of $[**amount**].

3. Attached as Exhibit [**exhibit number/letter**] is the calculation of Trustee's fees for the period of [**date**] through [**date**] in the amount of $[**amount**]. There are sufficient assets in the trust to pay Trustee's compensation.

4. Trustee states that its fee schedule is reasonable and necessary for the proper administration of this trust, and the fee schedule conforms with the prevailing charges for similar services by corporate fiduciaries in [**city, county**] County, Texas.

Trustee requests that this Court enter an order authorizing Trustee to pay such fees and expenses, pursuant to Exhibit [**exhibit number/letter**], out of the trust's assets in the amount of $[**amount**].

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Respectfully submitted,

_____

[**Name**]
Attorney for Trustee
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach exhibit(s).

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Form 11-18

[Caption. See § 3 of the Introduction in this manual.]

Order Authorizing Trustee's Compensation

On [**date**] the Court considered the Application for Payment of Trustee's Compensation to [**name of trustee**], Trustee, as trustee for the management trust for [**name of ward**], Ward, an incapacitated person, who was appointed by this Court on [**date**] to serve as trustee for the management trust. The Court finds that the compensation requested and rendered in this proceeding in the amount of $[**amount**] appears to be reasonable, that this compensation is in compliance with subchapter A of chapter 1155 of the Texas Estates Code, that Trustee has taken care of and managed the assets of Ward in compliance with Texas Estates Code requirements, that the management trust has adequate assets from which to pay this compensation, that this compensation should be authorized for payment, and that this request should be granted.

IT IS THEREFORE ORDERED that [**name of trustee**] as trustee for the management trust of [**name of ward**] pay the compensation in the amount of $[**amount**] to [**name of trustee**] from funds of [**name of ward**]'s management trust.

SIGNED on _____.

_____
JUDGE PRESIDING

APPROVED AS TO FORM:

© STATE BAR OF TEXAS

_____

[**Name**]
Attorney for Trustee
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach exhibit(s).

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Forms

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Chapter 12

Public Benefits

§ 12.1 Public Benefits Potentially Available to Wards

For many individuals suffering from disabilities, public benefits provide the main source of income and medical care. Guardians should not overlook the availability of these benefits. A multitude of public benefits programs are available for individuals with a disability that can be accessed during the guardianship process to support the ward. These public benefits programs can be divided into two groups: non-means-tested programs and means-tested programs. An understanding of these programs is necessary to maximize the benefits that may be available to a ward and his estate.

Non-means-tested programs contain no resource or income limitations in determining eligibility for the program. Non-means-tested programs include Social Security Disability Insurance (SSDI), Social Security retirement and survivor's benefits, as well as benefits for adult children with disabilities, and Medicare. Programs that are available regardless of a ward's financial situation are discussed in more detail at sections 12.2:1 through 12.5 below.

Means-tested programs present income or resource limitations to potential recipients. The most common means-tested programs are Supplemental Security Income (SSI) and Medicaid. These programs are discussed in more detail at sections 12.7 and 12.8 below.

Housing benefits from the U.S. Department of Housing and Urban Development (HUD), administered by public housing authorities across the state, and nutritional benefits through the Supplemental Nutrition Assistance Program (SNAP) can also provide significant benefits to a ward and should not be overlooked.

Finally, an array of benefits from the Department of Veterans Affairs, including service-connected compensation and non-service-connected pension benefits, sometimes increased due to a veteran's or widowed spouse's housebound status or need for the assistance of a third party, can provide a stream of income to offset care expenses. These programs are discussed in more detail at sections 12.10 through 12.11:4 below.

§ 12.2 Non-Means-Tested Public Benefits

§ 12.2:1 Social Security Disability Insurance (SSDI)

The Social Security Disability Insurance (SSDI) program is a monthly cash assistance benefit provided through the Social Security Administration (SSA). SSDI is not based on income or resource restrictions. Rather, it is available for wards who (1) are disabled and (2) have made sufficient contributions to Social Security through the payment of employment taxes during their work lives.

To receive SSDI benefits, a ward must meet the definition of a disabled person under SSA rules. An adult ward is considered disabled for SSDI purposes if he "is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 1382c(a)(3)(A); 20 C.F.R. § 416.905.

A ward must meet certain eligibility requirements to qualify for SSDI, including contributing to the Social Security program for at least twenty of the forty preceding work quarters. A ward may be eligible with less work history if he is disabled and under the age of thirty-one or if he is disabled due to blindness. 20 C.F.R. §§ 404.110, 404.120, 404.130.

The amount of the monthly SSDI benefit varies depending on the work history of the ward. The calculation of the monthly amount also considers the age and total contributions of the ward. Importantly, once a ward has received SSDI payments for twenty-four months, he becomes eligible for Medicare benefits. If the ward suffers from amyotrophic lateral sclerosis (ALS) or kidney failure, the twenty-four-month waiting period does not apply.

§ 12.2:2 Social Security Retirement Benefits

The Social Security retirement program, originally enacted in 1935, provides the largest source of income to retired individuals in the United States. The Social Security retirement program is not based on income or resource restrictions.

When it was originally enacted, Social Security was the first pension program established by the federal government. The Social Security retirement program is funded though the payment of Federal Insurance Contribution Act (FICA) taxes deducted from a worker's paycheck.

To be eligible for Social Security retirement benefits, a ward must have been credited a sufficient amount of quarters and must also have reached a minimum retirement age. The minimum age to receive Social Security retirement benefits is sixty-two. However, wards retiring at age sixty-two will not receive the full monthly benefit. Even if a ward retires at sixty-two, he will not be eligible for Medicare until age sixty-five. If a ward retires at age sixty-two, his benefit will be reduced by approximately 30 percent each month. The current retirement age for full benefits is between sixty-five and sixty-seven, depending on the individual's year of birth. For a chart outlining the retirement ages for each birth year, see 20 C.F.R. § 404.409.

An eligible ward has the option of a delayed retirement until age seventy. If delayed participation is elected, the amount of the benefit will increase each month that the participant delays retirement until age seventy. Currently, the rate of increase is 8 percent per year worked after full retirement age. *See* 42 U.S.C. § 402; 20 C.F.R. § 404.313.

In addition to meeting the age requirement, a ward is required to have been credited with at least forty quarters of reported earned income. 42 U.S.C. § 414(a)(2); 20 C.F.R. §§ 404.110(b)(1), 404.115.

A ward is able to earn a maximum of four quarters of work per year. In 1978, Social Security amended the way quarters were reported, requiring employers to report only annual income rather than report income earned quarterly. In 2024, as long as a worker earns at least $6,040 (or $1,510 per quarter) annually, whether received in one quarter or throughout the entire year, the worker will receive the maximum four work credits. *See* **www.ssa.gov/benefits/retirement/planner/credits.html**.

In addition to eligibility for the retired ward, in certain circumstances spouses, descendants, and parents may also be eligible for Social Security benefits on an individual's work record.

§ 12.2:3 Social Security Survivor Benefits

Upon the death of a worker, certain classes of individuals may be entitled to collect survivor benefits based on the deceased worker's earning record. These classes include surviving spouses, children, and parents of deceased workers. Each class has

different age and eligibility requirements. Additionally, a surviving spouse or child may qualify for a lump-sum death benefit of $255. Social Security survivor benefits are not based on income or resource restrictions.

A ward who qualifies as a surviving spouse may be entitled to collect "widow" or "widowers" benefits. The ward and his deceased spouse must have been married for at least nine months, unless the death of the spouse was accidental or unexpected. There is no length-of-marriage requirement if the couple has a child under age eighteen. To receive benefits, the ward must be age sixty or over, or at least age fifty if the spouse is disabled, though a spouse is subject to the same early claim reductions that are imposed on a worker who draws retirement benefits before full retirement age. 20 C.F.R. § 404.335. In addition, a divorced surviving spouse may be entitled to receive survivor benefits. 20 C.F.R. § 404.336. Multiple widows and former spouses can draw on the same worker's record without impacting the benefits of the others.

A ward who qualifies as an unmarried dependent child, either natural, adopted, or step, is entitled to receive 75 percent of the worker's benefits if the ward is under age eighteen. Once the ward reaches age eighteen (nineteen if the ward is a student), the benefits cease unless the ward is disabled. 20 C.F.R. §§ 404.350–.354.

A ward who is the parent of a worker also may be able to receive a survivor benefit if the ward has reached age sixty-two and, before the worker's death, was receiving support from the worker equal to at least one-half of the ward's ordinary living costs. In addition, the ward's income must be one-half or less of the amount of the ward's ordinary living costs. The support of the ward must have continued for a reasonable period of time (generally twelve months before the death of the worker).

If a ward, either as a surviving spouse or parent, is entitled to receive a larger benefit based on his own work record, he will not be eligible to receive a survivor benefit.

§ 12.2:4 Social Security Adult Disabled Child Benefits

If a ward is disabled before age twenty-two and remains disabled, the ward will be eligible for adult disabled child benefits for as long as the ward is disabled. These benefits are not considered disability benefits under SSI or SSDI. If the amount received as an adult disabled child is below the SSI income limit, the child may also be eligible to receive SSI benefits. The receipt of adult disabled child benefits does not cause an interruption of Medicaid benefits as long as the child is otherwise eligible for Medicaid. These benefits are not based on income or resource restrictions.

§ 12.2:5 Medicare

Medicare is the primary health insurance program for the elderly population of the United States. The program is administered by the Centers for Medicare and Medicaid Services (CMS) and the Social Security Administration. Medicare is not based on income or resource restrictions, though copays for Medicare Part B are higher for higher-income recipients.

Medicare is a federal health insurance program available to individuals who—

1. meet the disability or age (sixty-five or older) requirements of the program;
2. have paid money into the program through retirement tax payment or have become eligible to receive SSDI or Railroad Retirement Disability benefits; or
3. who have end-stage renal disease.

42 U.S.C. §§ 402, 426 to 426–1.

Medicare Benefits: Medicare is divided into Part A, which consists of hospital and limited nursing home benefits (limited to short-term rehabilitation), and Part B, which consists of physicians, tests, medical equipment, and so forth. Effective January 1, 1998, a new Part C, now generally referred to as Medicare Advantage, was introduced to allow Medicare beneficiaries the ability to elect various combinations of managed care and private-pay services. Part C serves as an alternative to traditional Medicare, and the benefits associated with a Medicare Advantage plan differ.

Medicare Part D became effective January 1, 2006, to offer prescription drug coverage to Medicare beneficiaries.

Medicare pays only for medical goods and services that are reasonably necessary to improve the functioning of the Medicare recipient. Experimental procedures, even though reasonable and necessary, may not be covered under Medicare. Medicare will pay for up to sixty days of acute hospital care per spell of illness, which may be extended for an additional ninety days provided the ward requires acute care. A "spell of illness" is a defined period for Medicare. The spell of illness begins on the first day the ward enters the hospital and begins receiving Part A benefits and ends after a sixty-day period during which no benefits are paid under Part A.

Enrollment in Medicare: Coverage through the Medicare program is automatic when payments have been contributed to the program from the qualifying ward's own income or that of the ward's spouse or parent, as is the case with dependent children or survivor coverage. A ward is automatically enrolled in Medicare in certain circumstances, including when—

1. he is already receiving Social Security or Railroad Retirement at age sixty-five; or
2. he has received SSDI or Retirement, Survivors, and Disability Insurance benefits for twenty-four months.

See 42 U.S.C. § 426.

If the Medicare card does not arrive after one of the triggering events above, the guardian should contact the ward's local Social Security office. If the application is not filed within certain time periods, eligibility may be lost or there may be a penalty for failure to apply for Medicare benefits.

Medicare eligibility rules provide a special enrollment period for a participant who continues to work until after age sixty-five and who is enrolled in his employer's group health plan. The special enrollment period covers each month that the ward is currently employed and covered under a group health plan and continues for eight months after the employment terminates.

Medicare Premiums: Most wards enrolled in Medicare are not required to pay the Part A premium, which is up to $505 (for 2024). The standard Part B premium is $174.70 (for 2024). Note that if a ward has a higher income, his Part B premium will increase above the base premium. *See* **www.medicare.gov/basics/costs/medicare-costs**. The Part B premium is determined on an annual basis and fluctuates each year. Wards over age sixty-five not otherwise eligible for the Medicare program may voluntarily purchase both Part A and Part B by applying and paying the applicable premium.

Since Part B premiums are determined on an actuarially sound basis for enrollees, late enrollees to Medicare Part B are assessed a surcharge for late enrollment into the program. The actuarial rate is the amount necessary to pay one-half of the benefits and the administrative costs for Medicare for the calendar year. The other one-half necessary to pay benefits and administrative costs is contributed by the federal government. The Part B premium is determined on an annual basis and fluctuates each year. The Part B surcharge increases the monthly Part B premium by 10 percent for each twelve-month period in which a ward could have been enrolled in Medicare Part B but was not. Previous periods of employment in which a ward was covered under a group health plan are disregarded.

Medicare Supplement Policies: Medicare Supplement policies, also sometimes referred to as "Medigap" policies, are insurance policies through private insurance companies designed to supplement the benefits provided by Medicare by paying some of the amounts that Medicare does not pay. Benefits of a Medicare Supplement policy include Medicare deductibles and other coinsurance costs. For example, most Medicare Supplement policies cover the copayment for days twenty-one through one hundred of skilled nursing care.

Medicare Supplement policies have an open enrollment period, during which companies must allow potential enrollees free choice of the plans that they offer and cannot refuse coverage. The open enrollment is six months from the enrollment in Medicare Part B.

Medicare Supplement policies are required to offer certain basic benefits to participants. These basic benefits, sometimes referred to as the "core" benefits, are included in all Medicare Supplement policies. The core benefits are—

1. hospitalization copayments for days sixty-one through ninety and sixty lifetime days paid under Part A;
2. the costs for the first three pints of blood;
3. the 20 percent copayment for Medicare-approved procedures paid under Part B; and
4. 100 percent of the hospice Part A coinsurance.

See 42 U.S.C. § 1395ss(o).

The basic coverage is quite minimal, so guardians who wish to purchase a Medicare Supplement policy for a ward should include coverage for skilled nursing and other essential coverage, such as coverage in a foreign country, that is not covered by the basic plan.

§ 12.3 Means-Tested Public Benefits

§ 12.3:1 Supplemental Security Income (SSI)

Supplemental Security Income (SSI) is a means-tested monthly cash assistance program intended to help pay for the costs of a ward's food and shelter. 42 U.S.C. §§ 1381–1385. As such, the benefits are designed to augment the income or assistance otherwise available to the aged (age sixty-five or over) or blind or disabled ward (as determined by the Social Security Administration), including children, who meet the income and resource restrictions of the program. The full amount of the SSI benefits is $943 (in 2024). However, this amount may be reduced by the receipt of income by the ward, received either in cash or as in-kind support and maintenance.

In Texas, once a ward qualifies for SSI benefits, the ward is automatically eligible for Medicaid benefits. The Medicaid benefits program is often more beneficial than any cash payment received from SSI since the Medicaid program provides comprehensive medical coverage. If a ward in Texas receives one dollar or more of SSI benefits, the ward automatically qualifies for Medicaid.

SSI Income Limits: "Income" for SSI purposes is generally anything the ward receives in cash or in-kind support and maintenance that can be used to meet the ward's needs for food and shelter. 20 C.F.R. §§ 416.1110–.1182. The definition includes gifts and certain distributions from trusts. The receipt of unearned income causes a dollar-for-dollar reduction in the SSI benefit, after disregarding the first $20 per month of unearned income. The receipt of earned income causes a reduction of

$1 of SSI benefit for every $2 earned (or a reduction of 50 percent of earned income), after disregarding the first $65 per month of earned income.

In addition to cash received by the ward, income also includes the payment of food and shelter expenses for the ward by a third party. This includes payments made by trusts and third parties, such as parents. However, there are two rules regarding the receipt of in-kind support and maintenance, the One-Third Reduction Rule and the Presumed Maximum Value rule, which limit the reduction of SSI benefits to a certain amount ($314.33 in 2024). *See* Understanding Supplemental Security Income Living Arrangements, **www.ssa.gov/ssi/text-living-ussi.htm**.

Practice Pointer: Note that payments to a store selling groceries and other items does not automatically disqualify someone from SSI. Careful records keeping can show the items purchased at such a store are entirely allowable under SSI rules.

§ 12.3:2 Medicaid

Medicaid is a means-tested, federally funded, state-administered health insurance plan available to wards who meet certain eligibility requirements. "Medicaid" is the term used to refer to government health insurance programs that provide medical care and services to indigent (poverty level) wards pursuant to title XIX of the Social Security Act. 42 U.S.C. §§ 1396–1396w-5. To be eligible for Medicaid benefits, a ward must meet certain income and resource restrictions. Since the Medicaid program is funded with federal funds, the state's Medicaid eligibility requirements are based on federal law and are similar to the requirements for SSI eligibility. In Texas, the Medicaid program is administered by the Texas Health and Human Services Commission (HHSC). While each state has some latitude to establish its own rules and regulations concerning Medicaid eligibility, such regulations cannot be more restrictive than the federal laws and guidelines.

Following are some of the long-term care programs available in Texas under the state's Medicaid program:

Institutionalized Programs: provide nursing home institutionalized care for elderly and disabled wards.

Personal Attendant Services: provide attendant care services to assist wards with activities of daily living as well as light housekeeping and meal preparation. Such programs include the Community Attendant Services (CAS), the Primary Home Care Program, and the Family Care Program.

Emergency Medicaid for Undocumented Immigrants: allows for the treatment of undocumented immigrant wards for the duration of their emergency condition.

Medicaid Waiver Programs: offer full Medicaid coverage and in-home services as a more cost-effective alternative to institutionalized care. Waiver programs include STAR+PLUS Home and Community Based Waiver (formerly known as the Community Based Alternatives (CBA)) program), Community Living and Support Services (CLASS), Medically Dependent Children's Program (MDCP), Deaf, Blind, Multiple Disability Waiver (DBMD), Home and Community Based Services (HCS), Texas Home Living Waiver (Tx/HmL), and Integrated Care Management programs. (Because of the popularity of the Waiver programs, these programs are often subject to a lengthy wait or "interest" list for the benefit. For example, the interest list for the CLASS program is approximately ten years in Houston and twelve years in San Antonio. The interest list varies in length from region to region.)

Deemed SSI Programs: Medicaid-mandated under federal law to provide continuing coverage for those wards who lose SSI as a result of a COLA increase for a different SSA program. These SSA programs include SSDI and the Disabled Adult Child (DAC) benefit.

Community Medicaid: provides comprehensive medical assistance that pays for doctor's visits, hospital stays, prescription drugs, and adaptive aids for wards not living in nursing homes.

Medicare Savings Programs: assist with the payment of premiums and deductibles associated with the Medicare program for low-income wards. Such programs include the Qualified Medicare Beneficiary Program (QMB) and the Specified Low-Income Medicare Beneficiary Program (SLMB).

Often the Medicaid program is the only source of health coverage available to a ward with disabilities, and the loss of such benefits can result in the loss of medical care for the ward.

Medicaid Eligibility: To be eligible to receive Medicaid long-term care benefits, the ward must meet certain categorical requirements as well as strict income and resource limitations. Failure to meet one of the requirements will result in either the denial or loss of Medicaid benefits.

To be eligible for Medicaid benefits, the ward must be either a U.S. citizen or qualified resident alien. 1 Tex. Admin. Code § 358.203. Simply having a permanent residency card is not enough to qualify as a resident alien for Medicaid eligibility purposes.

In determining whether a ward is a qualified resident alien, the date the ward entered the United States is important. Wards who entered the United States before August 22, 1996, and who have continuously resided in the United States must meet the definition of qualified alien as provided at 8 U.S.C. § 1641.

Wards who entered on or after August 22, 1996, must also meet the definition of qualified alien as provided at 8 U.S.C. § 1641 along with the eligibility limitations found in 8 U.S.C. §§ 1612, 1613. Qualified aliens are immigrant wards who have been lawfully admitted to the United States for permanent residence, refugees, or asylees. Qualified aliens also include immigrant wards who have had their deportation withheld, have been granted parole, have been granted conditional entry, or who are battered spouses. *See* Texas Health and Human Services Commission, *Medicaid for the Elderly and People with Disabilities Handbook* ch. D-8000, Alien Status, **https://hhs.texas.gov/handbooks/medicaid-elderly-people-disabilities-handbook** (MEPD). Some qualified aliens may be subject to a waiting period of five years if they entered the United States on or after August 22, 1996, or may be limited to benefits for a maximum of seven years. *See* MEPD §§ D-8300–8330.

To qualify for Texas Medicaid, the ward must be a resident of Texas. To meet the residency requirement, the ward must have established residence in Texas and possess an intent to remain in Texas. 1 Tex. Admin. Code § 358.207. No length of time to establish residency is required. Additionally, travel outside the state does not automatically terminate residency as long as the ward has the intent to return to Texas. Note, however, that absence from the country for a full calendar month or thirty consecutive days will disqualify a recipient from SSI qualification, so if Medicaid qualification is based on SSI qualification, Medicaid benefits will also be lost. 20 C.F.R. § 416.215; Social Security Administration Program Operations Manual SI System 00501.410.

If the guardian is seeking nursing home care for a ward, the ward must be either age sixty-five or older, blind, or disabled (pursuant to the definition of disability by the Social Security Administration). 1 Tex. Admin. Code § 358.211. In practice, this requirement is rarely an issue, because the "medical necessity" requirement, discussed below, is more stringent than the disability requirement. The disability requirement becomes an issue if a ward under age sixty-five applies for nursing home Medicaid and has not been deemed disabled by the SSA.

For nursing home and waiver programs, the ward must meet the "medical necessity" requirement. 26 Tex. Admin. Code § 554.2403. The initial assessment of medical necessity is made upon admission to the nursing home, and a follow-up assessment is done annually. The assessment is usually completed by the director of nursing at the nursing home and by a nurse and

physician employed by the insurance company contracted by HHSC. If it is determined that the ward does not meet medical necessity, the guardian may appeal the decision through a fair hearing.

Essentially, medical necessity requires a medical disorder or disease requiring attention by a registered or licensed vocational nurse on a regular basis. Inability to attend to "activities of daily living," such as bathing, grooming, dressing, and eating, is not sufficient to meet medical necessity. The ward must need skilled nursing rather than simply custodial care. 26 Tex. Admin. Code § 554.2401.

To be eligible for nursing home Medicaid, the ward must reside in a Medicaid facility in a Medicaid-certified bed. While this requirement seems straightforward, not all facilities that accept Medicaid have Medicaid beds available at any given time. Many facilities have waiting lists for Medicaid beds. If the ward resides in a Medicaid facility but is not placed in a Medicaid-certified bed, Medicaid will not pay for the nursing home.

Medicaid Income Limits: The income limits for a ward seeking Medicaid qualification depend on the marital status of the ward and whether the ward's spouse is also applying for Medicaid benefits. However, if a ward exceeds his applicable income limit, his guardian may create a Qualified Income Trust (QIT), also referred to as a "Miller Trust," to meet the income requirement. See section 12.13 below for further discussion. The income limit changes on January 1 each year to reflect any cost of living increases given by Social Security.

For an unmarried ward to be eligible for Medicaid, he can have no more than $2,829 (in 2024) per month in countable income. For a married couple with an ineligible spouse, the income cap for the applicant-spouse is the same as for an unmarried person ($2,829 per person per month in 2024). When determining whether the ward-spouse meets the income cap, apportionment of income is critical. This situation arises either in a spousal impoverishment case, in which one spouse enters a facility and the other remains in the community, or when both spouses enter a nursing home but only one spouse is applying for Medicaid benefits. Income is apportioned to the spouse in whose name the income is received (i.e., the "name on the check").

If both spouses reside in the nursing home and both are applying for Medicaid, the incomes of both spouses are combined. The income cap for both spouses applying for Medicaid is $5,658 (in 2024), or twice the unmarried ward limit. MEPD app. XII. If the combined income of both spouses exceeds this cap, a QIT may also be used.

Practice Pointer: It is important to remember that a ward's gross income, not net income, determines whether a QIT is needed. Note that deductions for items such as health insurance, federal income taxes, and other retirement benefits are deducted from income before receipt. For example, the Medicaid Part B premium is deducted from a ward's monthly Social Security benefit. The guardian must obtain an award letter from the pension source or SSA before determining whether a QIT is necessary for eligibility. When gathering documents, make sure to obtain the most recent Social Security statements. If a guardian is attempting to expand the spousal protected resource amount (SPRA), knowing the exact amount of income is crucial.

Medicaid Resources: For purposes of determining Medicaid eligibility, resources are cash, other liquid assets, or any real or personal property or other nonliquid assets that a ward, a ward's spouse, or a ward's parent could convert to cash to be used for the ward's support and maintenance. The value of a ward's resources is determined as of 12:01 A.M. on the first day of each month. 1 Tex. Admin. Code § 358.321.

Note that support and maintenance assistance are not considered a resource. MEPD ch. F. Certain resources are not considered when determining Medicaid eligibility. Examples of excluded resources are the homestead; a vehicle; retirement

accounts such as an IRA, 401k, and 403b plans; burial funds; preneed funeral contracts; burial items; limited amounts of life insurance (face value less than $1,500); personal effects; and business property. *See* MEPD § F-1100.

Practice Pointer: To be considered a countable resource, the resource must be owned either solely or in part by the ward and be accessible. MEPD § F-1220. An asset is considered an accessible resource if the ward has the right, authority, or power to liquidate the property or his share of the property. An individual's resources are available to the individual if they are being managed by a legal guardian, representative payee, agent under a power of attorney, or fiduciary agent, but if a court denies a guardian or agent access to the resources, HHSC does not consider the resources to be available to the individual. MEPD § F-1231. Resources held under a guardianship carry a presumption of being accessible unless specifically denied access by a court. *Henson v. Texas Health & Human Services Commission*, No. 03-13-00621-CV, 2015 WL 6830677 (Tex. App.—Austin Nov. 5, 2015, no pet.).

Practice Pointer: Note that the HHSC has not codified any rules for the exemption of retirement accounts. However, the HHSC has previously indicated the following regarding retirement accounts: for individuals who are receiving Required Minimum Distributions (RMDs), IRAs are excluded from countable resources. The same policy applies both to applicants and to their community spouses. Annuities held within IRAs will continue to be treated as exempt. For those with 401(k)s, TSAs, and other types of retirement accounts, exemption requires first rolling over the assets to an IRA. If there is an RMD, the account then becomes exempt; if not, it can then be made exempt by purchasing a deferred annuity within the IRA. RMDs are counted as income for both eligibility and copayment.

Medicaid Resource Limits: The countable resource limit for an unmarried ward is $2,000 of countable resources. MEPD § F-1300. This amount has not changed since 1989.

Under the spousal impoverishment rules, if one spouse resides in a nursing home and the other remains in the community, the resource limit is determined based on the couple's combined resources subject to the Spousal Protected Resource Amount (SPRA). The amount of countable resources allowed in this situation is a range between the minimum SPRA of $30,828 (in 2024) and the maximum SPRA of $154,140 (in 2024). MEPD app. XII. In some cases the amount of countable resources may exceed the maximum SPRA of $154,140 if the couple's combined gross income is less than the minimum monthly maintenance needs allowance (MMMNA) ($3,853.50 in 2024), which is the amount of gross monthly income the spouse is allowed to keep for his or her support in the community. *See* MEPD ch. J. The minimum and maximum SPRA are increased on January 1 each year. Note that some states, including Texas, set their own standard figure for the MMMNA, which in Texas is $3,435. See **www.medicaidplanningassistance.org/mmmna-definition/**.

The countable resource limit for a married couple, both of whom reside in the nursing home and are applying for benefits, is $3,000 of countable resources. The resources of both spouses are combined to determine whether the limit is reached. If both spouses reside in the nursing home, the spousal impoverishment rules do not apply.

If both spouses reside in a nursing home and only one spouse is applying for Medicaid benefits, the countable resource limit for the spouse applying for Medicaid is $2,000. Resources of the nonapplicant spouse are not deemed to the ward-spouse because they are not considered as living in the same household. MEPD § F-1300. Therefore, the nonapplicant spouse can have unlimited resources in his or her name.

Practice Pointer: Due to the COVID-19 pandemic, any stimulus payments to Medicaid recipients during the 2020 and 2021 calendar years are not considered resources or income for the Medicaid recipient unless the funds remain unspent for a period of twelve months.

§ 12.3:3 Considerations for Calculating Income

The Pickle Amendment allows recipients of SSI/Medicaid who also receive SSDI benefits to retain their Medicaid eligibility if such recipients receive a cost of living adjustment (COLA) on the SSDI amount that would push them over the SSI income limit ($943 in 2024), thereby disqualifying them from SSI. Pickle disregards the increase in SSDI. In a year in which there is no COLA for SSDI, the Pickle rules do not apply. *See* MEPD § A-2330.

For the years 2010 and 2011, there was no COLA increase for SSDI recipients, so wards whose SSDI amount pushed them over in those years were denied Medicaid benefits automatically. There have been COLA increases each year since 2012 (other than 2016), most recently a 3.2 percent increase in 2024, and therefore the Pickle rules have been in effect since then.

§ 12.3:4 Compassionate Allowances

If a ward suffers from certain conditions, Social Security will prioritize applicants to ensure that those with the most serious medical conditions do not suffer unnecessary delay in the processing of the application for benefits. Compassionate Allowances is not a separate program from Social Security disability benefits but is a mechanism for identifying the most medically needy applicants. The current list of Compassionate Allowances can be found at **www.ssa.gov/compassionateallowances/conditions.htm**. If a ward suffers from one of the diseases on the Compassionate Allowances list, Social Security expedites his application for benefits. This means that in certain circumstances the application for benefits may be approved in as little as two weeks.

§ 12.4 Department of Veterans Affairs Benefits

Wards who are veterans who meet certain eligibility requirements may be entitled to either service-connected disability compensation or pension payments for non-service-connected disabilities from the Department of Veterans Affairs (VA). Veteran wards are also entitled to special monthly payments known as Aid and Attendance as well as health care provided by the VA health-care system, burial benefits, and survivor benefits. Widowed spouses of veterans may also qualify for some of these benefits. Special considerations for guardianships of veterans and their dependents are discussed in chapter 5 of this manual.

§ 12.4:1 VA Health-Care System

The VA runs the largest health-care network in the country. The VA provides numerous health-care services to wards who qualify as eligible veterans, including basic care, inpatient and outpatient care, emergency care, and comprehensive rehabilitative services. *See* 38 C.F.R. § 17.38.

To be eligible for VA health-care benefits, the ward must have been in active military service, a National Guard member, or a reservist and had a discharge other than dishonorable. The ward must also meet financial eligibility requirements and complete an enrollment form. A ward is financially eligible if the ward's net worth is below the VA's national means threshold, which differs based on geographical location.

Eligible wards along with all veterans are assigned a priority status of VA health-care services, with veterans having a service-connected disability of more than 50 percent receiving the highest status. Health-care benefits include preventive care services, ambulatory (outpatient) diagnostic and treatment services, hospital (inpatient) diagnostic and treatment services, medication, and supplies.

In addition to the above benefits, eligible wards may also be entitled to nursing home care in federal VA facilities, state-run veterans' homes, or community nursing home programs. The nine Texas Veterans' Homes, which are operated by the Texas Veterans Land Board, are located in Houston, Temple, Floresville, Big Spring, Bonham, Amarillo, El Paso, Tyler, and McAllen. These homes were initially financed by the VA and private payment. However, under a mandate of the Texas legislature in 2001, the homes have all been granted certification as Medicaid providers. Texas Veterans' Homes are open to eligible veterans, spouses, unmarried surviving spouses, and "gold star parents" (defined as parents whose children have died while serving in the U.S. Armed Forces).

§ 12.4:2 VA Service-Connected Disability Compensation

Service-connected disability compensation is a monthly cash payment to disabled veteran wards. In addition to the monthly cash payment, eligible wards are entitled to priority health care provided by the VA. To be eligible for service-connected disability compensation, the ward must meet the following requirements:

1. the ward's disability must result from an injury or illness contracted during an active-duty service-connected illness or injury, which can include the aggravation of a preexisting condition that was aggravated during active duty;
2. the ward was discharged from service with other than dishonorable discharge; and
3. the injury must not result from the ward's "willful misconduct or abuse of alcohol or drugs."

See 38 U.S.C. § 1110.

Wards eligible for service-connected disability compensation are entitled to a monthly payment from the VA based on the ward's disability rating. 38 C.F.R. § 4.1. A ward's disability rating is the degree to which the disability would impair the ability of an average citizen to earn a living. Each ward eligible for service-connected disability compensation is assigned a disability rating from 0 percent to 100 percent. (Note: wards who are eligible for benefits and are permanently disabled and unable to work will be assigned a disability rating of 100 percent.) Monthly cash payments to wards are received tax-free and receive protection from wards' creditors.

§ 12.4:3 VA Low-Income Disability Payments

Low-income disability payments, referred to as non-service-connected disability pension, are provided to wards who qualify as disabled veterans and certain wards who qualify as surviving spouses of veterans, on a needs-based determination. In addition to meeting the service requirements of ninety consecutive days' active duty, one of which was during a wartime period, to be eligible for non-service-connected disability pension a ward who is a veteran or the widowed spouse of a veteran must satisfy the following requirements:

1. the applicant must meet net-worth limitations ($155,356 in 2024), comprising countable assets and annualized income, reduced by out-of-pocket medical expenses;
2. the applicant must suffer from a total and permanent disability (i.e., have a 100 percent disability rating); and
3. the disability cannot be the result of the applicant's own willful misconduct.

See 38 U.S.C. §§ 1521, 1522.

Note that the VA considers every veteran who is over age sixty-five to be completely disabled. This is significant because many guardians are unaware that their wards could potentially be eligible for non-service-connected disability benefits in addition to Medicaid long-term-care benefits.

A veteran eligible to receive non-service-connected disability pension will receive a monthly cash payment based on the level of care needed by the veteran and the number of the veteran's dependents. When a veteran without a spouse or dependent child qualifies for Medicaid and enters a nursing home or a domiciliary facility operated by the VA, the amount of the pension is reduced to $90 per month. 38 U.S.C. § 5503. This $90 pension payment is not counted by Medicaid as includable income or used in calculating the copayment amount.

To qualify for pension payments, the net worth of the veteran or widowed spouse must not exceed the applicable limit ($155,356 in 2024). *See* 38 C.F.R. § 3.274(b)(1). This includes all countable resources (not including the primary residence, vehicles necessary for the family's transportation, and personal effects) as well as annual income. Note, however, that income is reduced by unreimbursed medical expenses. 38 C.F.R. § 3.278(a).

For purposes of pension eligibility, income includes recurring income; irregular income; salary payments; income from a business, farm, or professional endeavor; income from property, including rental income; and installment income. In addition to the above sources of income, payments received from the U.S. Department of Labor, Office of Workers' Compensation Programs, Social Security Administration, or Railroad Retirement Board or payments from any workers' compensation board or employers' liability statute or for any damages collected as a result of personal injury or death, shall be counted as income. 38 C.F.R. § 3.271. There are some exclusions from income. *See* 38 C.F.R. § 3.272.

One of the most significant changes to the rules, which became effective October 2018, is the imposition of a penalty for transfers of "covered assets" within thirty-six months before the application for benefits. The penalty is calculated by dividing the amount of the transfer by the monthly benefit rate for a married veteran in need of aid and attendance ($2,727 in 2024) and rounding down to the nearest whole number. 38 C.F.R. § 3.276(e)(1). The result is the total number of months of the penalty period, provided, however, that the penalty will not exceed five years. 38 C.F.R. § 3.276(e). The penalty period begins on the first day of the month following the date of the transfer. 38 C.F.R. § 3.276(e)(2).

§ 12.4:4 VA Special Monthly Payments: Aid and Attendance

In addition to the regular disability compensation and pension payments discussed above, certain classes of veteran wards may also be eligible for special monthly payments. These payments are for regular aid and attendance and for housebound veteran wards.

Veteran wards who are unable to perform activities of daily living (such as bathing, dressing, and toileting) without assistance are entitled to receive additional aid and attendance benefits. *See* 38 U.S.C. § 1114(r). It is not required that a ward be 100 per-cent disabled to receive these benefits, but as a practical matter nearly all wards who do receive such benefits are 100 percent disabled.

Practice Pointer: For Texas Medicaid purposes, VA aid and attendance payments are not included in countable income to the extent they exceed the basic disability payment received by the ward. Moreover, none of the aid and attendance payments ($90 for individuals receiving Medicaid benefits) should be included in determining whether a ward needs a Qualified Income Trust. The rationale behind such a rule is that aid and attendance payments are considered payments by third-party insurance.

§ 12.4:5 VA Special Monthly Payments: Housebound Allowance

Similar to aid and attendance payments, veteran wards who are permanently housebound and who meet the requirements for non-service-connected disability compensation are entitled to an additional payment, called a housebound allowance. The ward must be reasonably certain to remain housebound for the remainder of the ward's life. *See* 38 U.S.C. § 1114(s). As with aid and attendance payments, the payment for housebound allowance is computed based on the dollar amount needed by the ward because of health-care needs and the family situation. 38 U.S.C. § 1114(s).

Essentially, the housebound allowance is an intermediate level of care and payments between the basic pension and a pension enhanced for aid and attendance. Additionally, payments received as a housebound allowance are not included in determining the ward's income for Medicaid eligibility purposes. A veteran cannot receive both the aid and attendance payment and the housebound allowance.

§ 12.4:6 VA Survivors' Benefits

Dependency and Indemnity Compensation (DIC) monthly cash payments are available for certain classes of survivors of deceased veterans who died while on active duty, active duty for training, or inactive duty or as the result of a service-connected disability incurred after September 15, 1940. 38 U.S.C. §§ 1312, 1311.

Surviving spouses, unmarried children under the age of eighteen, disabled children, and children between the ages of eighteen and twenty-three who are enrolled in VA-approved schools are eligible to receive DIC payments. Additionally, low-income parents of deceased veterans may be entitled to receive a DIC payment. 38 C.F.R. § 3.4(c).

In addition to the monthly DIC cash payments, individual recipients of DIC benefits may be entitled to receive aid and attendance payments or housebound allowances. DIC recipients will be entitled to aid and attendance if they are residents of a nursing home or require the regular assistance of another individual with the activities of daily living.

§ 12.4:7 VA Burial Benefits

Veterans and their spouses, dependents, and minor children are eligible to be buried in a VA cemetery. Currently, there are 155 VA cemeteries nationwide. Other burial benefits include the opening and closing of the grave and perpetual care. In addition to burial space in a VA cemetery, veterans and their spouses may be eligible for financial assistance in paying for funeral expenses.

§ 12.5 Planning Options for Accessing Public Benefits in Guardianship Proceeding

§ 12.5:1 Qualified Income Trust/Miller Trust

In Texas, the monthly income cap to determine Medicaid eligibility for an unmarried individual is $2,829 (in 2024) and $5,658 for a married couple (in 2024), both of whom are applying for Medicaid.

The quandary created by an income cap is that a large number of individuals require care who have more than $2,829 per month in income but not enough income to pay privately for their care. A Qualified Income Trust (QIT), also known as a Miller Trust, can be used to address this anomaly. The Miller Trust received its name from a Colorado case, *Miller v. Ibarra*,

which approved a somewhat similar trust. *Miller v. Ibarra*, 746 F. Supp. 19 (D. Colo. 1990). The requirements for a Miller Trust are codified at 42 U.S.C. § 1396p(d)(4)(B).

A QIT resolves income issues for the following Medicaid programs only: institutional Medicaid, the STAR+PLUS Home and Community Based Waiver program, and other home- or community-based waiver services, such as MDCP and CLASS. A QIT is expressly excluded as a method of reducing countable income for Medicare Savings Programs, including QMB and SLMB. 1 Tex. Admin. Code § 358.339(c)(4)(B). Additionally, a Miller Trust cannot be used for other home-care programs, such as Family Care, because these programs are not title XIX (or Medicaid) funded services.

See form 12-1 in this chapter for a sample QIT document.

Qualified Income Trust Requirements: Only the ward's income can be deposited into a QIT. No principal assets or resources may be placed in the QIT, except for a nominal amount of the grantor's resources needed to initiate the trust account.

The QIT must be irrevocable. Additionally, the QIT must contain a provision that the State of Texas will receive all amounts remaining in the QIT upon the death of the Medicaid recipient up to an amount equal to the total medical assistance paid by Medicaid on behalf of the recipient.

Once the trust is established, only the ward's income should be deposited into the trust account in the month of receipt. 1 Tex. Admin. Code § 358.339(c)(2)(B), (c)(2)(C). Any income not deposited into the QIT in the month of receipt is considered countable income, and such income may cause the loss of eligibility for benefits in the months that the income is not placed in the QIT. In the case of a married couple with only one spouse applying for benefits, only the income of the eligible spouse should be placed in the QIT. In the case of a married couple both of whom are applying for Medicaid, the income of both spouses should be placed in the QIT.

