ROLES OF AD LITEMS IN GUARDIANSHIP PROCEEDINGS

J. ERIC STOEBNER, *Temple*
Harrell, Stoebner & Villanueva, P.C.

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CHAPTER 3

John Eric Stoebner is a shareholder with the law firm of Harrell, Stoebner & Villanueva, P.C. with offices in Temple. He is a graduate of Texas A&M University in College Station and Baylor Law School in Waco. His areas of practice include real estate, estate planning, probate, guardianships, business transactions, and civil litigation, and he is board certified in Estate Planning and Probate Law by the Texas Board of Legal Specialization. In his free time, he is a tennis player, soccer referee, and Assistant Scoutmaster in Scouts BSA.

TABLE OF CONTENTS

RIGHTS OF ELDERLY AND INCAPACITATED PERSONS. 1

ATTORNEY AD LITEM. 1

SELECTION OF GUARDIAN 4

BOND 4

AD LITEM REPORT. 5

ATTENDANCE AT HEARINGS. 5

TRIAL BY JURY. 5

AAL VS. PRIVATE COUNSEL. 5

GUARDIAN AD LITEM 6

GUARDIANSHIP APPLICATIONS. 6

COURT-INITIATED INVESTIGATIONS. 6

COURT INVESTIGATORS. 6

COURT VISITORS 6

ASSESSING CAPACITY. 6

ALTERNATIVES TO GUARDIANSHIP. 7

PAYMENT OF AD LITEM FEES. 8

MOTION FOR SECURITY FOR COSTS. 10

EXHIBIT “A” 11

EXHIBIT “B” 21

EXHIBIT “C” 23

HEALTH CARE PROVIDER’S CERTIFICATE OF MEDICAL EXAMINATION 25

ROLES OF AD LITEMS IN GUARDIANSHIP PROCEEDINGS

This paper discusses the roles of court-appointed attorneys and other officers under the Guardianship Code, primarily under chapter 1054 of the Texas Estates Code (EC).

RIGHTS OF ELDERLY AND INCAPACITATED PERSONS.

Anyone involved in guardianship proceedings should become familiar with the "Rights of the Elderly" in chapter 102 of the Human Resources Code and the "Bill of Rights for Wards" in EC 1151.351, applicable "except where specifically limited by a court-ordered guardianship or where otherwise lawfully restricted."[1] All parties should remember that the primary purpose of a guardianship proceeding is always to promote and protect the well-being of an alleged incapacitated person, not to win court battles or adjudicate disputes among family members. *See* EC 1001.001.

ATTORNEY AD LITEM.

In a guardianship context, an attorney ad litem (AAL) is defined as an attorney appointed by a court to represent and advocate on behalf of a proposed ward (PW), an incapacitated person, an unborn person, or certain other individuals. EC 1002.002.

In all proceedings for the appointment of a guardian, the court *shall* appoint an AAL to represent the PW's interests, including the PW's expressed wishes. EC 1054.001; 1054.007(c). Appointment of an AAL is also sometimes mandatory in the context of an existing guardianship, such as when a guardian seeks permission to purchase property from the ward's estate (EC 1158.653) or when an application is filed to remove a ward's spouse acting as community administrator (EC 1353.151). As a rule, and in contrast to a guardian ad litem, the AAL's personal opinions about the merits of the guardianship have little relevance in court, unless the PW is unable to express any opinion.

At any time, a probate court *may*, in its discretion, appoint an AAL in any "guardianship proceeding"[2] to represent a ward under an existing guardianship. EC 1054.007; *Guardianship of Alford*, 596 S.W.3d 352, 361 (Tex. App.—Texarkana 2020, no pet.) (affirming AAL's appointment and fees for welfare check on ward upon complaint of possible neglect by guardian).

Once the court appoints an AAL, an attorney-client relationship is established between that attorney and the PW. *Coleson v. Bethan*, 931 S.W.2d 706, 712 (Tex. App.—Fort Worth 1996, no pet.). As a rule, the AAL must defend the rights of his involuntary client with the same vigor and astuteness he would employ in the defense of clients who had expressly employed him for such purpose. *Executors of Tartt's Estate v. Harpold,* 531 S.W.2d 696, 698 (Tex. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.). The AAL must exhaust all remedies available to his client and, if necessary, represent his client's interest on appeal. *Cahill v. Lyda*, 826 S.W.2d 932, 933 (Tex. 1992).

Notwithstanding such admonitions, however, an AAL should distinguish straightforward cases—which are the large majority—from those in which there are bona fide disputes. Otherwise, the court has discretion to disapprove the AAL's requested fees for work deemed unnecessary, or, *in extremis*, to remove the AAL altogether. *See, e.g., Estate of Barnett*, No. 05-22-00538-CV, 2024 WL 260483 at *5 (Tex. App.—Dallas Jan. 24, 2024, no pet. hist.) (affirming trial court's award of $400 as AAL fees and denial of $20,081.22 requested); *Coleson*, 931 S.W.2d at 711-714 (discussing procedures and grounds to remove AAL). *See also* EC 1155.151(a-1) (ad litem fees shall be set in an amount the court considers "reasonable and just"); Tex. Disciplinary R. Prof'l Conduct 1.04 (attorney fees must be reasonable).

The AAL's first act should be to file an answer on behalf of the PW asserting a general denial. This confirms acceptance of the appointment and ensures service with copies of court filings. The author suggests then sending a contact letter to applicant's counsel with a copy of the answer and requesting copies of the pleadings and basic information about the case, including instructions for contacting the PW.[3]

Thereafter, an AAL representing a PW in a guardianship application has several specific duties defined in the Estates Code. The AAL shall interview the PW within a reasonable time before the hearing to appoint a guardian. EC 1054.004. To the extent possible, the AAL shall discuss with the PW: (1) the law and facts of the case; (2) the PW's legal options regarding disposition of the case; (3) the grounds on which guardianship is sought; and (4) whether alternatives to guardianship would meet the needs of the PW and avoid the need for the appointment of a guardian. *Id.* The AAL shall discuss with the PW the AAL's opinion regarding: (1) whether a guardianship is necessary for the PW; and (2) if a guardianship is necessary, the specific powers or duties of the guardian that should be limited if the PW receives supports and services. *Id.* The AAL shall also review (1) the application for guardianship; (2) certificates of current physical, medical, and intellectual examinations; and (3)

[1] *See* Exhibit "A" for a copy of these statutes.

[2] Defined in EC 1002.015. Note that all applications to appoint a guardian are guardianship proceedings, but not all guardianship proceedings are applications to appoint a guardian.

[3] *See* Exhibit "B" for a sample form letter.

all the PW's relevant medical, psychological, and intellectual testing records. *Id.*

In addition to these statutory duties, the AAL should specifically ask the client about their preferences regarding the choice of guardian, if a guardianship is created. *See* EC 1104.002. The AAL should obtain and review the client's existing estate planning documents (especially medical and financial powers of attorney, and any designation of guardian) and financial records showing the client's assets and income. In contested cases, the AAL should interview the client's family members and friends regarding personal relationships, living arrangements, daily routine, and other relevant circumstances.

Other actions taken by an AAL will vary from case to case. Much depends on whether the client can express any preferences about the guardianship proceeding. If not, then the AAL's role, as a practical matter, is to represent the client's best interests and to make recommendations on their behalf, similar to the role of a guardian ad litem (because an AAL is charged "to represent the proposed ward's interests" as well as their expressed preferences).[4] If the client opposes a guardianship, but is obviously incapacitated, the AAL may choose to focus their efforts, and their client's attention, on alternatives to guardianship or on more debatable matters, such as limits on the guardian's authority, or identification of a preferred guardian. If a client ignores advice, is not thinking rationally, or instructs the AAL to take a position that is clearly against their best interests, the AAL may invite the client to testify and thereby "have their day in court", even if it may work against their preferred outcome. On direct examination, the AAL may ask the client tactful but detailed questions relevant to the issue of capacity; then steer the questioning into areas that may be credibly disputed.

In all cases, however, the AAL should ensure that the applicant has given the required notices and has met their burden of proof on the required elements, and that the proposed guardian is qualified and properly bonded.

Required Notices.

