

TEXAS GUARDIANSHIP MANUAL

Third Edition



Austin 2012

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TEXAS GUARDIANSHIP MANUAL

Third Edition

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The State Bar of Texas is pleased to publish the third edition of the *Texas Guardianship Manual*. The revised and updated manual continues to be an outstanding tool to assist attorneys with administering guardianships to meet the needs of Texas citizens. The State Bar makes this resource available to support attorneys in providing the highest level of professionalism for their clients.

The publication of this manual would not have been possible without the exceptional contributions of its authors, led by Sarah Patel Pacheco. The dedicated effort of the authors in producing the highest quality resources for Texas attorneys is a commendable and remarkable contribution to the profession.

A handwritten signature in black ink, appearing to read "Bob Black".

Bob Black
President, State Bar of Texas



Preface to 2013 Supplement

The 2013 supplement to the *Texas Guardianship Manual* updates the manual to reflect the conversion from the Texas Probate Code to the Texas Estates Code. The new Texas Estates Code is effective January 1, 2014, at which time the Texas Probate Code will no longer be in effect. In addition, practice notes and forms have been updated to reflect changes in statutory and case law since the publication of the third edition of the Manual in 2012. The 2013 supplement also includes new chapters addressing foreign guardianships and guardianship management trusts. The State Bar would like to express its gratitude to the Texas Guardianship Manual Committee for its dedicated work on this valuable resource. In addition, the Bar also wishes to thank Catherine H. Goodman of Shannon Gracey, Ratliff & Miller, L.L.P., who contributed significantly to the chapter on foreign guardianships, and Kelley Bentley of Wright Abshire, who assisted greatly with the chapter on management trusts.



Preface

The State Bar of Texas is excited to publish the third 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 reference that addresses situations that commonly arise in a Texas guardianship practice.

The format of the manual should enable the attorney to quickly determine whether guardianship is 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. Since 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, the attorney must always be alert to unusual aspects of a particular case and refer to appropriate 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 TexasBarBooks Department of the State Bar have contributed their expertise to this manual over the years. The generosity of these individuals in giving of their talents and time to this new edition is greatly appreciated. They include Lisa Jamieson, Terry Hammond, and Nathan Griffin.

Of particular note is The Honorable Steve King, presiding judge of Tarrant County Probate Court Number One. Judge King contributed significant time and talent to this most recent edition. His experience, insights, and coordination of the various associate editors has been invaluable. Also, a special thanks to David Ashmore, Elma Garcia, and Courtney Cavaliere, who helped tremendously in preparing this edition. Finally, we would be remiss to not also acknowledge 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*, and Sharon B. Gardner, who chaired this committee from 1993 until 2010. They have set a high standard for this and all future committees.

As with any manual, practitioners are encouraged to make sure they apprise themselves of statutory changes. The committee anticipates providing timely and useful updates to the manual; suggestions for inclusions or revisions are encouraged. They should be directed to the TexasBarBooks Department of the State Bar of Texas. It is the committee's hope that the *Texas Guardianship Manual* will become a valuable tool for all Texas guardianship practitioners. However, it is not intended to imply that certain suggested actions are practice standards or compulsory in all proceedings.

Sarah Patel Pacheco, *Chair*



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3 Alternatives to Guardianship and Preguardianship Planning

Practice notes discussing the alternatives to guardianship and related forms

4 Creating Guardianships

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

5 Guardianships of Veterans and Dependents

Practice notes and related forms concerning the special requirements for the administration of veterans benefits

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

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

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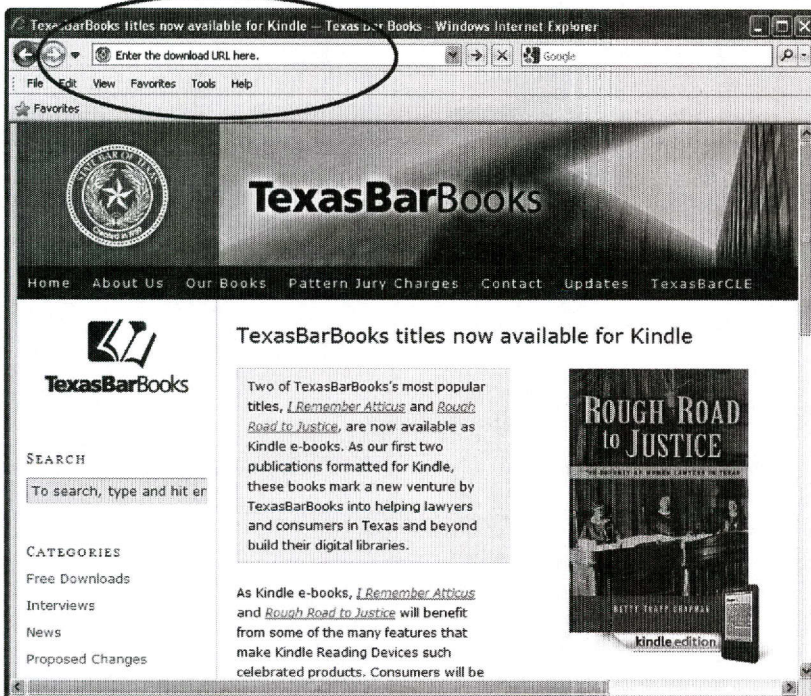
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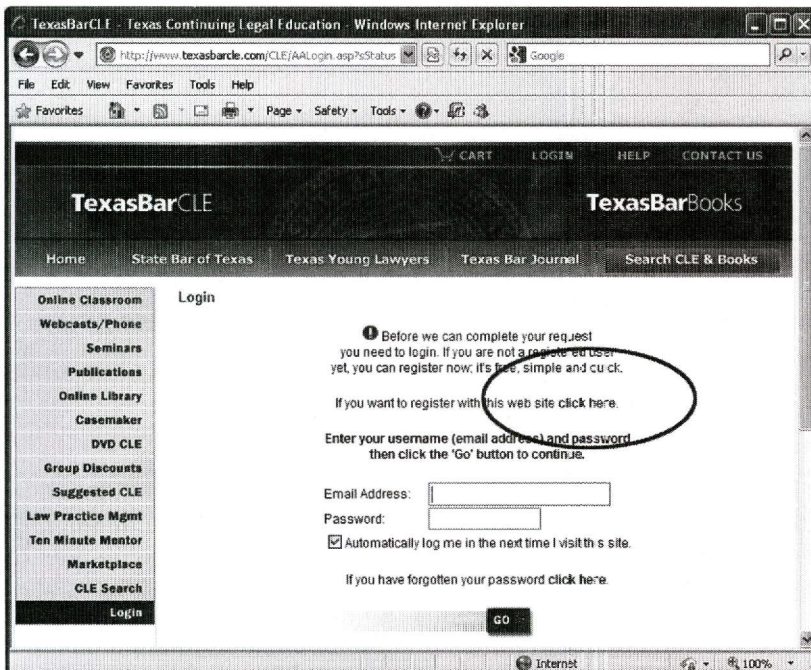
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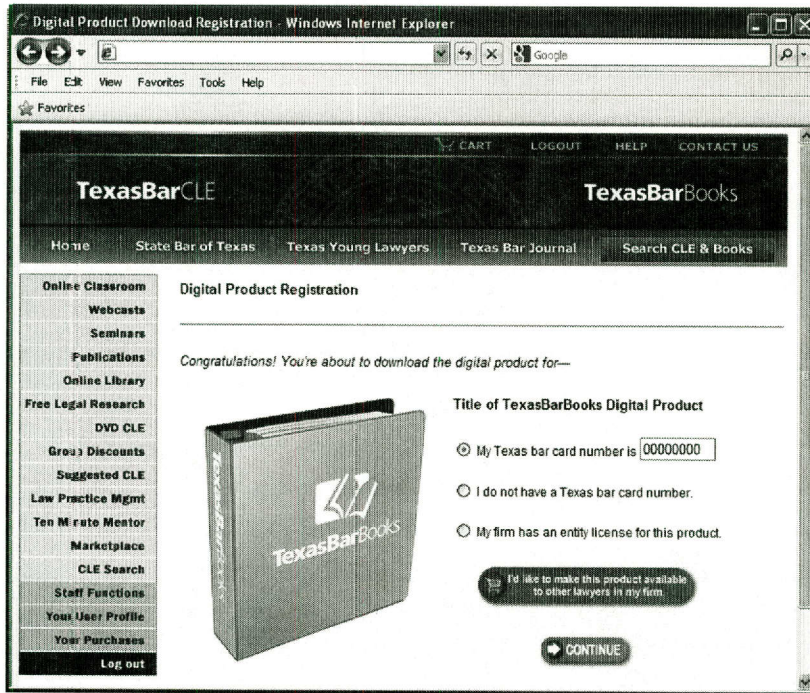
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- find and highlight the next variable, instruction, or optional text;
- retain the embedded instructions for viewing while you work on your hard drive but prevent them from printing on your hard copies; and
- delete the embedded instructions entirely on forms you plan to e-mail or file electronically.

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[Reserved]

Introduction

The *Texas Guardianship Manual* 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 very 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 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 is hard to achieve, however, 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 terms or phrases within the brackets. The choices are separated by forward slash marks.

Optional words. In a phrase such as “Ward [and his estate],” the user must determine whether to include the phrase “and his estate.”

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 “[set out 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 words simply distinguish 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 product

The downloadable digital product version of the *Texas Guardianship Manual* contains the entire text of the manual as a single PDF file that is searchable and hyperlinked to allow for easy, rapid navigation to topics of interest. Also included are electronic versions of all State Bar of Texas–copyrighted forms from the manual as editable text files, as well as printable or downloadable PDF files of selected forms linked from the main PDF file for easy retrieval.

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 Casemaker online.

Caveat: Note that the word-processing forms included in the digital product 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 digital product including usage notes, see the material following the “How to Download This Manual” tab.

§ 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
Plaintiff

v.

DON DAVIS
Defendant

§
§
§
§
§
§
§

IN THE DISTRICT COURT

OF TRAVIS COUNTY, TEXAS

345th JUDICIAL DISTRICT

§ 4 Page Numbers

Page numbers are consecutive for both practice notes and forms within each chapter. Practice notes begin with the number of the chapter, followed by the number of the page within the chapter. Forms begin with the number of the form, followed by the number of the page within the form. This system is used to permit revisions

within any chapter without renumbering the pages in the remaining chapters.

§ 5 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:

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State Bar of Texas
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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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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 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 conduct of the bar and the discipline of its 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.

Court—State (West 2013). Article X deals with discipline and suspension of attorneys; its contents, entitled the Texas Disciplinary Rules of Professional Conduct, are discussed in section 1.5 below.

§ 1.4 Texas Rules of Disciplinary Procedure

The Texas Rules of Disciplinary Procedure, which are located in volume 3A of the Texas Government Code in title 2, subtitle G, appendix A-1, and at www.legalethictexas.com/Ethics-Resources/Rules/Texas-Rules-of-Disciplinary-Procedure.aspx, 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. 1.06Y, *reprinted in* Tex. Gov't Code, tit. 2, subtit. G, app. A-1 (West 2013).

§ 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 3A of the Texas Government Code in title 2, subtitle G, appendix A, and may also be found in Texas Rules of

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. 1.06Y.

§ 1.5 Texas Disciplinary Rules of Professional Conduct

The Texas Disciplinary Rules of Professional Conduct are located in volume 3A 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.legalethictexas.com/Ethics-Resources/Rules/Texas-Disciplinary-Rules-of-Professional-Conduct.aspx. 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 online at www.legalethictexas.com/Ethics-Resources/Opinions.aspx.

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 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 online at www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html.

§ 1.7 The ACTEC Commentaries

Unfortunately, neither the Model Rules of Professional Conduct (MRPC) nor the official comments to them are designed to specifically address 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 applica-

ble 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 www.actec.org/public/CommentariesPublic.asp.

§ 1.8 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 online at www.txpd.org.

§ 1.9 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's 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 in Texas Rules of Court—State (West 2013).

[Section 1.10 is reserved for expansion.]

III. Professional Responsibility

§ 1.11 Professional Misconduct

barred. Tex. Gov't Code § 81.078(c); *see also* Tex. Rules Disciplinary P. R. 8.05.

§ 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 dis-

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. Civ. 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. 1.06V 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. 1.06Z); 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. 1.06T).
- Tex. Rules Disciplinary P. R. 1.06V.
- Tex. Disciplinary Rules Prof'l Conduct R. 8.04(a), *reprinted in* Tex. Gov't Code, tit. 2, subtit. G, app. A (West 2013) (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 bar-ratry 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 vio-

lation, 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. Civ. App.—El Paso 1977, writ ref'd n.r.e.); see also *Searcy v. State Bar of Texas*, 604 S.W.2d 256 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.); *Muniz v. State*, 575 S.W.2d 408 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

§ 1.12 Attorney's Fees

§ 1.12:1 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. 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. Civ. App.—Waco 1972, writ dismissed). 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).

§ 1.12:2 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).

§ 1.12:3 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. Civ. App.—Corpus Christi 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. Civ. 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. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

In *Robinson v. Risinger*, 548 S.W.2d 762, 766 (Tex. Civ. 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. Civ. App.—Corpus Christi 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 1985, writ ref'd n.r.e.).

§ 1.12:4 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.

§ 1.13 Conflicts of Interest

§ 1.13:1 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. Civ. 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 representation 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. Civ. App.—San Antonio 1962, writ ref'd n.r.e.).

In *Merrell v. Fanning & Harper*, 597 S.W.2d 945 (Tex. Civ. 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. Civ. 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 guaran-

tee 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 standard 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.

§ 1.13:2 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. Civ. 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 representation 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 asso-

ciated 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 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. Civ. App.—Dallas 1980, writ dismissed), 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. Civ. App.—Corpus Christi 1980, no writ).

§ 1.14 Confidentiality

§ 1.14:1 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 "unprivileged 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.

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).

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).

§ 1.14:2 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 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 condi-

tions 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.” A review of case law reveals no precedent involving application to video cameras, but those cameras would arguably constitute a mechanical or electronic 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 18.20 of the Code of Criminal Procedure. Tex. Penal Code § 16.02(a). The article 18.20 definitions are virtually the same as those in the federal act (without the references to interstate commerce or communications). Tex. Code Crim. Proc. art. 18.20, § 1(1)–(3).

The 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 rea-

sonably should know was obtained by interception of the communication. Tex. Civ. Prac. & Rem. Code § 123.002(a)(1), (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).

§ 1.15 Commingling Funds

§ 1.15:1 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. Civ. 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.

§ 1.15:2 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.

§ 1.16 Advertising

§ 1.16:1 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 solicitation 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.

§ 1.16:2 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 Web sites, 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.

Firm Names and Letterhead: Tex. Disciplinary Rules Prof'l Conduct R. 7.01(a) prohibits the practice of law under a trade name or a name that is misleading as to the identity of the attorneys practicing under the name or under a firm name that includes names other than one or more of the attorneys in the firm. This rule allows use of words such as *professional corporation*, *limited liability partnership*, or similar designations and allows use of abbreviations for the entity. Tex. Disciplinary Rules Prof'l Conduct R. 7.01(e) prohibits advertising using a trade name unless it is in the form authorized above and actually used in the firm's letterhead and contracts. However, use of the name of a deceased or retired partner or predecessor firm is not considered misleading. Tex. Disciplinary Rules Prof'l Conduct R. 7.01(a) & cmt. 1. If a law firm has a multistate practice, 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(b). If an attorney has taken a position with the government, 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).

Communications about Services: The rules specifically prohibit making or sponsoring false or misleading communications about attorneys' services or qualifications. *See* Tex. Disciplinary Rules Prof'l Conduct R. 7.02. The following

seven categories of communications are considered false and misleading:

1. Communications containing material misrepresentations of fact or law or omitting a fact necessary to prevent the statement as a whole from being materially misleading. Tex. Disciplinary Rules Prof'l Conduct R. 7.02(a)(1).
2. Communications that contain any reference in a public media advertisement to past successes or results obtained unless (a) the attorney served as lead counsel in the matter or was primarily responsible for the settlement or verdict, (b) the client actually received the amount involved, (c) the reference is accompanied by adequate information about the nature of the case or matter and the damages or injuries the client sustained, and (d) if the gross amount received is stated, the attorney's fees and litigation expenses withheld are also stated. Tex. Disciplinary Rules Prof'l Conduct R. 7.02(a)(2).
3. Communications that are likely to create an unjustified expectation about the results the attorney can achieve or that state or imply that the attorney can achieve results by means that violate the law or the disciplinary rules. Tex. Disciplinary Rules Prof'l Conduct R. 7.02(a)(3).
4. Communications comparing the attorney's services with other attorneys' services unless the comparison can be substantiated with objective, verifiable data. Tex. Disciplinary Rules Prof'l Conduct R. 7.02(a)(4).
5. Communications stating or implying that the attorney is able to influence any tribunal or official improperly or

on irrelevant grounds. Tex. Disciplinary Rules Prof'l Conduct R. 7.02(a)(5).

6. Communications in an advertisement in the public media or in a solicitation communication that designate one or more areas of practice unless the attorney is competent to practice in those areas. Tex. Disciplinary Rules Prof'l Conduct R. 7.02(a)(6). (Although an attorney is not required to be board certified to advertise a specialty, certification is conclusive of an attorney's competence as required by Tex. Disciplinary Rules Prof'l Conduct R. 7.02(a)(6). Tex. Disciplinary Rules Prof'l Conduct R. 7.02(b).)
7. Communications that use an actor or model to portray a client of the attorney. Tex. Disciplinary Rules Prof'l Conduct R. 7.02(a)(7).

Prohibited Solicitations and Payments: An attorney may not contact, in person or by regulated telephone or other electronic means (not including the attorney's Web site) that will result in live, interactive communication, someone (other than a family member) who was not previously a client regarding a particular event or series of events when the attorney's objective is pecuniary gain. Tex. Disciplinary Rules Prof'l Conduct R. 7.03(a), (f). However, an attorney employed by a nonprofit organization may contact members of the organization for limited purposes. Tex. Disciplinary Rules Prof'l Conduct R. 7.03(a). Attorneys may not pay referral fees to nonattorneys, although they may pay for advertising and for the expenses of an attorney referral service. Tex. Disciplinary Rules Prof'l Conduct R. 7.03(b). Attorneys may not advance or offer to 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(d) and legitimate referral fees. Tex. Disciplinary Rules Prof'l Conduct R. 7.03(c). An attorney shall not enter into an

agreement to collect fees in violation of the above rules, nor may he accept referrals from an attorney referral service unless the service meets the requirements of chapter 952 of the Texas Occupations Code. Tex. Disciplinary Rules Prof'l Conduct R. 7.03(d), (e).

Advertisements in Public Media: Tex. Disciplinary Rules Prof'l Conduct R. 7.04 governs communications made through the public media. Attorneys may list specialties in legal directories and legal newspapers, as long as the information is not false or misleading. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(a). An attorney who advertises in the public media must publish or broadcast the name of at least one attorney who is responsible for the content of the advertisement. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(b)(1). Attorneys may also advertise that they are, for example, "Board Certified, Family Law—Texas Board of Legal Specialization" if in fact they are so recognized by the Texas Board of Legal Specialization. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(b)(2)(i). Attorneys may include statements that they are members of an organization the name of which implies that its members possess special competence only if the 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 objective, exacting, publicly available standards that are reasonably relevant to the special training or special competence that is implied and that are in excess of the level of training and competence generally required for admission to the bar. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(b)(2)(ii). An infomercial or comparable presentation must state that it is an advertisement both verbally and in writing at both the beginning and the end and in writing during any portion that explains how to contact an attorney or firm. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(b)(3). The statements required by Tex. Disciplinary Rules Prof'l Conduct R. 7.04(b) must be displayed conspicuously

and in easily understood language. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(c).

Attorneys may advertise their services in the public media either directly or through a public relations firm. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(d). A particular attorney must be responsible for the content of each advertisement, so all advertisements must be reviewed and approved in writing by the advertising attorney or an attorney in the advertised firm. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(e), cmt. 10. Copies of advertisements and a record of where they were used must be retained for four years after their last use. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(f).

In advertisements in the public media, a person who portrays an attorney whose services are being advertised or narrates the advertisement as if he were such an attorney must in fact be an attorney whose services are being advertised. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(g).

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. If specific percentages are disclosed, the advertisement must state whether the percentage is calculated before or after the expenses are deducted from the recovery. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(h).

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 to be effective or for the time stated in the advertisement. However, quoted prices are not expected to be honored for longer than one year. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(i).

Tex. Disciplinary Rules Prof'l Conduct R. 7.04(m) prohibits use of false or misleading slogans or jingles in the public media.

The geographic location of the attorney's principal office must be disclosed. No other office may be advertised unless that other office is staffed by an attorney at least three days a week or the advertisement states the days and times an attorney will be at the office or that meetings with attorneys will be by appointment only. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(j).

If the rules require that specific items of information accompany communications about an attorney's services, the required items must be presented in the same manner as the communication and with equal prominence. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(q).

Advertisements on the Internet must display the statements and disclosures required by rule 7.04. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(r).

Additional rules apply to cooperative advertising by attorneys from different firms, referral services, and payments for advertising made by another attorney. Tex. Disciplinary Rules Prof'l Conduct R. 7.04(k), (l), (n)–(p).

Prohibited Written, Electronic, or Digital Solicitations: Tex. Disciplinary Rules Prof'l Conduct R. 7.05 pertains to certain written, audio, audio-visual, digital media, recorded telephone message, or other electronic communications to prospective clients for the purpose of obtaining professional employment. This rule prohibits an attorney from sending communications that involve coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment; that contain information forbidden by Tex. Disciplinary Rules Prof'l Conduct R. 7.02; that fail to satisfy the requirements of Tex. Disciplinary Rules Prof'l Conduct R. 7.04 that would apply if the communication were an advertisement in the public media; or that contain a false, fraudulent, misleading, deceptive, or unfair statement or claim. Tex. Disciplinary Rules Prof'l Conduct R. 7.05(a). The format of a written, electronic, or digital solicitation com-

munication is governed by Tex. Disciplinary Rules Prof'l Conduct R. 7.05(b), and requirements for audio, audio-visual, digital media, recorded telephone message, and other electronic communications are governed by Tex. Disciplinary Rules Prof'l Conduct R. 7.05(c).

All written, audio, audio-visual, digital media, recorded telephone message, or other electronic communications must be reviewed by the attorney and signed or approved by the attorney or by an attorney in the firm. Tex. Disciplinary Rules Prof'l Conduct R. 7.05(d). A copy of each such communication and the dates and places it was sent must be retained for four years. Tex. Disciplinary Rules Prof'l Conduct R. 7.05(e).

Communications to family members or to pre-existing clients, communications made at the request of the prospective client, communications made without concern for a specific past occurrence or event or series of past occurrences or events and not concerned with a specific legal problem of which the attorney is aware, and communications not motivated by the desire for employment or the possibility of pecuniary gain are exempt from the provisions of Tex. Disciplinary Rules Prof'l Conduct R. 7.05. Tex. Disciplinary Rules Prof'l Conduct R. 7.05(f).

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.

Filing Requirements: Tex. Disciplinary Rules Prof'l Conduct R. 7.07 establishes a procedure for preapproval of advertising by the Advertising Review Committee. A copy of the written, audio, audio-visual, digital, or other electronic communications, including a representative sample of the envelope or other packaging to be used, together with an application form and a filing fee, must be submitted no later

than the sending of the communication. Tex. Disciplinary Rules Prof'l Conduct R. 7.07(a). A copy of an advertisement in the public media in the form in which it will appear (for example, video, print copy, audiotape), production script and other information, time and locations of dissemination or proposed dissemination, a completed application form, and a filing fee must be submitted. Tex. Disciplinary Rules Prof'l Conduct R. 7.07(b). Requirements for filing with regard to a Web site are prescribed in Tex. Disciplinary Rules Prof'l Conduct R. 7.07(c).

An attorney may seek an advance advisory opinion about compliance of a proposed solicitation not less than thirty days before its dissemination. An opinion of noncompliance is not binding in a disciplinary proceeding, but a finding of compliance is binding as to all materials submitted for preapproval if the information received in connection with the solicitation is true and not misleading. The finding of compliance is admissible evidence if offered by a party. Tex. Disciplinary Rules Prof'l Conduct R. 7.07(d).

Certain types of communications are exempt from the approval process. These advertisements, if they contain no false or misleading information, include those providing basic information such as the name, address, electronic address, phone numbers, office and telephone service hours, and fax numbers of the attorney or attorneys in a firm, with a designation such as "lawyer" or "law firm"; fields of specialization and concentration or practice limitation; dates of admission; foreign language ability; acceptance of credit cards; identification with group prepaid legal plans; and any fee for initial consultation or fee schedule. *See* Tex. Disciplinary Rules Prof'l Conduct R. 7.07(e).

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.

§ 1.17 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.

[Sections 1.18 through 1.20 are reserved for expansion.]

IV. Professional Malpractice

§ 1.21 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 client. 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 dismissed).

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. Civ. App.—Galveston 1953, writ refused n.r.e.); *Kruegel v. Porter*, 136 S.W. 801 (Tex. Civ. 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.).

§ 1.22 Elements of Legal Malpractice

§ 1.22:1 Attorney-Client Relationship and Duty

In order 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. Civ. 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 judgment 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.

§ 1.22:2 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 Purnell). 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. Civ. App.—San Antonio 1966, no writ), *disapproved by Cosgrove*, 774 S.W.2d at 665, in which 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 non-

vested 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. Civ. 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. Civ. 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. Civ. 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. Civ. 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 stan-

dard, 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. Civ. App.—Amarillo 1939, writ *dism'd* judgm't cor.).

§ 1.22:3 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 (Tex. Civ. App. 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. Civ. 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 speculation 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).

§ 1.22:4 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. Civ. 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. Civ. 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. Civ. 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. Civ. 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. Civ. 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 1.24:1 below for a discussion of when a cause of action accrues.

§ 1.22:5 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 (Tex. Civ. App. 1901, no writ).

§ 1.22:6 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).

§ 1.23 Who Can Sue for Legal Malpractice

§ 1.23:1 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. Civ. App.—Corpus Christi 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, for 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 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.)

§ 1.23:2 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. Civ. 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), decided by the U.S. Supreme Court in 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 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 Texas Supreme 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. Estates 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. Civ. 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.

§ 1.24 Defenses to Legal Malpractice

§ 1.24:1 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 dismissed); *Citizens State Bank v. Shapiro*, 575 S.W.2d 375 (Tex. Civ. 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. Civ. 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. Civ. 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. Civ. 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 Tolloed 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 of action 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. Civ. 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. Civ. 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).

§ 1.24:2 Good-Faith Defense

The good-faith defense is the equivalent of the error-in-judgment rule. See section 1.22:2 above.

§ 1.25 Potential Areas for Legal Malpractice

§ 1.25:1 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).

§ 1.25:2 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.

§ 1.25:3 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. Civ. App. 1904, no writ); *Fox v. Jones*, 14 S.W. 1007 (Tex. Ct. App. 1889).

§ 1.26 Procedures to Help Avoid Malpractice Actions

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

§ 1.26:1 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.

§ 1.26:2 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.

A sample engagement letter and fee agreement is attached as form 1-1.

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.

§ 1.26:3 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).

§ 1.26:4 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.

§ 1.26:5 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.

§ 1.27 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), 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.

The case involved a maritime law specialist.

§ 1.28 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 dismissed 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 reasons 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, Tex. Prob. Code § 681 (now Tex. Estates 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. Estates Code § 1054.054(a). See section 1.31 below for a discussion of the claim against the 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 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. Estates Code § 1054.056.

§ 1.29 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 lacks legal competence and action is required to protect the client, the attorney is mandated to take reasonable action to secure the appointment of a guardian or seek other protective orders. Tex. Disciplinary Rules Prof'l Conduct R. 1.02(g). 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 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 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 an attorney ad litem, guardian ad litem, and employee of the ward's trust are 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 discovered, he may be charged with a Class A misdemeanor. *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 Texas Department of Aging and Disability Services at 1-800-458-9858.

Although Tex. Estates 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 as to 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, and the grounds on which the guardianship is sought. Tex. Estates Code § 1054.004(a).

§ 1.30 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, tit. 2, subtit. G, app. B (West 2013).

§ 1.31 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 1991, writ denied); *see also Yaklin v. Glusing, Sharpe & Krueger*, 875 S.W.2d 380, 383 (Tex. App.—Corpus Christi 1994, no writ).

Possible Existence of Attorney-Client Relationship

Relationship: An issue has arisen in the last few 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 rule 1.02 of the Texas 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.

Furthermore, the Texas Disciplinary Rules of Professional Conduct appear to recognize that a person under a disability, whether created by a guardianship or otherwise, can be the client. Comment 13 to rule 1.02 provides that "[i]f a

legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the *client*." Tex. Disciplinary Rules Prof'l Conduct R. 1.02 cmt. 13 (emphasis added).

The possible existence of an attorney-client relationship between the guardian's attorney and the ward could also be argued based on decisions in Texas 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 dismissed 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. Civ. App.—El Paso 1937, writ refused) (attorney retained by agent deemed to be attorney of principal's selection). See section 1.28 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 manual, 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 a 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." *Querner v. Rindfuss*, 966 S.W.2d 661, 666 (Tex. App.—San Antonio 1998, pet. denied) (estate attorney may be held liable for fraud). In such an event, the attorney may be held personally liable if he "knowingly commits a fraudulent act or knowingly enters into a conspiracy to defraud a third person." *Querner*, 966 S.W.2d at 666. The attorney cannot shield himself from liability on the basis that he was an agent of the client "because no one is justified on that ground in knowingly committing a willful and premeditated fraud for another." *Querner*, 966 S.W.2d at 666.

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. 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 of Texas 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 relationships 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 Estates Code, which allows for management of the community estate outside of court supervision and control. *See* Tex. Estates Code chapter 1353. The attorney knows that the wife is considering divorcing her husband, and the attorney believes that the wife 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 Texas 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 of 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 of 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 1.32 through 1.40 are reserved for expansion.]

V. Texas Deceptive Trade Practices—Consumer Protection Act (DTPA) Liability

§ 1.41 Application of Act to Legal Services

In 1993 the legislature added a professional services exemption to the Deceptive Trade Practices—Consumer Protection Act, 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). Tex. Bus. & Com. Code § 17.49(c) provides:

Nothing 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.

However, 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 lia-

ble for the professional's conduct. Tex. Bus. & Com. Code § 17.49(d).

§ 1.42 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 1.43 through 1.50 are reserved for expansion.]

VI. Grievances

§ 1.51 Grievance Procedure

A grievance may be filed with the State Bar 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. 15.06.

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 which, if true, would constitute a violation of the Texas Disciplinary Rules of Professional Con-

duct. 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 which 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 in order 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 may appeal the judgment of the evidentiary panel to the

Board of Disciplinary Appeals. Tex. Rules Disciplinary P. R. 2.24. An appeal from the decision of the Board of Disciplinary Appeals 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. 2.28. If the complaint is heard in a district court, the judgment may be appealed as in civil cases generally. Tex. Rules Disciplinary P. R. 3.16.

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

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 provides 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

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, 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.

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 such 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, 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 matter becomes litigated/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.

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 all statements made by us regarding the successful outcome of any claim or defense of any claim is an opinion only and not a representation or 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 of the interests that are 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.

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

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-

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.”

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.

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.

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.

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.

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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[Reserved]

Chapter 3

Alternatives to Guardianship and Preguardianship Planning

§ 3.1 Scope of Chapter

This chapter contains a brief discussion of various alternatives to guardianship administration. These summaries are intended only to inform the attorney of possible approaches, and sources outside this manual should be consulted if it is determined that one of these alternatives is appropriate.

The guardianship sections of the Estates Code contain a clear policy statement requiring the use of less restrictive alternatives to guardianship if such are available and appropriate. Tex. Estates Code § 1001.001. A guardianship with full authority is authorized only as indicated by the limitations of the proposed ward. The court is mandated to encourage the development or maintenance of maximum self-reliance and independence of the proposed ward. Tex. Estates Code § 1001.001.

§ 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. Estates 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. Estates 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.

Convenience signers may also be added to other multi-party accounts, such as joint tenancy with right of survivorship, pay-on-death, or trust accounts, without granting ownership rights to the convenience signer. Tex. Estates Code § 113.106.

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

Many elderly and disabled persons receive Security Retirement Income or Supplemental Security Income (SSI) benefits. The Social Security Administration 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 power of a court-appointed guardian of the estate to receive and manage these benefits is subordinate to that of a representative payee. The Social Security Administration may deny a court-appointed guardian of the estate the right to receive the ward's SSI and Social Security 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 may be avoided by having a representative payee appointed. The local Social Security Administration 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 Program, www.vba.va.gov/bln/21/Fiduciary/index.htm.

Caveat: Incapacitated veterans entitled to receive more than \$100,000 will likely have to have a bonded, court-appointed guardian to manage the funds.

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*. Guardianship of a minor may be

avoided if the sole property of the minor consists of a right to receive ERS funds, 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 has 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. *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. Civ. App.—Corpus Christi 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 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 regards 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.

§ 3.8 Durable Power of Attorney

A "durable power of attorney" means a written instrument that (1) designates another person as attorney in fact or agent; (2) is signed by an adult principal; (3) contains 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 showing the principal's intent that the authority conferred on the attorney in fact or agent shall be exercised notwithstanding the principal's subsequent disability or incapacity; and (4) is acknowledged by the principal before an officer authorized to take acknowledgments to deeds of conveyance and to administer oaths under the laws of this state or any other state. Tex. Estates Code § 751.002. Several significant improvements were made by the 1993 and 1997 statutory changes, including the following:

1. The power of attorney does not terminate unless the document provides a specific termination date. Tex. Estates Code § 751.004.
2. A principal is bound by the agent's acts notwithstanding the incapacity or disability. Tex. Estates 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. Estates Code § 751.104.
4. Any person who, in good faith, relies on the power of attorney without notice of its revocation; the death, divorce, or annulment of the principal; or the appointment of a guardian, is protected. Tex. Estates Code § 751.054. The agent may execute a self-serving affidavit to establish the existence of this good-faith reliance. This affidavit is permitted to state the principal's specific disability or incapacity. Tex. Estates Code § 751.055.
5. The power of attorney must be recorded only if it covers real property. See Tex. Estates Code § 751.151.
6. Appointment of a spouse as agent is automatically revoked on divorce or annulment. Tex. Estates Code § 751.053.