The QIT must provide that the trustee shall pay the following expenses from the QIT account:

1. a $60 personal needs allowance to the ward;
2. an amount to the spouse, if any, sufficient to provide for the minimum monthly maintenance needs allowance (MMMNA) ($3,853.50 in 2024);
3. medical expenses not subject to payment by a third party, such as health insurance premiums; and
4. from the funds remaining, the cost of medical assistance provided to the ward.

Practice Pointer: In the QIT declaration, all sources of income that will fund the trust must be listed, but not the amounts of the income. Failure to list the income sources will result in an unsatisfactory QIT and the denial of Medicaid benefits. Additionally, sometimes the ward of the trust cannot execute the QIT agreement, and that individual may not have a valid power of attorney. If the ward cannot sign the trust agreement, the agreement may be executed by an individual with authority over the settlor's funds or by the settlor's spouse.

Termination of QIT: Once the Medicaid recipient no longer needs a QIT, all deposits of income into the QIT should cease. Upon the death of the Medicaid recipient, the Medicaid caseworker determines the amount of vendor payments the Medicaid program has made to the nursing home on the recipient's behalf and sends written notice to the guardian, as the ward's responsible party, requesting that Medicaid be repaid from the residual funds in the trust. Repayment is made to the Health and

Human Services Commission (HHSC) in whole dollar amounts and may be made by cashier's check, money order, or personal check. A receipt is issued for the payment.

§ 12.5:2 Trusts Affecting Medicaid Eligibility

Generally, property held in trust is considered a resource if the guardian could seek authority to revoke the trust or compel distributions from the trust on behalf of the ward. MEPD § F-6100. If the ward (including his guardian or agent) does not have access to the trust, the trust is not considered a countable resource. If the trust is not considered a countable resource, all disbursements from the trust are considered income to the ward, except if such disbursements are made for medical or social services on behalf of the ward. MEPD § F-6100.

All transfers to irrevocable trusts will be considered a disqualifying transfer of asset, unless one of the exception trusts provided for in 42 U.S.C. § 1396p(d)(4)(A)–(C) apply. Exception trusts include a self-settled special needs trust under section (d)(4)(A), a Qualified Income Trust under section (d)(4)(B), or a pooled trust account under section (d)(4)(C). To create a section (d)(4)(A) or (d)(4)(C) trust, the ward must be under age sixty-five. This age restriction also applies to special needs trusts created by a court pursuant to Texas Estates Code chapter 1301 and Texas Property Code chapter 142. An individual of any age may establish a QIT.

Practice Pointer: Note that the placement of a homestead in a revocable living trust converts the homestead to a countable resource under Texas Medicaid rules. MEPD § F-3200. To have the home excluded from countable resources, the home must be removed from the trust and an intent to return home must be reestablished. MEPD § F-3211. To protect the home from Medicaid Estate Recovery at the ward's death, a guardian might seek court authorization to execute a Lady Bird Deed on behalf of the ward, which would allow the property to pass outside of probate, thereby not subjecting it to Medicaid Estate Recovery. Tex. Est. Code § 1162.001.

§ 12.5:3 Spending Down of Assets Through Guardianship Process

The guardian of the estate or an interested party may apply to the court for authority to make a tax-motivated gift or transfer to qualify the ward for government benefits on behalf of the ward. Tex. Est. Code § 1162.001. The court may authorize the guardian to make the tax-motivated gifts or transfers to qualify for government benefits on a periodic basis without further application or court order if the court finds it would be in the best interest of the ward and the ward's estate. The court may modify or set aside such an order later because of a change in the ward's financial condition. Tex. Est. Code § 1162.004. Tax-motivated gifts, contributions, and transfers to qualify for government benefits must comply with all requirements of the Texas Estates Code. Any gift or transfer not authorized by the Code, with or without court approval, is invalid.

For further discussion and forms, see part VII in chapter 8 of this manual.

§ 12.5:4 Medicaid Transfer of Assets Penalty

Medicaid rules impose a transfer of assets penalty on any transfers for less than fair market value made by a Medicaid recipient. Texas imposes a penalty on institutional services and home- and community-based waiver programs. The length of the penalty period is determined by dividing the uncompensated value of the property by the average daily rate for a private pay patient in a nursing facility (currently $242.13 per day). *See* MEPD § I-5000. The penalty period does not begin to run until

the ward enters a nursing home, files a Medicaid application, and would be eligible for Medicaid benefits but for the transfer. Medicaid considers all transfers occurring within five years (sixty months) of the Medicaid application.

Practice Pointer: Per Texas Estates Code section 1162.001, a guardian is allowed to facilitate transfers of the ward's property "as necessary to qualify the ward for government benefits." Before the addition of this provision, a ward was unable to transfer property that would have allowed him to access a government benefit program. Be advised that a court will authorize transfers under this section only if the transfer is allowed by the program. Therefore, a disqualifying transfer may not be allowed under this section.

Exceptions to Medicaid Transfer of Assets Penalty: In certain situations an individual may transfer assets for less than fair market value and not incur a penalty. An individual may transfer his interest in his home, without incurring a penalty, to the following individuals:

1. the ward's spouse;
2. the ward's child who is under age twenty-one or who is any age and meets the disability criteria of the SSA;
3. the ward's sibling who has an equity interest in the home and who resided in the home for at least one year immediately before the ward's institutionalization; or
4. the ward's son or daughter (other than a child under age twenty-one or a disabled child) who resided in the home for at least two years immediately before the institutionalization and who was providing care that delayed institutionalization.

MEPD § I-3100.

An individual may transfer any asset, including the home, to the following individuals without incurring a transfer of assets penalty:

1. the ward's spouse or another individual for the sole benefit of the spouse;
2. a disabled child or a trust for the sole benefit of a disabled child who meets the definition of disability by the SSA; or
3. a trust for the sole benefit of any disabled individual under age sixty-five.

MEPD § I-3200.

A trust created for the "sole benefit" of an individual pursuant to MEPD § I-3200 must meet particular distribution standards, including a provision for the spending of the funds for the beneficiary on a basis that is actuarially sound based on the life expectancy of the individual. MEPD § I-3300.

Practice Pointer: When considering transfers to a disabled child, always inquire about the benefits received by the child. If the child receives a means-tested benefit, such as SSI, any transfer to the child could cause loss of benefits. Therefore, in that situation, the transfer should be in the form of a third-party special needs trust solely for the benefit of the disabled child. If the child receives SSDI, the transfer can be directly to the child without the potential loss of benefits.

§ 12.6 Texas Medicaid Estate Recovery Program (MERP)

In Texas, a Medicaid estate recovery claim may be filed against the estate of a deceased Medicaid recipient for covered Medicaid services if the recipient was age fifty-five or older at the time the services were received and the recipient initially applied for Medicaid on or after March 1, 2005. 1 Tex. Admin. Code § 373.103(a). Services covered under the estate recovery program include nursing home services, ICF-MR services, home- and community-based services (e.g., STAR+PLUS Home and Community Based Waiver, CLASS), certain Medicaid-funded attendant services, and related hospital and prescription drug services. 1 Tex. Admin. Code § 373.103(c). Acceptance of one of these Medicaid-funded covered services provides the basis for a Class 7 probate claim. 1 Tex. Admin. Code § 373.201.

For estate recovery purposes, the "estate" of a deceased Medicaid recipient includes the real and personal property of the decedent included under the definition of the probate estate found in section 3(*l*) of the Texas Probate Code (now Tex. Est. Code § 22.012). 1 Tex. Admin. Code § 373.105. This is a key definition, because it precludes recovery against assets passing outside of the probate estate of the decedent such as remainder interests and interests in survivorship accounts (i.e., POD or JTROS accounts).

§ 12.6:1 MERP Exemptions

MERP should not seek to make a claim against a deceased Medicaid recipient's estate if one of the statutory exemptions exists. A statutory exemption exists if one of the following individuals survived the Medicaid recipient:

1. a surviving spouse;
2. a child under age twenty-one;
3. a surviving child of any age who is blind or disabled as defined by 42 U.S.C. § 1382c; or
4. an unmarried adult child residing continuously in the decedent's homestead for at least one year before the time of the Medicaid recipient's death.

1 Tex. Admin. Code § 373.207(a).

If one of the above statutory exemptions exist, Medicaid will permanently withdraw any potential claim against the deceased Medicaid recipient's estate. There are also exemptions for certain assets of American Indians or Alaska Natives or for government reparation payments to individuals in special populations. 1 Tex. Admin. Code § 373.207(b), (d).

§ 12.6:2 MERP Undue Hardship Waivers

MERP will not recover from an estate if recovery would cause an undue hardship. An undue hardship does not exist solely because recovery would prevent heirs or legatees from receiving an anticipated inheritance or because of circumstances giving rise to a hardship created by, or as the result of, estate planning methods under which assets were sheltered or divested contrary to requirements of Medicaid law in order to avoid estate recovery. 1 Tex. Admin. Code § 373.209(b).

To obtain an undue hardship waiver from estate recovery, one of the following grounds must be established by the ward seeking the waiver:

1. the estate has been operated as a family business, farm, or ranch for at least twelve months before the decedent's death; is the primary income-producing asset of the heirs and legatees; and the estate produces 50 percent or more of the income of the heirs or legatees, and recovery would cause the heirs or legatees to lose their primary income source;

2. recovery would cause heirs or legatees to become eligible for public medical assistance;

3. waiver recovery would allow one or more survivors to stop receiving public benefits;

4. the decedent received Medicaid as a result of having been a victim of a crime; or

5. other compelling reasons.

1 Tex. Admin. Code § 373.209(c).

§ 12.6:3 Deductions from MERP Claim

There are allowable deductions from the estate recovery claim. These deductions are—

1. reasonable and necessary expenses incurred in maintaining the decedent's home (i.e., property taxes, utility bills, homeowner's insurance, home repairs, and home maintenance such as lawn care); and

2. expenses incurred in paying the decedent's cost of care (including attendant care) that delayed nursing home entry.

1 Tex. Admin. Code § 373.213.

If a request for a deduction from the claim is made, the request must be supported with documentation, such as receipts, as evidence of the payment of the expenses.

Requests for allowable deductions from the estate recovery claim must be submitted to MERP within sixty days of the receipt of the notice of intent to file a claim. If the request is allowed, the expenses will cause a dollar-for-dollar reduction in the amount of the MERP claim.

§ 12.6:4 When MERP Not Cost-Effective

In addition to the statutory exemptions from estate recovery, MERP will not pursue an estate recovery claim if it is not cost-effective. A claim is considered not cost-effective if—

1. the value of the recoverable estate is $10,000 or less;

2. the recoverable Medicaid costs are $3,000 or less; or

3. the costs associated with selling estate property equal or exceed the value of the property.

1 Tex. Admin. Code § 373.215.

Form 12-1

Trust Declaration of [name of settlor]

This declaration of trust is made by [**name of settlor**], Settlor, who is also a beneficiary of this trust.

1. *Name of Trust and Trust Purpose.* This trust shall be known as the [**name of settlor**] Income Trust. Settlor requires continuing medical and nursing supervision and is dependent on others for [his/her] personal care. The overriding purpose of this trust is to obtain the necessary care from whatever sources may be available. To that end this trust is designed to assist Settlor in meeting the requirements of eligibility for benefits under the Medical Assistance Program in the state of Texas, under the provisions of 42 U.S.C. § 1396p(d)(4)(B), as amended by the Omnibus Budget Reconciliation Act of 1993 (effective August 10, 1993), and all other applicable laws, regulations, and administrative procedures.

2. *Settlor.* Settlor [, settlor's spouse if applicable,] and the Texas Department of Human Services shall be the sole beneficiaries of the trust. Settlor's Social Security number is [**number**]. Settlor resides at [**address, city, county**] County, Texas.

3. *Appointment of Trustee.* Settlor appoints [**name of trustee**], Trustee, as the trustee of this trust. Trustee shall serve without bond or supervision of any court.

4. *Trust Estate*

4.1. *Income Trust.* It is Settlor's intent to transfer all or part of [his/her] income into the trust, to be held and managed as the trust estate. Only Settlor's "income," as defined by the rules and laws governing the Medical Assistance Program in Texas, may be transferred to the trust, as listed on Exhibit A, attached to this trust.

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4.2. *When Income Transferred*. Settlor's income that will be transferred to the trust shall be transferred in the same month in which it is received by Settlor, unless a longer time is authorized by regulation or written directive by the agency administering the Medical Assistance Program. Income may be transferred directly from the income source to the trust.

4.3. *All Income from Same Source*. If income from any source is transferred to the trust in a given month, all income from that source shall be transferred to the trust in the same month. For example, Trustee may not transfer only a part of Settlor's Social Security income to the trust in any given month; either all or none must be transferred in that month.

5. *Disposition of Principal and Income*

5.1. *Distributions for Benefit of Settlor.* To the extent required by the Medical Assistance Program, income placed in the trust must be paid out of the trust for medical care provided to Settlor, including nursing facility or ICF/MR or home/community-based waiver services provided to Settlor. Payments must be made by Trustee not later than the last day of the month following the month of receipt of the income or within any other time period that may be required by the Medicaid program. Subject to the requirements of this trust, Trustee may make other distributions of principal and/or interest for Settlor's health, education, maintenance, and support, as Trustee, in Trustee's discretion, deems advisable. Other distributions may include payment of the administrative fees of the trust, income tax owed by the trust, attorney's fees the trust is obligated to pay (in proportion to whatever part of the trust benefits Settlor), food or clothing for Settlor, or mortgage payments for Settlor's home.

5.2. *Maintenance of Qualification for Public Benefits*. The overriding purpose of this trust is to assure eligibility of Settlor for Medical Assistance Program benefits. Therefore, Trustee shall make distributions from the trust in amounts and for the purposes necessary to maintain such eligibility, and only in amounts and for purposes that do not defeat eligibility, notwithstanding any other provision of this trust. Among the requirements of the Medical

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Assistance Program at the time of establishment of this trust, which Trustee shall meet as long as and to the extent required, is the requirement that Trustee make payments from the trust in the following priority:

a. A monthly personal needs allowance for the needs of Settlor; then

b. If Settlor is married, a sum to Settlor's spouse sufficient to provide the minimum monthly maintenance needs allowance for the spouse; then

c. From the funds remaining, if any, the cost of medical assistance provided Settlor.

5.3. *Payments for Settlor's Spouse*. Subject to sections 5.1 and 5.2 above, all trust funds that can be paid to Settlor's spouse, if any, without reduction or loss of Settlor's eligibility for public benefits, shall be used by Trustee for the benefit of Settlor's spouse. Trustee may exercise discretion in determining the purposes for which such payments are made but shall have no discretion to make payments to or for the benefit of any person or entity other than Settlor's spouse. The trust cannot be terminated and distributed to any other individuals or entities for any other purpose.

6. *Termination of Trust*

6.1. *Irrevocability*. This trust is irrevocable.

6.2. *Termination*. This trust shall terminate upon Settlor's death. Upon termination, the remaining trust property, if any, shall be distributed as described in section 6.3 below.

6.3. *Distribution upon Termination*. At Settlor's death, Trustee shall distribute to the Texas Department of Human Services or its successor agency as reimbursement any remaining trust property up to an amount equal to the total medical assistance paid on behalf of Settlor by the Texas Medical Assistance Program. All remaining trust property shall be

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distributed to the named beneficiaries of the last will and testament of Settlor in the amounts and/or proportions therein, or in the event Settlor dies intestate, to [his/her] heirs at law as provided by Texas law at the time of [his/her] death.

7. *Trust Administrative and Protective Provisions*

7.1. *Jurisdiction*. This trust shall be administered expeditiously and consistently with its terms, and without any judicial intervention, order, approval, or other action by a court, subject only to the jurisdiction of a court that is invoked by Trustee or other interested parties or as otherwise provided by law.

7.2. *Reports*. Periodic reports shall not be made unless required by the regulations of the Texas Department of Human Services. The trust records shall be open at all reasonable times to inspection by Settlor, the Texas Department of Human Services, and their properly appointed representatives.

8. *Powers of Trustee.* In addition to all of those powers specifically granted by this trust, Trustee may exercise those powers included in title 9 of the Texas Property Code (the Texas Trust Code), together with any amendments to the Code after the date of this trust.

9. *Trustee Succession and Administrative Provisions*

9.1. *Resignation of Trustee and Appointment of Successor Trustee*. Any trustee may resign by giving thirty (30) days' written notice to Settlor or to the guardian, conservator, or other legal representative of Settlor. The trustee's resignation shall be effective thirty days from the date notice is given. In the event the trustee resigns or dies while holding office, [**name of successor trustee**] shall serve as successor Trustee. Any trustee may, while serving as trustee, appoint one or more successor trustees and may alter the succession of trustees indicated in this trust. If any trustee ceases to act as trustee at a time when no successor trustee who is able and willing to serve has been appointed either by this trust or by the trustee, any

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interested person may apply to be appointed successor trustee as set forth in section 113.083 of the Texas Property Code.

9.2. *Representative of Settlor*. The guardian of Settlor or, if none, the agent of Settlor acting under a general power of attorney may act for Settlor for all purposes under the administrative provisions of this trust.

9.3. *Rights of Successors*. Every successor trustee shall have all the title, rights, powers, privileges, and duties of the original trustee, without any conveyance or transfer. No successor trustee shall be responsible for any act or omission to act by any previous trustee.

9.4. *No Bond*. No trustee shall be required to give any bond in any jurisdiction, and if, notwithstanding this direction, any bond is required by any law, statute, or rule of court, no sureties shall be required.

10. *Definitions*

10.1. *Reference to Codes*. Except as otherwise provided, definitions of terms in this trust shall be in accordance with the Texas Estates Code and Texas Property Code, as amended.

10.2. *Successor Agencies and Programs*. All references in this trust to the Texas Department of Human Services and the Medical Assistance Program shall include any successor public agency or program.

11. *Construction*

11.1. *Conformity with Statutes*. In case of ambiguity or conflict, this trust shall be construed to comply with the provisions of the Texas Trust Code, as amended.

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11.2. *Applicable Law*. The validity of this trust shall be determined by reference to the laws of the state of Texas. Questions of construction and administration of this trust shall be determined by reference to the laws of the state of Texas.

11.3. *Headings of Articles and Sections*. The headings of articles and sections are included solely for convenience of reference and shall have no significance in the interpretation of this agreement.

11.4. *Construction of Number and Gender*. Unless the context requires otherwise, words denoting the singular may be construed as denoting the plural, words denoting the plural may be construed as denoting the singular, and words of one gender may be construed as denoting another gender, as appropriate.

SIGNED by [**name of settlor**], Settlor, and [**name of trustee**], Trustee, who accepts the office of Trustee, on [**date**].

_____

[**Name of settlor**]
Settlor

This instrument was acknowledged before me on [**date**] by [**name of settlor**] in the above-stated capacity.

_____

Notary Public, State of Texas

_____

[**Name of trustee**]
Trustee

This instrument was acknowledged before me on [**date**] by [**name of trustee**] in the above-stated capacity.

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_____

Notary Public, State of Texas

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Exhibit A

Income for [name of settlor]

Income Source

[**list sources of income**]

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Chapter 13

Foreign Guardianships

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Chapter 13

Foreign Guardianships

§ 13.1 Introduction

The increasing ease of mobility in today's current population may impact existing guardianships, especially when a person under guardianship ("ward") travels across state lines. Although Texas has not yet adopted the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA), interstate guardianships are addressed in Texas Estates Code chapter 1253. See section 13.2:4 below. Because Texas practitioners are likely to face interstate guardianship issues involving foreign jurisdictions that have adopted the UAGPPJA, this chapter references provisions of the UAGPPJA as well as the Estates Code. It also reviews foreign guardianship issues under the topics of original proceedings (see section 13.2), interstate transfers (section 13.3), actions by foreign guardians (section 13.4), and actions regarding nonresident wards (section 13.5).

§ 13.2 Original Proceedings

Section 1023.001 of the Texas Estates Code, titled "Venue for Appointment of Guardian," provides that "a proceeding for the appointment of a guardian for the person or estate, or both, of an incapacitated person shall be brought in the county in which the proposed ward resides *or is located* on the date the application is filed or in the county in which the principal estate of the proposed ward is located." Tex. Est. Code § 1023.001(a) (emphasis added). Section 1023.001 is considered a "presence jurisdiction" statute, meaning that a Texas probate court can exercise jurisdiction over a person or his estate if the person is merely "present" in that county on the date the guardianship application is filed. This "presence jurisdiction" statute can often result in difficult interstate guardianship proceedings in which Texas courts are able to exercise jurisdiction over individuals located in Texas although they are residents of another state. The use of "venue" in this statute appears to presume that the jurisdictional conflict would be between counties within Texas rather than between states.

Texas courts have heard two notable multijurisdictional guardianship cases that have garnered national attention and that demonstrate the challenges that courts face due to lack of uniformity in state guardianship statutes. *See In re Glasser*, 2011 WL 2898956 (N.J. Super. Ct. App. Div. July 21, 2011); *In re Guardianship of Glasser*, 297 S.W.3d 369 (Tex. App.—San Antonio 2009, no pet.); *In re Guardianship of Parker*, 189 P.3d 730 (Okla. Civ. App. 2008, no pet.); *In re Guardianship of Parker*, 275 S.W.3d 623 (Tex. App.—Amarillo 2008, no pet.); *see also In re Guardianship of Parker*, 329 S.W.3d 97 (Tex. App.—Amarillo 2010, no pet.). These cases also highlight the necessity of cooperation between the courts of multiple states with which the alleged incapacitated person has contact. The *Glasser* and *Parker* cases are similar in that they involve temporary guardianships granted in Texas due to its presence jurisdiction statute when both alleged incapacitated persons were clearly residents of other states. The court in *Glasser* was presented with the problem of how to protect Mrs. Glasser, who was in Texas, when no guardianship proceeding was pending in her home state of New Jersey. In *Parker*, however, the Texas trial court refused to recognize an Oklahoma court's guardianship order, holding that it was invalid because the guardianship application in Oklahoma was brought to defeat the Texas court's initial jurisdiction. The *Glasser* case was resolved by the Texas court's deferring to the New Jersey court (subsequent to the filing of a guardianship proceeding there) as the true residence of the proposed ward. The *Parker* case, however, resulted in the appointment of different guardians of the person and estate by two different states. See section 13.2:3 below for further discussion of these cases.

§ 13.2:1 Guardianship Proceedings Filed in Texas and in Foreign Jurisdiction

The Texas legislature has attempted to tackle the *Glasser* scenario by taking initial steps to address multijurisdictional conflicts in original proceedings. *See* Tex. Est. Code §§ 1253.101–.103.

Under section 1253.101, a court in which a guardianship proceeding is filed and venue of the proceeding is proper may delay further action in the proceeding in that court if—

1. another guardianship proceeding involving a matter at issue in the proceeding filed in the court is subsequently filed in a court in a foreign jurisdiction; and
2. venue of the proceeding in the foreign court is proper.

Tex. Est. Code § 1253.101.

A recent case involving guardianship proceedings filed in Texas and Florida for the same individual shows the complexities that may arise in multijurisdictional conflicts. *See In re Fontaine*, No. 12-17-00400-CV, 2018 WL 720802 (Tex. App.—Tyler Feb. 6, 2018, no pet.). In March 2016 the daughter, Margret, filed a guardianship application for her father in Sabine County, Texas. The father contested the guardianship and revealed a declaration of guardian disqualifying Margret and naming his stepson, Pippin, who lived in Florida, as the desired guardian. In June 2016, the Texas court determined that the father was not incapacitated, but the court did not sign an order until two months later. In the two-month period prior to the court's order, the father moved to Florida to live with Pippin. In July 2017, the daughter filed for temporary guardianship and for a temporary restraining order (TRO) in the Texas court. Not realizing that the court had actually dismissed the guardianship earlier, the Texas court granted the TRO and ordered that the father be returned to Texas. Pippin then filed for plenary guardianship in Florida in August 2017. Margret also went to Florida and brought her father back to Texas. However, in September 2017 at the temporary injunction hearing in Texas, noting that the case had been dismissed in August 2016, the court denied Margret's temporary injunction. Margret then filed for guardianship in a new cause number in Texas. The father entered a special appearance claiming to be a Florida resident.

The Texas court granted the special appearance and dismissed Margret's guardianship application. Margret applied to the court of appeals for a writ of mandamus in December 2017. In February 2018, the Florida court appointed Pippin as plenary guardian for the father. The Tyler court of appeals then denied the writ of mandamus, stating that an interlocutory appeal is the remedy for an order that grants a special appearance. The appellate court, without citing either the Texas Estates Code or the UAGPPJA, also stated that Margret could develop the merits of her case in a Florida court with an eventual outcome not predetermined by the Texas district court's ruling.

§ 13.2:2 Determination of Most Appropriate Forum for Certain Guardianship Proceedings

Under section 1253.102 of the Texas Estates Code, a court that delays further action in a guardianship proceeding under section 1253.101 shall determine whether venue of the proceeding is more suitable in that court or in the foreign court. In making that determination, the court may consider—

1. the interests of justice;
2. the best interests of the ward or proposed ward;
3. the convenience of the parties; and

4. the preference of the ward or proposed ward, if the ward or proposed ward is twelve years of age or older.

Tex. Est. Code § 1253.102.

Section 1253.103 adds that a court that delays further action may issue any order it considers necessary to protect the proposed ward or the proposed ward's estate. Tex. Est. Code § 1253.103.

According to section 1253.102(c), the court must resume the guardianship proceeding if the court determines that venue is more suitable in the Texas court. If the court determines that venue is more suitable in the foreign court, the court must, with the consent of the foreign court, transfer the proceeding to the foreign court. Tex. Est. Code § 1253.102(c).

§ 13.2:3 Jurisdiction Due to Unjustifiable Conduct

The Texas legislature has provided the courts the ability to decline jurisdiction of a guardianship matter if the court believes it acquired personal jurisdiction over the proposed ward due to the unjustifiable conduct on the part of one or more of the parties in the guardianship proceeding. *See* Tex. Est. Code §§ 1253.151, 1253.152. The legislature has also determined it is necessary to empower the courts in these situations to assess costs and expenses as a sanction on parties who acquired the court's jurisdiction by unjustifiable conduct. In *In re Guardianship of Parker*, 189 P.3d 730 (Okla. Civ. App. 2008, no pet.); *In re Guardianship of Parker*, 275 S.W.3d 623 (Tex. App.—Amarillo 2008, no pet.); and *In re Glasser*, 2011 WL 2898956 (N.J. Super. Ct. App. Div. July 21, 2011); *In re Guardianship of Glasser*, 297 S.W.3d 369 (Tex. App.—San Antonio 2009, no pet.), one party was responsible for transporting the alleged incapacitated person from the foreign jurisdiction to Texas without court permission and without notifying the other parties in the matter. One party's sudden move of the alleged incapacitated person to Texas may be motivated by the tactical advantage of effectuating personal service on and personal jurisdiction over the person (and, in the case of *Parker*, the estate as well, although there was no estate in Texas).

Section 1253.151 of the Texas Estates Code provides that, if at any time a court determines that it acquired jurisdiction of a proceeding for the appointment of a guardian of the person, estate, or both of a ward or proposed ward because of unjustifiable conduct, the court may—

1. decline to exercise jurisdiction;
2. exercise jurisdiction for the limited purpose of fashioning an appropriate remedy to ensure the health, safety, and welfare of the ward or proposed ward or the protection of the ward's or proposed ward's property or prevent a repetition of the unjustifiable conduct, including staying the proceeding until a petition for the appointment of a guardian or issuance of a protective order is filed in a court of another state having jurisdiction; or
3. continue to exercise jurisdiction after considering the extent to which the ward or proposed ward and all persons required to be notified of the proceedings have acquiesced in the exercise of the court's jurisdiction, whether the court of this state is a more appropriate forum than the court of any other state after considering the factors described by section 1253.102(b) of the Estates Code and whether the court of any other state would have jurisdiction under the factual circumstances of the matter.

Tex. Est. Code § 1253.151.

Section 1253.152 of the Estates Code provides that, if a court determines that it acquired jurisdiction of a proceeding for the appointment of a guardian of the person, estate, or both of a ward or proposed ward because a party seeking to invoke the court's jurisdiction engaged in unjustifiable conduct, the court may assess against that party necessary and reasonable

expenses, including attorney's fees, investigative fees, court costs, communication expenses, witness fees and expenses, and travel expenses. The court may not assess fees, costs, or expenses of any kind against the state of Texas, an instrumentality of the state of Texas, or a governmental subdivision, agency, or instrumentality unless authorized by other law. Tex. Est. Code § 1253.152.

§ 13.2:4 Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA)

Interstate guardianship practice has been dramatically affected since the promulgation of the UAGPPJA in 2007. The UAGPPJA, because of the support of numerous national senior protection organizations, has now been adopted in forty-six states, Puerto Rico, the Virgin Islands, and the District of Columbia. The complete Act and a map indicating the jurisdictions that have adopted the UAGPPJA and showing the four states, including Texas, that have not adopted the Act are available at the Uniform Law Commission website, **www.uniformlaws.org**. The Texas legislature has adopted one provision of the Act as Texas Estates Code sections 1253.151–.152, which were taken from section 207 of the UAGPPJA, but Texas is one of only four states that have not fully adopted the UAGPPJA. The other three states are Florida, Kansas, and Michigan. In 2017, the Virgin Islands was the final U.S. territory to adopt the Act. In 2018, Wisconsin became the forty-sixth state to pass the Act. Because the UAGPPJA has been adopted by a significant majority of states in the United States, familiarity with the provisions of the UAGPPJA is necessary in contemplating interstate guardianship issues involving states that have adopted the Act. The American Bar Association Commission on Law and Aging Adult Guardianship Statutory Table of Authorities provides a chart of state statutes referencing state enactments of the UAGPPJA. *See* American Bar Association Commission on Law & Aging, Adult Guardianship Statutory Table of Authorities (Jan. 28, 2021), **www.americanbar.org/content/dam/aba/administrative/law_aging/2019-adult-guardianship-statutory-table-of-authorities.pdf**. The Uniform Law Commission provides helpful analyses on the benefits of adoption of this Act and the status of adoption of the Act. *See* Uniform Law Commission, Adult Guardianship and Protective Proceedings Jurisdiction Act (Mar. 21, 2016), **www.uniformlaws.org/committees/community-home?CommunityKey=0f25ccb8-43ce-4df5-a856-e6585698197a**.

The UAGPPJA creates a three-level priority for determining which state has jurisdiction to appoint a guardian or issue a protective order: (1) the home state, (2) a significant-connection state, and (3) another state. Comments to section 203 of the Act state that "the principal objective of this section is to eliminate the possibility of dual appointments or orders" except in emergency situations.

Section 201(a)(2) of the UAGPPJA focuses on the "home state," which is defined as the state in which the respondent (alleged incapacitated person) was physically present for at least six months immediately before the filing of a petition for protective order or for the appointment of a guardian. *See* UAGPPJA § 201(a)(2). Section 203 provides that a court has priority jurisdiction to appoint a guardian or issue a protective order if the state in which the application is filed is the respondent's home state. *See* UAGPPJA § 203(1).

The second level of priority involves a "significant-connection state," defined by section 201(a)(3) to mean "a state, other than the home state, with which a respondent has a significant connection other than mere physical presence and in which substantial evidence concerning the respondent is available." To determine whether a "significant connection" exists, the court must consider the—

1. location of the respondent's family;
2. length of time the respondent was present in state;

3. location of the respondent's property; and
4. extent of the respondent's ties to the state.

UAGPPJA § 201(a)(3), (b).

Under section 203 of the Act, a significant-connection state has jurisdiction to appoint a guardian or issue a protective order if, on the date the petition is filed—

1. the respondent does not have a home state;
2. the court of the respondent's home state has declined to exercise jurisdiction, having decided that the state in which the petition is filed is a more appropriate forum; or
3. a petition for appointment or order is not pending in the respondent's home state or another significant-connection state, and, before the court makes an appointment or issues an order, a petition is not filed in the respondent's home state, an objection is not filed by a person required to be notified of the proceeding by section 208 of the Act, and the court determines that it is an appropriate forum under the nine factors set forth in section 206 of the Act.

UAGPPJA § 203(2).

The third level of priority is any "other state," provided that the home state and all significant-connection states have declined to exercise jurisdiction because the other state is the more appropriate forum and the jurisdiction in the other state is consistent with the constitutions of the other state and the United States. UAGPPJA § 203(3).

Under section 206 of the Act, a court having jurisdiction under section 203 may decline to exercise jurisdiction if it determines at any time that a court of another state is a more appropriate forum. The court may either dismiss or stay the proceeding and may impose any proper conditions including that a petition for the appointment of a guardian or issuance of protective order be filed promptly in another state.

The Act references nine factors for the court to consider when determining whether a particular court is an appropriate forum. They are—

1. the respondent's expressed preference;
2. whether abuse, neglect, or exploitation of the respondent has occurred or is likely to occur and which state could best protect the respondent from such;
3. the length of time the respondent was present in or a legal resident of a state;
4. the distance of the respondent from the court in each state;
5. the financial circumstances of the respondent's estate;
6. the nature and location of evidence;
7. the ability of the court in each state to decide the issue expeditiously and the procedures necessary to present evidence;
8. the familiarity of the court of each state with the facts and issues in the proceeding; and
9. the court's ability to monitor the conduct of the guardian or conservator.

UAGPPJA § 206.

The UAGPPJA has additional provisions for jurisdiction in emergency or special situations. *See* UAGPPJA § 204.

An increasing number of reported cases now apply the UAGPPJA. A few recently reported opinions are helpful in understanding the impact of the Act.

A New York court recently addressed the appropriateness of the State of New York as the proper guardianship forum in *In re Appointment of Guardian of J.D.S.*, 70 Misc.3d 556, 137 N.Y.S.3d 621 (Sur.Ct. 2020), in which New York was determined to be the home state but the court declined to exercise jurisdiction because it determined that North Carolina was the more appropriate forum.

J.D.S. was a thirty-five-year-old intellectually disabled man. His parents were divorced. For the vast majority of his life he had lived with his mother, much of the time in North Carolina. From June 2016 until mid-July 2018, he resided in New York with his father. In mid-July 2018, J.D.S. returned to North Carolina to live with his mother and remained there.

Thereafter, the father and mother cross-petitioned for guardianship in North Carolina and, in addition, within six months of the time J.D.S. left for North Carolina, the father filed a guardianship petition in New York. North Carolina subsequently determined that it was a "significant-connection state" within the meaning of the North Carolina version of the UAGPPJA and notified the New York court of that determination. Since J.D.S. had resided in New York for more than six of the previous twelve months, New York was his home state. The New York court therefore had to determine whether to retain jurisdiction of the case or defer to North Carolina as the more appropriate forum.

The New York court applied the New York version of the UAGPPJA and reviewed the nine factors a court must consider to determine whether that state was an appropriate forum. It noted that it found no case law analyzing and weighing the statutory factors but that the statute is clear that each factor must be considered. *J.D.S.*, 70 Misc.3d 556, 558. Based on the nine statutory factors, the court determined that North Carolina was the most appropriate forum.

Similarly, the application of the UAGPPJA in a case involving a ward with connections to more than one state, each of which has adopted the Act, is illustrated in *Schwaber & Kafer P.C. v. Alpizar*, 2021 WL 408231, 2021 N.Y. Slip Op. 30327 (N.Y. Sup. Ct. 2021). In this proceeding, a North Carolina guardian registered her guardianship order in New York under the UAGPPJA. The incapacitated person owned income-producing real property in New York. Under New York law, a guardian cannot be sued without the permission of the guardianship court. The plaintiff's attorneys moved for permission to sue the guardian and the incapacitated person in New York for fees owed. The court held that, pursuant to the transfer and jurisdiction provisions of the UAGPPJA, the motion for permission to litigate had to be made in North Carolina because North Carolina was the more appropriate forum and the guardianship was under the supervision of that court.

Another recent interstate conflict in a contested guardianship proceeding involving Georgia and Florida that was resolved with the application of UAGPPJA demonstrates the beneficial impact of the Act. In *In re Estate of Kevin Lee Hanson*, 848 S.E.2d 204 (GA Ct. App. 2021, cert. den.), a Georgia appeals court determined that a Georgia probate court erred in concluding that it had jurisdiction to appoint the parents as the son's permanent guardian and conservator where the son was clearly a Florida resident and where Florida did not decline to exercise jurisdiction.

In a case of first impression, the Georgia court applied the Georgia version of the UAGPPJA while Florida (which is one of only four states that have not adopted the UAGPPJA) had no similar law and determined that Florida was the "home state" of

the proposed ward. Kevin lived in Hillsborough County, Florida. Kevin's parents also lived in Florida. Kevin, at the age of thirty-eight, received a traumatic brain injury when a bridge collapsed in Miami, in 2018. Kevin was treated first in Florida and was then transported to Atlanta for further treatment. While Kevin was still in Georgia, the Hansons filed a petition in the Fulton County, Georgia, probate court seeking to be appointed as Kevin's emergency coguardians and coconservators. The trial court granted the petition to last for sixty days or until the effective date of the appointment of a permanent guardian/conservator. The Hansons did not notify Babbitt (the mother of Kevin's children) or the children, all of whom lived in Florida, of the emergency petition.

The Hansons filed a petition in Georgia seeking to be appointed permanent coguardians and coconservators. Babbitt and the children intervened in the proceeding and asked to have the emergency orders set aside, but the court denied that petition. Before the expiration of the first emergency appointment, the Hansons filed a second emergency petition. Babbitt and the children moved to dismiss the petition for permanent orders, arguing that under the Georgia UAGPPJA, jurisdiction belonged in Florida. The probate court denied Babbitt's motion. Kevin was subsequently transported back to Florida for medical treatment in Sarasota. Even so, the Georgia probate court granted the Hansons' petition to be appointed permanent guardians and conservators. Babbitt appealed, and the court of appeals remanded it to the Georgia court to consider whether Georgia was a "significant connection state" that would give the Georgia court jurisdiction. On remand, the Georgia trial court again found that it had jurisdiction and issued a new order naming the Hansons as permanent coguardians and coconservators of Kevin's property, including property located in Florida. Babbitt appealed again, claiming that the Georgia court erred in finding that it had jurisdiction under the UAGPPJA, which had been adopted in Georgia but not in Florida.

The appellate court reversed the permanent guardian/conservator appointment of the Hansons and remanded the case to the trial court with instructions that the Georgia court lacked jurisdiction to appoint permanent guardians/conservators in the matter since Kevin's home state was Florida and Florida had not declined to exercise jurisdiction. The appellate court stated that the probate court on remand held that it had jurisdiction because Georgia was a "significant-connection state" but that the statute requires that Kevin also not have a "home state" or that the court of Kevin's "home state" declined to exercise jurisdiction because Georgia was a more appropriate forum. The record showed that Babbitt filed a petition in Hillsborough County, Florida, seeking guardianship of Kevin in late August 2018 and filed a proceeding in Sarasota County after Kevin returned to Florida in October 2018. Thus, neither case could have been dismissed before the Hansons filed their petition in Georgia seeking permanent orders. Babbitt also contended that the Georgia probate court erred in appointing a guardian for a term that exceeds ninety days and ordering a conservatorship regarding property not located in Georgia. The appellate court agreed with Babbitt. Under the UAGPPJA, the Georgia court had special limited jurisdiction to appoint a guardian in an emergency for a term not exceeding ninety days for a respondent who is physically present in Georgia and to appoint a conservator regarding property located only in Georgia. The probate court erred by exceeding these limitations.

This kind of interstate conflict between one state that has adopted the UAGPPJA and another that has not is a scenario that could very likely occur in Texas.

An Alabama federal court case highlighted the importance of states adopting the UAGPPJA in order to prevent the implementation of guardianships in multiple states. *See Morris v. Trust Company of Virginia*, Nos. 2:12-CV-1020-WKW, 2:13-CV-930-WKW, 2015 WL 1475487 (US Dist. Ct. Ala. N. Div. Mar. 31, 2015). In *Morris*, the children of Amy Morris applied for guardianship in Virginia, alleging that their mother suffered from Alzheimer's dementia with psychosis. While the Virginia guardianship was pending, Thomas Morris discharged his mother from a Virginia hospital and moved her to a nursing facility in Alabama. The mother then executed a deed of gift transferring her Virginia house and stock worth $1.6 million to her children. The children listed the Virginia house for sale, claiming that their mother did not intend to return to Virginia. The children

filed a competing action for guardianship in Alabama. Because Alabama had adopted the UAGPPJA, the Alabama court stayed its proceedings pending the outcome of the guardianship and conservatorship proceedings in Virginia, which was still considered the home state of Amy Morris. The children attempted to nonsuit the Virginia guardianship proceedings, but the court-appointed attorney for Amy objected, claiming her interests differed from those of her children and that she did not have the capacity to change her domicile to Alabama. The Virginia court concluded that Amy was incapacitated before executing the deed of gift to her children, appointed the Trust Company of Virginia as Amy's conservator, and entered a judgment exceeding $1 million against the children.