- Citation by posting to all interested persons. EC 1051.102.
- Citation by personal service to the PW (if age 12 or older). EC 1051.051; 1051.103.
    - The PW cannot waive personal service. EC 1051.055, .105; *Dyer v. Wall*, 645 S.W.2d 317, 318–19 (Tex. App.—Corpus Christi–Edinburg 1982, no writ).
    - An AAL may not waive service on behalf of a PW, even by answering and appearing in the case on the PW's behalf. EC 1051.055(e); *Ortiz v. Gutierrez*, 792 S.W.2d 118, 119 (Tex. App.—San Antonio 1989, writ dism'd).[5]
    - An order creating a guardianship is **void** (and not merely voidable) for lack of jurisdiction if the PW is not personally served with citation. *See Fairley,* 650 S.W.3d at 388–89 (citing several cases).
    - Personal service should be performed by a sheriff or constable. EC 1051.051(b). Service by private process server is defective, but the defect is not jurisdictional and is waived unless there is an objection to the form of service prior to appearance in the case by the PW or by the AAL on their behalf. *Fairley*, 650 S.W.3d at 387.
- Citation by personal service to, or filed waivers of citation signed by:
    (1) PW's parents (even if the PW is an adult), if the whereabouts of the parents are known or can be reasonably ascertained;
    (2) any court-appointed conservator or person having control of the care and welfare of the PW;
    (3) PW's spouse, if the whereabouts of the spouse are known or can be reasonably ascertained; and
    (4) if not the applicant, the person named in the application to be appointed guardian.

EC 1051.103, -.105.

[4] *See* EC 1054.001.

[5] In a recent case, the Supreme Court indicated in dicta that service on the PW's attorney of record, including an attorney ad litem, will substitute for personal service on the PW, pursuant to sections 1051.051(a) and 1051.055 of the Estates Code. *Guardianship of Fairley*, 650 S.W.3d 372, 387 fn. 9 (Tex. 2022), reh'g denied (Sept. 2, 2022). After this decision, however, the Legislature amended section 1051.055 as follows (new language in italics): "If a party is represented by an attorney of record in a guardianship proceeding, *including a proposed ward who has been personally served with notice of the proceeding and is represented by an attorney ad litem,* a citation or notice required to be served on the party shall be served on that attorney." The Legislature apparently intended to clarify that a PW must be personally served with citation even if an attorney appears on their behalf, confirming the holding in cases such as *Ortiz*, 792 S.W.2d at 119.

- Notice by "qualified delivery method"[6] to:

(1) adult children;
(2) adult siblings;
(3) administrator of nursing home or residential facility where the PW resides;
(4) anyone holding power of attorney for the PW;
(5) a person designated by the PW in a written declaration to serve as guardian[7]; and
(6) each person related by 3rd degree of consanguinity if there is no living spouse, parent, adult sibling, or adult child.

EC 1051.052, -.104.

The consequences for failing to give proper notice can be severe. As previously indicated, a PW must be personally served with citation and cannot waive service, otherwise the court's orders are void *ab initio*. *See Fairley*, 650 S.W.3d at 388–89; *Gauci v. Gauci*, 471 S.W.3d 899, 902-903 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *Guardianship of B.A.G.*, 794 S.W.2d 510, 513 (Tex. App.—Corpus Christi–Edinburg 1990, no writ). The PW's parents, spouse, or conservator, and the proposed guardian, may all waive citation, but must be personally served otherwise. If they are not served and have not waived service, the guardianship is not void but is voidable. *See Guardianship of Guerrero*, 496 S.W.3d 288, 292-293 (Tex. App.—San Antonio 2016, no pet.) (holding spouse of PW entitled to personal service of citation and, after filing answer, to notice of hearing). When personal service on the PW's parents, conservator, or spouse is impossible because their whereabouts are unknown, the AAL should ensure that evidence of the efforts made to locate them is put into the record, and service of a new citation should be made by publication. EC 1051.051(d). If service by mail to adult children is unclaimed or undelivered, then citation on such children should be made by posting. EC 1051.052(g). Failure to give or attempt notice to adult siblings (and living relatives other than parents, spouse, and children), nursing homes, residential facilities, agents holding a power of attorney for the PW, and persons designated as guardians, does not affect the validity of a guardianship. EC 1051.104(c); *Guardianship of V.A.*, 390 S.W.3d 414, 419 (Tex. App.-San Antonio 2012, pet. denied).[8]

Elements for proof by clear and convincing evidence.

(A) The PW is an incapacitated person;[9]
(B) it is in the PW's best interest to have the court appoint a person as the PW's guardian;
(C) the PW's rights or property will be protected by the appointment of a guardian;
(D) alternatives to guardianship that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible; and
(E) supports and services available to the PW that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible.

EC 1101.101(a).

Elements for proof by a preponderance of the evidence.

(A) the court has venue of the case;
(B) the person to be appointed guardian is eligible to act as guardian and is entitled to appointment, or, if no eligible person entitled to appointment applies, the person appointed is a proper person to act as guardian;
(C) if a guardian is appointed for a minor, the guardianship is not created for the primary purpose of enabling the minor to establish residency for enrollment in a school or school district for which the minor is not otherwise eligible for enrollment; and
(D) the PW:

  (i) is totally without capacity as provided by this title to care for himself or herself and to manage his or her property; or
  (ii) lacks the capacity to do some, but not all, of the tasks necessary to care for himself

[6] Defined in EC 1002.0265.
[7] *See* EC ch. 1104.
[8] EC 1051.103 requires personal service of citation to the PW's parents and spouse "if the whereabouts of the [parents and spouse] are known or can be reasonably ascertained." Similarly, section 1051.104 requires service by qualified delivery method to various persons "if their whereabouts are known or can be reasonably ascertained." The statutes are unclear what further notices are required if such a person's whereabouts are unknown and cannot be reasonably ascertained, and the author found no caselaw or other authority addressing the matter. Therefore, the safe course of action is to serve citation by publication (for parents and spouse) or posting (for children), as applicable. Note that section 1051.104(c) does not include adult children in the list of interested persons for whom failure to provide statutory notice does not affect the validity of a guardianship. According to one appellate opinion, however, if service to an adult child is attempted by qualified delivery method, the court is not deprived of jurisdiction and the guardianship is not voidable, even though citation by posting was apparently not made. *Hailey v. Paduh*, No. 04-12-00823-CV, 2014 WL 1871334, at *9-10 (Tex. App.—San Antonio May 7, 2014, no pet.).
[9] *See* "Assessing Capacity", below.

> or herself or to manage his or her property [i.e., partial incapacity].

EC 1101.101(b).

Evidence of incapacity of an adult PW must be supported by a certificate of medical examination or certificate of intellectual disability that confirms the incapacity and identifies a medical reason for it. EC 1101.103, -.104; *Guardianship of Parker*, 275 S.W.3d 623, 629 (Tex. App.—Amarillo 2008, no pet.) (see "Assessing Capacity", below).[10] Furthermore, a determination of incapacity of an adult PW, other than a person who must have a guardian appointed to receive funds due the person from any governmental source, must be evidenced by recurring acts or occurrences in the preceding six months and not by isolated instances of negligence or bad judgment. EC 1101.102. The court may not use age as the sole factor. EC 1101.105. If the PW is not present at a final hearing, the court must make a finding that his or her appearance was not necessary. EC 1101.051(b).

A finding of *partial* incapacity requires further specific findings whether the PW lacks the capacity, or lacks sufficient capacity with supports and services, to make personal decisions regarding residence, voting, operating a motor vehicle, and marriage. EC 1101.101(c).

Selection of Guardian.

The court must appoint a guardian for an incapacitated person other than a minor according to the circumstances and considering the incapacitated person's best interests. EC 1104.101. The AAL should ensure that the court gives "due consideration" to the ward's preference as to choice of guardian (EC 1104.002) and inquire into the qualifications, abilities, and capabilities of the person(s) seeking to be appointed guardian (EC 1101.051).

When selecting a guardian, the court must find that a proposed guardian is not disqualified.[11] EC 1104.351 *et seq*.; *Hill v. Jones*, 773 S.W.2d 55, 57 (Tex. App.—Houston [14th Dist.] 1989, no writ). The court may find a proposed guardian to be disqualified on several grounds, all of which should be explored and evaluated by the AAL. These grounds include inexperience, lack of education, "notoriously bad" conduct (including criminal history),[12] indebtedness to the ward or other adverse financial interest,[13] or any other reasons making the proposed guardian "unsuitable". EC 1104.351 *et seq*. A proposed guardian is disqualified by law if the PW has executed a written declaration to that effect pursuant to EC chapter 1104.

When multiple qualified persons seek appointment as guardian, the ward's spouse is entitled to serve as guardian, or if there is no spouse, the "nearest of kin" is entitled to serve. EC 1104.102. If an applicant is not disqualified and is entitled to serve as guardian in their capacity as spouse or nearest of kin, the court should not consider whether there is someone who may be more capable than the applicant, but only whether the applicant is incapable. *Hill*, 773 S.W.2d at 57; *accord*, *Blackburn v. Gantt*, 561 S.W.2d 269, 273 (Tex. Civ. App. – Houston [1st Dist.] 1978, no writ). The choice of guardian among multiple persons who are equally entitled is made by the trier of fact. *Carney v. Aicklen*, 587 S.W.2d 507, 512 (Tex. App.—Tyler 1979, writ ref'd n.r.e.).