§ 3.9 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. Estates Code § 752.002. A person is not required to use the statutory form, but to be considered a statutory form, the form must be in substantially the form set forth in chapter 752. Sections 752.101 through 752.115 of the

Texas Estates Code set forth the construction of the powers that are given in the statutory power of attorney. Many banks and brokerage firms will only accept the form of power of attorney included in chapter 752 or one that looks substantially similar to it.

Practice Pointer: Some banks and brokerage firms will only accept their power of attorney form. Have your clients check with their banks and brokerage firms and if this is the case, also have the client execute their forms as well as the statutory durable power of attorney form.

§ 3.10 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 either be notarized or witnessed by two qualified witnesses. Tex. Health & Safety Code § 166.154. A separate, detailed disclosure statement is required. Tex. Health & Safety Code §§ 166.162–164. See forms 3-3 and 3-4 in this chapter. The medical power is revoked by (1) 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) the execution of a subsequent power of attorney; or (3) divorce if the agent is a spouse unless the power provides otherwise. Tex. Health & Safety Code § 166.155.

§ 3.11 Directive to Physician

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 & 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 3-5 in this chapter. The form is called “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 when 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.

§ 3.12 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 3-6 in this chapter.

§ 3.13 Surrogate Decision Making

§ 3.13:1 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: (1) to the patient's spouse; (2) to 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) to a majority of the patient's reasonably available adult children; (4) to the patient's parents; (5) to the individual clearly identified to act for the patient by the patient before the patient became incapacitated; (6) to the patient's nearest living relative; or (7) to a member of the clergy. Tex. Health & Safety Code § 313.004(a).

Surrogate decision making does not (1) replace the authority of a guardian nor 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 Health & 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) electroconvulsive 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 & 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.

Limitation 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 of 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).

§ 3.13:2 Persons with Intellectual Disabilities

Surrogate decision making for persons with an intellectual disability 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; 40 Tex. Admin. Code §§ 9.281–.295.

Note: 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, 82nd Leg., R.S., ch. 272 (H.B. 1481), eff. Sept. 1, 2011 (adding Tex. Gov't Code ch. 392). Although House Bill 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.

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

With or without legal assistance, a person may express his wishes and desires as to 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 to address potential uncertainties with regard to end-stage planning and palli-

ative 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 is included as form 3-7 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.agingwithdignity.org/five-wishes.php.) "Five Wishes" meets the legal requirements for end-stage planning documents in forty-two states. However, because of statutory restrictions in Texas, "Five Wishes" cannot be used in Texas. The included form should be used as an example only and is not derived from any statute. Further, there is no case law upholding the use of such a statement, and it is unclear what the legal effect of such a document is under Texas law. 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.

§ 3.15 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.

§ 3.16 Interventional Alternatives

§ 3.16:1 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)*.

§ 3.16:2 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 to treatment and examined within seventy-two hours. *Tex. Hum. Res. Code § 48.208*. The removal may last no longer than seventy-two hours unless extended by the court for up to thirty days. 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.

§ 3.16:3 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/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*.

§ 3.16:4 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 will now have to 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 Department of Transportation by a physician, a family member, or a 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, and/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 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 3-8 in this chapter*.

§ 3.17 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).

§ 3.18 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. Estates 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. See form 3-9 in this chapter; but see section 9.5:2 in this manual and Tex. Estates Code § 1203.103. The designation may be revoked in the same manner as a will under section 253.002 of the Estates Code. The designation need not be recorded to be effective, and there is no advantage to the client in doing so.

§ 3.19 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. Estates 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 3-10 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 253.002 of the 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. Estates Code § 1104.156.

§ 3.20 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 3-11 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. 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.

Tex. Civ. Prac. & Rem. Code §§ 137.001–.011.

§ 3.21 Payment of Claims without Guardianship

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. Estates 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. Estates 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. Estates 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. Estates Code § 1355.002(c)(2). See form 3-12 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. Estates 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. Estates 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. Estates Code §§ 1355.102, 1355.103. See forms 3-13 and 3-14. 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. 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. Estates Code §§ 1355.102(a)(3), 1355.103(b). Note that there is no provision for withdrawal by the guardian of a nonresident.

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. Estates 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, 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. Estates Code § 1355.105.

Payment of claims of less than \$10,000 to charitable institutions for the benefit of incapacitated inmates is also allowed. Tex. Estates Code §§ 1355.151, 1355.152.

§ 3.22 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 gov-

erned by chapter 117 of the 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 3.23:3 and 3.23:4 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.).

§ 3.23 Trusts

§ 3.23:1 Purpose and Function

Guardianship of an incapacitated person may sometimes be avoided through effective use of an inter vivos or testamentary trust.

§ 3.23:2 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. 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.

§ 3.23:3 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 3-15 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. However, if the value of the principal is \$50,000 or less, 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 only be appointed to serve as trustee 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 3-16, 3-17, and 3-18.

On the petition of a parent, next friend, guardian, conservator, 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 Estate 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.

§ 3.23:4 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 Tex. Estates Code chapter 1301. See chapter 11 of 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 beneficiary. Medicine or treatments approved by a licensed physician may be conclusively presumed to be appropriate for the health of the beneficiary. Any income not distributed shall be added to the principal of the trust. Tex. Prop. Code § 142.005(b)(2), (3). See form 3-17 in this chapter.

Practice Pointer: If distributions are made using this standard, the beneficiary will not qualify for state Medicaid assistance. A departure from this standard distribution is permitted to incorporate “special needs” language necessary to maintain government benefits:

Notwithstanding any other provision in 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 terms of the trust.

Tex. Prop. Code § 142.005(g). See section 3.23:5 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 BENEFICIARY AND CERTAIN PERSONS INTERESTED IN THE WELFARE OF THE BENEFICIARY MAY HAVE REMEDIES UNDER SECTION 114.008 OR 142.005, PROPERTY CODE. Tex. Prop. Code § 142.005(b)(7).
8. If the beneficiary is a minor, 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 beneficiary is incapacitated, the trust terminates when the beneficiary regains capacity or on the death of the beneficiary. Tex. Prop. Code § 142.005(b)(4).
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).

§ 3.23:5 Self-Settled Special Needs Trusts under 42 U.S.C. Section 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), (C).

This definition differs substantially from those of "incapacitated person" found in the Texas 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. Estates Code § 1002.017.

§ 3.23:6 Chapter 1301 Guardianship Management Trusts

Chapter 1301 guardianship management trusts are discussed in chapter 11 of this manual.

§ 3.23:7 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. Estates Code §§ 1302.001–.007. This type of trust meets the requirements of 42 U.S.C. section 1396p(d)(4)(C), which exempts it from the applicability of 42 U.S.C. section 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 presents a realistic alternative to keep funds in professional management that might have been spent down below the economic threshold of most bank trust departments.

In addition, assets in a guardianship management trust pursuant to 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. Estates 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. Estates 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. Estates 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. Estates 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. Estates 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. Estates 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. Estates Code § 1302.005(2).

See forms 3-19 and 3-20 in this chapter.

§ 3.23:8 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 section 3.23:2 above.

§ 3.23:9 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 Texas 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).

§ 3.24 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. Estates Code § 1353.002(a). The spouse who is not incapacitated is presumed qualified to serve as the community administrator. Tex. Estates 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. Estates 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 appraisal as well as an annual accounting. Tex. Estates Code §§ 1353.051–.052.

A community administrator may be removed after citation, notice, and hearing for the grounds specified in Estates Code section 1353.101. *See* Tex. Estates 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 under section 1202. *See* Estates Code §§ 1202, 1353.103. *See* chapter 9 in this manual for discussions 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. Estates 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. Estates Code § 1353.053.

§ 3.25 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. Estates 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. Estates 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. Estates Code § 451.003. Such an order may be revoked within one year if other information comes to light showing a necessity for administration. Tex. Estates Code § 451.004. *See* forms 3-21 and 3-22 in this chapter.

§ 3.26 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 3-23 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), (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.

§ 3.27 Sales of Property

§ 3.27:1 Sale of Property without Guardianship—Minor

An application for the sale of real or personal property under Tex. Estates 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 proceeds must be placed in the court regis-

try and can only be withdrawn under the provisions of Tex. Estates Code ch. 1355. See forms 3-24 and 3-25 in this chapter.

The sale is usually in the form of a private sale, and the sale must be for cash. Tex. Estates 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.

§ 3.27:2 Sale of Property without Guardianship of Estate

Under Tex. Estates Code § 1351.052, the request for sale can be made only by a guardian of the person. This provision is similar to that of section 1351.001. This procedure may be used only if there is no need for a guardianship of the estate and the total value of the property of the incapacitated person does not exceed \$100,000. See forms 3-26 and 3-27 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 benefit 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. Estates 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.

§ 3.28 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 Estates Code as a personal representative. The receiver administers the property until the need for the receivership is over. Tex. Estates 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 3-28 and 3-29 in this chapter.

§ 3.29 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, they are to verify the pleadings, but if they are 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.

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 3-30 and 3-31 in this chapter.

§ 3.30 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 will have a particular emphasis toward a target group, such as veterans or the intellectually disabled.

Beyond the Emergency Order for Protective Services (see the discussion at section 3.16:2 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.

§ 3.31 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.

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).

[Reserved]

Form 3-1

Authorization Agreement for Nonparent Relative or Voluntary Caregiver



**AUTHORIZATION AGREEMENT
FOR NONPARENT RELATIVE OR
VOLUNTARY CAREGIVER**

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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 relative 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): Child's Grandparent <input type="checkbox"/> Child's Adult Sibling <input type="checkbox"/> Child's Aunt or Uncle <input type="checkbox"/> Parental Child Safety Placement Voluntary Caregiver in accordance with Child Protective Services <input type="checkbox"/>
Physical Address:
Telephone Number:
Other contact information:

**PARENT AND RELATIVE OR VOLUNTARY 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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Parent authorizes the above named relative or voluntary caregiver to perform the following acts in regard to the child and the relative or voluntary caregiver assumes the responsibility of performing these functions:

- (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; and
- (7) To apply for and receive public benefits on behalf of the child.
- (8) This authorization agreement does not confer on the relative or voluntary 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 the relative's or voluntary 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 relative's or voluntary 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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WARNINGS AND DISCLOSURES

This authorization agreement is an important legal document. The parent and the relative or voluntary caregiver must read all of the warnings and disclosures before signing this authorization agreement.

The parent and relative 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 relative or voluntary 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 relative or voluntary caregiver to return the child to the parent immediately on request may have criminal and civil consequences.

Under other applicable law, the relative or voluntary caregiver may be liable for certain expenses relating to the child in the relative's or 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.

This authorization agreement does not supersede, invalidate, or terminate any prior authorization agreement regarding the child.

This authorization agreement is void if a prior authorization agreement regarding the child is in effect and has not expired or been terminated.

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, unless that parent is deceased or has had his or her parental rights terminated. This authorization agreement is **void** unless:

1. The parties mail a copy of this agreement to a non-signing parent **not later than the 10th day** after the date the authorization agreement is signed, **by certified or international registered mail**, as applicable, **return receipt requested**.
2. If the parties do not receive a response from the non-signing parent before the 20th day after the date the copy of the agreement is mailed, the parties must mail a second copy of the agreement **by first class mail or international first class mail**, as applicable, to the parent **not later than the 45th day** after the date the authorization agreement is signed.

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



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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:
o any offense under Title 5 of the Texas Penal Code (including murder, homicide, kidnapping, assault and sexual assault); or
o any other criminal offense in Texas or any other state if the offense involves a violent act or prohibited sexual conduct.

This authorization agreement (select one of the following two):

- Expires on this date: _____ OR
- Is valid until revoked in writing by either party

In addition, check here if you want the agreement to continue in effect after your death or during any period of incapacity.

Execution of a subsequent authorization agreement does not by itself supersede, invalidate, or terminate a prior authorization agreement.

By signing below, parent and the relative or voluntary 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

RELATIVE OR VOLUNTARY CAREGIVER
Printed name:
SUBSCRIBED AND ACKNOWLEDGED BEFORE ME on this ____ day of _____, 20____.

Notary Public in and for the State of TEXAS

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.

You should select someone you trust to serve as your agent (attorney in fact). Unless you specify otherwise, generally the agent's (attorney in fact's) authority will continue until—

1. you die or revoke the power of attorney;
2. your agent (attorney in fact) resigns 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 (attorney-in-fact) to act for me in any lawful way with respect to all of the following powers that I have initialed below.

TO GRANT ALL OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF (N) AND IGNORE THE LINES IN FRONT OF THE OTHER POWERS LISTED IN (A) THROUGH (M).

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;
- ____(M) Tax matters.
- ____(N) ALL OF THE POWERS LISTED IN (A) THROUGH (M). YOU DO NOT HAVE TO INITIAL THE LINE IN FRONT OF ANY OTHER POWER IF YOU INITIAL LINE (N).

SPECIAL INSTRUCTIONS:

Special instructions applicable to gifts (initial in front of the following sentence to have it apply):

_____ **Gifts.** I grant my agent (attorney-in-fact) 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.

Include additional instructions limiting or extending the powers granted to your agent as applicable. The following are examples.

_____ **Power to Create and Transfer Assets into Trust.** I grant my agent the power to create revocable or irrevocable trust(s) for my benefit. My agent is further empowered to transfer all of my real property, stocks, bonds, accounts with financial institutions, insurance, and other property into such trust(s) as my agent shall deem proper.

_____ **Disclaimer.** Any authority granted to my agent shall include the power to effectively disclaim, in whole or in part, any gift or any property receivable from a decedent by reason of a contract, will or inheritance.

_____ **Compensation.** My agent and any successors, shall be entitled to reasonable compensation for services rendered.

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 ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

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).

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. Revocation of the durable power of attorney is not effective as to a third party until the third party receives actual notice of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

If any agent named by me dies, becomes legally disabled, resigns, or refuses to act, 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

IMPORTANT INFORMATION FOR AGENT (ATTORNEY IN FACT)

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 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 or attorney in fact when you act for the principal by writing or printing the name of the principal and signing your own name as “agent” or “attorney in fact” in the following manner:

(Principal’s Name) by (Your Signature) as Agent (or as Attorney in Fact)

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
- (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 or attorney in fact;
 - (C) a complete account of receipts, disbursements, and other actions of you as agent or attorney in fact 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 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:

- (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;
- (5) the appointment and qualification of a permanent guardian of the principal's estate; or
- (6) if ordered by a court, the suspension of this power of attorney on the appointment and qualification of a temporary guardian until the date the term of the temporary guardian expires.

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 Dura-

ble 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.

THE ATTORNEY-IN-FACT OR AGENT, BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

Form 3-3

A medical power of attorney is not effective unless the principal first receives a disclosure in substantially the same form as the statutory disclosure entitled "Information Concerning Medical Power of Attorney." Tex. Health & Safety Code § 166.162. The principal must sign a statement acknowledging receipt of the disclosure and stating that he has read and understood its contents. Tex. Health & Safety Code § 166.162. This form is based on the form found in Tex. Health & Safety Code § 166.163. An acknowledgment of receipt of the disclosure statement is incorporated into the medical power of attorney designation of health-care agent, form 3-4 in this chapter.

Information Concerning Medical Power of Attorney

THIS IS AN IMPORTANT LEGAL DOCUMENT.

BEFORE SIGNING THIS 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 no longer capable of making them 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 mental 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 begins 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 had.

It is important that you discuss this document with your physician or other health-care provider before you sign it to make sure 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 home, or residential-care home, 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 permit a person to do 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 who have signed copies. Your agent is not liable for health-care decisions made in good faith on your behalf.

Even after you have signed this document, you have the right to make health-care decisions for yourself as long as you are able to do so, 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, your appointment of a spouse dissolves on divorce.

This document may not be changed or modified. If you want to make changes in the document, you must make an entirely new one.

You may wish to designate an alternate agent in the event that your agent is unwilling, unable, or ineligible to act as your agent. Any alternate agent you designate has the same authority 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;
- (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 power of attorney is executed, has a claim against any part of your estate after your death.

[Reserved]

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.)

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].

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.

Acknowledgment of Disclosure Statement

I have been provided with a disclosure statement explaining the effect of this document. I have read and understand the information contained in the 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

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: _____

Address: _____

Form 3-5

This form is based on the form found in Tex. Health & Safety Code § 166.033.

Directive to Physicians and Family or Surrogates

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 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 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.

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 artificial nutrition and fluids, 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 treatment decisions with my physician compatible with my personal values:

1. [Name]
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 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:

“Artificial 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 stomach (gastrointestinal 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 artificial hydration and nutrition. 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.

“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.

Form 3-6

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: _____

Hospitalization insurance co.: _____

Pediatrician: _____

Type of credit card: _____

Credit card number: _____

Name on credit card: _____

Expiration date: _____

Form 3-7

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.

___ 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 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

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.

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].

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]**.

[Reserved]

[Reserved]

Form 3-9

This form is based on the form found in Tex. Estates 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.

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 _____

[Name of declarant]

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] 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

Form 3-10

This form is based on the form found in Tex. Estates 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]

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

Form 3-11

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].

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

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.

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.

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.

[Reserved]

Form 3-12

[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]

[Reserved]

Form 3-13

[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. 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.
6. 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.

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.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

Applicant

[Address]

[Telephone]

SIGNED under oath before me on _____.

Notary Public, State of Texas

Form 3-14

[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

[Reserved]

Form 3-15

[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 one of the following.

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].

Or

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 one of the following.

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 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.

Or

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.

Respectfully submitted,

[Name]
Attorney for Movant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Certificate of Service

I certify that in accordance with the Texas Rules of Civil Procedure I served a true and correct copy of [title of document, e.g., Motion for Leave to Resign as Guardian] on the parties listed below. This service was made by [method of service, e.g., certified mail, properly addressed, return receipt requested, in a postpaid envelope deposited with the United States Postal Service].

[Name]

Attach proposed trust agreement along with proposed trustee's fee schedule.

[Reserved]

Form 3-16

[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 _____

JUDGE PRESIDING

Form 3-17

Terms of Trust and Agreement of Trustee

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.

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 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 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—

- (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 [designated] 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 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 [designated] 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

[Reserved]

Form 3-18

[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.

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).

Form 3-19

[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.

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.

Respectfully submitted,

[Name]
Attorney for Applicant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach exhibit(s).

[Reserved]

Form 3-20

[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:

1. [Name of guardian] 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

Form 3-21

[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. Four 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.

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.

Respectfully submitted,

[Name]

Attorney for Applicant

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

Attach exhibit(s).

[Reserved]

Form 3-22

[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-

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

Form 3-23

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]

[Reserved]

Form 3-24

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—

- 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.

Respectfully submitted,

Applicant

BEFORE ME, the undersigned authority, on this day personally appeared [**name**], who after being duly sworn stated that the statements contained in this application are true and correct based on the information and belief of Applicant.

SIGNED under oath before me on _____.

Notary Public, State of Texas

[Name]
Attorney for Applicant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach exhibit(s). For a sale involving real property, attach a proposed closing statement.

[Reserved]

Form 3-25

[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 [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

Attach exhibit(s).

Form 3-26

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];

- 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.

Respectfully submitted,

Applicant

BEFORE ME, the undersigned authority, on this day personally appeared [name], who, after being duly sworn stated that the statements contained in this application are true and correct based on the information and belief of Applicant.

SIGNED under oath before me on _____.

Notary Public, State of Texas

[Name]
Attorney for Applicant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach exhibit(s). For a sale involving real property, attach a proposed closing statement.

[Reserved]

Form 3-27

[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 _____

JUDGE PRESIDING

Attach exhibit(s).

Form 3-28

[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/proposed ward]], [Ward/Proposed Ward], is [an incapacitated person/a minor] who resides at [address of [ward/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—

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.:
 [E-mail address]
 [Address]
 [Telephone]
 [Telecopier]

BEFORE ME, the undersigned authority, on this day personally appeared [name of applicant], the applicant in the foregoing Application for Appointment of Receiver, known to me to be the person whose name is subscribed to the above and foregoing application, and who, on [his/her] oath, stated that the application contains a correct and complete statement of the matters to which it relates and all the contents are true to the best of Applicant's knowledge.

[Name of applicant]

SIGNED under oath before me on _____.

Notary Public, State of Texas

Certificate of Service

I certify that in accordance with the Texas Rules of Civil Procedure I served a true and correct copy of [title of document, e.g., Motion for Leave to Resign as Guardian] on the parties listed below. This service was made by [method of service, e.g., certified mail, properly addressed, return receipt requested, in a postpaid envelope deposited with the United States Postal Service].

List the name and address of each party or attorney served.

SIGNED on _____.

[Name of attorney]

[Reserved]

Form 3-29

[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/proposed ward]], [Ward/Proposed Ward], is [an incapacitated person/a minor] who resides at or is located at [address of [ward/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.

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/proposed ward]] and granted authority over the property of [name of [ward/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 the [ward/proposed ward], the power to enter into contracts to continue the business of the [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

Form 3-30

[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 father], father, who resides at [address]./Petitioner's only living parent is [name of mother], mother, who resides at [address]./Petitioner's parents are [name of father], father, who resides at [address] and [name of mother], mother, who resides at [address].]

If there is a managing conservator of the minor, include the following.

Petitioner's managing conservator is [name of managing conservator], [Petitioner's [mother/father], who resides at the address shown above/who resides at [address of nonparent managing conservator]].

If there is a guardian of the person and/or estate of the minor, include the following.

The guardian of the [person/estate/person and estate] of Petitioner is [name], who resides at [address, city, county, state].

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].

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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Name of affiant], being duly sworn, on [his/her] oath, swears that: "I am the [mother/father/managing conservator/guardian of the person/guardian ad litem] in the above-entitled and -numbered cause. I have read and examined the foregoing Original Petition for Removal of Disabilities of Minority, and every statement contained in the petition is within my personal knowledge and is true and correct."

[Name of affiant]

SIGNED under oath before me on _____.

Notary Public, State of Texas

Form 3-31

[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 by attorney] and [name of guardian ad litem], duly appointed as guardian 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

[Reserved]

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Form 4-29	Application to Transfer Guardianship from [name of county] County, Texas, Pursuant to Texas Estates Code Section 1023.003	4-29-1 through 4-29-2
Form 4-30	Order Transferring Guardianship Proceeding from [name of county] County, Texas, Pursuant to Texas Estates Code Section 1023.003	4-30-1 through 4-30-2

[Reserved]

Chapter 4

Creating Guardianships

I. Temporary Guardianships

§ 4.1 Purpose of Temporary Guardianship

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

§ 4.2 Procedure and Standing to Bring Application

All permanent guardianship provisions regarding a party's standing also apply to temporary guardianships. Tex. Estates 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 4.35 below. Similarly, anyone disqualified to be appointed permanent guardian is also disqualified to be appointed temporary guardian. See section 4.31. However, temporary and permanent guardianships will also have certain different procedural requirements.

§ 4.3 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. Tex. Estates 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 can come from other sources. As this is a temporary solution, there is a lesser burden for medical evidence, and a person for whom a temporary guardian is appointed may not be presumed to be incapacitated. Tex. Estates Code § 1251.002.

§ 4.4 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. Estates Code § 1251.003(a). An attorney ad litem will be appointed to represent the ward if independent counsel has not been retained. Tex. Estates Code § 1251.004.

§ 4.4:1 Contents of Application

The 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 Government Code and has complied with the requirements of subchapter G, chapter 1104, of the Texas Estates Code.

Tex. Estates Code § 1251.003(b). See form 4-2 in this chapter.

§ 4.4:2 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. Estates Code § 1251.006. A hearing on the temporary guardianship application is required; there are no longer ex parte guardianships in Texas.

§ 4.5 Notice

The clerk must issue notice to be served on the respondent and the respondent's appointed attorney and on the proposed temporary guardian named in the application if that person is not the applicant. This is accomplished by personal service on the proposed ward and by providing a copy of the notice to the attorney ad litem or independent counsel. The notice must describe

the rights of the parties and the date, time, place, purpose, and possible consequences of a hearing on the application. A copy of the application (form 4-2 in this chapter) must be attached. Tex. Estates Code § 1251.005.

§ 4.6 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. Estates 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. Estates Code § 1251.008. Generally, the proposed ward is represented by the attorney ad litem; however, he may also retain other counsel to represent him.

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. Estates 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. Estates Code § 1251.008.

At the conclusion of the hearing, the court may enter an order appointing a temporary guardian if it finds substantial evidence that the proposed ward is a minor or an incapacitated person and there is either imminent danger to the ward's physical health or safety or that the ward's estate will be seriously damaged or dissipated unless immediate action is taken. Tex. Estates Code § 1251.010(a). Substantial evidence is that which reasonable minds could have viewed as supporting the finding. *Southwest-Tex 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. Estates 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. Estates Code §§ 1251.151, 1251.012, 1251.101.

§ 4.7 Qualification

A temporary guardian must qualify in the same form and manner required of a permanent guardian under the Estates Code. Tex. Estates Code § 1251.052(a). See section 4.35 below.

§ 4.8 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. Estates Code § 1251.001(b). On one day's notice to the party who filed the application, the respondent or the respondent's attorney may move to dismiss the application for temporary guardianship. The court must hear and determine the motion expeditiously. Tex. Estates Code § 1251.007. The appointment of a temporary guardian is not an adjudication of incapacity. Tex. Estates Code § 1251.002.

§ 4.9 Duration of Guardianship

A temporary guardianship may not remain in effect for more than sixty days, unless a temporary guardian is appointed pending a contest on the application. Tex. Estates Code §§ 1251.151, 1251.051. See forms 4-4 and 4-5 in this chapter. The temporary guardianship expires at the con-

clusion of the hearing contesting the application or on the date a permanent guardian qualifies. Tex. Estates Code § 1251.052(b).

§ 4.10 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. Estates Code § 1251.051. See form 4-4 in this chapter. A temporary guardianship pending contest continues until the contest is concluded. Tex. Estates Code § 1251.052.

§ 4.11 Account

At the expiration of either type of temporary guardianship, the temporary guardian must file a sworn account with the court. The account 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. Estates 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. *See* Tex. Estates Code § 1204.102. See forms 4-8 through 4-10 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. Estates Code § 1251.153. See form 4-11.

§ 4.12 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 4-16 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 4-12. The signed receipt or other evidence of delivery 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 4-13 and section 14.2:4 in this manual.

[Sections 4.13 through 4.20 are reserved for expansion.]

II. Permanent Guardianships

§ 4.21 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, and that the rights or property of the proposed ward will be protected by the appointment. Tex. Estates Code § 1101.101(a)(1). A definition of the term *incapacitated person* is found at Tex. Estates Code § 1002.017. A ward is a person for whom a guardian has been appointed. Tex. Estates Code § 1002.030.

The guardian's ability to act in most circumstances will be dependent on orders of the court. Tex. Estates 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. Estates Code § 1001.001. The guardianship may be of the person, the estate, or both Tex. Estates Code § 1101.151(a).

§ 4.22 Guardian of Person

A guardian of the person of a totally 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 full authority of 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. Estates Code § 1151.051. However, some of these powers may require specific court authority. The powers of a guardian of a partially incapacitated person are those set forth in the order of appointment or any subsequent orders. A report on the condition of the ward must be filed at the end of each year of the guardianship. Tex. Estates Code § 1163.101. See

sections 8.56 through 8.59 and form 8-35 in this manual.

§ 4.23 Guardian of Estate

A guardian of an estate of a totally incapacitated person is entitled to possess and manage all properties belonging to the ward; to collect all debts, claims, and obligations due the ward; and to bring and defend all suits by or against the ward, subject to any limitations imposed by the court under Estates Code section 1101.152. Tex. Estates 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. Estates Code §§ 1151.101, 1151.102. The powers of a guardian of a partially incapacitated person are those set forth in the order of appointment or any subsequent orders. Within thirty days of qualifying, unless an exception is granted by the court, the guardian must file an initial inventory and appraisal of the ward’s property subject to the guardian’s management. Tex. Estates Code § 1154.051(a). Within sixty days of the end of each year of the guardianship, an account must be filed. Tex. Estates 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 those limited powers set forth in 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.

§ 4.24 Persons for Whom Guardian May Be Appointed

The 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. Estates 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 disabilities of minority removed for general purposes. Tex. Estates Code § 1002.019.

§ 4.25 Persons for Whom Guardian Is Appointed to Receive Government Funds

In recent years the appointment of guardians 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 “legal custodian” appointed instead of a guardian. See section 3.3 in this manual; see also section 5.5.

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 Estates Code provides a special category of guardianship for these situations. See Tex. Estates 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. Estates Code § 1101.106.

Such guardians 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. Estates 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.

§ 4.26 Guardians of Minors

Both Parents Living and Living Together:

No appointment is necessary for a parent to act as guardian of the person of a minor. Both parents are natural guardians of the person of the minor, and either is entitled to be appointed guardian of the estate. If the parents cannot agree who should be appointed, the court appoints the one it deems better qualified to serve. Tex. Estates 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. Estates 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. Estates 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. Estates 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. Estates 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. Estates 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. Estates Code § 1104.052(4)).

§ 4.27 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. Estates 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. Estates 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. Estates 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. Estates 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. Estates Code § 1104.102(3)(C).

§ 4.28 More Than One Guardian

Generally, only one person may be appointed guardian of the person or estate. However, nothing prohibits the joint appointment, if it is in the best interests of the ward, of—

1. a husband and wife;
2. joint managing conservators;
3. coguardians duly appointed in another jurisdiction; 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. Estates Code § 1104.001.

§ 4.29 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. Estates Code § 1002.023. The term *corporate fiduciary* is defined in Tex. Estates Code § 1002.007.

§ 4.30 Waiver of Prior Right

The attorney may 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, a waiver may be secured from each person with a prior right. See form 4-21 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. Estates Code § 1203.103.

§ 4.31 Persons Disqualified to Serve as Guardian

The persons who may not be appointed as guardians include—

1. minors or other incapacitated person;
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;
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 made under Estates Code section 1104.202(b) (see section 3.14 and form 3-7 in this manual);
8. persons not certified to serve as guardian as required by subchapter F, chapter 1104, of the Texas 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. Estates Code §§ 1104.351–.358.

§ 4.32 Standing to Bring Guardianship Action

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. Estates Code § 1055.001(b). The standing of a person with an adverse interest is determined by a motion in limine. Tex. Estates 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).

§ 4.33 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. 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. Estates Code § 1104.053(a). See section 3.19 and form 3-10 in this manual.

§ 4.34 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 but is subject to the court's approval. Tex. Estates Code § 1104.054(a).

If a guardian has already been appointed, a minor who is twelve years of age or older may select another, if the previously appointed guardian dies, resigns, or is removed. Tex. Estates Code § 1104.054(b). The minor or his attorney must file a written application to make the selection. See form 4-23 in this chapter. If the court is satisfied that the selected person is suitable and qualified to serve as guardian, it will enter an order appointing the new guardian and revoking the letters of guardianship issued to the former guardian. Tex. Estates Code § 1104.054(b).

§ 4.35 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. Estates Code § 1055.001. However, the person seeking the appointment is usually the applicant, and 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, 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;
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 description and estimated value of the proposed ward's property, including any compensation, pension, insurance, or allowance;
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 Government Code and has complied with the requirements of subchapter G, chapter 1104 of the Texas Estates Code.

Tex. Estates Code § 1101.001.

If appointment of a guardian for a minor is sought, form 4-19 in this chapter should be used. If the ward is an adult incapacitated person, see form 4-17 for partial incapacity and form 4-18 for total incapacity.

§ 4.36 Jurisdiction

Original jurisdiction for guardianship proceedings will depend on the courts available in a given county. The following counties have statutory probate courts: Bexar, Collin, Dallas, Denton, El Paso, Galveston, Harris, Hidalgo, 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. Estates Code § 1022.005.

Original jurisdiction for guardianship proceedings in other counties will either be in the constitutional county court, or, if one exists, in a statutory county court at law that has been given explicit guardianship jurisdiction by statute. Tex. Estates 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. Estates 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. Estates 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 such county court at law from the constitutional county court. Tex. Estates Code § 1022.004.

Appeals from final orders of all courts exercising probate jurisdiction are to the courts of appeals. Tex. Estates 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. Estates Code § 1022.007.

§ 4.37 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. Estates Code § 1023.001(a).

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 conservator-

ship resides or, if the parents have joint custody, 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 residence. 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. Estates 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 is instituted in the county in which the will is probated or in the county in which the appointee resides if he resides in Texas. Tex. Estates Code § 1023.001(c).

§ 4.38 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. Estates Code § 1023.003. 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. If the application is filed by a person other than the guardian, the guardian must also be personally served. Tex. Estates Code § 1023.004.

If after hearing the application the court determines that the transfer would be in the ward's best interests, it will enter an order authorizing the transfer after payment of court costs. Tex. Estates Code § 1023.005. The clerk must record all guardianship papers not yet recorded. On payment of the clerk's fee, the clerk must transmit the case file of the guardianship proceedings and a certified copy of the index of the guardianship records to the clerk of the county to which

the guardianship has been transferred. Tex. Estates Code § 1023.006.

The order transferring the guardianship will not take effect until—

1. the case file and a certified copy of the index are filed in the office of the county clerk of the county to which the guardianship is transferred; and
2. a certificate under the clerk's official seal and reporting the filing of the case and a certified copy of the index is filed in the court ordering the transfer by the county clerk of the county to which the guardianship was ordered transferred.

Tex. Estates Code § 1023.007. See forms 4-29 and 4-30.

§ 4.39 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. Estates Code § 1022.008. See section 10.2:5 in this manual.

§ 4.40 Notice and Citation

When an application for appointment of a guardian is filed, a number of persons 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. Estates Code § 1051.106.

§ 4.40:1 Notice by Posting

Citation of all guardianship applications must be by posting. Tex. Estates 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.

§ 4.40:2 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, and (5) the person named in the application to be appointed guardian, if that person is not the applicant. Tex. Estates Code § 1051.103. Any competent person may waive the issuance and personal service of citation, in person or by attorney, by filing a written waiver with the clerk. Tex. Estates Code § 1051.251. See form 4-22 in this chapter. But the attorney ad litem for the proposed ward cannot waive service. Tex. Estates Code § 1051.055(e).