Cases involving the application of the UAGPPJAA illustrate its impact on Texas residents and/or Texas litigants.

An Illinois state appellate court ruled that an Illinois resident, who was moved by her son from her home state of Illinois to the son's home in Texas subsequent to her daughter's filing of a guardianship proceeding in Illinois (which has adopted the UAGPPJA), was subject to the jurisdiction of the Illinois courts and that orders issued in a later-filed guardianship proceeding in Texas could not deprive the Illinois court of jurisdiction over the person and estate of the Illinois resident. The Illinois court found the Texas statutory scheme to be essentially inferior in that it lacked the elements necessary to defeat the specific provisions of the Uniform Act, stating:

> Our review of pertinent Texas law reveals that it has not adopted the Uniform Guardianship Act and that its laws governing jurisdiction over guardianship proceedings is in no way similar to section 203 of the Uniform Guardianship Act. Pursuant to section 1023.001 of [the Texas Estates Code], "a proceeding for the appointment of a guardian for the person or estate, or both, of an incapacitated person shall be brought in the county in which the proposed ward resides or is located on the date the application is filed or in the county in which the principal estate of the proposed ward is located." There is nothing in the Texas law that connects jurisdiction over a proposed ward to location within the state for a specified period of time. We find that, at a minimum, some type of time requirement regarding a potential ward's presence within a state and/or connection to a state is required for a state's law to be "similar to Section 203 [of the Guardianship Jurisdiction Act]" such that section 209(1) of the Guardianship Jurisdiction Act would apply to divest the circuit court of Illinois of jurisdiction. We decline to address specifically what residency and/or connection requirements a state that has not adopted the Guardianship Jurisdiction Act would need to have in place in order to be considered "similar" to section 203 of the Guardianship Jurisdiction Act for purposes of section 209(1) of the Guardianship Jurisdiction Act. We hold only that the Texas law, which contains no such requirements whatsoever, cannot be so considered.

See In re Estate of Kusmanoff, 2017 IL App (5th) 160129, ¶ 75 (citations omitted). This case seems to highlight the possibility that Texas, with its presence jurisdiction, may be used as a safe haven by those who are trying to obtain a guardianship in a state that is not the true "home state" of an incapacitated adult and has a statutory scheme that does not recognize a person's "home state," as would forty-six other jurisdictions in the United States.

Texas courts may apply the same concepts and principles found in the UAGPPJA when adjudicating interstate guardianship jurisdiction issues without specifically referencing the Act.

In *Lawrence v. Page*, No. 01-16-00133-CV, 2016 WL 5947490 (Tex. App.—Houston [1st Dist.] Oct. 13, 2016, no pet.), an incapacitated and physically compromised elderly mother, who had lived in Houston for over fifty years, was removed from Texas for a "vacation" in Georgia by a daughter to whom the mother had given $450,000 over a seven-year period. The "vacationing" daughter promised her sister, who resided in College Station, that the daughter would return their mother to Houston. However, the daughter, now in Georgia, had emptied the elderly mother's home and left a note to her sister that she and their

mother planned to move to Georgia. Half of the mother's stock was sold the same day of the move, and funds were deposited into the Georgia daughter's bank account.

The Texas daughter sought and obtained a restraining order from the Harris County probate court against the Georgia daughter and filed for guardianship to protect her mother and her estate. At the hearing, the mother expressed her preference that her Houston residence remain her permanent residence. The court denied a special appearance by the Georgia daughter and the mother, and appointed the Texas daughter as temporary guardian. The court found that the elderly mother would have suffered irreparable harm absent the imposition of the restraining order and injunction due to the Georgia daughter's financial reliance on her mother. The court applied the legal concept of "domicile" and found that the mother might be "fairly regarded as at home" in Houston, Texas.

Thus Texas courts may, when presented with situations where "presence" jurisdiction would result in an unjust result, apply the "home state" analysis to adjudicate jurisdiction in the proceeding, but are not required to do so.

The UAGPPJA has been useful in resolving post-adjudication cases that appeared settled but were then disrupted by subsequent litigation. An Arkansas appellate court determined that a guardianship that was established in Connecticut could not be challenged two years later when an application for guardianship was filed in Arkansas absent special circumstances unless the Connecticut court determined that Arkansas was a more appropriate forum (and had not done so). *See Pierce v. Whitehill*, No. CV-20-674, 2021 WL 4930528 (Ct. App.—Ark. Oct. 20, 2021, no pet.).

§ 13.3 Interstate Transfers

The Texas legislature has addressed transfers of guardianship cases to and from other states. *See* Tex. Est. Code §§ 1253.001–.003, 1253.051–.053, 1253.055, 1253.056. However, these statutes are not very detailed, and courts are left to their own discretion about the form of the application, whether relatives must receive notice of the application, whether an attorney or guardian ad litem will be appointed to represent the ward, and whether hearings are required. What is clear is that appointment of attorneys ad litem for wards is not mandatory, and the court is required to give full faith and credit to the judgment of the foreign court on the incapacity of the ward and the qualifications and powers of the guardian. Tex. Est. Code § 1253.053(d). These concessions generally make transfers of guardianship to and from foreign courts more efficient and less expensive than original guardianship adjudications. But because the statutes are more detailed for "intrastate" guardianship transfers between Texas counties, courts may be inclined to apply these requirements to interstate guardianship transfers as well. *See* Tex. Est. Code §§ 1023.002–.010.

§ 13.3:1 Transfer of Guardianship to Foreign Jurisdiction

Section 1253.001 of the Texas Estates Code provides that a guardian of the person or estate of a ward may apply to the court that has jurisdiction over the guardianship to transfer the guardianship to a court in a foreign jurisdiction *to which the ward has permanently moved. See* Tex. Est. Code § 1253.001. The transfer to another state may be initiated by the court. *See* Tex. Est. Code § 1253.001. The Estates Code does not contemplate an application to transfer the guardianship in advance of a prospective move to another jurisdiction. As a practical matter, however, the court with jurisdiction over the proceeding may, on request, approve in advance a provisional placement of the person under guardianship in the foreign jurisdiction and subsequently approve the transfer of the guardianship to that jurisdiction. Obtaining prior Texas court permission to move a ward out of state is recommended because a guardian can be removed if the guardian "is absent from the state for a consecutive period of three or more months without the court's permission, or removes from the state." Tex. Est. Code § 1203.051(a)(4). It

is recommended that notice should be given to relatives as required by Estates Code section 1151.056(b)(3) since the transfer of the cause is a change of residence. See forms 13-1 and 13-2 in this chapter for examples of a motion and order to change the residence of the ward to a foreign state.

The Estates Code does not list what is required to be stated in an application to transfer a guardianship to a foreign jurisdiction. For an application to transfer a guardianship from one Texas county to another, the Code provides only that "the person shall file a written application in the court in which the guardianship is pending stating the reason for the transfer." Tex. Est. Code § 1023.003(a). Therefore, a simple application stating the reason for the transfer might be acceptable for an interstate transfer as well. However, to be safe, many practitioners include some variation of the elements required by an original application for guardianship as provided by section 1101.001 of the Estates Code. It is recommended that notice should be given to relatives as required by Estates Code section 1151.056(b)(3) since the transfer of the cause is a change of residence. See forms 13-3 and 13-4 for examples of a motion to transfer guardianship to foreign jurisdiction and an order approving motion to transfer.

Notice of the application to transfer a guardianship under Tex. Est. Code § 1253.001 must be served personally on the ward and shall be given to the foreign court to which the guardianship is to be transferred. Tex. Est. Code § 1253.002. The Code does not specify the manner in which notice is to be given to the foreign court. It is best to contact the foreign court to determine the foreign court's preference and to process how the transfer will occur. The notice should then be filed with the foreign court, and the filing should be documented with the Texas court. This statute does not require that relatives of the ward be notified of the application to transfer.

On a Texas court's motion or on the motion of the ward or any interested person, the court must hold a hearing to consider the application to transfer the guardianship. Tex. Est. Code § 1253.003(a). Because this statute provides that interested persons may move for a hearing, some courts require that the ward's relatives receive notice of the application to transfer guardianship. It is recommended that notice should be given to relatives as required by Estates Code section 1151.056(b)(3) since the transfer of the cause is a change of residence.

Under a literal interpretation of the statute, if the court does not desire a hearing and no motions are made by the ward or any interested person, a hearing is not mandatory. Therefore, many guardianship transfers are accomplished without a hearing in a Texas court. The party seeking transfer of the proceeding may wish to consult with the receiving court to confirm if and how additional notices, if required, are to be effectuated.

A Texas court is obligated to transfer the guardianship to the foreign court if the court determines the transfer is in the best interests of the ward, but the transfer of the guardianship must be made contingent on the acceptance of the guardianship in the foreign jurisdiction. Tex. Est. Code § 1253.003(b). The statute does not specify the form of acceptance expected from the foreign court, and it is important to determine the expectations of the Texas court that is being asked to transfer the case. To facilitate the orderly transfer of the guardianship, the Texas court is required to coordinate efforts with the foreign court. Tex. Est. Code § 1253.003(c). However, absent extenuating circumstances, a transfer of a guardianship out of Texas may be accomplished by the guardian's attorney's contacting the foreign court and facilitating the transfer without the direct communication of the judges involved.

Practice Pointer: The Estates Code does not adequately envision the statutes that apply to interstate transfers in other jurisdictions and, in particular, transfers to jurisdictions that have adopted the UAGPPJA. Please see section 13.3:2 below for addi-

tional context regarding additional requirements and expectations when transferring a guardianship to any American state or territorial jurisdiction other than Florida, Kansas, or Michigan.

§ 13.3:2 Receipt and Acceptance of Foreign Guardianship

A guardian, appointed by a foreign court, of a ward who resides in Texas or who intends to move to Texas may file an application to have the foreign guardianship transferred to the Texas court of the county in which the ward resides or "in which it is intended that the ward will reside." Tex. Est. Code § 1253.051. The moving party should confer with the court with original jurisdiction over the proceeding to determine how the transfer application is to be filed. Some jurisdictions have staff counsel that can and will initiate the transfer application and process. The only requirement for the application listed in this statute is that a certified copy of all papers of the guardianship filed and recorded in the foreign court be attached to the application. Tex. Est. Code § 1253.051. Presumably, an application for receipt and acceptance of a foreign guardianship should contain most of the information required of an initial guardianship application under section 1101.001 of the Texas Estates Code. However, the applicant should request that the Texas court give full faith and credit to the provisions of the foreign guardianship order concerning the determination of the ward's incapacity and the rights, powers, and duties of the guardian. *See* Tex. Est. Code § 1253.053(d). The application should also state that the guardian will file an appointment of resident agent if the guardian is not currently living in Texas. See forms 13-5 and 13-6 in this chapter for examples of an application for receipt and acceptance of foreign guardianship and an order receiving, accepting, and modifying foreign guardianship.

Notice of the application for receipt and acceptance of a foreign guardianship must be served personally on the ward and shall be given to the foreign court from which the guardianship is to be transferred. Tex. Est. Code § 1253.052. The Estates Code does not specify the form of the notice to be given to the foreign court, but any form of notice acceptable to both courts should be sufficient. Counsel for the transferring party may want to contact counsel or the court itself in the receiving jurisdiction to confirm how notice may best be given.

The Estates Code also does not require notice to relatives of the ward. However, if the law of the state transferring the guardianship requires notice to relatives, the Texas court may want the same relatives to be given notice of the application for receipt and acceptance. The Texas court may also require that the same relatives, who would have been provided notice of a guardianship application in an original proceeding filed in Texas, are to receive notice of the application for receipt and acceptance, and, therefore, the Texas court should be consulted on this issue before the hearing.

If an application for receipt and acceptance of a foreign guardianship is filed in two or more courts with jurisdiction, the proceeding must be heard in the court with jurisdiction over the application filed on the earliest date if venue is otherwise proper in that court. A court that does not have venue to hear the application must transfer the proceeding to the proper court. Tex. Est. Code § 1253.055.

A Texas court reviewing an application for receipt and acceptance of a foreign guardianship should first determine that the proposed guardianship is not a collateral attack on an existing or proposed guardianship in another jurisdiction in Texas or another state. Tex. Est. Code § 1253.053(b)(1). The Texas court is also to consider whether one or more states may have jurisdiction of the application and, if so, whether the application has been filed in the court that is best suited to consider the matter. Tex. Est. Code § 1253.053(b)(2).

The Texas court is required to hold a hearing to consider the application for receipt and acceptance of a foreign guardianship and to consider modifying the administrative procedures or requirements of the proposed transferred guardianship in accor-

dance with local and state law. Tex. Est. Code § 1253.053(a). The statutes do not state any time limits on when this hearing must occur.

If transfer of the guardianship from the foreign jurisdiction to Texas is in the best interests of the ward, the Texas court is required to grant the application. Tex. Est. Code § 1253.053(c). The court is also required to give full faith and credit to the provisions of the foreign guardianship order concerning the determination of the ward's incapacity and the rights, powers, and duties of the guardian. Tex. Est. Code § 1253.053(d). However, the court may modify the administrative procedures or requirements of the transferred guardianship in accordance with local and state law. Tex. Est. Code § 1253.053(f). The court is to coordinate efforts with the appropriate foreign court to facilitate the orderly transfer of the guardianship. Tex. Est. Code § 1253.053(e). Presumably, the foreign court will send the original pleadings to the clerk of the appropriate Texas court even though certified copies of the pleadings are required to be filed with the original application. If the Texas court denies the application for receipt and acceptance of a guardianship, the foreign guardian can still file an application to be appointed guardian of the incapacitated person under section 1101.001 of the Estates Code. Tex. Est. Code § 1253.056.

Section 1253.0515 of the Estates Code, titled "Certification or Training of Guardian," requires that a guardian filing an application for receipt and acceptance of foreign guardianship comply with chapter 155, subchapter C (Standards and Certification for Certain Guardians) or D (Guardianship Registration and Database) (subchapter D was redesignated by the Eighty-sixth Legislature as subchapter F, *see* Act of May 24, 2019, 86th Leg., R.S., ch. 467 (H.B. 4170), eff. Sept. 1, 2019), of the Texas Government Code, as applicable, and restricts a court from granting an application for receipt and acceptance of foreign guardianship unless the guardian is in compliance with section 1253.0515. *See also* Rule 7.8, Judicial Branch Certification Commission Rules for Registration of Guardianship Programs.

The provisions of chapter 155 of the Government Code require that a private professional guardian or guardianship program seeking to transfer a foreign guardianship to Texas must comply with Texas certification requirements before a court can accept the guardianship or approve the guardian's appointment in Texas. Additionally, the provisions of chapter 155 of the Government Code require that a family member guardian must complete online training and a criminal background check before the Texas court can accept the guardianship or approve the guardian's appointment in Texas. The foreign guardianship must also be registered with the Judicial Branch Certification Commission, as well. *See* Tex. Gov't Code ch. 155, subchs. C–E.

Practice Pointer: In jurisdictions that have a more comprehensive public guardianship system, it is common for the movant for the transfer of a guardianship or conservatorship to be a public guardianship program. Any guardian or conservator appointed in a foreign jurisdiction seeking to transfer a guardianship or conservatorship to Texas *must* submit to a criminal background check in order to transfer the proceeding to Texas. The receipt and acceptance of a foreign guardianship in Texas may become complicated due to Texas having not adopted the UAGPPJA. *See* Tex. Gov't Code §§ 155.204–.205.

§ 13.3:3 Transfers to and from UAGPPJA States

Because forty-six states and three jurisdictions have passed the UAGPPJA, a significant number of guardianships will be transferred to UAGPPJA states from Texas and from UAGPPJA states to Texas. Therefore, it is important that attorneys and courts become familiar with the UAGPPJA provisions on interstate guardianship transfers. See section 13.2:4 above for discussion of the UAGPPJA.

Section 301(a) of the UAGPPJA allows a guardian in a UAGPPJA state to petition the court to transfer a guardianship or conservatorship to another state (for purposes of this chapter the receiving state will be considered to be Texas). It does not require the ward to have permanently moved to Texas; the application to transfer can be filed in advance of the ward's move. *See* UAGPPJA § 301(d)(1). In the event of a transfer of a guardianship or conservatorship to Texas from a foreign jurisdiction that has adopted the UAGPPJA, notice of the petition must be given to the same persons in the UAGPPJA state who would have been entitled to receive notice of a petition to appoint a guardian in an original proceeding in that state. UAGPPJA § 301(b). A hearing on the transfer application may be held on the transferring court's own motion or at the request of the ward or guardian or any other person required to be given notice. UAGPPJA § 301(c). The transferring court will issue a provisional transfer order if the court in the foreign state is satisfied that (1) the ward has moved to Texas or is reasonably expected to move to Texas, (2) the transferring court is satisfied that the Texas court will accept the transfer, (3) plans for care and services for the ward in Texas are reasonable and sufficient, and (4) there are no objections with merit. The transferring court will also confirm that adequate arrangements have been made for the management of the ward's property before the transferring court signs a provisional transfer order. UAGPPJA § 301(e).

It is at this juncture that the guardian in the transferring court may and likely will seek counsel in Texas. The transferring court will expect the Texas court to issue a provisional order of acceptance and the provisional order must be filed with that court. See forms 13-7 and 13-8 in this chapter for examples of a motion for provisional order and provisional order receiving and accepting foreign guardianship. On receipt of the provisional order of acceptance and resolution of any outstanding issues such as final accounting and bond release, the transferring court will likely issue a final order confirming the transfer and terminating the guardianship in the foreign court. UAGPPJA §§ 301(f), 302. It is at this point in the process that counsel will need to utilize the provisions of the Estates Code discussed in section 13.3:2 above to initiate the process for receipt and acceptance of a foreign guardianship. *See* Tex. Est. Code § 1253.051.

The UAGPPJA also addresses the transfer of a case from a transferring court (for purposes of this chapter the transferring court will be considered to be Texas) to a receiving court in a UAGPPJA state. Although the UAGPPJA was designed to accomplish uniformity in substance and practice between the transferring and receiving jurisdictions, the variance in Texas law and the UAGPPJA will likely result in the retention of counsel on both ends of the transfer. Court systems in UAGPPJA jurisdictions have created uniform form banks with minor modifications for state idiosyncrasies. Samples of some UAGPPJA forms are included in this chapter for the Texas practitioner's reference.

Section 302(a) of the UAGPPJA provides that the Texas guardian who seeks transfer of the guardianship must petition the receiving court to accept the guardianship or conservatorship. See form 13-9 for an example of a petition for receiving state to accept guardianship. The petition must include a certified copy of a provisional order of transfer from the Texas court that is transferring the proceeding. UAGPPJA § 302(a). See forms 13-10 and 13-11 for examples of a motion and order for provisional order transferring ward and cause to the receiving state. Notice of the petition to accept transfer must be given to those persons who would be entitled to notice of a new guardianship application in both the transferring (Texas) and the receiving foreign state in the manner required by the foreign state. UAGPPJA § 302(b). Any objector to the transfer has the burden to show that the transfer of the proceeding would be contrary to the interests of the ward. UAGPPJA § 302(d)(1).

The foreign court is expected to issue a provisional order granting the petition to transfer to the foreign court unless the foreign court finds that the transfer would be contrary to the best interests of the ward or that the guardian would be ineligible for appointment in the foreign state. UAGPPJA § 302(d). See form 13-12 for an example of a provisional order granting transfer of guardianship to a receiving state. The court shall issue a final order accepting the proceeding and appointing the guardian in the new state when the court receives the final order from Texas transferring the guardianship to the foreign state. UAGPPJA

§ 301(f). See forms 13-13 and 13-14 for examples of a motion for final order accepting transfer to the receiving state and final order accepting transfer to the receiving state. In granting the petition to transfer, the foreign court must recognize the Texas guardianship order including the determination of incapacity and the appointment of the guardian. UAGPPJA § 302(g). The foreign court then has ninety days from the date of the final order to determine whether the guardianship needs to be modified to conform to the laws of the foreign state. UAGPPJA § 302(f).

If the foreign court denies the petition to accept the transfer of the guardianship, the Texas guardian is not prohibited from seeking appointment as guardian under the foreign state's ordinary procedures provided that the foreign court has jurisdiction to make such an appointment. UAGPPJA § 302(h).

One case highlights an issue of confusion involving the "provisional order of transfer" required by a state that has passed the UAGPPJA (New York) and is receiving a transfer from a state that has not passed the UAGPPJA (Texas). In *In re Application of B.A.M.W.*, 989 N.Y.S.2d 603 (N.Y. Sup. Ct. 2014), the mother of the ward was appointed as guardian of the person in Texas in 2012, then moved to New York and attempted to transfer the Texas guardianship to New York. The court in New York denied the mother's transfer petition because it did not include a certified copy of a Texas provisional order of transfer. The mother then sent a certified copy of the Texas order appointing her as guardian, which the New York court said did not cure the problem. The New York court went to the Delaware state court's website and included in its opinion a sample provisional transfer order "in an effort to ease the burden on the practitioner in this at times challenging and emerging area of law." *In re B.A.M.W.*, 989 N.Y.S.2d at 621.

An Alabama case emphasized that the state receiving the guardianship must accept the guardianship and its guardian "as is" or reject the transfer during the "provisional order" stage under the UAGPPJA. In *Sears v. Hampton*, 143 So. 3d 151 (Ala. 2013), Sears was appointed as guardian of her mother in Kentucky. Two years later, Sears applied to the Kentucky court for a provisional order to transfer the guardianship to Alabama where she and her mother were living. The Kentucky court issued the provisional transfer order. Sears then petitioned the Alabama court for a provisional order accepting the transfer of the guardianship. Another daughter of the mother disagreed with some expenditures that Sears made from her mother's estate and filed an objection in the Alabama court. The Alabama court appointed a guardian ad litem who recommended that the court appoint the county guardian to take Sears's place as guardian. Sears appealed. The Alabama Supreme Court ruled that the probate court failed to comply with Alabama's version of the UAGPPJA by appointing a different guardian during the "provisional order" stage and prior to entering a final transfer order. During the "provisional order" stage, Sears's letters of guardianship from Kentucky were still in effect, which meant that different appointed fiduciaries for the mother had conflicting and competing authority. The Alabama Supreme Court noted that any changes to the guardianship by the receiving court could be made only after a final order of acceptance had been entered and that the UAGPPJA provides a ninety-day period after acceptance of the final order to make any modifications to conform the guardianship to the laws of the accepting state.

The certainty that the UAGPPJA provides in the context of interstate transfers is demonstrated by several cases. A Delaware court applied the UAGPPJA to determine that Delaware could exercise jurisdiction over a guardianship case that was adjudicated in Maryland (the home state) and provisionally transferred to Delaware. The Delaware court conducted an evidentiary review to determine that Delaware was a significant connection state and, despite the ward having been placed in Maryland, Delaware, and South Carolina within a six-month period of time, Delaware should accept the transfer due to the ward having previously been a longtime Delaware resident with property in Delaware. *See In re A.W.B.*, No. 19887-N, 2022 WL 20470263 (Del. Ch. June 14, 2022) (unpublished opinion).

In another Delaware case, the court applied the UAGPPJA to require a guardian who had been appointed by the Delaware court in 2003 but had moved the ward to South Korea two years later and maintained the ward in South Korea for seventeen consecutive years to transfer the case to South Korea. The court had evidently been content to maintain the case on its docket until the guardian sought expense reimbursement from the ward's estate for expenses incurred in South Korea. The Delaware court found that under the UAGPPJA, the court can decline to exercise jurisdiction if it determines at any time that a court of another state is a more appropriate forum. The Delaware court considered the nine factors referenced in section 13.2:4 above and denied the petition for reimbursement and declined continuing jurisdiction, holding that Delaware was no longer the home state, finding that "[t]his presents unique challenges to this Court's ability to monitor, oversee, and supervise the guardianship. Those challenges would not be present if the guardianship was under the jurisdiction of a court or tribunal in South Korea, the current 'home state.'" *In re L.Y.*, No. 5818-N, 2022 WL 2047062 (Del. Ch. Aug. 18, 2022) (unpublished opinion). The court ordered that the guardian had to petition to transfer or file for a new guardianship in South Korea. *See In re L.Y.*, 2022 WL 20470262.

Practice Pointer: The American Bar Association has devoted extensive resources to documenting cases where application of the UAGPPJA, if adopted, would have prevented elder abuse. *See* **www.americanbar.org/content/dam/aba/administrative/law_aging/story_chart_sorted_by_first_state.pdf**. Because Texas has not adopted the UAGPPJA, and because the UAGPPJA is now the dominant law and language in interstate guardianship proceedings, practitioners are advised to consult additional resources provided by the American Bar Association Commission on Law and Aging. *See* **www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/guardianship_jurisdiction/**.

§ 13.4 Actions in Texas by Foreign Guardian

§ 13.4:1 Nonresident Guardian of Nonresident Ward's Estate

Occasionally, a foreign guardian will need to either manage or sell a nonresident ward's real or personal property located in Texas. Section 1252.051 of the Texas Estates Code provides for the appointment of the foreign guardian through the functional equivalent of an ancillary guardianship proceeding in Texas. This statute allows the Texas court to give full faith and credit to the foreign court's adjudication of the ward's incapacity and to the foreign guardian's appointment as guardian. However, the nonresident guardian of a Texas estate must still comply with a number of procedural requirements before the Texas court will give the foreign guardian any authority over the nonresident ward's Texas estate.

A nonresident of Texas may be appointed and qualified as guardian or coguardian of a nonresident ward's estate located in Texas in the same manner provided by the Estates Code for the appointment and qualification of a resident as guardian of the estate of an incapacitated person if—

1. a court of competent jurisdiction in the geographical jurisdiction in which the nonresident resides appointed the nonresident guardian;
2. the nonresident is qualified as guardian or as a fiduciary legal representative by any name known in the foreign jurisdiction of the property or estate of the ward located in the jurisdiction of the foreign court; and
3. with the written application for appointment in the county court of any county in Texas in which all or part of the ward's estate is located, the nonresident files a complete transcript of the proceedings from the records of the court in which the nonresident applicant was appointed, showing the applicant's appointment and qualification as the guardian or fiduciary legal representative of the ward's property or estate.

Tex. Est. Code § 1252.051.

The transcript must be under court seal, if any, and certified to and attested by the clerk of the foreign court or the officer of the court charged by law with custody of the court records. The certificate of the judge, chief justice, or presiding magistrate of the foreign court must be attached to the transcript, certifying that the attestation of the transcript by the clerk or legal custodian of the court records is in correct form. Tex. Est. Code § 1252.052(b). Because of these requirements, filing a complete transcript of the foreign court's proceedings can be expensive and time-consuming.

If the nonresident applicant meets these requirements, the Texas court must enter an order appointing the nonresident as guardian of the estate of the Texas property without the necessity of any notice or citation. Tex. Est. Code § 1252.052(a). Presumably, the Texas court will require the foreign guardian to post a corporate surety bond payable to the Texas judge who will be supervising the guardianship. In some cases this may be problematic because some out-of-state guardianship providers such as governmental entities may be prohibited from serving as guardian or posting a bond in a foreign state. In this situation it may be necessary to ask for the appointment of a professional guardian licensed in Texas. See forms 13-15 and 13-16 in this chapter.

The nonresident guardian must also file an appointment of resident agent to accept service of process in all actions or proceedings with respect to the Texas guardianship estate. Presumably, the foreign guardian must also sign an oath similar to that of a resident guardian. The foreign guardian will then have qualified to serve as guardian over the Texas estate, and the Texas clerk will then issue letters of guardianship to the nonresident guardian. Tex. Est. Code § 1252.052(b).

After qualification, the nonresident guardian must file an inventory and appraisement of the estate of the ward in Texas subject to the jurisdiction of the Texas court and subject to all applicable provisions of the Estates Code with respect to the handling and settlement of estates by resident guardians. Tex. Est. Code § 1252.053. A resident guardian who has any of the ward's estate may be ordered by the court to deliver the estate to a duly qualified and acting foreign guardian of the ward. Tex. Est. Code § 1252.054. This process may be streamlined if funds resulting from the sale of property are deposited into the registry of the Texas court and then transferred to the foreign guardian pursuant to the foreign guardian's existing bond.

The nonresident guardianship is often short-lived because its usual purpose is to liquidate Texas assets to support the ward's livelihood in a foreign jurisdiction. Provisions of the Estates Code regarding sales of real and personal property must be followed, including the posting of an adequate bond or the deposit of proceeds of sale into the registry of the court. On the liquidation of Texas assets, the Texas court will often issue an order transferring the net proceeds of sale to the guardianship in the foreign court and then terminate the Texas proceeding on the filing of an account for final settlement and application to terminate the guardianship in Texas. *See* Tex. Est. Code § 1252.055. It is usually necessary for the nonresident guardian appointed in Texas to coordinate with the original appointing court and to obtain mirror orders from that court for actions to be taken in Texas.

§ 13.4:2 Nonresident Guardian's Removal of Ward's Property from Texas

The Texas Estates Code also allows a nonresident guardian, even without complying with the ancillary guardianship procedure described at section 13.4:1 above, to remove personal property of the ward out of the state if (1) the removal does not conflict with the tenure of the property or the terms and limitations of the guardianship under which the property is held and (2) all debts known to exist against the estate in Texas are paid or secured by bond payable to and approved by the judge of the court in which guardianship proceedings are pending. Tex. Est. Code § 1252.055.

It is unclear, however, what type of procedure or order is required to allow the foreign guardian to remove such property from Texas and what protection is provided to the entity in Texas that releases the ward's property to the foreign guardian.

§ 13.4:3 Recognition Under UAGPPJA

Article 4 of the UAGPPJA provides a uniform process by which guardianship orders may be registered, enforced, and given full faith and credit by all jurisdictions that have adopted the UAGPPJA. However, Texas has not adopted article 4 of the UAGPPJA, and guardianship orders issued by foreign courts cannot be registered and recognized by Texas courts. See section 13.2:4 above for discussion of the UAGPPJA.

§ 13.5 Actions Regarding Nonresident Ward

§ 13.5:1 Resident Guardian of Nonresident Ward's Texas Estate

Section 1252.001 of the Texas Estates Code provides for the appointment of a resident guardian of a nonresident incapacitated person's Texas estate. The appointment must be considered in the same manner as a guardianship of the estate of a resident of Texas. A court in the county in which the principal estate of the nonresident ward is located has jurisdiction to appoint a guardian. Tex. Est. Code § 1252.001(b). The court is required to take all actions and make all necessary orders with respect to the estate of the ward for the maintenance, support, care, or education of the ward out of the proceeds of the ward's estate, in the same manner as if the ward were a resident of Texas who was sent abroad by the court for education or treatment. Tex. Est. Code § 1252.002. If a nonresident guardian of the estate later qualifies in Texas under section 1252.051 of the Estates Code, the court is to close the resident guardianship and may order the resident guardian to distribute the ward's estate to the nonresident qualified guardian. Tex. Est. Code §§ 1252.003, 1252.054.

§ 13.5:2 Recognition Under UAGPPJA

A Texas guardian who is guardian of the person or estate of a nonresident ward may utilize the UAGPPJA to manage the ward's person and estate in a foreign jurisdiction pursuant to article 4 of the UAGPPJA. Section 401 of the UAGPPJA allows a guardian who has been appointed in Texas to register the guardianship order in a foreign jurisdiction by filing, as a foreign judgment in a court in the appropriate county, certified copies of the order and the guardian's letters of guardianship. A petition for the appointment of a guardian must not currently be pending in the foreign jurisdiction in which the Texas guardian is seeking to have the Texas guardianship order recognized. The Texas guardian must also give notice to the Texas court with jurisdiction over the existing guardianship indicating the guardian's intent to register the guardianship in the foreign jurisdiction. UAGPPJA § 401. The Texas guardian may also secure and file protective orders in a foreign jurisdiction in which property belonging to the protected person is located. UAGPPJA § 402.

Once the guardianship or protective order is registered in the foreign jurisdiction, the Texas guardian may exercise all powers authorized in the Texas order other than those prohibited under the laws of the foreign jurisdiction including maintaining actions and proceedings in the foreign jurisdiction subject to any conditions imposed on nonresident parties. UAGPPJA § 403(a). Therefore, the appointment of a resident agent in the foreign jurisdiction may be necessary. The court in the foreign jurisdiction may also grant any relief available under the UAGPPJA and the laws of the foreign jurisdiction to enforce the registered order. UAGPPJA § 403(b). See section 13.2:4 above for discussion of the UAGPPJA.

§ 13.5:3 Receivership

A nonresident guardian or any interested party may also apply to the court in the county in which the nonresident ward's estate is located for the appointment of a suitable person as receiver to take charge of the estate. The applicant must show that the ward's estate is in danger of injury, loss, or waste and that there is no guardian of the estate in Texas and that one is not necessary. The court's order appointing the receiver must specify the duties and powers necessary for the receiver to protect, preserve, and conserve the ward's estate. Tex. Est. Code § 1354.001.

The court order shall require a receiver appointed under section 1354.001 to give bond as in ordinary receiverships in an amount the judge deems necessary to protect the estate. Tex. Est. Code § 1354.002. The person who is appointed receiver shall proceed to take charge of the endangered estate pursuant to the powers and duties vested in the person by the order of appointment and subsequent orders made by the judge.

If the needs of the incapacitated person require the use of the income or corpus of the estate for the education, clothing, or subsistence of the incapacitated person, the judge, with or without application, shall enter an order in the judge's guardianship docket that appropriates an amount of income or corpus that is sufficient for that purpose. The receiver shall use the amount appropriated by the court to pay a claim for the education, clothing, or subsistence of the minor or other incapacitated person that is presented to the judge for approval and ordered by the judge to be paid. Tex. Est. Code § 1354.004.

If the receiver has funds in excess of what is needed for current necessities and expenses of the incapacitated person, the receiver may invest such funds with court approval on the terms and conditions provided by the Texas Estates Code for investments by guardians. The receiver shall report to the judge all investments made in the same manner that a report is required of a guardian. Tex. Est. Code § 1354.005.

All necessary expenses incurred by the receiver in administering the estate may be rendered monthly to the judge in the form of a sworn statement of account that includes a report of the receiver's acts, the condition of the estate, the status of the threatened danger to the estate, and the progress made toward abatement of the danger. If the judge is satisfied that the statement is correct and reasonable, the judge shall promptly enter an order approving the expenses and authorizing the receiver to be reimbursed from the funds of the estate in the receiver's hands. A receiver shall be compensated for services rendered in the same amount as provided for similar services rendered by guardians of estates. Tex. Est. Code § 1354.006.

When the ward's estate is no longer liable to injury, loss, or waste, the receiver shall report to the judge and file a full and final sworn account of all property of the estate the receiver received or had on hand when the receivership was pending, all sums paid out, all acts performed by the receiver with respect to the estate, and all property of the estate that remains in the receiver's hands on the date of the report. On the filing of the report, the clerk shall issue posted notice to all persons interested in the welfare of the incapacitated person and shall give personal notice to the person who has custody of the incapacitated person to appear before the judge and contest the report and account if the person desires. Tex. Est. Code § 1354.007.

If the judge is satisfied that the danger to the estate has abated and that the account is correct, the judge shall enter an order finding that the danger to the estate has abated and shall direct the receiver to deliver the estate to the person from whom the receiver took possession as receiver, to the person who has custody of the incapacitated person, or to another person as the judge may find is entitled to possession of the estate. A person who receives the estate under these circumstances shall file an appropriate receipt for the estate that is delivered to the person. The judge's order shall discharge the receivership and the sureties on the bond of the receiver. If the judge is not satisfied that the danger has abated or is not satisfied with the receiver's report and account, the judge shall enter an order that continues the receivership. Tex. Est. Code § 1354.008.

Practice Pointer: Practitioners should carefully consider whether a receivership is the most effective means to remedy the situation and circumstances to be addressed by the court. The statutory scheme for receivership is considerably less detailed and onerous than are guardianship provisions. A case requiring the maximum amount of safeguards and monitoring may be best suited for guardianship, whereas a matter that requires quick and expeditious resolution without significant controversy may best be addressed by the appointment of a receiver.

Form 13-1

The Texas Estates Code does not indicate what is required to be included in an application to change residence of ward to a foreign jurisdiction. This form is provided as an example only and should be modified as needed to conform to the facts of the particular case. See section 13.3:1 in this chapter.

[Caption. See § 3 of the Introduction in this manual.]

Motion to Change Residence of Ward to [foreign county] County, [foreign state]

[**Name of guardian**], Movant, court-appointed permanent guardian of the person and estate of [**name of ward**], Ward, requests that this Court approve the change of residence of [**name of ward**] to [**foreign county**] County, [**foreign state**], and would respectfully show as follows:

1. On [**date**], this Court established this guardianship matter for the benefit of [**name of ward**], an adult [male/female] [**age**] years of age, whose date of birth is [**date of birth**]. [**Name of ward**] has resided at [**address, city, county**] County, [**state**], since [**date**]. [**Name of attorney ad litem**] is the attorney ad litem for Ward in this proceeding. Movant qualified as guardian of [**name of ward**] by posting a $[**amount**] corporate surety bond on [**date**].

2. [Movant intends to move [**name of ward**]/[**Name of ward**] has expressed their preference to move] to [**foreign state**]. Movant intends to move [**name of ward**] on [**date**] to [**foreign address, city, county**] County, [**foreign state**]. Movant believes that, upon the relocation of [**name of ward**], it would be in the best interest of [**name of ward**] for this cause to be transferred to a court of competent jurisdiction in [**foreign state**].

3. Notice of this Motion to Change Residence has been served personally on [**name of ward**] and to [**name of attorney ad litem**], and notice [has been/will be] provided to relatives of Ward as required by Texas Estates Code section 1151.056(b)(3).

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4. Upon the change of residence of Ward to [**foreign address, city, county**] County, [**foreign state**], Movant will apply to transfer the ward and this cause to [**foreign state**] pursuant to Texas Estates Code section 1253.001 *et seq.*

Movant respectfully requests that this Court find that this change of residence is in the best interest of [**name of ward**] and approve the change of residence of [**name of ward**] to [**foreign state**], and that Movant be granted all other relief to which Movant may be entitled.

Respectfully submitted,

_____

[**Name**]
Attorney for Movant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Certificate of Service

I certify that a true copy of this [**title of document**] was served in accordance with rule 21a of the Texas Rules of Civil Procedure.

SIGNED on _____.

_____

[**Name of attorney**]

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Form 13-2

[Caption. See § 3 of the Introduction in this manual.]

Order Approving Change of Residence of Ward to [foreign county] County, [foreign state]

On this day the Court considered the motion of [**name of guardian**], court-appointed permanent guardian of the person and estate for [**name of ward**], for the approval of the change of residence of [**name of ward**] to [**foreign county**] County, [**foreign state**].

After a hearing on the motion, the Court finds that proper notice has been provided to all interested persons.

The Court further finds that the evidence presented shows that it would be in the best interest of [**name of ward**] to approve the change of the residence of [**name of ward**] to [**foreign address, city, county**] County, [**foreign state**], and that, as no good cause has been shown to the contrary, this motion should be granted.

IT IS THEREFORE ORDERED that [**name of guardian**] shall have authority to change the residence of [**name of ward**] to [**foreign address, city, county**] County, [**foreign state**].

IT IS FURTHER ORDERED that, upon the change of address of the ward, [**name of guardian**] shall have authority to initiate the transfer of [**name of ward**] to [**foreign county**] County, [**foreign state**], pursuant to section 1253.051 *et seq.* of the Texas Estates Code.

SIGNED on _____.

_____
JUDGE PRESIDING

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Form 13-3

The Texas Estates Code does not indicate what is required to be included in an application to transfer a guardianship to a foreign jurisdiction. This form is provided as an example only and should be modified as needed to conform to the facts of the particular case. See section 13.3:1 in this chapter.

[Caption. See § 3 of the Introduction in this manual.]

Motion to Transfer Ward and Cause to [foreign county] County, [foreign state] Under Texas Estates Code Section 1253.001

[**Name of guardian**], Movant, court-appointed permanent guardian of the person and estate of [**name of ward**], Ward, pursuant to section 1253.001 of the Texas Estates Code, requests that this Court approve the transfer of [**name of ward**] and this cause to [**foreign county**] County, [**foreign state**], and would respectfully show as follows:

1. On [**date**], this Court established this guardianship matter for the benefit of [**name of ward**], an adult [male/female] [**age**] years of age, whose date of birth is [**date of birth**]. [**Name of ward**] has resided at [**foreign address, city, county**] County, [**foreign state**], since [**date**]. [**Name of attorney ad litem**] is the attorney ad litem for Ward in this proceeding. Movant qualified as guardian of [**name of ward**] by posting a $[**amount**] corporate surety bond on [**date**].