Bond.

As a rule, guardians must be bonded, and the AAL should require and introduce evidence of the ward's assets and their value and make sure the bond is sufficient. Bond is not waivable for a guardian of the estate (except for a corporate or government fiduciary) and is waivable for a guardian of the person only in rare circumstances. EC 1105.101.[14]

For a guardianship of the person, the criteria for setting the type and amount of bond require an inquiry into the guardian's (1) familial relationship to the ward, (2) ties to the community, (3) financial condition, (4) past history of compliance with the court, and (5) reason for any previous denial of a corporate surety bond. EC 1105.102(c). A nominal cash bond (e.g. $100) is permissible for close relatives serving only as guardian of the person.

For a guardianship of the estate, the court must hear evidence of the PW's financial assets, income, debts, and expenses. EC 1105.153. As a rule, the bond must be set in an amount equal to or greater than the value of the ward's non-real estate assets (including all accounts and other personal property) plus the ward's gross income for the succeeding 12-month period. EC 1105.154. For large estates, certain assets can be "frozen" by safekeeping agreements with the asset

[10] See Exhibit "C" for a sample CME form and cover letter to the examining provider.

[11] On this issue, the Guardianship Code uses various terms interchangeably, including "eligible", "entitled", and "proper".

[12] A felony conviction does not automatically disqualify a proposed guardian, as is generally the case for administrators. But it is still a relevant factor and may affect the proposed guardian's ability to obtain a bond.

[13] A person "who has an interest adverse to the proposed ward" lacks standing to request or oppose a guardianship proceeding at all, and their pleadings may be dismissed upon a motion in limine. EC 1055.001.

[14] Bond may be waived for a guardian of the person appointed by the ward's parent in their Will or other written declaration, and the parent waives bond.

depository or custodian to reduce the bond, pursuant to EC 1105.155-.156. A chapter 1301 management trust, with a corporate fiduciary as trustee, may also be considered for large estates.

Ad Litem Report.

Before the final hearing, the AAL should file a brief report confirming performance of their statutory duties and addressing other necessary matters, including the PW's attendance at hearings and the PW's expressed preferences regarding the creation of a guardianship, the scope of the guardianship, and the choice of guardian. Such a report is helpful as notice to applicant's counsel and the court of what issues, if any, are disputed or require attention before the final hearing. The report should avoid an overt expression of a personal opinion that is inconsistent with the client's preferences or instructions.

Attendance at Hearings.

A court generally may not consider an application for the appointment of a guardian by submission.[15] EC 1055.051(a). Further, the PW must be present at a hearing for the appointment of a guardian unless the court, on the record or in the order, determines that a personal appearance is not necessary. EC 1101.051(b). If it is obvious that the PW is totally incapacitated, or the client has no desire to appear in court, the AAL may so indicate in their report and ask the court to waive the client's attendance at hearings. In many cases, a PW would be unable to understand a court hearing or participate meaningfully, or the proceedings might even be upsetting to them.

Trial by jury.

Any party in a guardianship proceeding is entitled to a jury trial on disputed issues, including capacity and the selection of a guardian. EC 1055.052; 1101.052; *Carney*, 587 S.W.2d at 512; *Ulrickson v. Hawkins*, 696 S.W.2d 704, 708 (Tex. App.–-Fort Worth 1985, writ ref'd n.r.e.); *In re Guardianship of Dahl*, 590 S.W.2d 191, 198 (Tex. App.—Amarillo 1979, writ ref'd n.r.e.). Notwithstanding this right, because of the time and expense required for a jury trial, AALs should hesitate to ask for a jury except in unusual cases; otherwise, they can expect a skeptical review of their fee request.

AAL vs. Private Counsel.

Public policy strongly favors a client's freedom to employ a lawyer of his choosing. *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 562 (Tex. 2006). Because a PW's incapacity is never presumed, they retain the presumptive right to retain counsel of their own choice. *See In re Kelm*, 569 S.W.3d 232, 240 (Tex. App.—Houston [1st Dist.] 2018, no pet.). *See also Oldham v. Calderon*, No. 14-95-01426-CV, 1998 WL 104819 at *1 (Tex. App.—Houston [14th Dist.] Mar. 12, 1998, pet. denied) (affirming right of PW to retain counsel even though later found partially incapacitated). If private counsel is retained, the court shall remove an appointed AAL. EC 1054.006(a) & (b).

The PW's capacity to retain counsel can, however, be challenged. On the motion of a party to a guardianship proceeding or on the court's own motion, the court may hold a hearing on the ward's or PW's capacity to retain an attorney. EC 1054.006(c) (effective Sept. 1, 2023). The burden of proof is on the party motioning the court. *Id*. If the court finds by a preponderance of evidence that the ward or PW does not understand the guardianship proceeding or the purpose for which the attorney was retained, the court may appoint an attorney ad litem. *Id*. If a guardianship is granted, and a court finds the ward lacked the capacity to contract at the time private counsel was retained, then the attorney risks not being paid for their work. *Compare Breaux v. Allied Bank,* 699 S.W.2d 599, 602 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.) (holding retained counsel not entitled to payment from ward's estate when ward was under temporary guardianship at time of retention) *with Oldham*, 1998 WL 104819 at *3 (holding retained counsel entitled to payment from ward's estate despite failing to defeat guardianship).

The Bill of Rights for Wards explicitly acknowledges a ward's right to "retain counsel of the ward's choice" to represent him or her before the guardianship court, even after being declared incapacitated. EC 1151.351(b)(17). Despite this right, the court may order that compensation for services provided by a private attorney 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. EC 1202.103.

If the PW has signed a statutory durable POA, the agent has authority to engage, compensate, and discharge an attorney for the principal, under EC 752.101(7), and to defend the principal in litigation, under EC 752.110. *See Price v. Golden*, No. 03-99-00769-CV, 2000 WL 1228681 at *5 (Tex. App.—Austin Aug. 31, 2000, no pet.) (affirming agent's authority to retain counsel for PW prior to appointment of guardian).

[15] An exception applies if the applicant seeking appointment as guardian was appointed conservator of the proposed ward in a suit affecting the parent-child relationship. In such cases, the court may appoint the conservator as guardian without a hearing. EC 1103.002.

GUARDIAN AD LITEM.

A guardian ad litem (GAL) is a person appointed by a court to represent the best interests of a ward or PW in a guardianship proceeding. EC 1002.013; 1054.051. Unlike the AAL, the GAL has no client, and no attorney-client relationship with the PW exists. *See Am. Gen. Fire & Cas. Co. v. Vandewater*, 907 S.W.2d 491, 493 fn. 2 (Tex. 1995); *Byrd v. Woodruff*, 891 S.W.2d 689, 710 (Tex. App.-Dallas 1994, writ dism'd). The GAL need not even be a licensed attorney at all. In further contrast to an AAL, the GAL states their *own* opinions to the court and is *not* necessarily an advocate for the person's expressed wishes.

A GAL appointed under the Guardianship Code is not liable for civil damages arising from a recommendation or an opinion given in the capacity of guardian ad litem, unless the opinion or recommendation is willfully wrongful, reckless, malicious, grossly negligent, or given in bad faith. EC 1054.056.

Guardianship Applications.

In the context of a guardianship application, a GAL is typically appointed in highly contested proceedings to advise and guide the court. The decision to appoint a GAL in this situation is at the court's discretion. *Guardianship of Murray*, No. 13-19-00646-CV, 2021 WL 3669337, at *3 (Tex. App.—Corpus Christi–Edinburg Aug. 19, 2021, pet. denied). The statutory duties of the GAL are to (1) investigate whether a guardianship is necessary for the PW; and (2) evaluate alternatives to guardianship and supports and services available to the PW that would avoid the need for appointment of a guardian. EC 1054.054(c). The information gathered by the GAL is subject to examination by the court, typically in a written report containing the GAL's findings and recommendations. *See* EC 1054.054(d).

Court-Initiated Investigations.

A GAL is also appointed by the court *sua sponte* when the court receives a credible report that a person might need a guardian. Under chapter 1102, the court shall appoint a guardian ad litem when there is probable cause to believe that a person domiciled or found in the county in which the court is located is an incapacitated person, and the person does not have a guardian in this state. EC 1102.001(a). To establish probable cause, the court may require an informant to submit a sworn statement ("information letter") or a certificate of medical examination. EC 1102.002-.003. The guardian ad litem investigates the person's conditions and circumstances to determine whether: (1) the person is an incapacitated person; and (2) a guardianship is necessary. *Id*. If the GAL finds a need for a guardianship, he or she may file an application for the appointment of a guardian of the person, estate, or both. EC 1102.004.

COURT INVESTIGATORS.