§ 4.40:3 Notice by Certified Mail

Persons who must receive notice by certified or registered mail, return receipt requested, or by any other form of mail that provides proof of delivery 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 person named as another relative 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. Estates Code § 1051.104(a).

Proof of service by certified mail must be filed by the applicant or applicant's attorney with the court under oath that notice was mailed, giving the name of each person to whom the notice was mailed if not shown on the proof of delivery. Tex. Estates Code § 1051.104(b).

Estates Code section 1051.106 provides that a court cannot act on an application until the affidavit is filed.

§ 4.41 Appointment of Ad Litem

The court must appoint an attorney ad litem in the guardianship proceeding to represent the proposed ward. Tex. Estates Code § 1054.001. The court may also appoint a guardian ad litem to represent the proposed ward's best interests. Tex. Estates Code § 1054.051.

§ 4.42 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. Estates Code § 1101.051(b).

Jury Trial: The proposed ward or any party in a contested permanent guardianship proceeding is entitled to a jury trial. Tex. Estates Code §§ 1055.052, 1101.052. A jury trial is not authorized in a temporary guardianship. *In re Kuhler*, 60 S.W.3d 381 (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. Estates Code § 1101.051(a).

§ 4.43 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; and
3. the rights or property of the proposed ward will be protected by the appointment of a guardian.

Tex. Estates 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. Nor can a guardian of a minor's estate be appointed based on the payment of claims under Estates Code chapter 1355. Tex. Estates Code §§ 1101.102, 1101.154. If the proposed ward is not a minor, age cannot be the sole basis for granting a guardianship. Tex. Estates 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. Estates Code § 1101.101(a)(2).

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 must present a governmental certificate. Tex. Estates Code § 1101.106.

§ 4.44 Physician's Letter or Certificate

A court may never grant an application to create a guardianship for an adult incapacitated person, a person whose alleged incapacity is mental retardation, or a person who receives government funds unless a physician's letter or certificate is presented to the court. Tex. Estates Code § 1101.103(a).

The physician's letter or certificate must be dated no more than 120 days before the filing date of the application, and it 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 function and summarize the proposed ward's medical history if reasonably available;
- (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) perform simple calculations;
 - (D) reason logically; and
 - (E) administer daily life activities;
- (5) state whether any current medications 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 condition 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; and

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

Tex. Estates Code § 1101.103. See form 4-1 in this chapter. 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 Department of Aging and Disability Services and the recommendations include a determination of intellectual disability, or a physician or psychologist licensed by the Department of Aging and Disability Services 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 department. Tex. Estates Code § 1101.104 (text of section as amended by Acts 2013, 83d Leg. ch. 780 (S.B. 1235), § 2. *See also* section as amended by Acts 2013, 83d Leg. ch. 161 (S.B. 1093), § 6.036). If the court determines it is necessary, it may appoint a physician 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 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. Tex. Estates Code § 1101.103(c)(d).

§ 4.45 Preference of Proposed Ward

Before appointing a guardian, the court shall give due consideration to the proposed ward's preference of a guardian. Tex. Estates 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. Estates Code § 1104.054(b).

While a proposed ward may express a preference, the court will weigh whether the proposed ward retains the ability and judgment to make such a preference during the pendency of a guardianship proceeding.

§ 4.46 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 under subchapter A, chapter 1156, of the Texas Estates Code; whether the person is totally incapacitated because of a mental condition; that the person does not have the capacity to operate a motor vehicle 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. Estates 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 the specific powers, limitations, or duties with respect to the care and management of the ward's person and property. If necessary, it may specify the amount of funds

from the corpus of the person's estate the guardian may spend to educate and maintain the ward under subchapter A, chapter 1156, of the Texas Estates Code. It must also state whether the person is incapacitated because of a mental condition and, if so, whether the person retains the right to vote in public elections or maintains eligibility to hold or obtain a driver's license. Tex. Estates 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); and
6. that the clerk will issue letters of guardianship when the guardian has qualified.

Tex. Estates Code § 1101.153(a).

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. Estates Code §§ 1101.151(c), 1101.152(c).

See form 4-20 in this chapter for an order granting guardianship of an incapacitated person.

§ 4.47 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 4-27 and 4-28 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 (Tex. App.—Houston [14th Dist.] 1998, no writ).

§ 4.48 Special Protections for Ward

§ 4.48:1 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 Web site for the attorney general of Texas at www.oag.state.tx.us/elder/select.shtml for 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 to 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.

§ 4.48:2 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 B misdemeanor. Tex. Hum. Res. Code §§ 48.052, 48.053.

Complaints about a nursing home or similar facility may be made to the Texas Department of Aging and Disability Services at 1-800-458-9858.

§ 4.48:3 Duty to Report Abuse or Neglect of Child

A person who has 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 Web site, www.txabusehotline.org.

§ 4.48:4 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).

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 older than fourteen years of age who 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).

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)-(l).

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).

[Sections 4.49 and 4.50 are reserved for expansion.]

III. Bond and Letters of Guardianship

§ 4.51 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 oper-

ated by a county. Tex. Estates Code § 1105.101(a), (b). The amount is fixed by the judge based on evidence presented at the hearing on the guardianship application. It should 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. Estates Code §§ 1105.153, 1105.154. Under certain circumstances, the court may order that a new bond be executed and/or that the amount increased or decreased. Tex. Estates 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. Estates Code § 1105.156. The guardian may also deposit his own cash or securities in lieu of a bond or to reduce the amount of the bond. Tex. Estates Code § 1105.157(a). See section 7.2 and forms 7-6 through 7-8 in this manual.

The bond must 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. Estates 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. Estates Code §§ 1105.108, 1105.110. See form 4-26 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. Estates 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. Estates Code § 1105.161. See form 4-25.

The attorney should determine local custom concerning personal sureties; in some counties they are encouraged, whereas in others they are not permitted. 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. Estates Code § 1105.201.

Guardian of Person: A guardian of the person must be bonded unless the guardian is a corporate fiduciary or county guardianship program or is appointed by a will or written declaration made by a parent that waives a bond. Tex. Estates Code § 1105.101(a), (b), (c). If there is no guardian of the estate, the only kinds of bonds a court may accept are—

1. a corporate surety bond;
2. a personal surety bond;
3. a cash bond; or
4. a personal bond.

Tex. Estates 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. Estates Code § 1105.102(c).

§ 4.52 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. Estates Code

§ 1106.001. The appointed guardian is deemed to have qualified on taking and filing the oath (see form 4-24 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. Estates 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. Estates 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. Estates Code § 1106.004.

Form 4-1

Physician'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 at the 2013 annual meeting of the statutory probate judges of Texas.

PHYSICIAN'S CERTIFICATE OF MEDICAL EXAMINATION

Revision November 2013

In the Matter of the Guardianship of

For Court Use Only

an Alleged Incapacitated Person

Court Assigned: _____

To the Physician

The purpose of this form is to enable the Court to determine whether the individual identified above is incapacitated according to the legal definition (set out on page 4), and whether a guardian should be appointed to care for that person.

1. General Information

Physician's Name _____ Phone: (____) _____

Office Address _____

[] YES [] NO -----I am a physician currently licensed to practice in the State of Texas.

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

Physical Diagnosis: _____

a. Severity: [] Mild [] Moderate [] Severe

b. Prognosis: _____

c. Treatment/Medical History: _____

3. Evaluation of the Proposed Ward's Mental Function

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.

PHYSICIAN'S CERTIFICATE OF MEDICAL EXAMINATION

Revision November 2013

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
- Performing simple calculations
- 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)
- 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 on page 4.

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 _____

PHYSICIAN'S CERTIFICATE OF MEDICAL EXAMINATION

Revision November 2013

Developmental Disability, continued

Please answer the questions in the 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 on the next page.

"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.

As a physician, you may use a previous assessment, social history, or relevant record from a school district, another physician, a psychologist, 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 on the next page.
 - 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 certified by the Department of Aging and Disability Services 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 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(1).*

PHYSICIAN'S CERTIFICATE OF MEDICAL EXAMINATION

Revision November 2013

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.

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.

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:

Blank lines for explanation of partial incapacity.

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:

Blank lines for explanation of total incapacity.

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
Memory care unit
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's Signature

Date

Physician's Name Printed

License Number

[Reserved]

Form 4-2

[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 in support shows 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. 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].

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, precise, and to support with facts that will justify the powers requested. The court must, under Tex. Estates 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 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 applicant's control and what the value will be for bonding purposes. Tex. Estates 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.

8. 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 and guardian ad litem] to represent [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 [name of proposed ward].

Respectfully submitted,

[Name]
Attorney for Applicant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Name of applicant], Applicant in the foregoing Application for Appointment of Temporary Guardian of the [Person/Estate/Person and Estate], appeared in person before me today and stated under oath: "I have reviewed the foregoing application. It contains a correct and complete statement of the facts and matters to which it relates, and all the contents thereof are true, complete, and correct to the best of my knowledge."

[Name of applicant]

SIGNED under oath before me on _____

Notary Public, State of Texas

[Reserved]

Form 4-3

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 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 independent counsel retained by Proposed Ward and citation having been returned, finds substantial evidence exists that Proposed Ward is [a minor/an incapacitated person]; that there is probable cause to believe that an imminent necessity exists to appoint a temporary guardian under sections 1251.001-.153 of the Texas Estates Code; that Proposed Ward has no legal guardian of [his/her] [person/estate/person and estate]; that this Court has venue pursuant to section 1023.001 of the Texas Estates Code because Proposed Ward [specify venue facts]; that Applicant is not ineligible to act as temporary guardian of the [person/estate/person and estate] of Proposed Ward and is entitled to be so appointed; that this Court has jurisdiction of this cause; [and] that rights of property will be protected by such appointment [; and that Proposed Ward is without funds].

IT IS THEREFORE ORDERED that [name of applicant] is appointed temporary guardian of the [person/estate/person and estate] of [name of proposed ward], a proposed incapacitated person, until [date] and that this order appointing [name of applicant] as temporary guardian be effective and the clerk attach a certificate to the order showing compliance on the

taking of [name of applicant]'s oath and the giving of a [cash/surety] bond in the amount of \$[amount], which is the proper amount hereby ordered fixed in accordance with law.

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.

Continue with the following.

Select one of the following.

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 powers: [specify].

IT IS FURTHER ORDERED that the temporary guardianship will terminate on [date].

SIGNED on _____

JUDGE PRESIDING

[Reserved]

Form 4-4

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

Motion to Appoint Temporary Guardian Pending Contest

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

1. On [date] this Court appointed Movant 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, Movant, temporary guardian of the [person/estate/person and estate] of Ward, [a minor/an adult proposed incapacitated person], requests that a temporary guardian be appointed under section 1251.051 of the Texas Estates Code and that Movant be granted all further relief to which [he/she] may be entitled.

Respectfully submitted,

[Name]
 Attorney for Movant
 State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Certificate of Service

I certify that in accordance with the Texas Rules of Civil Procedure I served a true and correct copy of **[title of document, e.g., Motion for Leave to Resign as Guardian]** on the parties listed below. This service was made by **[method of service, e.g., certified mail, properly addressed, return receipt requested, in a postpaid envelope deposited with the United States Postal Service]**.

List the name and address of each party or attorney served.

SIGNED on _____.

[Name of attorney]

Form 4-5

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

Order Appointing Temporary Guardian Pending Contest

On [date] the Court considered the Motion to Appoint Temporary Guardian Pending Contest of [name of movant], temporary guardian of the [person/estate/person and estate] of [name of ward], [a minor/an adult proposed incapacitated person]. The Court finds that there exists a necessity to appoint a temporary guardian pending contest of the permanent guardianship and that [name of movant] should be appointed temporary guardian pending contest of the [person/estate/person and estate] of [name of ward] and is qualified to serve.

IT IS ORDERED that [name of movant] 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.

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

IT IS FURTHER ORDERED that [name of movant] 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 movant] takes [his/her] 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 the appointment remain in effect until the contest concerning the permanent guardianship is resolved.

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 [his/her] bond as former temporary guardian of the [person/estate/person and estate] of [name of ward] 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 [his/her] actions, including any funds previously received by [him/her] in [his/her] 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 movant] 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].

Continue with the following.

SIGNED on _____

JUDGE PRESIDING

Form 4-6

[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 ward], 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 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 [he/she] may be entitled.

Respectfully submitted,

[Name]
Attorney Ad Litem
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Form 4-7

[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

[Reserved]

Form 4-8

[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 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 the 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 guardian of the estate of [name of ward], [a minor/an incapacitated person], by order of this Court dated [date], and [he/she] 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:

Real Property

Description	Community or Separate	Value
Total		

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]

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				

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		

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.

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 [him/her] from this trust, discharging the surety on [his/her] 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], the 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

[Name]

Attorney for Temporary Guardian

State Bar No.:

[E-mail 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 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

“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).

Form 4-9

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

Form 4-10

Bank Certificate and Verification of Funds on Deposit
[Temporary Guardianship]

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]

[Reserved]

Form 4-11

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 that the final account has been filed and exhibited for the time required by law, that the final account appears to comply with the provisions of the Texas Estates Code, that no objections have been filed, that the final account should be approved as filed, that the property remaining on hand should be delivered to the person entitled to have possession of such property, and that this temporary guardianship should be closed.

IT IS ORDERED that the Final Account of Temporary Guardian is hereby approved; that [name of temporary guardian] deliver all property belonging to the estate of [name of ward], [a minor/an adult incapacitated person], and still remaining on hand to the following named person, whom the Court has found to be legally entitled to possession of such property: [name and address].

SIGNED on _____.

JUDGE PRESIDING

[Reserved]

Form 4-12

[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

[Name]

Attorney for Temporary Guardian

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

Form 4-13

[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

[Reserved]

Form 4-14

[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, the 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.

[Name]

Attorney for Movant

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

Attach exhibit(s).

Form 4-15

[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, 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

[Reserved]

Form 4-16

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]

[Reserved]

Form 4-17

[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.

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 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. Approximate values and descriptions of Proposed Ward's property are listed in Exhibit [**exhibit number/letter**], attached to and incorporated in this application.
9. The requested term of this guardianship is for such time as Proposed Ward's medical condition necessitates the guardianship.
10. The specific facts that require a guardian to be appointed and Applicant's interest in the appointment are [**insert facts supporting necessity for guardianship**].

11. 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].

12. 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.

13. 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 right to vote and operate a motor vehicle. Tex. Estates Code § 1101.001(b)(4)(A), (B).

14. No guardianship for Proposed Ward exists in this or any other state.

15. 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. Estates Code §§ 1101.152(b)(3)–1156.001

Continue with the following.

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 siblings and children are [specify names and ages]. [List any parent, child, or sibling who is deceased.]]**

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/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.

Respectfully submitted,

[Name]

Attorney for Applicant

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

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

“I have reviewed the foregoing application, it contains a correct and complete statement of the facts and matters to which it relates, and all the contents are true, complete, and correct to the best of my knowledge.”

[Name of applicant]

SIGNED under oath before me on _____.

Notary Public, State of Texas

Attach exhibit(s).

[Reserved]

Form 4-18

[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. 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.

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. Approximate values and descriptions of Proposed Ward's property are listed on Exhibit **[exhibit number/letter]**, attached to and incorporated in this application.

9. The requested term of this guardianship is for such time as Proposed Ward's medical condition necessitates the guardianship.

10. The specific facts that require a guardian to be appointed and Applicant's interest in the appointment are **[insert facts supporting necessity for guardianship]**.

11. 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, **[name of physician]**, M.D., attached hereto and incorporated in this application as Exhibit **[exhibit number/letter]**.

12. 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 and to hold or obtain a license to operate a motor vehicle under chapter 521 of the Transportation Code.

13. No guardianship for Proposed Ward exists in this or any other state.

14. 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.

15. Applicant is not aware of any person or institution that holds a power of attorney signed by Proposed Ward.

Or

15. [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. Estates Code §§ 1101.152(b)(3), 1156.001

16. 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, or sibling who is deceased.]]

Continue with the following.

17. 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.:
 [E-mail address]
 [Address]
 [Telephone]
 [Telecopier]

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

"I have reviewed the foregoing application, it contains a correct and complete statement of the facts and matters to which it relates, and all the contents are true, complete, and correct to the best of my knowledge."

[Name of applicant]

SIGNED under oath before me on _____.

Notary Public, State of Texas

Attach exhibit(s).

[Reserved]

Form 4-19

[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.

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].

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. Approximate values and descriptions of Proposed Ward's property are listed in Exhibit [exhibit number/letter], attached to and incorporated in this application.

9. The requested term of this guardianship is until Proposed Ward reaches majority.

10. The specific facts that require a guardian to be appointed and Applicant's interest in the appointment are [insert facts supporting necessity for guardianship].

11. 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.

12. Proposed Ward has not been the subject of a legal or conservatorship proceeding within the preceding two years.

Or

12. 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.

13. No guardianship for Proposed Ward exists in this or any other state.

14. 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; [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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

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

“I have reviewed the foregoing application, it contains a correct and complete statement of the facts and matters to which it relates, and all the contents are true, complete, and correct to the best of my knowledge.”

[Name of applicant]

SIGNED under oath before me on _____.

Notary Public, State of Texas

[Reserved]

Form 4-20

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

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

On [date] the Court heard the application of [name of applicant], Applicant, for letters of guardianship of the [person/estate/person and estate] of [name of ward], Ward, [a minor/an incapacitated person], under the authority of sections 1101.001 and 1101.152–.153 of the Texas Estates Code. 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. It is in the best interests of Ward to have a guardian appointed by this Court. The rights of Ward or Ward's property will be protected by the appointment of a guardian.

The Court further finds by a preponderance of evidence the following:

Due notice of the application has been given as required by law, and citation has been personally served on Ward in accordance with law.

Ward [appeared/did not appear] in person [include if applicable: , and the Court finds that it was not necessary for Ward to appear in person]. [Ward [also] appeared by and through [his/her] [attorney/guardian] ad litem.]

Ward is [an adult/a minor] [male/female] [age] years old. [Include if applicable: Ward is mentally incapable to care for [himself/herself] and to manage [his/her] property and financial affairs.] Ward has no legal guardian of [his/her] person and estate. This Court has venue because [Ward resides in [county] County, Texas, and this county is where the principal part of [his/her] property is located/Ward's parent[s] reside[s] in [county] County, Texas]. Appli-

cant is [eligible/a proper person] to be appointed as guardian and is entitled to be appointed. This Court has jurisdiction of this cause; evidence has been presented regarding the incapacity of Ward and the rights of property will be protected by the appointment.

Include the following if applicable.

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.

IT IS ORDERED that

Select one of the following.

the Court finds that [name of ward] is incapacitated and lacks some capacity as provided by the Texas Estates Code to provide for [himself/herself] and to manage [his/her] estate as specified in the order and that [name of ward]'s rights are only limited as follows: [specify].

Or

[name of guardian], the guardian, is granted only those powers and authority over [name of ward]'s [person/estate/person and estate] as follows: [specify].

Or

the Court finds that [name of ward] is totally incapacitated and totally incapable of maintaining [his/her] person or finances. Evidence of this total incapacity was provided by medical and other evidence, and [name of guardian] is granted the full powers under the Estates Code.

Include the following if applicable.

IT IS FURTHER ORDERED that Ward will no longer have the right to:

- 1. vote in a public election;

2. own, possess, or purchase a firearm; and
3. 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 applicant] is appointed guardian of the person and estate of [name], an incapacitated person, and that the clerk of this Court issue letters of guardianship when [he/she] has qualified according to law.

IT IS FURTHER ORDERED that the guardian's bond is hereby fixed in the amount of \$[amount].

IT IS FURTHER ORDERED that the duly appointed [attorney/guardian/attorney and guardian] ad litem, [name[s]], [is/are] hereby awarded a fee of \$[amount] for [his/her/their] services in this guardianship matter to be paid out of the estate and [is/are] discharged as [attorney/guardian/attorney and guardian] ad litem in this matter.

Select from the following if applicable.

IT IS FURTHER ORDERED that [name of appraiser] appraise the assets of the estate of [name], an incapacitated person.

And/Or

IT IS FURTHER ORDERED that once the guardian has qualified, [he/she] may expend funds for the use and benefit of [name of ward] pursuant to sections 1101.151, 1101.152, and 1156.001–.004 of the Texas Estates Code as follows: [specify].

And/Or

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 applicable.

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.

Continue with the following.

SIGNED on _____

JUDGE PRESIDING

Form 4-21

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

[Reserved]

Form 4-22

[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.

[Name]

[Address, city, state]

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

“I have reviewed the foregoing application, it contains a correct and complete statement of the facts and matters to which it relates, and all the contents are true, complete, and correct to the best of my knowledge.”

[Name of applicant]

SIGNED under oath before me on _____.

Notary Public, State of Texas

[Reserved]

Form 4-23

[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

[Reserved]

Form 4-24

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

[Reserved]

Form 4-25

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]

[Name of surety]
[Address, city, state]

SIGNED under oath before me on _____.

Notary Public, State of Texas

Form 4-26

[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

[Reserved]

Form 4-27

The 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.

“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.”

[Name of affiant]

[Address, city, state]

SIGNED under oath before me on _____.

Notary Public, State of Texas

Form 4-28

The 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.

“The proposed ward was not present because it would not be in the best interests of the proposed ward to attend the hearing, and the 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.

“No guardianships of any kind exist for the proposed ward in this or any other state.”

Include the following if applicable.

“This guardianship is not sought for the purpose of establishing residency for school purposes only.”

Continue with the following.

[Name of affiant]
[Address, city, state]

SIGNED under oath before me on _____.

Notary Public, State of Texas

Form 4-29

[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 case 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.

Respectfully submitted,

[Name]
 Attorney for Applicant
 State Bar No.:
 [E-mail address]
 [Address]
 [Telephone]
 [Telecopier]

Certificate of Service

I certify that in accordance with the Texas Rules of Civil Procedure I served a true and correct copy of [title of document, e.g., Application to Transfer Guardianship] on the parties listed below. This service was made by [method of service, e.g., certified mail, properly addressed, return receipt requested, in a postpaid envelope deposited with the United States Postal Service].

List the name and address of each party or attorney served.

SIGNED on _____

[Name of attorney]

Form 4-30

[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

papers to the [designation of clerk] clerk of [name of receiving county] County,
Texas.

3. Guardian, [name of guardian], shall give a new bond payable to the judge of the court to which the guardianship is transferred within twenty days of the date of this order.
4. All costs associated with this proceeding are hereby waived.

SIGNED on _____.

JUDGE PRESIDING

Chapter 5
Guardianships of Veterans and Dependents

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[Reserved]

Chapter 5

Guardianships of Veterans and Dependents

§ 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 participate in various guardianship matters.

§ 5.2 Authority

The authority of the VA is generally stated in 38 C.F.R. §§ 13.1–.111, which includes citations to the applicable United States Code sections.

§ 5.3 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. § 13.111. 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.

§ 5.4 Duty of Department of Veterans Affairs

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 use. 38 U.S.C. § 5502; 38 C.F.R. § 13.100.

§ 5.5 Legal Custodianship

The VA, through the Veterans Service Center Manager, has authority to select and appoint or recommend appointment of the person or legal entity to receive VA benefits in a fiduciary capacity on behalf of a beneficiary who is incompetent or who is under legal disability by reason of minority or court action. 38 C.F.R. §§ 13.55–.63. The VA has authority to make an independent determination whether to pay benefits to a court-appointed guardian or an alternative payee of its own selection, including the veteran in certain cases. 38 U.S.C. § 5502; 38 C.F.R. §§ 13.55–.63. The VA may wish to use a third-party alternative payee (called a legal custodian) as an alternative to a court-administered guardianship. 38 C.F.R. § 13.58. The VA field representative may appoint a legal custodian even if a probate court has appointed a guardian of the estate. The field representative may also remove the custodian and replace him or her for failure to serve the best interest of the beneficiary. 38 U.S.C. § 5502; 38 C.F.R.

§ 13.100(a)(2). The custodian must account to the VA on an annual basis but no bond is required and no applications for expenditure of funds are required. *See* 38 U.S.C. § 5502; 38 C.F.R. § 13.102. The main disadvantages of a legal custodianship are that (1) the custodian lacks legal standing to deal with real property and assets other than VA funds, (2) a custodian is not a legal entity who can file suit on behalf of the veteran, and (3) few safeguards exist to protect the veteran's funds against misappropriation by the custodian. Even so, legal custodianships

are often preferred over court-supervised guardianships.

§ 5.6 Inception of Guardianship Proceeding by Department of Veterans Affairs

In certain cases the VA determines 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 regional counsel of the Department stating that a guardianship is necessary is prima facie evidence of that fact in lieu of the medical report or evaluation generally required. Tex. Estates Code § 1101.106. See forms 5-1 and 5-2 in this chapter. Despite the provision of section 1101.106 of the Estates Code, some courts still (and should) require the same medical capacity assessment letter or certificate required for other incapacitated adults. The VA medical center in which the veteran receives treatment will usually provide this letter or certificate.

§ 5.7 Inception of Guardianship Proceeding on Veteran— Notice to Department of Veterans Affairs

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 regional office of the VA before, or shortly after, the initiation of the guardianship to insure that the VA will recognize the guardianship. This approach is recommended to avoid the appointment of a guardian to manage assets of a veteran that the VA may refuse to recognize.

§ 5.8 Powers, Duties and Obligations of Guardian of Person Entitled to Government Funds

A guardian of a person for whom it is necessary to have a guardian appointed to receive VA funds 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. The guardian may, without prior court approval, 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. Estates Code § 1151.251.

§ 5.9 Required Notification to Department of Veterans Affairs by Guardian

The duty and authority of the VA extends to requiring an account and to reviewing investments made by a court-appointed guardian. 38 C.F.R. §§ 13.104, 13.106.

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. Estates Code § 1151.301. The preferred method of providing the required notice is to forward a copy of the document to the Veterans Service Center at the VA regional office that serves the county in which the guardianship is pending and to request a waiver from the regional counsel of the Department prior to filing the application. A form waiver may be sup-

plied with the request, although some regional offices 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.

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, middle name.
4. The ward's Social Security number.
5. Service number.
6. Service dates (date entered and separation date).
7. The ward's date of birth.

§ 5.10 Guardian's Commission

The basis for computing the commission to be paid to a guardian does not include veterans benefits received. Tex. Estates Code § 1155.001(1).

§ 5.11 Death of Beneficiary/Ward

On the death of a beneficiary for whom benefits from the VA were payable to a court-appointed guardian, the VA may request an account and return of any remaining funds derived from the Department that would under state law escheat to the state, less certain expenses. 38 U.S.C. § 5502(e); 38 C.F.R. § 13.110. Except for circumstances in which an escheat is involved, 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. Estates 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. Estates Code §§ 202.001–.002.

§ 5.12 Communication with the Department of Veterans Affairs

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 Web site 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, Texas 77030. The Web site for the Houston regional office is <http://www.vba.va.gov/ro/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 Texas 76799. The Web site 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.

§ 5.13 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 crimi-

nalization 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.centraltexas.va.gov/services/Social_Work/VJO_Program.asp.

§ 5.14 Uniform Acts

While it has never been adopted in Texas, forty-four states have adopted some form of the Uniform Veterans Guardianship Act (the original post-World War I act was promoted by the Uniform Law Commission in 1928, and a revised version was promoted in 1942 during World War II). Although the 1942 Act was deemed obsolete by the Uniform Law Commission in 2011, as its provisions were “contrary to modern guardianship law,” the Uniform Veterans Guardianship Act may remain in effect in foreign jurisdictions.

Form 5-1

[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, 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 41151.301 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

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

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.

Respectfully submitted,

 [Name]
 Attorney for Applicant
 State Bar No.:
 [E-mail address]
 [Address]
 [Telephone]
 [Telecopier]

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

“I have reviewed the foregoing application, it contains a correct and complete statement of the facts and matters to which it relates, and all the contents thereof are true, complete, and correct to the best of my knowledge.”

 [Name of applicant]

SIGNED under oath before me on _____.

 Notary Public, State of Texas

Attach exhibit(s).

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]

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

“I have reviewed the foregoing application, it contains a correct and complete statement of the facts and matters to which it relates, and all the contents thereof are true, complete, and correct to the best of my knowledge.”

SIGNED under oath before me on _____.

Notary Public, State of Texas

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

Form 5-2

[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;

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

APPROVED AS TO FORM:

[Name]

Attorney for Applicant

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

[Name]

Attorney Ad Litem

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

[Reserved]

Form 5-3

[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 2012–2013 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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Certificate of Service

I certify that, in accordance with the Texas Rules of Civil Procedure, I served a true and correct copy of [title of document, e.g., Notice of Hearing by Submission] on the parties listed below. This service was made by [method of service, e.g., certified mail, properly addressed, return receipt requested, in a postpaid envelope deposited with the United States Postal Service].

Department of Veterans Affairs

Central Area Fiduciary Hub –

Lincoln

P.O. Box 5444

Lincoln, NE 68505-5444

SIGNED on _____

[Name of attorney]

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 ad litem to represent a proposed ward in certain situations and has the discretion and authority to appoint one in others. *See* Tex. Estates Code §§ 1054.001, 1054.051; *see also* Tex. R. Civ. P. 173.

§ 6.2 Limitations on Guardians and Attorneys Ad Litem

It is important to understand the distinctions between guardians and attorneys ad litem and to recognize their differing roles, responsibilities, and duties. 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. Civ. 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. Civ. 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).

Furthermore, an attorney or guardian ad litem's authority to act is limited to the proceeding in

which he is appointed. *Barrow v. Durham*, 574 S.W.2d 857, 860 (Tex. Civ. App.—Corpus Christi 1978), *aff'd*, 600 S.W.2d 756 (Tex. 1980). Therefore, an ad litem cannot institute, intervene in, or represent a ward in any matter inconsistent with the order of appointment. An ad litem's actions 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. Civ. App.—Fort Worth 1980, no writ). There are several cases, discussed in section 6.8 below, defining the compensable and noncompensable elements for ad litem fees in personal injury actions, family law cases, and guardianships. Most importantly, the ad litem cannot be compensated for the performance of any work performed beyond the scope of the ad litem's appointment. *See* section 6.8 below for a complete discussion of ad litem fees.

§ 6.2:2 Limitations Imposed by Court Order

The 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 Estates Code on an attorney ad litem appointed to represent a proposed ward. *See* sections 6.4:3 and 6.4:4 below.

§ 6.3 Ethical Considerations

An attorney ad litem is subject to the same rules of ethics 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, tit. 2, subtit. G app. B (West 2013).

Because the question of capacity is the central issue in the guardianship proceeding, rule 1.02(g) of the Texas Disciplinary Rules of Professional Conduct should not be perceived as an impediment or limitation on the attorney ad litem’s duty to zealously advocate for his client. Rule 1.02(g) states:

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

Tex. Disciplinary Rules Prof’l Conduct R. 1.02(g), *reprinted in* Tex. Gov’t Code, tit. 2, subtit. G app. A (Tex. State Bar R. art X, § 9) (West 2013).

In addition, an attorney ad litem is 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 as to capacity, the assessment and testimony are privileged. *In re Houseman*, 66 S.W.3d 368 (Tex. App.—Beaumont 2002, no pet.).

But see *Franks v. Roades*, 310 S.W.3d 615 (Tex. App.—Corpus Christi, 2010, no pet.), in which an attorney who believed his client was incapac-

itated 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.

§ 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. Estates Code § 1002.002. The court must appoint an attorney ad litem to represent the interests of the proposed ward in every guardianship proceeding seeking the appointment of a guardian. *See* Tex. Estates Code § 1054.001. An attorney ad litem may also be appointed to represent a ward subsequent to the ward’s adjudication of incapacity. As mentioned in section 6.2:2 above, the duties and responsibilities of an attorney ad litem depend on the basis of the appointment.

§ 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. Estates Code §§ 1054.001, 1202.101, 1158.653. Failure to appoint an attorney ad litem when required by law may result in a 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. Estates Code § 1054.201. Although the appointment may be made orally, it is preferable for the court to enter a written order that clearly sets out the parameters of the appointment. *See Cole v. Waite*, 246 S.W.2d 849 (Tex. 1952) (oral appointment in open court valid). See forms 6-1 through 6-4 in this chapter.

Certification Requirements: An attorney ad litem must complete a course of study on guardianship law and procedure sponsored by the State Bar of Texas to become certified. *See* Tex. Estates Code § 1054.201(a). Currently, certification requires three hours of credit. Tex. Estates Code § 1054.201(b). This requirement may be fulfilled by the attorney's either attending a seminar or viewing a video 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. Estates 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 each of the four years immediately preceding the date the new certificate was issued. Tex. Estates Code § 1054.202(b).

Certification is required of any attorney seeking to represent the ward, in any guardianship proceeding. Tex. Estates Code § 1054.201. 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 2010, no pet.).

Similarly, private counsel retained by a ward or proposed ward pursuant to Texas Estates Code section 1054.006 must have a current certification under Tex. Estates Code § 1054.201.

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. The term of an appointment for an ad litem appointed under Texas Estate 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. Estates Code § 1054.002.

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 section 647A of the Probate Code (now Estates Code section 1054.201). *In re Guardianship of Marburger*, 329 S.W.3d at 930.

§ 6.4:3 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 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* Tex. Estates Code ch. 1051.

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. Estates Code § 1054.004(b). Generally, the applicant's attorney will 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. Estates 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 also referencing that the ad litem so appointed is an officer of the court. *See* also forms 6-20 through 6-23 in this chapter. The attorney ad litem should verify that, if needed, the physician'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 physician actually performed examination of the proposed ward not earlier than that same day. *See* Tex. Estates Code § 1101.103(a). If the proposed ward is alleged to be intellectually disabled, he 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 according to the rules adopted by the Health and Human Services Commission not earlier than twenty-four months before the hearing. Tex. Estates Code § 1101.104. *See* form 4-1 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, and the grounds on which the guardianship is sought. Tex. Estates Code § 1054.004(a). The attorney ad litem should inform the proposed ward that he is entitled, on request, to a jury trial. *See* Tex. Estates Code § 1101.052.

Additionally, pursuant to rule 1.02(g) of the Texas Disciplinary Rules of Professional Conduct, the attorney ad litem must assess the capacity of the proposed ward to determine whether the proposed ward possesses or lacks the cognitive ability to communicate with the attorney ad litem and whether, under Tex. Estates Code section 1002.017, the proposed ward “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.” Tex. Estates Code § 1002.017; *see also* Tex. Disciplinary Rules Prof'l Conduct R. 1.02(g) (“A lawyer shall take reasonable action to secure the appointment of a guardian . . . for . . . a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.” *See also* *Franks v. Roades*, 310 S.W.3d 615 (Tex. App.—Corpus Christi 2010, no pet.)