2. On [**date**], Movant filed a Motion to Change Residence of Ward to [**foreign county**] County, [**foreign state**], in which Movant indicated that [Movant intended to move Ward/Ward had expressed their preference to move] to [**foreign state**]. On [**date**], this Court approved the change of residence of Ward to [**foreign address, city, county**] County, [**foreign state**].

3. Movant believes that it is in the best interest of [**name of ward**] for this cause to be transferred to a court of competent jurisdiction in [**foreign state**].

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4. Notice of this motion to transfer the guardianship under section 1253.001 of the Texas Estates Code will be served personally on [**name of ward**] and to [**name of attorney ad litem**], and notice will be provided to the [**name of foreign court**] at [**address of foreign court, city, county**] County, [**foreign state**].

Movant has conferred with [**name of foreign court**] in [**foreign state**], which has confirmed the Court is willing to accept the transfer of this cause. Movant requests that the clerk transmit the court transcript and record to the receiving Court.

Movant respectfully requests that this Court find that this transfer is in the best interest of Ward and approve the transfer of this cause and [**name of ward**] to [**foreign state**], and that Movant be granted all other relief to which Movant may be entitled.

Respectfully submitted,

_____

[**Name**]
Attorney for Movant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Certificate of Service

I certify that a true copy of this [**title of document**] was served in accordance with rule 21a of the Texas Rules of Civil Procedure.

SIGNED on _____.

_____

[**Name of attorney**]

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Form 13-4

[Caption. See § 3 of the Introduction in this manual.]

Order Approving Motion to Transfer Ward and Cause to [foreign county] County, [foreign state] Under Texas Estates Code Section 1253.001

On this day the Court considered the motion of [**name of guardian**], court-appointed permanent guardian of the person and estate for [**name of ward**], for the transfer of [**name of ward**] and this guardianship proceeding to [**foreign county**] County, [**foreign state**]. After a hearing on the motion, the Court finds that citation and notice have been duly served as required by law, including notice to the [**name of foreign court**], that the evidence presented shows that it would be in the best interest of [**name of ward**] to remove the proceeding to [**foreign county**] County, [**foreign state**], and that, as no good cause has been shown to the contrary, this motion should be granted.

IT IS THEREFORE ORDERED that the clerk shall prepare a full and complete transcript of the guardianship proceedings according to section 1253.051 of the Texas Estates Code and that this cause be transferred to the [**name of foreign court**], which will have jurisdiction over these guardianship matters, on issuance of an order of receipt and acceptance by that Court.

SIGNED on _____.

_____
JUDGE PRESIDING

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Form 13-5

The Texas Estates Code does not indicate what must be included in an application for receipt and acceptance of a foreign guardianship except that a certified copy of all papers of the guardianship filed and recorded in the foreign court must be attached to the application. This form is provided as an example only and should be modified as needed to conform to the facts of the particular case. See section 13.3:2 in this chapter.

[Caption. See § 3 of the Introduction in this manual.]

Application for Receipt and Acceptance of Foreign Guardianship

[**Name of applicant**], Applicant, files this Application for Receipt and Acceptance of Foreign Guardianship pursuant to sections 1253.051–.056 of the Texas Estates Code with respect to [**name of ward**], Ward, and subject to a guardianship in [**county**] County, [**foreign state**], and shows in support:

1. *Guardian's Notice to Ward and Foreign Court.* [**Name of ward**], [a/an] [incapacitated/partially incapacitated] person, [is currently a resident/intends to become a resident] of [**county**] County, Texas, as [he/she] [resides/intends to reside] at [**address, city, county**] County, Texas, and will be personally served with the Application for Receipt and Acceptance of Foreign Guardianship pursuant to sections 1253.051–.056 of the Texas Estates Code. The [**name of foreign court**] [will be given/has been given] notice of this Application by delivery of a file marked copy of the same to [**name of foreign court, address, city, county**] County, [**state**].

2. *Best Interest.* Applicant requests that this Court find that the receipt and acceptance of the guardianship from the foreign court to this Court is in the best interest of Ward. Applicant is the [**relationship**] of Ward and guardian of [his/her] person and estate in [**foreign state**]. Ward [has resided/intends to reside] in [**county**] County, Texas, [since/as of] [**date**], and, therefore, it is necessary to transfer the foreign guardianship to [**county**] County, Texas.

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The receipt and transfer of the foreign guardianship is not a collateral attack on an existing or proposed guardianship in another jurisdiction in Texas or another state, and the application has been filed in the Court that is best suited to consider the matter.

3. *Ward's Incapacity.* Applicant asks this Court to give full faith and credit to the provisions of the foreign guardianship order concerning the determination of Ward's incapacity and the rights, powers, and duties of the guardians. Certified copies of all papers of the guardianship filed and recorded in the foreign court are attached to this application.

4. *Type of Guardianship.* Applicant seeks guardianship of the person and the estate of Ward in Texas. Applicant believes that a guardian of the person and estate is necessary for the protection and welfare of Ward and requests that [**name of proposed guardian**] be appointed guardian of the person and estate to handle the personal and financial affairs of Ward.

5. *Proposed Guardian.* Applicant requests that [**name of proposed guardian**] be appointed guardian of the person and estate of [**name of ward**] to assist [him/her] in managing [his/her] estate and personal affairs. Applicant is the [**relationship**] of [**name of ward**]. Applicant's address is [**address, city, county**] County, Texas. [[**Name of applicant**]/[**Name of proposed guardian**]] is not disqualified by law to serve as guardian for Ward.

6. *Venue.* This Court has venue of this proceeding because [**name of ward**] [resides/intends to reside] in this county.

7. *Duties and Powers of Guardian of the Person.* Applicant alleges that Ward has previously been adjudicated to be [totally/partially] incapacitated and is unable to properly manage [some/all] of [his/her] personal affairs and estate. As a result of these incapacities, Applicant requests that the guardian of the person be granted the following powers and authority:

Include as appropriate. The following are examples.

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a. To take charge of the person of Ward.

b. To review, take possession of, and consent to the disclosure of Ward's medical or dental records.

c. To apply for, arrange for, and consent to all psychological, psychiatric, or medical examinations, tests, or evaluations for Ward.

d. To consent to or object to medical and dental treatment for Ward, including surgery.

e. To apply for, consent to, and enroll Ward in nonresidential aging or Alzheimer's programs and services that are reasonably required and needed by Ward and that are operated by public and private agencies and facilities.

f. To make application for and to enroll Ward in private and public residential care facilities.

g. To place Ward in an appropriate living and treatment environment, including but not limited to a hospital; a nonresidential, private or public twenty-four-hour care facility; or a nursing home facility.

h. To apply for and employ nurses, sitters, caregivers, therapists, and other persons to assist Ward.

i. To have possession and control of Ward and to deny anyone access to Ward if such is in [his/her] best interest.

j. To hire and discharge doctors, psychiatrists, nurses, nurses' aids, and other health-care providers providing services to Ward.

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k. To affirm or revoke the advanced directive previously executed by Ward as may be in [his/her] best interest and to communicate that affirmation or revocation to Ward's treating physicians.

l. To retain and discharge caretakers for Ward and to monitor and control access of third parties to [him/her].

m. To give permission and sign releases for the inspection and dissemination of confidential legal, medical, financial, and other information and records to third parties.

n. To apply for and secure an identification card, social security card, or other identification documents for Ward.

o. To control the delivery and receipt of Ward's mail.

p. To do such other and further acts concerning Ward as the Court may from time to time direct by express authorization through written order of the Court.

8. *Duties and Powers of Guardian of the Estate.* Applicant alleges that Ward has previously been adjudicated to be [totally/partially] incapacitated and is unable to properly manage [some/all] of [his/her] personal affairs and [his/her] estate to the extent indicated in the attached certified copy of all papers of the guardianship that were filed and recorded in the foreign court. As a result of these incapacities, Applicant requests that the guardian of the estate be granted the following powers:

a. To possess and manage the properties of Ward, including all bank accounts, securities accounts, annuities, and other investments of Ward; to have possession and management of Ward's personal possessions; and to have total access to all records of Ward.

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b. To take possession of Ward's cash on hand or on deposit; Ward's stocks, bonds, or other securities; and Ward's accounts at financial institutions or at stock or brokerage firms, and to open new accounts and to be the authorized signatory on such accounts.

c. To collect debts, rentals, wages, or other claims due Ward.

d. To pay, compromise, or defend claims against Ward, subject to court approval.

e. To represent Ward in any legal action, subject to court approval.

f. To contract and to incur other obligations on Ward's behalf and to renew and extend any obligations, subject to court approval.

g. To collect and give receipt for any monies, rents, dividends, interest, trust proceeds, and all other types of income payable to or receivable by Ward.

h. To file a federal income tax return on Ward's behalf and to pay federal, state, and local taxes of Ward.

i. To review, take possession of, and consent to the disclosure of Ward's legal, financial, or other confidential books, documents, or other records.

j. To employ and to discharge from employment attorneys, accountants, appraisers, and other persons necessary in the administration of the estate of Ward.

k. To do such other and further acts concerning the property and interests of Ward and Ward's estate as the Court may from time to time direct by express authorization through written order of the Court.

9. *Property of Ward.* Ward's estate consists of the following: [**describe estate**].

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10. *Compliance with Texas Estates Code.* The proposed guardian has complied with the requirements of chapter 155 of the Texas Estates Code and is in compliance with section 1253.0515 of the Texas Estates Code.

Pursuant to Texas Estates Code section 1253.053, Applicant respectfully requests this Court grant this Application for Receipt and Acceptance of Foreign Guardianship and consider modifying the administrative procedures or requirements of the proposed transferred guardianship in accordance with local and state law.

Applicant further requests that this Court find that it is in the best interest of Ward to grant this application and grant Applicant any further relief that the Court may deem appropriate.

Respectfully submitted,

_____

[**Name**]
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach exhibits.

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Form 13-6

[Caption. See § 3 of the Introduction in this manual.]

Order Receiving, Accepting, and Modifying Foreign Guardianship

On this day, the Court considered the Application for Receipt and Acceptance of Foreign Guardianship (the Application) pursuant to sections 1253.051–.056 of the Texas Estates Code filed by [**name of applicant**].

The Court, having read the Application, having received the certified copy of all papers of the guardianship filed and recorded from [**name of foreign court**], and being fully advised in the premises, makes the following findings of fact by clear and convincing evidence:

1. The proposed guardianship requested in the Application is not a collateral attack on an existing guardianship in another jurisdiction in this or another state.

2. The Application has been filed in the Court best suited to hear this matter.

3. [**Name of ward**], Ward, is an [incapacitated/partially incapacitated] person as defined by the Texas Estates Code and has no legal guardian of [his/her] person and estate in the state of Texas.

4. The receipt and acceptance of the guardianship from [**name of foreign court**] is in the best interest of Ward.

5. It is in the best interest of Ward to have the Court appoint a guardian of [his/her] estate in the state of Texas.

6. In granting this Application, the Court gives full faith and credit to the provisions of the foreign guardianship order concerning the determination of Ward's incapacity and the rights, powers, and duties of the guardian.

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7. The rights of Ward will be protected by the appointment of a guardian of [his/her] estate in the state of Texas.

The Court makes the following findings of fact by a preponderance of the evidence:

1. Ward [is a resident/will be a resident] of [**county**] County, Texas, and this Court has jurisdiction and venue to appoint a guardian of the [person/estate/person and estate] of Ward.

2. Notice has been properly served on those persons required by the Texas Estates Code.

3. Ward [was present in court/was not present in court, the personal appearance of Ward at the hearing being unnecessary or inadvisable because Ward's incapacities are such that Ward would not have been able to understand or participate in the hearing, and to require Ward to participate in the hearing would not be in [his/her] best interest].

4. [[**Name of applicant**]/[**name of proposed guardian if not the applicant**]] is the [**relationship**] of Ward and [his/her] guardian in the state of [**foreign state**] and is eligible to act as guardian and is a proper person to be appointed guardian of the estate of Ward.

5. Ward [is without/has limited] capacity to manage [his/her] finances and personal affairs.

IT IS THE ORDER OF THIS COURT that [**name of guardian**] is appointed as [full/limited] guardian of the person [and/or] estate of [**name of ward**] and shall have the following duties and authorities unless otherwise ordered by the Court.

IT IS ORDERED that the guardian of the estate shall have the following authority, duties, and responsibilities and, to the extent the prior order appointing guardian is inconsistent with this order, the prior order of adjudication or modified as ordered herein:

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1. To possess and manage the properties of Ward, including all bank accounts, securities accounts, annuities, and other investments of Ward, and to have possession and management of Ward's home, Ward's personal possessions, and any other property owned by Ward, and to have total access to all records and past transactions of Ward and [his/her] attorney-in-fact with respect to such properties.

2. To take possession of Ward's cash on hand or on deposit; Ward's stocks, bonds, or other securities; and Ward's accounts at financial institutions or at stock or brokerage firms, and to open new accounts and to be the authorized signatory on such accounts.

3. To collect debts, rentals, wages, or other claims due to Ward.

4. To pay, compromise, or defend claims against Ward, subject to court approval.

5. To represent Ward in any legal action, subject to court approval.

6. To contract and to incur other obligations on Ward's behalf and to renew and extend any obligations, subject to court approval.

7. To collect and give receipt for any monies, rents, dividends, interest, trust proceeds, and all other types of income payable to or receivable by Ward.

8. To apply for and to receive funds from governmental sources for Ward, including Social Security, Medicare, supplemental security income benefits (SSI), HUD Section 8 rent subsidies, childhood disability benefits under the Old-Age Survivors and Disability Insurance Program, aid to families with dependent children (AFDC), and veterans benefits.

9. To apply for and to consent to governmental services on the Ward's behalf, including vocational rehabilitation programs, Medicaid services, food stamps, and veterans benefits.

10. To apply for and to secure insurance on Ward's behalf for Ward's property and the Ward's person.

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11. To file a federal income tax return on Ward's behalf and to pay federal, state, and local taxes of Ward.

12. To review, take possession of, and consent to the disclosure of Ward's legal, financial, or other confidential books, documents, or other records, including the power to enter into the Ward's safe deposit box.

13. To employ and to discharge from employment attorneys, accountants, appraisers, and other persons necessary in the administration of the estate of Ward.

14. To employ and to discharge from employment nurses, sitters, caregivers, tutors, therapists, and other persons engaged to assist Ward.

15. To do such other and further acts concerning the property and interests of Ward and Ward's estate as the Court may from time to time direct by express authorization through written order of the Court.

IT IS FURTHER ORDERED that the guardian of the person shall have the following authority, duties, and responsibilities and, to the extent the prior order appointing guardian is inconsistent with this order, the prior order of adjudication or modified as ordered herein:

1. To take charge of the person of Ward.

2. To review, take possession of, and consent to the disclosure of Ward's medical and dental records.

3. To apply for, arrange for, and consent to any and all psychological, psychiatric, or medical examinations, tests, or evaluations for Ward.

4. To consent to or object to medical and dental treatment for Ward, including surgery.

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5. To apply for, consent to, and enroll Ward in nonresidential aging or Alzheimer's programs and services that are reasonably required and needed by Ward and that are operated by public and private agencies and facilities.

6. To make application for, consent to, and enroll Ward in private and public residential care facilities.

7. To place Ward in an appropriate living and treatment environment, including but not limited to a hospital; a nonresidential, private, or public twenty-four-hour care facility; or a nursing home facility.

8. To apply for, consent to, and employ nurses, sitters, caregivers, therapists, and other persons to assist Ward.

9. To have possession and control of Ward and to deny anyone access to Ward if such is in [his/her] best interest.

10. To hire and discharge doctors, psychiatrists, nurses, nurses' aids, and other health-care providers providing services to Ward.

11. To affirm or revoke the advanced directive previously executed by Ward as may be in [his/her] best interest and to communicate that affirmation or revocation to Ward's treating physicians.

12. To retain and discharge caretakers for Ward and to monitor and control access of third parties to [him/her].

13. To give permission and sign releases for the inspection and dissemination of Ward's confidential legal, medical, financial, and other information and records to third parties.

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14. To apply for and secure an identification card, Social Security card, or other identification documents for Ward.

15. To control the delivery and receipt of Ward's mail.

16. The power and authority to do such other and further acts concerning Ward as the Court may from time to time direct by express authorization through written order of the Court.

IT IS FURTHER ORDERED that the guardianship is further modified as follows:

Insert any additional modifications.

SIGNED on _____.

_____
JUDGE PRESIDING

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Form 13-7

The Texas Estates Code does not indicate what must be included in an application for receipt and acceptance of a foreign guardianship except that a certified copy of all papers of the guardianship filed and recorded in the foreign court must be attached to the application. This form is provided as an example only and should be modified as needed to conform to the facts of the particular case. See section 13.3:3 in this chapter.

[Caption. See § 3 of the Introduction in this manual.]

Application for Provisional Order Receiving and Accepting Foreign Guardianship Pending Final Transfer of Foreign Guardianship

[**Name of applicant**], Applicant, files this Application for Provisional Order Receiving and Accepting Foreign Guardianship pursuant to sections 1253.051–.056 of the Texas Estates Code with respect to [**name of ward**], Ward, and subject to a [guardianship/conservatorship] in [**county**] County, [**foreign state**], and shows in support:

On [**date**], [**name of applicant**] filed an Application for Receipt and Acceptance of a Foreign Guardianship in this Court in which the Applicant requested the transfer of the [guardianship/conservatorship] of the [person/estate] of [**name of ward**] to [**county**] County, Texas.

Applicant has filed a petition for [**name of foreign court**], [**county**], [**foreign state**] to transfer the [guardianship/conservatorship] of the [person/estate] of [**name of ward**] to [**county**] County, Texas and is in receipt of a Provisional Order Granting Transfer of [Guardianship/Conservatorship] to Texas.

The transferring court requires a Provisional Order Receiving and Accepting Foreign Guardianship Pending Final Transfer of Foreign Guardianship in order to effectuate the transfer of the foreign proceeding to this Court.

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Applicant has attached the pleadings, including the Provisional Order Granting the Transfer of the [Guardianship/Conservatorship] of the [Person/Estate] of [**name of ward**] from [**foreign state**] to Texas, and requests that this Court issue a Provisional Order Receiving and Accepting Foreign Guardianship Pending Final Transfer of Foreign Guardianship.

Notice has been properly served on those persons required by the Texas Estates Code, and there has been no objection to the transfer of this proceeding to this Court.

The proposed guardian has filed proof of successful completion of the Texas Judicial Branch Certification Commission's guardian training program, has registered this proceeding with the Texas Judicial Branch Certification Commission, and has completed the required criminal background check.

Applicant respectfully requests that this Court find that the provisional transfer of this proceeding to this Court is in the best interest of [**name of ward**] and that this Court grant Applicant any further relief that the Court may deem appropriate.

Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach exhibits.

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Form 13-8

[Caption. See § 3 of the Introduction in this manual.]

Provisional Order Receiving and Accepting Foreign Guardianship Pending Final Transfer of Foreign Guardianship

On [**date**], [**name of applicant**], Applicant, filed an Application for Receipt and Acceptance of a Foreign Guardianship in this Court, in which the Applicant requested the transfer of the guardianship of the [person/estate] of [**name of ward**] to [**county**] County, Texas.

This Court has been informed that Applicant has filed a petition for [**name of foreign court**], [**county**], [**foreign state**] to transfer the [guardianship/conservatorship] of the [person/estate] of [**name of ward**] to [**county**] County, Texas, and is in receipt of a Provisional Order Granting Transfer of [Guardianship/Conservatorship] to Texas.

This Court has been further informed that the transferring court requires a Provisional Order Receiving and Accepting Foreign Guardianship Pending Final Transfer of Foreign Guardianship in order to effectuate the transfer of the foreign proceeding to this Court.

The Court, having read the application, having reviewed the pleadings from [**foreign state**], and being fully advised of the premises, hereby enters this Provisional Order Receiving and Accepting Foreign Guardianship Pending Final Transfer of Foreign Guardianship and makes the following findings of fact by a preponderance of the evidence:

1. Applicant petitioned to transfer the [guardianship/conservatorship] of the [person/estate] from [**foreign state**] to [**county**] County, Texas on [**date**].

2. Applicant filed an Application for Receipt and Acceptance of Foreign Guardianship, in which Applicant sought to transfer the [guardianship/conservatorship] of the [person/estate] from [**foreign state**] to [**county**] County, Texas, on [**date**].

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3. The petitioner [filed/has attached] a certified copy of the [**foreign state**] provisional order of transfer.

4. This Court held a hearing on [**date**].

5. Notice has been properly served on those persons required by the Texas Estates Code.

Select one of the following.

6. There has not been an objection to the transfer.

Or

6. There has been an objection to the transfer. The objector has not established that the transfer would be contrary to the interests of [**name of ward**].

Or

6. There has been an objection to the transfer. The objector has established that the transfer would be contrary to the interests of [**name of ward**].

Continue with the following.

7. The proposed [guardian/conservator] [is/is not] eligible to be appointed guardian in Texas.

8. The proposed guardian [has/has not] filed proof of successful completion of the Texas Judicial Branch Certification Commission's guardian training program, has registered this proceeding with the Texas Judicial Branch Certification Commission, and has completed the required criminal background check.

9. This Court recognizes the provisional order transferring [guardianship/conservatorship] from [**foreign state**].

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10. This Court recognizes the determination of the ward's incapacity and the appointment of the [guardian/conservator] in [**foreign state**].

Select one of the following.

IT IS THEREFORE ORDERED that the motion is GRANTED. The petition to transfer the [guardianship/conservatorship] to [**county**] County, Texas is provisionally granted. The petitioner shall file with this Court a final order approving the transfer of the [guardianship/conservatorship] from [**foreign state**]. Upon the filing of the final order to transfer the guardianship, this Court will consider the Order Receiving, Accepting and Modifying Foreign Guardianship.

Or

IT IS THEREFORE ORDERED that the motion is DENIED. The petition to transfer the [guardianship/conservatorship] is denied. This order does not affect the ability of the [guardian/conservator] to seek appointment as [guardian/conservator] in Texas if this Court has jurisdiction to make an appointment other than by reason of the provisional order of transfer.

Insert any additional orders.

SIGNED on_____.

_____
JUDGE PRESIDING

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Form 13-9

This form is based on the form "GDN T 705: Petition for Washington to Accept a Guardianship or Conservatorship to Washington," with permission from the Washington Supreme Court's Pattern Forms Committee.

[**Name of receiving court**] Court of [**receiving state**], County of [**receiving county**]

In re Guardianship of: _____, Ward	No. _____ Petition for [**receiving state**] to Accept a Guardianship from [**county**] County, Texas

Petition for [receiving state] to Accept a Guardianship from [county] County, Texas

I am the guardian of [**name of ward**], Ward, in [**county**] County, Texas. I am petitioning the [**name of receiving court**] to enter a provisional order accepting the transfer of a guardianship from [**county**] County, Texas, under [**receiving state's UAGPPJA statute**].

1. Information about the Petitioner (Texas Guardian)

Name:

Relationship to Ward:

Street Address:

Mailing Address:

Contact Phone Number(s):

2. Information about Ward

Name:

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Age:

Street Address:

Mailing Address:

Contact Phone Number(s):

3. Information about the Case in the Transferring State

A. [**Name of ward**] is currently under a court-ordered guardianship in [**county**] County, Texas. This state is called the "transferring state."

B. Name of the court the case is filed in: [**name of transferring court**] (*Example:* Probate Court No. [**number**], [**county**] County, Texas)

C. Case number: [**number**]

D. The guardianship is a [[full/limited] guardianship of the person] [and] [full/limited] guardianship of the estate]

4. Basis to Accept the Transfer

I have filed a **certified copy** of the transferring state's provisional order of transfer.

Include as applicable.

A certified copy of the Order Appointing Guardian, signed by the transferring state, is [included in or attached to the provisional order of transfer/filed separately or attached to this petition].

I am eligible to be appointed as a guardian in [**receiving state**]. I am over the age of twenty-one, of sound mind, and I have not been convicted of a felony or misdemeanor involving dishonesty, neglect, use of physical force, or other crime relevant to my functions as

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guardian, and I am otherwise suitable and eligible to be appointed guardian in the state of [**receiving state**].

I [do/do not] reside in [**receiving state**]. I have appointed a resident agent and filed the Designation of and Consent by In-State (Resident) Agent form.

Insert any additional information.

5. People Entitled to Notice

Name:

Address:

Relationship to Ward:

Repeat above for each person entitled to notice.

6. Financial Information

The approximate value and the description of the property owned by Ward are:

A. **Assets:**

1. Real Property: $[**amount**]
   State(s) Where Property Is Located: [**state(s)**]
   Stocks, Mutual Funds, and Bonds: $[**amount**]
2. Mortgages and Notes: $[**amount**]
3. Bank Accounts: $[**amount**]
4. Other Property: $[**amount**]
   Description of other property: [**describe property**]

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The total approximate value of assets is: $[**amount**]

Ward receives compensation, pension, insurance, and allowances as follows:

B. **Monthly Income:**

1. Social Security Benefits: $[**amount**]

2. Veterans' Benefits: $[**amount**]

3. State Assistance: $[**amount**]

4. Retirement Income: $[**amount**]

5. [**other source of income**]: $[**amount**]

List any other monthly sources of income and their amounts.

The total approximate monthly income is: $[**amount**]

7. Lay Guardian Training (if applicable)

Select as applicable.

The proposed guardian in [**receiving state**] has already completed lay guardian training. Evidence of successful completion of the training is attached to the petition or filed separately.

Or

(If the court grants the request, evidence of successful completion of the lay guardian training will not be required until later.)

I request an extension of up to ninety days after provisional appointment for the guardian to complete and file proof of completion of the training because [**insert reasons**].

Or

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The proposed [**receiving state**] guardian is not required to complete lay guardian training because he or she is [a certified professional guardian/a financial institution subject to the jurisdiction of the Texas Department of Banking and authorized to exercise trust powers/a federally chartered financial institution authorized to serve as guardian].

8. Relief Requested

I am asking the court to enter:

Select as applicable.

a. an order provisionally granting this Petition for [**receiving state**] to Accept a Guardianship from a Transferring State;

And/Or

b. an order directing the guardian to request the transferring state to issue a final order confirming the transfer to [**receiving state**] and terminating the guardianship in the transferring state;

And/Or

c. an order directing the court clerk to issue provisional Letters of Guardianship, upon filing an oath, for [full/limited] guardianship, which will expire ninety days after the date of the Provisional Order Granting Transfer of Guardianship to [**receiving state**];

And/Or

d. an order establishing the amount of the bond to be posted or requiring restricted accounts. I propose a bond of $[**amount**];

And/Or

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e. an order directing the proposed [**receiving state**] guardian to file proof of successful completion of [**receiving state**]'s lay guardian training [if applicable] before the court enters a final order accepting guardianship in [**receiving state**].

Continue with the following.

I declare under penalty of perjury under the laws of the state of [**receiving state**] that the facts I have provided on this form (including any attachments) are true. [I have attached [**number**] pages.]

Signed at (city and state): _____ Date: _____

_____ _____
Signature Printed Name

Lawyer (if any) for person filing this petition fills out below:

_____ _____ _____
Signature Printed Name Date

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Form 13-10

The Texas Estates Code does not indicate what must be included in a motion for provisional order transferring a ward except that a certified copy of all papers of the guardianship filed and recorded in the foreign court must be attached to the motion. This form is provided as an example only and should be modified as needed to conform to the facts of the particular case. See section 13.3:3 in this chapter.

[Caption. See § 3 of the Introduction in this manual.]

Motion for Provisional Order Transferring Ward, [name of ward], and Cause to [name of receiving court], [receiving county], [receiving state] Pending Final Transfer

[**Name of movant**], Movant, files this Motion for Provisional Order Transferring Ward, [**name of ward**], and Cause to [**name of receiving court**], [**receiving county**], [**receiving state**] Pending Final Transfer, and shows in support:

On [**date**], [**name of movant**] filed a petition for [**receiving state**] to accept this guardianship from [**county**] County, Texas, in which Movant requested the transfer of the guardianship of the [person/estate] of [**name of ward**] to [**county**] County, [**receiving state**].

Pursuant to state statute, [**receiving state**] requires the issuance of a provisional order transferring [**name of ward**] and this cause to [**receiving state**] in order for [**receiving state**] to proceed with acceptance of the ward and this cause.

Movant has attached the pleadings that have been filed in [**county**] County, [**state**] to this motion and requests that this Court issue a provisional order transferring [**name of ward**] and this cause to [**receiving state**].

Notice has been properly served on those persons required by the Texas Estates Code, and there has been no objection to the transfer of this proceeding to this Court.

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Movant respectfully requests that this Court find that the provisional transfer of this proceeding to this Court is in the best interest of [**name of ward**] and that this Court grant Movant any further relief that the Court may deem appropriate.

Respectfully submitted,

_____

[**Name**]
Attorney for Movant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach exhibits.

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Form 13-11

[Caption. See § 3 of the Introduction in this manual.]

Provisional Order Transferring Ward, [name of ward], and Cause to [name of receiving court], [receiving county], [receiving state]

On this day the Court considered the motion of [**name of guardian**], court-appointed permanent guardian of the person and estate for [**name of ward**], for the provisional transfer of [**name of ward**] and this guardianship proceeding to [**receiving county**] County, [**receiving state**].

The Court finds that a petition for [**receiving state**] to accept this guardianship proceeding has been filed in [**name of receiving court**], [**receiving county**], [**receiving state**], and further finds that this Court has been provided with a copy of this petition.

The Court further finds this Court previously entered an order approving the change of residence of [**name of ward**] to [**receiving county**] County, [**receiving state**]. [**Reference form 13-2 in this chapter**].

The Court further finds that [**receiving state**] has adopted the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act and that the [**name of receiving court**] requires the issuance of a certified copy of a provisional order of transfer in order for [**receiving state**] to receive this guardianship proceeding.

IT IS THEREFORE ORDERED that this cause is provisionally transferred to [**name of receiving court**], [**county**] County, [**receiving state**], as it is the intention of this Court to transfer the ward and this proceeding to [**receiving state**] pursuant to section 1253.051 of the Texas Estates Code to the [**name of receiving court**], which will have jurisdiction over these guardianship matters, on issuance of an order of receipt and acceptance by that Court.

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SIGNED on_____.

_____
JUDGE PRESIDING

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Form 13-12

This form is based on the form "GDN T 706: Provisional Order Granting/Denying Transfer of Guardianship or Conservatorship to Washington," with permission from the Washington Supreme Court's Pattern Forms Committee.

[**Name of receiving court**] Court of [**receiving state**], County of [**receiving county**]

In re Guardianship of: _____, Ward	No. _____ Provisional Order [Granting/Denying] Transfer of Guardianship to [**receiving state**]

Provisional Order [Granting/Denying] Transfer of Guardianship to [receiving state]

The Court finds as follows:

1. The guardian petitioned to transfer the guardianship from [**transferring county**] County, Texas to [**receiving state**].

2. The petitioner filed a certified copy of the [**name of transferring Texas court**]'s provisional order of transfer.

3. This Court held a hearing on [**date**].

4. Notice of this petition was given to those persons who would be entitled to notice if the petition were a petition for the appointment of a guardian or issuance of a protective order in both the transferring state and this state. The notice was given in a manner that complies with [**receiving state**]'s requirements.

Select one of the following.

5. There has not been an objection to the transfer.

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Or

5. There has been an objection to the transfer. The objector has not established that the transfer would be contrary to the interests of the ward.

Or

5. There has been an objection to the transfer. The objector has established that the transfer would be contrary to the interests of the ward.

Continue with the following.

6. The proposed guardian [is/is not] eligible to be appointed guardian in [**receiving state**].

Include the following if applicable.

7. The proposed guardian [has/has not] filed proof of successful completion of [**receiving state**]'s lay guardian training program.

Continue with the following.

8. This Court recognizes the guardianship order from [**county**] County, Texas.

9. This Court recognizes the determination of the ward's incapacity and the appointment of the guardian.

IT IS THEREFORE ORDERED that—

Select one of the following.

1. The motion is denied. The petition to transfer the guardianship is denied. This order does not affect the ability of the guardian to seek appointment as guardian in this state if this Court has jurisdiction to make an appointment other than by reason of the provisional order of transfer.

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Or

1. The motion is granted. The petition to transfer the guardianship is provisionally granted. The petitioner shall seek a final order to transfer the guardianship from [**county**] County, Texas. Not later than ninety days after issuance of a final order accepting transfer of a guardianship in [**receiving state**], the Court shall determine whether the guardianship needs to be modified to conform to [**receiving state**] law.

Select one of the following.

2. The court clerk shall issue provisional letters of guardianship for [full/limited] guardianship valid until [**date**] to [**name**] upon the filing of an oath, any bond required in the paragraph below, and Designation of and Consent by In-State (Resident) Agent, if the guardian or limited guardian resides outside the state.

Or

2. Letters of guardianship in [**receiving state**] shall not issue until the [**name of receiving state court**] enters a final order appointing a guardian in this state.

Select one of the following.

3. There will be no bond. This is a guardianship only.

Or

3. [Guardianship/Conservatorship] bond is set in the amount of $[**amount**].

Or

3. Bond is waived.

Or

3. Bond shall be reviewed at review of inventory.

Include if applicable.

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4. The guardian shall have access to all accounts.

Or
Repeat paragraph as applicable.

4. The following account is blocked and no funds may be withdrawn, and the guardian shall file a receipt of funds into the blocked account with the court no later than thirty days from the date of this order: [**list account**].

Include any additional orders.

Dated: _____ _____
Judge/Court Commissioner

Presented by:

_____ _____
Signature of Guardian Printed Name

_____ _____
Signature of Attorney Printed Name

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Form 13-13

This form is based on the form "GDN T 707: Motion for Final Order Accepting Transfer to Washington," with permission from the Washington Supreme Court's Pattern Forms Committee.

[**Name of receiving court**] Court of [**receiving state**], County of [**receiving county**]

In re Guardianship of: _____, Ward	No. _____ Motion for Final Order Accepting Transfer to [**receiving state**]

Motion for Final Order Accepting Transfer to [receiving state]

I am the guardian of a ward in [**county**] County, Texas. The [**name of court**] in [**county**] County, Texas has confirmed transfer to [**receiving state**] and terminated the guardianship in Texas. I ask this Court to enter a final order accepting transfer of the guardianship to [**receiving state**] and enter an order appointing [**name of guardian**] as guardian of the ward in [**receiving state**].

1. I previously filed a petition for [**receiving state**] to accept a guardianship from [**county**] County, Texas. The Court granted that petition and entered a provisional order accepting transfer to [**receiving state**].

2. The Court in [**county**] County, Texas has entered a final order confirming transfer to [**receiving state**] and terminating the guardianship in Texas. **I have attached or filed a certified copy of that final order.**

Attach form 13-4 in this chapter.

3. I filed an Acceptance of Appointment and am qualified to act as guardian under [**receiving state**] law.

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4. I have notified all parties who would be entitled to notice of a guardianship petition.

Attach a separate declaration of service to show this.

I ask this Court to grant the petition and appoint a guardian in this state.

Insert any additional requests of the court.

I declare under penalty of perjury under the laws of [**receiving state**] that the facts I have provided on this form (including any attachments) are true. [I have attached [**number**] pages.]

Signed at (city and state): _____ Date: _____

_____ _____
Signature Printed Name

Lawyer (if any) for person filing this petition fills out below:

_____ _____ _____
Signature Printed Name Date

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Form 13-14

This form is based on the form "GDN T 708: Final Order Accepting Transfer to Washington," with permission from the Washington Supreme Court's Pattern Forms Committee.

[**Name of receiving court**] Court of [**receiving state**], County of [**receiving county**]

In re Guardianship of: _____, Ward	No. _____ Final Order Accepting Transfer to [**receiving state**]

Final Order Accepting Transfer to [receiving state]

The Court finds as follows:

1. The guardian has filed a Petition for [**receiving state**] to Accept a Guardianship from [**county**] County, Texas, and this Court entered an order provisionally granting the transfer.

2. This Court received a certified copy of the final order confirming transfer to [**receiving state**] and terminating the guardianship in [**county**] County, Texas.

Attach form 13-4 in this chapter.

3. Notice has been provided to all necessary parties.

IT IS THEREFORE ORDERED that—

1. This Court grants the Motion for a Final Order Accepting Transfer to [**receiving state**]. This Court accepts transfer of the guardianship to this Court's jurisdiction under [**receiving court's UAGPPJA jurisdiction statute**].

2. [**Name of guardian**] is appointed guardian by separate Order Appointing Guardian that the Court entered on this date.

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Dated: _____

_____
Judge/Court Commissioner

Presented by:

_____ _____
Signature of Guardian Printed Name

_____ _____
Signature of Attorney Printed Name

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Form 13-15

[Caption. See § 3 of the Introduction in this manual.]

Application for Appointment of Nonresident Guardian of Nonresident Ward's Estate

Pursuant to sections 1252.051–.055 of the Texas Estates Code, [**name of nonresident guardian**], Applicant, makes this Application for Appointment of Nonresident Guardian for the estate of [**name of nonresident ward**], Ward, and in support of the Application shows the following:

1. On [**date**], the Honorable [**name of judge**], judge of the [**name of foreign court**] of [**county**] County, [**state**], in Cause No. [**cause number**] found [**nonresident ward**] to be an incapacitated person and appointed [**name of nonresident guardian**] to be the guardian of the person and of the estate of [**name of nonresident ward**], who qualified by posting a corporate surety bond in the amount of $[**amount**].

2. [**Name of nonresident ward**] is a resident of [**county**] County, [**state**], and resides at [**address, city**].

3. [**Name of nonresident ward**] is without a guardian of [his/her] estate in Texas and appointment of a guardian is necessary as [he/she] owns real property in this county, which is located at [**address, city, county**] County, Texas, and is described and valued as [**legal description and valuation of property**].

4. Applicant seeks the appointment as nonresident guardian of the estate to (a) facilitate the sale of [**name of nonresident ward**]'s real property located at [**address, city, county**] County, Texas, in order to generate funds for the support, use, and benefit of [**name of nonresident ward**] and (b) conserve the estate. Applicant alleges that the property is liable to waste or will deteriorate in value, resulting in an expense and disadvantage to the

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estate. Furthermore, the value of the estate may diminish if a responsible party is not appointed to safeguard and conserve the estate assets. Applicant believes it would be in the best interest of [**name of nonresident ward**] for nonresident guardian to be appointed to assist in properly securing and managing Ward's estate.

5. Applicant is a proper and qualified person to act as such guardian in Texas and is entitled to receive the appointment for the reasons alleged in this Application and by virtue of its serving as guardian and conservator of the incapacitated person in the state of [**foreign state**], as reflected by the attached transcript, and not being otherwise disqualified to receive letters of guardianship. Certified copies of the complete transcript of the [**foreign state**] proceeding have been filed with this Court as required by Texas Estates Code section 1252.051.

6. Applicant files with this Application a designation of resident agent appointing [**name of Texas resident agent**], a resident of this county and state, as resident agent for [**name of nonresident guardian**] as guardian and conservator of the estate of [**name of nonresident ward**] and to accept service of process in all actions or proceedings with respect to the estate.

Applicant prays that a nonresident guardianship be created on the basis of the authenticated copies of the foreign proceedings; that [**name of nonresident guardian**] be appointed guardian of the estate of [**name of nonresident ward**], an incapacitated person, in the state of Texas, without the issuance of any notice or citation of any character; that applicant be authorized to sell and convey title to the above-described real property, and accept and collect the proceeds from the sale; and that the Court issue such other orders as may be appropriate or proper.

Respectfully submitted,

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_____

[**Name of attorney**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

By:

_____

[**Name of Texas attorney**]
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach exhibits.

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Form 13-16

[Caption. See § 3 of the Introduction in this manual.]

Order Appointing Nonresident Guardian of Nonresident Ward's Estate

On [**date**], the Court considered the Application for Appointment of Nonresident Guardian of Nonresident Ward's Estate.

The Court, having read the Application and having received and reviewed the transcripts of the proceeding in Cause No. [**number**] that found [**name of nonresident ward**], Ward, to be an incapacitated person and appointed [**name of nonresident guardian**] to be the guardian of the estate of [**name of nonresident ward**] without bond and limitation, hereby enters the following findings of fact:

1. This Court has jurisdiction and venue to appoint a permanent guardian of the estate of [**name of nonresident ward**].

2. [**Name of nonresident ward**] has been adjudicated as an incapacitated person by the [**name of foreign court**].

3. It is in the best interest of [**name of nonresident ward**] and [his/her] estate to have the Court appoint [**name of nonresident guardian**] as guardian of the estate of [**name of nonresident ward**] in this county for the limited purpose of liquidating certain real property located in [**county**] County, Texas, generally described as [**address, city, county**] County, Texas, and is described and valued as [**legal description and valuation of property**].

4. [**Name of nonresident guardian**] has previously qualified as guardian of the estate of [**name of nonresident ward**] in the [**foreign state**] proceeding and is eligible to act as and to be appointed guardian of the estate of [**name of nonresident ward**] pursuant to sections 1252.051–.055 of the Texas Estates Code.