Upon the filing of a guardianship application, a statutory probate court must appoint a court investigator to investigate the circumstances alleged in the application to determine whether a less restrictive alternative to guardianship is appropriate. [16] EC 1054.151. The investigator must file a sworn report of their findings and recommendations at least 10 days before the final hearing. EC 1054.153. In addition to this duty, a court investigator supervises the court visitor program (see below) and acts as the chief visitor, and investigates a complaint received from any person about a guardianship. EC 1054.152.

COURT VISITORS.

After a guardianship is created, a statutory probate court is required to send a court visitor to check on the ward from time to time, typically once per year, to assess their health and living conditions and to recommend any needed changes to the guardianship. EC 1054.101 *et seq*. The court investigator acts as chief visitor, while other court visitors are usually volunteers. EC 1054.105(a); 1054.152(1). The visitor must file a sworn report of their findings and recommendations that includes the contents required under EC 1054.104.

ASSESSING CAPACITY.

In a guardianship proceeding, "incapacitated person" means a minor child or 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. EC 1002.017.[17] Incapacity is never presumed but must be proved by clear and convincing evidence. EC 1101.101; *Kelm*, 569 S.W.3d at 240. Levels of incapacity can vary over time. *Dubree v. Blackwell*, 67 S.W.3d 286, 289 (Tex. App.—Amarillo 2001, no writ.).

A helpful and succinct guide to assessment of capacity is contained in *The Ad Litem Manual*, Section IV-N of *The Ad Litem Manual* by Steve M. King, available on the Tarrant County Probate Court No. 1 website.

[16] The requirement of a court investigator (in statutory probate courts), and the option to appoint a GAL, is a further reminder that the court's role in a guardianship proceeding is more than simply to act as a referee between adversarial parties.

[17] The term also includes a person who must have a guardian appointed for the person to receive funds due the person from a governmental source. EC 1002.017.

In most guardianship cases, it is not difficult to establish a PW's "substantial" inability to manage their own affairs. Consider whether the person is able to care for their own health, safety, and welfare, and to manage their money, property, and legal business, *entirely on their own, without assistance from anyone.* If not, then the person is probably incapacitated, at least partially. But the inability must (at least in part) be caused by a medically diagnosed "physical or mental condition" and not some other factor, such as lack of experience or education, or an eccentric personality. *See* EC 1002.017. Furthermore, incapacity by itself is not sufficient to justify a guardianship, and alternative ways to manage the incapacity must be found unfeasible by clear and convincing evidence. EC 1101.101(a).

A court may not create a guardianship for an adult unless it is presented with a certificate of medical examination (CME) or certificate of intellectual disability (CID). EC 1101.103, -.104. A CME or CID may be completed only by a physician (holding an M.D. or D.O. degree) licensed in Texas, or by an advanced practice registered nurse working under physician supervision. It may also be completed by a psychologist licensed by the Texas Health and Human Services Commission, if the PW's incapacity results from a mental condition.[18] A CME must be dated not earlier than the 120th day before the date the guardianship application is filed and must be based on an examination of the PW that was performed not earlier than the 120th day before the date the guardianship application is filed. EC 1101.103(a). A CID must be based on an examination that was not earlier than 24 months before the hearing date, or on an endorsement dated within the previous 24 months of an earlier determination of an intellectual disability. EC 1101.104. Because it is a statutory requirement, a CME/CID is admissible over a hearsay objection. *Parker*, 275 S.W.3d at 629. Further, it may be considered as evidence if filed with the court, even if not formally admitted into evidence. *Id.* Although submission of a professional opinion of incapacity is a prerequisite to creation of a guardianship, it is not conclusive, and its evidentiary weight is for the trier of fact to decide. *See* EC 1101.053(b) & (c). An expert opinion is only an *opinion*, no more or less. Incapacity must still be proved to the fact-finder by clear and convincing evidence. EC 1101.101.

ALTERNATIVES TO GUARDIANSHIP.

One of the more important duties of any court-appointed attorney or officer in a guardianship proceeding is to evaluate potential alternatives to guardianship. Many of them are listed in sections 1002.0015 and 1002.031 of the Estates Code. A thorough discussion of alternatives to guardianship, including supports and services, is outside the scope of this paper. Judge King provides a comprehensive list of alternatives to guardianship, and examples of supports and services, in Appendix E & F *of The Ad Litem Manual*. *See also* Brenda Hull Thompson & Gregory W. Sampson, "Guardianship Alternatives and Supports and Services for Wards", Advanced Guardianship Law Course 2016.

Note that "supports and services" do *not* include resources and assistance that enable another person to make personal decisions *for* a proposed ward. *Guardianship of A.E.*, 552 S.W.3d 873, 883 (Tex. App.—Fort Worth 2018, no pet.) Therefore, if a person is substantially unable to make adequate decisions even with assistance, then supports and services are not a feasible alternative to a guardianship. *See id.* at 883-889 (analyzing factors for evaluating alternatives to guardianship and reversing trial court's finding that alternatives were feasible).

To help test and articulate the need for a guardianship, ask what the applicant would do for the PW if appointed guardian that the applicant, or the PW, cannot do already. Then ask whether those same things can be accomplished in some way without a guardianship; and if not, why not.

If a PW has minimal assets and lives entirely on Social Security or veterans' benefits, then appointment of a representative payee or VA fiduciary can avoid the need for a guardianship of the estate.

If a PW is married, then community administration by the spouse, pursuant to EC 1353.001 *et seq*., can also be an effective alternative to a guardianship of the estate. But if an incapacitated person owns separate property, then a guardianship of the estate, or a financial power of attorney, is required because community administration cannot be used to manage separate property. If community administration will be used, it can be helpful to request in the final order (1) a fact finding that all property owned by the ward, including property owned solely in the ward's name, is community property, and (b) a specific confirmation of the spouse's powers to manage all such property pursuant to chapter 1353 of the Estates Code. Including such provisions may prevent difficulties in dealing with third parties who question the community spouse's power to administer assets titled solely in the ward's name.

Generally, the most practical alternative to a guardianship, and often the only *effective* alternative, is a medical or financial power of attorney (POA). But the AAL should consider the limitations of these instruments and whether they will suffice to protect the

[18] The term "mental condition" is not defined, but presumably includes both psychiatric and neurological conditions, including dementia.

client's interests and welfare. A principal does not lose or surrender any rights or powers by executing a POA; they merely *delegate* such powers to an agent. Consequently, POAs are "fragile" in the sense that the principal can make them effectively useless at any time, by ignoring the agent's advice, countermanding the agent's instructions to third parties (such as physicians or bank officers), or by revoking the instruments altogether.[19] Additionally, title companies and financial institutions are often loath to rely on a POA without direct confirmation of its validity by the principal. As a remedy, sections 751.201 *et seq*. of the Estates Code were enacted to make it more difficult for third parties to refuse acceptance of a POA, and, in the author's experience, the remedies provided therein are usually effective.

If the PW has not already signed POAs, it may still be possible to do so. In this context, it is important to note the distinction between *incapacity* as defined in the Guardianship Code, which is required to grant a guardianship, and *capacity to contract* or *testamentary capacity*, which are required to sign valid powers of attorney and other estate planning documents. The significance is that a person might be incapacitated as defined in the Guardianship Code but still have sufficient capacity to sign powers of attorney, by which a guardianship might be avoidable. *See Evans v. Allen*, 358 S.W.3d 358, 368 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (holding a testator may have testamentary capacity to sign valid Will even when under a guardianship); *Bach v. Hudson*, 596 S.W.2d 673, 675 (Tex. Civ. App.—Corpus Christi 1980, no writ) (noting legal standards for testamentary and contractual capacity are substantially the same). If POAs appear to be a feasible alternative to guardianship, it is helpful to obtain and include a fact finding in the final order that the PW has present legal capacity to sign POAs or had such capacity at the time existing POAs were signed.

PAYMENT OF AD LITEM FEES.

Prudent AALs and GALs should know the applicable law regarding payment of their fees to avoid unintended pro bono work, especially in cases with any seriously contested issues.