“Judicial Determination of Capacity of Older Adults in Guardianship Proceedings,” a capacity assessment handbook that is a collaborative effort of the American Bar Association Commission on Law and Aging, the American Psychological Association, and the National College of Probate Judges is available free at http://www.americanbar.org/groups/law_aging/publications.html. It examines the issue of capacity from several standpoints and is designed to assist judges in understanding the concept of incapacity.

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. Further, section 1.02(g) of the Texas Disciplinary Rules of Professional Conduct should not be viewed as a restraint on the attorney ad litem. Because the question of capacity has already been brought to the attention of the court, section 1.02(g) is not an impediment or limitation on the attorney ad litem’s duty to zealously advocate for his client. *But see Franks v. Roades*, 310 S.W.3d 615 (Tex. App.—Corpus Christi 2010, no pet.).

Practice Pointer: Given the clear purpose clause of the guardianship provisions of the Estates Code (Tex. Estates 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 are 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 him to become a fact witness.

§ 6.4:4 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 6-5 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 would be 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. Estates Code § 1053.052. See forms 6-8 and 6-9. 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 6-10 through 6-12. Although previous case law limited the statutory authority to tax costs in guardianship proceedings, 2013 amendments to the Estates Code specifically authorize judges to tax costs and require reimbursement of attorneys' fees of persons found to have acted without good faith or just cause. Tex. Estates Code §§ 1053.052, 1155.054. See sections 10.4:2–10.4:6 in this manual.

Consider Requesting Independent Medical Examination: The applicant is required to obtain a letter or certificate from a Texas physician or, in some limited circumstances, a psychologist that meets the requirements of Texas Estates Code section 1101.103. The various Texas statutory probate courts now have a form that is approved in all these courts. See form 4-1 in this manual. If the attorney ad litem believes the medical information is inadequate or incorrect, he 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. Estates Code § 1101.103(c). See forms 6-6 and 6-7. 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 he 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 he 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.

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. Estates Code § 1101.051(b). Courts generally require the attorney ad litem to arrange for the proposed ward to attend the 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 doctor's letter or certificate provided to the court. The certificate of medical examination (form 4-1) includes a provision to address this matter.

Methods to show that the proposed ward's presence at a hearing would not be in his best interests include the following:

- A physician'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 permission).
- A telephonic appearance (with court permission) if the proposed ward is physically unable to attend.
- Testimony by the ad litem of the proposed ward's lack of desire or ability to attend.

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. Estates Code § 1101.051(c). Such a request is to protect the privacy of the proposed ward.

§ 6.4:5 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. Estates Code § 1054.002. See forms 6-13 and 6-14 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. Estates 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. Estates 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. Estates 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. Estates Code §§ 1204.001(e), 1204.002. *See* form 6-15.

§ 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. Estates 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, he can make recommendations based on what he perceives 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, an appellate court 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. Goodyear Dunlop Tires North America, Ltd. v. Gamez*, 151 S.W.3d 574, 582–85 (Tex. App.—San Antonio 2004, no pet.).

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.

Tex. Estates Code § 1104.354(1).

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. Estates 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. Estates Code § 1054.051. In the interest of judicial economy, the court may instead appoint an attorney ad litem under Code section 1054.001 to serve also as the guardian ad litem. Tex. Estates 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, he 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 6-16 in this chapter.

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.

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. Estates Code § 1054.053.

§ 6.5:3 Statutory Duties in Proceeding to Appoint Guardian

A guardian ad litem is appointed to represent the interests of the proposed ward. Tex. Estates Code § 1054.051. A guardian ad litem's sole statutory duty is to protect, rather than to advocate, to "enable the court to determine the action that will be in that person's best interest." Tex. Estates Code § 1054.054(b).

§ 6.5:4 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 his 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; however, 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 6.4:3 above and forms 6-20 through 6-23 in this chapter.

Contact Proposed Ward's Physician: If there is a question as to 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 first-hand 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 he believes the proposed ward is in imminent danger, a guardian ad litem may seek the appointment of a temporary guardian or may seek his own appointment as guardian. See the discussion at section 6.4:3.

Meet Applicant and Verify Eligibility: 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. Estates 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 Medical

Examination: If the guardian ad litem believes the medical information is inadequate or incorrect, he may seek either or both a court-ordered independent mental or physical examination. *See* Tex. Estates 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 6-8 and 6-9 in this chapter. See also sections 6.4:4 and 10.2:5–10.4:6.

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. Estates 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 his 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 his own application to appoint a guardian if he determines 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: 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. any other information obtained by the guardian ad litem that may assist the court in reviewing the application for guardianship; and
6. 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 6.2:1 above.

§ 6.5:5 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* 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 his 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.

§ 6.5:6 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. Estates 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 Estate 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. Estates 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. Estates 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 6-13 and 6-14 in this chapter. See also form 6-17 for an order vacating the appointment of an attorney ad litem.

§ 6.7 Liability of 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 he would to any other client. Just as in any other case, a breach of these duties and responsibilities can give rise to an action for legal malpractice.

In contrast, a guardian ad litem is not 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). 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.

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 breach of those duties. *See Byrd v. Woodruff*, 891 S.W.2d 689 (Tex. App.—Dallas 1994, writ dismissed by agreement) (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 his 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 he is appointed to represent the interest of an incapacitated person in a guardianship proceeding involving the creation, modification, or termination of a guardianship. Note, however, there can be civil damages arising from a recommendation or an opinion given in the capacity of guardian ad litem if it is (1) willfully wrongful, (2) given with conscious indifference or reckless disregard to the safety of

another, (3) given in bad faith or with malice, or (4) grossly negligent. *See* Tex. Estates Code § 1054.056.

§ 6.8 Ad Litem Fees

§ 6.8:1 Basis of Fees for Ad Litem

Section 1155.151 of the 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 amount the court considers equitable and just and, except as provided by Subsection (c), shall be paid out of the guardianship estate, or the county treasury if the estate is insufficient to pay the cost, and the court shall issue the judgment accordingly.

Tex. Estates Code § 1155.151.

However, 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 litem). Tex. Estates 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 his 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

litem 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 online at www.co.harris.tx.us/probate/attorneyfees.aspx. 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.

§ 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 August 31, 2009, no pet.); *Magna Donnelly 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 1982); *Mills v. Mills*, 559 S.W.2d 687 (Tex. Civ. App.—Fort Worth 1977). The 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 and 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.*, 113 S. Ct. 2786 (1993).

No "Bonus" Factors: Absent exceptional circumstances, a court should not enhance the fee calculated by multiplying necessary number of hours expended by a reasonable hourly rate. Additional sums are rarely appropriate, particularly since the guardian ad litem serves, in part, as an advisor to the court and will enjoy the protection of qualified judicial immunity. Tex. Estates 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 2010).

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 his role will not be paid for unauthorized work. *Land Rover U.K., Ltd. v. Hinojosa*, 210 S.W.3d 604, at 607 (Tex. 2006) (per curiam); *Magna Donnelly v. Deleon*, 267 S.W.3d 108 (Tex. App.—San Antonio 2008); *Goodyear Dunlop v. Gamez*, 151 S.W.3d 574 (Tex. App.—San Antonio 2004, no pet.); *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

In determining reasonableness, the factors to be considered include—

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
2. the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
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 lawyer or lawyers 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.

These factors are often called the "ABA" factors, the "Garcia" factors (*Garcia v. Martinez*, 988 S.W.2d 219, 222 (Tex. 1999)), or the "Arthur Andersen" factors (*Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 818 (Tex. 1997)). *See also In re Guardianship of Hanker*, No. 01-12-00507-CV, 2013 WL 3233251 at *3 (Tex. App.—Houston [1st Dist.] June 25, 2013, no pet.).

A trial court is not required to consider all of the factors in every case. The factors are guidelines for the trial court to consider, not elements of proof. *In re Estate of Johnson*, 340 S.W.3d 769 (Tex. App.—San Antonio 2011); *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554, 567 (Tex. App.—Austin 2004, no pet.); *Academy Corp. v. Interior Buildout & Turnkey Construction, Inc.*, 21 S.W.3d 732, 742 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

To apply these factors, a reviewing court “may draw upon the common knowledge of the justices and their experience as lawyers and judges to view the matter in light of the evidence and the amount in controversy.” *Land Rover U.K., Ltd. v. Hinojosa*, 210 S.W. 3d 604, 607 (Tex. 2006); quoting *Borden, Inc. v. Martinez*, 19 S.W.3d 469, 471 (Tex. App.—San Antonio 2000, no pet.).

Some of the factors may be given more weight than others by the trial court. *In Re Guardianship of Hanker*, 2013 WL 3233251 *3; *Ford Motor Co. v. Garcia*, 363 S.W.3d 618 (Tex. App.—Corpus Christi 2010, reversed & remanded 363 S.W.3d 573 (Tex. 2012) (short timeframe and complexity of case).

See forms 6-18 and 6-19 in this chapter for an application and order to pay appointee’s fees and expenses.

§ 6.8:4 Examples of Noncompensable Activities

While ad litem’s 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. American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 93-379, December 6, 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 are 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.).

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.

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 August 31, 2009, no pet.).

§ 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 attorney's services were reasonable and necessary under a particular extenuating circumstance. *Jocson v. Crabb*, 133 S.W.3d 268, 271 (Tex. 2004); *Goodyear Dunlop*, 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 and/or support staff may be employed. This will still be subject to a subsequent finding by the court that the additional attorney's services were reasonable and necessary. *In re Guardianship of Glasser*, 297 S.W.3d 369 (Tex. App.—San Antonio 2009) (attorney ad litem in guardianship allowed to retain litigation counsel); *accord Scally v. Scally*, No. 14-09-00344-CV, 2010 WL

386 4924 (Tex. App.—Houston [14th Dist.] 2010) (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 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 573 at 580–81, for specific application to ad litem.

§ 6.8:6 Source of Payment

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. Estates 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 litem). Tex. Estates Code §§ 1053.052, 1155.054. See section 10.4:2 in this manual.

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 section 6.8:3 above), 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 (that involving wrongful death, malpractice, fiduciary breach, or trust). Although your 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 the 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 services like Google Maps or Mapquest.

§ 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 Always Required

By a specific order of the Texas Supreme Court, any order awarding a fee to a person appointed by a statutory probate court must be separate and apart from any other pleading: Mandatory Reports of Judicial Appointments and Fees, Misc. Docket No. 94-9143, (Sept. 21, 1994) *reprinted in* Texas Rules of Court—State (West 2013) at 775, cited in *Epstein v. Hutchison*, 175 S.W.3d 805 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).

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 "imbedded" in another pleading. Fee applications should not be filed as claims against the estate unless: the estate is insolvent or the guardian has indicated he 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 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. Estates Code § 1053.052. For further discussion on seeking security costs, see section 6.4:4 above and section 10.4:2–10.4:6 in this manual.

§ 6.9 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 24-hour toll-free number, 1-800-252-5400, or at the Department's secure Web site, www.txabusehotline.org. Complaints about a nursing home or similar facility may be made to the Texas Department of Aging and Disability Services at 1-800-458-9858.

The duty imposed 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.

§ 6.10 Duty to Report Abuse or Neglect of Child

A person who has 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 Web site, 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. Estates 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 the pending application for permanent guardianship.

Respectfully submitted,

[Name]
Attorney for Movant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Notice of Hearing

The above motion is set for hearing on _____ at _____ .M.
in [designated and location of court].

SIGNED on _____.

Judge or Clerk

Certificate of Service

I certify that in accordance with the Texas Rules of Civil Procedure I served a true and correct copy of [title of document, e.g., Motion for Leave to Resign as Guardian] on the parties listed below. This service was made by [method of service, e.g., certified mail, properly addressed, return receipt requested, in a postpaid envelope deposited with the United States Postal Service].

List the name and address of each party or attorney served.

SIGNED on _____.

[Name of attorney]

Form 6-2

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

Order Appointing Attorney Ad Litem
(Tex. Estates 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.

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.

SIGNED on _____.

JUDGE PRESIDING

APPROVED AS TO FORM:

By _____

Attorney for Movant

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

Form 6-3

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

Motion for Appointment of Attorney Ad Litem
(Tex. Estates 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 [his/her] 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.

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.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

Form 6-4

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

Order Appointing Attorney Ad Litem
(Tex. Estates 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.

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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Form 6-5

[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 [his/her] 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 [his/her] application filed herein and for such other and further relief to which Attorney Ad Litem may show [himself/herself] justly entitled. Attorney Ad Litem requests a judgment for reasonable ad litem fees.

Respectfully submitted,

[Name]

Attorney Ad Litem

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

Certificate of Service

I certify that in accordance with the Texas Rules of Civil Procedure I served a true and correct copy of [title of document, e.g., Motion for Leave to Resign as Guardian] on the parties listed below. This service was made by [method of service, e.g., certified mail, properly addressed, return receipt requested, in a postpaid envelope deposited with the United States Postal Service].

List the name and address of each party or attorney served.

SIGNED on _____

[Name of attorney]

Form 6-6

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 Examination

This Motion for Examination under rule 204 of the Texas Rules of Civil Procedure and 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/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 medical doctor/a psychiatrist/a psychologist], for the purpose of determining the [degree of physical incapacity/mental condition/degree of mental retardation] of [Ward/Proposed Ward] and the prognosis.

2. Good cause is shown for an examination of [Ward/Proposed Ward] because [his/her] [degree of physical incapacity/mental condition/degree of mental retardation] 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 [he/she] 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 a [medical/mental] examination in accordance with rule 204 of the Texas Rules of Civil Procedure and section [1101.103/1101.104] of the Texas Estates Code to determine the [degree of physical incapacity/mental condition/degree of mental retardation] 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.:
[E-mail 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 in accordance with the Texas Rules of Civil Procedure I served a true and correct copy of [**title of document, e.g.**, Motion for Leave to Resign as Guardian] on the parties listed below. This service was made by [**method of service, e.g.**, certified mail, properly addressed, return receipt requested, in a postpaid envelope deposited with the United States Postal Service].

List the name and address of each party or attorney served.

SIGNED on _____.

[Name of attorney]

[Reserved]

Form 6-7

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

Order for Examination

On [date] the Court considered the Motion for Examination under rule 204 of the Texas Rules of Civil Procedure and section [1101.103/1101.104] of the Texas Estates Code of [name of attorney ad litem], as attorney ad litem for [name of [ward/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 in that the [physical incapacity/mental condition] of [Ward/Proposed Ward] has been put in issue.

IT IS ORDERED that [name of psychologist] is hereby appointed to make a neuropsychological evaluation of [name of [ward/proposed ward]] as to [his/her] mental status and that such psychologist should render [his/her] conclusions and recommendations in a written report to [name of appointed physician] within [specify time frame].

IT IS FURTHER ORDERED that [name of appointed physician] is hereby appointed to [review the results of the neuropsychological evaluation and] make an examination of [name of [ward/proposed ward]] as to the [degree of physical incapacity/mental condition/degree of mental retardation] and render a written report of [his/her] findings to be filed with the Court and that copies are to 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/proposed ward]]'s estate/by [county] County, Texas, in accordance with section 1155.101 of the Texas Estates Code].

SIGNED on _____

JUDGE PRESIDING

Form 6-8

[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. [His/Her] 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.

Respectfully submitted,

 [Name]
 Attorney Ad Litem
 State Bar No.:
 [E-mail 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 in accordance with the Texas Rules of Civil Procedure I served a true and correct copy of [title of document, e.g., Motion for Leave to Resign as Guardian] on the parties listed below. This service was made by [method of service, e.g., certified mail, properly addressed, return receipt requested, in a postpaid envelope deposited with the United States Postal Service].

List the name and address of each party or attorney served.

SIGNED on _____

[Name of attorney]

[Reserved]

Form 6-9

[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

[Reserved]

Form 6-10

[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 [him/her].
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.:
 [E-mail 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 in accordance with the Texas Rules of Civil Procedure I served a true and correct copy of [title of document, e.g., Motion to Dismiss Action for Failure to Give Security for Costs] on the parties listed below. This service was made by [method of service, e.g., certified mail, properly addressed, return receipt requested, in a postpaid envelope deposited with the United States Postal Service].

List the name and address of each party or attorney served.

SIGNED on _____.

[Name of attorney]

Form 6-11

[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

[Reserved]

Form 6-12

[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

[Reserved]

Form 6-13

[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 [him/her] from the duties as [attorney/guardian] ad litem.

Respectfully submitted,

[Name]
 Attorney for [Attorney/Guardian] Ad Litem
 State Bar No.:
 [E-mail address]
 [Address]
 [Telephone]
 [Telecopier]

Certificate of Service

I certify that in accordance with the Texas Rules of Civil Procedure I served a true and correct copy of [title of document, e.g., Motion for Discharge] on the parties listed below. This

service was made by [method of service, e.g., certified mail, properly addressed, return receipt requested, in a postpaid envelope deposited with the United States Postal Service].

List the name and address of each party or attorney served.

SIGNED on _____.

[Name of attorney]

Form 6-14

[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 [his/her] duties as [attorney/guardian] ad litem.

SIGNED on _____.

JUDGE PRESIDING

[Reserved]

Form 6-15

[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 the closing of [his/her] 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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Reserved]

Form 6-16

[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].

IT IS ORDERED that [name of guardian ad litem] [, an attorney licensed to practice before this Court,] is appointed guardian ad litem to represent and protect the best interests of the incapacitated person, [name of 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].

IT IS FURTHER ORDERED that the guardian ad litem be entitled to reasonable compensation for [his/her] 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]'s certificates of current physical, medical, and intellectual examinations and have access to all of [name of 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]'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 of ward]'s health-care records and [name of ward]'s care, treatment, diagnosis, and needs.

SIGNED on _____

JUDGE PRESIDING

Form 6-17

[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

[Reserved]

Form 6-18

[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/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/proposed ward]] by Judge [name] on [date]. Applicant and [his/her] 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 [his/her] 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 in the preservation, safekeeping, and management of [Ward/Proposed Ward] [and [his/her] estate]. [Name of law firm] should be reimbursed for such expenses.

Since [his/her] appointment as attorney ad litem, and prior to the period to which this application pertains, Applicant has requested of this Court approval of 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 such 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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Certificate of Service

I certify that in accordance with the Texas Rules of Civil Procedure I served a true and correct copy of [title of document, e.g., Application to Pay Appointee's Fees and Expenses] on the parties listed below. This service was made by [method of service, e.g., certified mail, properly addressed, return receipt requested, in a postpaid envelope deposited with the United States Postal Service].

List the name and address of each party or attorney served.

SIGNED on _____

[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 filed herein and states that such 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 herein 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

SIGNED under oath before me on _____

Notary Public, State of Texas

Attach exhibit(s).

Form 6-19

[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 appointee], who was appointed by Judge [name] on [date] to serve as [attorney ad litem/guardian ad litem/physician/[other party designation]] for [name of ward], 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'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 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 such 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]'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]'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

Form 6-20

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,

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:**

- | | | |
|-------------------------------------------------------------------|-------------------------------------------------|-----------------------------------------------|
| <input type="checkbox"/> Progress notes | <input type="checkbox"/> Laboratory reports | <input type="checkbox"/> Operative reports |
| <input type="checkbox"/> Discharge summary | <input type="checkbox"/> Radiology reports | <input type="checkbox"/> Consultation reports |
| <input type="checkbox"/> X-ray or other images | <input type="checkbox"/> Photographs/videotapes | <input type="checkbox"/> Test results |
| <input type="checkbox"/> Prescriptions and medicine records | | <input type="checkbox"/> Hospital records |
| <input type="checkbox"/> Consultations | <input type="checkbox"/> Correspondence | |
| <input type="checkbox"/> Nurses' notes | <input type="checkbox"/> Billing records | |
| <input type="checkbox"/> Entire health records in your possession | | |
| <input type="checkbox"/> 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

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.

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: _____

Description of personal representative's authority: _____

Attach documentation showing personal representative's authority.

[Reserved]

Form 6-21

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:

1. This is a case arising under title 3 of the Texas Estates Code.

[Name of movant] seeks an order from the Court requiring [name] to execute an 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.

2. 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.

3. 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.

[Name]
Attorney for [name of movant]
State Bar No.:
[E-mail 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 the above was served on each attorney of record or party in accordance with the Texas Rules of Civil Procedure on [date].

[Name]

Attorney for [name of movant]

Attach copy of authorization for release of protected health information. See form 6-20.

Form 6-22

[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.

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

- Entire health records in the possession of health-care provider
- Other: [specify]

Continue with the following.

SIGNED on _____

JUDGE PRESIDING

[Reserved]

Form 6-23

**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:

[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 6-22.

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. Estates 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. Estates Code § 1154.051(a), (c). The date of qualification under the Code is the later of the date that the court approves the bond or the date that the guardian takes the proper oath. Tex. Estates 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. Estates Code § 1154.051(b). Account values should be as of the date of the guardian's qualification and as accurate as possible as 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, its total value should be shown along with the interest owned by the ward. Tex. Estates 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 from a source that is not immediately collectible. Tex. Estates 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. Estates 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. Estates 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. Estates 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. Estates Code § 1105.252. The inventory assets and their values are used to redetermine the guardian’s bond. Tex. Estates Code § 1105.154. See section 4.51 in this manual. A bond cannot be decreased by a review of the inventory. The procedure to decrease the bond requires a safekeeping agreement or a freeze of certain assets of the guardian. Tex. Estates Code §§ 1105.155–.157, 1105.255.

See section 7.2 below.

§ 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. Estates 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.

Estates Code § 1105.157(a). Though other assets belonging to the ward or his estate may be deposited, cash or securities are the usual deposits, and cash is the most common. These deposits may be made in domestic or national banks, savings and loan associations, trust companies, or other approved corporate depositories. See Tex. Estates Code § 1105.155. They must be made in strict accordance with the Estates Code and may be increased, decreased, withdrawn, or released only on court order. Tex. Estates 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.

Use of Freeze Order: Some probate courts permit a “freeze order.” A general bank resolution is required, which gives authority to bank officers to execute an agreement not to release funds the guardian places with the bank under a freeze order.

A majority of courts prefers the use of the safekeeping or freeze agreement, which itself 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.

§ 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 increase or reduce the guardian’s bond commensurate with the amount of assets placed with the institution. Tex. Estates 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. Estates Code § 1105.157(c).

Caveat: Freeze agreements can only be entered into 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 notice of the

appointment if the ward paid or should have paid taxes administered by the comptroller and must provide notice by publication to all the ward's creditors. Tex. Estates 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. Estates Code § 1153.003(a). See forms 7-11 and 7-12. In addition, the notice may 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. Estates 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. Estates 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. But if the previous guardian has given timely and proper notice, the

successor is not required to give further notice. Tex. Estates 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. Estates Code ch. 1157. The guardian must pay approved claims against the estate in the specific order set out in the statute. Tex. Estates 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. Estates 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. Estates Code § 1157.001. Unsecured claims must be presented within the time prescribed by the notice of presentment issued by the guardian. Tex. Estates Code § 1157.060; *see also* Tex. Estates 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. Estates 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. Estates Code § 1157.004.

The Estates Code also permits the creditor to use alternative procedures to approve the claim if the evidence to support the claim has been lost. Tex. Estates 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. Estates Code § 1157.005. There are special procedures for the presentation and allowance of secured claims. *See* Tex. Estates 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. Estates Code § 1157.151. A creditor whose claim is based on a written agreement that provides for attorney's fees may include contracted attorney fees for the preparation, presentation, and collection of the claim as part of the claim. Tex. Estates 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 a claim. Tex. Estates 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. Estates Code § 1157.051. Failure to act within thirty days constitutes a rejection of the claim as a matter of law. Tex. Estates 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. Estates 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. Estates 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. Estates 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. Estates Code § 1157.054. The Estates Code has no classification provision in a guardianship as it does for a decedent's estate. In a guardianship, allowed claims are assigned only an order in which they are paid. Tex. Estates Code § 1157.103. Thus, if the claim in a

guardianship is allowed and approved, the court will order the guardian to pay it in the order established by the Code. *See* Tex. Estates Code § 1157.103. 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. Estates Code § 1157.056. See form 7-15 in this chapter for an order.

§ 7.4:5 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. Estates Code § 1157.063.

[Reserved]

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		
5. Real Property		
Total		

List of Claims Owing to Estate

Description of Claim	Community or Separate	Value
Total		

Respectfully submitted,

[Name of guardian]

Guardian

[Name]

Attorney for Guardian

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

I, [name of guardian], having been duly sworn, state on oath that the foregoing Inventory, Appraisal, 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 appraisal shown for each item on the foregoing Inventory, Appraisal, and List of Claims is the fair market value thereof.

[Name of appraiser]

Appraiser

SIGNED under oath before me on _____.

Notary Public, State of Texas

[Reserved]

Form 7-2

The inventory, appraisal, 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, Appraisal, and List of Claims
[Complex]

Date of Guardian's Qualification: [date]

The following is a full, true, and complete inventory and appraisal of [name of ward]'s [include if applicable: separate/community/separate and community] 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 [Separate/Community/Separate and Community] Assets

Real Property

(See Schedule A) \$[amount]

Stocks, Bonds, and Securities

(See Schedule B) \$[amount]

Cash

(See Schedule C) \$[amount]

Jointly Owned Property

(See Schedule D)

[\$amount]

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

[Name]
 Attorney for Guardian
 State Bar No.:
[E-mail 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

SIGNED under oath before me on _____.

Notary Public, State of Texas

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		

Schedule D
Jointly Owned Property

Description	Community or Separate	Value
Total		

Schedule E
Personal Property

Description	Community or Separate	Value
Total		

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.

Respectfully submitted,

[Name]

Attorney for Applicant

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

Form 7-4

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

Order Extending Inventory, Appraisal, and List of Claims

On [date] the Court considered the Application for Extension of Time to File Inventory, Appraisal, 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

[Reserved]

Form 7-5

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

Order Approving Inventory, Appraisalment, and List of Claims

On [date] the Court considered the Inventory, Appraisalment, 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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Reserved]

Form 7-6

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

Application for Safekeeping of Assets and Reduction of Guardian's Bond

[Name of applicant], Applicant, guardian of the [person/estate/person and estate] of [name of ward], Ward, an 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 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].

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:

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 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].

Respectfully submitted,

[Name]

Attorney for Applicant

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

Form 7-7

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

Order Authorizing Safekeeping of Assets and Reduction of Guardian's Bond

On [date] the Court considered the application of [name of applicant], guardian of the [person/estate/person and estate] of [name of ward], Ward, an 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 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], guardian of the [person/estate/person and estate] of [name of ward], an incapacitated person, shall deposit assets in the amount of \$[amount] belonging to [name of 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.

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 guardian of the [person/estate/person and estate] of [name of ward].

SIGNED on _____.

JUDGE PRESIDING

APPROVED AS TO FORM:

[Name]
Attorney for Applicant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

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.

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).

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. Estates 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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Reserved]

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.

[Reserved]

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

[Reserved]

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).

[Reserved]

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.

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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Chapter 8
Administration

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[Reserved]

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 the court will require 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 Code and many judges have their own local rules and procedures for guardianship cases in their court. 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. Estates Code § 1151.051(c)(3). The guardian of the estate must take care of and manage the estate of the ward. Tex. Estates Code § 1151.151. A guardian will 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 by the Estates Code or by prior court approval. *See* Tex. Estates Code §§ 1155.101–.103. When the ward's estate possesses adequate funds, with proper court approval the guardian of the estate may acquire goods or services and pay for these expenditures. *See* Tex. Estates 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. Estates Code § 1156.051(b).

§ 8.3 Annual Allowance

Guardians incur routine expenses throughout the guardianship. A court can order a monthly allowance in the order appointing guardian but most courts require a separate application to be filed after the guardian qualifies. The guardian of the estate must file an application showing projected monthly expenditures for the current guardianship period to be paid from 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. Tex. Estates 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. Estates Code § 1156.002.

The application may provide that certain amount of money be paid to the guardian of the person for the ward's education and maintenance. Tex. Estates 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. An accounting for those expenditures is still required annually even if the court authorized the budget. Tex. Estates Code § 1156.003(d).

§ 8.3:1 Annual Expenditures for Ward and Dependents

Application: A written application requires—

1. details of each type of expense and the annual amount that the guardian seeks to pay;
2. a list of specific expenses needed during the year, with amounts for the ward's education and maintenance separately listed from those need to maintain the ward's property; and
3. reasonable details of the ward's needs or justification for the expenses.

Tex. Estates Code §§ 1156.001, 1156.002.

The application should identify as many major categories as the guardian will need to maintain the ward throughout the year, such as food, clothing, education, routine medical expenses, nursing home expenses, and a certain amount for entertainment, relief care, vacation, and other costs. The application should also indicate the ward's income from all sources as the court must consider these in determining the monthly amount. *See* Tex. Estates Code § 1156.002. Once the court has approved particular expenditures, it is good practice to incorporate these

expenses in subsequent annual accounts for recurring needs.

Spouses and Dependents: In addition, a guardian of the estate for a ward may seek court authority for expenditure of funds for maintenance or education of the ward's spouse and dependents. Tex. Estates Code § 1156.052. See forms 8-3 and 8-4 for an application and order to expend funds. The applicant must mail notice of the application to all interested persons. *See* Tex. Estates Code § 1156.052(c); *see also* Tex. Estates Code § 1002.018 (defining interested persons). In addition to the preceding, the application should also include information regarding—

1. as applicable, 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. Estates Code § 1156.052.

Order: The court order should provide for approval of the individual and total expenditures. The order should never extend beyond a period of twelve months so that the guardian can adjust and revise these expenses as a part of each annual account. See form 8-2 in this chapter for an order establishing expenditures.

§ 8.3:2 Annual Expenditures for Minors

Parents have an obligation to support their minor children. Tex. Fam. Code § 151.001(a)(3); *see* Tex. Estates 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. *See* Tex. Estates Code § 1156.051(b). 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.

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. Estates Code § 1156.051(b).

Though not required by the 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. Estates Code § 1156.051(b). *See* form 8-5 in this chapter for an application.

It is important that at the beginning of the guardianship and throughout its existence the guardian of the estate make no expenditure from the minor ward's estate without first obtaining the court's permission. If there is an emergency, the guardian of the estate should not make the expenditure without first determining that the ward would otherwise suffer a substantial injury or that the estate would be seriously impaired. *See* Tex. Estates Code § 1156.004; *see* also the discussion of ratification of expenditures in section 8.7 below. Further, it should be determined that there is no other way to provide for the expenditure. The guardian should be careful in this area, because a mistake may require him to reimburse the ward's estate if the court finds that the expenditure was not justified. *See* Tex. Estates Code § 1156.004.

Order: The court will enter an order authorizing the expense if it finds the expenditure was in the ward's best interests. *See* Tex. Estates Code § 1156.004. The court may also appoint a guardian ad litem. *See* Tex. Estates Code § 1054.051. *See* form 8-6 for an order.

§ 8.4 Payment of Additional Expenses

§ 8.4:1 Purpose and Function

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. Estates Code §§ 1155.101, 1155.103.

§ 8.4:2 Application

A written application for payment of expenses should 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. Estates Code § 1163.003(a)(1). See form 8-7 in this chapter for an application for authority to expend funds.

§ 8.4:3 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

§ 8.5:1 Purpose and Function

The Estates Code permits reimbursement for necessary and reasonable expenses that the guardian of the estate has paid out of personal funds. See Tex. Estates Code § 1155.101.

§ 8.5:2 Application

A written application for reimbursement of expenditures should 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.

See form 8-9 in this chapter for an application for reimbursement.

§ 8.5:3 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.

§ 8.5:4 Order

Section 1155.101 of the 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. Estates 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. Estates 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. Estates 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 Web site. As with any expenditure that the court must approve, the application should contain specific, detailed information as to the nature of the request. See forms 8-11 and 8-12 in this chapter for an application and attorney's fee order.

Note that the 1994 supreme court's appointee order (Tex. S. Ct. Misc. Or. 94-9143) does not apply to fees paid to attorneys retained in connection with the administration of the guardianship. Fees paid by the guardian to a court appointee under Texas Estates Code sections 1054.001, 1155.151, and 1102.001 are discussed in 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. Estates 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

A 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 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. Estates 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.

The court may approve the investment management plan without a hearing. Tex. Estates Code § 1161.051(b).

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. Estates 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. Estates 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 investment in any manner. Tex. Estates Code § 1161.053.

Section 1161.051 of the Estates Code applies only to an application for the appointment of a guardian filed on or after September 1, 2003 (and the provisions relating to authority to invest in or sell securities under the investment plan apply only to a plan approved by the court on or after September 1, 2005). However, it is recommended that an investment plan be filed on existing guardianships so that guardians have clear guidance from the court as to their duties and level of care. A proposed application for a management plan and the corresponding order are included as forms 8-45 and 8-46 in this chapter.

[Sections 8.9 and 8.10 are reserved for expansion.]

II. Compensation

§ 8.11 Guardian Compensation

§ 8.11:1 Purpose and Function

The Estates Code permits all guardians to be compensated for acting as a guardian. *See* Tex. Estates 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. Estates 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. Estates Code § 1155.004. However, Social

Security or veterans benefits may not be considered. Tex. Estates 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. Estates 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. Estates Code § 1155.003. The court must find that the guardian of an estate has taken care of and managed the estate according to Code provisions. Tex. Estates Code § 1155.003. The guardian must give consideration to the method of characteriz-

ing 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. Estates Code §§ 1155.001, 1155.003(b). In addition, while Code section 779 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. Estates 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. Tex. Estates Code § 1155.006(a). 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. Estates 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. Estates Code § 1155.008.

Unless a guardian of an estate is permitted to receive additional compensation, 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. Estates Code § 1155.005.

§ 8.11:4 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. Estates Code § 1155.003(a). The Code makes no specific provision about when an application for compensation of the guardian of the person should be filed. *See* Tex. Estates Code § 1155.002(a). The request can be made

either as part of the annual account or by separate application. 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 statutory calculated amount. *See* Tex. Estates Code § 1155.006.

Contents of Application for Compensation:

A written application should contain the court-approved income and expenses that are being used to make the compensation calculation and specific reasons justifying the compensation. *See* form 8-15 in this chapter for an application for compensation. Some courts allow the application to be included with the annual account and others require it to be a separate pleading.