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5. [**Name of nonresident ward**]'s property will be protected by the appointment of a nonresident guardian of the estate.

6. [**Name of nonresident guardian**] has filed an appointment of resident agent as required by section 1252.052 of the Texas Estates Code.

7. All other requirements of sections 1252.051–.055 of the Texas Estates Code have been satisfied.

IT IS ORDERED that

1. [**Name of nonresident guardian**] is hereby appointed permanent guardian of the estate of [**name of nonresident ward**] and is hereby granted the following specific duties and powers to act in Ward's behalf:

   a. The power to manage, maintain, repair or insure property, real, personal, or mixed, tangible or intangible, or any interest therein owned by [**name of nonresident ward**] in [**county**] County, Texas.

   b. The power to liquidate, with prior permission from the Court, [**name of nonresident ward**]'s real and personal property located in [**county**] County, Texas, and, on approval by the Court, transfer the proceeds of sale to the [**foreign state**] proceeding.

2. The guardian of the estate appointed is ordered to swear an oath that it will faithfully discharge the duties of guardian of the estate of Ward.

3. The guardian of the estate shall give good and adequate corporate surety bond in the amount of $[**amount**] as is conditioned by law.

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4. On the guardian of the estate's filing its oath and approval of the guardian's bond as is required, the clerk of the Court shall issue to the guardian of the estate letters of guardianship.

5. The guardian of the estate shall file an inventory and appraisement of the estate of [**name of nonresident ward**] located in [**county**] County, Texas, and otherwise comply with all applicable provisions of the Texas Estates Code with respect to the handling and settlement of estates by resident guardians.

SIGNED on_____.

_____
JUDGE PRESIDING

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Chapter 14
Final Accounts and Closing Guardianships

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Chapter 14

Final Accounts and Closing Guardianships

§ 14.1 Closing Guardianship

§ 14.1:1 Closing Estate

A guardianship of an estate of a ward is settled and closed if—

1. a minor ward dies or becomes an adult by becoming eighteen years old, by removal of disabilities of minority according to Texas law, or by marriage;
2. an incapacitated ward dies or is restored to full legal capacity;
3. the spouse of a married ward is qualified as the community survivor and the ward owns no separate property;
4. the estate of a ward becomes exhausted;
5. the foreseeable income accruing to a ward or to his estate is so negligible that maintaining the guardianship in force would be burdensome (see section 14.1:2 below for further discussion of closing an estate with negligible income);
6. all the assets of the estate have been placed in a management trust under Texas Estates Code chapter 1301 or have been transferred to a pooled trust subaccount in accordance with a court order issued as provided by chapter 1302, and the court determines that a guardianship of the ward's estate is no longer necessary;
7. the court determines that the ward has sufficient capacity with supports and services to care for himself and to manage his property;
8. a minor's estate consists only of cash or cash equivalents in an amount of $100,000 or less, in which case the guardianship may be terminated, the assets paid to the county clerk of the county in which the guardianship was pending, and the funds managed by the clerk as provided by chapter 1355 of the Estates Code;
9. all the ward's assets are placed in a Texas Achieving a Better Life Experience (ABLE) account; or
10. the court determines for any other reason that a guardianship for the ward is no longer necessary.

Tex. Est. Code §§ 1204.001(b), (d), 1202.001(b)(2), 1202.003.

If any of the above situations exists, the guardian should prepare a verified account for final settlement (see section 14.2 below) setting out the specific reason that the guardianship should be settled and closed. *See* Tex. Est. Code §§ 1204.001, 1204.051, 1204.052, 1204.101, 1204.102, 1204.108. See form 14-1 in this chapter.

§ 14.1:2 Closing Estate with Negligible Income

In the case of negligible income, the court may authorize the income to be paid to a parent or other person acting as guardian, to assist as far as possible in the maintenance of the ward, and without any liability for future accountings as to the income. *See* Tex. Est. Code § 1204.001(b)(6), (c).

Circumstances resulting in negligible income generally occur when a guardian is at the end of a "spend-down" strategy in order to qualify the ward for nursing home Medicaid.

Practice Pointer: Counsel for the guardian should be aware of a number of considerations well before this point:

1. An application should be made for a preneed funeral plan to be purchased by the guardian while sufficient funds ($4,000–$5,000) are on hand. See chapter 12 in this manual for a discussion on purchasing a preneed funeral plan that will not be considered a resource for Medicaid purposes.
2. A realistic estimate of the fees and expenses necessary to wind down the guardianship of the estate must be made so that an application for fees may be made while a reserve that will cover their payment still exists.
3. While Texas Estates Code section 1157.103 gives first priority for claims arising from expenses of administration (including attorney's fees), there must be sufficient funds remaining in order to cover these expenses.

§ 14.1:3 Appointing Attorney Ad Litem to Represent Ward

In the settlement or closing of a guardianship, the court may appoint an attorney ad litem to represent the ward's interests in the final settlement with the guardian if the ward is deceased and there is no executor or administrator of the ward's estate, the ward is a nonresident, or the ward's residence is unknown. The court will allow the attorney ad litem reasonable compensation out of the ward's estate for services provided. Tex. Est. Code § 1204.002. Chapter 6 in this manual deals with the appointment of an attorney ad litem to represent the interests of the ward.

§ 14.1:4 Payment of Certain Expenses and Debts

In *In re Estate of Glass*, 961 S.W.2d 461 (Tex. App.—Houston [1st Dist.] 1997, no writ), the court restated the holding of *Easterline v. Bean*, 49 S.W.2d 427, 428 (Tex. 1932), in which the Supreme Court of Texas declared that "it has long been the public policy of this state that, when a ward dies, the probate court loses jurisdiction of the guardianship matter, save and except that the guardianship shall be immediately settled and closed, and the guardian discharged." The court in *Easterline* ordered that the guardianship be terminated under section 745 of the Texas Probate Code (now Texas Estates Code section 1204.001) and ordered the guardian to deliver the property of the deceased ward to the personal representative of the deceased ward's estate or other person entitled to the property. However, the Estates Code does give the guardian the power to take limited actions after the death of the ward. The guardian may make funeral arrangements and pay for the funeral and all other debts subject to court approval. Tex. Est. Code § 1204.051. When there is a proceeding to declare the heirs of the deceased ward, the court may order the guardian to pay the taxes and expenses of administering the ward's estate and to sell property of the ward's estate in order to pay taxes and expenses of administering the estate or to distribute among the heirs. Tex. Est. Code § 1204.052.

§ 14.2 Final Account

§ 14.2:1 Time for Filing

When the guardianship of an estate is required to be settled and closed, the guardian must prepare and submit an account for final settlement to the court. Tex. Est. Code § 1204.101. In addition to the final account, the final report of a guardian of the

person must be filed not later than the sixtieth day after the date on which the guardianship is required to be settled. Tex. Est. Code § 1204.108(b). For a list of situations requiring a guardianship to be closed, see section 14.1:1 above.

§ 14.2:2 Contents

The Texas Estates Code requires that specific categories be reported in the account for final settlement, including—

1. the property, rents, revenues, and profits received by the guardian and belonging to the ward during the term of the guardianship;
2. the disposition made of the property, rents, revenues, and profits, if any;
3. expenses or debts against the estate remaining unpaid, if any;
4. the property of the guardianship that remains in the hands of the guardian, if any;
5. payment by the guardian of all required bond premiums;
6. the tax returns the guardian has filed during the guardianship;
7. the amount of taxes the ward owed during the guardianship that the guardian has paid;
8. a complete account of the taxes the guardian has paid during the guardianship, including the amount of the taxes, the date the guardian paid the taxes, and the name of the governmental entity to which the guardian paid the taxes;
9. a description of all current delinquencies in the filing of tax returns and the payment of taxes and a reason for each delinquency; and
10. other facts necessary for a full understanding of the exact condition of the guardianship.

Tex. Est. Code § 1204.102.

The guardian must verify the final account and include vouchers supporting each item not previously reported to the court. A detailed description of every transaction during the guardianship administration is not necessary. It is sufficient simply to refer to the inventory already on file and to incorporate that and all other pleadings on file, including annual accounts and pleadings relating to approved sales, expenditures, or any other transactions on behalf of the guardianship into the final account. Thus, any detailed statement of facts and figures in the account for final settlement should relate only to those items not previously reported to the court. Tex. Est. Code § 1204.102. Unlike annual accounts, the account for final settlement does not require a verification of funds for the deposit accounts reported in such final account. This is because the person entitled to receive the funds is served with a copy of the account for final settlement and will verify the funds are present when such recipient signs the receipt.

Usually, the account for final settlement includes a statement by the guardian that the remaining assets should be delivered to the person or persons legally entitled to receive them. The guardian is obligated to deliver the property of a deceased ward to the personal representative of the ward's estate or other person entitled to it. Tex. Est. Code § 1204.108(a).

Form 14-1 in this chapter is an account for final settlement. The final account should include a request for attorney's fees for the attorney representing the guardian or the guardian's estate. However, the application for and order approving payment of any appointee's fees by the court must be filed separately from the final account. Forms 14-2 and 14-3 are a final report for guardian of the person only and the corresponding order discharging the guardian of the person. See forms 6-19 and 6-20 for

an application and order to pay appointee's fees. The final account should also request that the final fees awarded to the guardian, in a separate application and order, be paid before the remaining assets are delivered.

The final report of a guardian of the person must be sworn to and state the reason the guardianship was terminated and to whom the ward's property that was in the guardian's possession was delivered. Tex. Est. Code § 1204.108(b).

§ 14.2:3 Citation

One of the following forms of citation is required when the account for final settlement is filed unless waiver of service is authorized (see form 14-4 in this chapter).

1. If a ward is age fourteen or older, a resident of Texas, and his address is known, he shall be cited by personal service. Tex. Est. Code § 1204.105(c)(1).
2. If the ward is deceased and an executor or administrator other than the guardian has been appointed for the estate, the executor or administrator shall be cited by personal service. Tex. Est. Code § 1204.105(c)(2), (e).
3. If the ward's residence is unknown, if he is a nonresident of Texas, or if he is deceased and no representative for the estate has been appointed and has qualified in Texas, citation shall be by publication. However, citation by posting is required if directed by written court order. Tex. Est. Code § 1204.105(c)(3).

Many courts make citation by posting a mandatory requirement; the attorney should check with the county clerk in the attorney's county for local practice.

§ 14.2:4 Court Action

After citation has been returned, the court will examine the final account and all accompanying vouchers, hear all evidence in support of the account and all objections, if any, to any portion of the account, and audit and settle the account. Tex. Est. Code § 1204.106. If the court approves the final account, it will enter an appropriate order (see form 14-5 in this chapter). Tex. Est. Code § 1204.152. Included in that order will be authority for the guardian to (1) deliver any remaining property to the ward or to any person legally entitled to receive the property and (2) pay any unpaid debts or expenses. Tex. Est. Code § 1204.109. If there is no property remaining in the hands of the guardian at the time of the hearing, the order will discharge the guardian and his surety and close the estate. Tex. Est. Code § 1204.151.

If there is any property remaining in the estate for the guardian to deliver, he should deliver the property to any person legally entitled to receive it (see section 14.2:5 below) and obtain a signed receipt or other evidence of delivery from each recipient (see form 14-6). After the guardian has fully administered the estate, the guardian should then file an application to close the estate and discharge guardian (see form 14-7). Following that, the estate will be closed, the guardian will be discharged from his trust, and the guardian's surety will be relieved of his obligations under the bond. Tex. Est. Code §§ 1105.159, 1204.152. See forms 14-8 through 14-10.

§ 14.2:5 Delivery of Remaining Assets

The remaining assets are to be delivered to the ward, the personal representative of the ward's estate if the ward is deceased and one has been appointed, or any other person legally entitled to receive the assets, such as a trustee of a guardianship man-

agement trust created for the ward or the county clerk as provided by chapter 1355 of the Texas Estates Code. Tex. Est. Code § 1204.109.

§ 14.2:6 Heirship

In some instances it may be appropriate for the guardian to seek to determine the deceased ward's heirs. For example, the ward may have died intestate without any debts and with a modest estate. A probate court in which the guardianship is pending may determine the heirs if the ward dies intestate and no administration is pending. Tex. Est. Code § 33.004(b). The heirship proceeding brought under section 33.004(b) may not be brought in the guardianship proceeding but must be brought as a separate action in the court in which the guardianship is pending. Tex. Est. Code § 33.004(b).

§ 14.3 Refund of Bond

§ 14.3:1 Refund of Cash Bond

If a cash bond has been delivered to the court, a motion to release the guardian's cash bond should be filed with the probate court after orders approving the final account and authorizing the payment of all expenses, attorney's fees, and the guardianship fee are entered. The probate judge will enter an order releasing the cash bond. Tex. Est. Code § 1105.159. See forms 14-9 and 14-10 in this chapter.

§ 14.3:2 Refund of Surety Bond Premium

A copy of the order granting the guardian's discharge should also be forwarded to the bonding company with a request for refund of any unused premium. Many times if the guardianship is closed early in the year, part of the premium is refundable.

Form 14-1

[Caption. See § 3 of the Introduction in this manual.]

Account for Final Settlement

[**Name of guardian**], Guardian, guardian of the estate of [**name of ward**], Ward, [[a/an] [partially] incapacitated person/a minor child], files this Account for Final Settlement in accordance with sections 1204.001 and 1204.102 of the Texas Estates Code and shows the Court the following:

1. Guardian was appointed personal representative of the estate of Ward on [**date**]. Since that time, Guardian has administered this guardianship in accordance with the provisions of the Texas Estates Code.

Select one of the following. If using the first option, proceed to paragraph 3. Otherwise, skip to paragraph 4.

2. The guardianship of the estate of Ward should be settled and closed because Ward died on [**date**].

Or

2. The guardianship of the estate of Ward should be settled and closed because Ward became an adult by [becoming eighteen years of age/removal of disabilities/marriage] on [**date**].

Or

2. The guardianship of the estate of Ward should be settled and closed because Ward was restored to full legal capacity on [**date**].

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2. The guardianship of the estate of Ward should be settled and closed because the spouse of Ward qualified as the community administrator on [**date**], and Ward owns no separate property.

Or

2. The guardianship of the estate of Ward should be settled and closed because the estate of Ward has become exhausted.

Or

2. The guardianship of the estate of Ward should be settled and closed because the foreseeable income accruing to Ward or to their estate is so negligible that maintaining the guardianship in force would be burdensome.

Or

2. The guardianship of the estate of Ward should be settled and closed because all the assets of the estate have been placed in a management trust under chapter 1301 of the Texas Estates Code or have been transferred to a pooled trust subaccount in accordance with a court order issued as provided by chapter 1302 of the Texas Estates Code, and the Court has determined that a guardianship for Ward is no longer necessary.

Or

2. The guardianship of the estate of Ward should be settled and closed because the Court has determined that a guardianship of Ward's estate is no longer necessary.

Select one of the following if applicable.

3. Ward is deceased, and no personal representative of the estate has been appointed in Texas. Citation of the estate by [publication/posting] is necessary, in accordance with section 1204.105 of the Texas Estates Code.

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3. Ward is deceased and [**name of representative**] was appointed personal representative of the estate on [**date**] by order of the [**designation**] Court of [**county**] County, Texas, in Cause No. [**number**], styled "[**style of case**]." The personal representative is a person other than Guardian and it is expected that [he/she] will sign a waiver of citation and notice after receiving a copy of this final account.

Continue with the following.

4. This Account for Final Settlement covers the period from [**date**] through [**date**] and is accompanied by proper vouchers in support of each item not previously reported to the Court. The total value of the estate at the beginning of this accounting period was $[**amount**], as shown on the [inventory/account] filed by Guardian on [**date**].

Select one of the following.

5. No claims against the estate have been presented to Guardian during this accounting period.

Or

5. The following is a list of claims paid during the period of this account: [**list claims, state whether allowed or rejected, and if they have been paid**].

Select one of the following.

6. All property belonging to the estate that has come into the possession or to the attention of Guardian has previously been listed and inventoried in the pleadings, accounts, and reports filed with this Court, to which reference is hereby made for all purposes.

Or

6. The following is a list of property belonging to the estate that has come into the possession or to the attention of Guardian during the term of the guardianship and has not been previously listed and inventoried in the pleadings, accounts, and reports filed with this

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Court, to which reference is hereby made for all purposes: [**list property or assets owned by the estate that the guardian has not previously disclosed to this court in pleadings, etc.**].

Select one of the following.

7. There have been no changes in the property belonging to the estate that have not been previously reported to the Court.

Or

7. The following changes in property belonging to the estate have occurred during the period covered by this account: [**specify changes, including change in value (unrealized gain/loss) of noncash assets**].

Continue with the following.

8. The following is a complete list of revenues and income received by Guardian for the benefit of Ward during the period covered by this account: [**list income**].

9. The following is a complete list of all disbursements of cash [**include if applicable:** other than payment of claims shown in paragraph 5. above] made by Guardian for the benefit of Ward during the period covered by this account: [**list disbursements**].

10. The following is a description of all property, other than cash assets, remaining in the hands of Guardian: [**describe property**].

11. The cash remaining in the hands of Guardian is located in the following deposit accounts as evidenced by an official letter from each depository attached to this account: [**list name and address of each depository, account number(s), and balance(s) of each account**].

12. The following assets of this estate are deposited subject to [court order/safekeeping order], as evidenced by an official letter from each depository attached to this account:

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[**list name and address of each depository, account number(s), and balance(s) of each account**].

13. The following is a summary and reconciliation of the foregoing paragraphs of this account:

A. Changes in Estate

Paragraph 4: Value of assets at the beginning of the accounting period:	$[**amount**]
Paragraph 5: Total claims paid:	$[**amount**]
Paragraph 6: Property not previously reported:	[**specify**]
Paragraph 7: Net change in value of assets:	$[**amount**]
Paragraph 8: Total receipts:	$[**amount**]
Paragraph 9: Total disbursements:	$[**amount**]
TOTAL NET VALUE OF ESTATE:	$[**amount**]

B. Assets Remaining in Estate:

Paragraph 10: Total noncash assets being administered:	$[**amount**]
Paragraph 11: Total cash on hand:	$[**amount**]
Paragraph 12: Assets [held by court order/in safekeeping]:	$[**amount**]
TOTAL NET VALUE OF ESTATE:	$[**amount**]

14. The following debts and expenses of the estate have not been paid and are currently owed by the estate: [**specify, e.g.:** The estate is indebted to Guardian, [**name of guard-**

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ian], for commission in accordance with section 1155.002 of the Texas Estates Code/The estate is indebted to [**name of attorney**] for attorney's fees and expenses in accordance with section 1155.054 of the Texas Estates Code in the amount of $[**amount**]].

15. After payment of the debts and expenses described above, the estate properly remaining in the hands of Guardian and in safekeeping should be delivered to the following person, who is legally entitled to receive it: [**name and address of heir or personal representative**].

16. Since the date of qualification of Guardian, the physical welfare and well-being of Ward have been as follows: [**specify**].

Guardian requests that citation and notice be issued and served as required by law; that after hearing, the Court audit, settle, and approve this account and order Guardian to pay the outstanding debts and expenses of the estate and deliver the property remaining on hand to the person legally entitled to receive it; and that on distribution of the property as ordered and the filing of proper receipts therefor, the Court enter an order discharging Guardian from their trust as guardian of the estate of Ward and releasing the surety on Guardian's bond from further liability.

Respectfully submitted,

_____

[**Name**]
Guardian

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[**Name**]
Attorney for Guardian
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Guardian's Affidavit

BEFORE ME, the undersigned authority, on this day personally appeared [**name of affiant**], who swore on oath that the following facts are true:

"I am Guardian in the foregoing Account for Final Settlement. I have personal knowledge of the allegations and facts stated in it, and the contents and exhibits are true, complete, and correct.

"This account contains a correct and complete statement of the matters pertaining to the estate of Ward. The bond premium on this estate has been paid.

Select one of the following.

"No tax returns have been filed on behalf of Ward."

Or

"Guardian has filed the following tax returns on behalf of Ward: [**specify**]. [Guardian has paid the following taxes owed by Ward during the guardianship: [**specify amount, date paid, and governmental entity paid**]."/There are no taxes currently owed by Ward."]

Or

"The following tax returns are delinquent in filing: [**specify amount, date due, and reason for delinquency**]."

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Continue with the following.

_____

[**Name of affiant**]
Affiant

SIGNED under oath before me on _____.

_____

Notary Public, State of Texas

Attach exhibit(s).

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Form 14-2

[Caption. See § 3 of the Introduction in this manual.]

Final Report on Location, Condition, and Well-Being of Ward and Application to Discharge Guardian

[**Name of guardian**], Guardian, guardian of the person of [**name of ward**], Ward, [[a/an] [partially] incapacitated person/a minor child], files this Final Report on Location, Condition, and Well-Being of Ward for the period [**date**] through [**date**] pursuant to section [1163.101/ 1163.103] of the Texas Estates Code and respectfully shows the Court the following:

Guardian informs this Court that Ward died on [**date**]. A copy of Ward's death certificate is attached as Exhibit [**exhibit number/letter**] and incorporated by this reference.

Guardian requests that the Court discharge Guardian due to the termination of the guardianship.

Guardian prays that this Court acknowledge this Final Report and order it to be entered of record, discharge [**name of guardian**] as guardian of the person of [**name of ward**], and grant such further relief to which Guardian may be entitled.

Respectfully submitted,

_____

[**Name**]
Attorney for Guardian
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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BEFORE ME, the undersigned authority, on this day personally appeared [**name of guardian**], guardian of the person of [**name of ward**], [a/an] [partially] incapacitated person, who being first duly sworn, states on oath that the foregoing final report is a true, correct, and complete statement of the present location, condition, and well-being of [**name of ward**], [a/an] [partially] incapacitated person, as of this date.

_____
[**Name**]
Guardian

SIGNED under oath before me on _____.

_____
Notary Public, State of Texas

Attach exhibit(s).

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Form 14-3

[Caption. See § 3 of the Introduction in this manual.]

Order Acknowledging Review of Final Report and Discharging Guardian

On [**date**] the Court considered the Final Report on Location, Condition, and Well-Being of Ward of [**name of guardian**], guardian of the person of [**name of ward**], [[a/an] [partially] incapacitated person/a minor child]. It appears to the Court that the guardianship has terminated and that [**name of guardian**] has discharged their duty to report on the location, condition, and well-being of [**name of ward**].

IT IS THEREFORE ORDERED that the Final Report on Location, Condition, and Well-Being of Ward filed by [**name of guardian**], guardian of the person of [**name of ward**], [[a/an] [partially] incapacitated person/a minor child], is hereby entered of record, and [**name of guardian**] is discharged as guardian of the person.

SIGNED on _____.

_____
JUDGE PRESIDING

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Form 14-4

Waiver of Notice and Citation

I, [**name of personal representative**], executor of the estate of [**name of deceased**], have received a copy of the Account for Final Settlement that [will be/has been] filed in this case, and waive the issuance and service of citation to appear and answer that pleading.

SIGNED on _____.

_____
[**Name of personal representative**]

SIGNED under oath before me on _____.

_____
Notary Public, State of Texas

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Form 14-5

[Caption. See § 3 of the Introduction in this manual.]

Order Approving Account for Final Settlement

On [**date**] the Court considered the Account for Final Settlement of this guardianship filed by [**name of guardian**], guardian of the estate of [**name of ward**], Ward, [[a/an] [partially] incapacitated person/a minor child]. After examining the final account and the vouchers accompanying the final account and hearing the evidence in support of the final account, the Court finds as follows:

1. Citation has been duly served on all persons interested in this estate.

2. This Court has jurisdiction of the proceeding and of the subject matter as required by law.

3. The final account has been filed and exhibited for the time required by law, satisfactory evidence has been presented as to the status of the assets of this estate, and the final account appears to comply with the provisions of the Texas Estates Code and should be approved as filed.

4. This Court has been fully advised that Ward [became an adult by [becoming eighteen years of age/removal of disabilities of minority/marriage] on [**date**]/died on [**date**]/was restored to full legal capacity on [**date**]], and there is no further need for a guardianship.

5. The property remaining in the hands of [**name of guardian**] should be delivered to those persons entitled by law to receive the property.

Select from the following as appropriate.

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6. [There are no expenses or debts against the estate that remain unpaid./There are [**describe debt or expense, i.e.,** property taxes still due], and the liability for the unpaid claim will be passed on to [Ward/the personal representative of this estate/[**specify other person legally responsible**].]

7. [This final account should be approved as filed./This final account should be approved and an administration has been opened in the estate of [**name of ward**], the will having been admitted to probate in the [**designation**] court of [**county**] County, Texas, and [**name of executor**] has been appointed independent executor of the estate of [**name of ward**].]

Continue with the following.

IT IS ORDERED that the Account for Final Settlement is approved, that any debts and expenses remaining unpaid be paid, and that all the property belonging to the estate and still remaining in the hands of [**name of guardian**] after payment of all debts and expenses be delivered to [**name of heir or personal representative**].

IT IS FURTHER ORDERED that [**name of depository**] release and deliver to [**name of guardian**] all the assets belonging to the estate and remaining in possession of that institution in safekeeping, including deposits, dividends, and interest in account number [**number**].

IT IS FURTHER ORDERED that when the remaining property is distributed to the person named above and proper receipts are filed with this Court, [**name of guardian**] apply to this Court for an Order Closing Estate and Discharging Guardian, declaring that this guardianship is closed.

SIGNED on _____.

_____
JUDGE PRESIDING

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Form 14-6

Receipt and Release

The undersigned acknowledges receipt of the following property in full and complete satisfaction of that portion of the estate of [**name of ward**] to which the undersigned is entitled:

Description	Amount
1. Real Property	
2. Stocks, Bonds & Securities	
3. Mortgages, Notes, and Cash	
4. Insurance Payable to Estate	
5. Jointly Owned Property	
6. Miscellaneous Property	
Total	

Include the following if applicable.

All the above-described real and personal property of [**name of ward**]'s estate is reflected in [**name of guardian**]'s final account approved by this Court on [**date**].

This receipt is also intended to be a FULL AND COMPLETE release of [**name of guardian**], as guardian of the estate, and all other persons acting for or on behalf of them and the estate of [**name of ward**], including, but not limited to, individuals, fiduciaries, administra-

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tors, trustees, agents, heirs, assigns, attorneys, legal representatives, and accountants, with respect to any or all past or future claims or demands which the undersigned recipient may have with respect to the assets in the guardianship of the same.

SIGNED on _____.

_____

[**Name of recipient**]
[**Address**]
[**Telephone**]

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Form 14-7

[Caption. See § 3 of the Introduction in this manual.]

Application to Close Estate and Discharge Guardian

This Application to Close Estate and Discharge Guardian of the estate of [**name of ward**] is filed by [**name of applicant**], Applicant, who furnishes the following information to the Court:

1. This Court has previously entered its Order Approving Account for Final Settlement of this estate and has ordered Applicant to deliver the property remaining on hand after payment of debts and expenses to those persons entitled to receive that property, as identified in the final account.

2. Applicant has fully complied with the order, and there is no property of this estate remaining in the hands of Applicant. The signed receipts of the persons who have received the property are attached to this application.

Applicant requests that the Court enter an order discharging Applicant from their trust, discharging Applicant's principal and surety on their bond from further liability, and declaring this guardianship of the estate to be closed.

Respectfully submitted,

_____

[**Name**]
Guardian

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_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Include attachment(s).

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Form 14-8

[Caption. See § 3 of the Introduction in this manual.]

Order Closing Estate and Discharging Guardian

On [**date**] the Court considered the Application to Close Estate and Discharge Guardian filed by [**name of applicant**], guardian of the estate of [**name of ward**]. After reviewing the application and supporting receipts, the Court finds that [[**name of ward**] has reached the age of majority/[**name of ward**] died on [**date**]/[**name of ward**] is no longer an incapacitated person as of [**date**]]; the Account for Final Settlement has previously been approved; that the guardian of the estate has distributed all the property of the estate remaining after the payment of all debts and expenses; that this estate has now been fully administered, and there is no property remaining on hand for distribution; and that this guardianship should be closed.

IT IS ORDERED that [**name of applicant**], guardian of the estate, is discharged from this guardianship; that [**name of surety**], the surety on the bond of [**name of guardian**], is hereby discharged from further liability under the bond; and that this guardianship of the estate is hereby closed.

IT IS FURTHER ORDERED that no additional bond shall be required of the guardian at this time.

SIGNED on _____.

_____
JUDGE PRESIDING

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APPROVED AS TO FORM:

_____

[**Name**]
Attorney for Guardian
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

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Form 14-9

[Caption. See § 3 of the Introduction in this manual.]

Motion to Release Guardian's Cash Bond

This Motion to Release Guardian's Cash Bond is filed under section 1105.159 of the Texas Estates Code by [**name of movant**], Movant, guardian of the [person/estate/person and estate] of [**name of ward**], who shows the Court the following:

Movant has fully complied with the orders of this Court and has filed [his/her] final report of the guardian of the [person/estate/person and estate].

Movant filed [his/her] cash bond in the amount of $[**amount**] on [**date**], in accordance with this Court's order of [**date**], and attaches a copy of the receipt and a notice to judge of deposit into registry of court of cash in lieu of corporate bond as Exhibit [**exhibit number/letter**].

Movant requests this Court to release the cash bond held in the registry of the Court, along with all interest, to [**name of movant**] in care of the law firm of [**name of firm**] at [**address, city, state**] or its agents.

Movant, guardian of the [person/estate/person and estate] of [**name of ward**], prays that this Court order the clerk of [**county**] County to release the cash bond in the amount of $[**amount**], along with all interest, to [**name of movant**] in care of the law firm of [**name of firm**] at [**address, city, state**] or its agents.

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_____

[**Name**]
Attorney for Movant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Attach exhibit(s).

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Form 14-10

[Caption. See § 3 of the Introduction in this manual.]

Order Releasing Guardian's Cash Bond

On [**date**] the Court considered the Motion to Release Guardian's Cash Bond filed by [**name of movant**], Movant, guardian of the [person/estate/person and estate] of [**name of ward**], [[a/an] [partially] incapacitated person/a minor child]. The Court finds that—

1. Movant has faithfully performed their duties as guardian;

2. the guardianship has been administered in accordance with the laws of the state of Texas and the Texas Estates Code;

3. all orders of this Court relating to Movant's trust as guardian have been in all respects fully complied with by Movant; and

4. the guardianship has been closed.

IT IS ORDERED that the clerk of [**county**] County shall release from the registry of the Court the cash bond in the amount of $[**amount**], along with all interest, to [**name of movant**] in care of the law firm of [**name of firm**] at [**address, city, state**] or its agents.

SIGNED on _____.

_____
JUDGE PRESIDING

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Chapter 15

Compliance, Show-Cause Order, Removal, and Reinstatement

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Chapter 15

Compliance, Show-Cause Order, Removal, and Reinstatement

§ 15.1 Scope of Chapter

When a guardian or the guardian's attorney fails to comply with guardianship procedures outlined in the Texas Estates Code, the court must take steps to bring the guardian into compliance. Usually, a deadline will have been inadvertently overlooked, which can be easily remedied. However, in some cases a guardian's noncompliance is more serious, and the court has a duty to require the guardian to correct the error, or the court must remove the guardian and appoint a new guardian to do so. Examples of serious misconduct requiring court intervention include misapplication or mismanagement of the ward's funds, an insufficient or defective bond, removing the ward from the state without court permission, and theft of the ward's assets. This chapter discusses compliance requirements for guardians and the methods the court may apply to ensure a guardian's compliance.

§ 15.2 Compliance

Every guardian must meet a number of statutory requirements in order to qualify and continue to serve as a guardian. The requirements vary depending on whether the guardian is serving as guardian of the person, estate, or both. At each stage of the guardianship process, failure to comply with the statutory requirements can result in being cited to attend show-cause hearings, removal, and various penalties and fines. Texas Estates Code chapter 1105 sets out the requirements that must be met to qualify as a guardian. *See* Tex. Est. Code §§ 1105.002–.257. The most common types of guardians' failures to comply with the law are discussed below.

§ 15.2:1 Requirement to Qualify

Texas Estates Code section 1105.051 addresses the required oath or declaration, and section 1105.101 requires, with limited exceptions, that all non-corporate guardians of the person or estate post a bond in order to qualify. *See* Tex. Est. Code §§ 1105.051, 1105.101. It is a guardian's responsibility to care for and manage the ward's estate as a prudent person would manage that person's property. The guardian's bond is to ensure the guardian's careful performance of this duty and to protect the ward from loss because of any waste or mismanagement caused by the guardian. *Rodriguez v. Gonzales*, 830 S.W.2d 799, 801 (Tex. App.—Corpus Christi–Edinburg 1992, no writ). The guardian must take an oath and give bond within twenty-one days of being appointed; otherwise the court may remove the guardian without notice. *See* Tex. Est. Code §§ 1105.003, 1203.051(a)(1). *See also Thedford v. White*, 37 S.W.3d 494, 497 (Tex. App.—Tyler 2000, no pet.) (trial court's removal of guardian without hearing, where guardian failed to file oath and bond, did not violate removed guardian's due-process rights).

§ 15.2:2 Requirement to File Inventory and Appraisement

Texas Estates Code section 1154.051 requires that a guardian of the estate file an inventory and appraisement not later than the thirtieth day after qualification as guardian. The inventory and appraisement is critical to confirm the initial assets to be accounted for during administration and that the bond is adequate. The guardian must file the inventory and appraisement within thirty days of appointment as guardian or is subject to removal without notice. *See* Tex. Est. Code §§ 1154.051,

1203.051(a)(2). A guardian's failure to timely file the inventory may cause the following additional penalties to be imposed: (1) liability for costs and fees incurred due to the removal process and (2) a $1,000 fine. *See* Tex. Est. Code §§ 1155.152, 1163.151.

§ 15.2:3 Requirement to Notify Creditors

The guardian must provide various notices by qualified delivery method to creditors by certain deadlines. *See* Tex. Est. Code § 1153.003.

Within four months after receiving letters, the guardian must give notice—

1. to secured creditors, and
2. to persons having an outstanding claim for money against the ward if the guardian has actual knowledge of the claim.

Tex. Est. Code § 1153.003.

If another person appointed as guardian or formerly appointed as guardian has given notice required under Texas Estates Code section 1153.001 or 1153.003, then the guardian of the estate is not required to give such notice. *See* Tex. Est. Code § 1153.005.

If a guardian fails to give the required notice, the guardian and the surety on the guardian's bond are liable for any damages any person suffers because of the guardian's neglect, unless it appears that such person had notice otherwise. Tex. Est. Code § 1153.005(b).

§ 15.2:4 Requirement to Apply for Monthly Allowance

If a monthly allowance was not decreed in the court's order appointing the guardian, the guardian of the estate must file an application requesting a monthly allowance within thirty days of the date the guardian qualified or by the date specified by the court. Tex. Est. Code § 1156.001(a), (b). The application must request a monthly allowance to be spent from the income and corpus of the ward's estate for the ward's education and maintenance and for the maintenance of the ward's property. Tex. Est. Code § 1156.001(a). Typically, the expenses in a monthly allowance are those that recur on a monthly or quarterly basis.

§ 15.2:5 Requirement to Collect Claims and Recover Property; Duty of Care

A guardian is to use ordinary diligence to collect all claims and debts of the estate or ward, if there is a reasonable prospect of collecting the claims or recovering the property. Tex. Est. Code § 1151.105(a). A guardian who willfully neglects to use ordinary diligence is liable, along with the guardian's surety, for the loss suffered by the estate because of the guardian's negligence. Tex. Est. Code § 1151.105(b). The guardian is to manage the estate as a prudent person would manage the person's own property, except as otherwise provided in the Texas Estates Code. Tex. Est. Code § 1151.151(a).

§ 15.2:6 Requirement to File Annual Report of Person

The guardian of the person is required to file a sworn annual report with the court detailing the ward's current condition, supports and services the ward receives or has received, and in what way the ward's condition has changed, if at all, in the previ-

ous year. Tex. Est. Code § 1163.101. If the guardian of the person fails to file the required report, on the court's own motion the guardian will be cited to appear and show why the report should not be filed. Tex. Est. Code § 1203.052(a)(2). Unless good cause is shown, the court may revoke the letters of guardianship, fine the guardian an amount not to exceed $1,000, or both. Tex. Est. Code § 1163.151.

§ 15.2:7 Requirement to File Annual Accounting

The guardian of the estate, who is often the same person as the guardian of the person, is required to file an annual account each year not later than the sixtieth day after the anniversary of the guardian's qualification date. Tex. Est. Code §§ 1163.001, 1163.002. The account should enumerate the claims made against the estate and how they have been treated, describe the property that has come into the guardian's knowledge or possession, list the changes in the ward's property that have not been previously reported, and include a complete list of receipts, disbursements, and property that is still being administered by the guardian. Tex. Est. Code § 1163.001. The guardian of the estate is required to file this accounting each year until the estate is closed. Tex. Est. Code § 1163.002. If the guardian of the estate fails to file the required account, on the court's own motion the guardian will be cited to appear and show why the account should not be filed. Tex. Est. Code § 1203.052(a)(2). The penalty for failure to file the annual accounting is the same as that for failure to file the annual report, which is discussed at section 15.2:6 above. *See* Tex. Est. Code § 1163.151.

§ 15.2:8 Requirement to Post New Bond

The court may require the guardian to post a new bond if, among other things, the bond amount is insufficient. *See* Tex. Est. Code § 1105.251(a). This often occurs after review of an annual accounting and sale of certain assets. A person interested in the guardianship may file a motion to increase the guardian's bond if the bond is insufficient or defective. Tex. Est. Code § 1105.251(b). If the court becomes aware that the bond is insufficient or has other problems, the court must either enter an order without notice, requiring the guardian to give a new bond, or without delay cite the guardian to show cause why the guardian should not be required to give a new bond. Tex. Est. Code § 1105.252(1). If required to give a new bond, the guardian must do so within the time specified by the court, or the guardian will be subject to removal without notice. *See* Tex. Est. Code § 1203.051(a)(3). It is the court's duty to annually examine the condition of the ward's estate and to determine the sufficiency of the guardian's bond, and to require the guardian to increase the bond if the current bond is not ample security to protect the ward's estate. *See Heyn v. Massachussetts Bonding & Insurance Co.*, 110 S.W.2d 261, 265 (Tex. App.—Dallas 1937, writ dism'd). The court is to impose fines for contempt of court, assess damages on a guardian and the guardian's surety for nonperformance of the guardian's duties, and remove a guardian who fails to give a bond as required by law. *Heyn*, 110 S.W.2d at 265.

§ 15.2:9 Requirement to File Final Account

When a guardianship ends, whether because the ward is restored, a minor ward reaches the age of majority, the ward dies, or because of another event prescribed by law, an account for final settlement must be filed by the guardian of the estate. Tex. Est. Code § 1204.001. The guardian of the estate must account for all financial transactions that have occurred since the most recent annual account, pay whatever debts or taxes are due, and distribute any remaining assets. Tex. Est. Code § 1204.102. Failure to file the final accounting will likely result in the guardian's being cited to appear and present the account within the time specified in the citation. Tex. Est. Code § 1204.201. If the guardian fails to file the final accounting and deliver the prop-

erty to the proper person, the person may file a complaint against the guardian and have the guardian cited to appear and deliver the assets. Tex. Est. Code § 1204.202. See section 15.2:11 below regarding the guardian's failure to deliver the assets.

§ 15.2:10 Requirement to Close Guardianship of Person

Within sixty days of a ward's death, the guardian must file an affidavit notifying the court of the termination of the guardianship of the person. *See* Tex. Est. Code § 1204.108.

§ 15.2:11 Requirement to Close Guardianship of Estate

Once the court approves the final accounting, the guardian must deliver any remaining estate property to the rightful owners as ordered by the court. Tex. Est. Code § 1204.202. Failure to timely deliver the property as ordered subjects the guardian to liability for damages at a rate of 10 percent of the amount of the appraised value of the money or estate withheld, per month, for each month the property is withheld. Tex. Est. Code § 1204.202.

§ 15.2:12 Failure to File Final Account and No Complaint Filed

If a written complaint has not been filed by anyone interested in the guardianship, on or after the third anniversary of the date the minor ward reached majority or the ward died, whichever is applicable, the court may remove the estate from its active docket without a final account or appointing a successor guardian. Tex. Est. Code § 1204.201(b).

§ 15.3 Show-Cause Order

"Show cause" is not defined in the Texas Estates Code. However, *Black's Law Dictionary* defines a show-cause order as "[a]n order directing a party to appear in court and explain why the party took (or failed to take) some action or why the court should or should not impose some sanction or grant some relief." *See Black's Law Dictionary* 1272 (10th ed. 2014). When a show-cause order is issued, the guardian has the burden of proof to explain his action or inaction. The Estates Code provides a number of instances in which a guardian of either the person or estate might be cited and required to appear to explain his actions. This process can be initiated by the court or by an interested party seeking an explanation of the actions taken by the guardian. Because of the potential consequences of a show-cause order, including removal of the guardian, money damages, and in extreme cases imprisonment, when the order is issued the guardian is required to be personally served to provide due process.