Section 1155.151 of the Estates Code provides:

> (a) In a guardianship proceeding, the court costs of the proceeding, including the costs described by Subsection (a-1), shall, except as provided by Subsection (c), be paid as follows, and the court shall issue the judgment accordingly:
>
> (1) out of the guardianship estate;
> (2) out of the management trust, if a management trust has been created for the benefit of the ward under Chapter 1301 and the court determines it is in the ward's best interest;
> (3) by the party to the proceeding who incurred the costs, unless that party filed, on the party's own behalf, an affidavit of inability to pay the costs under Rule 145, Texas Rules of Civil Procedure, that shows the party is unable to afford the costs, if:
>
> (A) there is no guardianship estate or no management trust has been created for the ward's benefit; or
> (B) the assets of the guardianship estate or management trust, as appropriate, are insufficient to pay the costs; or
>
> (4) out of the county treasury if:
>
> (A) there is no guardianship estate or management trust or the assets of the guardianship estate or management trust, as appropriate, are insufficient to pay the costs; and
> (B) the party to the proceeding who incurred the costs filed, on the party's own behalf, an affidavit of inability to pay the costs under Rule 145, Texas Rules of Civil Procedure, that shows the party is unable to afford the costs.
>
> (a-1) In a guardianship proceeding, the cost of any guardians ad litem, attorneys ad litem, court visitors, mental health professionals, and interpreters appointed under this title shall be set in an amount the court considers equitable and just.
>
> (a-2) Notwithstanding any other law requiring the payment of court costs in a guardianship proceeding, the following are not required to pay court costs on the filing of or during a guardianship proceeding:

[19] By statute, a medical power of attorney can be revoked at any time, even after the principal has been declared incapacitated. Health & Safety Code sec. 166.155(a). The author is unaware of any comparable statute with respect to durable financial powers of attorney, but there is no apparent reason why the same policy should not apply. The Bill of Rights of Wards states that a ward retains the right "to self-determination in the substantial maintenance, disposition, and management of real and personal property" and "to exercise full control of all aspects of life not specifically granted by the court to a guardian". EC 1151.351.

(1) an attorney ad litem;
(2) a guardian ad litem;
(3) a person or entity who files an affidavit of inability to pay the costs under Rule 145, Texas Rules of Civil Procedure, that shows the person or entity is unable to afford the costs;
(4) a nonprofit guardianship program;
(5) a governmental entity; and
(6) a government agency or nonprofit agency providing guardianship services.

(b) The costs attributable to the services of a person described by Subsection (a-1) shall be paid under this section at any time after the commencement of the proceeding as ordered by the court.

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

(d) If a guardianship of the estate or management trust under Chapter 1301 is created, a person or entity who paid any costs on the filing of or during the proceeding is entitled to be reimbursed out of assets of the guardianship estate or management trust, as appropriate, for the costs if:

(1) the assets of the estate or trust, as appropriate, are sufficient to cover the reimbursement of the costs; and
(2) the person or entity has not been ordered by the court to pay the costs as all or part of the payment of court costs under Subsection (c).

(e) If at any time after a guardianship of the estate or management trust under Chapter 1301 is created there are sufficient assets of the estate or trust, as appropriate, to pay the amount of any of the costs exempt from payment under Subsection (a-2), the court shall require the guardian to pay out of the guardianship estate or management trust, as appropriate, to the court clerk for deposit in the county treasury the amount of any of those costs.

(f) To the extent that this section conflicts with the Texas Rules of Civil Procedure or other rules, this section controls.

Fees and expenses of the attorney ad litem and guardian ad litem are set in an amount the court considers equitable and just, are taxed as costs of court, and the court shall issue the judgment accordingly. EC 1054.007(b); 1054.055(a). The amount of ad litem fees is set at the court's discretion. *Garcia v. Martinez*, 988 S.W.2d 219, 222 (Tex. 1999). A trial court abuses its discretion when it acts without reference to any guiding rules and principles. *Id.* The amount of attorney fees awarded must be supported by sufficient evidence. *Goodson v. Castellanos*, 214 S.W.3d 741, 758–59 (Tex. App.—Austin 2007, pet. denied). In determining the fee amount, the court should apply eight factors: (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. *Garcia*, 988 S.W.2d at 222.

Section 1155.151(a)(1) provides that the ward must pay all court costs, including ad litem fees, "out of the guardianship estate". EC 1155.151(d), (e). This clearly includes a ward for whom a guardian of the estate is appointed.[20] It is also clear that the PW does not pay the *applicant's* attorney fees if no guardianship is created. EC 1155.054(a); *In re Guardianship of Whitt*, 407 S.W.3d 495, 500 (Tex. App.—Houston [14th Dist.] 2013, no pet.). But who pays the ad litem fees (and other court costs) if a guardianship of the person only is created, or no guardianship is created at all?[21] It may be argued that if no guardianship of the estate is created,

[20] Unless there is a finding that a party to a proceeding acted in bad faith or without just cause, in which case that party can be ordered to pay the costs. EC 1155.151(c).

[21] Cases applying the relevant provisions of the Probate Code held that the PW must always pay the ad litem fees

then there is no "guardianship estate" from which to pay the court costs. EC 1155.151(a)(1), (d), (e). But section 1155.054 allows payment of an applicant's attorney fees "from the ward's estate" upon creation of "a guardianship", without distinction between a guardianship of the person or estate. EC 1155.054(a), (b). *See also* EC 1155.101 ("A guardian is entitled to reimbursement from the guardianship estate for all necessary and reasonable expenses … including reasonable attorney's fees"). There is no apparent reason why an applicant's attorney fees, but not ad litem fees and other court costs, should be paid by a ward under a guardianship of the person only. If no guardianship at all is created, then the EC would appear to require the applicant to pay the AAL's fees.[22] But a GAL appointed pursuant to a court-initiated investigation under chapter 1102 may have their fees paid from "the PW's estate" even if no guardianship is created at all. EC 1102.005.

MOTION FOR SECURITY FOR COSTS.

Unless and until the Legislature or the appellate courts provide clarification, an AAL, GAL, or other court officer can avoid being put into the position of a judgment creditor (whether against the applicant or the PW) for their fees by filing a motion to require the applicant(s) to provide security for the probable costs of the proceeding. EC 1053.052. The security is typically cash deposited with the court clerk but may also be in the form of a bond. Tex. R. Civ. Proc. 146, 148. Failure to pay the security when ordered may result in dismissal of a party's pleadings. *See Ridge v. Ridge*, 658 S.W.3d 427, 437 (Tex. App.—Houston [14th Dist.] 2022, no pet.); Tex. R. Civ. P. 143. Additionally, an ad litem may seek payment of their fees and costs "at any time" during the pendency of a case, pursuant to section 1155.151(b), and need not wait until the conclusion of the case to be paid.

and other court costs. *See In re Guardianship of Soberanes*, 100 S.W.3d 405, 408 (Tex. App.—San Antonio 2002, no pet.) (holding ward must pay ad litem fees upon termination of temporary guardianship of person only); *Overman v. Baker*, 26 S.W.3d 506, 513 (Tex. App.—Tyler 2000, no pet.) (holding PW, not applicant, required to pay ad litem fees incurred in unsuccessful guardianship application). These cases, however, applied section 665A of the Probate Code, which differs substantially from its updated counterpart in section 1155.151.

[22] *But see Overman,* 26 S.W.3d at 513.

EXHIBIT "A"

HUMAN RESOURCES CODE

TITLE 6. SERVICES FOR THE ELDERLY

CHAPTER 102. RIGHTS OF THE ELDERLY

Sec. 102.001. DEFINITIONS. In this chapter:

(1) "Convalescent and nursing home" means an institution licensed by the Department of Aging and Disability Services under Chapter 242, Health and Safety Code.

(2) "Home health services" means the provision of health service for pay or other consideration in a patient's residence regulated under Chapter 142, Health and Safety Code.

(3) "Alternate care" means services provided within an elderly individual's own home, neighborhood, or community, including:

(A) day care;

(B) foster care;

(C) alternative living plans, including personal care services; and

(D) supportive living services, including attendant care, residential repair, or emergency response services.

(4) "Person providing services" means an individual, corporation, association, partnership, or other private or public entity providing convalescent and nursing home services, home health services, or alternate care services.

(5) "Elderly individual" means an individual 60 years of age or older.

Added by Acts 1983, 68th Leg., p. 5159, ch. 936, Sec. 1, eff. Sept. 1, 1983. Amended by Acts 1985, 69th Leg., ch. 264, Sec. 25, eff. Aug. 26, 1985; Acts 1991, 72nd Leg., ch. 14, Sec. 284(20), (30), eff. Sept. 1, 1991; Acts 1995, 74th Leg., ch. 76, Sec. 8.101, eff. Sept. 1, 1995; Acts 1997, 75th Leg., ch. 475, Sec. 1, eff. Sept. 1, 1997.

Amended by:

Acts 2015, 84th Leg., R.S., Ch. 1 (S.B. 219), Sec. 4.362, eff. April 2, 2015.

Sec. 102.002. PROHIBITION. (a) A person providing services to the elderly may not deny an elderly individual a right guaranteed by this chapter.

(b) Each agency that licenses, registers, or certifies a person providing services shall require the person to implement and enforce this chapter. A violation of this chapter is grounds for suspension or revocation of the license, registration, or certification of a person providing services.