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. The court will consider compensation applications for the guardian of the estate after approval of the annual account or with a final account. Tex. Estates Code § 1155.003(a).

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. Estates Code § 1155.006(a)(2). But requests for interim fees are not generally granted except in rare circumstances.

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 appointee’s

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 Attorneys Serving as Guardian

If an attorney is serving as a guardian and is also providing legal services in connection with the guardianship, such 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. Estates 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. Estates Code § 1155.052(b). Each court shall set the compensation to be paid to attorneys for guardian services. Tex. Estates 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 attorney in the same guardianship. Therefore, it is often necessary to segregate an attorney's time 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

§ 8.21:3 Application Form

§ 8.21:1 Contract for Goods or Services

A written application for approval to contract for goods and services should contain—

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.

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; and

§ 8.21:2 Application to Contract for Goods or Services

Prior court approval is required when managing the ward's property. *See* Tex. Estates Code §§ 1151.102, 1151.103. Procedures to be used for incurring specific contract obligations against the ward's estate can be found at Tex. Estates Code §§ 1151.102, 1151.103, 1156.051, 1156.052, 1156.001–.004.

The guardian should submit the application to the court for approval as soon as possible. Note some courts like the application to be verified but it is not required by statute. See form 8-17 in this chapter for an application.

§ 8.21:4 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.

§ 8.21:5 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**§ 8.22:1 Purpose and Function**

It is the obligation of the guardian of an estate to collect and recover property for the ward's estate. Tex. Estates Code § 1151.105. The guardian is permitted to sue to recover property. Tex. Estates 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. Estates Code § 1155.053. The court may authorize a contingency fee in excess of one-third of the recovery, but most will only do so under exceptional circumstances. Tex. Estates Code § 1155.053(b). The Code governs this process and the method of payment. Tex. Estates Code § 1155.053(b).

§ 8.22:2 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. Estates Code § 1155.053(c).

See form 8-19 in this chapter for an application to employ an attorney.

§ 8.22:3 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 Code. Tex. Estates 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. Estates 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. Estates 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. Estates Code § 1158.352.

§ 8.31:2 Public Sale

A public sale of real property must be conducted in the same basic manner as any public sale ordered by statute. The sale 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. Estates Code §§ 1158.401–.403.

The court may permit a sale 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. Estates Code § 1158.403(c). Sales not completed on the sale day may be continued. Tex. Estates Code § 1158.404. If the highest bidder defaults, the sale may be advertised and the property sold again without a further court order; a defaulting bidder is liable for a 10 percent of the amount of the bid and the amount of any deficiency in the price on the second sale. Tex. Estates 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. Estates 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. Estates Code §§ 1158.501, 1158.502; see also Tex. Estates Code § 1158.001. The procedure is the same as for a private sale of real property under the Code. Tex. Estates Code §§ 1158.501, 1158.502.

§ 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 that conforms 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. Estates 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. Others will merely review the application and, if it contains sufficient information, approve it by submission after the proper posting time has run. 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. Estates 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 Estates Code section 1158.253, file a written opposition or seek sale of other estate property. Tex. Estates Code § 1158.254. “Interested person” is defined in Tex. Estates 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. Estates 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. Estates 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. Estates 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 at private or public 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. Estates 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. Estates Code § 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. Estates 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 Estates Code provides that after 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 sale. Tex. Estates Code § 1158.551. However, many title companies require and courts want the guardian to report the sale before the final closing has taken place. Other

courts want the title company to close the sale into escrow and then let the guardian report the sale. Some courts require an appraisal of the property. The attorney should check with staff of the court in which the case is pending to see which process is preferred. Also, sometimes coordination is necessary between the title company and the court to due to the requirements of the Code. 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 and order of sale);
3. the time and place of the sale;
4. the name of the purchaser;
5. the amount that the property was sold for (the net sales price after expenses, not the total purchase price);
6. the terms of the sale and whether the sale was at public auction or a private sale; and
7. a statement that the purchaser is ready to comply with the terms of the sale.

Tex. Estates Code § 1158.551. See form 8-23 in this chapter.

§ 8.32:6 Decree of Sale

Once the report of sale is filed, the court must wait five days before the decree of sale may be signed. 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. Estates Code § 1158.552. If the sale is not completed, it is important to have the decree set aside within thirty days of its signature; otherwise a motion for new trial or bill of review will have to be filed. See Tex. Estates Code § 1056.101. See

form 8-24 in this chapter for a decree.

§ 8.32:7 Delivery of Deed or Lien Documents

Only after the decree of sale is signed may the guardian of the estate execute a deed to the property that has been sold. Tex. Estates Code § 1158.558(a). The deed that the guardian signs is a special, not a general, warranty deed. *See* Tex. Estates 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. Estates Code § 1158.558(b).

§ 8.32:8 Bond on Sale

A court may not confirm 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. If a new bond is required, the court may not confirm the sale until the increased bond is filed. Tex. Estates 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 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. Estates 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. Estates 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. Estates Code § 1158.653. If a purchase is made in violation of the Code, the court will set aside the sale and order that the property be reconveyed to the estate. Tex. Estates 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. Estates 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. Estates Code § 1158.001. The 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). Applications must be made for all sales of personal property, either by the guardian of the estate or by an interested person. Tex. Estates Code § 1158.101.

§ 8.42 Application for Sale of Perishable Personal Property

After the inventory and appraisal 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. Estates 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 in under chapter 117 or subchapter F,

chapter 113, of the Texas Property Code.

Tex. Estates 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. Estates Code § 1158.001. See form 8-26 in this chapter for an order approving a sale.

§ 8.42:2 Public Sale

A public sale 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. Estates Code § 1158.103. The 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 as to the time, place, and terms of the sale. *See* Tex. Estates 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 Estates Code permits the private sale of perishable personal property, there are no provisions to guide the guardian through the process. *See* Tex. Estates 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. Estates Code § 1158.001. 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

A 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 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. Estates 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 to submit final account and conclude guardianship).

§ 8.43:1 Application for Sale of Personal Property

The 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. Estates 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. Estates Code §§ 1158.102, 1158.252. See form 8-27 in this chapter for an application.

§ 8.43:2 Hearing

No specific Estates Code provision requires that an application for the sale of personal property be heard by the court. See Tex. Estates Code § 1158.001; *but see* Tex. Estates 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 find out its practice.

§ 8.43:3 Citation

Because, insofar as possible, an application for the sale of personal property must conform to that for a sale of real property, the citation requirements for real property sales should also apply. *See* Tex. Estates Code § 1158.102. Thus, the application for sale should have citation by posting issued before the court acts on the application. *See* Tex. Estates 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. Estates 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. Estates 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 at a private sale; and
3. state the purpose for the sale and its advisability.

See Tex. Estates 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. Estates 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. Estates 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. Estates Code §§ 1158.105, 1158.551. *See* form 8-23 in this chapter for a report.

§ 8.43:6 Decree of Sale

The sections of the Estates Code regulating the confirmation of sales of real property apply to the sale of personal property. Tex. Estates Code § 1158.105(a).

Once a report of sale is filed, the court must wait five days before the decree of sale can be signed. *See* Tex. Estates Code § 1158.522. Before signing, the court must review the report and determine that the sale was made for the best price. The court also must determine if an increased bond should be filed. *See* Tex. Estates Code §§ 1158.552, 1158.556. If a bill of sale is required, the guardian should issue it without warranty. Tex. Estates Code § 1158.105(c). The action of the court in approving the sale constitutes a final judgment. *See* Tex. Estates Code § 1158.556. There is usually no need to execute separate documents conveying ownership as in real property sales; it is the decree of sale that

vests the title in the purchaser. Tex. Estates 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 a decree.

§ 8.43:7 Review of Guardian's Bond

A court should not confirm 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. Estates Code §§ 1158.552(3), 1158.553 (applicable to sale of personal property pursuant to 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 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 commis-

sion merchant or bonded livestock auction commission merchant.

Tex. Estates 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. Estates 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. Estates Code § 1158.154.

§ 8.45 Abandonment of Property

If the ward's estate has real or personal property that is worthless or burdensome and if it would be more economical to abandon the property than to conduct a sale, the guardian may file an application under 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. Estates 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

A guardian of an estate must file a sworn

account not later than the sixtieth day after the expiration of twelve months from the date the guardian of an estate qualified, unless the court

extends the time or waives the accounting requirement. Tex. Estates 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. Estates 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. Estates Code § 1106.003(a). A waiver may be considered only if the estate contains negligible or fixed income. Tex. Estates 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. Estates Code §§ 1201.002, 1201.003. 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. Estates 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. Estates Code § 1163.102(b).

§ 8.52 Annual Account Document

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. Estates Code § 1163.001.

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 as to both form and substance before finalizing 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. Estates Code § 1163.003.

§ 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; and
5. if the taxes have not been paid, the reasons for any failure to file tax returns or pay taxes;
6. if the guardian is a private professional guardian, a guardianship program, or the Department of Aging and Disability Services, 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. Estates 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. Estates 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. Estates Code § 1163.052. The account may not be approved unless the guardian proves possession

of all cash and assets of the estate. Tex. Estates Code § 1163.051(c). If the estate is solvent, the court will then order the guardian to pay all outstanding claims. However, if the estate is insolvent, the court must order any outstanding claims to be paid in the order of their priority. Tex. Estates Code §§ 1163.053, 1163.054; *see also* Tex. Estates Code § 1157.103.

See forms 8-32 and 8-34 in this chapter for orders.

§ 8.55:1 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.

On application the court may order the continued retention of the assets after one year if the retention is an element of the investment plan. Tex. Estates Code § 1161.006.

§ 8.55:2 Application

Within 180 days (or another date specified by the court) of qualification of the guardian of the estate, the guardian must invest estate assets according to Estates Code section 1161.003 or file a written application for an order either modifying or eliminating the guardian's duty to invest the estate or authorizing the guardian to—

1. develop an investment plan for estate assets;
2. invest in or sell securities under the investment plan;
3. declare that one or more estate assets must be retained despite being underproductive with respect to income or overall return; or

4. loan estate funds, invest in real estate or make other investments, or purchase a life, term, or endowment insurance policy or an annuity contract.

Tex. Estates Code § 1161.051(a).

The court may approve the investment plan without a hearing. Tex. Estates Code § 1161.051(b).

If the court determines that the action requested is in the best interests of the ward and the ward's estate, the court must enter an order granting the authority requested. The order must state in reasonably specific terms—

1. the nature of the investment, investment plan, or other requested action, including (if applicable) the authority to invest in or sell securities in accordance with the plan's objectives;
2. when an investment must be reviewed and reconsidered by the guardian;
3. whether the guardian must report the guardian's review and recommendations to the court.

Tex. Estates Code § 1161.052(a), (b).

§ 8.55:3 Ward's Will

The fact that the ward's will contains a specific or general gift or the funds are in a survivorship account does not prevent a guardian of the estate from taking and controlling or closing the account or the court from authorizing an action to modify or eliminate a duty with respect to an account. Tex. Estates Code § 1161.053.

§ 8.55:4 Exception

A guardian does not have to follow the procedures set out in section 1161.051 if an invest-

ment or sale is specifically authorized by other law. Tex. Estates Code § 1161.054.

§ 8.56 Annual Report Required

Once each year for the duration of the guardianship, the guardian of a person must file a report advising the court of the physical, medical, and mental status of the ward. Tex. Estates Code § 1163.101. The report is to cover the twelve-month period after the guardian was qualified and each twelve-month period thereafter. Tex. Estates 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. Estates Code § 1163.102(b), (c).

§ 8.57 Annual Report Document

The annual report must be made under oath and must contain—

1. the guardian's current name, address, and phone number;
2. the ward's current name, address, phone number, age, and date of birth;
3. a complete description of the ward's residence and its type (nursing, foster, etc.);
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; and
 13. if the guardian is a private professional guardian, a guardianship program, or the Department of Aging and Disability Services, 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. Estates Code § 1163.101(c).

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. Estates Code § 1163.103.

See form 8-35 in this chapter for an annual report.

§ 8.58 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. Estates Code § 1163.104(a). The court may waive the cost and fees associated with the filing of the annual report. Tex. Estates Code § 1163.104(c). See form 8-36 in this chapter for an order.

§ 8.59 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. Estates 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. Estates Code § 1163.151(b).

[Sections 8.60 through 8.70 are reserved for expansion.]

VII. Power to Make Certain Gifts and Charitable Contributions

§ 8.71 Authority

A guardian may seek the court's permission to make tax-motivated gifts, charitable contributions, and certain transfers to qualify the ward for government benefits from assets of the ward's estate. Tex. Estates 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 transfers to qualify the ward for government benefits on behalf of the ward. Tex. Estates Code § 1162.001. Notification of the application must be given by posting and by certified mail. Tex. Estates Code §§ 1162.001, 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. Estates Code § 1162.003. See form 8-41 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. Estates 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. Estates 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. Estates Code § 1162.001. See form 8-42 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.

If the court deems it advisable, it may appoint a guardian ad litem for the ward or any other interested party. Tex. Estates Code § 1162.008.

The court may modify an approved transfer plan if the guardian applies to the court for such modification. Tex. Estates 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. The court may modify or set aside such an order later because of a change in the ward's financial condition. Tex. Estates Code § 1162.004.

§ 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. Estates Code § 1162.001.

§ 8.76 Charitable Contribution

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. Estates 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. Estates 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. Estates Code § 1162.051.

The application must remain on file for at least ten days before the hearing. Tex. Estates 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 justifies the contribution; and
5. the charitable contribution is of a reasonable amount and for a worthy cause.

Tex. Estates Code § 1162.053. See forms 8-43 and 8-44 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 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. Civ. App.—Houston 1966), *writ ref'd n.r.e.*, 407 S.W.2d 770 (Tex. 1966) (per curiam) (decided before enactment of Tex. Prob. Code §§ 865–866, now Texas Estates Code chapter 1162). Posting is required on an application to make tax-motivated gifts or transfers for government benefits. Tex. Estates Code § 1162.001.

[Sections 8.78 through 8.80 are reserved for expansion.]

VIII. Investments

§ 8.81 Generally

The guardian of the estate is not required to invest funds needed for the education, support, and maintenance of the ward or others the ward supports. Excess funds must be invested unless the court orders otherwise. Tex. Estates 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. 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. Estates Code § 1161.007.

§ 8.82 Standard for Management and Investments

The standard applicable to a guardian is that 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. Other relevant factors include—

1. anticipated cost 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. Estates Code § 1161.002(a).

In determining whether a 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 taking into consideration the prudence of only a single investment. Tex. Estates 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 incorporated city or town 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. the 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; and
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.

Tex. Estates 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. Estates 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. The court should render an order authorizing the investment. Tex. Estates Code § 1161.151(a).

§ 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.

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. Estates Code § 1161.008.

§ 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.

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.

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.

A 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.

A guardian of the estate may obtain mortgagee's title insurance policy on any real estate loan in lieu of abstract and an attorney's opinion.

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.

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. Estates Code ch. 1161, subch. E.

[Reserved]

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 Annual Expenditures

[Name of applicant], Applicant, guardian of the estate of [name of ward], Ward, an incapacitated person, files this Application to Establish Annual Expenditures 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 for the period of [date] to [date], 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 care and maintenance of Ward
4. There will be adequate funds available monthly to pay these expenses because Ward currently receives income of \$[amount] from [source of income]. There are currently on deposit the following amounts belonging to Ward's estate: [describe deposits, including amount].

The last annual account was approved by this Court on [date] and covered the period from [date] to [date].

Applicant requests this Court to enter an order authorizing a monthly allowance of \$[amount] for maintenance expenses of Ward, including but not limited to [include as applicable: day care, clothing, medical care, education, food, shelter, and transportation] and that annually these expenditures should not exceed \$[amount].

Respectfully submitted,

[Name]
Attorney for Applicant
State Bar No.:
[E-mail 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

EXHIBIT A

Estimated Expenses

<u>Description</u>	<u>Monthly Allowance</u>	<u>Yearly Allowance</u>
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		
13. Home maintenance		
14. Lawn service		

	<u>Monthly</u> <u>Allowance</u>	<u>Yearly</u> <u>Allowance</u>
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	\$ _____	\$ _____

Form 8-2

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

Order Establishing Annual Expenditures

On [date] the Court considered the Application to Establish Annual Expenditures. 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 clear and convincing evidence has been presented in support of the application, and that the application should be granted.

IT IS THEREFORE ORDERED that the proposed annual expenditures described in Exhibit A of the Application for the period [date] to [date] are approved.

IT IS FURTHER ORDERED that Applicant, [name of applicant], is authorized to expend \$[amount] per month from the income, and principal if income is insufficient, of the Ward's guardianship estate for the care and benefit of Ward for the period [date] to [date], as described in the Application.

SIGNED on _____

JUDGE PRESIDING

APPROVED AS TO FORM:

[Name]
Attorney for Applicant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Reserved]

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/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.

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.:
[E-mail 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

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 [timeframe for payment] installments the annual amount of \$[amount] 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

APPROVED AS TO FORM:

[Name]

Attorney for Applicant

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

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

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.:
[E-mail 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

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.”

Affiant

SIGNED under oath before me on _____.

Notary Public, State 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].

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 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

APPROVED AS TO FORM:

[Name]

Attorney for Applicant

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

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 income and, if income is insufficient, from the principal of 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.

Respectfully submitted,

 [Name]
 Attorney for Applicant
 State Bar No.:
 [E-mail 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

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 the income and, if the income is insufficient, from the principal of [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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Reserved]

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)]].

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.:
[E-mail 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

SIGNED under oath before me on _____.

Notary Public, State of Texas

[Reserved]

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 by clear and convincing evidence 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.

SIGNED on _____

JUDGE PRESIDING

APPROVED AS TO FORM:

[Name]
Attorney for Applicant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Form 8-11

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

Application for Payment of Attorney's Fees

[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, 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 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.

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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Approved:

By _____
[Name of applicant], as guardian of the estate
of [name of ward], an incapacitated person.

Exhibit A

Statement of Time and Services

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			

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.

"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

[Reserved]

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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Reserved]

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 comply with section 1156.001 of the Texas Estates Code, as they were made for the care and maintenance of Ward, who received the benefits of them, and [they have not exceeded the statutory limitation of \$5,000 during the present accounting period/although the expenditures exceed \$5,000, they were made to a nursing home for

Ward's care. See Exhibit [exhibit number/letter], which shows expenditures for the nursing home].

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.

Respectfully submitted,

[Name]
Attorney for Applicant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach exhibit(s) if expenditures were made to a nursing home.

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 did not exceed the annual statutory limitation of \$5,000 during the accounting period/that although the expenditures exceed \$5,000 for the current accounting period, they were made to a nursing home; therefore, the statutory limitation of \$5,000 per accounting period does not apply]; 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

APPROVED AS TO FORM:

[Name]

Attorney for Applicant

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

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 was appointed as guardian by Judge [name of judge] 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:

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]

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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Reserved]

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 was appointed by Judge [name of judge] 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

APPROVED AS TO FORM:

[Name]

Attorney for Applicant

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

Form 8-17

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

Application to Contract for Goods or Services

[Name of applicant], Applicant, guardian of the estate of [name of ward], Ward, an incapacitated person, files this Application to Contract for Goods or Services for [specify goods or 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]. The person[s] identified in the attached agreement [is/are] willing to provide these 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 services. Applicant believes that the costs for these 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 services in the monthly amount identified therein for the period from [date] to [date] and for all other relief to which Applicant is entitled.

Respectfully submitted,

[Name]
Applicant

[Name]

Attorney for Applicant

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

Attach exhibit(s).

Form 8-18

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

Order Approving Contract for Goods or 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 or services to be provided by [name] for the benefit of Ward. The Court finds that the contract identified in the application as Exhibit [exhibit number/letter] 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 from funds of [name of ward]'s estate.

SIGNED on _____

JUDGE PRESIDING

APPROVED AS TO FORM:

[Name]
Attorney for Applicant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Reserved]

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/[specify other reason]]. 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-

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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach exhibit(s).

[Reserved]

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

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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Include attachment(s).

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, appraisal, 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.

Or

a public sale 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/public] sale on the terms requested or as may be authorized by law.

Respectfully submitted,

[Name]
Attorney for Applicant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

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]**.

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. Estates 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			

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

[Reserved]

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 [public/private] sale.

IT IS THEREFORE ORDERED that the real property described in Exhibit A attached to the application be sold at a [private/public] sale for cash or such other terms as are permitted by law.

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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

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/public] sale on [date] in [county] County, Texas.
4. The name of the purchaser is [name of purchaser].
5. The total price of the property sold 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 for cash and was made as specified in the closing documents, copies of which are attached as Exhibit [exhibit number/letter].

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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

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

“My name is [name of guardian]. I am competent to make this affidavit. The facts stated within this affidavit are within my personal knowledge. The report of sale is true and correct in every respect, and it contains a correct and complete statement of the matters to which it relates.”

Affiant

SIGNED under oath before me on _____.

Notary Public, State of Texas

Attach exhibit(s).

[Reserved]

Form 8-24

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

Decree of Sale for [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 and that [name of title company] is ordered to place the net proceeds of this sale in the amount of \$[amount] with the county clerk in the registry of this Court.

Or

Include the following if no bond increase will be made so funds are being sent directly to the safekeeping account.

IT IS FURTHER ORDERED that [name of guardian] be authorized to make this conveyance [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]].

Include the following if a bond increase is ordered.

IT IS FURTHER ORDERED that the bond of [name of guardian] be increased to \$[amount] and that [name of title company] is authorized to make this conveyance on the presentation of letters of guardianship ordering the 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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach exhibit(s).

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, Appraisal, 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.

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/public] sale 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/public] sale for cash and for all further relief to which Applicant may be entitled.

Respectfully submitted,

[Name]
Attorney for Applicant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

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/public] sale 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

APPROVED AS TO FORM:

[Name]

Attorney for Applicant

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

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, Appraisal, 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]**.

6. It would be in Ward's best interests for [his/her] personal property as herein described to be sold at [a private sale for cash or such other terms as may be authorized by law/a public sale in compliance with the provisions of the Texas Estates Code].

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/public] sale 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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach exhibit(s).

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/public] sale.

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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

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, Appraisal, 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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach exhibit(s).

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

APPROVED AS TO FORM:

[Name]
Attorney for Applicant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach exhibit(s).

Form 8-31

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

Annual Account
[Complex]

[Name of guardian], Guardian, guardian of the 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

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 being rented, the terms and price for rent]**.

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 Texas Estates Code]**.

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]**.

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].

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]
Paragraph 14: Total personal property other than cash	\$[amount]

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.:
[E-mail 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 the following under oath:

“My name is [name of guardian]. I am the guardian of the 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 related. The bond premium for the next accounting period has been paid. All tax returns for the ward during this accounting period have been filed.

“The guardian has paid all taxes owed by the ward during the accounting period of this account as follows: [list name of agency, date, and amount paid].”

<p>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 indicating why such taxes have not or cannot be paid.</p>

Affiant

SIGNED under oath before me on _____

Notary Public, State of Texas

Attach exhibit(s).

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.

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.

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 report/annual account and annual report] as provided under section 1106.003 of the Texas Estates Code.

Select as applicable.

- 4. The expenditures from the corpus of [name of ward]’s estate in the amount of \$[amount] are hereby approved and ratified.
- 5. 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.
- 6. [Name of guardian]’s bond be reduced to \$[amount].

7. [Name of guardian] is authorized to pay the claims of \$[amount] to [name].

8. [Name of guardian] is authorized to spend \$[amount] per month during the next twelve-month accounting period from the corpus of [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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Reserved]

Form 8-33

[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]

Value of All Property Now in Possession of Estate

(Summary only)

Real estate	\$[amount]
Notes payable to estate	\$[amount]
Stocks, bond, & securities	\$[amount]
Cash: (balance shown above)	\$[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				

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	Income
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. Estates Code § 1163.001(c), including stocks, bonds, notes, and any other securities.

Description	Safekeeping	Community or Separate	Amount
Total			

Respectfully submitted,

 [Name]
 Guardian

 [Name]
 Attorney for Guardian
 State Bar No.:
 [E-mail 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 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.

Affiant

SIGNED under oath before me on _____

Notary Public, State of Texas

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.

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 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 report/annual account and annual report] as provided under section 1106.003 of the Texas Estates Code.

SIGNED on _____.

JUDGE PRESIDING

APPROVED AS TO FORM:

[Name]
Attorney for Guardian
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Form 8-35

[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.]

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.]

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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Name of guardian] appeared in person before me today and stated under oath:

"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

Include attachment(s).

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.

SIGNED on _____

JUDGE PRESIDING

APPROVED AS TO FORM:

[Name]
Attorney for Guardian
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Form 8-37

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. Estates 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].”

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).

Form 8-38

[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

APPROVED AS TO FORM:

[Name]
Attorney for Guardian
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Form 8-39

[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.

Respectfully submitted,

[Name]

Attorney for Applicant

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

Form 8-40

[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.:
 [E-mail address]
 [Address]
 [Telephone]
 [Telecopier]

[Reserved]

Form 8-41

[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 ever to be able to use or enjoy the property, and if such 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.
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 [devises/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 tax-motivated gifts of the above-described assets of Ward as identified in the application and all further relief to which Applicant may be entitled.

Respectfully submitted,

[Name]
Attorney for Applicant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach exhibit(s).

Form 8-42

[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 personal property as described in the application.

SIGNED on _____

JUDGE PRESIDING

APPROVED AS TO FORM:

[Name]
Attorney for Applicant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Reserved]

Form 8-43

[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 personal property is to be given, include the following statement.

Applicant estimates that the total fair market value of this personal property is between \$[amount] and \$[amount]. In connection with the making of the proposed gifts, Applicant

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 charitable gifts of the above-described assets of Ward as identified in the application and all further relief to which Applicant may be entitled.

Respectfully submitted,

[Name]
Attorney for Applicant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

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

Attach exhibit(s).

[Reserved]

Form 8-44

[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 [asset/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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Reserved]

Form 8-45

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].

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, appraisal, 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	

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				

Include the following if accounts are numerous.

Summary of Cash on Hand

Deposit	Date of Deposit	Name of Institution	Account Number[s]	Amount
Combined Total				

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.

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 maintained 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 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 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]**.

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.

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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Reserved]

Form 8-46

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

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

APPROVED AS TO FORM:

[Name]

Attorney for Applicant

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

[Reserved]

Chapter 9

Modification, Restoration, and Removal

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Chapter 9

Modification, Restoration, and Removal

§ 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. Estates Code ch. 1201; *but see* Tex. Estates Code § 1201.051 (does not apply to guardianship only created 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. Estates Code § 1201.002. The obligation of review is both on the overseeing court and the guardian. In addition, a ward or third party may ask the court to consider modifying or terminating the guardianships based on a variety of factors. Finally, when a guardian seeks to resign or is removed, a successor guardian may be appointed. 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 appointee 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. The court is required to make its determination in writing and to file it with the clerk. Tex. Estates Code § 1201.054.

Practice Pointer: This provision appears fairly innocuous but is in reality very powerful. Because the standards for the court are some-

what of a blank slate (for example discretionary), this provision could be employed in a number of creative ways. Even though the procedure and standards for modification under Estates Code chapter 1202 are fairly restrictive, 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 the reports of the court investigator or court visitors, the annual accounting of the guardian of the estate, the annual report of the guardian of the person, or conduct a hearing. Tex. Estates 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. Estates Code § 1201.053(b).

§ 9.3 Modification

The ward or any person interested in the ward's welfare may petition the court for an order of modification. Tex. Estates Code § 1202.051. Estates Code chapter 1202 addresses the modification of a guardianship to either expand or limit the guardian's powers. Tex. Estates Code § 1202.051. See forms 9-1 through 9-4 in this chapter.

§ 9.3:1 Application

Any interested person may seek to increase or decrease the guardian and ward's powers. Tex.

Estates Code § 1202.051(2), (3). To do so, the applicant must file a sworn application that includes—

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. general description of the increased or decreased powers sought by the guardian and/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 chil-

dren or, if there is no known spouse, sibling, or child, the names and addresses of the ward's next of kin.

Tex. Estates Code § 1202.052.

It is also advisable to attach a physician's certificate supporting a modification of the guardianship. *See* Tex. Estates Code § 1202.152.

§ 9.3:2 Informal Request

A ward may also request modification by informal letter to the court. Tex. Estates Code § 1202.054(a). On receipt of a ward's information request, the court must appoint a court investigator or guardian ad litem to determine if modification is necessary. Tex. Estates Code § 1202.054(b). Any person found to have knowingly interfered with the transmission of a request for modification to the court may be adjudged in contempt of court. Tex. Estates Code § 1202.054(a).

§ 9.3:3 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 amendments to the Code made that year. These 1997 amendments do not apply to a guardianship created before September 1, 1997, unless a court modifies the older, pre-1997 guardianship. Only these Code 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.

§ 9.3:4 Citation

An application to modify must be served on the guardian and the ward. Tex. Estates Code § 1202.053.

§ 9.3:5 Representation of Ward

The court must appoint an attorney ad litem in every modification proceeding. Tex. Estates Code § 1202.101. The appointee is entitled to reasonable compensation for his services. Tex. Estates Code § 1202.102.

In addition, the ward has the right to retain private counsel to represent him in seeking the restoration of certain of his rights. *See* Tex. Estates Code § 1202.103. 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 goodfaith belief that the ward had the capacity necessary to retain the attorney's services." Tex. Estates Code § 1202.103(b). Further, the guardian or any other interested person may challenge the authority of counsel to represent 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. Civ. App.—Corpus Christi 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 modification as the ward's ability to contract is often one of the last powers to be restored. The attorney should personally meet the potential client to determine whether the potential client 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 seek permission to visit with the proposed ward from his court appointed counsel. Furthermore, 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 doctor should reduce his opinion to writing.

§ 9.3:6 Hearing

The party filing the application has the burden of proof at a hearing. Tex. Estates Code § 1202.151(b). At the hearing, the court may consider 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 or modification of the ward's guardianship. Tex. Estates Code § 1201.151(a).

To grant the application, the court must find the modification warranted by a preponderance of the evidence. *See* Tex. Estates Code § 1202.153(b), (c). 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 Estates Code section 1101.103, is required for a modification of the guardianship. Tex. Estates Code § 1202.152. A court may not grant an application to modify

without medical evidence that is dated not earlier than 120 days before filing of the application. Tex. Estates Code § 1202.152(a).

The court is permitted to make a broad range of findings when presented with an application for modification. 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. Estates Code § 1202.051(2), (3). 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. guardian's name;
2. 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 retains the right to vote; and
6. a direction that the clerk must issue modified letters of guardianship to conform to the order.

See Tex. Estates 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. See Tex. Estates Code § 1202.157.

§ 9.4 Restoration

The Estates Code provides the specific authority for a court to restore a ward based on a preponderance of the evidence and permits a ward or any person interested in the ward's welfare to

petition the court for an order finding that the ward no longer is incapacitated and ordering the closing of the guardianship. Tex. Estates Code §§ 1202.051, 1202.153. See forms 9-9 and 9-10 in this chapter.

§ 9.4:1 Application

As with a modification proceeding, any person interested in the ward's welfare, including the ward and presumably the ward's guardian, may petition the court for an order restoring the ward. Tex. Estates Code § 1202.051. To do so, the applicant must file a sworn application that includes—

1. the ward's name, sex, date of birth, and address;
2. the ward's name, sex, date of birth, and address;
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 statement seeking a restoration of the ward's capacity because the ward is no longer an incapacitated person and a general facts and evidence supporting restoration;
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 chil-

dren or, if there is no known spouse, sibling, or child, the names and addresses of the ward's next of kin.

Tex. Estates Code § 1202.052.

It is also advisable to attach a physician's certificate finding that the ward has the necessary capacity to be restored. *See* Tex. Estates Code § 1202.152.

§ 9.4:2 Informal Request

In addition, the ward may make a request for restoration by informal letter. Tex. Estates Code § 1202.054. If the court receives such an informal letter seeking restoration, the court investigator or a guardian ad litem is appointed to file an application for restoration, as appropriate, on the ward's behalf. The guardian ad litem may also be appointed to serve as attorney ad litem. The guardian and the ward (if the ward is not the applicant) are then served with citation. *See* Tex. Estates Code §§ 1202.053, 1202.054. Any person found to have knowingly interfered with the transmission of a request for restoration to the court may be adjudged in contempt of court. Tex. Estates Code § 1202.054(a). *See* the discussion at sections 9.3:1 through 9.3:3 above.

§ 9.4:3 Representation of Ward

The court must appoint an attorney ad litem in every restoration proceeding. Tex. Estates Code § 1202.101. The appointee is entitled to reasonable compensation for his services. Tex. Estates Code § 1202.102.

In addition, the ward has the right to retain private counsel to represent him in seeking restoration. *See* Tex. Estates Code § 1202.103. 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. Estates Code § 1202.103(b). And the guardian or any other interested person may challenge the authority of counsel to represent by filing a motion under rule 12 of the Texas Rules of Civil Procedure.

§ 9.4:4 Citation

An application to restore a ward must be served on the guardian and the ward, unless the ward is the applicant. Tex. Estates Code § 1202.053.

§ 9.4:5 Hearing

To grant the application, the court must find the restoration warranted by a preponderance of the evidence. *See* Tex. Estates Code § 1202.153(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 Estates Code 1101.103, is required for restoration of a ward's capacity. Tex. Estates Code § 1202.152. A court may not grant an application to restore without medical evidence that is dated not earlier than 120 days before filing of the application. Tex. Estates Code § 1202.152(a).

The party requesting restoration has the burden of proof at a hearing. Tex. Estates Code § 1202.151(b). At the hearing, the court may generally require 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 or modification of the ward's guardianship. But when a ward is completely restored and the applicant seeks an order confirming the removal of the person's disability to purchase a firearm imposed under 18 U.S.C. § 922(g)(4), the court must hear and consider evidence about—

1. the circumstances that led to imposition of the firearms 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.
2. Removing the person's or ward's disability to purchase a firearm is in the public interest.

Tex. Estates Code § 1202.201.

§ 9.4:6 Order

If the court decides to terminate the guardianship, the order restoring the ward must include—

1. the guardian's name;
2. the ward's name;
3. the type of guardianship being modified (person, estate, or both);
4. that the ward is no longer an incapacitated person;
5. there is no longer a 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.