§ 15.3:1 Common Instances Where Show-Cause Orders Issued

To protect the ward's health, safety, and finances, a guardian must take certain actions to ensure that the court is made aware of the guardian's activities and the status of the ward's person and estate. The guardian must file an oath and post bond, timely file an inventory, submit the proper annual reports and accountings, post a new bond if necessary, and, when the guardianship has ended or the service of the guardian has concluded, file a final accounting and deliver the guardianship assets to the proper person. A guardian who fails to take these actions may be subject to a show-cause order. See discussion at section 15.3 above.

§ 15.3:2 Other Instances Where Show-Cause Orders Issued

There are other, less common instances in which a court may issue a show-cause order against a guardian.

Transfer of Guardianship: When a guardian or any other person files an application to transfer a guardianship to a different county, citation will issue and the sureties on the bond and the guardian will be cited to appear and show cause why the application should not be granted. Tex. Est. Code §§ 1023.003–.004.

Additional Inventory and Appraisement or List of Claims: Any interested party may file a written complaint that property or claims were omitted from the filed inventory, appraisement, and list of claims. In that case, the guardian will be cited by personal service to appear and show cause why the omissions were made and why the guardian should not be required to amend the inventory. Tex. Est. Code § 1154.102.

Bond Required from Guardian Otherwise Exempt: If the guardian of the estate was not initially required to post a bond, and if a claimant files a proper complaint, the court must issue citation and require the guardian to show cause why the guardian should not be required to post a bond. Tex. Est. Code § 1105.103. If required, the bond must be—

(1) in an amount sufficient to protect the guardianship and guardianship's creditors;

(2) approved by and payable to the judge; and

(3) conditioned that the guardian:

  (A) will well and truly administer the guardianship; and

  (B) will not waste, mismanage, or misapply the guardianship estate.

Tex. Est. Code § 1105.103(e). Failure to give the bond as required will result in the court's removing the guardian without notice. Tex. Est. Code § 1105.103(f).

Authority of Guardian to Engage in Certain Borrowing: A guardian may file a proper application for authority to mortgage or pledge guardianship property by deed of trust or as security for an indebtedness under section 1151.202 of the Texas Estates Code. The clerk will issue and post citation, and interested persons will be required to appear and show cause why the application should not be granted. Authorized purposes for the creation of such indebtedness include the payment of taxes (either ad valorem or income taxes), payment of expenses of administration, payment of an allowed and approved claim, the renewal or extension of an existing lien, an improvement or repair to the ward's real estate under certain conditions, the purchase of a residence for the ward or the ward's dependents, or funeral expenses or expenses of last illness for the ward. Tex. Est. Code § 1151.201.

Liability for Nonpayment of Claims: If a guardian fails to pay on demand a claim that the court orders to be paid and the estate has sufficient assets to pay the claim, the court may cite the guardian and the sureties on the guardian's bond to show cause why the guardian or sureties should not be held liable for payment of the debt, interest, costs, or damages resulting from the failure to timely pay the debt. Tex. Est. Code § 1157.108.

Failure to Apply for Sale: If a guardian fails to apply to sell guardianship property to pay charges and claims against the estate that have been allowed and approved or established by suit, an interested party may file an application and have the guardian cited to appear and show cause why the sale of certain property should not be ordered. Tex. Est. Code § 1158.601.

Complaint for Failure to Rent: An interested party may file a sworn complaint and have the guardian cited to appear and show cause why the guardian did not rent property of the guardianship estate. Tex. Est. Code § 1159.005.

Application to Show Cause for Failure to Lease Minerals: Any interested party may require the guardian to be cited and appear to show cause why the guardian did not enter into a lease or other mineral agreement. Tex. Est. Code § 1160.251.

Guardian's Failure to Invest: If a guardian fails to invest or properly invest the property of the guardianship estate, the court on its own motion or on the motion of an interested party may issue citation and require the guardian to show cause why the property was not invested or was not invested properly. Tex. Est. Code § 1161.007(a). The court may appoint a guardian ad litem to represent the ward at a show-cause hearing for the limited purpose of determining the ward's best interest with respect to the investment of the ward's property. Tex. Est. Code § 1161.007(e).

Guardian's Failure to File Annual Report or Annual Accounting: As stated at sections 15.2:6 and 15.2:7 above, the guardian of the person is required to file an annual report, and the guardian of the estate is required to file an annual accounting. If the guardian of either the person or estate fails to comply, the court may issue citation and require the guardian to show cause why such documents were not filed. Tex. Est. Code § 1163.151.

§ 15.4 Removal

Texas Estates Code sections 1203.051 and 1203.052 provide for the removal of a guardian by the court or at the request of an interested person, with or without notice, depending on the circumstances requiring the removal of the guardian. *See* Tex. Est. Code §§ 1203.051, 1203.052. The supreme court shall ensure that courts with jurisdiction over a guardianship immediately notify the Judicial Branch Certification Commission of the removal of a guardian. Tex. Gov't Code § 155.151.

§ 15.4:1 Removal Without Notice

Texas Estates Code section 1203.051 provides for the removal of a guardian by the court or at the request of an interested person, with or without notice to and service of citation on the guardian, depending on the circumstances requiring the removal. A guardian may be removed without notice if the guardian—

1. fails to qualify;
2. fails to timely file an inventory;
3. fails to timely give a new bond;
4. is absent from the state for three months at one time without court permission or removes from the state;
5. cannot be served, evades service, cannot be found, or is a nonresident of the state without a resident agent to accept service;
6. neglects to educate or maintain the ward as liberally as the ward's means and the condition of the ward's estate permit;
7. misapplies, embezzles, or removes from the state estate assets or is about to do any of these acts; or
8. engages in conduct with respect to the ward that would be considered to be abuse, neglect, or exploitation, as those terms are defined by Texas Human Resources Code section 48.002.

Tex. Est. Code § 1203.051(a). Removal without notice for the last two reasons must be found on the basis of clear and convincing evidence given under oath. Tex. Est. Code § 1203.056(a). The burden to prove sufficient grounds is on the party seeking the guardian's removal. *Youngs v. Choice*, 868 S.W.2d 850, 853 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

§ 15.4:2 Removal with Notice

If a removal action cannot be prosecuted without notice because it does not meet the requirements of Texas Estates Code section 1203.051, a removal action with notice may be instituted by the court on its own motion or by the complaint of an interested person. Tex. Est. Code § 1203.052. The guardian must be given personal citation of the reason, time, and place of the hearing for removal. Tex. Est. Code §§ 1203.052, 1203.053. Service on the attorney of record will not comply with the Code, and, without personal service, the court's removal order would be void. *See Wetsel v. Estate of Perry*, 842 S.W.2d 374, 375 (Tex. App.—Waco 1992, no writ). The burden to prove sufficient grounds is on the party seeking the guardian's removal. *Youngs v. Choice*, 868 S.W.2d 850, 852 (Tex. App.—Houston [14th Dist.] 1993, writ denied). A guardian may be removed with notice if—

1. sufficient grounds appear to support the belief that the guardian has misapplied, embezzled, or removed property committed to the guardian's care from the state or is about to do so;
2. the guardian fails to file any account or report required by law;
3. the guardian fails to obey court orders with respect to the guardian's duties;
4. the guardian is proved to be guilty of gross misconduct or gross mismanagement in the performance of the guardian's duties;
5. the guardian becomes incapacitated, is sentenced to the penitentiary, or is otherwise incapable of performing the guardian's duties;
6. the guardian engages in conduct with respect to the ward that would be considered to be abuse, neglect, or exploitation, as those terms are defined by Texas Human Resources Code section 48.002;
7. the guardian neglects to educate or maintain the ward to the extent that the ward's estate and the ward's ability or condition permit;
8. the guardian interferes with the ward's progress or participation in community programs;
9. the guardian fails to be certified as required by subchapter G, chapter 1104, of the Estates Code;
10. the court determines that, because of the dissolution of the joint guardians' marriage, the termination of the guardians' joint appointment and the continuation of only one of the joint guardians as the sole guardian is in the best interest of the ward; or
11. the guardian would be ineligible for appointment under subchapter H, chapter 1104, of the Estates Code.

Tex. Est. Code § 1203.052(a).

If there is probable cause to believe that a guardian is an incapacitated person, a court may, on the court's own motion or on complaint of an interested person, appoint an attorney ad litem to represent the ward's interests and a court investigator or guardian ad litem to investigate whether the guardian should be removed. If the court determines it is necessary, the court may appoint the necessary physicians to examine the guardian to determine whether the guardian is an incapacitated person for purposes of removal of the guardian. Tex. Est. Code § 1203.052(c).

Upon complaint of the Judicial Branch Certification Commission, the court may, with notice, remove a guardian who would be ineligible for appointment under subchapter H, chapter 1104, of the Estates Code because of the guardian's failure to maintain the certification required under subchapter F, chapter 1104. Tex. Est. Code § 1203.052(b).

The court is not prevented from finding grounds other than those provided by the Estates Code to justify the removal of a guardian. *See Haynes v. Clanton*, 257 S.W.2d 789, 791 (Tex. App.—El Paso 1953, writ dism'd by agr.) (trial court's removal of personal representative of decedent for unsuitability due to adverse interest was upheld in decedent's estate). The laws and rules governing estates of decedents apply to guardianships, to the extent applicable and not inconsistent with other provisions of the Estates Code. Tex. Est. Code § 1001.002. Thus, it can be argued that case law governing decedents' estates can also be applied to guardianship matters.

If costs are incurred because a guardian is removed for cause, the guardian and the surety on the guardian's bond are liable for any costs of removal and other additional costs incurred that are not authorized expenditures, as well as reasonable attorney's fees incurred in removing the guardian. Tex. Est. Code § 1155.152. A guardian removed for cause is not entitled to reimbursement of the attorney's fees incurred by the guardian in defending against the removal. *Henderson v. Viesca*, 922 S.W.2d 553, 560–62 (Tex. App.—San Antonio 1996, writ denied).

If there is a necessity, the court may immediately appoint a successor guardian without citation or notice and withhold the discharge of the prior guardian and his sureties until the removed guardian's final account is approved. In addition, the court may order the removed guardian to immediately turn over the ward's estate to the successor on qualification. Tex. Est. Code §§ 1203.055, 1203.102.

An order removing a guardian is a final appealable order, rather than a matter for mandamus relief. *In re Webster*, No. 05-15-00945-CV, 2015 WL 4722306 (Tex. App.—Dallas Aug. 10, 2015, no pet.).

§ 15.4:3 Order of Removal

The order must state the actual cause of removal. Tex. Est. Code § 1203.053(1). The order must also direct that any letters of guardianship issued to the person who is removed shall be surrendered, if the removed guardian has been personally served with citation, and all the letters be canceled of record. Tex. Est. Code § 1203.053(2). The order must also require the removed guardian to deliver the guardianship assets in the removed guardian's possession to the person entitled to the property, typically the person who has been appointed and qualified as the successor guardian. Tex. Est. Code § 1203.053(3)(A). The order must also order the removed guardian to relinquish control of the ward's person. Tex. Est. Code § 1203.053(3)(B).

§ 15.5 Limited Rights to Seek Reinstatement

A guardian who is removed under Texas Estates Code section 1203.051(a)(6)(A) or (B) may file an application for reinstatement no later than thirty days after the date the court signs the order of removal. Tex. Est. Code § 1203.056(b). On the filing of the application, the clerk must issue notice in compliance with Estates Code section 1203.056(c). The court must hold a hearing on the application as soon as practicable but no later than sixty days from the date of the removal order. Tex. Est. Code § 1203.056(e). If, at the conclusion of the hearing, the court is satisfied by a preponderance of the evidence that the applicant did not engage in the conduct that directly led to the guardian's removal, the court shall set aside any order appointing a successor representative and shall enter an order reinstating the guardian. Tex. Est. Code § 1203.056(e). In the order, the court may also order the successor to file a final account. Tex. Est. Code § 1203.056(f).

§ 15.5:1 Removal of Joint Guardian

If a joint guardian is removed, the other joint guardian may continue to serve as the sole guardian unless removed for a reason. Tex. Est. Code § 1203.057. Dissolution of the joint guardians' marriage is not a cause for removal of a joint guardian. Tex. Est. Code § 1203.057.

Form 15-1

[Caption. See § 3 of the Introduction in this manual.]

Application for Turnover Order

[**Name of applicant**], temporary guardian of the estate of [**name of ward**], Ward, an incapacitated person, files this Application for Turnover Order and shows the Court the following:

1. Petitioner is [**name of applicant**], the temporary guardian of this estate, having qualified as such on [**date**]. As such, Petitioner is a person interested in this estate. Petitioner may be served with citation and notice by and through his attorney of record, [**name of attorney**], [**address of attorney**]. [**Name of respondent**], Respondent, may be served with citation at [**address of respondent**].

2. [**Name of guardian ad litem**], guardian ad litem of Ward, may be served with citation and notice at [**address of guardian ad litem**].

3. [**Name of attorney ad litem**], attorney ad litem of Ward, may be served with citation and notice at [**address of attorney ad litem**].

4. There is currently a guardianship action pending in Cause No. [**number**], styled "[**style of case**]," in the [**designation**] Court of [**county**] County, Texas. Petitioner would show the Court that there was not sufficient time to apply to the Court before instituting this action for permission to incur costs and attorney's fees because of the nature of the relief requested and because of the potential for continued damage to Ward's property and estate. Petitioner respectfully requests that the Court ratify, approve, and further authorize Petitioner, as temporary guardian, to proceed and incur further and additional attorney's fees and costs as may be necessary to bring this matter to conclusion, including appeals if necessary. Petitioner would show the Court that there is a reasonable prospect of recovery of property and that it is in the best interests of this estate to proceed.

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> Modify the following as applicable to fit the facts and circumstances surrounding the property in question.

5. Ward is the owner of certain real and personal property located at [**address of property**], [**county**] County, Texas [**zip code**]. Specifically, Ward is the sole owner of the following personal property: [**list property**].

6. The property in question is currently in the possession and control of Respondent at [**address of property**]. Further, Petitioner would show the Court that Respondent has failed and refused to allow Petitioner, as temporary guardian of the estate, or Petitioner's agents to enter the premises to retrieve the property of Ward. Respondent has actual knowledge of the appointment of Petitioner as temporary guardian and specifically knows that the temporary guardian has exclusive authority to take possession of the property of Ward.

7. Petitioner would show the Court that on [**date**], Petitioner made formal demand on Respondent for all property belonging to Ward to be turned over to Petitioner. Petitioner would show the Court that Respondent has failed and refused to disclose or deliver all such property and is hiding, secreting, and causing damage to and devaluation of assets belonging to Ward.

> Specify facts as applicable relating to the respondent's possession of and refusal to return property.

Petitioner requests the Court to ORDER [**name of respondent**] to immediately deliver and turn over to Petitioner, as temporary guardian, the property described above, as well as any other property belonging to Ward.

8. It is necessary, in order to protect the interests of Ward, to specifically authorize and empower any peace officer in the state of Texas, and in particular the constable of precinct [**designation**], [**county**] County, Texas, to enter the premises located at [**address of property**], **BY FORCE, IF NECESSARY, AND WITHOUT NOTICE TO ANY**

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OCCUPANTS, and specifically allow the temporary guardian to take possession of and remove from the premises the above-described property AND all other property belonging to Ward.

Include the following if applicable and modify as appropriate to conform to the facts of the case.

9. At all times material hereto, Respondent was acting in a fiduciary capacity with respect to Ward and owed the duties of a fiduciary to Ward. Petitioner would show the Court that the actions of Respondent were willful, intentional, and intended to damage Ward and/or Ward's estate. Further, such actions were in breach of the fiduciary duties owed by Respondent to Ward and/or Ward's estate. It was necessary for Petitioner to incur reasonable attorney's fees and costs of court to preserve and protect Ward's estate, for which such fees and costs Petitioner requests the Court enter judgment against Respondent. Further, Petitioner requests the Court enter judgment against Respondent for all actual damages which may be shown, as a result of the devaluation, spoilage, or waste of assets belonging to Ward. Further, Petitioner requests the Court enter judgment against Respondent, and any persons acting in active concert with him, for punitive or exemplary damages.

Petitioner prays that citation issue as required by law to Respondent and upon hearing; that this Court order Respondent to fully disclose and turn over all property and assets belonging to Ward; that this Court specifically authorize and empower any peace officer of the state of Texas, and in particular the constable of precinct [**designation**], [**county**] County, Texas, to enter the premises located at [**property address**], BY FORCE AND WITHOUT NOTICE TO ANY OCCUPANTS, and to secure and allow the property of Ward described above to be taken by the temporary guardian; that judgment be entered against Respondent for actual damages, punitive damages, attorney's fees, and costs of court; and for such other and further relief in law or in equity to which Petitioner may be entitled.

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Respectfully submitted,

_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

VERIFICATION

STATE OF TEXAS)

COUNTY OF [**county**])

BEFORE ME, the undersigned notary public, on this day personally appeared [**name**], who being by me duly sworn on [his/her] oath deposed and said that [he/she] has read the above and foregoing [**title of document**] [and exhibits] and that the matters contained therein are within [his/her] personal knowledge and are true and correct.

_____

SWORN TO AND SUBSCRIBED BEFORE ME on _____.

_____
Notary Public, State of Texas

Certificate of Service

I certify that a true copy of this [**title of document**] was served in accordance with rule 21a of the Texas Rules of Civil Procedure.

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SIGNED on _____.

_____

[**Name of attorney**]

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Form 15-2

[Caption. See § 3 of the Introduction in this manual.]

Turnover Order

On this day the Application for Turnover Order filed by [**name of applicant**], Applicant, was presented to the Court. On considering the evidence and the agreement of the parties, the Court finds and concludes that the property of [**name of ward**], Ward, should be preserved and protected and makes the following findings and orders:

1. In order for Applicant to discharge the duties of temporary guardian of the estate of Ward, it is necessary for Applicant to be in possession of all property and records belonging to Ward.

2. Applicant is entitled to an Order for the delivery of all property and records belonging to Ward as requested, for the reason that the property and records are not exempt from attachment, execution, or any other type of seizure for the satisfaction of liabilities and cannot be readily attached or levied on by ordinary legal process.

IT IS THEREFORE ORDERED that [**name of respondent**], and all other persons in active concert with him, or persons with possession or control over assets belonging in any manner to [**name of ward**], shall immediately turn over ALL such property and assets to [**name of applicant**], as temporary guardian of the estate of [**name of ward**], pending further orders of this Court. Delivery of the items shall occur on or before [**time**] on [**date**], by delivery to [**address**]. [**Name of applicant**], as temporary guardian of the estate of [**name of ward**], or [**name of applicant**]'s attorney of record, shall give a proper receipt for all items delivered, and [**name of applicant**], as temporary guardian of the estate of [**name of ward**], shall maintain possession and control of the property pending further orders of this Court.

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IT IS FURTHER ORDERED that any peace officer in the state of Texas, and in particular the constable of precinct [**designation**], [**county**] County, Texas, is specifically authorized and empowered to enter the premises located at [**address of property**], **BY FORCE, IF NECESSARY, AND WITHOUT NOTICE TO ANY OCCUPANTS,** and specifically allow the temporary guardian to take possession of and remove from the premises the above-described property AND all other property belonging to [**name of ward**].

SIGNED on _____.

_____
JUDGE PRESIDING

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Form 15-3

[Caption. See § 3 of the Introduction in this manual.]

Motion to Remove Guardian

[**Name of applicant**], Applicant, guardian ad litem for [**name of ward**], Ward, an incapacitated person, files this Motion to Remove Guardian and shows the following in support:

1. It has come to Applicant's attention that [**name of respondent**], guardian of the [person/estate/person and estate] of Ward, [**specify grounds for removal under the Texas Estates Code**].

2. Applicant requests that this Court, pursuant to section [**number**] of the Texas Estates Code, [immediately and without notice/upon notice and hearing], remove [**name of respondent**] as guardian of the [person/estate/person and estate] of Ward, and immediately appoint a suitable person or entity as successor guardian of the [person/estate/person and estate].

WHEREFORE, Applicant hereby respectfully requests that this Court [immediately and without notice/issue notice as required and] remove [**name of respondent**] as guardian of the [person/estate/person and estate] of [**name of ward**], and immediately appoint a suitable person or entity as successor guardian of the [person/estate/person and estate], and that Applicant have all other and further relief to which he may be justly entitled.

Respectfully submitted,

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_____

[**Name**]
Attorney for Applicant
State Bar No.:
[**Email address**]
[**Address**]
[**Telephone**]
[**Telecopier**]

Certificate of Service

I certify that a true copy of this [**title of document**] was served in accordance with rule 21a of the Texas Rules of Civil Procedure.

SIGNED on _____.

_____

[**Name of attorney**]

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Form 15-4

[Caption. See § 3 of the Introduction in this manual.]

Order Removing Guardian and Appointing Successor Guardian of the [Person/Estate/Person and Estate]

This Court, having considered the Motion to Remove Guardian filed by [**name of movant**], guardian ad litem for [**name of ward**], Ward, as well as the affidavits and arguments of counsel, finds, based on clear and convincing evidence, that—

1. Ward has previously been found by the Court to be an incapacitated person;

List any grounds requiring proof by clear and convincing evidence as applicable under Tex. Est. Code § 1203.051(a)(6).

Include the following as appropriate depending on the facts of the case, and modify paragraph numbers depending on the number of grounds listed above, if any.

2. a continued necessity exists for the appointment of a guardian of the [person/estate/person and estate] of Ward, and it is in the best interest of Ward that a successor guardian be appointed for his [person/estate/person and estate];

3. the rights of [Ward/Ward's property/Ward and Ward's property] will be protected by the appointment of a successor guardian of his [person/estate/person and estate].

The Court finds, based on a preponderance of the evidence, that—

1. this Court has jurisdiction and venue to appoint a guardian of the person and estate of Ward;

2. notice has been properly served on those persons required by the Texas Estates Code;

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3. Ward was not present in Court, but was represented by his attorney ad litem;

List grounds for removal as applicable.

Repeat the following as needed if more than one successor guardian will be appointed, and modify paragraph number(s) depending on number of grounds for removal listed above, if any.

4. [**name of successor guardian**] is eligible to act as successor guardian of the [person/estate/person and estate] and is a proper person to be appointed guardian of the [person/estate/person and estate] of Ward.

IT IS THEREFORE ORDERED that [**name of respondent**] is hereby REMOVED from serving as guardian of the [person/estate/person and estate], and all letters of guardianship previously issued to [**name of respondent**] shall be surrendered and are canceled, and that [**name of respondent**] shall immediately turn over to the successor guardian of Ward's estate all assets of Ward's estate in his possession.

The following paragraphs should be modified as appropriate if the same person is appointed as successor guardian of both the estate and person or eliminated if not applicable.

IT IS FURTHER ORDERED that [**name of proposed successor guardian**] is appointed as successor to [**name of respondent**], and that on the execution of a personal surety bond in the amount of $[**amount**], and when the successor guardian of the person has qualified according to law, the clerk of this Court shall issue letters of guardianship to [**name of proposed successor guardian**], who shall have the same powers and authority as previously granted to the guardian of the person.

Include any additional powers as necessary under the specific circumstances.

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IT IS FURTHER ORDERED that [**name of proposed successor guardian**] is appointed as successor to [**name of respondent**], and that on the execution of a corporate surety bond in the amount of $[**amount**], and when the successor guardian of the estate has qualified according to law, the clerk of this Court shall issue letters of guardianship to [**name of proposed successor guardian**], who shall have the same powers and authority as previously granted to the guardian of the estate.

Include any additional powers as necessary under the specific circumstances.

SIGNED on _____.

_____
JUDGE PRESIDING

NOTICE TO ANY PEACE OFFICER OF THE STATE OF TEXAS: YOU MAY USE REASONABLE EFFORTS TO ENFORCE THE RIGHT OF A GUARDIAN OF THE PERSON OF A WARD TO HAVE PHYSICAL POSSESSION OF THE WARD OR TO ESTABLISH THE WARD'S LEGAL DOMICILE AS SPECIFIED IN THIS ORDER. A PEACE OFFICER WHO RELIES ON THE TERMS OF A COURT ORDER AND THE OFFICER'S AGENCY ARE ENTITLED TO THE APPLICABLE IMMUNITY AGAINST ANY CIVIL OR OTHER CLAIM REGARDING THE OFFICER'S GOOD FAITH ACTS PERFORMED IN THE SCOPE OF THE OFFICER'S DUTIES IN ENFORCING THE TERMS OF THIS ORDER THAT RELATE TO THE ABOVE-MENTIONED RIGHTS OF THE COURT-APPOINTED GUARDIAN OF THE PERSON OF THE WARD. ANY PERSON WHO KNOWINGLY PRESENTS FOR ENFORCEMENT AN ORDER THAT IS INVALID OR NO LONGER IN EFFECT COMMITS AN OFFENSE THAT MAY BE PUNISHABLE BY CONFINEMENT IN JAIL FOR AS LONG AS TWO YEARS AND A FINE OF AS MUCH AS $10,000.

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Mental Health and Involuntary Commitment

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Chapter 16

Mental Health and Involuntary Commitment

§ 16.1 Scope of Chapter

Attorneys representing clients facing inpatient commitment for mental-health services are well advised to (1) develop a basic understanding of common psychiatric conditions and the treatments available for such conditions, (2) review the laws associated with the commitment process and understand the full scope of rights belonging to proposed patients, (3) understand the impact of involuntary commitment, and (4) recognize the options available to their clients and the consequences associated with each option.

Attorneys practicing in mental health should be aware of the most common forms of mental illness that present in patients facing involuntary commitment. An explanation of such common forms is set out at sections 16.2 through 16.2:3 below. A basic question facing the families of those experiencing a mental-health crisis is how to get help for their loved ones. Persons receiving treatment for a mental-health crisis will receive it either voluntarily or involuntarily. This chapter does not address patients who enter the mental-health system voluntarily. Sections 16.3 through 16.3:4 explain how proposed patients enter the mental-health system involuntarily—either with or without a mental-health warrant.

When the patient is presented to a mental-health facility, an application for court-ordered mental-health services may be filed, triggering the appointment of an attorney ad litem, the setting of a probable cause hearing and a final hearing, and the service of notice on the proposed patient, as detailed at sections 16.4 through 16.4:8.

Once the proposed patient is in the hospital and evaluated by a physician for the purpose of preparing a certificate of medical examination for mental health, a motion for an order of protective custody may be filed. Sections 16.5 through 16.5:3 address the criteria required for detention, important timelines, and proper transportation upon release of the proposed patient. The hearing on the motion for an order of protective custody is called a “probable cause” hearing and is discussed at sections 16.6 through 16.6:4. Importantly, section 16.7 sets out the rights of the proposed patient.

Information regarding the hearing on the application for court-ordered mental-health services, or final hearing, is set out at sections 16.8 through 16.8:6; sections 16.9 through 16.9:4 describe the health-care facilities to which patients may be committed and discuss the requirements associated with transporting the patient. Sections 16.10 through 16.10:7 discuss post-commitment proceedings, including modifications to the court order, motions for reexamination, and appeals. A continuing care plan, furlough, discharge, and termination of court-ordered mental-health services are covered at sections 16.11 through 16.11:6.

When a patient who is involuntarily committed refuses to comply with the physician’s orders regarding the administration of psychoactive medication, the physician may file with the court an application for an order authorizing such administration. Details regarding the application, hearing, and order, along with information regarding the patient’s rights, are included in sections 16.12 through 16.12:5.

The long-term consequences associated with involuntary commitment can be very impactful on the liberties of the patient and perhaps even the patient’s ability to work in his chosen profession. Such consequences are explained in sections 16.13 through

16.13:4. Finally, sections 16.14 through 16.14:4 set out several options available to clients facing involuntary commitment, including practice tips for attorneys.

§ 16.1:1 Mental Health and Guardianship

Persons who are mentally ill are not always incapacitated, and incapacitated persons are not always mentally ill. Generally speaking, a person suffering from mental illness will not always necessarily require a guardian. Only a small percentage of persons cycling through the involuntary commitment process have a guardian of their person appointed. Some practitioners believe that incapacitated, mentally ill persons who face involuntary commitment on a regular basis may be improper candidates for guardianship, especially if they refuse to comply with treatment, lack insight into their conditions, and cannot be located for long periods of time. To support this belief, they might point to Texas Estates Code section 1151.051, which places on guardians the duty to provide care, supervision, and protection for the ward and to provide the ward with clothing, food, medical care, and shelter. Thus, if the ward is noncompliant with medication and cannot be put in a permanent placement, the guardian cannot fulfill his duties to the ward and so risks removal.

There are several compelling reasons to consider a guardianship for an incapacitated, mentally ill person facing involuntary commitment. First, the guardian of a ward's person has the power to consent to medical, psychiatric, and surgical treatment other than the inpatient psychiatric commitment of the ward. *See* Tex. Est. Code § 1151.051. Even though the guardian cannot consent to the commitment of the ward, the guardian may consent to the administration of psychiatric treatment, including the administration of medication, obviating the need for an application for an order to authorize psychoactive medication and thus avoiding the resulting delay in treatment.

Second, when an incapacitated, mentally ill person who is under guardianship cannot be located for long periods of time and refuses to accept permanent placement, and such a person turns up in a hospital or is detained in the criminal justice system, the guardian is either notified of, or has the right to be informed of, the ward's location. *See* Tex. Health & Safety Code § 573.0021. The guardian is then able to communicate with the physician treating the ward and consent to the administration of psychoactive medication, curbing the decompensation of the ward that would inevitably result if treatment were delayed until a court ordered the onboarding of psychoactive medication.

Third, only the guardian of a proposed patient's person or a peace officer may transport a ward to an inpatient mental-health facility to be examined for the purpose of preparing a certificate of medical examination for mental health and initiating the involuntary commitment process, as discussed at section 16.3:2 below.

§ 16.1:2 Increase in Mental-Health Awareness

Increased suicides among veterans, rampant use of opioids as self-medication techniques, and epidemic homelessness have fueled a groundswell of public support, and even demand, for government programs designed to treat the mentally ill. For example, in 2019 the Texas legislature responded to the growing demand for increased access to mental-health services among veterans by passing Senate Bill 822, which created a commission to administer a grant program that supports community mental-health programs for veterans and their families. S.B. 822 was signed into law and is effective as of September 1, 2019. *See* Tex. Gov't Code § 531.0992(c), (d), (d–1), (d–2). Measures such as this, along with increased funding for mental health, will ultimately lead to a higher demand for attorneys who can efficiently and effectively represent clients facing involuntary commitment.

§ 16.2 What Constitutes Mental Illness

A mental illness is an illness, disease, or condition, other than epilepsy, dementia, substance abuse, or intellectual disability, that substantially impairs a person's thought, perception of reality, emotional process, or judgment or grossly impairs behavior as demonstrated by recent disturbed behavior. Tex. Health & Safety Code § 571.003(14). Patients facing mental-health commitment present several forms of mental illness. The most common forms include mood disorders, such as depression and bipolar disorder, and psychotic disorders such as schizophrenia, schizoaffective disorder, and psychosis not otherwise specified.

§ 16.2:1 Depression

To be diagnosed with depression, an individual must be experiencing five or more of the following symptoms during the same two-week period, at least one of which should be either depressed mood or loss of interest or pleasure: (1) depressed mood most of the day, nearly every day; (2) markedly diminished interest or pleasure in all, or almost all, activities most of the day, nearly every day; (3) significant weight loss when not dieting or weight gain, or decrease or increase in appetite nearly every day; (4) insomnia; (5) a slowing down of thought and a reduction of physical movement (observable by others, not merely subjective feelings of restlessness or being slowed down); (5) fatigue or loss of energy nearly every day; (6) feelings of worthlessness or excessive or inappropriate guilt nearly every day; (7) diminished ability to think or concentrate, or indecisiveness, nearly every day; and (8) recurrent thoughts of death, recurrent suicidal ideation without a specific plan, or a suicide attempt or a specific plan for committing suicide. *See* American Psychiatric Association, *Diagnostic & Statistical Manual of Mental Disorders* 161 (5th ed. 2013).

§ 16.2:2 Bipolar Disorder

Bipolar disorder is characterized by mood swings vacillating between depression and mania. Each phase of the mood swing can last moments, days, or months. *See* American Psychiatric Association, *Diagnostic & Statistical Manual of Mental Disorders* 123–25 (5th ed. 2013).

§ 16.2:3 Psychosis and Schizophrenia

A person suffering from a psychotic disorder, including schizophrenia, may experience delusions, hallucinations, disorganized thinking, and grossly disorganized or abnormal motor behavior, including catatonia. The person may also experience "negative" symptoms such as diminished emotional expression or a decrease in self-initiated purposeful activities. *See* American Psychiatric Association, *Diagnostic & Statistical Manual of Mental Disorders* 87–88 (5th ed. 2013).

Delusions are strongly held, sustained, false beliefs that are maintained by the patient despite obvious proof to the contrary. The most common type of delusion is a persecutory delusion, where one believes he is going to be harmed or harassed. Other types of delusions include referential (the belief that certain gestures, comments, or environmental cues are directed at oneself); grandiose (when an individual believes that he has exceptional wealth, abilities, or fame); erotomanic (when an individual falsely believes another person is in love with him); nihilistic (a conviction that a major catastrophe will occur); and somatic (a preoccupation with health and organ function). *See Diagnostic & Statistical Manual of Mental Disorders* 87.

While delusions involve strongly held beliefs, hallucinations are defined as sensory perception in the absence of external stimuli. The most common hallucinations include auditory hallucinations, in which a person hears voices. However, hallucinations may involve any of the senses. *See Diagnostic & Statistical Manual of Mental Disorders* 87.

Catatonia presents in either of two ways. The first is a marked decrease in reactivity to the environment. This could present with a resistance to instructions or a complete lack of verbal and motor responses. Alternatively, a person experiencing catatonic excitement exhibits excessive motor activity without purpose. *See Diagnostic & Statistical Manual of Mental Disorders* 88.

Thought disorder involves a disturbance of the mind that is usually manifested in a person's speech. A person may switch from topic to topic when communicating or respond to questions with nonrelated answers. In severe cases, speech may be so disorganized that it is incomprehensible, resulting in a communication sometimes described as "word salad." *See Diagnostic & Statistical Manual of Mental Disorders* 88.

§ 16.3 Emergency Detention and Apprehension

There are two types of emergency detention and apprehension: with and without a warrant. Emergency detention without a warrant may be accomplished by either a peace officer or a guardian of a ward's person. *See* Tex. Health & Safety Code § 573.001. Detention with a warrant results when any adult makes application for an order for emergency apprehension and detention, commonly referred to as a "mental health warrant," and successfully demonstrates to a judge or magistrate that he has a factual basis to believe, and does believe, that the proposed patient is mentally ill and, as a result, represents a substantial risk of serious harm to himself or others. *See* Tex. Health & Safety Code § 573.001.

§ 16.3:1 Apprehension by Peace Officer Without Warrant

A peace officer, without a warrant, may take a person into custody if the officer (1) has reason to believe and does believe that (a) the person is a person with mental illness and (b) because of that mental illness there is a substantial risk of serious harm to the person or to others unless the person is immediately restrained; and (2) believes that there is not sufficient time to obtain a warrant before taking the person into custody. Tex. Health & Safety Code § 573.001; *Edmiston v. Borrego*, 75 F.4th 551, 562–63 (5th Cir. 2023), *cert. denied sub nom. Crandel v. Hall*, 144 S. Ct. 1002 (2024).

A substantial risk of serious harm to the person or others may be demonstrated by the person's behavior or evidence of severe emotional distress and deterioration in the person's mental condition to the extent that the person cannot remain at liberty. The peace officer may form the belief that the person meets the criteria for apprehension from a representation of a credible person or based on the conduct of the apprehended person or the circumstances under which the apprehended person is found. Tex. Health & Safety Code § 573.001(b), (c).

A peace officer who takes a person into custody shall immediately transport the apprehended person to the nearest appropriate inpatient mental-health facility or a mental-health facility deemed suitable by the local mental-health authority, if an appropriate inpatient mental-health facility is not available. Tex. Health & Safety Code § 573.001(d)(1); *Trevino v. State*, 512 S.W.3d 587, 595 (Tex. App.—El Paso 2017, no pet.). A peace officer may also transfer the apprehended person to an emergency medical services provider in accordance with a memorandum of understanding. Tex. Health & Safety Code § 573.001(d)(2). A jail or similar detention facility may not be deemed suitable except in an extreme emergency, and a person detained in a jail or a

nonmedical facility shall be kept separate from any person who is charged with or convicted of a crime. Tex. Health & Safety Code § 573.001(e), (f).

A mental-health facility shall accept a person transported to the facility when an application for detention is filed by a peace officer or by an emergency medical services provider on behalf of a peace officer and in accordance with a memorandum of understanding. Tex. Health & Safety Code § 573.021(a); *Huntress v. Hickory Trail Hospital, L.P.*, No. 05-19-00892-CV, 2020 WL 2781795, at *5 (Tex. App.—Dallas May 29, 2020, pet. denied).

Immediately after transporting an individual to a detainment facility, a peace officer, or emergency medical service provider on behalf of a peace officer, must file a notification of detention with the facility. Tex. Health & Safety Code § 573.002(a); *Litoiu v. Davis*, No. 2:17-CV-211, 2018 WL 1516892, at *4 (S.D. Tex. Mar. 28, 2018, pet. ref'd). As soon as practicable, but not later than the first working day after the date a peace officer takes a person who is a ward into custody, the peace officer shall notify the court having jurisdiction over the ward's guardianship of the ward's detention or transportation to a facility. Tex. Health & Safety Code § 573.0021.

§ 16.3:2 Guardian's Application for Emergency Detention

A guardian of the person of a ward who is eighteen years of age or older, without the assistance of a peace officer, may transport the ward to an inpatient mental-health facility for a preliminary examination, as described at section 16.3:1 above, if the guardian has reason to believe and does believe that the ward is a person with mental illness and, because of that mental illness, there is a substantial risk of serious harm to the ward or to others unless the ward is immediately restrained. A substantial risk of serious harm to the ward or others may be demonstrated by the ward's behavior or evidence of severe emotional distress and deterioration in the ward's mental condition to the extent that the ward cannot remain at liberty. Tex. Health & Safety Code § 573.003.

After transporting a ward to a facility, a guardian shall immediately file an application for detention with the facility. The application for detention must contain (1) a statement that the guardian has reason to believe and does believe that the ward evidences mental illness; (2) a statement that the guardian has reason to believe and does believe that the ward evidences a substantial risk of serious harm to the ward or others; (3) a specific description of the risk of harm; (4) a statement that the guardian has reason to believe and does believe that the risk of harm is imminent unless the ward is immediately restrained; (5) a statement that the guardian's beliefs are derived from specific recent behavior, overt acts, attempts, or threats that were observed by the guardian; and (6) a detailed description of the specific behavior, acts, attempts, or threats. The guardian shall immediately provide written notice of the filing of an application to the court that granted the guardianship. Tex. Health & Safety Code § 573.004.

§ 16.3:3 Apprehension and Detention with Warrant

An adult may file a written application for the emergency detention of another person. The application must state (1) that the applicant has reason to believe and does believe that the person evidences mental illness; (2) that the applicant has reason to believe and does believe that the person evidences a substantial risk of serious harm to himself or others; (3) a specific description of the risk of harm; (4) that the applicant has reason to believe and does believe that the risk of harm is imminent unless the person is immediately restrained; (5) that the applicant's beliefs are derived from specific recent behavior, overt acts, attempts, or threats; (6) a detailed description of the specific behavior, acts, attempts, or threats; and (7) a detailed

description of the applicant's relationship to the person whose detention is sought. The application may be accompanied by any relevant information. Tex. Health & Safety Code § 573.011.

§ 16.3:4 Issuance of Warrant

An applicant for emergency detention must present the application personally to a judge or magistrate unless the applicant is a physician, in which case the application may be sent as a portable document format (PDF) file via email or other secure electronic means. The judge or magistrate shall examine the application and may interview the applicant. Tex. Health & Safety Code § 573.012.

The judge or magistrate shall deny the application unless the magistrate finds that there is reasonable cause to believe that (1) the person evidences mental illness, (2) the person evidences a substantial risk of serious harm to himself or others, (3) the risk of harm is imminent unless the person is immediately restrained, and (4) the necessary restraint cannot be accomplished without emergency detention. A substantial risk of serious harm to the person or others may be demonstrated by the person's behavior or evidence of severe emotional distress and deterioration in the person's mental condition to the extent that the person cannot remain at liberty. However, the magistrate or judge shall issue to an on-duty peace officer a warrant for the person's immediate apprehension if the magistrate finds that each of the four criteria discussed above are satisfied. Tex. Health & Safety Code § 573.012.