Added by Acts 1983, 68th Leg., p. 5159, ch. 936, Sec. 1, eff. Sept. 1, 1983. Amended by Acts 1985, 69th Leg., ch. 264, Sec. 26, eff. Aug. 26, 1985; Acts 1997, 75th Leg., ch. 475, Sec. 1, eff. Sept. 1, 1997.

Sec. 102.003. RIGHTS OF THE ELDERLY. (a) An elderly individual has all the rights, benefits, responsibilities, and privileges granted by the constitution and laws of this state and the United States, except where lawfully restricted. The elderly individual has the right to be free of interference, coercion, discrimination, and reprisal in exercising these civil rights.

(b) An elderly individual has the right to be treated with dignity and respect for the personal integrity of the individual, without regard to race, religion, national origin, sex, age, disability, marital status, or source of payment. This means that the elderly individual:

(1) has the right to make the individual's own choices regarding the individual's personal affairs, care, benefits, and services;

(2) has the right to be free from abuse, neglect, and exploitation; and

(3) if protective measures are required, has the right to designate a guardian or representative to ensure the right to quality stewardship of the individual's affairs.

(c) 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. A person providing services may use physical or chemical restraints only if the use is authorized in writing by a physician or the use is necessary in an emergency to protect the elderly individual or others from injury. A physician's written authorization for the use of restraints must specify the circumstances under which the restraints may be used and the duration for which the restraints may be used. Except in an emergency, restraints may only be administered by qualified medical personnel.

(d) An elderly individual with an intellectual disability who has a court-appointed guardian of the person may participate in a behavior modification program involving use of restraints or adverse stimuli only with the informed consent of the guardian.

(e) An elderly individual may not be prohibited from communicating in the individual's native language with other individuals or employees for the purpose of acquiring or providing any type of treatment, care, or services.

(f) An elderly individual may complain about the individual's care or treatment. The complaint may be made anonymously or communicated by a person designated by the elderly individual. The person providing service shall promptly respond to resolve the complaint. The person providing services may not discriminate or take other punitive action against an elderly individual who makes a complaint.

(g) An elderly individual is entitled to privacy while attending to personal needs and a private place for receiving visitors or associating with other individuals unless providing privacy would infringe on the rights of other individuals. This right applies to medical treatment, written communications, telephone conversations, meeting with family, and access to resident councils. An elderly person may send and receive unopened mail, and the person providing services shall ensure that the individual's mail is sent and delivered promptly. If an elderly individual is married and the spouse is receiving similar services, the couple may share a room.

(h) An elderly individual may participate in activities of social, religious, or community groups unless the participation interferes with the rights of other persons.

(i) An elderly individual may manage the individual's personal financial affairs. The elderly individual may authorize in writing another person to manage the individual's financial affairs. The elderly individual may choose the manner of financial management, which may include management through or under a money management program, a representative payee program, a financial power of attorney, a trust, or a similar method, and the individual may choose the least restrictive of these methods. A person designated to manage an elderly individual's financial affairs shall do so in accordance with each applicable program policy, law, or rule. On request of the elderly individual or the individual's representative, the person designated to manage the elderly individual's financial affairs shall make available the related financial records and provide an accounting relating to the financial management. An elderly individual's designation of another person to manage the individual's financial affairs does not affect the individual's ability to exercise another right described by this chapter. If an elderly individual is

unable to designate another person to manage the individual's financial affairs and a guardian is designated by a court, the guardian shall manage the individual's financial affairs in accordance with the Estates Code and other applicable laws.

(j) An elderly individual is entitled to access to the individual's personal and clinical records. These records are confidential and may not be released without the elderly individual's consent, except the records may be released:

(1) to another person providing services at the time the elderly individual is transferred; or

(2) if the release is required by another law.

(k) A person providing services shall fully inform an elderly individual, in language that the individual can understand, of the individual's total medical condition and shall notify the individual whenever there is a significant change in the person's medical condition.

(l) An elderly individual may choose and retain a personal physician and is entitled to be fully informed in advance about treatment or care that may affect the individual's well-being.

(m) An elderly individual may participate in an individual plan of care that describes the individual's medical, nursing, and psychological needs and how the needs will be met.

(n) An elderly individual may refuse medical treatment after the elderly individual:

(1) is advised by the person providing services of the possible consequences of refusing treatment; and

(2) acknowledges that the individual clearly understands the consequences of refusing treatment.

(o) An elderly individual may retain and use personal possessions, including clothing and furnishings, as space permits. The number of personal possessions may be limited for the health and safety of other individuals.

(p) An elderly individual may refuse to perform services for the person providing services.

(q) Not later than the 30th day after the date the elderly individual is admitted for service, a person providing services shall inform the individual:

(1) whether the individual is entitled to benefits under Medicare or Medicaid; and

(2) which items and services are covered by these benefits, including items or services for which the elderly individual may not be charged.

(r) A person providing services may not transfer or discharge an elderly individual unless:

(1) the transfer is for the elderly individual's welfare, and the individual's needs cannot be met by the person providing services;

(2) the elderly individual's health is improved sufficiently so that services are no longer needed;

(3) the elderly individual's health and safety or the health and safety of another individual would be endangered if the transfer or discharge was not made;

(4) the person providing services ceases to operate or to participate in the program that reimburses the person providing services for the elderly individual's treatment or care; or

(5) the elderly individual fails, after reasonable and appropriate notices, to pay for services.

(s) Except in an emergency, a person providing services may not transfer or discharge an elderly individual from a residential facility until the 30th day after the date the person providing services provides written notice to the elderly individual, the individual's legal representative, or a member of the individual's family stating:

(1) that the person providing services intends to transfer or to discharge the elderly individual;

(2) the reason for the transfer or discharge listed in Subsection (r);

(3) the effective date of the transfer or discharge;

(4) if the individual is to be transferred, the location to which the individual will be transferred; and

(5) the individual's right to appeal the action and the person to whom the appeal should be directed.

(t) An elderly individual may:

(1) make a living will by executing a directive under Subchapter B, Chapter 166, Health and Safety Code;

(2) execute a medical power of attorney under Subchapter D, Chapter 166, Health and Safety Code; or

(3) designate a guardian in advance of need to make decisions regarding the individual's health care should the individual become incapacitated.

Added by Acts 1983, 68th Leg., p. 5159, ch. 936, Sec. 1, eff. Sept. 1, 1983.
Amended by Acts 1997, 75th Leg., ch. 475, Sec. 1, eff. Sept. 1, 1997.
Amended by:

Acts 2015, 84th Leg., R.S., Ch. 1 (S.B. 219), Sec. 4.363, eff. April 2, 2015.

Sec. 102.004. LIST OF RIGHTS. (a) A person providing services shall provide each elderly individual with a written list of the individual's rights and responsibilities, including each provision of Section 102.003, before providing services or as soon after providing services as possible, and shall post the list in a conspicuous location.

(b) A person providing services must inform an elderly individual of changes or revisions in the list.

Added by Acts 1983, 68th Leg., p. 5159, ch. 936, Sec. 1, eff. Sept. 1, 1983. Amended by Acts 1997, 75th Leg., ch. 475, Sec. 1, eff. Sept. 1, 1997.

Sec. 102.005. RIGHTS CUMULATIVE. The rights described in this chapter are cumulative of other rights or remedies to which an elderly individual may be entitled under law.

Added by Acts 1997, 75th Leg., ch. 475, Sec. 1, eff. Sept. 1, 1997.

ESTATES CODE

TITLE 3. GUARDIANSHIP AND RELATED PROCEDURES

SUBTITLE E. ADMINISTRATION OF GUARDIANSHIP

CHAPTER 1151. RIGHTS, POWERS, AND DUTIES UNDER GUARDIANSHIP

SUBCHAPTER A. RIGHTS, POWERS, AND DUTIES IN GENERAL

[…]

Sec. 1151.351. BILL OF RIGHTS FOR WARDS. (a) A ward has all the rights, benefits, responsibilities, and privileges granted by the constitution and laws of this state and the United States, except where specifically limited by a court-ordered guardianship or where otherwise lawfully restricted.