See Tex. Estates Code §§ 1202.154–.155.

If the court determines not to restore the ward, the application is to be dismissed and an order

entered to that effect. See Tex. Estates Code § 1202.157.

§ 9.5 Appointment of Successor Guardian

The grounds and procedures for the appointment of successor guardians can be found under Tex. Estates Code §§ 1203.102, 1203.002, 1203.003.

The Texas Estates Code does not address the need for additional citation when a successor guardian is appointed. In practice, most courts require 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 Texas Estates Code appears to require only service of the original application for 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. The citation of the original application by another party did not grant the court jurisdiction over cross-applications filed by other persons. *Torres*, 5 S.W.3d at 782 n.1.

Notwithstanding the jurisdiction requirement, courts are also required to make a reasonable effort to consider the ward's preference as to the person to be appointed guardian. 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 preference requirements set forth in the Estates Code. It is advisable to check with court personnel to determine each court's procedures for appointing a successor guardian. Some allow the appointment by submission, others require a hearing, and all vary as to their notice requirements.

§ 9.5:1 Appointment Due to Death of Guardian

Estates Code section 1203.102 provides for the appointment of a successor guardian if the prior guardian dies and the guardianship needs to be continued. *See* Tex. Estates Code § 1203.102. Any “interested person” as defined under section 1002.018 of the Estates Code should be permitted to bring an application. A request for appointment of a successor guardian must be based on an application. *See* Tex. Estates Code §§ 1203.101, 1203.102. *See* form 9-8 in this chapter.

The personal representative of the deceased guardian’s estate must prepare a final account. Tex. Estates Code § 1203.102(a). If the deceased guardian was a guardian of the person, his personal representative should also file a final report of the condition of the ward and turn over any personal effects of the ward. Tex. Estates Code §§ 1163.101, 1163.151, 1204.201.

Unless the court is presented with sufficient facts that an immediate need exists for the appointment of a successor guardian, citation on the deceased guardian’s personal representative is required. Tex. Estates Code §§ 1203.101, 1203.102.

§ 9.5:2 Appointment Due to Prior Right

The Estates Code provides for the removal of a previously appointed guardian and subsequent appointment of a person with a prior right to be guardian. *See* Tex. Estates Code §§ 1203.103–.107; *see Novak v. Schellenberg*, 669 S.W.2d 162 (Tex. App.—Corpus Christi 1984, no writ); *Bell v. Grossenbacher*, 432 S.W.2d 575 (Tex. Civ. App.—San Antonio 1968, writ ref’d n.r.e.). This prior right may be waived in writing or by implication based on the person’s conduct. *See*

Estate of Morris v. First International Bank, 664 S.W.2d 132, 134 (Tex. App.—San Antonio 1983, no writ).

A person who holds a right to act as guardian that is superior to that of the appointed guardian must bring the application for his subsequent appointment. Tex. Estates Code § 1203.101. *See* form 9-9 in this chapter.

Unless otherwise provided, letters of an appointed guardian may not be revoked without personal citation on the guardian to show cause why the letters should not be revoked. Tex. Estates Code § 1203.101. Under these provisions, the guardian is not immediately removed, and his powers to act over the ward and the 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 the estate, the letters of the previously appointed guardian will be revoked, and letters will be granted to the applicant who exhibits the prior right.

A final account should be prepared and filed, and any assets that remain in the hands of the prior guardian should be turned over. *See* Tex. Estates Code §§ 1204.101, 1203.003, 1203.006. If the guardian served as both guardian of the estate and guardian of the person, he should be required to file not only a final account but also a final report as to the condition of the ward and to turn over any personal effects of the ward. Tex. Estates Code §§ 1163.101, 1163.151, 1204.201. 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. *See* form 9-10.

§ 9.5:3 Appointment Due to Resignation

If there is a delay in obtaining the appointment of a successor, the court may order the powers of the guardian to cease only on qualification of a successor guardian. If it is necessary to immediately appoint a successor guardian, the court may immediately accept the resignation of the guardian then serving and appoint a successor without citation or notice. However, neither the resigning guardian nor his sureties will be discharged until the court approves the resigning guardian's final account. Tex. Estates Code § 1203.002.

§ 9.5:4 Application

A guardian may seek to resign by filing one of two applications with the court presiding over the guardianship.

The guardian may resign by filing a written application, accompanied by a verified final accounting or report. Tex. Estates Code § 1203.001. Therefore, a guardian of the estate must file an application seeking authority to resign along with a final accounting that meets the requirements of Estates Code section 1204.102. *See* Tex. Estates Code § 1203.001. A guardian of the person must resign by filing an application seeking authority to resign along with a final report in compliance with the requirements of Texas Estates Code chapter 1163. *See* Tex. Estates Code § 1203.001. A guardian who has filed his resignation or final account is not discharged, however, until the court approves the final account and the guardian delivers the assets of the estate to his successor. Tex. Estates Code § 1203.006(a). *See* form 9-7 in this chapter.

Alternatively, the applicant may seek to resign immediately and then promptly file his final accounting or report. Tex. Estates Code § 1203.002. The court may immediately accept

the resignation and appoint a successor pending approval of the final account on a showing of the necessity to do so. But the guardian cannot be discharged until the court approves the final account and the guardian delivers the assets of the estate to his successor. Tex. Estates Code § 1203.002(b). The surety on the guardian's bond remains liable until the guardian is discharged. *Gabriel v. Snell*, 613 S.W.2d 810, 814 (Tex. App.—Houston [14th Dist.] 1981, no writ).

§ 9.5:5 Citation and Hearing

The citation and hearing requirements differ between the appointment of a successor guardian and the approval of the resigning guardian's accounting.

§ 9.5:6 Final Accounting or Report

The resigning guardian should arrange for the posting of citation to all interested persons. Tex. Estates Code § 1203.004. Citation must be issued by the clerk of the court. The resigning guardian should also serve the successor in interest, be it a successor guardian, the ward or the personal representative of the ward's estate. To reduce costs, the resigning guardian should seek a waiver of service before initiating personal service. The court may also direct citation by publication. Tex. Estates Code § 1203.004. After proper notice, the court shall have a hearing on the final account of the resigning guardian. Tex. Estates Code § 1203.005.

§ 9.5:7 Order Appointing Successor Guardian

The court's order should confirm its findings that it accepts the resignation, it appoints a successor, a continuing need for a guardianship exists, there is an immediate necessity for a successor appointment, and the successor guardian is not disqualified from serving as guardian. *See*

Tex. Estates Code §§ 1101.101, 1203.001. See form 9-10 in this chapter.

The Texas Estates Code does not mandate any particular form, findings or statements that must be in the order appointing a successor guardian. It is suggested that the order should be similar to an order appointing an original guardian. 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 (total, partial, minor, etc.).
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.
7. The amount of bond required.

The order should then—

1. grant or order the appointment of the person or entity appointed as a 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.

The order may also address the filing of the resigning guardian's final account or report. See section 9.5:6 above.

§ 9.5:8 Order Approving Final Accounting or Report

If the court is satisfied that the guardian has properly carried out his duties and accounted for assets of the estate, the court will enter an order approving the final accounting and direct the guardian to deliver any remaining assets to the person or entity entitled to receive them.

§ 9.6 Removal

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. Estates Code §§ 1203.051, 1203.052.

§ 9.6:1 Removal without Notice

The Estates Code provides eight specific grounds for a guardian's removal without notice. The guardian may be removed without notice if he (1) fails to qualify; (2) fails to timely file an inventory; (3) fails to timely give a new bond; (4) absents himself from the state for three months at one time without court permission or removes himself from the state; (5) cannot be served, evades service, or cannot be found; (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. Tex. Estates Code § 1203.051. Removal for the last two reasons must be found on the basis of clear and convincing evidence. Tex. Estates Code § 1203.056(a).

§ 9.6:2 Removal with Notice

Estates Code sections 1203.051 and 1203.052 provide that a removal action may be instituted by the court on its own motion or by the complaint of an interested person. The guardian must be given personal citation of the reason, time, and place of the hearing for removal. Tex. Estates 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 (Tex. App.—Waco 1992, no writ). The Code provides eleven specific grounds for removal of a guardian with notice: (1) sufficient grounds appear to support the belief that the guardian has misapplied, embezzled, or removed property committed to his care from the state or is about to misapply, embezzle, or remove it from the state; (2) the guardian fails to file any account or report required by law; (3) the guardian fails to obey court orders with respect to his duties; (4) the guardian is proved to be guilty of gross misconduct or gross mismanagement in the performance of his duties; (5) the guardian becomes incapacitated, is sentenced to the penitentiary, or is otherwise incapable of performing his 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 section 48.002 of the Human Resources Code or, if engaged in with respect to an elderly or disabled person, as defined by that section; (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 the guardian is 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 interests of the ward; or (11) the guardian would be ineligible for appointment under subchapter H, chapter 1104, of the Estates Code. Tex. Estates Code § 1203.052.

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 (Tex. Civ. App.—El Paso 1953, writ dismissed by agreement). Case law governing decedents' estates can also be applied to guardianship matters. Tex. Estates Code § 1001.002.

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. Estates Code §§ 1203.055, 1203.102.

§ 9.6:3 Order of Removal

The order must state the actual cause of removal. The order must also state that any letters of guardianship issued to the person who is removed shall, if the removed person has been personally served with citation, be surrendered and all of those letters canceled of record. The order must also require the delivery of the remainder of the estate and control of the ward to a successor guardian on qualification. Tex. Estates Code § 1203.053.

§ 9.6:4 Limited Rights to Seek Reinstatement

A guardian who is removed under section 1203.051(a)(6)(A) or (B) has thirty days after the court signs the order of removal to file an application with the court for a hearing to determine whether he should be reinstated. Tex.

Estates Code § 1203.056. On the filing of the application, the clerk must issue notice in compliance with 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. Estates Code § 1203.056(e). If, at the conclusion of a 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 an order appointing a successor representative, if any, and shall enter an order reinstating the guardian. Tex. Estates Code § 1203.056(e). In the order, the court may also order the successor to file a final account. Tex. Estates Code § 1203.056(f).

[Reserved]

Form 9-1

The ward or any person interested in the ward's welfare may petition the court for an order of modification. Tex. Estates 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:

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.

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]. The guardianship has proceeded as a partial guardianship with Guardian exercising only limited rights and powers over [Ward/Ward's estate/Ward and Ward's estate] for [time period, e.g., two years]. Ward's condition has now changed to the extent that Guardian's rights, powers, and duties need to be expanded in order to protect [Ward/Ward's estate/Ward and Ward's estate]. Guardian is seeking a full guardianship over [Ward/Ward's estate/Ward and Ward's estate].

A letter from Ward's attending physician dated [date] is attached as Exhibit [exhibit number/letter]. Based on the present findings of Ward's physician, a need exists in conformity with sections 1001.001, 1101.105, 1201.051-.054, 1202.051, and 1163.101(c)(7) of the Texas Estates Code for the Court to expand Guardian's rights, powers, and duties to those of a full guardianship over Ward, as Ward can no longer exercise independent judgment and control over [his/her] [person/estate/person or 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] and to permit Guardian to exercise full rights, powers, and duties over [Ward/Ward's estate/Ward and Ward's estate].

The Court is further requested to restrict Ward from exercising any right or power over [[himself/herself]/[his/her] estate/[himself/herself] and [his/her] estate]] as Ward is no longer able to maintain [his/her] [person/estate/person and estate] due to the deterioration in Ward's [mental/[and] physical] condition.

Applicant prays 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 totally incapacitated and totally incapable of maintaining [his/her] [person/estate/person and estate].

Include the following if the ward is 60 years old or older.

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.

Applicant prays that new letters of guardianship issue, granting Guardian full powers under the Texas Estates Code as guardian of the [person/estate/person and estate] of [name of ward], an incapacitated person, that Ward have no powers and rights over [his/her] [person/estate/person or estate], and for all further relief to which Applicant may be entitled.

Respectfully submitted,

[Name]
Attorney for Applicant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach exhibit(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:

“My name is [name of affiant].

“I am the applicant in the foregoing Application to Modify Guardianship. I have personal knowledge of the allegations and facts stated in it, and they are true, complete, and correct.”

[Name of affiant]
Affiant

SIGNED under oath before me on _____.

Notary Public, State of Texas

Form 9-2

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

**Order Modifying Guardianship from Partial Incapacity
to Total Incapacity**

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 Ward's condition has deteriorated to such an extent that Ward no longer should be permitted to exercise any rights and powers and is no longer partially incapacitated, that Guardian should be given full powers over [Ward/Ward's estate/Ward and [his/her] estate], 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 totally incapacitated and totally incapable of maintaining [his/her] [person/estate/person and estate] and that this guardianship should now be considered a full guardianship, and that [name of guardian] have full rights, duties, and powers over [[name of ward]/[name of ward]'s estate/[name of ward] and [his/her] 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 and that all other outstanding letters are hereby canceled, that the clerk of this Court issue new letters of guardianship that specifically state that [name of ward] is totally incapacitated and totally incapable of

maintaining [his/her] [person/estate/person and estate], and that [name of guardian] has full rights, powers, and duties as the guardian of the [person/estate/person and estate] of [name of ward], an incapacitated person.

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 hereby 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 hereby 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 hereby taxed as costs herein and that [name of guardian], as guardian of the estate of [name of ward], is ordered to pay such 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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Reserved]

Form 9-3

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

Application for Partial Restoration of Ward

This Application for Partial Restoration of Ward is filed under section 1202.051 of the Texas Estates Code by [name of applicant], Applicant. Applicant is [the ward/a party interested in the ward].

[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.

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].

The following paragraphs are examples.

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.]

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.]**

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.]**

Ward's progress is further 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 or certificate that support this application.]**

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 among 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;
- 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.

Ward currently has the capacity to perform the tasks commensurate with the powers listed above.

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.

Respectfully submitted,

[Name]
Attorney for Applicant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach exhibit(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:

“My name is [**name of affiant**].

“I am the applicant in the foregoing Application for Partial Restoration of Ward. I have personal knowledge of the allegations and facts stated in it, and they are true, complete, and correct.”

[Name of affiant]
Affiant

SIGNED under oath before me on _____.

Notary Public, State of Texas

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], [Ward/a party interested in [name of ward], Ward]. After considering the application, the Court finds by a preponderance of the evidence that it has subject matter jurisdiction of this matter; it has jurisdiction and venue over the application; proper notice of the application has been given; 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.

[Name of applicant] has presented to the Court a [letter/certificate] by Ward's physician, Dr. [name of physician], which generally describes the extent to which Ward has regained sufficient mental capacity and states that it is [his/her] opinion that Ward has regained sufficient mental capacity with regard to the activities described in the application.

Include the following if applicable.

Ward appeared and testified to [his/her] ability to understand the nature of the proceedings and that the powers being restored to [him/her] are commensurate with [his/her] current abilities.

Continue with the following.

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.

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 among 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;
- d. the power to make arrangements to travel within the state of Texas without court approval (i) with a family member without [name of guardian]'s consent and (ii) with a companion with [name of 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.

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.

- 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;
- d. the power to make arrangements to travel within the state of Texas without court approval (i) with a family member without [name of guardian]'s consent and (ii) with a companion with [name of 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.

IT IS FURTHER ORDERED that the clerk of this Court is hereby 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.

SIGNED on _____

JUDGE PRESIDING

APPROVED AS TO FORM:

[Name]
Attorney for Applicant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Form 9-5

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

Application for Restoration of Ward and Termination of Guardianship

This Application for Restoration of Ward and Termination of Guardianship is filed under section 1202.051 of the Texas Estates Code by [name of applicant]. [Name of applicant] is [the guardian/the ward/a party interested in the ward].

1. On or about [date], [name of applicant for appointment] filed an application for appointment of guardian of the [person/estate/person and estate] of [name of ward], Ward. [Name of applicant for appointment] is Ward's [relationship].

2. [State facts that led to the filing of the application for appointment of guardian.] Attached as Exhibit [exhibit number/letter] and incorporated by this reference for all purposes is a letter from [name] describing Ward's condition on [date].

3. On [date], [name of guardian], Guardian, was appointed the guardian of the [person/estate/person and estate] of Ward, an incapacitated person, and later qualified as such as required by law.

Paragraphs 4.–6. below are examples of the type of information the court will consider. Paragraph 4. may not be necessary if the guardianship has been in existence for less than a year.

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 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. Ward's progress is further documented in a letter dated [date] from [name of doctor]. A true and correct copy of the letter is attached as Exhibit [exhibit number/letter] and is incorporated by this reference for all purposes. [State facts from this letter that support the 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.

[Name of applicant] prays that the Court find that Ward has regained the capacity to do all of the tasks necessary to care for [himself/herself] and to manage [his/her] property and that no need exists for the continuation of the guardianship of the [person/estate/person and estate] of Ward. [Name of applicant] further prays for all other relief to which [he/she] may be entitled.

Respectfully submitted,

[Name]
Applicant

[Name]

Attorney for Applicant

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

Attach exhibit(s).

[Reserved]

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]]. After considering the application, the Court finds 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 a preponderance of evidence has been presented 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 therefor, the guardianship of the [person/estate/person and estate] of [name of ward] 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.

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.

SIGNED on _____

JUDGE PRESIDING

APPROVED AS TO FORM:

[Name]

Attorney for Applicant

State Bar No.:

[Address]

[Telephone]

[Telecopier]

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. 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 requests the Court to appoint a successor guardian of the [person/estate/person and estate] of Ward. In support, Applicant shows the following:

Applicant is the duly appointed, qualified, and acting guardian of the [person/estate/person and estate] of Ward. Applicant needs to resign as guardian of the [person/estate/person and estate] and requests that the Court appoint [name of proposed successor guardian], Proposed Successor Guardian, as the successor guardian.

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.

Ward is [a minor/an adult] [male/female] who is [number] 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.

On [date] this Court appointed Applicant as the permanent guardian of the [person/estate/person and estate] of Ward. Applicant wishes to resign as 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.

This Court has venue over these proceedings because the original guardianship was filed and created in this Court.

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].

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].

The nature and degree of Ward's continuing incapacity is as follows: [specify].

Include this paragraph only if the original order restricted the guardian or the ward to specific areas of authority or limitation.

The specific areas of protection and assistance being requested are as follows:
[specify].

Continue with the following.

The limitations that are requested to be imposed on Ward are as follows: **[specify]**.

Applicant prays that **[his/her]** resignation be accepted and 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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Certificate of Service

I certify that in accordance with the Texas Rules of Civil Procedure I served a true and correct copy of **[title of document, e.g., Motion for Leave to Resign as Guardian]** on the parties listed below. This service was made by **[method of service, e.g., certified mail, properly addressed, return receipt requested, in a postpaid envelope deposited with the United States Postal Service]**.

List the name and address of each party or attorney served.

SIGNED on _____

[Name of attorney]

Form 9-8

The application should contain a statement that sets out the specific emergency conditions that make the immediate appointment of a successor guardian necessary. 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.

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

Application to Appoint Successor Guardian

[Name of applicant], Applicant, the **[relationship]** of **[name of ward]**, Ward, an incapacitated person, files this Application to Appoint Successor Guardian and requests the Court to appoint a successor guardian of the **[person/estate/person and estate]** of Ward. In support, Applicant shows the following:

Ward is **[a minor/an adult]** **[male/female]** who is **[number]** 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.

[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.

A copy of Guardian's **[death certificate/resignation]** is attached as Exhibit **[exhibit number/letter]**.

Continue with the following.

[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.

This Court has venue over these proceedings because the original guardianship was filed and created in this Court.

Ward is a person who is incapacitated to care for [himself/herself] and to manage [his/her] property and financial affairs and is 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].

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].

The nature and degree of Ward's 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.

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 [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

sor 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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Certificate of Service

I certify that in accordance with the Texas Rules of Civil Procedure I served a true and correct copy of [title of document, e.g., Motion for Leave to Resign as Guardian] on the parties listed below. This service was made by [method of service, e.g., certified mail, properly addressed, return receipt requested, in a postpaid envelope deposited with the United States Postal Service].

List the name and address of each party or attorney served.

SIGNED on _____

[Name of attorney]

Form 9-9

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

Application for Appointment of Successor Guardian of Person

[Name of applicant], Applicant, files this Application for Appointment of Successor Guardian of Person and would show the Court as follows:

Applicant is [name of ward]'s [describe 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. [Name of ward], Ward, an incapacitated person, resides at and may be served with citation of this application at [address, city, county] County, Texas.

[Name of guardian] is currently serving as guardian of the person, and [he/she] may be served with this application at [address, city, county] County, Texas.

This application is brought pursuant to section 1203.103 of the Texas Estates Code. Applicant has a prior right to serve as guardian of the person. [Describe circumstances giving rise to the application. The following is an example: 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 the Ward, now that Applicant has reached majority, to have a family member caring for and overseeing Ward's personal decisions. Applicant is in a position 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 making these decisions. Applicant believes [his/her] appointment as guardian of the person is in the best interest of Ward.]

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.

[Name of applicant] respectfully requests that notice be given as required by law; that, pursuant to section 1203.103 of the Texas Estates Code, [name of guardian] be removed as guardian of the person and Applicant be appointed successor guardian of the person; and for all further relief to which Applicant may be entitled.

Respectfully submitted,

[Name]
 Attorney for Applicant
 State Bar No.:
 [E-mail address]
 [Address]
 [Telephone]
 [Telecopier]

Certificate of Service

I certify that in accordance with the Texas Rules of Civil Procedure I served a true and correct copy of [title of document, e.g., Motion for Leave to Resign as Guardian] on the parties listed below. This service was made by [method of service, e.g., certified mail, properly addressed, return receipt requested, in a postpaid envelope deposited with the United States Postal Service].

List the name and address of each party or attorney served.

SIGNED on _____

[Name of attorney]

Form 9-10

[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 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.

Modify the paragraph below if the successor guardian of the person and of the estate are different persons to reflect the names and capacities of each.

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.

Modify the paragraph below if the successor guardian of the person and of the estate are different persons to reflect the names and capacities of each.

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 of the rights, duties, and powers granted to a successor guardian by law. [Name of ward] is declared fully incapacitated without the authority 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.

[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

Select one of the following.

[name of prior guardian]'s resignation is accepted and [he/she] is ordered to file a final account of [his/her] actions as guardian not later than [date].

Or

[name of representative], as the legal representative of the deceased guardian's estate, is ordered to file a final account on behalf of the deceased guardian not later than [date].

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 any and all assets of Ward's estate in [his/her] possession.

Continue with the following.

SIGNED on _____

JUDGE PRESIDING

APPROVED AS TO FORM:

[Name]
Attorney for Applicant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Include the following if applicable.

[Name]
Attorney Ad Litem
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Reserved]

Chapter 10

Litigation

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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 the many possible contested guardianship issues.

§ 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. Estates 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. Estates 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. Estates Code § 1051.102(b)

Personal Citation: Citation must be personally served 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. Estates Code § 1051.103.

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. any other person named as another 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. Estates 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*. *In re Guardianship of V.A.*, 390 S.W.3d 414 (Tex. App.—San Antonio 2012, no pet. h.).

Waiver of Citation: 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 ward cannot accept or waive service on behalf of the ward. *In re Martinez*, No. 04-07-00558-CV, 2008 WL 227987 (Tex. App.—San Antonio, Jan. 30, 2008). All other persons entitled to personal service may file waivers. Tex. Estates Code § 1051.105.

In order 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.

Affidavit of Citation: The attorney for the applicant or the guardian ad litem filing the application must file—

1. copies of the notices given to the persons included in Texas 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 Texas 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. Estates Code § 1051.104(b).

Failure of the applicant to comply with this service requirement does not affect the validity of the guardianship except failure to serve the adult children of the proposed ward. *In re Guardianship of V.A.*, 390 S.W.3d at 417. *See also* Tex. Estate Code § 1051.104.

Lead Time Requirement: In the process of obtaining waivers and serving the persons included in Texas 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).” Tex. Estates Code § 1051.106.

The affidavit of service under Texas Estates Code section 1051.104(b) must also comply with the ten-day “lead-time” requirement.

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 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 Texas 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. Estates Code § 1051.201.

In any event, service by private process or an alternative method must always be on application (supported by an affidavit) and order. Tex. Estates Code § 1051.201.

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.

An appellate court 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.—Beau-

mont 2011, no pet. h.). In *In re Guardianship of Bays*, 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. h.).

§ 10.2:2 Temporary Guardianship

Temporary guardianships require compliance with certain expedited notice and citation requirements. Estates Code chapter 1251 provides the notice requirements applicable to temporary guardianships. On the filing of an application for temporary guardianship, the clerk must issue notice and personal citation to the proposed ward, his attorney ad litem, and the proposed temporary guardian (if that person is not the applicant). This 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. Estates Code § 1251.005. The court must appoint an attorney ad litem and hold a hearing within ten days of the filing of the application unless the hearing date is postponed for no more than thirty days as provided in section 1251.006(c). Tex. Estates Code §§ 1251.004, 1251.006(b). At the hearing, the proposed ward has the right to (1) receive prior notice, (2) be represented by counsel, (3) be present, (4) present evidence and confront and cross-examine witnesses, and (5) request a closed hearing. Tex. Estates Code § 1251.008.

The probate court's jurisdiction is generally contingent on proper service on the proposed ward. Failure to obtain proper service arguably voids any order affirming the temporary guardianship. Subsequent service is insufficient to meet the requirements of chapter 1251, which dictate that notice must predate the hearing. Tex. Estates Code § 1251.008(1). An applicant's failure to comply with the notice requirement before the date of the hearing denies the proposed ward his

constitutional right of due process embodied in Estates Code chapter 1251. Accordingly, anyone challenging the guardianship may argue that defective service effectively voids any order affirming the appointment of a temporary guardian on the basis of lack of service. See *Torres v. Ramon*, 5 S.W.3d 780 (Tex. App.—San Antonio 1999, no pet.). But see *In re Guardianship of Bays*, 355 S.W.3d 715 (Tex. App.—Fort Worth 2011, no pet. h.), in which alternative service was found to be effective.

On one day's notice to the party who filed the application, the respondent or respondent's attorney may move for dismissal, which the court is required to hear as expeditiously as possible. Tex. Estates Code § 1251.007. However, this provision is not to be interpreted to provide the court a vehicle for summary dismissal. *In re Guardianship of Vavra*, 365 S.W.3d 476 (Tex. App.—Eastland, 2012, no pet.). Because there are no powers of a temporary guardian set forth in the statute, the reasons for the temporary guardianship and the powers and duties of the temporary guardian must be described in the order of appointment. An order granting the temporary guardian "all the powers and duties as stated in the Texas Probate Code" conferred no authority on the guardian. *Bennett v. Miller*, 137 S.W. 3d 894, 897 (Tex. App.—Texarkana 2004, pet. filed).

§ 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 also should be personally served with the application to convert the temporary to a permanent guardianship to protect the court's jurisdiction.

tion. See the discussion of *Torres v. Ramon*, 5 S.W.3d 780 (Tex. App.—San Antonio 1999, no pet.), in 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. At the same time, it is advisable to also pray for “a guardianship of the person, and if necessary, a guardianship of the estate” and to 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 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 dismissed) (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*, No. 02-09-00039-CV, 2011 WL 2518819, at *2 (Tex. App.—Fort Worth June 23, 2011, no pet.), 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*, 2011 WL 2518819, at *2 (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. Therefore, the appellate court found that alternative service had been properly made. *Bays*, 2011 WL 2518819, at *2.

Likewise, in the recent decision of *In re Guardianship of Jordan*, Nos. 09-10-00240-CV, 09-11-00019-CV, 09-10-00543-CV, 2011 WL 3195309 (Tex. App.—Beaumont July 28, 2011, no pet.), the appellate court raised the issue of whether the Texas Supreme Court decision of *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71 (Tex. 2000), has changed the former strict compliance requirements reflected in the *Erickson* and *Ortiz* decisions. *Jordan*, 2011 WL 3195309, at *7 (citing *Dubai Petroleum Co.*, 12 S.W.3d at 75–77). In *Dubai Petroleum Co.*, the Texas Supreme Court addressed the issue of a trial court’s subject matter jurisdiction when a party failed to comply with a statute. *See Dubai Petroleum Co.*, 12 S.W.3d at 75–77. 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)). Thus, the court “overruled its precedent that a failure to establish a statutory prerequisite deprived a court of subject matter jurisdiction.” *Jordan*, 2011 WL 3195309, at *7 (citing *Dubai Petroleum Co.*, 12 S.W.3d at 76 (overruling *Mingus v. Wadley*, 115 Tex. 551, 285 S.W. 1084 (1926))). Applying this same reasoning in a guardianship proceeding, the appellate court held that it saw “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*, 2011 WL 3195309, at *7.

Further, in *In re Guardianship of V.A.*, 390 S.W.3d 414 (Tex. App.—San Antonio 2012, no pet. h.), the reviewing court excused several errors in citation. The failure to serve the father of the proposed ward was held not to be error where the father’s parental rights had been terminated and the failure to personally serve the ward’s managing conservator (although given notice) was excused per Tex. Prob. Code § 633(c)(3) (now Tex. Estates Code § 1051.103) based on the reasoning that the appellant could not assert the rights of others (here a *jus tertii* argument). The court also cited Tex. Prob. Code § 633(f) (now Tex. Estates Code § 1051.104(c)), which states, “The validity of a guardianship created under this chapter is not affected by the failure of the applicant to comply with the requirements of Subsections (d)(2)–(9) of this section” (*In re Guardianship of V.A.*, 390 S.W.3d at 417) and excused the failure to serve adult siblings under section 633(d)(2) (now section 1051.104(a)(2)) and the hospital administrator under Probate code section 633(d)(2) (now Estates Code section 1051.104(a)(3)).

The court also held that the failure to observe the “ten day waiting period” imposed by Probate

Code section 633(f) (now Estates Code section 1051.106) was not jurisdictional.

§ 10.2:5 Jurisdictional Conflicts between Family Court and Probate Court

Contested Guardianship of Minor’s Person: Section 1022.008 of the Estates Code authorizes a probate judge to transfer the contested guardianship of a minor’s *person* to a court of competent jurisdiction in which a suit affecting the parent-child relationship (SAPCR) is pending (that is, a district court or, in some instances, a county court at law). *See* Tex. Estates 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. Estates 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. Estates 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 Texas Family Code. Tex. Estates 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 Texas 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. Estates Code § 1022.002.

One case to address 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 exclusive continuing 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 Texas 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. Estates 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. Estates 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. Estates 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. dismissed); *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, constitutional county court, or county court. *See* Tex. Estates 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. Estates Code § 22.007(c) (previously Tex. Prob. Code §§ 606, 606A). Furthermore, the application of this jurisdictional section depends on when the proceeding was commenced. *See* Acts 2011, 82nd 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. Estates Code § 1022.005. Section 1021.001 defines matters related to a guardianship proceeding depending on if the court is a statutory probate court or not. See Tex. Estates 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 as to whether the probate courts’ jurisdiction trumps other mandatory venue provisions. Texas Estates 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. Estates Code § 1022.006.

Estates Code section 1022.007(b) goes on to provide 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. Estates 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 Texas Supreme Court held that a statutory probate court’s attempt to transfer a case from another court to its own court when venue of the proceeding is not otherwise proper is prohibited. For example, if a guardian sued for personal injuries to a ward, the suit by the guardian of the estate could only be transferred 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.

§ 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 guardianship estate in the probate court pursuant to Texas Estates Code section 1021.001, any party or person interested in the guardianship may seek to transfer the action to the probate court. Tex. Estates Code

§ 1022.007. The judge of the statutory probate court presiding over the guardianship may then transfer the 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 consolidate the proceedings in the statutory probate court Tex. Estates Code § 1022.007; *see also* Tex. Gov’t Code ch. 25 (for probate court provisions relating to particular counties).

But 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. Estates Code § 1022.007(b) at section 10.2:7 above.

§ 10.2:9 Transfer for Want of Venue

If after a guardianship proceeding has commenced the court determines that it does not have venue over the proceeding, on application of any interested person, the court must transfer the proceeding to a proper county. Tex. Estates Code § 1023.002(c). The appropriate venue for appointment of a guardian depends on the type of guardianship action and the venue rules in Tex. Estates Code chapter 1023.

§ 10.3 Proposed Ward’s Right to Private Attorney

The 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. Estates Code § 1054.001.

The right to counsel of one’s own choice is a fundamental one. *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). A proposed ward, in an application either for a temporary or a permanent guardianship, 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. Estates 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 such a motion 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 2000, no pet.). Such a motion might be a conflict for an attorney ad litem, who may be in a position to defend his 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 his burden to show such authority (and demonstrate the threshold capacity of the proposed ward to be able to retain counsel), he 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).

Unless proposed ward's chosen attorney is certified to act as an attorney ad litem under Texas Estates Code section 1054.201, the retained counsel may not serve. Tex. Estates Code § 1054.006(a); *see also In re Guardianship of Wehe*, No. 13-12-00263-CV, 2012 WL 5292893 (Tex. App.—Corpus Christi Oct. 25, 2012).

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 him in seeking a modification of the guardianship or the restoration of his rights. Tex. Estates 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. Estates 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. Estates 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

§ 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. Estates 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. Estates 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 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. Estates Code § 1022.003(g).

A recent amendment clarifies that the county court shall continue to exercise the jurisdiction over the management of the guardianship except the contested matter. Tex. Estates Code § 1022.003(h).

§ 10.4:2 Costs of Proceedings

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. Prob. Code § 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. h.); *In re Mitchell*, 342 S.W.3d 186 (Tex. App.—El Paso 2011); *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 2010, no pet. h.); *In re Guardianship of Person and Estate of A.M.K.*, No. 04-0800268-CV 2009 WL 1028074 (Tex. App.—San Antonio April 15, 2009); *In re Guardianship of Thomas*, No. 02-08-299-CV 2009 WL 670187 (Tex. App.—Fort Worth Mar. 12, 2009); *In re Guardianship of Humphrey*, No. 12-07-00118-CV, 2009 WL 388955 (Tex. App.—Tyler Feb. 18, 2009); *In re Guardianship of Humphrey*, No. 12-07-00225-CV, 2009 WL 388958 (Tex. App.—Tyler Feb.

18, 2009); *In re Guardianship of Humphrey*, No. 12-06-00222-CV2008 WL 2445503 (Tex. App.—Tyler June 18, 2008); *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).