A person apprehended pursuant to a warrant shall be transported for a preliminary examination to the nearest appropriate inpatient mental-health facility, or a mental-health facility deemed suitable by the local mental-health authority if an appropriate inpatient mental-health facility is not available. The warrant serves as an application for detention in the facility. The warrant and a copy of the application for the warrant shall be immediately transmitted to the facility. The patient may obtain a copy of such documents on payment of a reasonable amount to cover the costs of reproduction or, if the patient or proposed patient is indigent, the court shall provide a copy on the request of the patient or proposed patient without charging a cost for the copy. Tex. Health & Safety Code § 573.012.

§ 16.4 Court-Ordered Mental-Health Services

When the patient presents to a mental-health facility, the filing of an application for court-ordered mental-health services may be made following an assessment and determination of the patient's need for such services. This filing sets off a series of events including the appointment of an attorney ad litem, the setting of final hearing, and service of notice on the proposed patient.

§ 16.4:1 Application for Court-Ordered Mental-Health Services

A county or district attorney or other adult may file a sworn written application for court-ordered mental-health services. Only the district or county attorney may file an application that is not accompanied by a certificate of medical examination for mental health. Unless the proposed patient is a child in the custody of the Texas Juvenile Justice Department, the application must be filed with the county clerk in the county in which the proposed patient (1) resides, (2) is found, or (3) is receiving mental-health services by court order for emergency apprehension and detention. Tex. Health & Safety Code § 574.001.

If the application is not filed in the county in which the proposed patient resides, the court may, on request of the proposed patient or the proposed patient's attorney and if good cause is shown, transfer the application to that county. An application

may be transferred to the county in which the person is being detained if the county to which the application is to be transferred approves the transfer. *See* Tex. Health & Safety Code § 574.001.

§ 16.4:2 Form of Application

An application for court-ordered mental-health services must be styled using the proposed patient's initials and not the proposed patient's full name. The application must state whether the application is for temporary or extended mental-health services. An application for extended inpatient mental-health services must state that the person has received court-ordered inpatient mental-health services, in the form of involuntary commitment to a mental-health facility, for at least sixty consecutive days during the preceding twelve months. An application for extended outpatient mental-health services must state that the person has received court-ordered inpatient mental-health services, in the form of involuntary commitment, for a total of at least sixty days during the preceding twelve months or court-ordered outpatient mental-health services during the preceding sixty days. Any application must contain the following information according to the applicant's information and belief: (1) the proposed patient's name and address, (2) the proposed patient's county of residence in Texas, (3) a statement that the proposed patient is a person with mental illness and meets the criteria prescribed for the form of mental-health commitment sought (inpatient versus outpatient and temporary versus extended**)** for court-ordered mental-health services, and (4) whether the proposed patient is charged with a criminal offense. Tex. Health & Safety Code § 574.002.

§ 16.4:3 Appointment and Duties of Attorney

The judge shall appoint an attorney to represent a proposed patient within twenty-four hours after the time an application for court-ordered mental-health services is filed if the proposed patient does not have an attorney. At that time, the judge shall also appoint a language or sign interpreter, if necessary, to ensure effective communication with the attorney in the proposed patient's primary language. The court shall inform the attorney in writing of the attorney's duties. The proposed patient's attorney shall be furnished with all records and papers in the case and is entitled to have access to all hospital and physicians' records. Tex. Health & Safety Code § 574.003.

Following are the duties of the attorney representing a proposed patient:

(a) An attorney representing a proposed patient shall interview the proposed patient within a reasonable time before the date of the hearing on the application.

(b) The attorney shall thoroughly discuss with the proposed patient the law and facts of the case, the proposed patient's options, and the grounds on which the court-ordered mental health services are being sought. A court-appointed attorney shall also inform the proposed patient that the proposed patient may obtain personal legal counsel at the proposed patient's expense instead of accepting the court-appointed counsel.

(c) The attorney may advise the proposed patient of the wisdom of agreeing to or resisting efforts to provide mental health services, but the proposed patient shall make the decision to agree to or resist the efforts. Regardless of an attorney's personal opinion, the attorney shall use all reasonable efforts within the bounds of law to advocate the proposed patient's right to avoid court-ordered mental health services if the proposed patient expresses a desire to avoid the services. If the proposed patient desires, the attorney shall advocate for the least restrictive treatment alternatives to court-ordered inpatient mental health services.

(d) Before a hearing, the attorney shall:

(1) review the application, the certificates of medical examination for mental health, and the proposed patient's relevant medical records;

(2) interview supporting witnesses and other witnesses who will testify at the hearing; and

(3) explore the least restrictive treatment alternatives to court-ordered inpatient mental health services.

(e) The attorney shall advise the proposed patient of the proposed patient's right to attend a hearing or to waive the right to attend a hearing and shall inform the court why a proposed patient is absent from a hearing.

(f) The attorney shall discuss with the proposed patient:

(1) the procedures for appeal, release, and discharge if the court orders participation in mental health services; and

(2) other rights the proposed patient may have during the period of the court's order.

(g) To withdraw from a case after interviewing a proposed patient, an attorney must file a motion to withdraw with the court. The court shall act on the motion as soon as possible. An attorney may not withdraw from a case unless the withdrawal is authorized by court order.

(h) The attorney is responsible for a person's legal representation until:

(1) the application is dismissed;

(2) an appeal from an order directing treatment is taken;

(3) the time for giving notice of appeal expires by operation of law; or

(4) another attorney assumes responsibility for the case.

Tex. Health & Safety Code § 574.004.

§ 16.4:4 Setting of Application for Final Hearing

The judge or a magistrate shall set a date for a final hearing to be held within fourteen days after the date on which the application is filed. The hearing may not be held during the first three days after the application is filed if the proposed patient or the proposed patient's attorney objects. The court may grant one or more continuances of the hearing on motion by a party and for good cause shown or on agreement of the parties. However, the hearing shall be held not later than the thirtieth day after the date on which the original application is filed. If extremely hazardous weather conditions exist or a disaster occurs that threatens the safety of the proposed patient or other essential parties to the hearing, the judge or magistrate may, by written order made each day, postpone the hearing for twenty-four hours. The written order must declare that an emergency exists because of the weather or the occurrence of a disaster. Tex. Health & Safety Code § 574.005.

§ 16.4:5 Notice and Disclosure of Information

The proposed patient and his attorney are entitled to receive a copy of the application and written notice of the time and place of the hearing immediately after the date for the hearing is set. A copy of the application and the written notice shall be delivered in person or sent by certified mail to the proposed patient's (1) parent, if the proposed patient is a minor; (2) appointed guardian, if the proposed patient is the subject of a guardianship; or (3) each managing and possessory conservator that has been appointed for the proposed patient. Notice may be given to the proposed patient's next of kin if the relative is the appli-

cant and the parent cannot be located and a guardian or conservator has not been appointed. Tex. Health & Safety Code § 574.006.

Notice of the time and place of any hearing and of the name, telephone number, and address of any attorneys known or believed to represent the state or the proposed patient shall be furnished to any person stating that that person has evidence to present on any medical issue. The notice shall not include the application, medical records, names or addresses of other potential witnesses, or any other information whatever. Any clerk, judge, magistrate, court coordinator, or other officer of the court shall provide the information and shall be entitled to judicial immunity in any civil suit seeking damages as a result of providing the notice. Should such evidence be offered at trial and the adverse party claim surprise, the hearing may be continued under the provisions of section 574.005 of the Texas Health and Safety Code, and the person producing the evidence shall be entitled to timely notice of the date and time of the continuance. Any officer, employee, or agent of the department shall refer any inquiring person to the court authorized to provide the notice if such information is in the possession of the department. The notice shall be provided in the form that is most understandable to the person making the inquiry. Tex. Health & Safety Code § 574.006(d).

The proposed patient's attorney may request information from the county or district attorney as provided below if the attorney cannot otherwise obtain the information. If the proposed patient's attorney requests the information at least forty-eight hours before the time set for the hearing, the county or district attorney shall, within a reasonable time before the hearing, provide the attorney with a statement that includes (1) the provisions set out in Tex. Health & Safety Code § 574.007 that will be relied on at the hearing to establish that the proposed patient requires court-ordered temporary or extended inpatient mental-health services; (2) the reasons voluntary outpatient services are not considered appropriate for the proposed patient; (3) the name, address, and telephone number of each witness who may testify at the hearing; (4) a brief description of the reasons court-ordered temporary or extended inpatient or outpatient, as appropriate, mental-health services are required; and (5) a list of any acts committed by the proposed patient that the applicant will attempt to prove at the hearing. Tex. Health & Safety Code § 574.007(a), (b).

At the hearing, the judge may admit evidence or testimony that relates to matters not disclosed pursuant to Tex. Health & Safety Code § 574.007 if the admission would not deprive the proposed patient of a fair opportunity to contest the evidence or testimony. Unless the proposed patient (orally and in the presence of the court or in writing and sworn under oath along with the patient's attorney), the proposed patient's attorney, and the county or district attorney agree otherwise, not later than forty-eight hours before the time set for the hearing on the petition for commitment, the county or district attorney shall inform the proposed patient through the proposed patient's attorney whether the county or district attorney will request that the proposed patient be committed to inpatient services or outpatient services. Tex. Health & Safety Code § 574.007(c), (d).

§ 16.4:6 Court Jurisdiction, Transfer, and Associate Judges

A proceeding for court-ordered mental-health services or post-commitment proceedings must be held in the statutory or constitutional county court that has the jurisdiction of a probate court in mental-illness matters. If the hearing is to be held in a county court in which the judge is not a licensed attorney, the proposed patient or the proposed patient's attorney may request that the proceeding be transferred to a court with a judge who is licensed to practice law in Texas. The county judge shall transfer the case after receiving the request, and the receiving court shall hear the case as if it had been originally filed in that court. If a patient is receiving temporary inpatient mental-health services in a county other than the county that initiated the court-ordered inpatient mental-health services and the patient requires extended inpatient mental-health services, the county in which the proceedings originated shall pay the expenses of transporting the patient back to the county for the hearing unless

the court that entered the temporary order arranges with the appropriate court in the county in which the patient is receiving services to hold the hearing on court-ordered extended inpatient mental-health services before the original order expires. If an order for outpatient services designates that the services be provided in a county other than the county in which the order was initiated, the court shall transfer the case to the appropriate court in the county in which the services are being provided. That court shall thereafter have exclusive, continuing jurisdiction of the case, including the receipt of the general treatment program required by Texas Health and Safety Code section 574.037(b). Tex. Health & Safety Code § 574.008.

The county judge may appoint a full-time or a part-time associate judge to preside over the proceedings for court-ordered mental-health services if the commissioner's court of a county in which the court has jurisdiction authorizes the employment of an associate judge. To be eligible for appointment as an associate judge, a person must be a Texas resident and have been licensed to practice law in Texas for at least four years or be a retired county judge, statutory or constitutional, with at least ten years of service. Tex. Health & Safety Code § 574.0085(a), (b). To refer cases to an associate judge, the referring court must issue an order of referral. The order of referral may limit the power or duties of an associate judge. Except as limited by an order of referral, an associate judge has all the powers and duties set forth in Tex. Fam. Code § 201.007. Tex. Health & Safety Code § 574.0085(e), (f).

At the conclusion of any hearing conducted by an associate judge and on the preparation of an associate judge's report, the associate judge shall transmit to the referring court all papers relating to the case, with the associate judge's signed and dated report. After the associate judge's report has been signed, the associate judge shall give to the parties participating in the hearing notice of the substance of the report. The associate judge's report may contain the associate judge's findings, conclusions, or recommendations. The associate judge's report must be in writing in a form as the referring court may direct. The form may be a notation on the referring court's docket sheet. After the associate judge's report is filed, the referring court may adopt, approve, or reject the associate judge's report, hear further evidence, or recommit the matter for further proceedings as the referring court considers proper and necessary in the particular circumstances of the case. If a jury trial is demanded or required, the associate judge shall refer the entire matter back to the referring court for trial. An associate judge appointed under this Code section has the judicial immunity of a county judge. An associate judge appointed in accordance with this section shall comply with the Code of Judicial Conduct in the same manner as the county judge. Tex. Health & Safety Code § 574.0085(i)–(*l*).

§ 16.4:7 Medical Examination and Independent Psychiatric Evaluation

A hearing on an application for court-ordered mental-health services may not be held unless there are on file with the court at least two certificates of medical examination for mental health completed by different physicians, each of whom has examined the proposed patient during the preceding thirty days. At least one of the physicians must be a psychiatrist if a psychiatrist is available in the county. Tex. Health & Safety Code § 574.009(a).

If the certificates are not filed with the application, the judge or magistrate may appoint the necessary physicians to examine the proposed patient and file the certificates. The judge or designated magistrate may order the proposed patient to submit to the examination and may issue a warrant authorizing a peace officer to take the proposed patient into custody for the examination. If the certificates required under this section are not on file at the time set for the hearing on the application, the judge shall dismiss the application and order the immediate release of the proposed patient if that person is not at liberty. If extremely hazardous weather conditions exist or a disaster occurs, the presiding judge or magistrate may by written order made each day extend the period during which the two certificates of medical examination for mental health may be filed, and

the person may be detained until 4:00 P.M. on the first succeeding business day. The written order must declare that an emergency exists because of the weather or the occurrence of a disaster. Tex. Health & Safety Code § 574.009(b)–(d).

The court may order an independent evaluation of the proposed patient by a psychiatrist chosen by the proposed patient if the court determines that the evaluation will assist the finder of fact. The psychiatrist may testify on behalf of the proposed patient. If the court determines that the proposed patient is indigent, the court may authorize reimbursement to the attorney ad litem for court-approved expenses incurred in obtaining expert testimony and may order the proposed patient's county of residence to pay the expenses. Tex. Health & Safety Code § 574.010.

A certificate of medical examination for mental health must be sworn to, dated, and signed by the examining physician. The certificate must include (1) the name and address of the examining physician; (2) the name and address of the person examined; (3) the date and place of the examination; (4) a brief diagnosis of the examined person's physical and mental condition; (5) the period, if any, during which the examined person has been under the care of the examining physician; and (6) an accurate description of the mental-health treatment, if any, given by or administered under the direction of the examining physician. Tex. Health & Safety Code § 574.011(a)(1)–(a)(6).

In addition, in order to support a finding that court-ordered mental-health services are appropriate, the certificate of medical examination for mental health must include the examining physician's opinion that (1) the examined person is a person with mental illness, and (2) as a result of that illness the examined person is likely to cause serious harm to the person or to others or is (a) suffering severe and abnormal mental, emotional, or physical distress; (b) experiencing substantial mental or physical deterioration of the proposed patient's ability to function independently, which is exhibited by the proposed patient's inability, except for reasons of indigence, to provide for the proposed patient's basic needs, including food, clothing, health or safety; and (c) not able to make a rational and informed decision about whether to submit to treatment. The certificate must include the detailed reason for each of the examining physician's opinions under this Code section. If the certificate is offered in support of an application for extended mental-health services, the certificate must also include the examining physician's opinion that the examined person's condition is expected to continue for more than ninety days. Tex. Health & Safety Code § 574.011(a)(7), (b)–(e).

Practice Pointer: Always carefully examine each certificate of medical examination for mental health and look for the following common problems: (1) the same physician prepared both certificates of medical examination for mental health (sometimes one is handwritten and the other is typed); (2) the physician failed to state a diagnosis in conformity with Tex. Health & Safety Code § 571.003(14) (sometimes the patient is diagnosed with dementia or a personality disorder or the episode results from substance abuse, resulting in cause for dismissal of the application for mental-health services); or (3) the physician failed to sign or date the certificate.

§ 16.4:8 Protective Custody

The application for court-ordered mental-health services is filed before or with the motion for an order of protective custody. The hearing on the application for court-ordered mental-health services is commonly referred to as the "final hearing" and is discussed at sections 16.8 through 16.8:6 below. The hearing on the motion for an order of protective custody is commonly referred to as the "probable cause" hearing and is discussed at section 16.6:2.

§ 16.5 Emergency Detention

When a proposed patient is detained in custody for the purpose of evaluation, important timelines and procedures apply to ensure that the rights of the patient are observed.

§ 16.5:1 Preliminary Examination

A person accepted for a preliminary examination may be detained in custody for not longer than forty-eight hours after the time the person is presented to the facility unless a written order for protective custody is obtained. The forty-eight-hour period includes any time the patient spends waiting in the facility for medical care before the person receives the preliminary examination. If the forty-eight-hour period ends on a Saturday, Sunday, legal holiday, or before 4:00 P.M. on the first succeeding business day, the person may be detained until 4:00 P.M. on the first succeeding business day. If the forty-eight-hour period ends at a different time, the person may be detained only until 4:00 P.M. on the day the forty-eight-hour period ends. If extremely hazardous weather conditions exist or a disaster occurs, the presiding judge or magistrate may, by written order made each day, extend by an additional twenty-four hours the period during which the person may be detained. A physician shall examine the person as soon as possible within twelve hours after the time the person is apprehended by the peace officer or transported for emergency detention by the person's guardian. Tex. Health & Safety Code § 573.021(b), (c).

§ 16.5:2 Emergency Admission and Detention

A person may be admitted to a facility for emergency detention only if the physician who conducted the preliminary examination of the person makes a written statement that is acceptable to the facility and states that after a preliminary examination it is the physician's opinion that (1) the person is a person with mental illness, (2) the person evidences a substantial risk of serious harm to the person or to others, (3) the described risk of harm is imminent unless the person is immediately restrained, and (4) emergency detention is the least restrictive means by which the necessary restraint may be accomplished. The written statement must include a description of the nature of the person's mental illness and a specific description of the risk of harm the person evidences that may be demonstrated either by the person's behavior or by evidence of severe emotional distress and deterioration in the person's mental condition to the extent that the person cannot remain at liberty. The statement must also set out the specific detailed information from which the physician formed the opinion. Tex. Health & Safety Code § 573.022(a).

A mental-health facility that has admitted a person for emergency detention may transport the person to a mental-health facility deemed suitable by the local mental-health authority for the area. On the request of the local mental-health authority, the judge may order that the proposed patient be detained in a department mental-health facility. A facility that has admitted a person for emergency detention may transfer the person to an appropriate mental hospital with the written consent of the hospital administrator. Tex. Health & Safety Code § 573.022(b), (c).

Practice Pointer: Proposed patients often wish to be transferred to a mental-health facility where their long-standing, regular treating physician has privileges. In such case, the transfer may take place only if the hospital administrator of the receiving mental-health facility consents. In addition, if the preferred mental-health facility is private, it may require the proposed patient to pay for treatment or enter the facility on a voluntary basis.

§ 16.5:3 Release and Transportation

A person apprehended by a peace officer or transported for emergency detention or detained shall be released on completion of the preliminary examination unless the person is admitted to a facility. A person admitted to a facility shall be released if the facility administrator determines at any time during the emergency detention period that one of the criteria outlined in Texas Health and Safety Code section 573.022(a)(2) no longer applies. Tex. Health & Safety Code § 573.023.

Arrangements shall be made to transport a person who was not arrested and who is entitled to release to (1) the location of the person's apprehension, (2) the person's residence in Texas, or (3) another suitable location, unless the person objects to the transportation. If the person was apprehended by a peace officer, arrangements must be made to immediately transport the person. Otherwise, the person is entitled to reasonably prompt transportation. The county in which the person was apprehended shall pay the costs of transporting the person. Tex. Health & Safety Code § 573.024.

§ 16.6 Motion and Order for Protective Custody

A motion for an order of protective custody, commonly referred to as an "OPC," may be filed only in the court in which an application for court-ordered mental-health services is pending. The motion may be filed by the county or district attorney or on the court's own motion. The motion must state that the judge or county or district attorney has reason to believe and does believe that the proposed patient meets the criteria authorizing the court to order protective custody and the belief is derived from (1) the representations of a credible person, (2) the proposed patient's conduct, or (3) the circumstances under which the proposed patient is found. The motion must be accompanied by a certificate of medical examination for mental health prepared by a physician who has examined the proposed patient not earlier than the third day before the day the motion is filed. The judge of the court in which the application is pending may designate a magistrate to issue protective custody orders, including a magistrate appointed by the judge of another court if the magistrate has at least the qualifications required for a magistrate of the court in which the application is pending. Tex. Health & Safety Code § 574.021.

The judge or designated magistrate may issue an order of protective custody if the judge or magistrate determines that a physician has stated the physician's opinion and the detailed reasons for the physician's opinion that the proposed patient is a person with mental illness and the proposed patient presents a substantial risk of serious harm to the proposed patient or others if not immediately restrained pending the hearing. The determination that the proposed patient presents a substantial risk of serious harm may be demonstrated by the proposed patient's behavior or by evidence of severe emotional distress and deterioration in the proposed patient's mental condition to the extent that the proposed patient cannot remain at liberty. Tex. Health & Safety Code § 574.022(a), (b).

The judge or magistrate may determine that the proposed patient meets the criteria prescribed above from the application and certificate alone if the judge or magistrate determines that the conclusions of the applicant and certifying physician are adequately supported by the information provided. However, the judge or magistrate may take additional evidence if a fair determination of the matter cannot be made from consideration of the application and certificate only. The judge or magistrate may issue a protective custody order for a proposed patient who is charged with a criminal offense if the proposed patient meets the requirements of this Code section and the facility administrator designated to detain the proposed patient agrees to the detention. Tex. Health & Safety Code § 574.022(c)–(e).

When a protective custody order is signed, the judge or designated magistrate shall appoint an attorney to represent a proposed patient who does not have an attorney. Tex. Health & Safety Code § 574.024(a). However, it would be unusual for a proposed

patient to be without legal representation when the protective custody order is signed because an attorney should have already been appointed when the application for mental-health services was filed. Within a reasonable time before the probable cause hearing, the court that ordered the protective custody shall provide to the proposed patient and the proposed patient's attorney a written notice stating that the proposed patient has been placed under a protective custody order, the grounds for the order, and the time and place of the hearing to determine probable cause. Tex. Health & Safety Code § 574.024(b).

§ 16.6:1 Apprehension Under Order

A protective custody order shall direct a person authorized to transport patients under Tex. Health & Safety Code § 574.045 to take the proposed patient into protective custody and transport the person immediately to a mental-health facility deemed suitable by the local mental-health authority for the area. The proposed patient shall be detained in the facility until the probable cause hearing. A person may not be detained in a private mental-health facility without the consent of the facility administrator. Tex. Health & Safety Code § 574.023.

Practice Pointer: Note that the proposed patient is likely already in a mental-health facility, as the proposed patient has already been examined by a physician, as indicated by the certificate of medical examination for mental health supporting the judge's findings in the protective custody order. However, transport of the proposed patient to a mental-health facility pursuant to Tex. Health & Safety Code § 574.023 might be required if a patient presented in the emergency room of a hospital or was a patient in a hospital that was not also a mental-health facility.

§ 16.6:2 Probable Cause Hearing

A hearing must be held to determine if there is probable cause to believe that a proposed patient under a protective custody order presents a substantial risk of serious harm to the proposed patient or others to the extent that the proposed patient cannot be at liberty pending the hearing on court-ordered mental-health services and a physician has stated the physician's opinion and the detailed reasons for the physician's opinion that the proposed patient is a person with mental illness. Tex. Health & Safety Code § 574.025(a).

The hearing must be held not later than seventy-two hours after the time that the proposed patient was detained under a protective custody order. If the period ends on a Saturday, Sunday, or legal holiday, the hearing must be held on the next day that is not a Saturday, Sunday, or legal holiday. The judge or magistrate may postpone the hearing each day for an additional twenty-four hours if the judge or magistrate declares that an extreme emergency exists because of extremely hazardous weather conditions or the occurrence of a disaster that threatens the safety of the proposed patient or another essential party to the hearing. Tex. Health & Safety Code § 574.025(b).

The hearing shall be held before a magistrate or, at the discretion of the presiding judge, before an associate judge appointed by the presiding judge. The proposed patient and the proposed patient's attorney shall have an opportunity at the hearing to appear and present evidence to challenge the allegation that the proposed patient presents a substantial risk of serious harm to himself or others. The magistrate or associate judge may consider evidence, including letters, affidavits, and other material, that may not be admissible in a subsequent commitment hearing. The state may prove its case on the physician's certificate of medical examination for mental health filed in support of the initial motion. Tex. Health & Safety Code § 574.025(c)–(f).

§ 16.6:3 Continued Detention

The magistrate or associate judge shall order that a proposed patient remain in protective custody if the magistrate or associate judge determines after the hearing that an adequate factual basis exists for probable cause to believe that the proposed patient presents a substantial risk of serious harm to himself or others to the extent that he cannot remain at liberty pending the hearing on court-ordered mental-health services. Tex. Health & Safety Code § 574.026(a).

The magistrate or associate judge shall arrange for the proposed patient to be returned to the mental-health facility or other suitable place, along with copies of the certificate of medical examination for mental health, any affidavits or other material submitted as evidence in the hearing, and the notification of probable cause hearing prepared as prescribed by Tex. Health & Safety Code § 574.026(d). A copy of the notification of probable cause hearing and the supporting evidence shall be filed with the court that entered the original order of protective custody. Tex. Health & Safety Code § 574.026(b)–(c).

A person under a protective custody order shall be detained in a mental-health facility deemed suitable by the local mental-health authority for the area, and the facility administrator shall detain a person under a protective custody order in the facility until a final order for court-ordered mental-health services is entered or the person is released or discharged under Tex. Health & Safety Code § 574.028. A person under a protective custody order may not be detained in a nonmedical facility used to detain persons who are charged with or convicted of a crime except because of and during an extreme emergency and in no case for longer than seventy-two hours, excluding Saturdays, Sundays, legal holidays, and the period prescribed by Tex. Health & Safety Code § 574.025(b) for extremely hazardous weather conditions or the occurrence of a disaster that threatens the safety of the proposed patient. The person must be isolated from any person who is charged with or convicted of a crime, and the county health authority shall ensure that proper care and medical attention are made available to a person who is detained in a nonmedical facility. Tex. Health & Safety Code § 574.027.

§ 16.6:4 Release from Detention

The magistrate or associate judge shall order the release of a person under a protective custody order if the magistrate or associate judge determines after the probable cause hearing that no probable cause exists to believe that the proposed patient presents a substantial risk of serious harm to himself or others. In that case, arrangements shall be made to return a person released to the location of the person's apprehension, the person's residence in Texas, or another suitable location. Tex. Health & Safety Code § 574.028(a), (b).

A facility administrator shall discharge a person held under a protective custody order if the facility administrator (1) does not receive notice that the person's continued detention is authorized after a probable cause hearing held within seventy-two hours after the detention began, excluding Saturdays, Sundays, legal holidays, and the period prescribed by Tex. Health & Safety Code section 574.025(b) for extremely hazardous weather conditions or the occurrence of a disaster that threatens the safety of the proposed patient; (2) a final order for court-ordered mental-health services has not been entered within the time prescribed by Tex. Health & Safety Code section 574.005 (within fourteen days of the date the application is filed or within thirty days of the date the application is filed with continuances); or (3) the facility administrator or the administrator's designee determines that the person no longer meets the criteria for protective custody in that the proposed patient is either not a person with mental illness or the proposed patient no longer presents a substantial risk of serious harm to the proposed patient or others if not immediately restrained pursuant to Tex. Health and Safety Code section 574.022. Tex. Health & Safety Code § 574.028.

Practice Pointer: The overwhelming majority of proposed patients exit the involuntary commitment process either in this manner or even before the probable cause hearing as discussed at section 16.5:3 above, and the applications for mental-health services are dismissed by the court in such cases.

§ 16.7 Rights of Persons Apprehended, Detained, or Transported for Emergency Detention

A person apprehended, detained, or transported for emergency detention has the following rights: (1) to be advised of the location of detention, the reasons for the detention, and the fact that the detention could result in a longer period of involuntary commitment; (2) to a reasonable opportunity to communicate with and retain an attorney; (3) to be transported to a location in accordance with the guidelines set out in Texas Health and Safety Code section 573.024 if the person is not admitted for emergency detention unless the person is arrested or objects; (4) to be released from a facility pursuant to the requirements set out in Texas Health and Safety Code section 573.023; (5) to be advised that communications with a mental-health professional may be used in proceedings for further detention; (6) to be transported in accordance with Texas Health and Safety Code sections 573.026 and 574.045, if the person is detained or transported under an order of protective custody; and (7) to a reasonable opportunity to communicate with a relative or other responsible person who has a proper interest in the person's welfare. Tex. Health & Safety Code § 573.025(a).

A person apprehended, detained, or transported for emergency detention shall be informed of the person's rights orally in simple, nontechnical terms, within twenty-four hours after the time the person is admitted to a facility, and in writing in the person's primary language if possible or through the use of a means reasonably calculated to communicate with a hearing- or visually impaired person, if applicable. Tex. Health & Safety Code § 573.025(b).

Each law enforcement agency must make a good-faith effort to divert a person suffering a mental-health crisis to a proper treatment center in the agency's jurisdiction if (1) there is an available and appropriate treatment center in the agency's jurisdiction to which the agency may divert the person; (2) it is reasonable to divert the person; (3) the offense that the person is accused of is a misdemeanor, other than a misdemeanor involving violence; and (4) the mental-health crisis or substance abuse issue is suspected to be the reason the person committed the alleged offense. *See* Tex. Code Crim. Proc. art. 16.23.

§ 16.8 General Provisions Related to Final Hearing

Unless the proposed patient or the proposed patient's attorney requests that the final hearing be at the county courthouse, the judge may hold a hearing on an application for court-ordered mental-health services at any suitable location in the county. The hearing should be held in a physical setting that is not likely to have a harmful effect on the proposed patient. The proposed patient is entitled to be present at the hearing, but the proposed patient or the proposed patient's attorney may waive this right. The hearing must be open to the public unless the proposed patient or the proposed patient's attorney requests that the hearing be closed and the judge determines that there is good cause to close the hearing. The Texas Rules of Evidence apply to the hearing. The court may consider the testimony of a nonphysician mental-health professional in addition to medical or psychiatric testimony. The hearing is on the record, and the state must prove each element of the applicable criteria by clear and convincing evidence. Tex. Health & Safety Code § 574.031(a)–(g).

With respect to a hearing for temporary inpatient or outpatient mental-health services, the proposed patient or his attorney may waive the right to cross-examine witnesses in writing, and, if that right is waived, the court may admit, as evidence, the certificates of medical examination for mental health. The certificates admitted constitute competent medical or psychiatric testimony, and the court may make its findings solely from the certificates. If the proposed patient or the proposed patient's

attorney does not waive in writing the right to cross-examine witnesses, the court shall proceed to hear testimony. The testimony must include competent medical or psychiatric testimony. Tex. Health & Safety Code § 574.031(d–1).

In a hearing for extended inpatient or extended outpatient mental-health services, the court may *not* make its findings solely from the certificates of medical examination for mental health but shall hear testimony. The court may not enter an order for extended mental-health services unless appropriate findings are made and are supported by testimony taken at the hearing. See additional discussion on the required findings at section 16.8:4 below. The testimony must include competent medical or psychiatric testimony. Tex. Health & Safety Code § 574.031(d–2).

§ 16.8:1 Right to Jury

A hearing for temporary mental-health services must be before the court unless the proposed patient or the proposed patient's attorney requests a jury. A hearing for extended mental-health services must be before a jury unless the proposed patient or the proposed patient's attorney later waives the right to a jury. The waiver must be in writing, under oath, and signed and sworn to by the proposed patient and the proposed patient's attorney unless the proposed patient or the attorney orally waives the right to a jury in the court's presence. The court may permit an oral or written waiver of the right to a jury to be withdrawn for good cause shown, but the withdrawal must be made not later than the eighth day before the date on which the hearing is scheduled. A court may not require a jury fee. In a hearing before a jury, the jury shall determine if the proposed patient is a person with mental illness and meets the criteria for court-ordered mental-health services. The jury may not make a finding about the type of services to be provided to the proposed patient. Tex. Health & Safety Code § 574.032.

§ 16.8:2 Release After Hearing

The court shall enter an order denying an application for court-ordered temporary or extended mental-health services if after a hearing the court or jury fails to find, from clear and convincing evidence, that the proposed patient is mentally ill and meets the applicable criteria for court-ordered mental-health services. If the court denies the application, the court shall order the immediate release of a proposed patient who is not at liberty. Tex. Health & Safety Code § 574.033.

§ 16.8:3 Order for Temporary Mental-Health Services

The judge may order a proposed patient to receive court-ordered temporary *inpatient* mental-health services only if the judge or jury finds, from clear and convincing evidence, that—

(1) the proposed patient is a person with mental illness; and

(2) as a result of that mental illness the proposed patient:

  (A) is likely to cause serious harm to the proposed patient;

  (B) is likely to cause serious harm to others; or

  (C) is:

    (i) suffering severe and abnormal mental, emotional, or physical distress;

    (ii) experiencing substantial mental or physical deterioration of the proposed patient's ability to function independently, which is exhibited by the proposed patient's inability, except for reasons of indigence, to provide for the proposed patient's basic needs, including food, clothing, health, or safety; and

    (iii) unable to make a rational and informed decision as to whether or not to submit to treatment.

Tex. Health & Safety Code § 574.034(a).

An order for temporary *inpatient* mental-health services shall provide for a period of treatment not to exceed forty-five days unless the judge finds that a longer period (not to exceed ninety days) is necessary. Tex. Health & Safety Code § 574.034(g); *In re M.R.*, No. 02-15-00221-CV, 2015 WL 6759249, at *2 (Tex. App.—Fort Worth Nov. 3, 2015, no pet.).

The judge may also order a proposed patient to receive court-ordered temporary *outpatient* mental-health services only if—

(1) the judge finds that appropriate mental health services are available to the proposed patient; and

(2) the judge or jury finds, from clear and convincing evidence, that:

  (A) the proposed patient is a person with severe and persistent mental illness;

  (B) as a result of the mental illness, the proposed patient will, if not treated, experience deterioration of the ability to function independently to the extent that the proposed patient will be unable to live safely in the community without court-ordered outpatient mental health services;

  (C) outpatient mental health services are needed to prevent a relapse that would likely result in serious harm to the proposed patient or others; and

  (D) the proposed patient has an inability to participate in outpatient treatment services effectively and voluntarily, demonstrated by:

    (i) any of the proposed patient's actions occurring within the two-year period that immediately precedes the hearing; or

    (ii) specific characteristics of the proposed patient's clinical condition that significantly impair the proposed patient's ability to make a rational and informed decision whether to submit to voluntary outpatient treatment.

Tex. Health & Safety Code § 574.0345(a).

To be clear and convincing, the evidence must include expert testimony and evidence of a recent overt act or a continuing pattern of behavior that tends to confirm (1) the deterioration of ability to function independently to the extent that the proposed patient will be unable to live safely in the community, (2) the need for outpatient mental-health services to prevent a relapse that would likely result in serious harm to the proposed patient or others, and (3) the proposed patient's inability to participate in outpatient treatment services effectively and voluntarily. Tex. Health & Safety Code § 574.0345(b).

An order for temporary outpatient mental-health services shall state that treatment is authorized for not longer than forty-five days, except that the order may specify a period not to exceed ninety days if the judge finds that the longer period is necessary. Tex. Health & Safety Code § 574.0345(c).

A judge may not issue an order for temporary outpatient mental-health services for a proposed patient who is charged with a criminal offense that involves an act, attempt, or threat of serious bodily injury to another person. Tex. Health & Safety Code § 574.0345(d).

§ 16.8:4 Order for Extended Mental-Health Services

The vast majority of court-ordered mental-health services are for temporary services. However, the judge may order a proposed patient to receive court-ordered extended *inpatient* mental-health services only if the jury, or the judge if a trial by jury is not requested or the right to a jury is waived, finds, from clear and convincing evidence, that—

(1) the proposed patient is a person with mental illness;

(2) as a result of that mental illness the proposed patient:

(A) is likely to cause serious harm to the proposed patient;

(B) is likely to cause serious harm to others; or

(C) is:

(i) suffering severe and abnormal mental, emotional, or physical distress;

(ii) experiencing substantial mental or physical deterioration of the proposed patient's ability to function independently, which is exhibited by the proposed patient's inability, except for reasons of indigence, to provide for the proposed patient's basic needs, including food, clothing, health, or safety; and

(iii) unable to make a rational and informed decision as to whether or not to submit to treatment;

(3) the proposed patient's condition is expected to continue for more than 90 days; and

(4) the proposed patient has received court-ordered inpatient mental health services under [Texas Health and Safety Code title 7, subtitle C] or under Chapter 46B, Code of Criminal Procedure, for at least 60 consecutive days during the preceding 12 months.

Tex. Health & Safety Code § 574.035(a).

The judge may also order a patient to receive court-ordered extended *outpatient* mental-health services as long as the patient meets the same criteria as are required for temporary outpatient mental-health services pursuant to Tex. Health & Safety Code § 574.0345 and the proposed patient (1) has a condition that is expected to continue for more than ninety days and (2) has received court-ordered mental-health services for a total of at least sixty days during the preceding twelve months or during the preceding sixty days. Tex. Health & Safety Code § 574.0355.

The court may not make its findings solely from the certificates of medical examination for mental health but shall hear testimony. The court may not enter an order for extended mental-health services unless appropriate findings are made and are supported by testimony taken at the hearing. The testimony must include competent medical or psychiatric testimony. Tex. Health & Safety Code § 574.031(d–2). An order for extended inpatient services must provide for a period of treatment not to exceed twelve months. Tex. Health & Safety Code § 574.035(h). A judge may not issue an order for extended inpatient or outpatient mental-health services for a proposed patient who is charged with a criminal offense that involves an act, attempt, or threat of serious bodily injury to another person. Tex. Health & Safety Code §§ 574.035(i), 574.0355(e).

§ 16.8:5 Judge May Consider Outpatient vs. Inpatient Mental-Health Services

The judge shall dismiss the jury, if any, after a hearing in which a person is found to be a person with mental illness and to meet the criteria for court-ordered temporary or extended mental-health services. The judge may hear additional evidence relating to whether the treatment should be inpatient or outpatient and shall order the mental-health services provided in the least restrictive *appropriate* setting available. Specifically, the judge may enter an order committing the person to a mental-health facility for *inpatient* care if the trier of fact finds that the person meets the commitment criteria prescribed by Tex. Health & Safety Code § 574.034(a) or § 574.035(a) (see *first* set of criteria set out at sections 16.8:3 and 16.8:4 above) or committing the person to *outpatient* mental-health services if the trier of fact finds that the person meets the commitment criteria prescribed by Tex. Health & Safety Code § 574.0345(a) or § 574.0355(a) (see *second* set of criteria discussed at sections 16.8:3 and 16.8:4). Tex. Health & Safety Code § 574.036.

§ 16.8:6 Court-Ordered Outpatient Mental-Health Services

The court, in an order that directs a patient to participate in outpatient mental-health services, shall designate a person as responsible for such services. The person designated must be the facility administrator or an individual involved in providing court-ordered outpatient services. A person may not be designated as responsible for the ordered services without the person's consent unless the person is the facility administrator of a department facility or the facility administrator of a community center that provides mental-health services in the region in which the committing court is located or in a county where the patient has previously received mental-health services. The person responsible for the services shall submit to the court a general program of the treatment to be provided. The program must be incorporated into the court order and must include services to provide care coordination and any other treatment or services, including medication and supported housing, that are available and considered clinically necessary by a treating physician or the person responsible for the services to assist the patient in functioning safely in the community. Tex. Health & Safety Code § 574.037(a), (b).

If the patient is receiving inpatient mental-health services at the time the program is being prepared, the person responsible for the services shall seek input from the patient's inpatient treatment providers in preparing the program. The person responsible for the services shall submit the program to the court before the final hearing or before the court modifies an order under Tex. Health & Safety Code § 574.061, as appropriate. Tex. Health & Safety Code § 574.037(b–1), (b–2).

A patient subject to court-ordered outpatient services may petition the court for specific enforcement of the court order, and a court may set a status conference. Tex. Health & Safety Code § 574.037(c–1), (c–2). The court shall order the patient to participate in the program but may not compel performance. If a court receives information that a patient is not complying with the court's order, the court may set a modification hearing pursuant to Tex. Health & Safety Code § 574.062 and issue an order for temporary detention if an application is filed under Tex. Health & Safety Code § 574.063. The failure of a patient to comply with the program incorporated into a court order is not grounds for punishment for contempt of court. Tex. Gov't Code § 21.002; Tex. Health & Safety Code § 574.037(c–3), (c–4).

§ 16.9 Designation of Facility and Transportation of Patient

In an order for temporary or extended mental-health services specifying inpatient care, the court shall commit the patient to a designated inpatient mental-health facility. The court shall commit the patient to a mental-health facility deemed suitable by the local mental-health authority for the area, a private mental hospital, a hospital operated by a federal agency, or an inpatient mental-health facility of the institutional division of the Texas Department of Criminal Justice. A court may not commit a patient to an inpatient mental-health facility operated by a community center or other entity designated by the department to provide mental-health services unless the facility is licensed under chapter 577 of the Texas Health and Safety Code and the court notifies the local mental-health authority serving the region in which the commitment is made. Tex. Health & Safety Code § 574.041.