(b) Unless limited by a court or otherwise restricted by law, a ward is authorized to the following:

(1) to have a copy of the guardianship order and letters of guardianship and contact information for the probate court that issued the order and letters;

(2) to have a guardianship that encourages the development or maintenance of maximum self-reliance and independence in the ward with the eventual goal, if possible, of self-sufficiency;

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

(4) to reside and receive support services in the most integrated setting, including home-based or other community-based settings, as required by Title II of the Americans with Disabilities Act (42 U.S.C. Section 12131 et seq.);

(5) to consideration of the ward’s current and previously stated personal preferences, desires, medical and psychiatric treatment preferences, religious beliefs, living arrangements, and other preferences and opinions;

(6) to financial self-determination for all public benefits after essential living expenses and health needs are met and to have access to a monthly personal allowance;

(7) to receive timely and appropriate health care and medical treatment that does not violate the ward’s rights granted by the constitution and laws of this state and the United States;

(8) to exercise full control of all aspects of life not specifically granted by the court to the guardian;

(9) to control the ward's personal environment based on the ward's preferences;

(10) to complain or raise concerns regarding the guardian or guardianship to the court, including living arrangements, retaliation by the guardian, conflicts of interest between the guardian and service providers, or a violation of any rights under this section;

(11) to receive notice in the ward's native language, or preferred mode of communication, and in a manner accessible to the ward, of a court proceeding to continue, modify, or terminate the guardianship and the opportunity to appear before the court to express the ward's preferences and concerns regarding whether the guardianship should be continued, modified, or terminated;

(12) to have a court investigator or guardian ad litem appointed by the court to investigate a complaint received by the court from the ward or any person about the guardianship;

(13) to participate in social, religious, and recreational activities, training, employment, education, habilitation, and rehabilitation of the ward's choice in the most integrated setting;

(14) to self-determination in the substantial maintenance, disposition, and management of real and personal property after essential living expenses and health needs are met, including the right to receive notice and object about the substantial maintenance, disposition, or management of clothing, furniture, vehicles, and other personal effects;

(15) to personal privacy and confidentiality in personal matters, subject to state and federal law;

(16) to unimpeded, private, and uncensored communication and visitation with persons of the ward's choice, except that if the guardian determines that certain communication or visitation causes substantial harm to the ward:

(A) the guardian may limit, supervise, or restrict communication or visitation, but only to the extent necessary to protect the ward from substantial harm; and

(B) the ward may request a hearing to remove any restrictions on communication or visitation imposed by the guardian under Paragraph (A);

(17) to petition the court and retain counsel of the ward's choice who holds a certificate required by Subchapter E, Chapter 1054, to represent the ward's interest for capacity restoration, modification of the guardianship, the appointment of a different guardian, or for other

appropriate relief under this subchapter, including a transition to a supported decision-making agreement, except as limited by Section 1054.006;

(18) to vote in a public election, marry, and retain a license to operate a motor vehicle, unless restricted by the court;

(19) to personal visits from the guardian or the guardian's designee at least once every three months, but more often, if necessary, unless the court orders otherwise;

(20) to be informed of the name, address, phone number, and purpose of Disability Rights Texas, an organization whose mission is to protect the rights of, and advocate for, persons with disabilities, and to communicate and meet with representatives of that organization;

(21) to be informed of the name, address, phone number, and purpose of an independent living center, an area agency on aging, an aging and disability resource center, and the local mental health and intellectual and developmental disability center, and to communicate and meet with representatives from these agencies and organizations;

(22) to be informed of the name, address, phone number, and purpose of the Judicial Branch Certification Commission and the procedure for filing a complaint against a certified guardian;

(23) to contact the Department of Family and Protective Services to report abuse, neglect, exploitation, or violation of personal rights without fear of punishment, interference, coercion, or retaliation;

(24) to have the guardian, on appointment and on annual renewal of the guardianship, explain the rights delineated in this subsection in the ward's native language, or preferred mode of communication, and in a manner accessible to the ward;

(25) to make decisions related to sexual assault crisis services, including consenting to a forensic medical examination and treatment, authorizing the collection of forensic evidence, consenting to the release of evidence contained in an evidence collection kit and disclosure of related confidential information, and receiving counseling and other support services; and

(26) to have private communications with the ward's physicians or other medical professionals, unless the court, after a hearing requested by the ward's guardian, orders the private communications to be limited due to:

(A) the risk of substantial harm to the ward; or

(B) the communications being unduly burdensome to the physician or medical professional.

(c) This section does not supersede or abrogate other remedies existing in law.

Added by Acts 2015, 84th Leg., R.S., Ch. 1225 (S.B. 1882), Sec. 1, eff. June 19, 2015.

Amended by:

Acts 2019, 86th Leg., R.S., Ch. 1329 (H.B. 4531), Sec. 6, eff. September 1, 2019.

Acts 2021, 87th Leg., R.S., Ch. 521 (S.B. 626), Sec. 32, eff. September 1, 2021.

Acts 2023, 88th Leg., R.S., Ch. 939 (S.B. 1624), Sec. 9, eff. September 1, 2023.

EXHIBIT "B"

DATE

Mr./Ms. Opposing Counsel
Email: _____

Re: Cause No. _____; Guardianship of _____

Dear Counsel:

I have been appointed attorney ad litem in the above-referenced matter. Attached is a copy of my answer. At your convenience, please send me the following documents and information to assist in my investigation and representation:

- the Application and any other pleadings and documents filed with the court
- certificate of medical examination
- citation return for the proposed ward
- citation returns, waivers, or other proof of notice to all interested parties
- any power of attorney or designation of guardian signed by the proposed ward
- if requesting guardianship of estate: documentation of estate assets and income
- designation of resident agent (if applicable)
- contact information to schedule visit with proposed ward
- proof that the Applicant has obtained guardianship certification from the JBCC
- your proposed order appointing guardian, when available
- any other relevant information

I look forward to working with you on this case.

Sincerely,

J. Eric Stoebner
eric@templelawoffice.com

EXHIBIT "C"

Dear Client:

Attached to this letter is a "Health Care Provider's Certificate of Medical Examination" which you should forward to the proposed ward's health-care provider for completion.

- The form may be completed by a licensed Texas **physician** (or by an advanced practice registered nurse [APRN] working under physician supervision). A physician will have a Doctor of Medicine (MD) degree or a Doctor of Osteopathic Medicine (DO) degree.

- The form may also be completed by a **psychologist** who is licensed by the Texas Health and Human Services Commission, if the proposed ward's incapacity results from a mental condition, such as dementia, Alzheimer's, or a psychiatric disorder.

- The form may not be completed by a health care provider who is not a physician, APRN, or psychologist.

- The certificate is valid only if based on an examination that is **recent**. Therefore, if the proposed ward has not seen the provider within the last three months, you should schedule another appointment for the proposed ward with the provider and get the certificate completed after the new appointment.

    - Exception: If the proposed ward has an intellectual disability, and the provider completes the information required in the box on page 3 of the certificate, then the examination must have occurred within the last 18 months.

- If the proposed ward has been treated by multiple providers in the last three months, any of those providers may complete the form.

- The exact manner, scope, and method of the examination are within the discretion of the examining provider.

- After completing the certificate, the provider may return it to you or directly to your attorney. It is not necessary to return the original document. Any method of delivery (including fax) is permissible.

If you have any questions, please contact your attorney.

HARRELL, STOEBNER & VILLANUEVA, P.C.

Health Care Provider's Certificate of Medical Examination

Revision September 2023

In the Matter of the Guardianship of
_____,
an Alleged Incapacitated Person

For Court Use Only
Court Assigned:_____

To the Physician, Psychologist, or Advanced Practice Registered Nurse

This form is to enable the Court to determine whether the individual identified above is incapacitated according to the legal definition (on page 3), and whether that person should have a guardian appointed.

1. General Information

Examining Health Care Provider's Name _____ Phone: (_____)_____
Office Address _____
_____

Select one: ☐ I am a physician currently licensed to practice in the State of Texas;
☐ I am a psychologist currently licensed in the State of Texas or certified by HHSC; or
☐ I am an advanced practice registered nurse acting under a physician's delegation authority and supervision in accordance with Chapter 157, Occupations Code.

☐ YES ☐ NO I have experience examining individuals with the physical or mental condition resulting in the Proposed Ward's incapacity; or

☐ YES ☐ NO I have an established patient-provider relationship with the Proposed Ward

Proposed Ward's Name _____
Date of Birth _____ Age_____ Gender ☐ M ☐ F
Proposed Ward's Current Residence: _____
_____

I last examined the Proposed Ward on _____, 20_____ at:
☐ a Medical facility ☐ the Proposed Ward's residence ☐ Other: _____

☐ YES ☐ NO The Proposed Ward is under my continuing treatment.

☐ YES ☐ NO Before the examination, I informed the Proposed Ward that communications with me would not be privileged.

☐ YES ☐ NO A mini-mental status exam was given. If "YES," please attach a copy.

2. Evaluation of the Proposed Ward's Physical Condition *(required to be completed by physician or APRN only, not psychologist)*

Physical Diagnosis: _____
a. Severity: ☐ Mild ☐ Moderate ☐ Severe
b. Prognosis: _____
c. Treatment/Medical History: _____

3. Evaluation of the Proposed Ward's Mental Functioning

Mental Diagnosis: _____
a. Severity: ☐ Mild ☐ Moderate ☐ Severe
b. Prognosis: _____
c. Treatment/Medical History: _____

If the mental diagnosis includes dementia, answer the following:

☐ YES ☐ NO ---- It would be in the Proposed Ward's best interest to be placed in a secured facility for the elderly or a secured nursing facility that specializes in the care and treatment of people with dementia.