In 2013, the legislature amended the provisions for the taxing of costs and the awarding of fees of the ad litem to allow the taxing of costs and requiring reimbursement of attorney's fees of persons found to have acted without good faith or just cause. *See* Tex. Estates 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. Estates 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 his 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.—1994); *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. Estates Code § 1201.003.

Additionally, unlike most civil cases, guardianship proceedings require the appointment of one or more ad litem, 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 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. Estates 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 proceedings, 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. Estates 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 this chapter in any suit brought by the guardian, attorney ad litem, or guardian ad litem in their respective fiduciary capacities. Tex. Estates Code § 1053.052(c).

§ 10.4:4 Timing and Determination of Security Amount

A motion for security costs may be filed and heard at any time before the trial. Tex. Estates 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. Estates Code § 1053.052; *see also* Tex. R. Civ. P. 146. The court must receive proof

as to 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. This option is rarely used. *See* Tex. R. Civ. P. 592–609.

Surety Bond: 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. Civ. App.—Houston [1st Dist.] 1966, writ ref d n.r.e.). 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).

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 would 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, as to whether a cost bond shall be furnished or a deposit 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, March 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 1994, orig. proceeding, mand. overruled).

§ 10.4:7 Right to Request Jury Trial

Authority under Texas Estates Code: Any party to a contested guardianship proceeding may request a jury trial, including the proposed ward. Tex. Estates Code §§ 1055.052, 1101.052. Estates Code section 55.002 expressly guarantees the right to a jury trial in all contested probate and mental-illness proceedings, and section 55.002 applies to guardianship proceedings. Tex. Estates Code §§ 55.002, 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. Pelouquin*, 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).

§ 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. Estates Code §§ 1055.052, 1101.052.

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.).

§ 10.4:9 Issues That May Be Tried to Jury

For sample pattern jury charges relating to guardianship proceedings, see the current edition of *Texas Pattern Jury Charges—Family & Probate* (State Bar of Texas).

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. Civ. App.—Amarillo 1979, writ ref'd n.r.e.) (permanent guardianship).

Suitability to Serve: Whether a party is suitable to serve as guardian is also an issue of fact for a jury. *See 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. Civ. App.—Corpus Christi 1979, no writ).

§ 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.

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 his 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 are entitled to be appointed guardians of their incapacitated mates unless they are found to be disqualified. Tex. Estates Code § 1104.102(1). If disqualification is not an issue, a party seeking appointment of a spouse as guardian need not request a jury because of the priority of the spouse to serve. If, however, a request has been made that the spouse be disqualified because he or she is unsuitable to serve, perhaps because the spouse is neglectful, cruel, or abusive 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 to serve as guardian, the attorney must consider the character, education, transgressions, and appearance of the client in comparison with the other applicant. The attorney should also consider the relationship of the client to the proposed ward. 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* Tex. Estates Code § 1104.102. *See* section 10.5:3 below regarding disqualification.

§ 10.4:11 Right to Closed Hearing

The proposed ward or his attorney may request a closed hearing. Tex. Estates 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 ward's attorney must consent to the extension. Tex. Estates Code § 1251.006(c). If personal citation has not been delivered to the ward, a continuance is mandated. The continuance can

be for the entire period of the temporary guardianship (*see* Tex. Estates 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. Estates Code § 1251.051. Temporary guardianships pending contest are governed by 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. Estates 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 or when a court-appointed permanent guardian qualifies.

The court must find probable cause to believe that the appointment is necessary to protect the

proposed ward or his estate and that there is substantial evidence of incapacity. Tex. Estates Code § 1251.001. The presence of imminent danger, however, is not an essential element in this determination. To the extent the court will allow the selection, it is best if the parties agree to a third party to serve pending contest. Such agreement will not be construed by the court as a tacit admission for the necessity of a guardian. The court may, however, take judicial notice of arguments made in temporary guardianship proceedings and in any subsequent proceedings. *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. Estates 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. Estates Code §§ 1104.351–.358. Individuals disqualified under section 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. Estates 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. Estates 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.

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. Estates 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). (Note: An unpublished decision has no precedential value but may be cited with the notation “(not designated for publication).” Tex. R. App. P. 47.7.) 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 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 he is asserting a claim to property that is adverse to the ward. *See* Tex. Estates Code § 1104.354(3). *See* also the discussion of the

grounds for disqualification in 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 Texas Probate Code section 681 (now Tex. Estates 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, mand. motion overr.).

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 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. Civ. App.—San Antonio 1965, no writ).

In *Dobrowolski*, the husband was appointed guardian of his wife of seventeen years. Both 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*, 125 Tex. 305, 83 S.W.2d 620 (1935)). Because the couple's property had been commingled, a complete account would be needed to determine each spouse's separate property. In determining her assets, the guardian would have the duty to protect her interests. Because of the possibility of conflicting claims during the accounting process, the husband had 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 he or she has 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. Civ. 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. Estates Code § 751.052. Thus, the agent may have an adverse interest because, if he were appointed guardian, he would be accounting to himself for his 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. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

Guarantor of Ward's Promissory Note: A person who has guaranteed 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 the ward's. Note, however, that no Texas court has directly addressed this issue as of the publication date of this manual.

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 presented showed 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. Estates 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 appears that a party has 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 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, is clearly disqualified and lacks standing unless he pays off the debt. In such cases, the attorney should consider filing a motion for partial summary judgment seeking a ruling that 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 avoid the associated 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 aspect of jurisdiction and can be raised on appeal); *Allison v. Walvoord*, 819 S.W.2d 624, 627 (Tex. App.—El Paso 1991, mand. motion overr.); *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, his 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, a stricken party should file a motion for new trial or notice of appeal within thirty days from the date the court finds that the party lacks standing. Tex. R. Civ. P. 329b(a); Tex. R. App. P. 26.1.

On appeal, the appellate court will review the correctness of the 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.)).

§ 10.5:3 Disqualification

Certain individuals are “disqualified” to serve as a guardian. Tex. Estates 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.

Sections 1104.351–.358 prohibit the following types of persons from being appointed guardian.

Minors: A minor is disqualified from serving as a guardian. Tex. Estates Code § 1104.351(1).

Notoriously Bad Persons: A person whose conduct is “notoriously bad” is disqualified from serving as a guardian. Tex. Estates Code § 1104.353. A notoriously bad person may be

one convicted of child or spousal abuse, a spouse who had abandoned his 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. Civ. App.—Austin 1931, no writ) (husband disqualified because he abandoned wife for ten years); see also Tex. Estates Code § 1104.358. A determination of what constitutes notoriously bad conduct will generally be an issue of fact.

Incapacitated Persons: An incapacitated person is disqualified from serving as a guardian. Tex. Estates 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. Estates 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. Estates 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 his appointment. Tex. Estates Code § 1104.354(2).

Persons Asserting Claim Adverse to

Proposed Ward: A person asserting a claim adverse to the proposed ward or his estate is disqualified from serving as guardian. Tex. Estates 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. Estates 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.). 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. Civ. 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. Estates 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. The designation should be filed 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. Estates 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. Estates 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 estates case in *In re Estate of Gay*, 309 S.W.3d 676 (Tex. App.—Houston [14th Dist.] 2010, no pet. h.), 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. Estates Code § 1104.355.

Persons Not Certified to Serve: A person may not serve as a private professional guardian who does not have the certification required by Estates Code subchapter F. Tex. Estates 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 Physician'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 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 certificate of medical examination 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 Texas 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. Estates 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. Estates 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 section 10.6:3 below for a discussion on 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 function and summarize the proposed ward's medical history if reasonably available;

- (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) perform simple calculations;
 - (D) reason logically; and
 - (E) administer to daily life activities;
- (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; and
- (7) include any other information required by the court.

Tex. Estates Code § 1101.103.

§ 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 alone will not be sufficient to appoint a guardian. Instead, the application must also include documentation

regarding intellectual disability. Tex. Estates Code § 1101.104. Either a physician or a psychologist may complete a "determination of intellectual disability" (DID) under Tex. Estates 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. Estates Code § 1101.104(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.

In the event the proposed ward is "dually diagnosed," that is, has an intellectual disability diagnosis, but also a medical diagnosis (autism, static encephalopathy), a DID is not required, and the regular CME may be used.

Physicians are now authorized to perform DIDs and combine the CME with a DID. A traditional DID may also still be submitted. *See* Tex. Estates Code § 1101.104.

A standard form of CME (which includes a DID) is included as form 4-1 in this manual.

§ 10.6:4 Independent Medical Examination

If the proposed ward is uncooperative, if the applicant cannot obtain proper consent to waive the patient-physician privilege, or if the ad litem or a contestant wants 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 ward and attorney ad litem must receive notice at least four days before the hearing. Tex. Estates Code § 1101.103(c). Although 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.

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 his 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 representative 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). (Note that rule 509 refers to chapter 5 instead of chapter 13 of the Texas Probate Code.)

§ 10.7:2 Mental-Health Privilege

General Rule: All communications, including all records, between an individual and his physician or another professional related to the patient's mental health are privileged. Tex. R. Evid. 510(b). Further, section 576.005 of the

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 representative of the patient may consent to the release of the 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). In order 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).

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 physician'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 test for 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 district court granted the motion for summary judgment because the plaintiffs failed to establish that the principle on which their experts based their opinions was 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. Estates Code § 1101.103 (previously Tex. Prob. Code § 687) requires that the 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, he must state facts on which his opinion is based. *Ellington v. Ellington*, 443 S.W.2d 50, 53 (Tex. Civ. App.—Tyler 1969, writ ref’d n.r.e.). If the witness states that he believes the proposed ward is of unsound mind, he must

divulge detailed facts on which he bases his conclusion. Conversely, if he concludes the proposed ward is of sound mind, he may provide relatively little detail. See *Williford v. Masten*, 521 S.W.2d 878, 885 (Tex. Civ. App.—Amarillo 1975, writ ref’d n.r.e.); *Moeling v. Russell*, 483 S.W.2d 21, 23 (Tex. Civ. 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 Estates Code section 1101.001, a court investigator investigates the circumstances alleged in order to determine whether a less restrictive alternative is appropriate. Tex. Estates 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. Estates Code § 1051.154.

The investigator must file a report on his findings. Tex. Estates Code § 1054.153(a). In contested cases, the investigator must furnish the attorneys with a copy of his 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. Estates Code § 1054.153(b). Most court investigators appreciate receiving relevant telephone numbers and contact addresses from the applicant to assist in their investigation.

§ 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 pro-

ceeding. 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

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 him from seeking or contesting the guardianship.

A party should promptly send his request for disclosure and follow up with other discovery that does not exceed the new limitations. Discovery means 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 10-10 through 10-15 in this chapter.

§ 10.9 Considerations During Hearing and Trial

§ 10.9:1 Burden of Proof

The burden of proof in a contested matter is on the person alleging the incapacity. As the applicant, he will be required to prove the elements to

appoint a guardian. Tex. Estates 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. Section 1101.101 of the Estates Code lists 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 interests of the proposed ward to have a guardian; and
3. the rights or property of the proposed ward will be protected by the appointment of a guardian.

Tex. Estates 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.

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;
2. the person proposed as guardian is eligible to act as guardian and is entitled to appointment or, if no eligible person is entitled to be appointed, the person appointed is a proper person to act as guardian;
3. the guardianship is not created for the primary purpose of enabling a 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 himself and to manage his property or the proposed ward lacks the capacity to do some, but not all, of the tasks necessary to care for himself or to manage his property.

Tex. Estates Code § 1101.101(a)(2).

§ 10.9:3 Ward’s Presence in Courtroom

Section 1101.051 of the Estates Code requires the proposed ward’s presence in the courtroom at the hearing; if he does not attend, the court must make a finding on the record of why his presence was not necessary or may enter its determination in the order. Tex. Estates Code § 1101.051(b). Generally, the duty to bring the proposed ward to the courtroom or to explain his 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 his best interests. Some examples would include the following:

- Incorporate into the physician’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 his 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 Physician'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. Estates Code § 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 court of appeals held that the CME was not subject to evidentiary objections.

§ 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. Neither party is allowed to testify against the other as to 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 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 dismissed)).

§ 10.9:6 Jury Charge

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 *Texas Pattern Jury Charges—Family & Probate* (State Bar of Texas).

§ 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 dismissed w.o.j.) (citing former Probate Code section 247); see also Tex. Estates 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.

§ 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. See form 10-1 in this chapter for suggested language.

If the request for fees is not contested, it may be submitted as an application for payment of appointee's fees or by filing a claim. The application should be in writing, showing each item of expense and the date of the expense; 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 must be authorized by court order. Tex. Estates Code § 1155.103; *see also Woollett v. Matyastik*, 23 S.W.3d 48, 52 (Tex. App.—Austin 2000, pet. denied).

§ 10.10:2 Evidentiary Requirements

Generally, the determination of reasonable 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); *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)). 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, *3–*5. Expert testimony concerning the reasonableness and necessity of the services performed should support the award. *Barrett v. Parchman*, 675 S.W.2d 289, 291 (Tex. App.—Dallas 1984, no writ); *Hanker*, 2013 WL 3233251, *3; *see also* Tex. Disciplinary Rules Prof'l Conduct R. 1.04.

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 insufficient 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, *2, *3.

§ 10.10:3 Award of Attorney's Fees in Contested Cases

If the court finds that a party in a guardianship proceeding acted in bad faith or without just cause in prosecuting or objecting to an application in the proceeding, the court may require the party to reimburse the ward's estate for all or part of the attorney's fees awarded under this section and shall issue judgment against the party and in favor of the estate for the amount of attorney's fees required to be reimbursed to the estate. Tex. Estates 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. Estates Code § 1053.052. (see sections 10.4:2 through 10.4:6 above).

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.]

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—

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].

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.:
 [E-mail address]
 [Address]
 [Telephone]
 [Telecopier]

<p>Include the following if applicable. While not mandatory, some courts require that these applications be verified.</p>

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

[Name of applicant]

SIGNED under oath before me on _____.

Notary Public, State of Texas

Certificate of Service

I certify that in accordance with the Texas Rules of Civil Procedure I served a true and correct copy of [title of document, e.g., Motion for Leave to Resign as Temporary Guardian] on the parties listed below. This service was made by [method of service, e.g., certified mail,

properly addressed, return receipt requested, in a postpaid envelope deposited with the United States Postal Service].

List the name and address of each party or attorney served.

SIGNED on _____.

[Name of attorney]

Attach exhibit(s):

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-

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. 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 application and that **[his/her]** attorney's fees and expenses related to the establishment 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.

[Name]
 Attorney for Movant
 State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

<p>Include the following if applicable. While not mandatory, some courts require that these applications be verified.</p>

BEFORE ME, the undersigned authority, on this day personally appeared **[name of applicant]**, the applicant in the foregoing Application for Appointment of Temporary Guardian Pending Contest, known to me to be the person whose name is subscribed to the above and foregoing application, and on **[his/her]** oath stated that the application contains a correct and

complete statement of the matters to which it relates and all the contents thereof are true, complete, and correct to the best of applicant's knowledge.

[Name of applicant]

SIGNED under oath before me on _____.

Notary Public, State of Texas

Certificate of Service

I certify that in accordance with the Texas Rules of Civil Procedure I served a true and correct copy of [title of document, e.g., Motion for Leave to Resign as Guardian] on the parties listed below. This service was made by [method of service, e.g., certified mail, properly addressed, return receipt requested, in a postpaid envelope deposited with the United States Postal Service].

List the name and address of each party or attorney served.

SIGNED on _____.

[Name of attorney]

[Reserved]

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—

- a. to take control of [name of proposed ward]'s financial affairs to determine the status and extent of [his/her] assets;
- b. to take possession of [name of proposed ward]'s assets and financial documents wherever located, including the contents of [his/her] safe-deposit boxes;
- c. to collect the proceeds of any insurance policies, any annuity, contracts, and Social Security proceeds that are owed to [name of proposed ward];
- d. 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 inventories (and any other reports) in any Court having jurisdic-

tion of [name of proposed ward]'s estate or in connection with those tax returns;

- e. to pay all ad valorem taxes owed by [name of proposed ward]; and
- f. 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—

- a. 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.

- b. 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

APPROVED AS TO FORM:

[Name]
Attorney for Movant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Reserved]

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.

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.

[Name]
 Attorney for Movant
 State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Certificate of Service

I certify that in accordance with the Texas Rules of Civil Procedure I served a true and correct copy of **[title of document, e.g., Motion for Leave to Resign as Guardian]** on the parties listed below. This service was made by **[method of service, e.g., certified mail, properly addressed, return receipt requested, in a postpaid envelope deposited with the United States Postal Service]**.

List the name and address of each party or attorney served.

SIGNED on _____.

[Name of attorney]

Attach exhibit(s).

[Reserved]

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 AS TO FORM:

By _____

[Name]
Attorney for Movant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Reserved]

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 mental retardation, section 1101.104 requires that the physician or psychologist appointed be certified by the Texas Department of Aging and Disability Services. Tex. Estates 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

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.

[Name]
Attorney for Movant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Certificate of Service

I certify that in accordance with the Texas Rules of Civil Procedure I served a true and correct copy of [title of document, e.g., Motion for Leave to Resign as Guardian] on the parties listed below. This service was made by [method of service, e.g., certified mail, properly addressed, return receipt requested, in a postpaid envelope deposited with the United States Postal Service].

List the name and address of each party or attorney served.

SIGNED on _____.

[Name of attorney]

[Reserved]

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.

SIGNED on _____

JUDGE PRESIDING

APPROVED AS TO FORM:

By _____

[Name]
Attorney for Movant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

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

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.

[Name]
Attorney for Movant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Certificate of Service

I certify that in accordance with the Texas Rules of Civil Procedure I served a true and correct copy of [title of document, e.g., Motion for Leave to Resign as Guardian] on the parties listed below. This service was made by [method of service, e.g., certified mail, properly addressed, return receipt requested, in a postpaid envelope deposited with the United States Postal Service].

List the name and address of each party or attorney served.

SIGNED on _____

[Name of attorney]

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

APPROVED AS TO FORM:

By _____

[Name]
Attorney for Movant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Form 10-10

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

[Title of requestor]'s Requests for Disclosure

To: [Name of party], by and through [his/her] attorney of record, [name and address of attorney].

Pursuant to rule 194 of the Texas Rules of Civil Procedure, you are requested to disclose, within [thirty/fifty] days of service of this request, the information or material described in rule 194 to the offices of [name of party]'s attorney, [name of attorney] at [address, city, state].

[Name]

Attorney for [title of requestor]

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

Certificate of Service

I certify that in accordance with the Texas Rules of Civil Procedure I served a true and correct copy of [title of document, e.g., Motion for Leave to Resign as Guardian] on the parties listed below. This service was made by [method of service, e.g., certified mail, properly addressed, return receipt requested, in a postpaid envelope deposited with the United States Postal Service].

List the name and address of each party or attorney served.

SIGNED on _____

[Name of attorney]

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.

“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

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.

“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 any and 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 interroga-

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

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.

[Name]

Attorney for [title of requestor]

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

Certificate of Service

I certify that in accordance with the Texas Rules of Civil Procedure I served a true and correct copy of [title of document, e.g., Motion for Leave to Resign as Guardian] on the parties listed below. This service was made by [method of service, e.g., certified mail, properly addressed, return receipt requested, in a postpaid envelope deposited with the United States Postal Service].

List the name and address of each party or attorney served.

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.

[Reserved]

Form 10-12

Interrogatories to parties are the subject of Tex. R. Civ. P. 197. Interrogatories may not request items available through a request for 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.

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

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.

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

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.

[Reserved]

Form 10-13

Requests for production are the subject of Tex. R. Civ. P. 196. Requests for production may not request items available through a request for disclosure under Tex. R. Civ. P. 194. Note: A request for the documents provided to, reviewed by, or prepared by a testifying expert must be obtained through a request for 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.

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.

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.

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.

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:

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:

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.

5. *Admit or Deny*

that since [date] there were attempts or plans made to change a will signed by [name of proposed ward].

Answer:

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?

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?

31. Do you have an opinion on whether the proposed ward is able to be present in the courtroom for a hearing?
32. Is the proposed ward on medication? 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, provide up medical report and offer as an exhibit.

[Reserved]

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.

Respectfully submitted,

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

Certificate of Service

I certify that in accordance with the Texas Rules of Civil Procedure I served a true and correct copy of [title of document, e.g., Motion for Leave to Resign as Guardian] on the parties listed below. This service was made by [method of service, e.g., certified mail, properly addressed, return receipt requested, in a postpaid envelope deposited with the United States Postal Service].

List the name and address of each party or attorney served.

SIGNED on _____.

[Name of attorney]

Chapter 11

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Chapter 11

Guardianship Management Trusts

§ 11.1 Overview of Chapter 1301 Management Trust

A management trust established under chapter 1301 of the Estates Code is a court-ordered trust created for a ward or an incapacitated person. The court must find that such a trust is in the ward's or incapacitated person's best interests. Such a trust generally eliminates the need for a guardian of the ward's estate and permits the ward's property to be managed without application to the court for approval of discretionary distributions, payment of expenses, and other day-to-day administrative actions. Tex. Estates Code §§ 1301.053, 1301.101.

§ 11.2 Termination of Guardianship

If all the assets of the guardianship estate are transferred to a chapter 1301 trust, the guardian terminates the guardianship estate in the same way that a guardianship terminates at the death of the ward or on the removal of the ward's disabilities—by filing a final account, an application and order to discharge the guardian and terminate the guardianship, a waiver of notice of the final account, a receipt from the recipient of assets, and other appropriate documents. See generally chapter 14 of this manual.

After the chapter 1301 trust is created, the court may discharge the guardian of the estate only if the guardian of the ward's person remains and the court determines that the discharge is in the ward's best interests. Tex. Estates Code § 1301.152.

§ 11.3 Technical Requirements

Texas Estates Code chapter 1301 specifies important technical requirements for management trusts.

§ 11.3:1 Applicant

If there is an existing guardianship, the guardian of the ward's estate, the guardian of the ward's person, the guardian of both the ward's estate and his person, or the ward's attorney ad litem or guardian ad litem may apply to the court in which the guardianship is pending to create a trust under chapter 1301 of the Texas Estates Code. Tex. Estates Code §§ 1301.051, 1301.053.

§ 11.3:2 Court; Hearing; Order

The application for creation of a chapter 1301 trust for a ward must be filed in the court in which the guardianship is pending. If the guardian of the person and the guardian of the estate are in agreement, both may join in the application. 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 11-3 in this chapter.

The statute does not require a hearing on the application; however, the judge may decide a hearing is appropriate, especially if there is any indication of disagreement among the interested parties or any question as to 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.

If the court agrees to waive the hearing, the order should state that the court is creating a chapter 1301 management trust for the ward and direct the guardian to file the final account. See form 11-4.

§ 11.3:3 Trustee

If the value of the trust's principal is \$150,000 or less and the court finds the appointment to be in the ward's best interests, the court may appoint a person other than a financial institution to serve as trustee of the trust. Tex. Estates Code § 1301.057(c)(1). If the value of the trust's principal is more than \$150,000, the court may appoint a person other than a financial institution to serve as trustee only if the court finds that no financial institution is willing to serve as trustee and that the appointment is in the ward's best interests. Tex. Estates Code § 1301.057(c). Before making a finding that there are no financial institutions willing to serve, the court must check any lists of corporate fiduciaries located in the state that are maintained at the office of the presiding judge of the statutory probate courts or at the principal office of the Texas Bankers Association. Tex. Estates Code § 1301.057(c). In all other cases, the court must appoint a financial institution to serve as trustee of the trust. Tex. Estates Code § 1301.057(b).

§ 11.3:4 Best Interest

The establishment of a chapter 1301 trust must be in the ward's best interests, and the court must make a finding to that effect. Tex. Estates Code § 1301.053. Chapter 1301 does not define the term *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. For example, if the applicant seeks to establish a chapter 1301 special needs trust, the ward's best interests will be served by preserving the ward's eligibility for government benefits. If the trust is not a special needs trust, it is presumptively in

the ward's best interests to save the court costs and legal fees associated with a regular guardianship and obtain the advantages of the professional management and broader investment options available to a corporate trustee.

§ 11.3:5 Sole Beneficiary

The ward must be the sole beneficiary of a chapter 1301 trust. Tex. Estates Code § 1301.101(a)(1).

§ 11.3:6 Distribution Standard

A chapter 1301 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. Estates Code § 1301.101(a)(2), (3). The statute also allows for distribution "for the health, education, maintenance or support of . . . another person whom the [ward] . . . is legally obligated to support." Tex. Estates Code § 1301.102(a).

Practice Pointer: Exceptions exist to the mandatory health, education, support and maintenance standard for chapter 1301 management trusts. If the attorney wants the trust to qualify as a special needs trust so that the ward's eligibility for government benefits will be preserved, the trust must not permit distributions for the ward's basic health, education, maintenance, and support but only for the ward's special needs not covered by a government benefits program. For all other chapter 1301 trusts, no distributions should be permitted for the benefit of others whom have a legal obligation to support the ward. In particular, such a provision should not be included in a trust for a minor beneficiary. The parents have a legal obligation to support the minor ward; the minor ward does not have a legal obligation to support the parents. Tex. Estates Code § 1301.101(c). See section 11.4:2 below.

§ 11.3:7 Bond

If the trustee is a corporate fiduciary, the trustee of a chapter 1301 trust serves without bond. Tex. Estates Code § 1301.058(a). 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. Estates Code § 1301.058(b).

§ 11.3:8 Trustee's Compensation

Subject to the court's approval, the trustee of a chapter 1301 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 Estates Code. Tex. Estates 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. Estates 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. Estates 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 the trustee's regular fee schedule.

§ 11.3:9 Successor Trustee

The court may appoint a successor trustee of a chapter 1301 trust if the trustee resigns, becomes ineligible, or is removed. Tex. Estates Code

§ 1301.155. See forms 11-7 through 11-9 in this chapter.

§ 11.3:10 Liability

The guardian of the person or estate is not liable for the acts or omissions of the trustee of a chapter 1301 trust. Tex. Estates Code § 1301.156. 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. Estates Code § 1301.103.

§ 11.3:11 Amending Trust

The court may amend, modify, or revoke a chapter 1301 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. Estates Code § 1301.201. When creating or modifying a chapter 1301 trust, the court may omit or modify terms required by Code section 1301.101(a), (a-1), or (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 and that it is in the ward's best interests. Tex. Estates Code § 1301.101(c).

See forms 11-10 and 11-11 in this chapter.

§ 11.3:12 Termination

If the ward is a minor, a chapter 1301 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. Estates Code § 1301.203(a). Some courts will not permit a chapter 1301 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, 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, subject to Estates Code section 1301.202(c), or on the death of the ward. Tex. Estates Code § 1301.203(b).

If the minor beneficiary also suffers from a disability that would require the minor to access a government benefits program, the chapter 1301 management trust may be established as a special needs trust. However, some courts still require that the management trust terminate at the age of twenty-five, even though the ward is likely never to regain capacity. In this situation, the trust must be modified prior to the ward reaching the age of twenty-five in order to ensure that the ward's government benefits will not be reduced or terminated. *See* Tex. Estates Code § 1301.203.

§ 11.3:13 Annual Account

The trustee of a chapter 1301 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 Estates Code, and the annual account is subject to court review in the same manner as an annual account prepared by a guardian. The trustee must provide a copy of the annual account to the guardian of the ward's estate or person. Tex. Estates Code § 1301.154. See forms 11-5 and 11-6 in this chapter.

§ 11.3:14 Final Account

On termination of a chapter 1301 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. Estates Code § 1301.204. See forms 11-12 and 11-13 in this chapter.

§ 11.3:15 Application and Order to Discharge

After the order approving the final account is signed and entered, the trustee of a chapter 1301 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. Estates 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.

§ 11.4 Other Issues

§ 11.4:1 Pay-Back Provision in Special Needs Trust

If the chapter 1301 management trust qualifies as a special needs trust, the ward may be able to access government benefits programs. If the trust is seeking to qualify as a special 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 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 System 01120.203.B.3.

§ 11.4:2 Parents' Duty to Support Child

If the beneficiary of a chapter 1301 trust is a minor, the parents still have a duty to support the

child, the existence of a trust notwithstanding. Section 1156.051 of the Estates Code provides that a parent who is the guardian of a ward 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. Tex. Estates Code § 1156.051.

§ 11.4:3 Taxes

Chapter 1301 trusts are considered grantor trusts under Internal Revenue Code sections 671–678. Taxes due and the costs of preparation of tax returns may come out of trust proceeds. Income is taxable to the beneficiary. The trustee should be certain the appropriate tax returns are filed. See 26 U.S.C §§ 671–678.

[Reserved]

Form 11-1

[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.

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.

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.

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 qualified to serve as trustee of a trust created according to chapter 1301 of the Texas Estates Code.

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].

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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach exhibit(s).

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.

Modify the following paragraph if the trust is to be a "special needs" trust to include "special needs" provisions and to eliminate references to "health, education, support, or maintenance." See section 11.3:6 and form 11-3 for the special needs provision.

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.

Note: If the beneficiary is a minor, the trust must terminate when the beneficiary is twenty-five years old. Tex. Estates 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 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 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 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].

Trustee
[Name and title of representative]
[Name of entity]

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

[Reserved]

Form 11-3

The following special needs trust provisions should be included as terms of the standard management trust (see form 11-2) in order for the trust to qualify as a special needs trust under 42 U.S.C. § 1396p(d)(4)(A).

Special Needs Trust Termination Provisions

This Trust shall terminate on the death of [name of beneficiary], Beneficiary, or on a determination of capacity by the court, at which point Trustee, [name of trustee], shall distribute and deliver the remaining principal and undistributed income, free of Trust, as provided in the trust.

1. *Payment of Estate Taxes and Administration Expenses.* If termination has occurred due to Beneficiary's death, Trustee is authorized to pay all estate, inheritance, or other similar taxes which may be imposed on Beneficiary's estate due to the death of Beneficiary. Trustee is authorized to pay reasonable administration expenses associated with the administration of the trust estate, such as an accounting of the trust to a court, completion and filing of documents, or other required action associated with termination and wrapping up the trust.
2. *Reimbursement for State Medical Assistance Programs.* Pursuant to 42 U.S.C. § 1396p(d)(4)(A), the state of Texas or any other state that has made expenditures on Beneficiary's behalf shall receive all amounts remaining in the Trust on Beneficiary's death up to an amount equal to the total medical assistance paid on Beneficiary's behalf under a state plan administered pursuant to 42 U.S.C., chapter 7, subchapter XIX.
3. *Payment of Debts, Funeral Expenses, and Expenses of Last Illness.* After the satisfaction of any reimbursement to the state of Texas or any other state from which Beneficiary has received medical assistance payment, if termination has occurred due to Beneficiary's death,

Trustee is authorized to pay any expenses of Beneficiary's last illness, funeral and burial costs, and enforceable debts.

4. *Distribution of Residue.* Subsequently, after the state has been reimbursed for the above noted expenditures, Trustee shall distribute and deliver the remaining principal and undistributed income, free of Trust, to Beneficiary if Beneficiary is still living. If Beneficiary is no longer living at the termination of the Trust, Trustee shall distribute the amounts remaining in the Trust to the representative of Beneficiary's estate.

5. *Distribution of Income and Principal.* Trustee, [name of trustee], shall pay funds for the benefit of [name of beneficiary], Beneficiary, for [his/her] lifetime, subject to the conditions provided below. Payments will be made from the income or principal, up to and including the whole amount, as Trustee, in Trustee's sole and complete discretion, may from time to time deem necessary or advisable for the satisfaction of Beneficiary's supplemental needs as defined in this Trust. Any income not distributed shall be accumulated and added to the principal. As used in this Trust, "supplemental needs" refer to the requisites for maintaining Beneficiary's good health, safety, and welfare when, in the discretion of Trustee, such requisites are not being provided by any public agency, local or county agency, office or department of the state of Texas, of any other state, or of the United States (a "governmental agency"). Distribution shall be limited so that Beneficiary is not disqualified from receiving public benefits to which [he/she] is otherwise entitled, and this Trust shall be administered so as to SUPPLEMENT AND NOT SUPPLANT such benefits. Notwithstanding any provision in this Trust, Trustee may make distributions that would reduce public benefits without terminating them completely. For example, Trustee may provide food and shelter to Beneficiary when he is eligible for Supplemental Security Income in exchange for a reduction of benefits under the "one-third reduction rule," when Trustee in its uncontrolled discretion determines such distributions to be in Beneficiary's best interests. In making distributions, Trustee shall take into consideration applicable resource and income limitations of any public assistance programs

for which Beneficiary is eligible when determining whether or not to make any discretionary distributions. Further, and notwithstanding any provision in this Trust, Trustee may in its sole discretion, make distributions that would terminate one or more public benefits in the event Trustee determines that such a result is in the best interest of Beneficiary. Trustee is further authorized to make distributions to Beneficiary from the Trust estate without consideration as to whether such distributions would be considered a cost associated with a normal parental obligation, if the distribution is determined by Trustee to be in the best interest of Beneficiary.

6. *Disbursements to Be Supplemental.* This Trust is created expressly for Beneficiary's extra and supplemental care, maintenance, support, and education, in addition to the benefits [he/she] otherwise receives or may receive, as a result of [his/her] disability from any governmental agency or from any other private agency that provides services or benefits to persons with situations similar to Beneficiary's situation. It is [name of applicant]'s, Applicant, express purpose that this Trust be used only to supplement other benefits received by Beneficiary. In making distributions, Trustee shall take into consideration applicable resource and income limitations of any public assistance programs for which Beneficiary is a recipient when determining whether to make any discretionary distributions. This Trust is primarily for the benefit of Beneficiary, and the rights of any remaindermen shall be of secondary importance. Trustee shall not be held accountable to any remainderman if part or all of the principal shall be depleted as a result of distributions in accordance with the terms of the Trust. Any good faith determination made by Trustee as to the manner in which or extent to which the powers granted by this Trust shall be exercised shall be binding and conclusive on all persons who might at any time have or claim any interest in the Trust property.