§ 16.9:1 Commitment to Private Facility

The court may order a patient committed to a private mental hospital at no expense to the state if the court receives an application signed by the patient or the patient's guardian or next friend requesting that the patient be placed in a designated private mental hospital at the patient's or applicant's expense and a written agreement from the hospital administrator of the private mental hospital to admit the patient and to accept responsibility for the patient. Tex. Health & Safety Code § 574.042.

§ 16.9:2 Commitment to Federal Facility

A court may order a patient committed to a federal agency that operates a mental hospital if the court receives written notice from the agency that facilities are available and that the patient is eligible for care or treatment in a facility. The court may place the patient in the agency's custody for transportation to the mental hospital. A patient admitted under court order to a hospital operated by a federal agency, regardless of location, is subject to the agency's rules. The hospital administrator has the same authority and responsibility with respect to the patient as the facility administrator of an inpatient mental-health facility operated by the department. The appropriate courts of this state retain jurisdiction to inquire at any time into the patient's mental condition and the necessity of the patient's continued hospitalization. Tex. Health & Safety Code § 574.043.

§ 16.9:3 Commitment to Facility of Institutional Division of Texas Department of Criminal Justice

The court shall commit an inmate patient to an inpatient mental-health facility of the institutional division of the Texas Department of Criminal Justice if the court enters an order requiring temporary mental-health services for the inmate patient under an application filed by a psychiatrist for the institutional division under Tex. Gov't Code § 501.057. *See* Tex. Health & Safety Code § 574.044.

In 2019, the Texas legislature tasked the Commission on Jail Standards to conduct a comprehensive study on best practice standards for the detention of persons with intellectual and developmental disabilities, a population of people who can be more vulnerable to mental-health challenges. The task force included governmental officials and advocates; the representative of the Commission on Jail Standards served as presiding officer of the task force. The task force's written report on its findings is available at **www.tcjs.state.tx.us/wp-content/uploads/2020/12/Detention_of_Persons_with_IDD.pdf**. *See* ID Detention Task Force Act of 2019, 86th Leg., R.S., ch. 880 (H.B. 3116), eff. Sept. 1, 2019.

§ 16.9:4 Transportation of Patient

The court may authorize, in the following order of priority, the transportation of a committed patient or a patient detained pursuant to Texas Health and Safety Code section 573.022 or 574.023 to the designated mental-health facility by (1) a special officer for mental-health assignment certified under Texas Occupations Code section 1701.404; (2) the facility administrator of the designated mental-health facility, unless the administrator notifies the court that facility personnel are not available to transport the patient; (3) a representative of the local mental-health authority unless the representative notifies the court that local mental-health authority personnel are not qualified to ensure the safety of the patient during transport; (4) a qualified transportation service provider selected from the list established and maintained as required by Tex. Health & Safety Code § 574.0455 by the commissioners court of the county in which the court authorizing the transportation is located; (5) the sheriff or constable; or (6) a relative or other responsible person who has a proper interest in the patient's welfare. Tex. Health & Safety Code § 574.045(a).

The court shall require appropriate medical personnel to accompany the person transporting the patient if there is reasonable cause to believe that the patient will require medical assistance or the administration of medication during the transportation. The patient's friends and relatives may accompany the patient at their own expense. A female patient must be accompanied by a female attendant unless the patient is accompanied by her father, husband, or adult brother or son. Tex. Health & Safety Code § 574.045(b), (c), (d).

The patient may not be transported in a marked police or sheriff's car or accompanied by a uniformed officer unless other means are not available. The patient may not be transported with a state prisoner. The patient may not be physically restrained unless necessary to protect the health and safety of the patient or of a person traveling with the patient. If the treating physician or the person transporting a patient determines that physical restraint of the patient is necessary, that person shall document the reasons for that determination and the duration for which the restraints are needed. The person transporting the patient shall deliver the document to the facility at the time the patient is delivered. The facility shall include the document in the patient's clinical record. The patient must be transported directly to the facility within a reasonable amount of time and without undue delay. All vehicles used to transport patients under this section must be adequately heated in cold weather and adequately ventilated in warm weather. Special diets or other medical precautions recommended by the patient's physician must be followed. The person transporting the patient shall give the patient reasonable opportunities to get food and water and to use a bathroom. A patient restrained as necessary to protect the health and safety of the patient or of a person traveling with the patient may be restrained only during the apprehension, detention, or transportation of the patient. The method of restraint must permit the patient to sit in an upright position without undue difficulty unless the patient is being transported by ambulance. Tex. Health & Safety Code § 574.045(e), (*l*).

§ 16.10 Post-Commitment Proceedings

Post-commitment proceedings, including modifications, motions for rehearing, motions for reexamination, and appeals, are uncommon but are described below.

§ 16.10:1 Modification of Order for Inpatient Treatment

Within thirty days of commitment, the facility administrator of a facility to which a patient is committed for inpatient mental-health services shall assess the appropriateness of transferring the patient to outpatient mental-health services and may recommend that the court entering the commitment order modify the order to require outpatient mental-health services. Such a recommendation must explain in detail the reason for the recommendation and be accompanied by a supporting certificate of medical examination for mental health signed by a physician who examined the patient during the seven days preceding the recommendation. The patient shall be given notice of the recommendation and is entitled to a hearing with counsel on the recommendation if requested; otherwise, the court may make a decision regarding the recommendation based on (1) the recommendation, (2) the supporting certificate, and (3) consultation with the local mental-health authority concerning available resources to treat the patient. A modified order *may* extend beyond the term of the original order but not by more than sixty days. Tex. Health & Safety Code § 574.061.

A court on its own motion may set a status conference with the patient, the patient's attorney, and the person designated to be responsible for the patient's court-ordered outpatient services under section 574.037. Tex. Health & Safety Code § 574.0665.

§ 16.10:2 Modification of Order for Outpatient Treatment

The court that entered an order directing a patient to participate in outpatient mental-health services may set a hearing to determine if the order should be modified in a way that is a substantial deviation from the original program of treatment incorporated in the court's order. The court may set the hearing on its own motion, at the request of the person responsible for the treatment, or at the request of any other interested person. The court shall appoint an attorney to represent the patient if a hearing is scheduled. The patient shall be given notice of the matters to be considered at the hearing. The notice must comply with the requirements of Tex. Health & Safety Code § 574.006 for notice before a hearing on court-ordered mental-health services.

The hearing shall be held before the court, without a jury, and as prescribed by Tex. Health & Safety Code § 574.031. The patient shall be represented by an attorney and receive proper notice. The court shall set a date for a hearing on the motion to be held not later than the seventh day after the date the motion is filed. The court may grant one or more continuances of the hearing on the motion by a party and for good cause shown or on the agreement of the parties. Except for delays due to extremely hazardous weather conditions, the court shall hold the hearing not later than the fourteenth day after the date the motion is filed. Tex. Health & Safety Code § 574.062.

§ 16.10:3 Order for Temporary Detention

The person responsible for a patient's court-ordered outpatient treatment or the facility administrator of the outpatient facility in which a patient receives treatment may file a sworn application for the patient's temporary detention pending the modification hearing under Tex. Health & Safety Code § 574.062. The application must state the applicant's opinion and detail the reasons for the applicant's opinion that the patient, because of mental illness, presents a substantial risk of serious harm to the patient or others so that the patient cannot be at liberty pending a hearing and that detention in an inpatient mental-health facility is necessary to evaluate the appropriate setting for continued court-ordered services. The determination that the patient presents a substantial risk of serious harm to the patient or others may be demonstrated by the patient's behavior or evidence of severe emotional distress and deterioration in the patient's mental condition to the extent that the patient cannot live safely in the community. Tex. Health & Safety Code § 574.063(a), (b). *See* Tex. Health & Safety Code § 574.064(a–1).

The court may issue an order for temporary detention if a modification hearing is set and the court finds from the information in the application that there is probable cause to believe that the opinions stated in the application are valid. At the time the temporary detention order is signed, the judge shall appoint an attorney to represent a patient who does not have an attorney. Within twenty-four hours after the time detention begins, the court that issued the temporary detention order shall provide to the patient and the patient's attorney a written notice that states that the patient has been placed under a temporary detention order, the grounds for the order, and the time and place of the modification hearing. Tex. Health & Safety Code § 574.063(e).

§ 16.10:4 Renewal of Order for Extended Mental-Health Services

A county or district attorney or other adult may file an application to renew an order for extended mental-health services. The application must explain in detail why the person requests renewal. An application to renew an order committing the patient to extended inpatient mental-health services must also explain in detail why a less restrictive setting is not appropriate. The application must be accompanied by two certificates of medical examination for mental health signed by physicians who examined the patient during the thirty days preceding the date on which the application is filed, and the court shall appoint an attorney to represent the patient when an application is filed. Tex. Health & Safety Code § 574.066(a)–(d).

The patient, the patient's attorney, or another individual may request a hearing on the application. The court may set a hearing on its own motion. An application for which a hearing is requested or set is considered an original application for court-ordered extended mental-health services. A court may not renew an order unless the court finds that the patient meets the criteria for extended mental-health services prescribed by Tex. Health & Safety Code § 574.035(a)(1)–(a)(3). See discussion at section 16.8:4 above. The court must make the findings prescribed by this Code subsection to renew an order, regardless of whether a hearing is requested or set. A renewed order authorizes treatment for not more than twelve months. If a hearing is not requested or set, the court may admit into evidence the certificates of medical examination for mental health. The certificates constitute competent medical or psychiatric testimony, and the court may make its findings solely from the certificates and the detailed request for renewal. The court, after renewing an order for extended inpatient mental-health services, may

modify the order to provide for outpatient mental-health services in accordance with Tex. Health & Safety Code § 574.037. Tex. Health & Safety Code § 574.066(e)–(h).

§ 16.10:5 Motion for Rehearing

The court may set aside an order requiring court-ordered mental-health services and grant a motion for rehearing for good cause shown. Pending the hearing, the court may stay the court-ordered mental-health services and release the proposed patient from custody before the hearing if the court is satisfied that the proposed patient does not meet the criteria for protective custody under Tex. Health & Safety Code § 574.022, and, if the proposed patient is at liberty, require an appearance bond in an amount set by the court. Tex. Health & Safety Code § 574.067.

§ 16.10:6 Request for Reexamination and Hearing

A patient receiving court-ordered extended mental-health services, or any interested person on the patient's behalf and with the patient's consent, may file a request with a court for a reexamination and a hearing to determine if the patient continues to meet the criteria for the services. The request must be filed in the county in which the patient is receiving the services. The court may, for good cause shown, require that the patient be reexamined, schedule a hearing on the request, and notify the facility administrator of the facility providing mental-health services to the patient. A court is not required to order a reexamination or hearing if the request is filed within six months after an order for extended mental-health services is entered or after a similar request is filed. Tex. Health & Safety Code § 574.068(a)–(d).

After receiving the court's notice, the facility administrator shall arrange for the patient to be reexamined. The facility administrator or the administrator's qualified authorized designee shall immediately discharge the patient if the facility administrator determines that the patient no longer meets the criteria for court-ordered extended mental-health services. If the facility administrator determines that the patient continues to meet the criteria for court-ordered extended mental-health services, the facility administrator or designee shall file a certificate of medical examination for mental health with the court within ten days after the date on which the request for reexamination and hearing is filed. Tex. Health & Safety Code § 574.068(e)–(g).

A court that required a patient's reexamination may set a date and place for a hearing on the request if, not later than the tenth day after the date on which the request is filed, a certificate of medical examination for mental health stating that the patient continues to meet the criteria for court-ordered extended mental-health services has been filed or a certificate has not been filed and the patient has not been discharged. At the time the hearing is set, the judge shall appoint an attorney to represent a patient who does not have an attorney and give notice of the hearing to the patient, the patient's attorney, and the facility administrator. The judge shall appoint a physician to examine the patient and file with the court a certificate of medical examination for mental health. The judge shall appoint a physician who is not on the staff of the mental-health facility in which the patient is receiving services and who is a psychiatrist if a psychiatrist is available in the county. The court shall ensure that the patient may be examined by a physician of the patient's choice and at the patient's own expense if requested by the patient. The hearing is held before the court and without a jury. The hearing must be held in accordance with the requirements for a hearing on an application for court-ordered mental-health services. The court shall dismiss the request if the court finds from clear and convincing evidence that the patient continues to meet the criteria for court-ordered extended mental-health services prescribed by Tex. Health & Safety Code § 574.035, and the judge shall order the facility administrator to discharge the patient if the court fails to find from clear and convincing evidence that the patient continues to meet the criteria. Tex. Health & Safety Code § 574.069.

§ 16.10:7 Appeal

An appeal from an order requiring court-ordered mental-health services, or from a renewal or modification of an order, must be filed in the court of appeals for the county in which the order is entered. Notice of appeal must be filed not later than the tenth day after the date on which the order is signed. When an appeal is filed, the clerk shall immediately send a certified transcript of the proceedings to the court of appeals. Pending the appeal, the trial judge in whose court the cause is pending may stay the order and release the patient from custody before the appeal if the judge is satisfied that the patient does not meet the criteria for protective custody under Tex. Health & Safety Code § 574.022 (see section 16.8:4 above) and, if the proposed patient is at liberty, require an appearance bond in an amount set by the court. The court of appeals and supreme court shall give an appeal under this section preference over all other cases and shall advance the appeal on the docket. The courts may suspend all rules relating to the time for filing briefs and docketing cases. Tex. Health & Safety Code § 574.070.

§ 16.11 Continuing Care Plan, Furlough, Discharge, and Termination of Court-Ordered Mental-Health Services

Of utmost importance in the minds of patients facing involuntary mental-health commitment is how and when they may leave the facility. Although it is rare, some mental-health facility administrators will allow a patient a pass or furlough under certain circumstances and with the understanding that the pass or furlough may be revoked.

Patients are most often discharged by the mental-health facility administrator before the order of commitment expires, and so it is uncommon for a patient to remain in the mental-health facility for the duration of the commitment period specified in the order. When a patient is discharged, a continuing care plan should be developed unless continuing care is unnecessary.

§ 16.11:1 Continuing Care Plan

The physician responsible for the patient's treatment shall prepare a continuing care plan for a patient who is scheduled to be furloughed or discharged unless the patient does not require continuing care. The physician shall prepare the plan as prescribed by the Texas Health and Human Services Commission and shall consult the patient and the local mental-health authority in the area in which the patient will reside before preparing the plan. The local mental-health authority shall be informed of and must participate in planning the discharge of the patient. Tex. Health & Safety Code § 574.081(a), (b).

The plan must address the patient's mental-health and physical needs, including, if appropriate, the need for outpatient mental-health services following furlough or discharge and the need for sufficient psychoactive medication on furlough or discharge to last until the patient can see a physician. The physician shall deliver the plan and other appropriate information to the community center or other provider that will deliver the services. The facility administrator shall have the right of access to discharged patients and records of patients who request continuing care services. A patient who is to be discharged may refuse the continuing care services. A physician who believes that a patient does not require continuing care and who does not prepare a continuing care plan under this section shall document in the patient's treatment record the reasons for that belief. Tex. Health & Safety Code § 574.081.

Except as otherwise specified in the plan and subject to available funding provided to the commission and paid to a private mental-health facility for this purpose, a private mental-health facility is responsible for providing or paying for psychoactive medication and any other medication prescribed to the patient to counteract adverse side effects of psychoactive medication on furlough or discharge sufficient to last until the patient can see a physician. Tex. Health & Safety Code § 574.081(c–1).

The commission shall adopt rules to determine the quantity and manner of providing psychoactive medication, as required by this section. The executive commissioner may not adopt rules requiring a mental-health facility to provide or pay for psychoactive medication for more than seven days after furlough or discharge. Tex. Health & Safety Code § 574.081(c–2).

§ 16.11:2 Pass or Furlough from Inpatient Care

The facility administrator may permit a patient admitted to the facility under an order for temporary or extended inpatient mental-health services to leave the facility under a pass or furlough. A pass authorizes the patient to leave the facility for not more than seventy-two hours. A furlough authorizes the patient to leave for a longer period. The pass or furlough may be subject to specified conditions. When a patient is furloughed, the facility administrator shall notify the court that issued the commitment order. Tex. Health & Safety Code § 574.082.

§ 16.11:3 Return to Facility

The facility administrator of a facility to which a patient was admitted for court-ordered inpatient health-care services may authorize a peace officer of the municipality or county in which the facility is located to take an absent patient into custody, detain the patient, and return the patient to the facility by issuing a certificate or affidavit setting out facts establishing that the patient is receiving court-ordered inpatient mental-health services at the facility and showing that the facility administrator reasonably believes that the patient is absent without authority from the facility, the patient has violated the conditions of a pass or furlough, or the patient's condition has deteriorated to the extent that the patient's continued absence from the facility under a pass or furlough is inappropriate. The affidavit or certificate should be issued to a law enforcement agency of the municipality or county. Tex. Health & Safety Code § 574.083(a).

If there is reason to believe that an absent patient may be outside the municipality or county in which the facility is located, the facility administrator may file the affidavit with a magistrate requesting the magistrate to issue an order for the patient's return. The magistrate with whom the affidavit is filed may issue an order directing a peace or health officer to take an absent patient into custody and return the patient to the facility. The order extends to any part of the state and authorizes any peace officer to whom the order is directed or transferred to execute the order, take the patient into custody, detain the patient, and return the patient to the facility. Tex. Health & Safety Code § 574.083(b).

A peace or health officer shall take the patient into custody and return the patient to the facility as soon as possible if the patient's return is authorized by a certificate or court order issued under this section. A peace or health officer may take the patient into custody without having the certificate or court order in the officer's possession. A peace or health officer who cannot immediately return a patient to the facility named in the order may transport the patient to a local facility for detention. The patient may not be detained in a nonmedical facility that is used to detain persons who are charged with or convicted of a crime unless detention in the facility is warranted by an extreme emergency. If the patient is detained at a nonmedical facility, the patient may not be detained in the facility for more than twenty-four hours and must be isolated from all persons charged with or convicted of a crime, and the facility must notify the county health authority of the detention. The local mental-health authority shall ensure that a patient detained in a nonmedical facility receives proper care and medical attention. Notwithstanding other law regarding confidentiality of patient information, the facility administrator may release to a law enforcement official information about the patient if the administrator determines the information is needed to facilitate the return of the patient to the facility. Tex. Health & Safety Code § 574.083(d)–(h).

§ 16.11:4 Revocation of Furlough

A furlough may be revoked only after an administrative hearing held in accordance with department rules. The hearing must be held within seventy-two hours after the patient is returned to the facility. A hearing officer shall conduct the hearing. The hearing officer may be a mental-health professional if the person is not directly involved in treating the patient. The hearing is informal and the patient is entitled to present information and argument. The hearing officer may revoke the furlough if the officer determines that the revocation is justified under Texas Health and Safety Code section 574.083(c). A hearing officer who revokes a furlough shall place in the patient's file a written notation of the decision and a written explanation of the reasons for the decision and the information on which the hearing officer relied. The patient shall be permitted to leave the facility under the furlough if the hearing officer determines that the furlough should not be revoked. Tex. Health & Safety Code § 574.084.

§ 16.11:5 Discharge

The facility administrator of a facility to which a patient was committed or from which a patient was required to receive temporary or extended inpatient or outpatient mental-health services shall discharge the patient when the court order expires. Tex. Health & Safety Code § 574.085.

The facility administrator of a facility to which a patient was committed for inpatient mental-health services or the person responsible for providing outpatient mental-health services may discharge the patient at any time before the court order expires if the facility administrator or person determines that the patient no longer meets the criteria for court-ordered mental-health services. The facility administrator of a facility to which the patient was committed for inpatient mental-health services shall consider before discharging the patient whether the patient should receive outpatient court-ordered mental-health services in accordance with a furlough under Texas Health and Safety Code section 574.082 or a modified order under section 574.061 that directs the patient to participate in outpatient mental-health services. A discharge terminates the court order, and the person discharged may not be required to submit to involuntary mental-health services unless a new court order is entered in accordance with Code title 7, subtitle C. Tex. Health & Safety Code § 574.086.

The facility administrator or the person responsible for outpatient care who discharges a patient pursuant to Tex. Health & Safety Code § 574.085 or § 574.086 shall prepare a discharge certificate and file it with the court that entered the order requiring mental-health services. Tex. Health & Safety Code § 574.087.

§ 16.11:6 Relief from Disabilities in Mental-Health Cases

A person who is furloughed or discharged from court-ordered mental-health services may petition the court that entered the commitment order for an order stating that the person qualifies for relief from a firearm disability. In determining whether to grant relief, the court must hear and consider evidence about (1) the circumstances that led to imposition of the firearm disability under 18 U.S.C. § 922(g)(4); (2) the person's mental history; (3) the person's criminal history; and (4) the person's reputation. A court may not grant relief unless it makes and enters in the record the following affirmative findings: (1) the person is no longer likely to act in a manner dangerous to public safety and (2) removing the person's disability to purchase a firearm is in the public interest. Tex. Health & Safety Code § 574.088.

§ 16.12 Administration of Medication to Patient under Court Order

A mental-health facility shall provide to a patient in the patient's primary language, if possible, and in accordance with departmental rules information relating to prescription medication ordered by the patient's treating physician. The facility shall also provide the information to the patient's family on request, but only to the extent not otherwise prohibited by state or federal confidentiality laws. *See* Tex. Health & Safety Code § 574.0415. If the patient refuses to comply with a physician's recommended treatment plan that includes the consumption of psychoactive medication and progress in the patient's return to baseline is stymied as a result, the physician will likely file with the court an application for an order authorizing psychoactive medication.

§ 16.12:1 Physician's Application for Order to Authorize Psychoactive Medication

A physician who is treating a patient may, on behalf of the state, file an application in a probate court or a court with probate jurisdiction for an order to authorize the administration of a psychoactive medication regardless of the patient's refusal if (1) the physician believes that the patient lacks the capacity to make a decision regarding the administration of the psychoactive medication, (2) the physician determines that the medication is the proper course of treatment for the patient, (3) the patient is under an order for inpatient mental-health services or an application for court-ordered mental-health services has been filed for the patient, and (4) the patient, verbally or by other indication, refuses to take the medication voluntarily. Tex. Health & Safety Code § 574.104(a). The application must state:

1. that the physician believes that the patient lacks the capacity to make a decision regarding administration of the psychoactive medication and the reasons for that belief;
2. each medication the physician wants the court to compel the patient to take;
3. whether an application for court-ordered mental-health services under section 574.034 or 574.0345 (both temporary mental-health services) or section 574.035 or 574.0355 (both extended mental-health services) has been filed;
4. whether a court order for inpatient mental-health services for the patient has been issued and, if so, under what authority it was issued;
5. the physician's diagnosis of the patient; and
6. the proposed method for administering the medication and, if the method is not customary, an explanation justifying the departure from the customary methods.

Tex. Health & Safety Code § 574.104(b).

The hearing on the application may be held on the date of a hearing on an application for court-ordered mental-health services but shall be held not later than thirty days after the filing of the application for the order to authorize psychoactive medication. If the hearing is not held on the same day as the application for court-ordered mental-health services and the patient is transferred to a mental-health facility in another county, the court may transfer the application for an order to authorize psychoactive medication to the county where the patient has been transferred. Tex. Health & Safety Code § 574.105(d).

§ 16.12:2 Patient Rights—Application for Order Authorizing Psychoactive Medication

A patient for whom an application for an order to authorize the administration of a psychoactive medication is filed is entitled to (1) representation by a court-appointed attorney who is knowledgeable about issues to be adjudicated at the hearing; (2)

meet with that attorney as soon as is practicable to prepare for the hearing and to discuss any of the patient's questions or concerns; (3) receive, immediately after the time of the hearing is set, a copy of the application and written notice of the time, place, and date of the hearing; (4) be told, at the time personal notice of the hearing is given, of the patient's right to a hearing and right to the assistance of an attorney to prepare for the hearing and to answer any questions or concerns; (5) be present at the hearing; (6) request from the court an independent expert; and (7) oral notification, at the conclusion of the hearing, of the court's determinations of the patient's capacity and best interests. Tex. Health & Safety Code § 574.105.

§ 16.12:3 Hearing and Order Authorizing Psychoactive Medication

The court may issue an order authorizing the administration of one or more classes of psychoactive medication to a patient who (1) is under a court order to receive inpatient mental-health services or (2) is in custody awaiting trial in a criminal proceeding and was ordered to receive inpatient mental-health services in the six months preceding a hearing under this Code section. Tex. Health & Safety Code § 574.106(a).

Practice Pointer: When representing a patient who was committed while awaiting trial in a criminal proceeding, practitioners should be certain of the date on which the judge of the criminal court signed off on the commitment, as the application for a court order authorizing psychoactive medication may be heard only in the first six months after the date the order committing the patient was signed.

The court may issue an order authorizing the administration of psychoactive medication only if the court finds by clear and convincing evidence after the hearing (1) that the patient lacks the capacity to make a decision regarding the administration of the proposed medication and treatment with the proposed medication is in the best interest of the patient; or (2) if the patient was ordered to receive inpatient mental-health services by a criminal court with jurisdiction over the patient, that treatment with the proposed medication is in the best interest of the patient and either (a) the patient presents a danger to the himself or others in the inpatient mental-health facility in which the patient is being treated as a result of a mental disorder or mental defect; or (b) the patient (i) has remained confined in a correctional facility for a period exceeding seventy-two hours while awaiting transfer for competency restoration treatment, and (ii) presents a danger to the patient or others in the correctional facility as a result of a mental disorder or mental defect. Tex. Health & Safety Code § 574.106(a–1).

In making the finding that treatment with the proposed medication is in the best interest of the patient, the court shall consider (1) the patient's expressed preferences regarding treatment with psychoactive medication; (2) the patient's religious beliefs; (3) the risks and benefits, from the perspective of the patient, of taking psychoactive medication; (4) the consequences to the patient if the psychoactive medication is not administered; (5) the prognosis for the patient if the patient is treated with psychoactive medication; (6) alternative, less intrusive treatments that are likely to produce the same results as treatment with psychoactive medication; and (7) less intrusive treatments likely to secure the patient's agreement to take the psychoactive medication. Tex. Health & Safety Code § 574.106(b).

If making a finding that, as a result of a mental disorder or mental defect, the patient presents a danger to the patient or others in the inpatient mental-health facility in which the patient is being treated or in the correctional facility, as applicable, the court shall consider (1) an assessment of the patient's present mental condition; (2) whether the patient has inflicted, attempted to inflict, or made a serious threat of inflicting substantial physical harm to the patient's self or to another while in the facility; and (3) whether the patient, in the six months preceding the date the patient was placed in the facility, has inflicted, attempted to inflict, or made a serious threat of inflicting substantial physical harm to another that resulted in the patient being placed in the facility. Tex. Health & Safety Code § 574.1065.

Practice Pointer: When representing a patient in a hearing on an application for an order authorizing psychoactive medication, the practitioner should try to elicit testimony from the patient, physician, and other witnesses on the considerations set out in the two paragraphs immediately above (described in Tex. Health & Safety Code §§ 574.106, 574.1065), provided such testimony will be favorable to the patient's case.

A hearing under this subchapter shall be conducted on the record by the probate judge or judge with probate jurisdiction, except that a judge may refer a hearing to a magistrate or court-appointed associate judge who has training regarding psychoactive medications, and a record is not required if the hearing is held by a magistrate or court-appointed associate judge. A party is entitled to a hearing de novo by the judge if an appeal of the magistrate's or associate judge's report is filed with the court within three days after the report is issued. The hearing de novo shall be held within thirty days of the filing of the application for an order to authorize psychoactive medication. Tex. Health & Safety Code § 574.106(c), (d), (e).

If a hearing or an appeal of an associate judge's or magistrate's report is to be held in a county court in which the judge is not a licensed attorney, the proposed patient or the proposed patient's attorney may request that the proceeding be transferred to a court with a judge who is licensed to practice law in Texas. The county judge shall transfer the case after receiving the request, and the receiving court shall hear the case as if it had been originally filed in that court. Tex. Health & Safety Code § 574.106(f).

As soon as practicable after the conclusion of the hearing, the patient is entitled to have provided to himself and his attorney written notification of the court's determinations. The notification shall include a statement of the evidence on which the court relied and the reasons for the court's determinations. Tex. Health & Safety Code § 574.106(g).

An order entered under this section shall authorize the administration to a patient, regardless of the patient's refusal, of one or more classes of psychoactive medications specified in the application and consistent with the patient's diagnosis. The order shall permit an increase or decrease in a medication's dosage, restitution of medication authorized but discontinued during the period the order is valid, or the substitution of a medication within the same class. Tex. Health & Safety Code § 574.106(h).

§ 16.12:4 Effect of Order

A person's consent to take a psychoactive medication is not valid and may not be relied on if the person is subject to an order authorizing psychoactive medication. The issuance of an order authorizing psychoactive medication is not a determination or adjudication of mental incompetency and does not limit in any other respect that person's rights as a citizen or the person's property rights or legal capacity. Tex. Health & Safety Code § 574.109.

§ 16.12:5 Appeal

A patient may appeal an order authorizing psychoactive medication in the manner provided for an appeal of an order requiring court-ordered mental-health services. See section 16.10:7 above. An order authorizing the administration of medication regardless of the refusal of the patient is effective pending an appeal of the order. Tex. Health & Safety Code § 574.108.

§ 16.13 Consequences Associated with Involuntary Commitment

Though court records relating to involuntary commitments are closed and medical records are protected by HIPAA laws, persons involuntarily committed for the purpose of receiving mental-health services must reveal if they have been involuntarily committed when seeking certain licenses. *See* Tex. Health & Safety Code § 611.002; 45 C.F.R. §§ 160, 164.

§ 16.13:1 Possessing Firearms or Ammunition

Under federal law, it is unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person has been adjudicated as a mental defective or has been committed to any mental institution. *See* 18 U.S.C. § 922(d)(4). In addition, in Texas a person is ineligible to obtain a permit to carry a weapon if he has been hospitalized for a psychiatric condition. *See* Tex. Gov't Code §§ 411.172, 411.174(b)(8)(B).

§ 16.13:2 Transportation Workers Identification Credential

The impact of mental-health commitments on persons seeking to become eligible or seeking recertification for a Transportation Workers Identification Credential (TWIC) should be highlighted by the attorney and considered by the patient, especially if the proposed patient is currently in an occupation that requires workers to obtain a TWIC. A TWIC is a common form of identification used by people who require access to secure locations as they work as truck drivers, longshore workers, port facility employees, and merchant mariners. The TWIC application requires the applicant to disclose whether he has been involuntarily committed to a mental-health facility. The Transportation Security Administration (TSA) determines that an applicant poses a security threat warranting denial of a TWIC if the applicant has been adjudicated as lacking mental capacity or been committed to a mental-health facility. However, a waiver may be obtained that outlines procedures for waiver of mental-capacity standards. In evaluating the request for waiver, the TSA considers the circumstances surrounding the commitment, court records or official medical release documents indicating that the applicant no longer lacks mental capacity, and other factors that indicate the applicant does not pose a security threat warranting denial of the TWIC. *See* 49 C.F.R. § 1572.17.

§ 16.13:3 License to Practice Law

The Texas Board of Law Examiners finds eligible only applicants who possess good moral character and fitness. Rule IV of the Rules Governing Admission to the Bar of Texas provides that—

> [t]he purpose of requiring an Applicant to possess this fitness is to exclude from the practice of law any person having a mental or emotional illness or condition which would be likely to prevent the person from carrying out duties to clients, courts or the profession. A person may be of good moral character, but may be incapacitated from proper discharge of his or her duties as a lawyer by such illness or condition. The fitness required is a present fitness, and prior mental or emotional illness or conditions are relevant only so far as they indicate the existence of a present lack of fitness.

See Tex. Rules Govern. Bar Adm'n R. 4(c). The rules are available on the Texas Board of Law Examiners' website at **https://ble.texas.gov/rules**.

§ 16.13:4 License to Practice Medicine

Physicians and physicians in training (medical students, interns, and residents) must report diagnosis or treatment of a physical, mental, or emotional condition that has impaired or could impair their ability to practice medicine. In addition, in Texas, a physician's duty to report an impaired colleague is spelled out in the Medical Practice Act. The Act specifies that any physician, medical student, resident, or medical peer review committee shall report relevant information to the Texas Medical Board (TMB) if, in the opinion of the person or committee, that physician poses a continuing threat to the public welfare through the practice of medicine. If the physician refuses help or the committee believes that the physician poses a continuing threat to the public welfare through the practice of medicine, the law requires the committee to report the physician to the TMB and any known health-care entity in which the physician has clinical privileges. *See* Tex. Occ. Code §§ 160.002–.004.

§ 16.14 Options Often Available to Client Facing Involuntary Commitment

Considering the consequences of an involuntary commitment, which threaten to stymie the proposed patient's liberties in the future, an attorney representing a proposed patient facing involuntary commitment should be aware of all options available to the proposed patient.

§ 16.14:1 Motion for Continuance

The final hearing on an application for inpatient commitment for temporary mental-health services must be set within fourteen days of the filing of the application. As discussed at section 16.10:2 above, the court may grant one or more continuances, but a hearing must be held not later than the thirtieth day after the date on which the application was filed. Attorneys might consider requesting a continuance in the following situations, provided there is no petition for an order to administer psychoactive medication on file: (1) the proposed patient is about to be released from the hospital; (2) the proposed patient is cooperative with treatment and is experiencing his first mental breakdown or has a history of managing his illness without court intervention; or (3) the proposed patient wants his day in court but is too ill to effectively participate in the proceedings and not ill enough to warrant the attorney's stipulation to the admission of evidence supporting commitment. Continuing the final hearing often gives the proposed patient the opportunity to stabilize and be released by the hospital before the final hearing.

§ 16.14:2 Allow Patient Opportunity to Accept Treatment Voluntarily

Sometimes a particularly cooperative patient will be given the opportunity by his treating physician to convert to receiving inpatient mental-health services on a voluntary basis, thereby avoiding the commitment process. The patient's attorney may also request that the doctor allow the patient to accept treatment on a voluntary basis. Accepting treatment on a voluntary basis will enable the patient to avoid commitment and the consequences associated with commitment.

Practice Pointer: Sometimes the proposed patient has the financial ability to pay for care at a private mental hospital facility. However, private mental-health facilities often do not take patients who are unwilling to accept treatment on a voluntary basis. So if a proposed patient wishes to be transferred to a private mental-health facility, it may be necessary for the treating physician to allow the patient to consent to receiving mental-health services voluntarily.

§ 16.14:3 Proceed to Trial

Naturally, if the proposed patient is unwilling to wait for a continuance, wants his day in court, and is well enough to participate in the proceedings, the attorney is obligated to mount a defense on behalf of his client. The practitioner should consider the following before proceeding to trial: (1) the application for court-ordered mental-health services and certificates of medical examination for mental health should be reviewed for technical defects and inconsistencies (see section 16.4:7 above); (2) if the proposed patient is likely to present well, the attorney should consider calling him as a witness, but if the proposed patient is not likely to present well and does not wish to offer testimony, the attorney should explain why he is not present and ask that the court excuse his presence; (3) if the proposed patient has family or friends who support the proposed patient's desire to avoid involuntary commitment, the attorney should consider asking them to appear and offer testimony outlining why they support the proposed patient's release; (4) the attorney should visit with the proposed patient and his social worker about plans in the event of release so that it may be demonstrated, if the patient is in fact mentally ill, that the patient has plans to manage his illness and provide for his basic needs; (5) the rules of evidence apply in the final hearing, so the attorney should make appropriate objections; and (6) the attorney should remember that the judge looks out for the best interests of the proposed patient and the job of the attorney ad litem is to be the proposed patient's lawyer.

§ 16.14:4 Request Outpatient Commitment

Outpatient commitment as an alternative to inpatient commitment for temporary mental-health services is generally not common. A patient facing involuntary inpatient commitment likely has little insight into the severity of his illness; otherwise, he would have voluntarily sought treatment. Moreover, the statute ordering inpatient services requires that the patient be unable to submit voluntarily to outpatient treatment. *See* Tex. Health & Safety Code § 574.034. Consequently, the likelihood that he will abide by the terms of outpatient commitment is remote unless the patient is fortunate enough to have a dedicated support network of family, friends, or social workers. Additionally, few mental-health treatment facilities offer support for outpatient involuntary commitments.

Increasingly, however, Texas counties are implementing assisted outpatient treatment programs, providing successful alternatives to inpatient commitments. It is likely the court would be more amenable to outpatient commitment if (1) the proposed patient demonstrated the presence of a committed, experienced, and dedicated support system; (2) the mental-health treatment facility serving the proposed patient offered a robust and reliable outpatient program designed to accept outpatient commitments; (3) the proposed patient did not appear to be a danger to himself or others but the agreed opinion of the physicians, as evidenced in the two certificates of medical examination for mental health, determined that the proposed patient was suffering from severe distress and deterioration; and (4) outpatient commitment would be an effective form of treatment.

In 2017, the Texas legislature codified a process for court-ordered outpatient mental-health treatment for persons accused of nonviolent offenses so that those persons may be released on bond to receive outpatient mental-health treatment with the potential of having their charges dismissed upon successful completion of the outpatient program. *See* Tex. Code Crim. Proc. art. 16.23. Such nonviolent offenses do not include offenses related to intoxication including driving, boating, or flying while intoxicated or intoxication assault or manslaughter. *See* Tex. Code Crim. Proc. art. 16.23.

Appendix

Guardianship Resources

Federal and Texas Resources

Texas Department of Family and Protective Services
To report abuse, neglect, or exploitation of adults: 1-800-252-5400
www.txabusehotline.org
www.texasattorneygeneral.gov/consumer-protection/seniors-and-elderly

Texas Health and Human Services Guardianship Services Program
www.hhs.texas.gov/regulations/legal-information/guardianship

Texas Health and Human Services Aging and Disability Resource Center
855-937-2372
www.hhs.texas.gov/services/aging/long-term-care/aging-disability-resource-center/find-adrc

Eldercare Locator
U.S. Administration on Aging information on local programs
800-677-1116
https://eldercare.acl.gov/Public/Index.aspx

Medicaid
Benefits counseling line: 211
http://benefitsapplication.com/program_info/tx/medicaid

Medicare
General information: 800-633-4227
www.medicare.gov

Medication Assistance
www.needymeds.org
https://medicineassistancetool.org

Nursing Home Information Online
Nursing home comparison: **www.medicare.gov/care-compare/?providerType=NursingHome**
Nursing home consumer information: **www.hhs.texas.gov/services/your-rights**

Social Security Administration
800-772-1213
www.ssa.gov

National Guardianship Association
www.guardianship.org

Center for Guardianship Certification
https://guardianshipcert.org

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American Bar Association Commission on Law and Aging
www.americanbar.org/groups/law_aging

Department of Veterans Affairs
800-827-1000
www.va.gov

Texas Guardianship Association
www.texasguardianship.org

Judicial Branch Certification Commission, Office of Court Administration
Oversees the certification, registration, and licensing of guardians and guardianship programs
www.txcourts.gov/jbcc

Texas Council for Developmental Disabilities
https://tcdd.texas.gov

Texas Legal Services Center
www.tlsc.org

Texas Local Guardianship and Money Management Programs

Harris County Resources for Children and Adults—Guardianship Program—Houston, TX
https://resources.harriscountytx.gov/Our-Services/Services-for-Vulnerable-Adults

Friends for Life—Waco, TX
https://friendsforlife.org

Family Eldercare—Austin, TX
www.familyeldercare.org

Guardianship Services, Inc.—Fort Worth, TX
www.guardianshipservices.org

Senior Source—Dallas, TX
https://theseniorsource.org

LULAC Project Amistad—El Paso, TX
https://projectamistad.org

Brazos Bend Guardianship Services—Rosenberg, TX
https://brazosbendguardianship.org

Arc of Texas
www.thearcoftexas.org

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TEXAS STATUTORY PROBATE COURT WEBSITES

Harris County: **https://probate.harriscountytx.gov**

Bexar County: **www.bexar.org/3049/Probate-Courts**

Tarrant County: **https://access.tarrantcounty.com/en/probate-courts.html**

Dallas County: **www.dallascounty.org/government/courts/probate/**

Travis County: **www.traviscountytx.gov/probate**

Denton County: **www.dentoncounty.gov/1143/Probate-Court-No-1**

Collin County: **www.collincountytx.gov/Courts/Probate**

Galveston County: **www.galvestoncountytx.gov/our-county/probate-court**

Hidalgo County: **www.hidalgocounty.us/180/Probate-Court**

El Paso County: **www.epcounty.com/courts/probatecourts.htm**

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Statutes and Rules Cited

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