☐ YES ☐ NO ---- It would be in the Proposed Ward's best interest to be administered medications appropriate for the care and treatment of dementia.

☐ YES ☐ NO ---- The Proposed Ward currently has sufficient capacity to give informed consent to the administration of dementia medications.

d. Possibility for Improvement:

☐ YES ☐ NO ---- Is improvement in the Proposed Ward's physical condition and mental functioning possible?

If "YES," after what period should the Proposed Ward be reevaluated to determine whether a guardianship continues to be necessary? _____

4. Cognitive Deficits

a. The Proposed Ward is oriented to the following (check all that apply):

☐ Person ☐ Time ☐ Place ☐ Situation

b. The Proposed Ward has a deficit in the following areas (check all areas in which Proposed Ward has a deficit):

☐--- Short-term memory
☐--- Long-term memory
☐--- Immediate recall
☐--- Understanding and communicating (verbally or otherwise)
☐--- Recognizing familiar objects and persons
☐--- Solve problems
☐--- Reasoning logically
☐--- Grasping abstract aspects of his or her situation
☐--- Interpreting idiomatic expressions or proverbs
☐--- Breaking down complex tasks down into simple steps and carrying them out

c. ☐ YES ☐ NO -- The Proposed Ward's periods of impairment from the deficits indicated above (if any) vary substantially in frequency, severity, or duration.

5. Ability to Make Responsible Decisions

Is the Proposed Ward able to initiate and make responsible decisions concerning himself or herself regarding the following:

☐ YES ☐ NO ---- Make complex business, managerial, and financial decisions
☐ YES ☐ NO ---- Manage a personal bank account
If "YES," should amount deposited in any such bank account be limited? ☐ YES ☐ NO
☐ YES ☐ NO ---- Safely operate a motor vehicle
☐ YES ☐ NO ---- Vote in a public election
☐ YES ☐ NO ---- Make decisions regarding marriage
☐ YES ☐ NO ---- Determine the Proposed Ward's own residence
☐ YES ☐ NO ---- Administer own medications on a daily basis
☐ YES ☐ NO ---- Attend to basic activities of daily living (ADLs) (e.g., bathing, grooming, dressing, walking, toileting) without supports and services
☐ YES ☐ NO ---- Attend to basic activities of daily living (ADLs) (e.g., bathing, grooming, dressing, walking, toileting) with supports and services
☐ YES ☐ NO ---- Attend to instrumental activities of daily living (e.g., shopping, cooking, traveling, cleaning)
☐ YES ☐ NO ---- Consent to medical and dental treatment at this point going forward
☐ YES ☐ NO ---- Consent to psychological and psychiatric treatment at this point going forward

6. Developmental Disability

☐ YES ☐ NO ---- Does the Proposed Ward have developmental disability?
If "NO," skip to number 7 below.
If "YES," answer the following question and look at the next page.

Is the disability a result of the following? (Check all that apply)

☐ YES ☐ NO ---- Intellectual Disability?
☐ YES ☐ NO ---- Autism?
☐ YES ☐ NO ---- Static Encephalopathy?
☐ YES ☐ NO ---- Cerebral Palsy?
☐ YES ☐ NO ---- Down Syndrome?
☐ YES ☐ NO ---- Other? Please explain _____

Answer the questions in the "Determination of Intellectual Disability" box below only if both of the following are true:

(1) The basis of a proposed ward's alleged incapacity is intellectual disability.
and

(2) **You are making a "Determination of Intellectual Disability" in accordance with rules of the executive commissioner of the Health and Human Services Commission governing examinations of that kind**.

If you are not making such a determination, please skip to number 7 below.

DETERMINATION OF INTELLECTUAL DISABILITY

Among other requirements, a Determination of Intellectual Disability must be based on an interview with the Proposed Ward and on a professional assessment that includes the following:

1) a measure of the Proposed Ward's intellectual functioning;
2) a determination of the Proposed Ward's adaptive behavior level; and
3) evidence of origination during the Proposed Ward's developmental period.

You may use a previous assessment, social history, or relevant record from a school district, another physician, a psychologist, an authorized provider, a public agency, or a private agency if you determine that the previous assessment, social history, or record is valid.

1. Check the appropriate statement below. If neither statement is true, skip to number 7 below.
   - ☐ **I examined the proposed ward in accordance with rules of the executive commissioner of the Health and Human Services Commission governing Intellectual Disability examinations**, and my written findings and recommendations include a determination of an intellectual disability.
   - ☐ **I am updating or endorsing in writing a prior determination of an intellectual disability** for the proposed ward made in accordance with rules of the executive commissioner of the Health and Human Services Commission by a physician or psychologist licensed in this state or an authorized provider certified by the Health and Human Services Commission to perform the examination.
2. What is your assessment of the Proposed Ward's level of intellectual functioning and adaptive behavior?
   ☐ Mild (IQ of 50-55 to approx. 70) ☐ Moderate (IQ of 35-40 to 50-55)
   ☐ Severe (IQ of 20-25 to 35-40) ☐ Profound (IQ below 20-25)
3. ☐ Yes ☐ No ---- Is there evidence that the intellectual disability originated during the Proposed Ward's developmental period?

Note to attorneys: *If the above box is filled out because a determination of intellectual disability has been made in accordance with rules of the executive commissioner of the Health and Human Services Commission governing examinations of that kind, a Court may grant a guardianship application if (1) the examination is made not earlier than 24 months before the date of the hearing or (2) a prior determination of an intellectual disability was updated or endorsed in writing not earlier than 24 months before the hearing date. If a physician's or NPRN's diagnosis of intellectual disability is not made in accordance with rules of the executive commissioner — and the above box is not filled out — the court may grant a guardianship application only if the Physician's Certificate of Medical Examination is based on an examination the physician performed within 120 days of the date the application for guardianship was filed. See Texas Estates Code § 1101.104(a)(1).*

7. Definition of Incapacity

For purposes of this certificate of medical examination, the following definition of incapacity applies:

An "**Incapacitated Person**" is an adult who, because of a physical or mental condition, is substantially unable to: (a) provide food, clothing, or shelter for himself or herself; (b) care for the person's own physical health; or (c) manage the person's own financial affairs. Texas Estates Code § 1002.017.

8. Evaluation of Capacity

☐ YES ☐ NO ---- Based upon my last examination and observations of the Proposed Ward, it is my opinion that the Proposed Ward is incapacitated **according to the legal definition in section 1002.017 of the Texas Estates Code, set out in the box above.**

If you indicated that the Proposed Ward is incapacitated, indicate the level of incapacity:

☐ **Total** ---------- The Proposed Ward is totally without capacity (1) to care for himself or herself and (2) to manage his or her property.

☐ **Partial** ---------- The Proposed Ward lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself or to manage his or her property.

Evaluation of Capacity (continued)

If you indicated the Proposed Ward's incapacity is partial, what specific powers or duties of the guardian should be limited if the Proposed Ward receives supports and services? _____

_____

_____

If you answered "NO" to all of the questions regarding decision-making in Section 5 (on page 2) and yet still believe the Proposed Ward is **partially** incapacitated, please explain: _____

_____

_____

If you answered "YES" to any of the questions regarding decision-making in Section 5 (on page 2) and yet still believe the Proposed Ward is **totally** incapacitated, please explain: _____

_____

_____

9. Ability to Attend Court Hearing

☐ YES ☐ NO ---- The Proposed Ward would be able to attend, understand, and participate in the hearing.

☐ YES ☐ NO ---- Because of the Proposed Ward's incapacities, I recommend that the Proposed Ward not appear at a Court hearing.

☐ YES ☐ NO ---- Does any current medication taken by the Proposed Ward affect the demeanor of the Proposed Ward or his or her ability to participate fully in a court proceeding?

10. What is the least restrictive placement that you consider is appropriate for the Proposed Ward:

☐ ---------- Nursing home level of care ☐--- Assisted Living Facility

☐ ---------- Group Home ☐--- Memory care unit

☐ ---------- Own Home or with family ☐--- Other _____

11. Additional Information of Benefit to the Court: If you have additional information concerning the Proposed Ward that you believe the Court should be aware of or other concerns about the Proposed Ward that are not included above, please explain on an additional page.

_____ _____

Physician/Psychologist/Advanced Practice Registered Nurse's Signature — Date

_____ _____

Physician/Psychologist/Advanced Practice Registered Nurse's Name Printed — License Number

If the examination was conducted by an Advanced Practicing Registered Nurse, the supervising physician shall sign below:

_____ _____

Supervising Physician's Signature — Date

_____ _____

Supervising Physician's Name Printed — License Number