7. *Other Assistance.* As long as Beneficiary is unable to maintain and support [himself/herself] independently, Trustee shall ask that a legal guardian or other legal representative or conservator, as appropriate, seek support and maintenance for [him/her] from all available public resources, including, but not limited to, Supplemental Security Income, Social Security

Disability Insurance benefits, and Medicaid and Medicaid waiver programs. It is acknowledged that Trustee is neither licensed nor skilled in the field of social services and/or governmental assistance programs. Beneficiary's legal guardian or other legal representative, if any, shall be responsible for identifying programs that may be of social, financial, developmental, or other assistance to Beneficiary, including seeking the assistance of federal, state, and local agencies that have been established to help the handicapped or disabled and other similar resources. Trustee is authorized to cooperate with and may assist Beneficiary, [his/her] legal guardian, or other legal representative, if any, but shall have no duty or responsibility to determine which programs are available to Beneficiary. Trustee shall not, in any event, be liable to Beneficiary or any other party with respect to any aspect of Beneficiary's initial eligibility for federal, state, or local public assistance benefits or programs, including, but not limited to, the failure to identify each and every program or resource that might be available to Beneficiary on account of any handicap or disability.

8. *Not to Supplant Public Aid.* It is Applicant's further intent that no part of the corpus of this Trust shall be used to supplant or replace public assistance benefits of any governmental agency or governmental program ("public assistance benefits") that serve persons with the same or similar physical and/or mental condition as Beneficiary. In the event Trustee is requested by any department or agency, during Beneficiary's lifetime, to release principal or income of the Trust to or on behalf of [him/her] to pay for equipment, medication, or services that other organizations or agencies are authorized to provide, or in the event Trustee is requested by any department or agency administering such benefits to petition the Court or any other administrative agency for the release of Trust principal or income for this purpose, Trustee shall deny such request. Further, Trustee is directed to defend any contest or other attack of any nature of the Trust at the expense of the Trust estate.

9. *Prepayment of Allowable Expenses.* Subject to the terms and conditions of this Trust, it is not necessary that Beneficiary or [his/her] legal guardian or other legal representative

actually pay an allowable expense before requesting payment from Trustee. Beneficiary or [his/her] legal guardian or other legal representative may direct suppliers of allowable goods and services to apply directly to Trustee for payment. Trustee is authorized to make payments from the Trust directly to the providers only to the extent that the distribution is authorized by the terms of this Trust.

10. *Denial of Distribution.* If Trustee denies a request for distribution in whole or in part, Trustee shall provide a written notice of the decision to Beneficiary and [his/her] legal guardian or other legal representative within a reasonable period of time. The period of time for notice is not to exceed thirty days after the request is made, unless special circumstances require an extension of time for processing the request for distributions. If an extension of time is required, written notice of the extension shall be furnished to Beneficiary and his legal guardian or other legal representative before the termination of the initial thirty-day period. In no event shall an extension exceed a period of fifteen days from the end of the initial period unless it is by order of a court of competent jurisdiction. The extension notice shall indicate the special circumstances requiring an extension of time and the date on which the Trustee expects to render a decision.

[Reserved]

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.

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

APPROVED AS TO FORM:

[Name]
Attorney for Applicant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Include if applicable.

[Name]
Attorney Ad Litem
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach exhibit(s).

[Reserved]

Form 11-5

[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.

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].]

6. *Property of the Trust.* All property belonging to the trust that came into the possession or knowledge of Trustee is listed in paragraph 11. of this account and is more fully described in the statement of account activity.

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].

11. *Summary of Receipts and Disbursements.*

Beginning cash as received on [date] from [payor]: \$[amount]

Receipts

[Name of payor]:	\$[amount]	
Total receipts:	\$[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).

[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.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

Affidavit of Trustee

BEFORE ME, the undersigned authority on this day personally appeared [name], a trust officer of [name of trustee], known to me to be the person whose name is subscribed to the foregoing First Annual Account of Trustee of Management Trust and after being duly sworn by me, stated that the annual account is true, correct, and complete in every respect to the best of [his/her] knowledge, 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).

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

[Reserved]

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 [years] 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.

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 Beneficiary 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 [his/her] 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]
Successor Trustee

[Name]
Attorney for Applicant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach exhibit(s).

Certificate of Service

I certify that in accordance with the Texas Rules of Civil Procedure I served a true and correct copy of [title of document, e.g., Motion for Leave to Resign as Guardian] on the parties listed below. This service was made by [method of service, e.g., certified mail, properly addressed, return receipt requested, in a postpaid envelope deposited with the United States Postal Service].

List the name and address of each party or attorney served.

SIGNED on _____

[Name of attorney]

[Reserved]

Form 11-8

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

Application to Appoint Successor Trustee of Management Trust

[Name of applicant], Applicant, files this Application to Appoint Successor Trustee of Management Trust of [name of beneficiary], Beneficiary, an incapacitated person, and shows the following in support:

1. *Beneficiary.* [Name of beneficiary] is [a minor/an adult] [male/female] who is [years] years old, born [date of birth]. Beneficiary currently resides at [address, city, county] County, Texas. Beneficiary has previously been served with citation.

2. *Prior Trustee.* On [date], [name of trustee] was appointed trustee of a management trust, and [name of guardian] was appointed as the permanent guardian of the person of Beneficiary. Trustee has indicated that it wishes to resign.

3. *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 the trustee of the existing management trust of Beneficiary, and Proposed Successor Trustee is eligible to act as a trustee for the trust.

4. *Venue.* This Court has venue over these proceedings because the original management trust was filed and created in this Court.

5. *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.

6. *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.

Respectfully submitted,

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

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 appointment of successor trustee of the management trust of [name of beneficiary], Beneficiary, an incapacitated person. The Court has reviewed the application [to resign/indicating that the prior trustee is no longer willing to serve] 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.

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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Name]
Attorney for Successor Trustee
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

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.

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 A.

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

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 Applicants
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach exhibit(s).

[Reserved]

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.

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

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-

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.

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-

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).

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

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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Name]
Attorney for Trustee
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Attach exhibit(s).

[Reserved]

Form 11-13

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

Final Account

[Name of trustee], Trustee, of [city], Texas, trustee of the management trust created for [name of ward], Ward, an incapacitated person, according to chapter 1301 of the Texas Estates Code, by order of this Court dated [date], respectfully files its Final Account of the Original Management Trust.

1. 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. No claims against Ward's estate were presented to Trustee within the period covered by this final account, no claims have been allowed, paid, or rejected by Trustee, and none have been sued on.

3. Trustee represents that within its knowledge there are no claims due or owing Ward's estate.

4. No changes in the property belonging to Ward's estate, as described in the account for final settlement filed by the guardian of Ward's estate on [date] and approved by order of the Court dated [date] other than changes in cash listed in paragraph 6. below, have come to Trustee's knowledge.

5. No property belonging to Ward's estate has come into Trustee's possession that was not included in the guardian's final account.

6. A complete account of receipts and disbursements for the period [date] through [date] and the sources and nature thereof is as follows: [specify].

Cash on hand	\$[amount]
Receipts	
Total receipts:	\$[amount]
Total beginning cash and receipts:	\$[amount]
Disbursements	
Total disbursements:	\$[amount]
Recapitulation	
Beginning cash and receipts	\$[amount]
Less Disbursements	<\$[amount]>
Cash on hand	\$[amount]

7. A complete description of the property of Ward's estate being administered as of [date] is as follows:

Description	Amount
Total	

8. During the period covered by this account, Trustee was not required to file any tax returns on behalf of Ward, and no taxes were required to be paid.

9. During the course of its administration of the Original Management Trust, Trustee disbursed trust funds for the health, education, support, or maintenance of Ward according to

terms of the Original Management Trust, and ratification for these payments is respectfully requested. These disbursements were reasonable and in the best interests of Ward. A complete description of the disbursements is as follows:

Description	Date Paid	Amount
Total		

10. The remaining assets of the Original Management Trust should be delivered to [name of successor trustee] as trustee of the Restated Management Trust.

11. Trustee hereby waives all commissions and other compensation that it might otherwise be entitled to receive from the property of the Original Management Trust.

Trustee prays that after due citation the Court hear and approve its Final Account for the period ending [date], that the Court ratify the disbursements listed in paragraph 9. in the total amount of \$[amount], and for all further relief to which Trustee may be entitled.

Respectfully submitted,

[Name of trustee]

[Title]

APPROVED AS TO FORM:

[Name]
 Attorney for Guardian
 State Bar No.:
 [E-mail address]
 [Address]
 [Telephone]
 [Telecopier]

[Name of affiant] appeared in person before me today and stated under oath: "I am the representative of Trustee in the foregoing final account and exhibits. I have personal knowledge of the facts stated in it, and they are true, complete, and correct."

[Name of affiant]

SIGNED under oath before me on _____.

Notary Public, State of Texas

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.

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

and by [name] 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

APPROVED AS TO FORM:

[Name]

Attorney for [name of guardian applicant]

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

[Name]

Attorney for [name of trustee applicant]

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

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 any and all future liability and responsibility in connection with the administration of the Original Management Trust estate.

Respectfully submitted,

[Name]

Attorney for Trustee

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

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

APPROVED AS TO FORM:

[Name]

Attorney for Guardian

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

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].

Respectfully submitted,

[Name]

Attorney for Trustee

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

Attach exhibit(s).

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

[Reserved]

Chapter 13

Foreign Guardianships

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[Reserved]

Chapter 13

Foreign Guardianships

§ 13.1 Introduction

In recent sessions, the Texas legislature has addressed the challenges presented by the guardianship needs of incapacitated adults and the increased ease of mobility of today's population. See section 13.2:4 below. Although Texas has not yet adopted the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (hereinafter the UAGPPJA), interstate guardianships are now addressed in Texas Estates Code chapter 1253. Because Texas practitioners are likely to face interstate guardianship issues involving foreign jurisdictions that have adopted the UAGPPJA, reference is made in this chapter to provisions of the UAGPPJA as well as the Texas Estates Code. This chapter will review foreign guardianship issues under the topics of original proceedings, interstate transfers, actions by foreign guardians, and actions regarding nonresident wards.

§ 13.2 Original Proceedings

Section 1023.001 of the Texas Estates Code, titled "Venue for Appointment of Guardian" (previously section 610 of the Texas Probate Code), 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. Estates 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 and/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 important multijurisdiction 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. 2011); *In re Guardianship of Glasser*, 297 S.W.3d 369 (Tex. App.—San Antonio 2009); *In re Guardianship of Parker*, 189 P.3d 730 (Okla. Civ. App. 2008); *In re Guardianship of Parker*, 275 S.W.3d 623 (Tex. App.—Amarillo 2008). 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 deferring to the New Jersey court as the true residence of the proposed ward. The *Parker* case, however, resulted in different guardians of the person and estate being appointed 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

In 2007, the Texas legislature attempted to tackle the *Glasser* scenario by taking initial steps to address multijurisdictional conflicts in original proceedings through the passage of section 894 of the Texas Probate Code (now codified as sections 1253.101, 1253.102, and 1253.103 of the Texas Estates Code).

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. Estates Code § 1253.101.

§ 13.2:2 Determination of Most Appropriate Forum for Certain Guardianship Proceedings

Under section 1253.102 of the 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 12 years of age or older.

Tex. Estates 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. Estates 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. Estates Code § 1253.102(c).

§ 13.2:3 Jurisdiction Due to Unjustifiable Conduct

In 2011, the Texas legislature gave 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. Prob. Code § 895, effective September 1, 2011, now codified as Tex. Estates Code §§ 1253.151, 1253.152. The Texas legislature also determined it was 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); *In re Guard-*

ianship of Parker, 275 S.W.3d 623 (Tex. App.—Amarillo 2008), and *In re Guardianship of Glasser*, 297 S.W.3d 369 (Tex. App.—San Antonio 2009); *In re Glasser*, 2011 WL 2898956 (N.J. Super. Ct. App. Div. 2011), 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 Texas Estates Code and whether the court of any other state would have jurisdiction under the factual circumstances of the matter.

Tex. Estates Code § 1253.151.

Section 1253.152 of the Texas 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. Estates Code § 1253.152.

§ 13.2:4 Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

Interstate guardianship practice has been dramatically affected since the promulgation of the UAGPPJA in 2007. The UAGPPJA has been supported by numerous national senior protection organizations. It has been now been adopted in thirty-seven states, Puerto Rico, and the District of Columbia. The complete Act and a map of states that have adopted it are available at www.uniformlaws.org. The Texas legislature has adopted one provision of the UAGPPJA (Texas Probate Code section 895, now codified as Texas Estates Code sections 1253.151–152, which was taken from section 207 of the UAGPPJA), but Texas is one of thirteen states that has not yet fully adopted the UAGPPJA. However, because the UAGPPJA has been adopted by most of the United States, familiarity

with the provisions of the UAGPPJA is necessary in contemplating interstate guardianship issues involving states that have adopted the UAGPPJA.

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 constitution of the other state and the United States. UAGPPJA § 203(3).

Under section 206 of the Act, courts 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 appoint-

ment 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 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 emergent or special situations. *See* UAGPPJA § 204.

§ 13.3 Interstate Transfers

The Texas legislature in 2001 implemented Texas Probate Code sections 891 and 892 (now codified as Tex. Estates Code §§ 1253.001–.003, 1253.051–.053, 1253.055, 1253.056) to enable transfers of guardianship cases to and from other states. However, these statutes are

not very detailed, and courts are left to their own discretion as to 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 allowed to give full faith and credit to the judgment of the foreign court as to the incapacity of the ward and the qualifications and powers of the guardian. Tex. Estates 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. However, 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. Estates 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. Estates 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. Estates Code § 1203.051(a)(4). The Texas 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. Estates Code § 1023.003. Therefore, a simple application stating the reason for the transfer might be acceptable for an interstate transfer as well. However, to be safe, most practitioners include some variation of the elements required by an original application for guardianship as provided by section 1101.001 of the Texas Estates Code. See forms 13-1 and 13-2 in this chapter for an example of a transfer of guardianship to foreign jurisdiction and an order approving transfer to foreign jurisdiction.

Notice of the application to transfer a guardianship under Tex. Estates 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. Estates 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. Estates 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. However, under a literal interpre-

tation 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.

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. Estates 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 shall coordinate efforts with the foreign court. Tex. Estates Code § 1253.003(c). However, absent extenuating circumstances, a transfer of a guardianship out of Texas can be accomplished by the guardian’s attorney contacting the foreign court and facilitating the transfer without the direct communication of the judges involved.

§ 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 intends to reside. Tex. Estates Code § 1253.051. 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 must be attached to the application. Tex. Estates 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. Estates 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 13-3 and 13-4 in this chapter for an example of an application of 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. Estates Code § 1253.052. The Estates Code does not specify the form of the notice to be given to the foreign court; however, any form of notice acceptable to both courts should be sufficient. 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.

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. Estates 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. Estates 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. Estates 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 accordance with local and state law. Tex. Estates 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. Estates 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. Estates 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. Estates Code § 1253.053(f). The court is to coordinate efforts with the appropriate foreign court to facilitate the orderly transfer of the guardianship. Tex. Estates 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. In the event that 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 Texas Estates Code. Tex. Estates Code § 1253.056.

The Seventh District court of appeals has ruled that use of section 892 of the Texas Probate Code (now codified as Tex. Estates Code §§ 1253.051–.053, 1253.055; 1253.056) is the only way to request a Texas court to give full faith and credit to a guardianship order from another state. *See In re Guardianship of Parker*, 329 S.W.3d 97 (Tex. App.—Amarillo 2010). In this case, the ward’s son, Edward Parker, attempted to domesticate his Oklahoma guardianship order in a Texas court under the Uniform Enforcement of Foreign Judgments Act, Tex. Civ. Prac. & Remedies Code §§ 35.001–.008. The Texas appellate court held that, as a general rule, a sister state is not required by full faith and credit to enforce a judicial action that is subject to modification under the laws of the rendering state, and that a guardianship order is modifiable under the laws of Oklahoma. The court stated “[m]ore importantly, however, Texas has adopted specific provisions of its guardianship statutes that provide for acceptance and full faith and credit by a Texas court of a foreign guardianship. *See* Tex. Prob. Code Ann. § 892.” *Parker*, 329 S.W.3d 97 at 103. The court further stated “We do not believe full faith and credit requires the acceptance of an enforcement mechanism of Parker’s choosing over that expressly provided by Texas statutory provisions.” *Parker*, 329 S.W.3d 97 at 103.

§ 13.3:3 Transfers to and from UAGPPJA States

Because thirty-nine 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.

Section 301(a) of the UAGPPJA allows a guardian to petition the court to transfer a guardianship or conservatorship to another state. It does not require the ward to have permanently moved

to the receiving state; 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 from a foreign jurisdiction that has adopted UAGPPJA to Texas, notice of the petition must be given to the same persons in Texas who would have been entitled to receive notice of a petition to appoint a guardian in an original proceeding in Texas. UAGPPJA § 301(b). A hearing on the transfer application may be held on the Texas 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 foreign 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 foreign 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 foreign court will also confirm that adequate arrangements have been made for the management of the ward’s property before the foreign court signs a provisional transfer order. UAGPPJA § 301(e).

The foreign court will expect the Texas court to issue a provisional order of acceptance and forward a copy of the provisional order to the foreign court. On receipt of the provisional order of acceptance and resolution of any outstanding issues such as final accounting and bond release, the foreign court will issue a final order confirming the transfer and terminating the guardianship in the foreign court. UAGPPJA §§ 301(f), 302.

The UAGPPJA also addresses the transfer of a case from a foreign court (such as one in Texas) to court in a UAGPPJA state. Section 302 of the UAGPPJA provides that the existing Texas guardian or conservator must petition the foreign court to accept the guardianship or conservatorship. The petition must include a certified copy of the provisional order of transfer from

the Texas court. UAGPPJA § 302(a). 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 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). 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). 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 appointment. UAGPPJA § 302(h).

§ 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 that is 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 Texas 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 this state 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. Estates 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. Estates 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. Estates 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 13-5 and 13-6 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. Estates Code § 1252.052(b).

After qualification, the nonresident guardian must file an inventory and appraisal of the estate of the ward in Texas subject to the jurisdiction of the Texas court and subject to all applicable provisions of the Texas Estates Code with respect to the handling and settlement of estates by resident guardians. Tex. Estates 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. Estates Code § 1252.054.

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 Texas Estate 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. Estates 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 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 this state are paid or secured by bond payable to and approved by the judge of the court in which guardianship proceedings are pending in this state. Tex. Estates Code § 1252.055.

It is unclear, however, what type of procedure or order is required to allow the foreign guardian to remove this 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.

§ 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. Estates 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. Estates Code § 1252.002. If a nonresident guardian of the estate later qualifies in Texas under section 1252.051 of the Texas 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. Estates Code §§ 1252.003, 1252.054.

§ 13.5:2 Recognition under UAGPPJA

A Texas guardian who is guardian of the person and/or estate of a nonresident ward may utilize UAGPPJA to manage the ward's person and estate in a foreign jurisdiction pursuant to article 4 of UAGPPJA. Section 401 of 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 UAGPPJA and the laws of the foreign jurisdiction to enforce the registered order. UAGPPJA § 403(b).

§ 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. Estates Code § 1354.001.

The court order shall require a receiver appointed under this section to give bond as in ordinary receiverships in an amount the judge deems necessary to protect the estate. Tex. Estates 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. Estates 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. Estates 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. Estates 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, 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. Estates 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 this subsection 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 with the receiver's report and account, the judge shall enter an order that continues the receivership. Tex. Estates Code § 1354.008.

[Reserved]

Form 13-1

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 [name of foreign county]
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 [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, [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. Ward has expressed [his/her] preference to move to [foreign state]. Movant moved Ward on [date] to Movant's residence at [foreign address, city, county] County, [state]. Movant believes that 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 application to transfer the guardianship under section 1253.001 of the Texas Estates Code will be served personally on [name of ward], 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, [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 he be granted all other relief to which he may be entitled.

Respectfully submitted,

[Name]
Attorney for Applicant
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Verification

“My name is [name of guardian], and I am the movant in the above entitled and numbered cause. I have read and examined the foregoing Motion to Transfer Ward and Cause to [county] under Texas Estates Code Section 1253.001, which is to be filed in this cause, and all the allegations contained therein are true and correct to the best of my knowledge.”

[Name of affiant]

SIGNED under oath before me on _____.

Notary Public, State of Texas

Certificate of Service

I certify that, in accordance with the Texas Rules of Civil Procedure I served a true and correct copy of [title of document, e.g., Motion to Transfer Ward and Cause to [name of county/foreign state] under Section 1253.001 of the Texas Estates Code] on the parties listed below. This service was made by [method of service, e.g., certified mail, properly addressed, return receipt requested, in a postpaid envelope deposited with the United States Postal Service].

List the name and address of each party or attorney served.

SIGNED on _____.

[Name of attorney]

[Reserved]

Form 13-2

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

**Order Approving Motion to Transfer Ward and Cause
to [name of foreign county]
under Texas Estates Code Section 1253.001**

On this day came 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 [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 [name of foreign county] County, [state], and that as no good cause having 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

[Reserved]

Form 13-3

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], an incapacitated person, is currently a resident of [county] County, Texas, as he resides 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 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 in [county] County, Texas, since [date], and, therefore, it is necessary to transfer the foreign guardianship to [county] County, Texas. 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 the petition for guardianship of the estate, letter of guardianship, and referee report are on file with 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 applicant] 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 applicant] 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. Applicant 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 in this county.

7. *Duties and Powers of Guardian of the Person.* Applicant alleges that Ward has previously been adjudicated to be totally incapacitated and is unable to properly manage [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:

The following are examples.

- a. The authority to take charge of the person of Ward.

- b. To review, to take possession of and to consent to the disclosure of Ward's medical or dental records.
- c. To apply for, arrange for, and consent to any and 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, to consent to, and to 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 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.
- k. The authority 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.
 - 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. The 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.
8. *Duties and Powers of Guardian of the Estate.* Applicant alleges that Ward has previously been adjudicated to be totally incapacitated, and is unable to properly manage [his/her] personal affairs and [his/her] estate. As a result of these incapacities, Applicants request 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.
 - 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 any 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, to take possession of, and to 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]**.

Applicant respectfully requests this Court grant this Application for Receipt and Acceptance of Foreign Guardianship pursuant to sections 1253.051-.056 of the Texas Estates Code with the powers requested in this application and grant Applicant any further relief that the Court may deem appropriate.

Respectfully submitted,

[Name]
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

Verification

[Name of applicant], Applicant, states under oath:

“My name is [name of applicant], and I am the applicant in the above-styled and numbered cause. I have read and examined the foregoing Application for Receipt and Acceptance of a Foreign Guardianship pursuant to sections 1253.051–.056 of the Texas Estates Code that is to be filed in this cause, and all allegations contained in the application are true and correct to the best of my knowledge.”

[Name of affiant]

SIGNED under oath before me on _____.

Notary Public, State of Texas

Attach exhibits.

Form 13-4

[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 pleadings 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 person as defined by the Texas Estates Code and has no legal guardian of [his/her] person and estate in the state of Texas and that the incapacity is evidenced by recurring acts or occurrences within the preceding six-month period and not by isolated instances of negligence or bad judgment.
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. The rights of Ward will be protected by the appointment of a guardian of [his/her] estate in the state of Texas.

The Court hereby makes the following findings of fact by a preponderance of the evidence:

1. Ward is a resident of [county], County, Texas, and this Court has jurisdiction and venue to appoint a guardian of the estate of Ward.
2. Notice has been properly served on those persons required by the Texas Estates Code.
3. Ward 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] is the [relationship] of Ward and [his/her] guardian in the state of [name 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 capacity to manage [his/her] finances and personal affairs.

IT IS ORDERED that the guardian of the estate shall have the following authority, duties, and responsibilities:

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 any and all other types of income payable to or receivable by Ward.
8. To apply for and to receive funds from governmental sources for the 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 Veteran's 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 Veteran's benefits.
10. To apply for and to secure insurance on Ward's behalf for Ward's property and the Ward's person.
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, to take possession of, and to 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:

1. To take charge of the person of Ward.
2. To review, to take possession of, and to 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 the Ward.
4. To consent to or object to medical and dental treatment for Ward, including surgery.
5. To apply for, to consent to, and to 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, to consent to, and to enroll Ward in private and public residential care facilities.
7. To place the 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 nursing home facility.
8. To apply for, to consent to, and to 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 the 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. The power and authority 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.
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.
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.

SIGNED on _____.

JUDGE PRESIDING

Form 13-5

[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 the 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 a 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 (1) 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 (2) 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

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 Texas, 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,

[Name of attorney]

Attorney for Applicant

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

By:

[Name of Texas attorney]

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

Attach exhibits.

[Reserved]

Form 13-6

[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] to be an incapacitated person and appointed [name of nonresident guardian] to be the guardian of the estate of [name of nonresident ward], 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 [name of 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.

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 [name of 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.

4. On the guardian of the estate's filing its oath and approval of the guardian's bond as is required that 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 appraisal 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

[Reserved]

Chapter 14

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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 survivor in community, 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 for any other reason that a guardianship for the ward is no longer necessary; or
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.

Tex. Estates Code § 1204.001(b), (d).

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. Estates 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. Estates Code §§ 1204.001(b)(6), 1204.001(c).

Circumstances resulting in negligible income generally occur when a guardian is at the end of a "spend-down" strategy and the remaining funds are required for the nursing home. It is not

advisable to seek to have anyone else apply for these funds at this point.

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 reservoir or an amount that would cover their payment still exists.
3. While 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. Estates 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 Probate Code (now 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 subject to court approval. Tex. Estates 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. Estates Code § 1204.052.

§ 14.2 Final Account

§ 14.2:1 Time for Filing

When the guardianship of an estate is to be settled and closed, the guardian must prepare and submit an account for final settlement. Tex. Estates Code § 1204.101. 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. Estates Code § 1204.108(b). For a list of situa-

tions 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;
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. Estates Code § 1204.102.

The guardian must verify the account and attach to it vouchers supporting each item not previously reported. 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, and the like 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 already reported to the court. Tex. Estates Code § 1204.102.

Usually, the final item in the account for final settlement is a statement by the guardian that the property still on hand should be delivered to the person or persons entitled to receive it. 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. Estates Code § 1204.108(a).

Form 14-1 in this chapter is an account for final settlement. The account should include a request for attorney's fees for the attorney representing the guardian or the guardian's estate. However, the order approving payment of any appointee's fees by the court must be separate; see form 14-5. Forms 14-12 and 14-13 are a final report for guardian of the person only and the corresponding order. The 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 property of the ward was delivered. Tex. Estates 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 14-7 in this chapter).

1. If a resident ward is age fourteen or older and his address is known, he should be cited by personal service. Tex. Estates 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 should be cited by personal service. Tex. Estates Code § 1204.105(c)(2), (e).
3. If the residence of the ward is unknown, if he is a nonresident of Texas, or if he is deceased and no representative has been appointed and has qualified in Texas, citation should be by publication. However, the court may by written order require citation by posting. Tex. Estates 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 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. Estates Code § 1204.106. If the court approves the account, it will enter an appropriate order (see form 14-4 in this chapter). Tex. Estates Code § 1204.152. Included in that order will be authority for the guardian to deliver any property remaining on hand to the ward or to

any person legally entitled to receive the property and authority to pay any unpaid debts or expenses. Tex. Estates 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. Estates Code § 1204.151.

If there is any property remaining in the estate for the guardian to deliver, he should obtain a signed receipt or other evidence of delivery from each person (see form 14-8). The guardian should then file an application for discharge (see form 14-6). 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. Estates Code §§ 1105.159, 1204.152. See forms 14-9 through 14-11.

§ 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 management trust created for the ward or the county clerk as provided by chapter 1355 of the Estates Code. Tex. Estates 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. Estates 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 separate

action in court in which the guardianship is pending. Tex. Estates Code § 33.004(b).

probate judge will enter an order releasing the cash bond. Tex. Estates Code § 1105.159. See forms 14-10 and 14-11 in this chapter.

§ 14.3 Refund of Bond

§ 14.3:2 Refund of Surety Bond Premium

§ 14.3:1 Refund of Cash Bond

After orders approving the final account and authorizing the payment of all expenses, attorney's fees, and the guardianship fee are entered, 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, and the

A copy of the order granting the discharge also should 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.

[Reserved]

Form 14-1

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

Account for Final Settlement

[Name of guardian], Guardian, the guardian of [person/estate/person and estate] of [name of ward], Ward, an incapacitated person, files this Account for Final Settlement in accordance with section 1204.001 of the Texas Estates Code and shows the Court the following:

1. Guardian was appointed personal representative of the [person/estate/person and 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 [person/estate/person and estate] of Ward should be settled and closed because Ward died on [date].

Or

2. The guardianship of the [person/estate/person and 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 [person/estate/person and estate] of Ward should be settled and closed because Ward was restored to full legal capacity on [date].

Or

2. The guardianship of the [person/estate/person and 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 estate of Ward has become exhausted.

Or

2. The foreseeable income accruing to Ward or to [his/her] estate is so negligible that maintaining the guardianship in force would be burdensome.

Or

2. All the assets of the estate have been placed in a management trust under chapter 1301 of the Texas Estates Code, and the Court has determined that a guardianship for Ward 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.

Or

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 with 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].

5. [No claims against the estate have been presented to Guardian during this accounting period/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]].

6. All property belonging to the estate that has come into 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.

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].

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: **[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 on date of qualification of Guardian:	\$[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 guardian]**, 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]** (see Exhibit **[exhibit number/letter]**)]

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 **[his/her]**

trust as guardian of the [person/estate/person and estate] of Ward and releasing the surety on Guardian's bond from further liability.

Respectfully submitted,

[Name]
Guardian

[Name]
Attorney for Guardian
State Bar No.:
[E-mail 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].”

Continue with the following.

[Name of affiant]
Affiant

SIGNED under oath before me on _____.

Notary Public, State of Texas

Attach exhibit(s).

[Reserved]

Form 14-2

Bank Certificate and Verification of Funds on Deposit
[Permanent Guardianship]

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 guardian], as guardian of the [person/estate/person and estate] of [name of ward].

Account Description	Account Number	Amount
1. Checking		
2. Savings		
3. CDs		
4. Treasury Bonds		
Total		

[Name of officer]

[Title of officer]

[Name and address of financial institution]

[Reserved]

Form 14-3

This form should accompany an itemized statement of fees and expenses.

Affidavit in Support of Attorney's Fees

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

"I am the [attorney for/guardian of] the [person/estate/person and estate] of [**name of ward**]. Attached to this affidavit as Exhibit [**exhibit number/letter**] is an itemized statement of fees and expenses. This statement is true, correct, and complete in every respect, and the attorney's fees requested are reasonable and necessary in [**county**] County, Texas."

[Name of affiant]

Affiant

SIGNED under oath before me on _____.

Notary Public, State of Texas

Attach exhibit(s).

[Reserved]

Form 14-4

[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 [person/estate/person and estate] of [name of ward], an incapacitated person. After examining the account and the vouchers accompanying the account and hearing the evidence in support of the 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 account has been audited and settled by the Court, complies with the law in every respect, and should be approved as filed.
4. All claims, debts, and expenses of this estate are approved and should be paid.
5. There is no further need for a guardianship.
6. 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.

7. There are property taxes still due, and the liability for the unpaid claim will be passed on to the personal representative of this estate.
8. 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 hereby 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 by separate order [name of attorney] is awarded attorney's fees and expenses in the amount of \$[amount], which shall be paid out of the funds belonging to this estate.

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

Form 14-5

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

Order Granting Authority to Pay Attorney's Fees

On [date] the Court considered the Account for Final Settlement of [name of guardian], guardian of the [person/estate/person and estate] of [name of ward], an incapacitated person, for authority to pay legal fees incurred on behalf of the estate. After reviewing the application and supporting affidavit, the Court finds that the estate is indebted to [name] for legal services rendered to the estate from [date] through closing of the estate, incurred on behalf of the estate in the total of \$[amount], and that the fees are necessary and reasonable and should be paid.

IT IS ORDERED that [name of guardian] is authorized to pay the law firm of [name of firm] from the assets of the estate of [name of ward], an incapacitated person, before closing this estate.

SIGNED on _____

JUDGE PRESIDING

APPROVED AS TO FORM:

[Name]
Attorney for Guardian
State Bar No.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

[Reserved]

Form 14-6

[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 [person/estate/person and 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 [his/her] trust, discharging Applicant'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]
Guardian

[Name]

Attorney for Applicant

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

Include attachment(s).

Form 14-7

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 I do hereby 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

[Reserved]

Form 14-8

The Texas Estates Code neither contemplates nor requires that a person receiving distributions from an estate execute a release to the estate or its representative. If the parties to receive the assets agree to provide a release, the guardian can obtain one, but if they refuse, distribution cannot be conditioned on the guardian's receiving a release.

Receipts and Release

The undersigned hereby acknowledges receipt of the following 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. Cash	
4. Jointly Owned Property	
5. 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].

Continue with the following.

This receipt also constitutes a release in full of the estate and all persons acting for and on behalf of the estate, including but not limited to the judge of the probate court, all the officers of the probate court, [name of guardian] as guardian of the [person/estate/person and estate], and [name of guardian]'s surety, with respect to the estate or any of its assets.

SIGNED on _____.

[Name of recipient]

[Address]

[Telephone]

Form 14-9

[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 of the [person/estate/person and estate] of [name of ward]. After reviewing the application and supporting receipts, the Court finds that the Account for Final Settlement has previously been approved; that the 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 guardian], the 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 [name of 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

APPROVED AS TO FORM:

[Name]

Attorney for Guardian

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

Form 14-10

[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 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, the 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.

[Name]

Attorney for Movant

State Bar No.:

[E-mail address]

[Address]

[Telephone]

[Telecopier]

Attach exhibit(s).

Form 14-11

[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], an incapacitated person. The Court finds that—

1. Movant has faithfully performed [his/her] duties as the 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 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

[Reserved]

Form 14-12

[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, files this Final Report on Location, Condition, and Well-Being of Ward for the period [date] through [date] pursuant to section 1163.101 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.:
[E-mail address]
[Address]
[Telephone]
[Telecopier]

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).

Form 14-13

[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. It appears to the Court that the guardianship has terminated and that [name of guardian] has discharged [his/her] 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, is hereby entered of record, and [name of guardian] is discharged as guardian of the person.

SIGNED on _____

JUDGE PRESIDING

[Reserved]

Statutes and Rules Cited

[This index reflects only statutes and rules cited at text sections in the practice notes.]

TEXAS

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Art. V, § 10 10.4:7

Texas Business & Commerce Code

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